CHAPTER 4

OUTSTANDING FEATURES OF OUR CONSTITUTION

Drawn from different sources.

I. THE Constitution of India is remarkable for many outstanding features which will distinguish it from other Constitutions even though it has been prepared after "ransacking all the known Constitutions of the world" and most of its provisions are substantially borrowed from others. As Dr. Ambedkar observed,[1]—

> "One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled when the first written Constitution was drafted. It has been followed by many other countries reducing their Constitutions to writing . . . Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there be any, in a Constitution framed so late in the day are the variations made *to remove the faults and to accommodate it to the needs of the country.*"[1]

So, though our Constitution may be said to be a 'borrowed' Constitution, the credit of its framers lies in gathering the best features of each of the existing Constitutions and in modifying them with a view to avoiding the faults that have been disclosed in their working and to adapting them to the existing conditions and needs of this country. So, if it is a 'patchwork', it is a 'beautiful patchwork'.[2]

There were members in the Constituent Assembly[2] who criticised the Constitution which was going to be adopted as a 'slavish imitation of the West' or 'not suited to the genius' of the people. Many apprehended that it would be unworkable. But the fact that it has survived for about sixty years, while Constitutions have sprung up only to wither away in countries around us, such as Burma and Pakistan, belies the apprehension of the critics of the Indian Constitution.

Supplemented by multiple amendments, and practically recast by the 42nd, 43rd and 44th Amendments, 1976-78.

II. It must, however, be pointed out at the outset that many of the original features of the 1949-Constitution have been substantially modified by the 78 Amendments which have been made up to 1996,—of which the 42nd Amendment Act, 1976 (as modified by the 43rd and 44th Amendment Acts, 1977-78), has practically recast the Constitution in vital respects.

The 73rd Amendment Act which was brought into force in April 1993 has added 16 articles which provide for establishment of and elections to Panchayats. They comprise a new part, Part IX. By the same Amendment a

new schedule (Sch. 11) has been added which enumerates the functions to be delegated to the Panchayats.

The 74th Amendment Act was passed to establish Municipalities and provides for elections to them. It has inserted Part 9A consisting of 18 articles. Schedule 12 inserted by the Amendment mentions the functions to be assigned to the Municipalities. This Amendment came into force on 1st June 1993.

III. The Constitution of India has the distinction of being the most lengthy and detailed constitutional document the world has so far produced. The original Constitution contained as many as 395 Articles and 8 Schedules (to which additions were made by subsequent amendments). Even after the repeal of several provisions it still (in 2008) contains 444 Articles and 12 Schedules.[3]

The longest known Constitution.

During the period 1950-2000, while a number of Articles have been omitted,—64 Articles and 4 Schedules have been *added* to the Constitution, *viz.,* Arts. 21A, 31A-31C, 35A, 39A, 43A, 48A, 51A, 131A, 134A, 139A, 144A, 224A, 233A, 239A, 239AA, 239AB, 239B, 243, 243A to 243ZG, 244A, 257A, 258A, 290A, 300A, 312A, 323A, 323B, 338A, 350A, 350B, 361A, 363A, 371A-371-I, 372A, 378A, 394A.

This extraordinary bulk of the Constitution is due to several reasons :

(i) The framers sought to incorporate the accumulated experience gathered from the working of all the known Constitutions and to avoid all defects and loopholes that might be anticipated in the light of those Constitutions. Thus, while they framed the Chapter on the Fundamental Rights upon the model of the American Constitution, and adopted the Parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Eire, and added elaborate provisions relating to Emergencies in the light of the Constitution of the German Reich and the Government of India Act, 1935. On the other hand, our Constitution is more full of words than other Constitutions because it has embodied the modified results of judicial decisions made elsewhere interpreting comparable provisions, in order to minimise uncertainty and litigation.

Incorporates the accumulated experience of different Constitutions.

(ii) Not contented with merely laying down the fundamental principles of governance (as the American Constitution does), the authors of the Indian Constitution followed and reproduced the Government of India Act, 1935, in providing matters of administrative detail,—not only because the people were accustomed to the detailed provisions of that Act, but also because the authors had the apprehension that in the present conditions of the country, the Constitution might be perverted unless the form of administration was also included in it. In the words of Dr. Ambedkar,[1]

Detailed administrative provisions included.

> ". . . It is perfectly possible to pervert the Constitution without changing the form of administration."

Any such surreptitious subversion of the Constitution was sought to be prevented by putting detailed provisions in the Constitution itself, so that they might not be encroached upon without amending the Constitution.

The very adoption of the bulk of the provisions from the Government of India Act, 1935, contributed to the volume of the new Constitution inasmuch as the Act of 1935 itself was a lengthy and detailed organic law. So much was borrowed from that Act because the people were familiar with the existing system.

It was also felt that the smooth working of an infant democracy might be jeopardised[4] unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organisation of the Judiciary, the Services, the Public Service Commissions, Elections and the like. It is the same ideal of 'exhaustiveness' which explains why the provisions of the Indian Constitution as to the division of powers between the Union and the States are more numerous than perhaps the aggregate of the provisions relating to that subject in the Constitution of the U.S.A., Australia and Canada.

Peculiarity of the Problems to be solved.

(iii) The vastness of the country (see Table I), and the peculiar problems to be solved have also contributed towards the bulk of the Constitution. Thus, there is one entire Part [*Part* XVI] relating to the Scheduled Castes and Tribes and other backward classes; one Part [*Part* XVIII] relating to Official Language and another [*Part* XVII] relating to Emergency Provisions.

Constitution of the Units also included.

(iv) While the Constitution of the United States deals only with the Federal Government and leaves the States to draw up their own Constitutions, the Indian Constitution provides the Constitutions of both the Union and the Units (*i.e.,* the States), with the same fullness and precision. Since the Units of the federation differed in their historical origins and their political development, special provisions for different classes of the Units[5] had to be made, such as the Part B States (representing the *former Indian States*), the Part C States (representing the Centrally Administered areas) and some smaller Territories in Part D. This also contributed to the bulk of the 1949-Constitution (see Table III).

Special provisions for Jammu & Kashmir.

Though, as has just been said, the Constitution of the State was provided by the Constitution of India, the State of Jammu and Kashmir was accorded a special status and was allowed to make its own State Constitution. Even all the other provisions of the Constitution of India did not directly apply to Jammu and Kashmir but depended upon an Order made for the President in Constitution with the Government of State,—for which provision had to be made in Art. 370 [see Chap. 15].

Nagaland, Sikkim, etc.

Even after the inauguration of the Constitution, special provisions have been inserted [*e.g., Arts.* 371-371I], to meet the regional problems and demands in

certain States, such as Nagaland, Assam, Manipur, Andhra Pradesh, Maharashtra, Gujarat, Sikkim, Mizorma, etc.

Federal Relations elaborately dealt with.

(v) Not only are the provisions relating to the Units elaborately given, the relations between the Federation and the Units and the Units *inter se,* whether legislative or administrative, are also exhaustively codified, so as to eliminate conflicts as far as possible. The lessons drawn from the political history of India which induced the framers of the Constitution to give it a unitary bias, also prompted them to make detailed provisions "regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other activities",[6] and also as regards inter-State relations, co-ordination and adjudication of disputes amongst the States.

Both Justiciable and Non-justiciable Rights included: Fundamental Rights, Directive Principles, and Fundamental Duties.

(vi) There is not only a Bill of Rights containing justiciable fundamental rights of the individual [*Part* III] on the model of the Amendments to the *American* Constitution but also a Part [*Part* IV] containing Directive Principles, which confer no justiciable rights upon the individual but are nevertheless to be regarded as 'fundamental in the governance of the country',—being in the nature of 'principles of social policy' as contained in the Constitution of *Eire* (*i.e.,* the Republic of Ireland). It was considered by the makers of *our* Constitution that though they could not, owing to their very nature, be made legally enforceable, it was well worth to incorporate in the Constitution some basic non-justiciable rights which would serve as moral restraints upon future governments and thus prevent the policy from being torn away from the idea which inspired the makers of the organic law.

Even the Bill of Rights (*i.e.,* the list of Fundamental Rights) became bulkier than elsewhere because the framers of the Constitution had to include novel matters owing to the peculiar problems of *our* country, *e.g.,* untouchability, preventive detention.

To the foregoing list, a notable addition has been made by the 42nd Amendment inserting one new Chapter of Fundamental Duties of Citizens [*Part* IVA, *Art.* 51A], which though not attended with any legal sanction, have now to be read along with the Fundamental Rights [see, further, under Chap. 8, *post*].

More Flexible than Rigid.

IV. Another distinctive feature of the Indian Constitution is that it seeks to impart flexibility to a written federal Constitution.

It is only the amendment of a few of the provisions of the Constitution that requires ratification by the State Legislatures and even then ratification by only 1/2 of them would suffice (while the American Constitution requires ratification by 3/4 of the States).

The rest of the Constitution may be amended by a special majority of the Union Parliament, *i.e.,* a majority of not less than 2/3 of the members of

each House present and voting, which, again, must be majority of the total membership of the House [see Chap. 10].

On the other hand, Parliament has been given the power to alter or modify many of the provisions of the Constitution by a simple majority as is required for general legislation, by laying down in the Constitution that such changes "*shall not be deemed to be 'amendments' of the Constitution*". Instances to the point are—(a) Changes in the names, boundaries, areas of, and amalgamation and separation of States [*Art.* 4]. (b) Abolition or creation of the Second Chamber of a State Legislature [*Art.* 169]. (c) Administration of Scheduled Areas and Scheduled Tribes [*Para* 7 of the 5th Schedule and *Para* 21 of the 6th Schedule]; (d) Creation of Legislatures and Council of Ministers for certain Union Territories [*Art.* 239A(2)].

Legislation as supplementing the Constitution.

Yet another evidence of this flexibility is the power given by the Constitution itself to Parliament to supplement the provisions of the Constitution by legislation. Though the makers of the Constitution aimed at exhaustiveness, they realised that it was not possible to anticipate all exigencies and to lay down detailed provisions in the Constitution to meet all situations and for all times.

(a) In various Articles, therefore, the Constitution lays down certain basic principles and empowers Parliament to supplement these principles by legislation. Thus, (i) as to citizenship, Arts. 5-8 only lay down the conditions for acquisition of citizenship at the commencement of the Constitution and Art. 11 vests plenary powers in Parliament to legislate on this subject. In pursuance of this power, Parliament has enacted the Citizenship Act, 1955, so that in order to have a full view of the law of citizenship in India, study of the Constitution has to be supplemented by that of the Citizenship Act. (ii) Similarly, while laying down certain fundamental safeguards against preventive detention, Art. 22(7) empowers Parliament to legislate on some subsidiary matters relating to the subject. The laws made under this power, have, therefore, to be read along with the provisions of Art. 22. (iii) Again, while banning 'untouchability', Art. 17 provides that it shall be an offence 'punishable in accordance with law', and in exercise of this power, Parliament has enacted the Protection of Civil Rights Act, 1955[7] which must be referred to as supplementing the constitutional prohibition against untouchability. (iv) While the Constitution lays down the basic provisions relating to the election of the President and Vice-President, Art. 71(3) empowers Parliament to supplement these constitutional provisions by legislation, and by virtue of this power Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952.

The obvious advantage of this scheme is that the law made by Parliament may be modified according to the exigencies for the time being, without having to resort to a constitutional amendment.

(b) There are, again, a number of articles in the Constitution which are of a tentative or transitional nature and they are to remain in force only so long as Parliament does not legislate on the subject, *e.g.*, exemption of Union property from State taxation [*Art.* 285]; suability of the State [*Art.* 300(1)].

The Constitution, thus, ensures adaptability by prescribing a variety of modes in which its original text may be changed or supplemented, a fact which has evoked approbation from Prof. Wheare—

> "This variety in the amending process is wise but is *rarely found.*"[8]

This wisdom has been manifested in the ease with which Sikkim, a Protectorate since British days, could be brought under the Constitution—first, as an 'associate State' (35th Amendment Act), and then as a full-fledged State of the Union (36th Amendment Act, 1975).

Reconciliation of a written Constitution with Parliamentary sovereignty.

V. This combination of the theory of 'fundamental law' which underlies the written Constitution of the United States with the theory of 'Parliamentary sovereignty' which underlies the unwritten Constitution of *England* is the result of the liberal philosophy of the framers of the Indian Constitution which has been so nicely expressed by Pandit Nehru:

> "While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people. . . In any event, we could not make this Constitution as rigid that it cannot be *adapted* to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly capable tomorrow."[9]

The flexibility of *our* Constitution is illustrated by the fact that during the first 59 years of its working, it has been amended 94 times. Vital changes have thus been effected by the First, Fourth, Twenty-fourth, Twenty-fifth, Thirty-ninth, Forty-second, Forty-fourth, Seventy-third and Seventy-fourth Amendments to the Constitution, including amendments to the fundamental rights, powers of the Supreme Court and the High Courts.

Dr. Jennings[10] characterised *our* Constitution as rigid for two reasons: (a) that the process of amendment was complicated and difficult, (b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution, no change in these matters is possible without undergoing the process of amendment. We have seen that the working of the Constitution during six decades has *not* justified the apprehension that the process of amendment is very difficult [see also Chap. 10, *post*]. But the other part of his reasoning is obviously sound. In fact, his comments on this point have proved to be prophetic. He cited Art. 224 as an illustration of a provision which had been unnecessarily embodied in the Constitution:

> "An example taken at random is article 224, which empowers a retired judge to sit in a High Court. Is that a provision of such constitutional importance that it needs to be constitutionally protected, and be incapable of amendment except with the approval of two-thirds of the members of each House sitting and voting in the Union Parliament?"[11]

As Table IV will show it has required an amendment of the Constitution, namely, the Seventh Amendment of 1956, to amend this article to provide for the appointment of Additional Judges instead of recalling retired Judges. Similar amendments have been required, once to provide that a Judge of a High Court who is transferred to another High Court shall

not be entitled to compensation [*Art.* 222] and, again, to provide for compensation. It is needless to multiply such instances since they are numerous.

The greatest evidence of flexibility, however, has been offered by the amendments since 1976. The 42nd Amendment Act, 1976, after the Constitution had worked for over quarter of a century, introduced vital changes and upset the balance between the different organs of the State.[11] Of course, behind this flexibility lies the assumption that the Party in power wields more than a two-thirds majority in both Houses of Parliament.[11]

Role of Conventions under the Constitution.

VI. It is also remarkable that though the framers of the Constitution attempted to make an exhaustive code of organic law, room has been left for the growth of conventions to supplement the Constitution in matters where it is silent. Thus, while the Constitution embodied the doctrine of Cabinet responsibility in Art. 75, it was not possible to codify the numerous conventions which answer the problems as they may arise in England, from time to time, in the working of the Cabinet system. Take, for instance, the question whether the Ministry should resign whenever there is an adverse vote against it in the House of the People, or whether it is at liberty to regard an accidental defeat on a particular measure as a 'snap vote'.[12] Again, the Constitution cannot possibly give any indication as to which issue should be regarded as a 'vital issue' by a Ministry, so that on a defeat on such an issue the Ministry should be morally bound to resign. Similarly, in what circumstances a Ministry would be justified in advising the President to dissolve Parliament instead of resigning upon an adverse vote, can only be established by convention.

Sir Ivor Jennings[10] is, therefore, justified in observing that—

> "The machinery of government is essentially British and the whole collection of British constitutional conventions has apparently been incorporated as conventions."

Fundamental Rights, and Constitutional Remedies.

VII. While the Directive Principles are not enforceable in the Courts, the Fundamental Rights, included in Part III, are so enforceable at the instance of any person whose fundamental right has been infringed by any action of the State,—executive or legislative—and the remedies for enforcing these rights, namely, the writs of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* are also guaranteed by the Constitution. Any law or executive order which offends against a fundamental right is liable to be declared void by the Supreme Court or the High Court.

It is through a misapprehension of these provisions that the Indian Constitution has been described by some critics as a 'lawyer's paradise'.[12] According to Sir Ivor Jennings,[10] this is due to the fact that the Constituent Assembly was dominated by 'the lawyer-politicians'. It is they who thought of codifying the individual rights and the prerogative writs though none in *England* would ever cherish such an idea. In the words of Sir Ivor—

> "Though no English lawyer would have thought of putting the prerogative writs into a Constitution, the Constituent Assembly did so. . .These various factors have given India a most complicated Constitution. Those of us who claim to be

constitutional lawyers can look with equanimity on this exaltation of our profession. But constitutions are intended to enable the process of Government to work smoothly, and not to provide fees for constitutional lawyers. The more numerous the briefs the more difficult the process of government becomes. India has perhaps placed too much faith in us."[10]

With due respect to the great constitutional expert,[10] these observations disclose a failure to appreciate the very foundation of the Indian Constitution. Sir Ivor omits to point out that the fathers of the Indian Constitution preferred the American doctrine of 'limited government' to the English doctrine of Parliamentary sovereignty.

Judicial review makes the Constitution legalistic.

In *England,* the birth of modern democracy was due to a protest against the absolutism of an autocratic executive and the English people discovered in Parliamentary sovereignty an adequate solution of the problem that faced them. The English political system is founded on the unlimited faith of the people in the good sense of their elected representatives. Though, of late, detractions from its omnipotent authority have taken place because the ancient institution at Westminster has grown incapable of managing myriads of modern problems with the same ease as in Victorian age, nonetheless, never has anybody in England thought of placing limitations on the authority of Parliament so that it might properly behave.

The Founding Fathers of the *American* Constitution, on the other hand, had the painful experience that even a representative body might be tyrannical, particularly when they were concerned with a colonial Empire. Thus it is that the Declaration of Independence recounts the attempts of the British "Legislature to extend an unwarrantable jurisdiction over us" and how the British people had been "deaf of the voice of justice". At heavy cost had the colonists learnt about the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1628) to acknowledge that no tax could be levied without the consent of Parliament, did, in 1765, and the years that followed, insist on taxing the colonies, regardless of their right of representation, and attempt to enforce such undemocratic laws through military rule.

Hence, while the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and Parliament as the sole source of that law, Americans had to go further and to assert that there is to be a law superior to the Legislature itself and that it was the restraints of this paramount written law that could only save them from the fears of absolutism and autocracy which are ingrained in human nature itself.

As will be more fully explained in the Chapter on Fundamental Rights, the Indian experience of the application of the British Rule of Law in India was not altogether happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. The "Sons of Liberty' in India had known to what use the flowers of the English democratic system, *viz.,* the Sovereignty of Parliament and the Rule of Law, could be put in trampling down the rights of man under an

Imperial rule. So, in 1928, long before the dawn of independence in India, the Motilal Nehru Committee asserted that

> "Our first care could be to have our fundamental rights guaranteed in a manner *which will not permit their withdrawal under any circumstances.*"

Now, judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in a written Constitution as 'fundamental rights' if they are not enforceable, in Courts of law, against any organ of the State, legislative or executive. Once this choice is made, one cannot help to be sorry for the litigation that ensues. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the Indian Constitution, there is hardly anybody in India to-day who is aggrieved because the Supreme Court, each year, invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the fundamental rights.

At the same time, it must be pointed out that since the inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments, which have taken out considerable areas from the pale of judicial review, *e.g.,* by inserting Arts. 31A-31C; and by 1995 as many as 284 Acts,—Central and State,—have been shielded from judicial review on the ground of contravention of the Fundamental Rights, by enumerating them under the 9th Schedule, which relates to Art. 31B.[11]

VIII. An independent Judiciary, having the power of 'Judicial review', is another prominent feature of *our* Constitution.

On the other hand, we have avoided the other-extreme, namely, that of 'judicial supremacy', which may be a logical outcome of an over-emphasis on judicial review, as the American experience demonstrates.

Judicial power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.[13]

Compromise between Judicial Review and Parliamentary Supremacy.

Indeed, the harmonisation which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review, is a unique achievement of the framers of *our* Constitution. An absolute balance of powers between the diferent organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs in the Constitution of the *United States* has failed in its actual working, and the Judiciary has assumed supremacy under its powers of interpretation of the Constitution to such an extent as to deserve the epithet of the 'safety valve' or the 'balance-wheel' of the Constitution. As one of her own Judges has said (Chief Justice HUGHES), "The Constitution (of the U.S.A.) is what the Supreme Court says it is". It has the power to invalidate a law duly passed by the Legislature not only on the ground that it transgresses the legislative powers vested in it by the Constitution or by the prohibitions contained in the Bill of Rights but also on the ground that it is opposed to some general principles said to underlie vague expressions, such as due process, the contents of which not being

explicitly laid down in the Constitution, are definable only by the Supreme Court. The American Judiciary thus sits over the *wisdom* of any legislative policy as if it were a third Chamber or super-Chamber of the Legislature.

Under the *English* Constitution, on the other hand, Parliament is supreme and "can do everything that is not naturally impossible" (*Blackstone*) and the Courts cannot nullify any Act of Parliament on any ground whatsoever. As MAY puts it—

> "The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be *unjust* and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errs, its errors can be corrected only by itself."

So, English Judges have denied themselves any power "to sit as a court of appeal against Parliament".

The *Indian* Constitution wonderfully adopts the *via media* between the American system of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the Legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution, *e.g.,* Arts. 286, 299, 301, 304; but, at the same time, depriving the Judiciary of any power of 'judicial review' of the wisdom of legislative policy. Thus, it avoided expressions like 'due process', and made fundamental rights such as that of liberty and property subject to regulation by the Legislature.[11] But the Supreme Court has discovered 'due process' in Art. 21 in *Maneka Gandhi.*[14] Further the major portion of the Constitution is liable to be amended by the Union Parliament by a special majority, if in any case the Judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the words of Pandit Nehru:

> "No Supreme Court, no Judiciary, can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but, in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way. . . Ultimately, the fact remains that the Legislature must be supreme and must not be interfered with by the Courts of Law in such measures as *social reform.*"

Our Constitution thus places the supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution. But, as has been mentioned earlier, the balance between Parliamentary Sovereignty and Judicial Review was seriously disturbed, and a drift towards the former was made, by the Constitution (42nd Amendment) Act, 1976, by inserting some new provisions, *e.g.,* Arts. 31D, 32A, 131A, 144A, 226A, 228A, 323A-B, 329A.

The Janata Government, coming to power in 1977, restored the pre-1976 position, to a substantial extent, through the 43rd and 44th Amendments, 1977-78, by repealing the following Articles which had been inserted by the 42nd Amendment—31D, 32A, 131A, 144A, 226A, 228A, 329A; and by restoring Art. 226 to its original form (substantially).

On the other hand, the Judiciary has gained ground by itself declaring that 'judicial review' is a 'basic feature' of *our* Constitution, so that so long as the Supreme Court itself does not revise its opinion in this behalf, any amendment of the Constitution to take away judicial review of legislation on the ground of contravention of any provision of the Constitution shall itself be liable to be invalidated by the Court (see at the end of this Chapter).

Fundamental Rights subject to reasonable regulation by Legislature.

IX. The balancing between supremacy of the Constitution and sovereignty of the Legislature is illustrated by the novel declaration of Fundamental Rights which our Constitution embodies.

The idea of incorporating in the Constitution a 'Bill of Rights' has been taken from the Constitution of the United States. But the guarantee of individual rights in *our* Constitution has been very carefully balanced with the need for the *security of the State itself*.

American experience demonstrates that a written guarantee of fundamental rights has a tendency to engender an atomistic view towards society and the State which may at times prove to be dangerous to the common welfare. Of course, America has been saved from the dangers of such a situation by reason of her Judiciary propounding the doctrine of 'Police Powers' under which the Legislature is supposed to be competent to interfere with individual rights wherever they constitute a 'clear danger' to the safety of the State and other collective interests.

Instead of leaving the matter to the off-chance of judicial protection in particular cases, the Indian Constitution makes each of the fundamental rights subject to legislative control under the terms of the Constitution itself, apart from those exceptional cases where the interests of national security, integrity or welfare should exclude the application of fundamental rights altogether [*Arts.* 31A-31C].[11]

Social Equality also guaranteed by the Constitution.

X. Another peculiarity of the Chapter on Fundamental Rights in the Indian Constitution is that it aims at securing not merely political or legal equality, but *social* equality as well. Thus, apart from the usual guarantees that the State will not discriminate between one citizen and another merely on the ground of religion, race, caste, sex or place of birth,—in the matter of appointment, or other employment, offered by the State,—the Constitution includes a prohibition of 'untouchability, in any form and lays down that no citizen may be deprived of access to any public place, of the enjoyment of any public amenity or privilege, only on the ground of religion, race, caste, sex or place of birth.

We can hardly overlook in this context that under the Constitution of the *U.S.A.*, racial discrimination persists even to-day, notwithstanding recent judicial pronouncements to the contrary. The position in the United Kingdom is no better as demonstrated by current events.

Fundamental Rights checkmated by Fundamental Duties.

XI. Another feature, which was not in the original Constitution has been introduced by the 42nd Amendment, 1976, by introducing Art. 51A as Part IVA of the Constitution.

42nd Amendment 1976.

Though the Directives in Part IV of the Constitution were not enforceable in any manner and had to give way before the Fundamental Rights, under the original Constitution, the situation was reversed, through the backdoor, by the 42nd Amendment, 1976, by amending Art. 31C[11]—shielding *all* the Directives in Part IV of the Constitution from the Fundamental Rights in Part III. But this object has been frustrated by the majority decision in the case of *Minerva Mills* v. *Union of India,*[15] as a result of which Art. 31C will shield from unconstitutionality on the ground of violation of Art. 13 those laws which implement only the Directives specified in Art. 39(b)-(c) and not any other Directive included in Part IV of the Constitution.

In the same direction, the 42nd Amendment Act introduced 'Fundamental Duties', to circumscribe the Fundamental Rights, even though the Duties, as such, cannot be judicially enforced (see, further, under Chap. 8, *post*).

Universal Franchise without Communal Representation.

XII. The adoption of universal adult suffrage [*Art.* 326], *without any qualification* either of sex, property, taxation or the like, is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an over-whelming illiteracy (see Table I, *post*). The suffrage in India, it should be noted, is wider than that in England or the United States. The concept of popular sovereignty, which underlies the declaration in the Preamble that the Constitution is adopted and given by the 'people of India' unto themselves, would indeed have been hollow unless the franchise—the only effective medium of popular sovereignty in a modern democracy—were extended to the entire adult population which was capable of exercising the right and an independent electoral machinery (under the control of the Election Commission) was set up to ensure the free exercise of its. The electorate has further been widened by lowering the voting age from 21 to 18, by the 61st Constitution Amendment Act, 1988.

That, notwithstanding the outstanding difficulties, this bold experiment has been crowned with success will be evident from some of the figures[16] relating to the first General Election held under the Constitution in 1952. Out of a total population of 356 million and an adult population of 180 million, the number of voters enrolled was 173 million and of these no less than 88 million, *i.e.,* over 50 per cent of the enrolled voters, actually exercised their franchise. The orderliness with which eleven General Elections have been conducted speaks eloquently of the political attainment of the masses, though illiterate, of this vast sub-continent. In the eleventh General Election held in 1996, the number of persons on the electoral roll had come up to 550 million and the same came up to 67,14,87,930 in the 14th General Election in 2004.

No less creditable for the framers of the Constitution is the abolition of communal representation, which in its trail had brought in the bloody and lamentable partition of India. In the new Constitution there was no reservation of seats except for the Scheduled Castes and Scheduled Tribes and for the Anglo-Indians,—and that only for a temporary period (this

period was 10 years in the original Constitution, which has been extended to 60 years, *i.e.,* up to 2010 A.D., by subsequent amendments of Art. 334).[17]

XIII. It has been stated at the outset, that the form of government introduced by *our* Constitution both at the Union and the States is the Parliamentary Government of the British type.[18] A primary reason for the choice of this system of government was that the people had a long experience of this system under the Government of India Acts,[19] though the British were very slow in importing its features to the fullest length.

The makers of *our* Constitution rejected the Presidential system of government, as it obtains in *America,* on the ground that under that system the Executive and the Legislatures are separate from and independent of each other,[20] which is likely to cause conflicts between them, which *our* infant democracy could ill afford to risk.

But though the British model of Parliamentary or Cabinet form of government was adopted, a hereditary monarch or ruler at the head could not be installed, because India had declared herself a 'Republic'. Instead of a monarch, therefore, an elected President was to be at the head of the Parliamentary system. In introducing this amalgam, the makers of *our* Constitution followed the *Irish* precedent.

As in the Constitution of *Eire,* the Indian Constitution superimposes an elected President upon the Parliamentary system of responsible government.

Parliamentary Government combined with an elected President at the Head.

But though an elected President is the executive head of the Union, he is to act on the advice of his ministers, although whether he so acts according to the advice of his ministers is not questionable in the courts and there is no mode, short of impeachment, to remove the President if he acts contrary to the Constitution.

On the other hand, principle of ministerial responsibility to the Legislature, which under the English system rests on convention, is embodied in the express provisions of *our* Constitution [*Art.* 75(3)].

In the words of *our* Supreme Court,[21]

> "Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of government policy and its transmission into law, though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. . . In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England. . ."[21]

But *our* Constitution is not an exact replica of the Irish model either. The Constitution of *Eire* lays down that the constitutional powers of the President can only be exercised by him on the advice of Ministers, *except* those which are left to his discretion by the Constitution itself. Thus, the Irish President has an absolute discretion to refuse dissolution of the Legislature to a defeated Prime Minister, contrary to the English practice and convention.

42nd Amendment, 1976.

But in the Indian Constitution there is no provision authorising the President to act 'in his discretion' on any matter. On the other hand, by amending

Art. 74(1), the 42nd Amendment Act has explicitly codified the proposition which the Supreme Court had already laid down in several decisions,[21] that the President "*shall,* in the exercise of his functions, act *in accordance with* such advice," *i.e.,* the advice tendered by the Council of Ministers.

44th Amendment, 1978.

The Janata Government has preferred not to disturb this contribution of the 42nd Amendment, except to empower the President by the 44th Amendment, 1978, to refer a matter back to the Council of Ministers, for reconsideration.

A Federal System with Unitary Bias.

XIV. Perhaps the most remarkable achievement of the Indian Constitution is to confer upon a federal system the strength of a unitary government. Though normally the system of government is federal, the Constitution enables the federation to transform itself into a unitary State (by the assumption of the powers of States by the Union),—in *emergencies* [*Part* XVIII].

Such a combination of federal and unitary systems in the same constitution is unique in the world. For a correct appreciation of this unique system it is necessary to examine the background upon which federalism has been introduced into India, in the light of the experience in other federal countries. This deserves a separate treatment [see Chap. 5, *post*].

Integration of Indian States.

XV. No less an outstanding feature of the new Constitution is the union of some 552 Indian States with the rest of India under the Constitution. Thus, the problem that baffled the framers of the Government of India Act, 1935, and ultimately led to the failure of its federal scheme, was solved by the framers of the Constitution with unique success. The entire sub-continent of India has been unified and consolidated into a compact State in a manner which is unprecedented in the history of this country.

The process by which this formidable task has been formed makes a story in itself.

Status of Indian States under the British Crown.

At the time of the constitutional reforms leading to the Government of India Act, 1935, the geographical entity known as India was divided into two parts—British India and the Indian States. While British India comprised the nine Governors' Provinces and some other areas administered by the Government of India itself, the Indian States comprised some 600 States which were mostly under the personal rule of the Rulers or proprietors. All the Indian States were not of the same order. Some of them were States under the rule of hereditary Chiefs, which had a political status even from before the Mahomedan invasion; others (about 300 in number) were Estates or Jagirs granted by the Rulers as rewards for services or otherwise, to particular individuals or families. But the common feature that distinguished these States from British India was that the Indian States, had *not* been *annexed* by the British Crown. So, while British India was under the direct rule of the Crown through its representatives and according to the statutes of Parliament and enactments of the Indian Legislatures,—the Indian

States were allowed to remain under the personal rule of their Chiefs and Princes, under the 'suzerainty' of the Crown, which was assumed over the entire territory of India when the Crown took over authority from the East India Company in 1858.

Incidents of Paramountcy.

The relationship between the Crown and the Indian States since the assumption of suzerainty by the Crown came to be described by the term '*Paramountcy*'. The Crown was bound by engagements of a great variety with the Indian States. A common feature of these engagements was that while the States were responsible for their own internal administration, the Crown accepted responsibility for their external relations and defence. The Indian States had no international life, and for *external* purposes, they were practically in the same position as British India. As regards *internal* affairs, the policy of the British Crown was normally one of non-interference with the monarchical rule of the Rulers, but the Crown interfered in cases of misrule and mal-administration, as well as for giving effect to its international commitments. So, even in the internal sphere, the Indian States had *no legal* right against non-interference.

Nevertheless, the Rulers of the Indian States enjoyed certain personal rights and privileges, and normally carried on their personal administration, unaffected by all political and constitutional vicissitudes within the neighbouring territories of British India.

Place of Indian States in the Federal Scheme proposed by the Government of India Act, 1935.

The Government of India Act, 1935 envisaged a federal structure for the whole of India, in which the Indian States could figure as units, together with the Governors' Provinces. Nevertheless, the framers of the Act differentiated the Indian States from the Provinces in two material respects, and this differentiation ultimately proved fatal for the scheme itself. The two points of difference were—(a) While in the case of the Provinces accession to the Federation was compulsory or automatic,—in the case of an Indian State it was voluntary and depended upon the option of the Ruler of the State. (b) While in the case of the Provinces, the authority of the Federation over the Provinces (executive as well as legislative) extended over the whole of the federal sphere chalked out by the Act,—in the case of the Indian States, the authority of the Federation could be limited by the Instrument of Accession and all residuary powers belonged to the State. It is needless to elaborate the details of the plan of 1935, for, as has been stated earlier, the accession of the Indian States to the proposed Federation never came true, and this Part of that Act was finally abandoned in 1939, when World War II broke out.

When Sir Stafford Cripps came to India with his Plan, it was definitely understood that the Plan proposed by him would be confined to settling the political destinies of British India and that the Indian States would be left free to retain their separate status.

Proposal of the Cabinet Mission.

But the Cabinet Mission supposed that the Indian States would be ready to co-operate with the new development in India. So, they recommended

that there should be a Union of India, embracing both British India and the States, which would deal only with Foreign Affairs, Defence and Communications, while the State would retain all powers other than these.

Lapse of Paramountcy under the Indian Independence Act.

When the Indian Independence Act, 1947, was passed, it declared the lapse of suzerainty (paramountcy) of the Crown, in s. 7(1)(b) of the Act, which is worth reproduction:

'7. (1) As from the appointed day—

(*b*) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at the date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority, or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and

Provided that notwithstanding anything in paragraph (*b*). . . of this sub-section, effect shall, as nearly as may be, continue to be given to the provision of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the Rulers of the Indian States. . . on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.'

But though paramountcy lapsed and the Indian States regained their position which they had prior to the assumption of suzerainty by the Crown, most of the States soon realised that it was no longer possible for them to maintain their existence independent of and separate from the rest of the country, and that it was in their own interests necessary to accede to either of the two Dominions of India and Pakistan. Of the States situated within the geographical boundaries of the Dominion of India, all (numbering 552) save Hyderabad, Kashmir, Bahawalpur, Junagadh and the N.W.F. States (Chitral, Phulra, Dir, Swat and Amb) had acceded to the Dominion of India by the 15th August, 1947, *i.e.,* before the 'appointed day' itself. The problem of the Government of India as regards the States after the accession was two-fold:

(a) Shaping the Indian States into sizeable or viable administrative units, and (b) fitting them into the constitutional structure of India.

(A) The first objective was sought to be achieved by a three-fold process of integration (known as the 'Patel scheme' after Sardar Vallabhbhai Patel, Minister in-charge of Home Affairs)—

Integration and merger.

(i) 216 States were merged into the respective Provinces, geographically contiguous to them. These merged States were included in the territories of the States in Part B in the First Schedule of the Constitution. The process of merger started with the merger of Orissa and Chhattisgarh States with the then Province of Orissa on January 1, 1948, and the last instance was the merger of Cooch-Behar with the State of West Bengal in January, 1950.

(ii) 61 States were converted into Centrally administered areas and included in Part C of the First Schedule of the Constitution. This form of integration was resorted to in those cases in which, for administrative, strategic or other special reasons, Central control was considered necessary.

(iii) The third form of integration was the consolidation of groups of States into new viable units, known as Union of States. The first Union formed was the Saurashtra Union consolidating the Kathiawar States and many other States (February 15, 1948), and the last one was the Union of Travancore-Cochin, formed on July 1, 1949. As many as 275 States were thus integrated into 5 Unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. *These were included in the States in Part B* of the First Schedule. The other 3 States included in Part B were—Hyderabad, Jammu and Kashmir and Mysore. The cases of Hyderabad and Jammu and Kashmir were peculiar. Jammu and Kahsmir acceded to India on October 26, 1947, and so it was included as a State in Part B, but the Government of India agreed to take the accession subject to confirmation by the people of the State, and a Constituent Assembly subsequently confirmed it, in November, 1956. Hyderabad did not formally accede to India, but the Nizam issued a Proclamation recognising the necessity of entering into a constitutional relationship with the Union of India and accepting the Constitution of India subject to ratification by the Constituent Assembly of that State, and the Constituent Assembly of that State ratified this. As a result, Hyderabad was included as a State in Part B of the First Schedule of the Constitution.

(B) We have so far seen how the States in Part B were formed as viable units of administration,—being the residue of the bigger Indian States, left after the smaller States had been merged in the Provinces or converted into Centrally Administered Areas. So far as the latter two groups were concerned, there was no problem in fitting them into the body of the Constitution framed for the rest of India. There was an agreement between the Government of India and the Ruler of each of the States so merged, by which the Rulers voluntarily agreed to the merger and ceded all powers for the governance of the States to the Dominion Government, reserving certain personal rights and privileges for themselves.

But the story relating to the States in Part B is not yet complete. At the time of their accession to the Dominion of India in 1947, the States had acceded only on three subjects, *viz.,* Defence, Foreign Affairs and Communications. With the formation of the Unions and under the influence of political events, the Rulers found it beneficial to have a closer connection with the Union of India and all the Rajpramukhs of the Unions as well as the Maharaja of Mysore, signed revised Instruments of Accession by which all these States acceded to the Dominion of India in respect of *all* matters included in the Union and Concurrent Legislative Lists, except only those relating to taxation. Thus, the States in Part B were brought at par with the States in Part A, subject only to the differences embodied in Art. 238 and the supervisory powers of the Centre for the transitional period of 10 years [*Art.* 371]. Special provisions were made only for Kashmir [*Art.* 370] in view of its special position and problems. That article makes special provisions for the partial application of the Constitution of India to that State, with the concurrence of the Government of that State.

It is to be noted that the Rajpramukhs of the five Unions as well as the Rulers of Hyderabad, Mysore, Jammu and Kashmir all adopted the Constitution of India, by Proclamations.

Reorganisation of States.

The process of integration culminated in the Constitution (7th Amendment) Act, 1956, which abolished Part B States as a class and included *all the States in Part A and B in one list.*[22] The special provisions in the Constitution relating to Part B States were, consequently, omitted. The Indian States thus lost their identity and became part of one uniform political organisation embodied in the Constitution of India.[23]

The process of reorganisation is continuing still and the recent trend is towards conceding the demands of smaller units which were previously Part B States, Union Territories or autonomous parts of States, by conferring upon them the status of a 'State', *e.g.,* Nagaland, Meghalaya, Himachal Pradesh, Manipur, Tripura, Mizoram, Goa. Delhi has been made the National Capital Territory. This process will be further elaborated in Chap. 6 (Territory of India), *post.*

Outstanding and 'basic' features of the Constitution.

Before closing this Chapter, however, it should be pointed out that since the observations in the case of *Golak Nath,*[24] culminating with *Keshavananda,*[25] the Supreme Court had been urging that there are certain 'basic' features of the Constitution, which were immune from the power of amendment conferred by Art. 368, which, according to the Court, was subject to 'implied' limitations. On the other hand, the Indira Government had been attempting to thwart this doctrine by successive amendments of Art. 368, starting with the 24th Amendment, 1971, and ending with 42nd Amendment Act, 1976, so as to obviate any such conclusion by the Supreme Court.[26] The Court has, however, adhered to its view notwithstanding any of these amendments.[27] The present Chapter does not enter into that controversy, which will be dealt with in Chap. 10 (Procedure for Amendment), *post.* [See that Chapter as to the list of basic feature].

The comparative study of any Constitution will reveal that it has certain prominent features which distinguish it from other Constitutions. It is those prominent features which have been summarised in this Chapter by way of introducing the reader to the various provisions of the Indian Constitution.

REFERENCES

1. VII C.A.D., pp. 35-38.
2. VII C.A.D., 2, 242; XI C.A.D., 613, 616.
3. The Constitution of the United States, with all its amendments up to date, consists of not more than 7,000 words.
4. C.A.D., Vol. XI, pp. 839-40.
5. Of course, some of these provisions have been eliminated by the Constitution (7th Amendment) Act, 1956, which abolished the distinction between different classes of States.
6. DR. RAJENDRA PRASAD, C.A.D., Vol. X, p. 891.
7. The original title of this Act was the 'Untouchability (Offences) Act, 1955'. It has been extensively widened and made more rigorous, and renamed as the 'Protection of Civil Rights Act, 1955', by Act 106 of 1976.
8. WHEARE, *Modern Constitutions,* p. 143.
9. C.A.D. dated 8-11-1948, pp. 322-23.
10. JENNINGS, *Some Characteristics of the Indian Constitution,* 1953, pp. 2, 6, 25-26.

11. The major changes made by the 42nd Amendment Act have been elaborately and critically surveyed in the Author's *Constitution Amendment Acts*, pp. 117-34, which should be read along with this book.
12. C.A.D., Vol. VII, p. 293.
13. *G.C. Kanungo* v. *State of Orissa*, (1995) 5 S.C.C. 96 (paras 17 and 18) : A.I.R. 1995 S.C. 1655; *L. Chandra Kumar* v. *Union of India*, (1997) 3 S.C.C. 261 (paras 62 and 76) : A.I.R. 1997 S.C. 1125 and *State of A.P.* v. *K. Mohanlal*, (1998) 5 S.C.C. 468 (para 9).
14. *Maneka Gandhi* v. *Union of India*, AIR 1978 S.C. 597.
15. *Minerva Mills* v. *Union of India*, AIR 1980 S.C. 1789 (paras 21-26).
16. Report of the First General Elections in India (1951-52), Vol. I.
17. *Vide* the Constitution (79th Amendment) Act, 1999.
18. Prime Minister Nehru in the Lok Sabha, on 28-3-1957.
19. IV C.A.D., 578 (Sardar Patel).
20. VII C.A.D., 984 (Munshi).
21. *Ram Jawaya* v. *State of Punjab*, (1955) 2 S.C.R. 225; *Shamser Singh* v. *State of Punjab*, AIR 1974 S.C. 2192.
22. As will be more fully explained in a later Chapter, the number of the States,—all of one category,—is 28 at the end of 2000. Besides, there are 7 Union Territories.
23. It should be mentioned, in this context, that the last vestiges of the princely order in India have been done away with by the repeal of Arts. 291 and 362, and the insertion of Art. 363A, by the Constitution (26th Amendment) Act, 1971 (w.e.f. 28-12-1971), which abolished the Privy Purse granted to the Rulers of the erstwhile Indian States and certain other personal privileges accorded to them under the Constitution—as a result of which the heads of these pre-Independence Indian States have now been brought down to a level of equality with other citizens of India.
24. *Golak Nath* v. *State of Punjab*, AIR 1967 S.C. 1643.
25. *Keshavananda* v. *State of Kerala*, AIR 1973 S.C. 1461.
26. The Janata Government's efforts to enshrine the 'basic features theory' in the Constitution itself, by requiring a *referendum* to amend four 'basic features', failed owing to Congress opposition to the relevant amendments of Art. 368 of the Constitution, as proposed by the 45th Amendment Bill, 1978. The four basic features mentioned in that Bill were—(i) Secular and democratic character of the Constitution; (ii) Fundamental Rights under Part III; (iii) Free and fair elections to the Legislatures; (iv) Independence of the Judiciary.
27. *Minerva Mills* v. *Union of India*, AIR 1980 S.C. 1789 (paras 21-26, 28, 91, 93-94); *Sampat* v. *Union of India*, AIR 1987 S.C. 386; *Union of India* v. *Raghubir*, AIR 1989 S.C. 1933 (para 7).