# CHAPTER-I

# CONCEPTUAL AND THEORITICAL FRAMEWORK OF CONSTITUTIONALISM AS ADOPTED IN INDIA

Constitutionalism signifies the principles which a Constitution of a country seeks to enshrine. Constitutionalism is necessary to ensure justice and equality and the Constitution is the legal documents embodying these principles.

The object of this chapter is to highlight the significance of these metaphysical transcendental principles in the Constitution. Halsbury's Laws of India has aptly stated that in the field of Constitutional law there is synthesis of three following factors-

a. Supremacy of metaphysical transcendental principles,

b. Necessity to reduce these principles in written form,

c. Judiciary to enforce these principles in the Constitution.[1]

In order to understand the paradigm shifts in the legal philosophies of a nation it is important to know the constitutionalism[2] adopted at the time of framing the Constitution and understand the mind of the framers of the Constitution. This exercise is important in a multicultural-multi religious country like India. The exercise of reaching a consensus was complicated and challenging. In this backdrop, the object of the present chapter is to understand the initial principles that were adopted by the framers of the Constitution of India before embarking upon the journey of the paradigm shifts.

Validation of authority and the foundation or the infrastructure upon which to build the superstructure of governance requires a universally accepted legal principles or philosophy. Such universally accepted philosophies and principles are, to say the least, metaphysical and transcendental in nature. These principles ensure fairness,

[1] *HALSBURY'S LAWS OF INDIA, Constitutional Law I*, Vol- 34, 9-10, (Lexis Nexis, Butterworth, New Delhi, 2012)

[2] Constitutionalism is "a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law"

equality and justice to every individual within the geopolitical territory of a State yet such factors also limit the powers of the sovereign

According to Aristotle, a 'State exists even before the existence of human being' and individuals realised the importance and necessity of State much later. The theories of origin of state of sixteenth century reflected that consensus or general will was behind the existence of state.[3]State inevitably gave rise to the concept of sovereignty. Sovereignty by nature is absolute and unlimited. However, there is a long standing debate regarding unlimited and absolute authority of the sovereign and its potential arbitrariness.

In the context of the above objective, the chapter focuses upon the understanding of the concept of constitutionalism, the theories relating to constitutionalism and the factors that weighed with the framers of the Constitution of India. This chapter is intended to set the canvas for tracing the paradigm shifts in the legal philosophies that have taken place with the growth of the nation.

## CONSTITUTIONALISM

Constitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules[4] In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-fixed/ pre-determined in advance. The latter definition shows that having a constitution alone does not secure or bring about constitutionalism. Except for a few states which have unwritten constitutions, today almost all the nations/states in the world have constitutions. This does not, however, mean that all these states practice constitutionalism. That is why constitutionalism is far more important than a constitution.

The concept of Constitutionalism begins from the transformation of political state from natural state as evinced in the Social Contract Theory of Hobbes, John Locke and Rousseau.

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[3]S. N. Roy, *Modern Comparative Politics*, 109-110 (PHI Learning Private Limited, New Delhi, 2011)

[4] Hilaire Barnett, *Constitutional and Administrative Law,* 5 (London: Cavendish Publishing Limited, 1995)

Hobbes (1588-1679) in his 'Social Contract' theory presupposes that in pre-government/ natural state there was a constant threat of war and individuals were at war constantly with each other. Hobbes stated that this kind of society can neither bring stability nor it can bring justice. Therefore, Hobbes was of the view that the introduction of the concept of 'Government' was inevitable. According to Hobbes there were two kinds of pacts amongst individuals which were (i) *Pactum Unionis* and (ii) *Pactum Subjectionis*.

By *Pactum Unionis* people sought protection of their lives and property as a result of which society was formed where people understood to respect each other and live in peace and harmony. By *Pactum Subjectionis* individuals agreed to submit themselves under the authority of a superior power who may be called the sovereign. Thus, Pactum Subjectionis gave rise to the concept of 'sovereignty' or 'government'.[5]

Hugo Grotious (1583-1645), a contemporary of Thomas Hobbes also propounded Social Contract Theory. However, Grotious was of the view that once men surrender their natural rights to the Government or the Ruler through Social Contract, men lose all its right to control the Government. Therefore, surrender of natural rights to a superior political being amounted to forfeiture of rights to control the superior political being no matter how arbitrary it was.[6]

John Locke (1632-1704) presupposes that in social contract people do not surrender their rights to the ruler but to the Community. Thus, according to him, sovereignty still lies with the people and the government or the ruler acts as a trustee of the rights of its subjects. John Locke is of the view that a ruler or the government can be overthrown if it fails to deliver its function. John Locke accepted the two minds of pacts evinced by Thomas Hobbes i.e. Pactum Unionis and Pactum Subjectionis. The natural rights of men can not be violated as men are entitled to those rights by birth. Men surrender to the superior political being so that their natural rights can be protected.[7]

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[5]Henrik Saetra, The State of No Nature- Thomas Hobbes and Natural World, 8, *Journal of International Scientific Publications: Ecology and Safety* (2014).

[6] Daudi Mwita, Social Contract Theory of John Locke (1632- 1704) In the Contemporary World.

[7] Daudi Mwita, Social Contract Theory of John Locke (1632- 1704) In the Contemporary World, (June, 2011).

Rousseau (1712-1778) while explaining this transformation of Political state from State of Nature has stated that in natural state individuals were not in contact with each other. Thus, it was thought that they were equal. With the development of civilization (civil society) individuals came in contact with each other and this resulted in conflict of interests. Thus arose the necessity for a sovereign. However, Rousseau was of the view that sovereign power should be limited and obedience to the law must be subjected to 'General Will'.[8]

There was difference of opinion as to the nature of sovereign and whether the power of sovereign can be controlled in Social Contract theory. Thus origin of constitutionalism can be traced to this point where with the birth of the concept of sovereign arose the felt need to limit its powers as well.

Blackstone (1723-1780) explaining the nature of laws has divided it into two heads, i.e., (a) law of nature (which includes the faculty of reasoning), (b) law which is posited upon inferior human beings by superior human being. According to him the superior human being may tend to become arbitrary or make laws at his own pleasure while vested with the power of enacting laws for inferior human being[9]. He also opined that it was the original text of the Contract of 1688 between King James and his subjects which restricted the power of prince and ceased him to be arbitrary.[10]

The legal system of England as Blackstone has put it has (a) a creator and (b) the king/ queen who is the supreme executive authority. The power to rule over inferior human is vested upon the King. This vesting of power is, according to Blackstone, with the General Consent. General consent can be ascertained from the long and immemorial usage and following of customs and tradition[11]. General consent by the subjects to the superior human being is also found in the concept of validation of the sovereign by its subjects as discussed by Bentham. Therefore, a sovereign, however arbitrary it may be, requires validation from its subjects in order to be legitimate. While the legitimacy of Britain's sovereign is dependant upon the English Courts for

[8] Dusan Pavlovic, ROUSSEAU'S THEORY OF SOVEREIGNTY, 13-15, Thesis Submitted in Completion of Master's Degree in Central European University (June 15, 1997).

[9] Henrik Saetra, The State of No Nature- Thomas Hobbes and Natural World, 8, *Journal of International Scientific Publications: Ecology and Safety* , 179(2014).

[10] *Id* at 181

[11] George Sharswood, *Commentaries on the Laws of England by William Blackstone*, (J.B. Lippincott Company, Philadelphia, 1983).

their validation. Blackstone has mentioned that this legitimization of rules in Britain by Courts shall be based on divine law or the faculty of reason.[12] Thus again an abstract, metaphysical principle is required to validate a concrete law. This is the starting point of Constitutionalism where the sovereign's manifesto of governance is required to be validated by the people and as such limiting the power of the sovereign.

Constitutionalism is an ambiguous term which is often used as synonym for limited government, non-arbitrary government established by virtue of a Constitution. Almost all the countries in the world felt the necessity to draw up its Constitution. The Constitution of one country varies from the Constitution of another. However, the underlying principles are always same irrespective of the geographical barriers. The concept of Constitutionalism has emerged in the context of these principles in the Constitution. Thus, it means and includes those basic principles which the Constitution of a country commits to upheld. It is accepted that the sanctity of sovereign's demand for subordination generates its legitimacy from the recognition by its subjects while the subjects would want to restrain the sovereign from abusing its power. This demand for striking a balance between the ruler and the ruled gave rise to constitutionalism.

In India Justice Dr. Durga Das Basu has developed the concept of Constitutionalism on a broad philosophical aspect and has tried to trace its genesis, emergence of natural law and rule of law principle in the Constitution of India.[13] In this backdrop following are the several principles of Constitutionalism in India-

a. Sovereign elected constitutionally,

b. Absence of absolutism or arbitrariness on part of the Sovereign,

c. Amendability of the Constitution (According to Justice Basu a Constitution should be made flexible enough to address the social issues with the passage of time. However, according to him, this flexibility must not destroy the basic principles embedded in the Constitution).

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[12] George Sharswood, *Commentaries on the Laws of England by William Blackstone*, (J.B. Lippincott Company, Philadelphia, 1983).

[13] Dr. P. Ishwara Bhat, *Constitutionalism and Constitutional Pluralism*, 9 (Lexis Nexis, Haryana, First edition, 2013).

Western Constitutional lawyers have also reiterated that the principles embodied in the Constitution is constitutionalism. According to them there is a difference between Constitution and Constitutionalism. Constitution is used to describe rules, establishment of government offices, rights of citizens etc, while Constitutionalism is principles validating the legal rules embodied in the Constitution.[14]In the words of Fali S Nariman in '*The Silences in Our Constitutional Law*'[15]these principles are hardly explicitly mentioned in the Constitution, especially in the Constitution of India. However, the Indian Judiciary through judicial review in several important cases[16] has reflected that how important and effective these principles are. Constitutionalism is what keeps the Constitution alive and time specific.

David Dyzenhaus in his 'Constitutionalism in an Old Key: Legality and Constituent Power' has mentioned that Constitutionalism includes two basic ideas i.e.-

i. the idea that the Government is in the service of the rights of individuals, &

ii. the democratic idea of legitimacy government rests on the validation of it by the subjects.[17]

The first written manifestation of constitutionalism was in the American Constitution (1787) and the French Constitution (1791). The guarantee of fundamental rights to its citizens by the American Constitution is a proof of David Dyzenhaus first principle i.e. the Government is in service of the protection of the rights of people. The starting phrase of American Constitution 'We the People of the United States' is the proof of another idea that the legality of the Government is validated by its own subjects. The French Constitution[18] retained monarchy however changed the sovereignty from monarch to legislative assembly which was indirectly elected by voting. Thus, it follows both the two basic ideas of constitutionalism as mentioned by David Dyzenhaus.

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[14] Ziyad Motala, The Jurisprudence of Constitutional Law: The Philosophical Origins and Differences Between the Western Liberal and Soviet Communist State Law, 8(2), *Penn State Law Review*.

[15]Dr. P. Ishwara Bhat, *Constitutionalism and Constitutional Pluralism*, 37-52 (Lexis Nexis, Haryana, First edition, 2013).

[16] Kesavananda Case, Maneka Gandhi Case, Rajnarain Case.

[17]David Dyzenhhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 235, (Cambridge University Press, 2012).

[18] The first French Constitution adopted in 1791 was the shortest lived Constitution in the world.

Halasbury's Laws of India has aptly stated that a Constitutionalism and Constitution are independent of each other. A country may have Constitution without having Constitutionalism in it. Constitutionalism comprises of the principles to delimit the power of the Government. According to the Halsbury's Laws of India one of the factors of Constitutionalism is decentralisation of power instead of concentration of it within the hands of a few.[19]

Blackstone has time and again reminded that any precedent or rule is to be followed only when that is not absurd or unjust. His mention of 'natural justice' while explaining the binding nature of a judgment (Precedent) is another example of his idea of validation of any rule of law against the abstract and metaphysical principles.[20]

## FEATURES (CHARACTERISTICS) OF CONSTITUTIONALISM

Constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances) and responsible and accountable government[21] Henkin[22] identifies popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, police governed by law and judicial control, an independent judiciary, respect for individual rights and the right to self-determination as essential features (characteristics) of constitutionalism.

### i. Popular Sovereignty

Popular sovereignty envisages the fact that the public is the source or fountain of all governmental authority. The legitimacy of any governmental power is derived from the consent of the public. In other words, the government acquires its mandate from the people. The source of all sovereignty lies essentially in the nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it[23]. However, the concept of sovereignty differed from one jurist to another. Hugo Grotious was of the view that even though the source of the governmental authority

[19] *HALSBURY'S LAWS OF INDIA, Constitutional Law I*, Vol- 34, 9-10, (Lexis Nexis, Butterworth, New Delhi, 2012).

[20] George Sharswood, *Commentaries on the Laws of England by William Blackstone*, (J.B. Lippincott Company, Philadelphia, 1983).

[21] David Dyzenhhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 235, (Cambridge University Press, 2012).

[22] Michael Rosenfield ed., *Constitutionalism, Identity, Difference and legitimacy, Theoretical Perspectives*, 4042 (Durham: Duke University Press, 1994)

[23] Article 3, 1789 French Declaration of Human Rights.

was consent of public, once it was vested with the government there can not be any control or limitation of its authority.

The nature of Grotious Sovereign corresponds the nature of Austin's Sovereign where both of them propounded that the sovereign possessed unlimited, irresistible force.[24] Thus, vesting of sovereignty on the consent of people instead of on an individual or an institution was a conscious choice in order to limit or control the arbitrary power of the government.

Blackstone observes that a sovereign, even if it is hereditary, needs validation from its subjects. According to him laws prepared by the superior human being is binding upon the inferior human being, but is not absolute. These laws must conform to the laws of the nature or the divine law.[25] According to him a sovereign has some duties as well. Thus his concept of sovereign is in contradiction with the concept of sovereign as propounded by the Analytical School.

There is a certain sovereign entity which is empowered to govern, but ultimate sovereignty resides in the nation. The power of such sovereign entity emanates from the public. In other words, the public is involved in the decision making process which may take different forms. The most obvious one is election of representatives. The public is entitled to elect representatives who represent it. However, such election should be free, transparent and fair. When the public loses confidence in its representatives and where the latter fail to represent the interest of the public, representatives may be recalled before the expiry of their term of office.

Referendum is the other mechanism by which the sovereignty of the public is manifested or expressed. Before a government makes a decision or takes any action which affects the interest of the public, constitutionalism requires it to consult the public and listen to what the public says. H. L. A. Harts Rule of recognition is the reflection of this fact.

### ii. Separation of Powers (Checks and balances)

The main concern with the transformation of State of Nature to a Political State is that accumulation of authority to an individual or an institution which has the potential of

[24] John Dewey, 'Austin's Theory of Sovereignty.' 9(1), *Political Science Quarterly*, 31- 52(1984)
[25] George Sharswood, *Commentaries on the Laws of England by William Blackstone*, (J.B. Lippincott Company, Philadelphia, 1983).

being arbitrary. Thus, several theories have been propounded regarding delimitation of the power of the sovereign. Separation of power is one of such features which decentralises the power amongst various organs of the government.

John Locke (1632-1704) was the first philosopher to propound that for the better realisation of natural rights it was necessary to transfer individual's right to ascertain, judge and execute the natural law to the government. John Locke indicated that this Government which was established for the better realisation of natural rights of people had potential to abuse the power so vested. This led John Locke to Construct Constitutional Model which ceased accumulation of all powers in the hands of a few.[26] John Locke has laid the groundwork for modern political separation of power by proposing division of functions of ascertaining, judging and executing natural law between governmental organs. Though the model constructed by John Locke does not conform to the modern Constitutional model, but John Locke for the first time felt the necessity of separation of power. Locke separated the power between Executive and the Legislature where the authority of judging and executing the natural law were vested on the Executive and it was made responsible to the Legislature.[27]

Montesquieu (1689-1755) was influenced by the Separation of Power theory propounded by John Locke. However, Montesquieu's theory of Separation of Power differs from that of the Lockean theory. John Locke has separated the power between two organs of the government i.e. the Legislature and the Executive. However, according Montesquieu the power should be divided amongst three organs of the government i.e. the Executive, Legislature and the Judiciary to cease the abuse of power.

Lord Denning also opined that three organs of the Government are required to be separated. However, he has also accepted that in England strict separation of power was never possible. It was found that the same person in Executive is having some Legislative Power also. According to Lord Denning, the English Legal system has put a check by introducing Judicial Independence to stop the possibility of abuse of power in a circumstance where the same individual is vested with powers under two

[26] The Constitutional Model was given by John Locke in his 'Second Treatise on Government' available at John Locke, Two Treatise of Government', Book II, Para 4 ( Black Swan, London, 1690).

[27] David Jenkins, 'The Lockean Constitution: Separation Of Powers And The Limits Of Prerogative' 56(3) *McGill Law Joural* (2011)

different organs[28]. The necessity of diffusion of power is necessary to cease the organs of the government from abusing the powers. While explaining the necessity of separation of power Lord Denning has stressed upon the judicial creativity[29] and stated that along with the conventional duty of judges to interpret and apply the existing laws it is important to leave a space for judicial creativity.[30] While dealing with the necessity of 'Separation of Power' Blackstone has mentioned that vesting of the power of legislating the law and execute the same on the one and same individual shall lead to the formation of arbitrary government. Therefore, he was of the opinion that there must be two important organs of the government i.e. the legislature (Parliament) consisting of the King, House of Lords and House of Commons, while the Executive shall consist only of the King.[31] However, Blackstone remained silent about the position of judiciary in the separation of power arrangement. Lord Hodge, the Justice of the Supreme Court of United Kingdom, has reiterated that to keep a check and maintain balance between powers shared by the three organs of the Government it is important to provide independence to the judiciary. He has accepted that historically the judiciary was not a separate part from the executive in United Kingdom. Separation of power, according to Halsbury's Laws of England, is a constitutional system that restricts the organs of the government from being despotic. It has also mentioned that despite Britain's legal system (where separation of power is not followed strictly) the Judiciary is substantially insulated by virtue of strict laws, constitutional conventions, professional tradition and political practice from the influence of other two organs.[32] Conforming this principle of separation of power the 'Constitutional Reform Act, 2005'[33] has been enacted to separate the Judiciary of United Kingdom from that of the legislature and the executive.[34]

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[28] Lord Denning and Judicial Imperialism, Lord Denning Lecture by the Hon'ble Mr. Justice M.D. Kirby at University of Sydney on 26.07.1980.

[29] Judicial creativity was necessary according to Lord Denning. However, Prof. Gordon Reid the Pro-Vice Chancellor of University of Western Australia has pointed out that in most of the cases, at least in Australia, in the garb of judicial creativity the excessive use of judges were made. This according to Prof. Gordon Reid is 'Judicial Imperialism' and is contradictory to the principle of separation of power. Lord Denning Lecture by the Hon'ble Mr. Justice M.D. Kirby at University of Sydney on 26.07.1980.

[30] Lord Denning Lecture by the Hon'ble Mr. Justice M.D. Kirby at University of Sydney on 26.07.1980.

[31] George Sharswood, Commentaries on the Laws of England by Sir William Blackstone, Vol 1,111,(J. B. Lippincott Company, Philippine, 1893)

[32] LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND,Vol I(I), 7, (Butterworth, London, Fourth Ed. Reissue, 1989).

[33] Article 3 of the Constitutional Reform Act, 2005

### iii. **Responsible & Accountable Government-**

In democracy the Government is always supposed to be accountable to its servants. The concept of accountable government is reflected in Chapter VI i.e. Of The King's Duties in the Commentary on the Laws of England by Sir William Blackstone.[35] Accountability of the government is the one of the most important features of democracy which ceases the leaders to be arbitrary and exploitative. While explaining the accountability of the Government Aristotle has explained that it does not matter whether the power to rule is vested upon a single individual or group of individuals as long as the ruling of subjects is for the common interest. Ruling of the subjects with private interest amount to perversion and should be left.[36]

Responsible government is the government where all the ministers are members of the Parliament. This form of government is called the responsible government as any law

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Guarantee of continued judicial independence (1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.
(2) Subsection (1) does not impose any duty which it would be within the legislative competence of the Scottish Parliament to impose.
(3) A person is not subject to the duty imposed by subsection (1) if he is subject to the duty imposed by section 1(1) of the Justice (Northern Ireland) Act 2002 (c. 26).
(4) The following particular duties are imposed for the purpose of upholding that independence.
(5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
(6) The Lord Chancellor must have regard to— (a) the need to defend that independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
(c) The need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.
(7) In this section "the judiciary" includes the judiciary of any of the following— (a) the Supreme Court; (b) any other court established under the law of any part of the United Kingdom; (c) any international court.
(8) In subsection (7) "international court" means the International Court of Justice or any other court or tribunal which exercises jurisdiction, or performs functions of a judicial nature, in pursuance of— (a) an agreement to which the United Kingdom or Her Majesty's Government in the United Kingdom is a party, or (b) a resolution of the Security Council or General Assembly of the United Nations

[34] Lord Hodge, a Scottish lawyer and the Justice of the Supreme Court of the United Kingdom during a lecture in Lincoln's Inn Denning Society in 2016 on 'Upholding the rule of law: how we preserve judicial independence in the United Kingdom', available at https://www.supremecourt.uk/docs/speech-161107.pdf (visited on 23.04.2019)

[35] George Sharswood, Commentaries on the Laws of England by Sir William Blackstone, vol. 1, 159-160 (J. B. Lippincott Company, Philippine, 1893)

[36] Earnest Barker M.A., *The Political Thought of Plato and Aristotle*, (Methuen & Co., London, 1906).

enacted by such parliament goes through several stages of discussions by the members when the parliament is in session.[37]

The fundamental difference between 'Accountability' and 'Responsibility' is that the accountable government is supposed to be answerable to its subjects and can be blamed if something goes wrong in the governance. However, Responsible government is not necessarily answerable to its subjects.[38]

iv. **Rule of Law-**

The concept of rule of law differs from the idea of one propounder to another. Aristotle (350 B.C.) was in the favour of distinguishing between the rule of law and the political power. He believed that for a peaceful society citizen must have a good law and must be in habit of abiding by these laws. Therefore, for Aristotle the rule of law represented general obedience of the law by the citizenry which also reflects the citizen's acquiescence.[39]

According to Dicey (1835-1922) [40], Rule of law envisages the following:-

• No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land;

• No person is above the law;

• Courts play a vital role in protecting the rights of individuals.

a. No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land: - The first component of rule of law is related to the principle of legality. If certain behaviour is not categorized as a criminal act by the constitutionally mandated lawmaking organ, it is not treated as a criminal act and is not punishable. It is treated as an innocent act. Secondly for an act to be punishable, the act must be classified or identified as a criminal act by the legislature through the law-making process enshrined in a constitution and other laws. Finally, once

[37] Responsible Government, available at Earnest Barker M.A., *The Political Thought of Plato and Aristotle*, (Methuen & Co., London, 1906).

[38] Distinction between Accountable and Responsible Government, available at Earnest Barker M.A., *The Political Thought of Plato and Aristotle*, (Methuen & Co., London, 1906).

[39] Jill Frank, *Aristotle on the Constitutionalism and the Rule of Law*, 8(37), *Theoritical Inquiries in Law*, 41(2007).

[40] Albert Venn Dicey, *Introduction to the Study of Law of Constitution* 188 (London and New York, Macmillan, 1995).

certain behaviour is classified as a criminal act, the accused should be tried and punished by the courts.

b. No one is above the law: - These words express the absolute supremacy of law over arbitrary power including widespread discretionary power of government. Human beings should be treated equally before or under the law without discrimination on the basis of status, wealth, race, nationality, gender, sex, etc. Similarly, even though avoidance of discretionary power is totally impossible, the manner in which such power is to be exercised is strictly monitored. Discretionary power is one of the reasons for the prevalence of corruption.

c. Rights are based on the actual decision of courts: - According to Dicey[41], the mere recognition of rights in a constitution alone does not secure or ensure the rights of an individual. The rights recognized by a constitution and other laws are to be protected or defended through the medium of courts whenever these rights are infringed.[42] Therefore, Dicey opposed conferring of wide discretionary power on the executive.

Ivor Jennings (1903-1965) has maintained that the purpose of Rule of Law is to bring peace in the society and to secure that all the disputes are settled in accordance with the legal rights. According to his idea of Rule of Law it is the obedience of the law by the people which establishes the rule of law in the society. Therefore, rule of law, according to Ivor Jennings, signifies public order. He was of the opinion that in order to ensure rule of law force can be used upon the lawless man if necessary as a lawless can destroy peace of a substantial part of this world. Both Thomas Hobbes (1588-1679) and Ivor Jennings (1903-1965) have kept the sovereign out of the purview of the 'Rule of Law'. According to them there is a need of a strong and strict sovereign in order to maintain law and order in the society.[43]

[41] Ibid

[42] The Late O. Hood Phillips, Paul Jackson (ed.), *Constitutional and Administrative law*, 33, (Sweet & Maxwell, London, 2001)

[43] Sir Ivor Jennings, *The Law and The Constitution*, 42-45, (University of London Press, London, Fifth Edition, 1972).

## WHAT IS CONSTITUTION

Constitution is a document of a country setting out the expectations of citizens of a nation as to how they want to be ruled. In this context the 'Social Contract' theory of Thomas Hobbes is relevant. In this theory Thomas Hobbes has advocated for a system which will be set up after reciprocal promise and acceptance regarding 'to rule' and 'be ruled'[44].Dieter Grimm, a German Judge, has viewed Constitution as a set of legal norms.[45]

According to Aristotle a nation requires the Constitution for the purpose of ensuring justice and bringing stability. Aristotle has viewed the society as a place of individuals having different & conflicting interests. He has recognised self-interest and interest of the community. According to him any ruler (be it in monarchy, aristocracy, polity) becomes unreasonable and arbitrary when the ruler gives preference to the self-interest. Thus there is a need to bring un-equals to the equal ground to ensure justice and justice must be preserved under the 'watchful eyes' which will ensure stability. This 'watchful eyes' would be not of an individual but of the law and it would be provided in a Constitution of any nation.[46]

Indians expressed their demand of having a Constitution of their own in 1939[47].This demand of Indians reflects that in order to ensure stability and upheld the principles of natural justice, rule of law in the governance it is important to have a posited document. Dr. Sarvapalli Radhakrishnan, the first speaker after the election of the permanent Chairman of the Constituent Assembly, said '*A Constitution is the fundamental law of the nation. It should embody and express the dreams and passions, the ideals and aspirations of the people. It must be based on the consent of all, and respect the rights of all people who belong to this great land*'. Thomas Paine in 'Rights of Man' has stated '*A Constitution is not an act of a government, but of a people constituting a government, and a government without a Constitution is power*

[44]David Singh Grewal, *The Original Theory of Constitutionalism*, 5191 Yale Law School Faculty Scholarship Series, (2018).

[45]David Dyzenhhaus, *Constitutionalism in an Old Key: Legality and Constituent Power*, 235, (Cambridge University Press, 2012)

[46]Krishna K. Ladha, Aristotle's Politics: On Constitutions, Justice, Laws and Stability, paper presented in Indian Institute of Management Kozhikode.

[47]The Working Committee of the Congress put a demand before the members of Cripps Mission in 1939 regarding the wish of all Indians to have Constitution. Durga Das Basu, *Introduction to the Constitution of India*, 14 (PHL Pvt. Ltd., New Delhi, 1987).

*without right……. A constitution is a thing antecedent to a government; and a government is only the creature of the Constitution*.'[48]

However, Barrister Samaraditya Pal, the Senior Advocate of the High Court of Calcutta & Barrister (Inner Temple),has observed that how and by whom the Constitution would be framed comes under the periphery of politics of any nation. The differences in principles, ideology in Constitutions of different countries are because of different political philosophies. Thus the principles of Constitution reflects the type of political authority in a nation. In support of his statement the example of Weimar Constitution may be discussed. After the end of 1st World War in 1919 Germany in order to bring stability and ensure justice adopted a Constitution known as the Weimar Constitution. The Weimar Constitution (1919-1933) declared Germany as the 'democratic republic'[49]. German citizens were also guaranteed some basic rights integral to the human being. However, after the rise of Hitler to power he suspended most of the rights of citizens in 1933 and passed the Enabling Act establishing dictatorship in Germany.[50] This political situation in Germany negates the observation of Thomas Paine to an extent that government is the creature of the Constitution and has no role to play in its drafting. Thus, the idea behind having a Constitution by any nation is that of self-determination.

## I. IMPORTANCE OF CONSTITUTION

In the previous discussion it was found that almost all the civilizations demanded for Constitution at certain point of time. This gives rise to further question regarding the importance of Constitution. H. L. A. Hart has given answer to this query. According to H. L. A. Hart law did not prevail in society from the beginning. The existence of law was the result of the necessity felt by the pre-law society to have in order to bring certainty. Pre-law society was governed by customary rules. These rules were followed by most of the members of community. In this situation Hart has come up with a hypothetical situation where there is a disagreement within the community regarding any customary rule. Hart has raised the question that by what means that

[48]Samaraditya Pal, *India's Constitution: Origins and Evolution*, Vol 1, lxxiii, (Lexis Nexis, Mumbai, 2015).

[49] Article 1 of the Weimar Constitution- The German Reich is a Republic. State authority derives from the people.

[50] Nazism and the rise of Hitler, available at Samuel Koehne, Nazism Political Religion and Ordinary Germans, 49(3), *Agora*, (2014).

conflict would be solved. Confusion regarding customary rules, as claimed by Hart, became complex in heterogeneous society. Hart has called this situation a 'Normative Uncertainty'. Thus, Hart has claimed that there is a need for an authoritative document which would set forth the standard of behaviour for both the ruled and the ruler.[51] This contention of Hart supports nations' quest for having Constitution and also reflects the importance of the same. Hart was strictly against customary rules, as according to him, it makes the society static and failed to change keeping pace with the change in society[52]. Hart's this contention support 'Amendment' to the Constitution. Thus, the reason for which a nation must have a Constitution, for the same reason the Constitution should be flexible enough to be amended.

## II. CONSTITUTION- A LAW OR NOT

To find an answer to this it is to be found first that when does a norm become Law? Kelsen in his Pure Theory has claimed that a legal order or a legal system is comprised of norms which are systematically arranged. These norms are arranged hierarchically where one norm acquires its validity from another norm. This leads to the basic norm which does not need any validation from another norm and is transcendental and metaphysical and validates other norms.[53]According to Kelsen in order to be binding these norms are required to come through a process and become Law. Kelsen has divided norms in Norms in Abstracto and Norms in Concreto. Norms in Abstracto becomes Norms in Concreto when the legal system apply norms in Abstracto to any concrete problem which further gives rise to Norms in Concreto (This process in today's legal system may be distinguished as legislative, executive and judicial process). Norms in Concreto is the Law while the Norms in Abstrato is those principles that a Law must include to ensure equality, justice and stability.

If this theory is applied to the Constitution of India it would inevitably be found that Constitution is a Law. The Constitution includes Norms in Abstracto for e.g. the Rule of Law, Natural Justice and it has been drafted and come in to being through a legislative process. Moreover, Article 13 of the Constitution of India has laid down

[51] Scott. J. Shapiro, What Is The Rule Of Recognition (And Does It Exist)? 04, Public Law & Legal Theory, Yale Law School.

[52] The Rule of Change by H. L. A. Hart. Available at Scott. J. Shapiro, What Is The Rule Of Recognition (And Does It Exist)? 04, Public Law & Legal Theory, Yale Law School.

[53] Kelsen calls this basic norm the Grundnorm.

that any law which is not in conformity with the Constitutional principles would be declared void. Therefore, the rule that a norm acquires validity from higher norm applies to the Indian legal system through Article 13 of the Constitution of India. The Grundnorm which is transcendental, metaphysical and does not need any further validation can be distinguished as the Principle of Rule of Law, Natural Justice embodied in the Constitution of India.

According to Bentham, law is 'an assemblage of signs declarative of a volition conceived or adopted by the Sovereign in a state, concerning the conduct to be observed in a certain case by certain person or class of persons, who in the case in question are or are supposed to be subject to his power'.[54] This definition of law shows that a Law must have following eight aspects-

a. Source,
b. Subjects,
c. Object,
d. Extent,
e. Aspects,
f. Force (rewards/ punishment)
g. Expression,
h. Remedial appendage.

Let us find out what happens if this definition of Law propounded by Bentham is applied to the Constitution of India.

**a. Source**- According to Bentham for a law it is to be clear whose will has it become. Bentham claimed that the will of a sovereign is the law. When this is applied to the Indian Constitution it has found that Pandit Jawaharlal Nehru in his Objective Resolution[55] Maintained that in true sense the sovereignty lies with the people of India. to substantiate this statement, there is another proof where Pandit Jawaharlal Nehru has stated that monarchy can only be continued in some states in India only when the people of such state consents to that.[56] Thus, in case of the Indian Constitution the source of it is the will of

[54] Lloyd, Introduction to Jurisprudence, 273, (Sweet & Maxwell, England, 8th Edition, 2008).
[55] Objective Resolution was discussed on 17th October, 1949 in the Constituent Assembly.
[56] Constituent Assembly Debates, Vol I, 13th December, 1946.

its people. This is the reason the Preamble of the Constitution starts with 'WE THE PEOPLE OF INDIA'.

**b. Subject**- Bentham has asserted that a Law must point out its subjects to which it is going to be applied. The Constitution of India is again quite clear on that issue when in the Preamble it states that 'IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION'. The phrase 'GIVE TO OURSELVES' in the Preamble shows that the subjects are the people of India.

**c. Object**- according to Bentham a law must have an object i.e. it must identify circumstances to which it may be applicable. The Preamble of the Constitution has again stated its objects clearly in 'resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC'.

**d. Aspect**- Bentham has stated that once the Object of law is clear it needs to formulate the manner through which it will fulfil the object. The Preamble of the Constitution has already stated the manner through which it intend to constitute India into SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC, and that is by securing to all its citizens -

**'JUSTICE**, social, economic and political;

**LIBERTY** of thought, expression, belief, faith and worship;

**EQUALITY** of status and of opportunity'

**e. Extent**- According to Bentham law must confine its limitation and the Constitution of India has also delimited its extent to Indian people. Article 13 of the Constitution of India has provided extent and limitation regarding validity of any law enacted in India.

**f. Force**- While explaining 'force' of a law Bentham has stated that a Law must be clear about its motive and means to bring it to fulfilment. In the Preamble of the Constitution of India it has mentioned that the motive of the Constitution is to 'assure the dignity of the individual and the unity and integrity of the Nation.' The means to fulfil this motive is 'to promote among them all **FRATERNITY'.**

**g. Expression**- Bentham, by expression, has meant that the nature of signs through which the will is made known. In case of the Constitution of India the

expression is written. In the Preamble it is clearly mention that the Constitution of India is enacted.

h. **Remedial Appendages-**while explaining remedial appendage Bentham has stated that it means law must have mechanism to obviate mischief done by one individual. In the Constitution of India Article 32 and Article 226 are laid down to provide remedy for any mischief done.

Bentham has also mentioned that a law must be validated no matter it is emanating from the will of the Sovereign. In Bentham's theory the validation of law comes in form of obedience of the same by the subjects. Therefore, even if the members of the Draft Committee of the Constituent Assembly was not representatives of Indian people in true sense, but Indian citizens' unquestionable& unconditioned submission to the Constitution gives validation to the Constitution of India.In this backdrop it can safely be stated that according to Bentham's definition of Law the Constitution of India is definitely a Law.

Law, as Austin defined it, is the command of the Sovereign and has sanction along with it. Austin distinguished law between two heads and these are- laws properly so called and Laws improperly so called. Under Law properly so called Austin has stated that positive laws or Laws strictly so called are law as it has sanction with it in case of non-conformation to that command. Thus the feature of Law strictly so called are-

a. Must be posited (i.e. the source is definite)
b. Must be command by the political superior to the political inferior,
c. Must have sanction attached in case of non-conformation by the political inferior.

If this theory is applied to the Constitution of India it would be found that-

a. The source of the Constitution of India is definite.
b. There is a command in the Constitution of India. Article 13 of the Constitution is a command that any law to be enacted or any existing law must be void to the extent of non-conformity with the provisions of the Constitution of India.
c. Sanction in the Constitution of India has been provided under Article 32 and Article 226. Any law not in conformity with the Constitutional provisions can be declared null and void under these two Articles.

Thus, the Constitution of India is a Law according to the definition of Austin. However, the only difference between Austin's definition of Law and the Constitution of India is regarding the nature of the sovereign. Austin's sovereign is politically supreme, obeyed none, was in habit of being obeyed but in case of the concept of sovereign in the Constitution of India it lay diffused to the people of India and culminated into the three organs of governance through elected representatives and not in individuals. Austin's sovereign is not even bound by the law so posited by him. However, in case of India the Constitution of India binds every Indian.

In analytical school of law Bentham has stated that even though law emanates from the sovereign the law needs validation and the validation comes in form of obedience from subjects. Bentham was of the view that the sovereign would ensure this obedience by inflicting pain (sanction) for disobedience and pleasure for obeying (reward) the same. H. L. A. Hart has questioned that how long law will be validated through the obedience of subjects putting them in fear of sanction. According to Hart the validation comes because of the underlying principles embedded in law. In his theory Hart has named these principles 'Primary Rules' which brings certainty to the legal system and ensures peoples' obedience to the posited law which Hart has named 'Secondary Rules'. This theory of H. L. A. hart is known as the 'Rule of Recognition'. If Hart's theory is applied to the Constitution of India then the Primary Rules would include all the constitutional principles (for eg. Principle of Rule of Law, Natural Justice) and the Constitution itself is the Secondary Rule. Thus, it can again be safely stated that the Constitution of India is a Law.

Article 13 of the Constitution of India has declared that any law which is in contradictory with the provisions of the Indian Constitution shall not have any effect in the territory[57]. This provision has made it clear that the Constitution of India is the Supreme Law of the Land.

[57] Article 13- Laws inconsistent with or in derogation of the fundamental rights.
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. (3) In this article, unless the context otherwise requires,— (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not

Indian Judiciary has reiterated that the Indian Constitution is not only the Law but the Supreme Law of the land in several cases. One of the important principles adopted in the Indian Constitution is 'Judicial Review' and 'Independence of the Judiciary'. These two features of Indian Judiciary ensures conformity of all the enactments in India with the Constitutional provisions as the Constitution is the supreme law of the land. Therefore, in India the Constitution is considered as the Law because the court can declare any law or administrative action unconstitutional if found to be inconsistent with the Constitutional provisions.[58]

In *Rajasthan* v. *Union of India*[59] Bhagwati J. observed- *It is necessary to assert in the clearest term particularly in the context of the recent history, that the Constitution is the supreme lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of the Government, be it executive or the legislature or the judiciary, derives its authority from the constitution and it has to act within the limits of its authority.*

Judicial Review empowers the Indian Judiciary to examine all the laws in India in order to find out the inconsistency with the Constitutional provisions. In S.S. Bola v. B. D. Sharma[60] Ramaswami J. has observed- *the founding father very wisely, therefore incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and Fundamental freedoms and to help to create a healthy nationalism.* Observation of Ramaswami J. in the aforementioned case that the Constitution itself is subject to Judicial Review proves that in India the Constitution is considered as Law. Thus, any Constitutional original and/or amended provision if found to be inconsistent with the underlying principles of Indian Constitution shall be declared to be *ultra vires*.

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previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. 1 [(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

[58] M. P. Jain, Indian Constitutional Law, 1603, (Lexis Nexis, Gurgaon, 7th Ed. 2014)

[59] *Rajasthan* v. *Union of India* AIR 1977 SC 1361

[60] *S. S. Bola* v. *B. D. Sharma* AIR 1997 SC 3127.

While explaining the importance of Constitution as the Supreme Lex the Apex Court in India Cement Ltd. v. State of Tamil Nadu[61] observed that *It has to be remembered that it is a Constitution that requires interpretation. Constitution is the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be.* The observation in the aforementioned case that the Constitution is not merely an 'Act' also proves that Indian Constitution is regarded as Law. However, the difference between the Constitution and other enacted Laws in India is that other laws derive their validity from the Constitution itself.

With the filing of Shankari Prasad case[62] the question whether constitutional amendments can be considered as law in order to bring it under the purview of judicial scrutiny under Article 13 of the Constitution of India arose. This conflict makes it clear that there was never a confusion regarding the status of the Constitution of India as Law[63]. Therefore, Ramaswamy J. rightly pointed out that Constitution can be considered as Law for the purpose of bringing it under the judicial scrutiny under Article 13. In Shankari Prasad case the court observed that even if constitutional amendments are considered as law, they are not ordinary law. To make this distinction clearer the court divided law into ordinary law and constitutional law. All the constitutional amendments, according to the court, fell within the purview of 'Constitutional Law', and should not be subject to judicial scrutiny. However, it has been accepted that constitutional amendments are also law but a different kind of law and is not subject to judicial review.

Therefore, the answer for the question whether Indian Constitution is law lies within the fundamental principles embodied in it. Judicial Review is one of the principles embodied in the Indian Constitution which proves that in India the Constitution is regarded as Law. Dieter Grimm[64] has aptly mentioned that in United *Mizrahi Bank Ltd*. v. *Migdal Village HCJ* the Israeli Court has observed that *judicial review is the*

[61] *India Cement Ltd*. v. *State of Tamil Nadu* AIR 1990 SC 85.

[62] *Shankari Prasad Singh* v. *Union of India* AIR 1951 SC 458.

[63] In Shankari Prasad Singh's case the conflict was between Article 13 and Article 368 of the Indian Constitution. The question was whether the amending power of the Parliament in India under Article 368 is so wider that the amended provisions can not be brought under the judicial scrutiny under the Article 13 no matter it is against the principles embodied in the Constitution of India. However, for the sake of brevity in this chapter this conflict has not been dealt with. In this chapter the focus is on

i. Whether Constitution is a Law? and
ii. Whether constitutional amendments can also be regarded as Law?

[64] Dieter Grimm is a Professor of Law at Humboldt University of Berlin.

*soul of the Constitution itself. Strip the Constitution of judicial review and you have removed its very life.. It is therefore no wonder that judicial review is now developing. The majority of enlightened democratic states have judicial review.. the twentieth century is the century of judicial review.*[65]

## PREAMBLE- WHETHER A PART OF THE CONSTITUTION OF INDIA

Almost all the countries in the world have Constitution with Preamble. The absence of Preamble does not affect the validity of the Constitution. However, it is considered that having a preamble makes it easier to understand the aims, objectives and the basic purposes of the Constitution. In this backdrop it is apt to discuss about the long standing controversy regarding whether the Preamble is a part of the Constitution. This question has been dealt with by Liav Orgad in detail in his paper titled 'The Preamble in Constitutional Interpretation'.[66]

According to Liav Orgad Preamble constitutes the introduction to the Constitution. This Preamble can appear with or without a formal heading. In a study conducted by Orgad it was found that 37 countries have a formal Preamble to their Constitution while 13 countries have introductory article instead of having a formal Preamble.[67] To understand what purpose does the Preamble serve in the Constitution it is important to understand the nature of Preamble. Liav Orgad has divided it into three heads basing upon the function the Preamble does, these are-

a. Ceremonial/ Symbolic Preamble
b. Interpretative Preamble
c. Substantive Preamble.

A ceremonial or symbolic Preamble is said to have no legal force. A Preamble of ceremonial nature is persuasive in nature and is not legally binding upon citizens. The concept of ceremonial preamble was first elaborated in Plato's Laws. A symbolic preamble usually convinces people on moral ground as to why they should follow the law of the land. Plato while explaining why preamble should be persuasive stated that

[65] P. Ishwara Bhat (ed.) , *Constituionalism and Constitutional Pluralism*, 65, (LexisNexis, Gurgaon, 1st Ed. 2013)
[66] Liav Orgad, The Preamble in Constitutional Interpretation, 8(4), , *I*CON*, 714-738.
[67] Id at 716.

a preamble without persuasive nature is a 'dictatorial prescription'.[68] However, this platonic idea of preamble raised a big question about the role of politics in modern age. In a multicultural society having multifarious conflicting interests it is quite difficult to convince everyone about the importance of same value, morality, rationality. Therefor, Kent Roch[69] is of the view that a preamble can not be without a legal force.[70] The exact opposite concept of ceremonial/ symbolic preamble is substantive preamble. Kent Rocher while critically analysing the applicability of platonic idea of preamble was of the view that a preamble should be substantive and must have a legal force. He questioned that what would persuade citizens to obey the law if the preamble can not do that always. He was of the view that Platonic idea of symbolic/ ceremonial preamble can be apt for a homogeneous society. Kent Rocher has taken Federal Legislation to study the nature and function of preamble as it operates in a heterogeneous society.[71]The substantive preamble contains legally binding clauses and represents a source of rights and obligation.[72] Both Liav Orgad and Angelo Rinella[73] were of the view that it is through the interpretation of the Constitution one is able to understand the substantive nature of the preamble (i.e. the legal force underlying in the preamble).

When both the symbolic/ceremonial and substantive preamble are two extreme idea regarding the nature of preamble, there is a moderate concept i.e. interpretive preamble. According to this theory reference to the preamble can be made only in the occasion of ambiguity and confusion regarding the provisions of the Constitution. Liav Orgad, the propounder of this concept, has stated that reference to the preamble during the occasion of ambiguity is necessary as the preamble highlights the legal and social responsibility of the State.

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[68] ibid

[69] Professor of Law, University of Toronto.

[70] Kent Roch, The Uses and Audiences of Preambles in Legislation,47, *MCGill*, 130-159 (2001).

[71] Id at 134.

[72] G.F. Ferrari, J. O' Dowd, (ed.), *75 years of the Constitution of Ireland: An Irish-Italian Dialogue*, 6, (Clause Press, Dublin, 2014)

[73] Angelo Rinella is a Professor of Comparative Public Law at the University of Rome LUMSA

Another nature of preamble is pointed out by Kevin M. Stack i.e. the Regulatory nature of preamble. According to him, it is the regulatory nature of the preamble which ensures upholding of the principles of rule of law and natural justice.[74]

While the function of preamble in a Constitution is clear, this chapter is especially dealing with the function of the Preamble of the Constitution of India. The genesis of the 'Preamble' of the Constitution of India can be traced back to the 'Objective Resolution' introduced by Jawaharlal Nehru on 13th December, 1947. Plain reading of the preamble of the Constitution of India reveals the social, economic and political responsibility of the State towards its citizens.[75] It is through the interpretation of the Preamble by the Supreme Court of India in several landmark cases the legal force of the preamble is upheld.

The preamble of the Constitution of Nepal is substantive in nature as it has explicitly been stated that no amendment can be made to the Preamble. This indicates the independent nature of preamble in the Constitution of Nepal as a substantive source of law.[76] While in India it took almost two decades to decide whether the Preamble to the Constitution of India is a part of the Constitution and whether any amendment can be made changing the nature of the preamble. It was in the case of *Kesavananda Bharti* v. *State of Kerala*[77] where the Supreme Court conclusively decided that no amendment can be made changing the 'Basic Structure' of the Constitution of India and Preamble needs to be referred to understand the Basic Structure of the Constitution of India.

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[74] Kevin M. Stack, Preamble as Guidance, 84(5), *Geo-Wash L. Rev*, 1254 (2016)

[75] Preamble of the Constitution of India-

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

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

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this 26th day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

[76] Article 116 Clause 1 of the Constitution of Nepal- Amendment of the Constitution

(1) A bill to amend or repeal any Article of this Constitution, without prejudicing the spirit of the Preamble of this Constitution, may be introduced in either House of Parliament: Provided that this Article shall not be subject to amendment.

[77] *Kesavananda Bharti* v. *State of Kerala* AIR 1973 SC 1461.

The Preamble to the Constitution of India was drafted at the end of the first reading of the Constitution. The motion to adopt the Constitution was moved on 17th October, 1949. The Preamble connotes some fundamental aspect and ideologies of Indian Polity. This has been noticed even during the 42nd Amendment in 1972 when the then Government expressly declared India as a 'Socialist, Secular' country. The stakeholders of the Government are expected to conform to these fundamental aspects and follow these ideologies underlying in the preamble. The preamble is also an outline of the aspirations of the citizens of India. These aspirations can be protected by the sovereign only by conforming to the ideologies enshrined in the Preamble.[78] Therefore, from this point of view Preamble is a part and has a legal background in the Constitution of India. However, it took India almost 20 years to decide whether the Preamble is a part of the Constitution. To understand this journey there is a need of discussing these following landmark case laws.

The question regarding preamble being a part of the Constitution of India arose indirectly in *A.k. Gopalan* v. *State of Madras*[79]. In this case the validity of section 14 the Preventive Detention Act, 1950 was in question. Section 14 of this Act prohibits disclosure of the grounds of detention to the detenue. While the majority of 6 judges Bench i.e. KANIA C.J., PATANJALI SASTRI, MUKHERJEA and DAS JJ. upheld the validity of the whole Act except section 14 by applying the Rule of severability Fazl Ali, and Mahajan JJ. observed that the whole Act should be declared ultra vires. The dissenting view of Fazl Ali and Mahajan JJ. was that the essence of the Preamble is to guarantee justice and that can be ensured only if

i. the rights of an individual are protected, and/or

ii. proper procedure to be followed in occasion of restriction upon such rights.

According to Fazl Ali J. '*There is nothing revolutionary in the view that "procedure established by law "must include the four principles of elementary justice which inhere in and are at the root of all civilized systems of law, and which have been stated by the American Courts and jurists as consisting in (1) notice, (2) opportunity to be heard, (3) impartial tribunal and (4) orderly course of procedure. These four*

[78] Bidyut Chakraborty, Preamble: Whether a Part of the Indian Constitution, SAGE Publishing,
[79] AIR 1950 SC 88

*principles are really different aspects of the same right, namely, the right to be heard before one is condemned. Hence the words "procedure established by law ", whatever its exact meaning be, must necessarily include the principle that no person shall be condemned without hearing by an impartial tribunal*.' However, the majority view while upholding the arbitrary arrest and detention under the Preventive Detention Act, 1950 observed 'Procedure established by law' in the Constitution meant the procedure established by the sovereign. Therefore, anything posited by the sovereign is the law and can not be questioned if found contrary to the essence of the Preamble.[80] Thus, in A.K. Gopalan case preamble was neither regarded as a substantive source of law, not it was regarded to have any importance in the interpretation of the Constitution of India.

In Re. Berubari Case[81] the important question as to the Preamble being a part of the Constitution of India arose. This case was presided over by a 7 Judges bench comprising of B Sinha, A S Shah, K Dasgupta, K S Rao, M Hidayatullah, P Gajendragadkar, S Das. Ganjendragadkar J. While writing the judgment mentioned the observation of the majority judges i.e. Preamble is definitely a key to open the mind of makers of the Constitution, but it is not a part of the Constitution of India. He has referred William W. Willoghby[82] while justifying this observation. Willoghby also was not in favour of attributing substantive nature to the Constitution of America. While Willoghby was against the attribution of substantive nature to the preamble, judges in Berubari case have acknowledged that preamble helps to understand the intention of the makers of the Constitution which helps interpreting the Constitutional provision during the occasion of ambiguity. Thus, the contention of Mr. N. C. Chatterjee (i.e. one of the petitioners) regarding consideration of the Preamble as the substantive source of Law was rejected by the Bench.[83] Even though in this case it was observed that the preamble is not a part of the Constitution of India, but this case led to the observation regarding 'Basic Structure in *Kesavananda Bharti* v. *State of Kerala*.

[80] *A.k. Gopalan* v. *State of Madras* AIR 1950 SC 88

[81] Re. Berubari Union and Exchange of Enclaves case

[82] William W. Willoghby is a Professor of political Science in the University of Hopkins and has done extensive study in the field of the Constitution of United States of America.

[83] Re. Berubari Union and Exchange of Enclave case.

In Golaknath case[84] Wanchoo J. said *on a parity of reasoning we are of the opinion that the Preamble can not prohibit or control in any way or impose any implied prohibitions or limitations on the bar to amend the Constitution contained in Article 368.* Bachawat J. observed *moreover the* Preamble *can not control the unambiguous language of the articles of the Constitution.*[85]

In this backdrop one of the most important matter is that the Constituent Assembly never intended to consider the Preamble as not a part of the Constitution. This intention of making the Preamble a part of the Constitution of India is clear from the statement made by the President of the Draft Committee i.e. Dr. B. R. Ambedkar on 17th October 1949 that[86]

*A point of order has been raised that the whole Constitution that has been framed and accepted by this House is inconsistent with this amendment or the Preamble and therefore it should be ruled out of order.*

Therefore, the intention of the Draft Committee was overlooked by the Indian Judiciary until it corrected its error in *Kesavananda Bharti* v. *State of Kerala*. In Kesavananda Bharti case it was regarded that-

i. the Preamble to the Constitution of India is a part of the Constitution,

ii. that Preamble is not a source of power nor is it a source of limitations,

iii. the Preamble has a significant role to play in the interpretation of the Constitution.[87]

Jagan Mohan Reddy J. observed *the Preamble to the Constitution which our Founding Fathers have, after the Constitution was framed, finally settled to conform to the ideals and aspirations of the people embodied in that instrument, have in ringing tone declared the purposes and objectives which the Constitution was intended to subserve.*[88]

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[84] *Golak Nath* v. *State of Punjab* AIR 1967 SC 1643.

[85] R. C. Lahoti, *PREAMBLE: The Spirit and Backbone of the Constitution of India*, 37-38 (EBC, Lucknow, 2017).

[86] Constituent Assembly Debate, Vol X, at 435

[87] R. C. Lahoti, *PREAMBLE: The Spirit and Backbone of the Constitution of India*, 38 (EBC, Lucknow, 2017)

[88] *Kesavananda Bharti* v. *State of Kerala* AIR 1973 Para 1164

Y. V. Chandrachud J. observed that *the Preamble is a part of the Constitution which helps in interpretation of the Constitution in case of ambiguity. However it is not a provision of the Constitution. Thus it is out of the amending power of the legislature under Article 368 of the Constitution.*

Regarding amenability of the Preamble the view of the judges were[89]-

D.G. Palekar observed that *since the Preamble is a part of the Constitution it can also be amended.*

H. R. Khanna J. developed the concept of 'Natural Rights' which he linked with the principles enshrined in the Preamble and accepted that these rights are inalienable. However, Justice Khanna dissented with Justice D. G. Palekar in saying that the whole Preamble is amenable. Justice Khanna observed that the Preamble can also be amended as it is a part of the Constitution, but the Basic Structure enshrined in the Preamble can not be amended.

S.N. Diwedi and A.N. Ray JJ. came to a conclusion that the Preamble is a part of the Constitution as the heading 'The Constitution of India' was placed above the Preamble.

Therefore, from the above discussion it is clear that the Preamble is a part of the Constitution of India. The Preamble is neither a ceremonial/symbolic nor a substantive source of law in India. It has a significant role to play while interpreting the ambiguous provisions of the Constitution. In Kesavananda Bharti case it is upheld that the Preamble enshrines some principles which are identified as 'Basic Structure' in the case and is declared to be not subject to any change. These principles identified as 'Basic Structure' of the Constitution of India are nothing but the principles of Constitutionalism. Thus, the Constitution of India is a posited law underlying the principles of constitutionalism which can never be detached from the Constitution of India.

[89] R. C. Lahoti, *PREAMBLE: The Spirit and Backbone of the Constitution of India*, pp. 42-44 (EBC, Lucknow, 2017).