

Comparison of Indian Constitutional Scheme with that of Other Countries

LEARNING OBJECTIVES

In this Chapter, you will learn about:

- British Constitution
- American Constitution
- Chinese Constitution
- Swiss Constitution
- Japanese Constitution
- French Constitution

7.1 BRITISH CONSTITUTION

7.1.1 Introduction

The Constitution of present United Kingdom has evolved from the past which contained smaller states and has been continuing till the present. The defining feature of the British Constitution is its unwritten form. Absence of a Constitution does not mean Britain does not have one, it does but it is unwritten and other elements, such as statutes, judicial precedents, conventions, treaties, etc., collectively form together the essence of constitution. Hence it is termed as uncoded Constitution rather than unwritten constitution.

According to Munro “the British Constitution is a complex amalgam of institutions, principles and practices. It is a composite of charters and statutes, of judicial decisions, of common law, of precedence, usages and traditions. It is not one document but hundreds of them. It is not derived from one source but from several.... It is a child of wisdom and chance.”

7.1.2 Sources of the British Constitution

(a) Conventions

British Constitution is based generally on the traditions and conventions of the English society. Without these conventions, it is difficult work with it and they are considered to be sacred. Most of the fundamental features of the Constitution is based on the conventions only. Therefore, the conventions are called as the living soul of the British Constitution. Let us now look at some of the important conventions.

- (i) Collective responsibility of the cabinet to the Parliament
- (ii) Appointment of leader of largest party as the Prime Minister
- (iii) King or Queen should accept the advice of the cabinet

(b) Charters

The great charters and agreements provide the source for Constitution defining the powers of the crown, rights of the citizen, etc. These charters have gained historic importance and hence act as guide to the constitution. Some of the important charters are as follows:

- (i) Magna Carta, 1215
- (ii) Bill of Rights, 1689
- (iii) Act of Union with Scotland, 1707

(c) Statutes

The statutes or laws are passed by the parliament from time to time and hence act as important source for the constitution. The British Parliament has full power to amend and/or remove these statutes any time it wishes. Some of the important statutes are as follows:

- (i) Parliament Act, 1911
- (ii) Representation of People's Act, 1918
- (iii) Indian Independence Act, 1947

(d) Judicial decisions

Judgements and interpretations of British courts act as another important source of constitution. These judgements, interpretations, etc., define the validity, scope of the statutes, charters and the common law. These judiciary act as vanguard on upholding the constitutional values, hence Dicey termed the British Constitution to be a judge-made constitution.

(e) Eminent works

Eminent works of great scholars too serve as basis for constitution. *Dicey's Law and constitution*, *Blackstone's Commentaries of English constitution*, etc., are some of them.

(f) Common law

The common law exists apart from the statutes and the charters. These are generally not in written form but have evolved from historical growth of the British society, these are important rules and regulation which are based upon the customs and traditions of the English society and which are later validated by the courts. The right of trial by jury, right of freedom of speech and assembly, etc., are some of the important common laws.

7.1.3 Salient Features of the British Constitution

Let us now look at some of the fundamental aspects of the British Constitution.

(a) ***Partially written and partially unwritten constitution***

The British Constitution is mostly in unwritten form. The written form consists of important parts like the Magna Carta, Bill of Rights, etc., but the unwritten form is more remarkable and noticeable. What unwritten here means is that unwritten part of the Constitution is larger than the written part, the written part of the Constitution was not created at a single instance, whenever statutes, laws were enacted it was not for improving the constitution, they indirectly helped in identifying the values of the constitution. Thus the British Constitution is largely based on traditions and conventions of the English society.

(b) ***Evolutionary***

The British Constitution is the oldest of the written constitutions. It has been in continuous usage without any change for the past few centuries. British society also has not faced any drastic revolutions like the French or the Russian. The basic idea of the Constitution has grown like an organism from period to period. It has been evolutionary and gradually the constitutional values and ideals were incorporated in various statutes, laws, conventions and traditions.

(c) ***Difference in theory and reality***

Many features which exists as constitutional features are not practiced in actual practice. In theory, all power of Government rests with the crown. All laws should receive consent of the Crown, King is the commander-in-chief of all forces and only he can declare war and conclude peace treaties. Thus in theory, British Government is an absolute monarchy and in actual reality it is democratic republic. The King presently is just a figurehead and no real power is vested in him. The people via the parliament are more powerful than the crown.

(d) ***Parliamentary sovereignty***

Legally, the British Parliament can do anything, save just make man a woman or woman a man. There is no law which the parliament can make. Everything comes under the purview of the parliament and changes can be brought by simple act. It can abolish monarchy, abolish House of Lords, prevent someone from attaining the throne and deprive all powers of the crown and many more. The important aspect is that no court can question the legality of such acts. Acts, laws cannot be struck down like in India or America for being ultra vires of the constitution. The British Parliament is both the law making and the constituent authority, and there is no legal difference between them.

(e) ***Unitary constitution***

In India and America some of the powers are vested with the regional governments, and it is shared between the centre and the states. But Britain is not a federation or union of states, and hence it has a unified constitution. Powers, thus, are completely appropriated by the government with its head at London. Though local governments exists, they derive power from the union, which can give greater or deprive of the present powers of the local governments. Thus, British Constitution is unitary in essence and practice.

(f) Flexible constitution

There is no separate procedure for amendment of constitutional provisions, it is passed like any other bill requiring simple majority. Constitutional law is thus treated like any other law, making it flexible. Thus British Constitution can adapt itself to new conditions easily.

(g) Rule of law

Though it is not explicitly stated, rule of law is inherently present in the British Constitution. We may see that British Constitution does not contain defined provisions for protection of its citizens unlike in America or India, but the British citizens are well protected and their rights are derived from the presence of Rule of Law. All institutions the King, Parliament, courts, even the citizens are subject to it. Tradition and public opinion upholds the ideal from any infringement by the parliament.

(h) Parliamentary form of government

Unlike America's Presidential style, England follows a Parliamentary form of government. The King-Crown is the nominal head of the state and the Prime Minister acts as the head of the government. The King listens and adheres to the advice of the ministers. And the ministers are collectively responsible to the Parliament. Being themselves the member of the parliament, there is less conflict between the executive and the legislature leading to smooth functioning of the government.

(i) Separation of powers combined with concentration of responsibility

There is strict separation of power between the executive, legislature and the judiciary. Each institution performs its function separately without encroaching on another. But the cabinet in England has come to play very prominent role. It controls the agenda of the parliament and to an extent even influences the judiciary, thus cabinet is called as the steering wheel, which steers the ship called the government.

(j) Blend of Monarchy, aristocracy and democracy

The British Constitution is a balance between monarchy, aristocracy and democracy. The Crown-King represents the monarchy, the House of Lords (the Upper House) represents the aristocracy and the House of Commons represents the Lower House giving representation to the common man, thus upholding the ideals of democracy. Though the powers of Monarch and Aristocrats have been drastically reduced they have not been scrapped. These institutions serve as remnants of the bygone era serving little purpose in the present.

(k) Bicameral legislature

British has a bicameral parliament. The House of Lords having hereditary membership is the Upper House and the House of Commons is the Lower House. House of Commons is more powerful than the Upper House. It is elected by people having universal adult franchise.

7.1.4 Executive

Cabinet is the real executive. The crown obeys the advice of the cabinet. Thus, the cabinet is central to the functioning of the government. However there is difference between the ministry and the cabinet. The ministry has larger composition and they do not meet as a body and hence do not have collective function. Whereas cabinet consists of members of the ministry, it is the circle within the circle of the ministry. The Prime Minister appoints his inner circle consisting of most important members to advise him, to formulate policies and to implement them.

The important feature of the cabinet is the exclusion of the King from the cabinet. The King does not preside over it. Since the cabinet members come from the parliament, and Prime Minister is the leader of a majority party, there is complete cooperation and harmony between the parliament and the cabinet. Ministerial responsibility is the inherent feature of the cabinet system. There are two kinds of responsibilities: legal and political. Legal responsibility comes from the fact that every law that is passed is first signed by the King and the minister responsible for it countersigns it. Hence in case of illegality, the minister is held responsible and not the crown. Political responsibility comes with the collective responsibility of the cabinet to the parliament. They either sail or sink together. Prime Minister is the leader of the cabinet, and the ministers work under him. Being from same party gives the cabinet political homogeneity, which helps its smooth functioning.

The Cabinet has both individual and collective functions. As individuals, the ministers are in charge of departments and carry out its functions. Collectively, the cabinet is responsible for final determination of policy which is to be submitted to the parliament, it exercises complete control over the national executives and cabinet also helps in cooperation and coordination between various departments, thus helping in effective functioning of the government.

Prime Minister is the leader of the largest party of the parliament. He is called upon by the King to form the government. Prime Minister recommends the names of the members to be appointed as ministers and as the cabinet. He is free to choose whom to be included in the cabinet. He allocates each minister his/her portfolio. He can also reshuffle/remove any minister as it comes under his discretion as he is the head of the government. He coordinates the work between the cabinet members. As chairman of the cabinet, he summons and prepares agenda of the meeting. Prime Minister is thus called as the keystone of the cabinet without whom the structure would cease to exist.

Apart from his important role in the cabinet, the Prime Minister acts as the leader of the House of Commons. He acts as the representative of the cabinet in the house and presents the parliament the agenda of the government. Another most important power of the Prime Minister is his power to dissolve the government. Only he can recommend the crown to dissolve the house and propose a date for election. Prime Minister also acts as the important channel of communication between the cabinet and the crown. In his capacity as head of the government, he is the chief adviser to the crown. In the international stage, the Prime Minister represents the nation. He formulates the foreign policy.

The most important part of the executive is the crown. It has the supreme executive authority. It can declare war or peace, appoints all the executives, supreme command over the armed forces, conducts the foreign relations. But in reality, the cabinet exercises all these powers. The crown acts per the advice of the Prime Minister and the cabinet. Apart from this, crown also forms part of the legislature. The King summons, prorogues sessions of the parliament, he also dissolves the house. The King gives final assent to any bill passed by the parliament. Even in such legislative functions, the King adheres to the voice of the cabinet and acts accordingly. In no place does the King have discretion to act on his own except in case where there is no party having majority, King decides on whom to call to form the government.

Though it may seem the King is mere ceremonial head, but he does have some inherent rights, right to be consulted, right to warn and right to encourage. Prime Minister has to keep the King informed and should consult him in important cases of public interest. The King also renders warning and advice whenever such situation arises, and the cabinet cannot ignore such messages.

7.1.5 Legislature

The parliament is the ultimate sovereign institution, and it has very wide powers. It has the right to make or unmake any law, and there is no authority which can question or declare it is ultra vires of the constitution. Also there is no distinction between common law and the constitutional law. In reality, there are other factors which play an important role limiting the extreme sovereign powers of the parliament. The parliament is bound by moral limitations, rule of law is a fundamental feature governing the land, public opinion too plays an important role in limiting the sovereign powers of the parliament, judicial precedents and judge-made laws also become important conventions. The parliament is at present overburdened with work, hence it cannot take up all the matters on its own, delegated legislation has thus come to play an important role, this also limits the sovereign powers of the parliament.

The House of Commons or the Lower House is the elected body. When the King dissolves the parliament, it is the house of commons which is dissolved hence we can say parliament is nothing but the House of Commons. It enjoys highest power in law making, control of the executive and financial administration.

Being the popular chamber, the House of Commons takes up the law making and has been given enormous power. Though House of Lords, the Upper House, is present, its powers have been curtailed and been made subordinate to the House of Commons. It has the final say in all the legislative actions. Decision regarding all non-monetary bills now rests with the commons. Thus House of Commons supremacy is well established and functional.

All money bill should originate in the House of Commons. House of Lords have very limited power regarding the money bill, at most it can delay it only for a month. House of Commons can get the assent of the King without support from the Lords, thus its control over money bills is complete and decisive. It also controls the purse of the nation. Budget making is an important instrument to keep check over the executive. Raising taxes or expenditure needs its seal of approval.

In the parliamentary setup, the council of ministers are responsible to the popular chamber. The council has a collective responsibility towards the commons. So long as the council of ministers enjoys confidence of the house, they can continue to run the government and when they lose it they have to tender their resignation. The House of Commons keep check over the executive by seeking information about the functions and actions of the government and by criticising it. Ministers are obliged to reply to questions asked in the house. 'Question hour' helps the house to scrutinize the working of the government. Apart from law-making, the house debates the policies and actions of the government.

The house of Lords is the oldest functioning second chamber in the world. Unlike the House of Commons, it consists of hereditary members, Lords, Nobles. Since 1911, its powers have been very much curtailed. A bill can originate in any house, and it has to be approved by both the houses for it to be passed. Being a historical institution, the House of Lords maintains the tradition and custom of English way of life. It helps prevent drastic deviation in laws made by the commons. Private member bill arising from the house helps in saving time of the commons. The second chamber upholds the ideals of bicameralism, and it helps in detailed scrutiny of the bills, creates an atmosphere for free and fair discussion. It acts as the revisory chamber for bills originating from the House of Commons. The house of Lords is also bestowed with important judicial functions.

7.1.6 Judiciary

There is no single judicial system followed throughout entire United Kingdom. England and Wales follow a system, Scotland follows a different system and Northern Ireland follows yet another system. Hence there is no uniform judicial courts throughout the country. Rule of law is supreme in England, and hence there are no separate administrative courts. Everyone is treated equally before the law. But there is no concept of judicial review. No law can be declared to be ultra vires of the constitution. Parliament is thus supreme, and no authority can question the validity of a law. Unlike courts of America, where a law has to pass the judicial scrutiny, English courts do not scrutinize the laws. Important aspect of the British judiciary is its quality and quickness. The procedures are simple, and hence cases move faster unlike courts in India. Fairness and speed are the essential features English courts. English judges enjoy high degree of independence.

The judges are appointed for life and can be removed only by elaborate procedure in the parliament. The trial is open to all, and anyone can attend it. The judges are impartial and people trust the system to deliver justice. Trial by jury is an essential feature which can be demanded by the accused. The courts uphold the human rights, helping in upholding civil rights, freedom of speech, movement, freedom of press, etc. Free legal aid is provided to those who cannot afford it from a financial point of view.

7.2 AMERICAN CONSTITUTION

7.2.1 Introduction

Philadelphia Convention held in 1787 forms the basis for the American Constitution. It came into force in 1789 after ratification of required number of states. It is one of the briefest Constitution in the world consisting of originally seven articles. Around 26 amendments have been carried out exposing the rigid character of the constitution. The concept of Montesquieu's separation of power has found ideal application in the American system, all the institutions are separate and it has checks and balances to prevent overreach. Though constitutionally the federal government is weak, judicial interpretation by the Supreme Court has strengthened its position.

7.2.2 Salient Features of the American Constitution

The following are the salient features of the American Constitution:

(a) Written form

Like any other federal constitution, it is in written character. It is simple and elegant consisting of only seven articles. It was created as a skeleton Constitution where the framers created just the important broad outlines where rest of the details will be filled by the acts of the Congress. Thus, Constitution is just the starting point. Other than the written character, there are elements like conventions, customs, legislative measures and judicial decisions which form the unwritten part forming a vital part of the constitutional provisions. Though election of President as per the Constitution is indirect in character, present convention is that it is a direct contest between the individuals.

(b) Rigidity

It is the most rigid Constitution in the world. Though amendment is possible, it is very lengthy and cumbersome, and it requires ratification of three-fourth of the states. Hence any proposed amendment takes years before it is implemented. The rigidity can be seen from the fact that

only 26 amendments have been carried out in all these years of existence of the constitution. Though it seems rigid, the Constitution has adapted well to changing circumstances, from the Industrial Revolution to the present technological revolution.

(c) Federal nature

Originally it was a federation of 13 states, which is now expanded into 50 states. There is constitutional division of powers between union and the states. The Constitution has elaborated the powers of the centre and has left all the residual powers to the states. Thus Constitution has created a weak centre and strong federal states. But in practice, this is not followed, the powers of centre has increased manifold due to the concept of 'implied powers' as propounded by the Supreme Court of America.

(d) Supremacy of the constitution

The Constitution is supreme law of the land. Neither the centre nor the states can override the constitution. Any law passed by state or centre can be declared ultra vires of the Constitution if it is in violation by the Supreme Court.

(e) Separation of powers

Though there is no direct statement in Constitution regarding separation of powers, the concept is implied and seen from the fact that the constitutional makers have attempted to keep separate executive, legislature and judiciary as much as possible. The President is the head of the executive, he is indirectly elected and he has nothing to do with the Congress. The Congress is thus only the legislative body. President is not responsible to the Congress and thus cannot be removed by vote of no-confidence. He also does not participate in its debates. Both the organs are independent of each other. Supreme Court enjoys enormous freedom and independence of function. In actual practice, there is no complete separation of powers between the institutions. Today the President controls the legislative policy of the Congress. There is coordination between the executive and the legislature. Thus in practice, there is overlap and sharing of powers between different institutions.

(f) Checks and balances

Power of each institution is checked by another, and thus balance of power is maintained. President can veto the bills of the Congress. International treaty needs approval from the senate. Internal appointments too need ratification from the senate, thus senate checks the power of the President. Organisation of judiciary is determined by the Congress, and the President has the power to appoint the judges of the Supreme Court, subject to the approval by the senate. The Supreme Court has powers to strike down bills of both centre and states if it is in violation of the constitutional provisions.

(g) Bill of rights

The basic fundamental rights of life, property and liberty was not incorporated into the original constitution. By subsequent first 10 amendments, these rights got approval and made as part of the constitution. The citizens can take a recourse to courts if their fundamental rights are violated. These rights can only be modified or suspended by another constitutional amendment. Thus citizens of America enjoy freedom of speech, habeas corpus, freedom of worship, freedom from unreasonable seizure, etc., as they have been made as fundamental feature of the constitution.

(h) Judicial review

The judicial review is sometimes called as the judicial veto as this keeps in check the powers of the legislature and the executive. The courts thus act as custodian and guardian of the constitutional rights, any bill which violates it will be struck down. Judiciary has also expanded the power of the centre with its doctrine of 'implied powers', hence Constitution is what judiciary interprets. The judiciary interprets the Constitution according to the changing circumstances of the society. This has made the Constitution relevant to any period in the time scale.

(i) Republican form of government

Unlike monarchical form followed in the United Kingdom, the United States has adopted a republican form. The head of the state, the President is elected. The people drive the Constitution. The Constitution makes it binding to adopt republican form of government.

(j) Presidential government

President is head of the state and government. He is vested with all the executive powers. Unlike parliamentary form followed in the United Kingdom and India, the President is not responsible to the Congress. He does not attend any session, not directly introduce any legislation nor participates in the debates. The Congress too cannot remove the President by no-confidence motion. He enjoys problem-free 4-year tenure. Also, the President cannot dissolve the Congress. The cabinet of the President consists of members of his own selection, and they need not be from the Congress.

(k) Dual citizenship

The Constitution provides for dual citizenship. The individual is thus citizen of both the state and the country.

(l) Popular sovereignty

The people are the ultimate sovereign. The preamble of the Constitution establishes this idea. Rest of the government and its institutions are subjected to sovereignty of the people.

(m) Spoils system

The Spoils System is an important part of the constitution. The Pendleton Act (1883) has curtailed and made only 20% of the offices subject to patronage of the President. Previously, all the offices were considered to be the spoils of victory of election of the President. He appointed his followers and supporters in the key posts. They worked not for the government but for the President and to help in his re-election. And when a new President is elected, the previous members resign and he appoints his own supporters to the posts. This system created numerous problems and inefficiency. This was rectified by the Pendleton Act though not completely removing the Spoils System.

(n) Bicameral legislature

Like United Kingdom and India, the United States, too, follows a bicameral system. Its lower house is called as the House of Representatives and upper house the Senate. Its upper house is the most powerful upper house in the world. Senate, thus, has more powers than the House of Representatives. It has executive, legislative and judicial powers. It has compact membership of hundred having a tenure of 6 years, whereas the lower house has 2-year tenure consisting of 435 members.

7.2.3 Executive

United States follow the Presidential form of government, hence the President here is not mere head of the state, and he is also the head of the government. He appoints the cabinet, carries out functioning of the government independent of the Congress, he is neither responsible nor is controlled by the Congress, and Congress too cannot remove him. The President is supported by a Vice President who succeeds him in case the chair falls vacant for any reason. The President of America is considered to be the most powerful office in the world comparable to none. But the powers is limited by the constitutional checks and balances by giving powers to the legislature and judiciary.

The Presidential powers and functions can be studied under his executive, legislative, financial, judicial and emergency powers.

As the chief executive the President is responsible for implementation and overseeing of the policies. He is responsible for the execution of constitutional provisions, laws made by the Congress and decrees given by the Supreme Court. He is given power to make appointments and also removal of the high executives like the ambassador, ministers and federal judges. President is the brain behind the formulation of the national policy which bears his stamp. He also negotiates and concludes agreement with foreign countries. 'Executive agreements' skirt the approval from the senate, thus helping the President securely uphold the treaties.

Though the President is not the part of the legislature, he still has been given powers to legislate. The President can send messages to the Congress or even personally read them. Though it is not compulsory to adopt such messages, it carries weight of the office of the President which cannot be ignored. He can also call upon extraordinary session of the Congress to legislate on some important issue. He can also give ordinances which has to be later taken up by the Congress. The other important role played by the President is in exercising his veto powers. He can either give ascent or send back the bill to the Congress with some recommendations. He has to approve the bill within 10 days. And if the Congress is adjourned within the 10 days, the bill dies. Thus the President is given pocket veto in this case, where he can delay unwanted bills without giving ascent and waiting for the Congress to adjourn. Any bill sent again for review if passed by two-third majority of the Congress, the President has to approve it. Thus, the President has absolute, qualified and pocket veto powers.

The President has been given powers to grant reprieve, pardon or amnesty. His power to do so is confined to federal matters and does not apply in case of state laws. Budget making and giving annual financial statement to the Congress is the prerogative of the President. Thus maintaining healthy financial environment is one of the responsibilities of the President.

Though he cannot directly declare war, only the Congress can do so, he can create situation where it is inevitable for the Congress but to declare war. The President makes appointment of the heads of armed forces. During emergency situations, the powers of President increase enormously.

The cabinet is called as the extension of the shadow of the President. Unlike cabinets in the United Kingdom and India, which leads an independent existence with respect to its leader and is responsible to their parliaments, the American cabinet is neither independent of and nor responsible to the Congress. All the appointments of the cabinet is the personal wish of the President. Hence it is also called as the 'kitchen cabinet'.

7.2.4 Legislature

The federal legislature consists of two bodies: the upper senate and the lower house of representatives. The senate consists of 100 members where each state sends two members each. The lower house is composed of 435 members elected based on territorial representation on

demographic basis. There is also significant difference in life of each house, lower house is shorter having 2-year tenure and upper house having a 6-year time period. The houses of American legislature is not a sovereign body like the British Parliament, hence it has to act according to the boundaries prescribed by the constitution. Also the President has veto power over the bills, and if he sends the bill again for reconsideration it has to be passed by two-third majority in the house. The judiciary also strikes down any law which is ultra vires of the Constitution that is law which violates the constitutional provisions. There is also the underlying concept of separation of powers, where each institution is independent of each other.

The Constitution has granted set of powers on which Congress can make laws. Rest of the residual powers fall under the purview of the states. But the power of the Congress has expanded under the doctrine of 'implied powers' as given by the Supreme Court. Under this, the powers of the Congress has been widened to cover areas where state is responsible. The Constitution also provide for the concurrent powers shared by Congress and the state, but the Congress can override the state in case of conflict.

Apart from the legislative powers, the Congress has other powers which comes under electoral, constituent, executive, financial, judicial, inquisitorial, directing and supervisory.

The constitutional amendment bill can be passed by the Congress with two-third majority. It can also call for constitutional convention if two-third of the state requests it. The electoral powers of the Congress is important. If the Presidential candidates fail to secure majority in the Electoral College, it the duty of the lower house to select the President from the top three securing the majority and senate chooses the Vice President. Apart from this, the lower house elects its speaker and senate it President pro tempore.

Senate confirms all the appointments and the foreign treaties. Congress approves the resolution of war and peace. The house can set up investigative committee to check into complaints regarding alleged misappropriation of funds or a scandal. The lower house has power of initiating impeachment proceedings against the President, Vice President and other high-ranking public servants and the senate. Impeachment is passed if two-third of the house vote for it. The Constitution grants the financial supremacy of the constitution. The Congress thus controls the purse of the nation. No amount of money can be appropriated without its approval. Though budget is prepared and presented by the President, it is Congress that approves it. Thus Congress plays decisive role in functioning of the government.

7.2.5 Judiciary

Federal judiciary was considered to be the important organ of the state. Its key role was to maintain the checks and balances on the legislature and executive. It was considered to be the guardian and protector of the constitutional principles. Any law which is in violation of the Constitution is struck down. Constitution does not provide for the qualification and the appointment process of the judges of the court, hence the President is free to appoint anyone. The judges are appointed for life. It is their prerogative to retire at either 65 after completing 15 years of service or at 70 after completing 10 years of service. With 'good behaviour', the judge can continue his service. The lower house can initiate impeachment proceeding based on allegation of treason, bribery or other high crime of misdemeanour, and it goes to the senate where a resolution is passed by two-third majority supporting the removal.

The Supreme Court has both original and appellate jurisdiction. The original jurisdiction covers action by the centre against a state, action by one state against another, in cases involving high-ranking public servants and ambassadors, and in cases where state act against citizen

belonging to another state or alien. Appeals lie to the Supreme Court from the lower district courts, and from state courts where federal question is involved. The important aspect of American Supreme Court is that it does not exercise advisory jurisdiction.

Two important aspects of the judiciary is the concept of judicial review which has made the courts the guardian of the Constitution and the concept of 'due process of law' which is the safe guard against the arbitrary executive action.

7.3 CHINESE CONSTITUTION

7.3.1 Introduction

The first Constitution of People's Republic of China was promulgated in 1954. Its main objective was to build socialism step by step. It did not follow the socialism of Soviet but rather developed its own version under the influence of Mao Tsetung came to be known as 'Maoism'. This Constitution was in force till 1975 when it subjected to revision. The new Constitution was a brief document, and it enumerated the achievements of the previous constitution. There was no major deviation and it followed the path laid by the Chairman Mao. Once again this Constitution was subjected to revision soon in 1978. This Constitution was fairly liberal than the earlier ones, but it did not affect any major changes to the old setup. This was old wine in new bottle.

Under the leadership of Deng Xiao-ping, the Constitution was again revised in the year 1982, and it has been continuing till the present. The preamble elaborates the achievements of the communist state till then. It took major deviation in Mao's views. Economy was given precedence.

7.3.2 Salient Features of Chinese Constitution

The important aspects of the 1982 Constitution are as follows:

(a) **Written character**

Like the previous other constitutions, it is also a written document. It presently consists of 138 articles. Hence it is not so brief like the 1975 Constitution and even bigger than the 1954 Constitution, which contained 116 articles.

(b) **Flexible**

It is fairly easier to amend the constitution. The amendment can be moved either by the standing committee or by one fifth of the members of the Congress. Once approved, it is deemed passed if two-third of the members of the Congress give approval. Since it is a one party, communist-dominated Congress, it is easy for the amendment to be approved and passed.

(c) **Unitary state**

The Constitution provides for a strong unitary state where people of all nationality come under single state. There is no provision of creation of autonomous provinces or states in the style of India or Canada, though limited powers to provinces has been envisaged. There are 21 provinces, 5 autonomous regions and 2 cities, but all these are mere names as the central government has complete control over them. The government in the provinces act as agents of the centre.

(d) **Power to the people**

Constitution is based on the power of the people. All power belongs to them. The national People's Congress and the local People's Congress are elected directly by the people. All organs of the state maintain close contact with the people to fulfil their wishes and heed to their opinions.

The feudal lords and the capitalists have been stripped of all political rights. And thus ordinary people are considered to be the foundation of the Chinese communist state.

(e) Planned economy

Like its Russian counterpart, China, too, adopted the planned growth of the economy. It is vital and important aspect for a socialist state. Revolutionary changes have been brought about in agriculture and in industries. Most of the industries were brought under the control of the state. The planning is carried out to provide better living condition for the people, thus it is both social and economic planning which is carried out.

(f) People's democratic dictatorship

China cannot be categorised either as a parliamentary form or a Presidential form even though it has some of the features of both. It is a republic state headed by the President who is just a nominal head performing ceremonial functions. The real executive power lies with the Prime Minister who heads the state council which is responsible to the National people's Congress which is an elected body. The democratic character comes from the fact that the Prime Minister cannot become a dictator as he is given only two terms of totally 10 years. But the dictatorship character arises because the state council is ultimately controlled by the communist party of China. The chairman of the party holds all the power.

(g) Democratic centralism

All organs of the state follow this principle of democratic centralism. National people's Congress is an elected body, some organs of the state too is elected hence they are responsible and accountable to the people. This reflects the democratic character of the state. All policy making is centralised. It is controlled by the state committee of National People's Congress and state council. The communist party is the highest decision-making authority. This policy of democratic centralism was adopted from the erstwhile Soviet Union.

(h) Fundamental rights

The citizens are guaranteed economic, social, political, cultural, civil and personal rights and liberties. They also enjoy equality before law and equal protection from it. Right to education, right to get elected, freedom of speech and expression, association, freedom of religion, etc., are guaranteed to the people. There is also no discrimination based on sex. But all these rights are curtailed by one Article 51, which says all these rights should not violate principles of the state, community and of other citizens. This article thus gives blanket power to the state to control the fundamental freedom of the citizens. Apart from rights, there is also set of important duties like joining the militia, pay tax, practice family planning, etc., which has to be carried out by every single person.

(i) Socialist state

Article 1 declares that China is a socialist state. This is interpreted ideology of Marx, Engels and Lenin by Mao. The Chinese society is led by working class which is comprised of alliance of both workers and peasants. This alliance is against the enemies—the feudalists, the imperialists and the bureau-capitalists. All power is given to the people which is exercised under the guidance of the communist party of China.

(j) Unicameral legislature

The National People's Congress forms the legislature of the Chinese state. NPC along with the standing committee carries out the legislative functions of the state. It is elected for a period of 5 years, and it is the sole law-making body in the country. It has power to appoint all important

positions from Prime Minister, President and to judicial officers, etc., it has also been given power to remove these persons. Though it may sound impressive, all these are only formal power. In practice, the NPC acts according to the direction of the communist party.

(k) **Provision of standing committee**

This standing committee is elected by the members of the NPC. It is the executive body of the Congress. It has life till the Congress is functioning. The power of the standing committee has been very much curtailed at the present.

(l) **Judiciary**

The judiciary is completely different from the western systems. The Supreme People's court is the apex court which guarantees the socialist legality. It has both appellate and original jurisdiction. The judicial structure is basically pyramidal, where the local people's court forms the base and the Supreme Court sits at the Apex. These courts too come under the democratic dictatorship system and is controlled by the dictates of the communist party of China.

7.3.3 Executive

The President is elected for a 5-year term by the National people's Congress. The President can continue for another term, thus he has maximum period of 10 years. The office is for ceremonial reasons and his functions are formal.

The Prime Minister, here called as the Premier, is appointed by the President. Other officers too are appointed by him based on the recommendation from the NPC of the standing committee. Those appointed by him are also removed by him on basis of recommendation from the NPC or the standing committee. State of war and martial law are declared by him. He is also given special pardoning powers. He receives the foreign Ambassadors and other dignitaries on behalf of the state. He also ratifies the foreign treaties and other agreements signed by the government.

All these functions are carried out on the recommendation and guidance of the standing committee of the NPC. Thus, the President is a ceremonial figure having no power on his own.

The state council is the real government. It is equivalent to the cabinet system in other countries. Premier is the head of the council and NPC selects other members based on his recommendation. The office runs till the term of the NPC that is for 5 years. The President has the power to remove the members based on the recommendation from the NPC.

The important power of the state council are it is the central government, thus it forms all the policies and implements them, it carries out the administration of the country, it sends various legislative proposals for the consideration of the NPC, it lays down responsibilities and functions of each ministry, it also supervises the functioning of the provinces, autonomous regions and other areas, they all fall under the direct control of the central government, it ensures the country is defended effectively, it recruits, trains and appoints the civil servants to various administrative posts and it prepares the budget document to get approved from the NPC.

Though the position of the Premier is not as equivalent to that of British or Indian Prime Minister, he does enjoy enough powers. The premier does not create or destroy the state council. He can only select those members he want to get appointed to the council and the NPC makes such recommendation to the President who finally appoints them. He is just the head of the state council, hence the government. He plays the role of coordinating between the various ministries and controlling their functions.

7.3.4 Legislature

The national people's Congress is the unicameral legislature. Since China follows a unitary form of government, secondary chamber to represent the interests of the states were not needed. Thus, NPC forms the highest instrument of state to form the laws and the sole authority to approve and pass them. The time period is of 5 years and the periodic elections are conducted by the state council.

The functions of the NPC are, they can ask questions to the state council or the ministers. All the members have to abide by the Constitution and protect its secrets. NPC is the one and only law-making body. Standing committee does this function when the NPC is in recess. The other important function of the NPC is to supervise the working of the constitution. Apart from these, the NPC elects all major important institutions, the President, Vice President, the Prime Minister and his council of ministers, the auditor and secretary general of the state council, the chairman of the central military commission. It also elects the President of Supreme people's court, and the Procurator General of the Supreme People's procuratorate. The NPC has the power to amend the constitution, the proposal for amendment is submitted by the standing committee or one-fifth of the deputies of the NPC.

It takes care of the development and the social planning of the country. It first examines such plans, approves them and finally submit report of their implementation. The budget of the government is approved by the NPC. It has power to alter the boundaries of the provinces, autonomous regions, etc. Apart from electing people it has power to remove or recall them.

It has power to take decisions on matters which are not specified in the constitution. Thus, NPC has been given enormous powers. But all these exist in paper and the real power lies with the communist party of China. NPC cannot take all decisions on its own. Thus in reality, the communist party of China is the power centre and all other institutions function in relation to it.

The standing committee of NPC is the smaller version of the Congress. The whole NPC is very large and meets only once a year, thus the standing committee only takes care of the day to day functions and working of the government. It is headed by a chairman, followed by a vice chairman, the secretary general and members. It has the life time of the NPC, and when new NPC is constituted a new standing committee is elected.

The legislative function of the standing committee are: it can summon the NPC, it enacts the legislation when NPC is not in session, it supervises the working of all major state organs like the State council, Central military commission, etc., it has been delegated the power to legislate on behalf of the NPC.

Its elective functions are: when NPC is not in session, it decides on the choice of ministers, the auditor general and the secretary general. It has the power to appoint and remove the Vice Presidents and judges of Supreme People's court, the deputy procurators general and Procurator of the Supreme people's procuratorate.

The following are its executive functions: though the ambassadors and diplomatic personals are appointed by the President, they are removed by the standing committee; ratification of treaties are also decided by the committee; the decision to pardon criminals though approved by the President, he is advised to do so by the standing committee; it has also been given power to declare war when NPC is not in session.

The standing council interprets the law which is generally the function of the Supreme courts (United States and India). It also interprets the Constitution and helps in its implementation. It supervises the function of the state council and can even rejects its decisions.

The standing committees play a minor role in proposing amendment to the constitution. But the power to amend rests with the NPC.

7.3.5 Judiciary

The structure of judiciary is simple and is in form of a pyramid. The local people's court constitute the base and the supreme people's court is at the apex. Every provinces too has its set of courts which has entire jurisdiction over it.

The Constitution does not provide the functions of the supreme people's court. But some of its important functions are: to supervise the courts below it, the NPC has the power to widen the powers of this court, it has original jurisdiction over cases of national importance, it also hears appeals against the decisions of the high courts in the provinces.

China also has a unique procuratorate system. Starting from the local procuratorates it goes till the apex, the supreme people's procuratorate. Each procuratorate is managed by the one above it. These bodies are elected by the local organ of the state authority and hence are responsible only to it. The main function of these procuratorates are: to prosecute people who violate the socialist principles of the state, it also advises the government on legal matters, the supreme people's procuratorate acts as the chief public prosecutor of the government, apart from citizens it can also take action against the government and its officials, and finally they act as the protector of the socialist legacy of China.

Some of the important features of the Chinese judiciary are: it has a single well-integrated judicial system unlike in the United States where state and federal courts are separated, the judiciary is not completely independent as at all levels the judicial officials are elected by the government, the Constitution moreover does not specify the tenure and qualification of the judges, thus everything falls under the discretion of the NPC and other government bodies, generally trials are conducted in open and only few exceptions are there for closed trials, unlike in major democracies the supreme court of China has no power to declare any law made by the legislature as ultra vires of the constitution, even the judiciary has no power to question the action of the executives, since all actions of either legislature or the executive comes only after the blessing from the communist party, they can never be violation of the constitution. Thus the Chinese judiciary is a committed judiciary, the one which is committed to the communist ideology, the communist party, and to the communist government.

7.4 SWISS CONSTITUTION

7.4.1 Introduction

The Swiss Constitution was first adopted in the year 1848. Loose organisations of small states called cantons came together to create this constitution. The most important feature of this Constitution is the tilt towards strong and unified government based on federalism. It terminated the system of cantons and created 'confederation' of states. This Constitution of 1848 underwent two revisions one in 1874 and another in 1999 and the present Swiss system is governed by this constitution. It gave more powers to the federal government in controlling the military.

The new Constitution was ratified by the people and came into force on 1 January, 2000. It consists of 197 articles. The structure has more or less remained the same. It makes Switzerland a social welfare, democratic and a republican state.

7.4.2 Salient Features of the Swiss Constitution

The following are the salient features of the Swiss constitution:

(a) Written and enacted document

Like American Constitution, it is also a written document consisting of 197 articles. The Constitution is the supreme law of the land. It creates a balance between federal government and the cantons. It seeks to prevent friction and internal strife. It is also voluminous.

(b) Rigid

It is difficult to carry out amendments to the Constitution, but it is not so rigid like the American constitution. Any amendment has to be passed by the parliament, and it has to be ratified by majority of the cantonal governments and also by majority of people in the referendum. It is flexible in the sense that people have more powers through instruments of 'initiative' and 'referendum'. Thus it widens the democratic powers of the people. And in each instance, it is passed by a simple majority.

(c) Plural executive

Switzerland has unique system of plural executive also known as collegial or plural presidency. Seven members or ministers are all designated as the Presidents. Usual practice is power is vested with one individual either Prime Ministers or President and he controls the government. Here all the seven members have equal powers. To carry out ceremonial functions, the senior member is elected as the President of the federation and another the Vice President for a year. Each canton gets its representation in the presidency and no two Presidents should belong to the same political party. Hence there is wide diversity and is always a coalition government.

(d) Federal system

The Constitution declares Switzerland to be a confederation. The powers are shared between the centre and the cantons. Certain subjects which are of national importance like foreign affairs, military affairs, declaration of war, etc., comes under the centre, there are some concurrent powers shared both by centre and the cantons such as control of press, regulation of industries, etc., and rest of the residuary power lies with the canton. The federal court has been set up to interpret the provisions of the Constitution and help settle legal disputes arising between centre and the cantons. Like United States, the federal states have been given enough autonomy and hence can be considered as a true federation.

(e) Direct democracy

Modern democracy is called as representative government because people do not rule themselves directly, they select-elect their representatives to rule on their behalf. Though Switzerland has such kind of representative structure, it also has three important concepts which widen the power of democracy, they are Initiative, referendum and *landsgemeinde*. *Initiative* refers to initiative of at least one lakh voters to send proposal to the parliament to adopt it as a bill or send it back to the people as referendum. Constitutional amendment bills and some 'urgent' bill of public importance should be placed before the people after passed by the parliament. Eight cantonal governments or at least 50,000 voters can demand referendum on any other bill. Thus, referendum places the final veto power in the hands of the people. The system of town parliament in the five small cantons is called as the *landsgemeinde*. Each adult member is the member of the town assemble and hence cantonal elections do not take place here.

(f) Social welfare state

Each person is ensured social security and health care by the government. It is the responsibility of the centre and cantonal government to ensure everyone are economically protected, shielded against illness, old age issues, and maternity and against widowhood, etc. The Constitution thus has created a social welfare state which strives to protect its members.

(g) Fundamental rights

It is so expansive that it covers social, economic and political sphere. And it is much wider than the provisions contained in the universal declaration of human rights adopted by the general assembly of the United Nations in 1948. Economic rights include right to free choice of vocation, formation of union, people have right over their property and they have to be fully compensated if such property is acquired by the state. Political freedom ensures free press: print and electronic, editorial secrecy is guaranteed, freedom to form opinion and express it, arbitrary arrest and detention are prevented. But all these political rights are tied to citizenship that is only a Swiss national enjoys all these freedoms.

(h) Republican constitution

Republicanism is not just at the centre but every canton also follows it. Swiss equality is for everyone in the society, hence it had abolished the aristocratic and oligarchic privileges. All political institutions are elective in character. The principle of republicanism is the fortification of Swiss democracy.

(i) Secondary position of judiciary

The apex judicial body has no power to review the laws made by the centre. The Constitution has made it secondary to the legislative body unlike in countries like the United States or India. The judiciary can only review laws made by the cantons and declare it unconstitutional if it is in violation. The judges too are elected by the federal assembly. Thus the Swiss federal tribunal has only limited judicial review powers.

(j) Bicameral system

It has upper house known as the council of states representing the cantons on equal basis like American senate. It is a small body consisting of 46 members. The lower body is larger having 200 members elected by the people. The lower body is called the National Council. Both the bodies have equal power and one does not dominate over the other.

(k) Dynamic constitution

The Swiss Constitution is very dynamic. It has adapted well according to changing situations. Growing aspirations of the people have been addressed by widening their rights. The state too intervenes whenever rights of the citizens are threatened and laws have been made subsequently to protect it.

7.4.3 Executive

The Swiss executive is headed by a ceremonial office of the President. Senior most member of the seven ministers is elected President for 1- year tenure. He is neither *primus inter pares* or does he enjoy precedence over his colleagues. Since some jobs cannot be performed as a group, an individual is appointed to the role of the President. He receives envoys, appoints ambassadors

and represents the country at international fora. Thus, the Swiss executive is plural or a collegial system. No single individual enjoys the power. And after expiration of 1 year, he returns back to his membership and other persons are elected based on rotation of seniority. The Swiss executive is also very stable and cannot be easily dismissed before its end of tenure.

As per the Constitution, the executive is subordinate to the legislature. The executive cannot act independently of the assembly. The Swiss executive is not like the cabinet system of the British. The members here are from different political parties, and hence bring unity in diversity. They are not the members of the legislature but are elected by the national assembly. They are also neither individually nor collectively responsible to the legislature. But ministers take part in deliberations of the legislature to get approval. Hence it is not like the American system where the executive is completely separated from the legislature.

The function of the executive is to oversee the working of the cantons. It checks whether canton is functioning on basis of the constitution. It also helps in resolving dispute between two cantons. It carries out foreign relations, signs treaties and protects independence and sovereignty of the nation. It also looks after the law and order situation, and if any cantonal government fails to uphold it, it can intervene on behalf of the legislature. It controls the federal army and has power to deploy troops in case of emergency when parliament is not in session.

The executive submits the draft of the bill to the legislature for deliberation. Thus the government initiates debate in the parliament, and the parliament can pass the bill with or without amendments. It periodically submits report to the parliament on functioning of the cantons, internal condition of the country and its foreign relation. It also submits set of recommendations to promote welfare of the citizens to be adopted by the parliament. Though they are not members of the legislature, they are allowed to participate, debate, deliberate and answer question. They also attend meetings of the parliament committees discussing the bills and influence it with their knowledge and experience.

The executive submits the budget and it collects revenue and supervises the expenditure. It has some powers of judicial nature. It hears appeals of private individuals against decisions of various departments and federal railway authority. It also has appellate jurisdiction over decisions of cantonal government in some discrimination cases.

Thus the Swiss system is neither parliamentary nor Presidential. It is unique by itself. It is non-partisan and has high integration and cooperation among its members.

7.4.4 Legislature

The federal parliament is of bicameral nature. It represents the federal nature of Indian and American system. The similarity ends there, the Swiss Constitution provides equal power to both the houses, and thus no house is subordinate to the other. It is also one of the other unique feature of the Swiss system.

The senate is similar to American senate, each full canton has two members and each half canton one member. Thus all cantons receive equal representation. These members are elected by the cantons themselves based on their own system; thus each canton can have their own system of electing, determining the tenure, salary, etc., the cantons have also the power to recall or replace their representatives.

The members of House of Representatives are elected by the people directly based on proportional representation with list system and secret ballot. Population and size of the canton determine the number of representatives sent by it. The President acts as the chairman of the house. He regulates the business, protect the privilege and dignity of the house.

The legislative powers include passing of federal laws, approval of treaties, passing of constitutional amendment and approval of budgets, etc. It can demand information from the executive and question it. It elects the seven members of the government and appoints one of them as the President. It also elects members of the federal judiciary, appoint commander-in-chief of the armed forces, etc. It has the power to declare war or peace. It has judicial power to grant amnesty and pardon. It also hears appeal against the government in administrative cases.

The constitutional amendment power is subject to people's verdict. Any such amendment has to be ratified by the parliament first and then approved in a referendum by the people and the cantons.

7.4.5 Judiciary

It is the youngest institution in the Swiss system. It consists of 26 judges elected by the parliament. One of them is appointed as its President and another vice-President. The judges represent all the linguistic background.

It covers both civil and criminal cases and also other issues of public law. Its civil jurisdiction covers all suits between federation and the cantons and also between cantons themselves. It also takes up cases between individual and the federation. It decides cases relating to loss of nationality or citizenship dispute between communes of different cantons. The final appeal from the cantonal courts lie to the federal court.

7.5 JAPANESE CONSTITUTION

7.5.1 Introduction

The present Constitution also known as 'Mac Arthur' Constitution is mostly continuation of the older Meiji Constitution. It differs from the older in some crucial important aspects. The Japanese Constitution is the only document to be called the 'peace document' of the world. Though it was a post-war gift by the Americans, it makes Japan a demilitarized state and a democracy.

7.5.2 Salient Features of the Japanese Constitution

The following are the salient features of the Japanese constitution:

(a) Document of peace

It openly renounces war. It also says japan will not maintain any standing armed forces. The preamble declares that Japan is a peace-loving country and strives for peace in the world. Though there is no armed forces, the Constitution provides for setting up self-defence forces to protect national interest.

(b) Sovereignty of people

The older Constitution vested the power on the monarch. It held imperial sovereignty and people had no power. The present Constitution restores democracy and gives back power to the people. The people are thus made sovereign and they elect their representatives to the diet to voice their concerns. The emperor is made symbolic and has no power. The government derives power from the people as stated in the preamble.

(c) Unitary system

Unlike the United States, it is not a federal state. All powers are held by the central government and there is no distribution of powers between the centre and the provinces. Though there are

separate local, provincial assemblies they all derive power from the laws passed by the parliament and not from the constitution.

(d) Rigid

Like the United States, it is difficult to amend the constitution. Apart from two-third majority in the parliament, it has also to be ratified by the people in a special referendum. Japanese Constitution has not been amended even once.

(e) Limited judicial review

The Supreme Court is the last resort to validate the law against the violation of the constitution. The Constitution thus has specifically provided for judicial review. But the Supreme Court has not used this power like its counterpart in the United States, it is due to the fact that the conduct of the judges is subject to review after 10 years by the people. The rights and liberties of the people are thus protected by the Constitution by keeping judicial review as a check on the executive and legislature.

(f) Parliamentary form of government

Japan follows British type of system, where the monarch is simply a figurehead and the actual power is vested in the Prime Minister and his cabinet. The parliament can pass a no-confidence motion to remove the government. The Prime Minister and his cabinet are responsible to the diet.

(g) Fundamental rights and duties

A detailed bill of fundamental rights and duties are important feature of the new constitution. It is a comprehensive document covering all areas of social, economic and political rights of the citizens. Apart from rights to citizens, it also speaks about duties by the citizens. Some of the fundamental rights are equality and equal protection before the law, freedom of religion is guaranteed to all, bonded labour is abolished, right to life has been guaranteed to all, etc. These rights are also protected by the courts.

(h) Separation of powers and checks and balances

Previous Meiji Constitution had given enormous power to the monarch and relegated the institutions of parliament and judiciary to a secondary position. Thus the new Constitution explicitly separates and protects the independence of each institutions. The people are made the new sovereign from whom the power is derived. The judiciary is independent and powerful to keep check on the other democratic institutions.

7.5.3 Executive

In the Meiji Constitution, the emperor was accorded the status of divine. He ran the government and all the powers were bestowed upon him, the diet was merely there to approve the wishes of the emperor. After the World War II, the scenario changed and the powers of the emperor was stripped down and was made a nominal head of the state. He now acts on the advice of the Prime Minister and his cabinet.

The emperor has been given power to appoint the Prime Minister as designated by the diet. He attests the final ratification of law, international treaties and appointment of ambassadors. All laws, amendments, etc., are promulgated by the President. He convenes and dissolves the diet. The emperor has also the power to grant amnesty, reprieve, commutation of punishment, etc. He appoints the chief judge of Supreme Court on the advice of the cabinet. Thus all

powers of the emperor are merely formal, and he acts as the figurehead of the state. He cannot veto or send back any bills back to the diet unlike his counterpart, the British Monarch.

The cabinet headed by the Prime Minister takes care of the functioning of the government. It takes all important political and administrative decisions. It submits law to be promulgated by the diet. It prepares the budget and get financial approval from the diet. It designates who will be the chief justice of the Supreme Court and makes appointments of the other judges. The cabinet controls and administers the civil service. It submits to the emperor who can be granted amnesty, reprieve and commutation of sentence. The cabinet is made responsible to the diet by the constitution.

The Prime Ministers is considered to be the keystone and performs some important functions. He selects members of his cabinet and forms the government. He can also remove, reshuffle the cabinet whenever he wants. Being chairman of the cabinet, he supervises its function or chairs any committee. He is also the leader of diet in general and the lower house of representatives in particular. He makes appointments of all important positions in the government. He also selects the date of election for the diet which is then approved by the emperor.

The Prime Minister and his cabinet continue as long as they enjoy confidence of the diet. The lower house can pass a motion of no confidence.

7.5.4 Legislature

The parliament is called as diet in Japan. It consist of two houses: the Upper House of Councillors and the Lower House of Representatives. This type of system existed even in the Meiji constitution, but the parliament has no power then.

The House of Representatives play a crucial role and considered to be more powerful than the upper chamber. The house enjoys wide powers in matter of legislature. Bills rejected or amended by the upper house can be passed by the lower house as it was earlier with a two-third majority. And it can pass the bill if the upper house fails to take action on any bill for more than 60 days. Though the House of Councillors can delay the bill, the power to pass the bill lies with the lower house.

The lower House of representative controls the executive. The Prime Minister and his cabinet are made responsible to it by the constitution. If the house passes the no-confidence motion, the government has to resign. The executive has to submit periodic reports to the house. The house can also set up committees to investigate in any wrong doings. And without the approval from the diet, no treaty can be implemented. The parliamentary control of the executive is also carried out by asking questions, debating, etc. The Prime Minister is generally the choice of the lower house, even the minister mostly belong to the Lower House of Representatives.

The purse of the nation is controlled by the lower house. The budget has to be introduced before it. No tax can be added or increased without the approval from the house. The upper house can only delay passing of the financial bill; thus even in financial matters, the lower house overrides the upper chamber.

The diet acts as the final court of impeachment of the judges of Supreme Court. Both the chambers have equal number of members in the court of impeachment. The Constitution provides the lower house to amend the electoral law of the country. Thus there should be no discrimination between race, sex, creed, family origin, education, income, property or social status. Both houses participate to elect the Prime Minister. But in such elections, the lower house has upper hand.

Both the houses can initiate amendments to the Constitution and it has to be passed by two-third majority by each. After it is passed, it is sent to people for ratification in a special referendum. Once majority of people approve it, it is considered to have amended the Constitution and thus becomes a part of it.

The upper house, though comparatively weaker than the lower house of representative, carries out the important function of giving stability and continuity to the diet as it is a permanent house which cannot be dissolved. It also moderates and restraints extreme views of the lower house. Thus it is not so powerful like the second chambers of England or the United States.

7.5.5 Judiciary

The doctrine of separation of powers is followed. Thus the judiciary is separated from the executive and the legislature. The Supreme Court controls all the lower courts. The Constitution has also provided for the power of judicial review—to strike down any law which is ultra vires of the constitution.

The judges can only be removed by the process of impeachment, thus maintaining the independence and integrity of the judiciary. Every 10 years, people review the appointment and working of the judges. If the people disapprove any judge, he is then dismissed. Constitution thus provides review of appointment of the judges for every 10 years.

There is no separate administrative tribunal appointed by the executive as everything is taken up by the courts themselves. Open trials are conducted, only the judges can issue warrants for arresting a person. Every lawyer, judge or a public prosecutor has to pass from the legal research and training institute which is under the control of the Supreme Court. Thus, those practising law in Japan are very few as compared with other countries.

7.6 FRENCH CONSTITUTION

7.6.1 Introduction

French Constitution is different from various others in the world. From the French revolution in 1789, it has undergone numerous changes, from becoming a republic to directorate under Napoleon and once again ruled by Bourbons, and now finally a democratic republic. In these years, France has seen 12 regime changes and 13 Constitutions. Thus extreme political changes has given France a new Constitution.

The first republic was inaugurated in 1792. It was comparable to the traditional American or the British system of government having a cabinet system. The powers were separated between the institutions. The powers of monarchy was also severely cut down. A new Constitution was adopted in 1793 giving more powers to the assembly which was to be elected directly by the people. This Constitution was once again replaced in 1799 with Constitution of the Consulate giving powers to Napoleon Bonaparte. He once again issued another Constitutional Charter of 1814 restoring divine rights of the Monarch. Napoleon's regime was replaced by monarchy of Louis-Phillipe, and new Constitutional Charter of 1830 was adopted. This gave limited powers to the Monarch.

People were not satisfied and rose against this regime and overthrew it. The National Assembly adopted a new Constitution in 1848 making France a republic once again. This period from 1848 till fall of the regime in 1870 is called as the Second Republic.

Once again, effort was taken to form a new constitution. This Constitution was very rigid, it created a republic, and made sure that this form of government could not be changed even by constitutional amendment. This 'Third Republic' which lasted till 1940 is considered to be the longest in the French republican government history.

President Petain assumed despotic powers bring the third republic to an end. The new Constitution called the 'Fourth Republic' was adopted in 1946 and did not last more than 12 years. This gave enormous powers to the parliament and made the President weaker and subject to control by the parliament.

The final and present Fifth Republic was created under the leadership of Charles de Gaulle. The National Cabinet was assembled and the new Constitution was drafted by Debre. It was presented to the people who gave acceptance to the Constitution in the referendum.

7.6.2 Salient Features of the French Constitution

The following are the salient features of the Fifth Republic constitution:

(a) **Written and endorsed Constitution**

It is a brief, written document presently having 92 articles. It was written by a constituent committee headed by de Gaulle. It was first endorsed by the cabinet, then by the parliament. Finally, people overwhelmingly adopted the Constitution in the referendum. The Constitution has given immense power to the President who is elected by the people. He is vested with the powers of the state and can deal with any crisis within the country or abroad. Thus President is the actual head of the government as well as the formal head of the state.

(b) **Rigid**

Unlike Indian Constitution, which has provision to amend the Constitution easily, amending French Constitution is quite a task. It does have provision to amend the Constitution, but certain conditions have to be met. The bill will be proposed by the President to the premier and to the members of the parliament. Both houses of the parliament should pass the bill identically, and the bill becomes definitive after the approval from a referendum. The President if so wishes can cancel the referendum and instead submit the bill to the joint session of the parliament in which it has to be passed. And no amendment is possible when integrity of the territory is in question. Also the republican nature of the Constitution cannot be amended.

(c) **Unitary system**

French Constitution creates a unitary system. This is rooted in the French constitutional history where power is biased towards the centre. The centre is more powerful than the British union. There does exist local governments at various levels in France. The territory is divided into 'departments' and these are further divided into cantons, arrondissements and communes. They have restricted powers, and this comes from acts of parliaments and not from the constitution. These local governments are nothing but the agents of the centre and are subjected to its control. Thus French system is more rigid and centralised than its British counterpart.

(d) **Separation of powers**

The most important aspect of the Fifth Republic is that it has separated the executive and legislative institutions, but has made the executive accountable to the legislature through the concept of ministerial responsibility. The cabinet functions under the Prime Minister, but the President has the overall control. The cabinet members cannot be members of the legislature, and if so

they are, they should resign to enter into the government. Though the cabinet is not from the parliament, it is accountable to it. Though the President has overall control, he is not directly accountable to the parliament, only the cabinet headed by the Prime Minister is accountable to it. The legislature may pass a vote of no-confidence in the government, and in such case the government has to resign.

(e) Quasi-Presidential government

Against the quasi-parliamentary form, French system is more of a quasi-Presidential type since authority of the President is far wider than of the Prime Minister. He is not a titular head like his British counterpart, rather he is more like the American President. The French President appoints the Prime Minister and other ministers on recommendation of the Prime Minister. He chairs the cabinet meetings and thus makes his wishes get adopted by the government. But he is not responsible, only the Prime Minister and his cabinet are accountable to the parliament. The President has also been given wide veto powers. His position is strengthened by his 5-year-long tenure and his election by the people. His removal too is a difficult process to be followed.

(f) Syncretisme

The Fifth Republic has introduced some set of principles which are together called as syncretisme by the French people. Some of the principles are: President has been given vast powers in determining and promulgating emergency, the parliament is bi-cameral system where both upper senate and lower national assembly has coordinate powers, though the Prime Minister and the cabinet are not from the parliament they are responsible to it, in theory the President is the head of the state and Prime Minister head of the government, in practice the President assumes both the role when he wills and the Prime Minister is subordinate to powers of the President, the President can refer bills of public importance for referendum by the people. Thus these basic principles guide and form basis of the French constitution.

(g) Constitutional council

It is a unique institution having 9 members (3 nominated by the President, 3 nominated by the President of the national assembly, and 3 nominated by the President of the senate). The members enjoy 9-year tenure and are not eligible for reappointment. The former Presidents are ex-officio members of the council. This institution is neither a cabinet, nor a judicial body and neither a legislative organ, but it is a fusion of all three. It has controlling, adjudicatory and consultative powers. Its important functions are, to oversee the Presidential and parliamentary elections, it also declares the result of the referendum. It verifies the constitutional validity of act made by the executive or by the parliament. The President has to consult the body before declaring the state of emergency. Though it was not envisaged such kind of powers, it has come to play dominant and restraining role on the executive and the legislature.

(h) Economic and social council

The Constitution provides for creation of such body. It renders advice and opinion of the bills submitted before it. Generally it is consulted on economic and social issues by the government.

(i) Recognition of political parties

In India and the United States, the Constitution does not recognise the political parties. The important feature of the French Constitution is its recognition of political parties and the role played by them. Political parties which is not loyal to France and respect democracy can be banned.

(j) Administrative law

Though all citizens are equal before law, France provides separate courts for trying of public servants. Citizens have ordinary courts and the civil servants have specially constituted administrative courts following administrative law.

(k) Popular sovereignty

The people are the ultimate sovereign. The Constitution provides of 'equality, liberty and fraternity'. The Constitution also declares France to be an indivisible secular, democratic and social republic. The people exercise their sovereignty through their representatives and by the referendum process. The Constitution provide for universal adult suffrage, anyone who is a major is allowed to exercise their right to vote.

7.6.3 Executive

French President is different from his counterparts in Britain and the United States. He is head of the state like the British monarch and he also heads the government like the American President. The tilt is more towards the American system even though he has some symbolic powers. This is an important feature of the Fifth Republic which sought to make the position of the President stronger compared to the previous Constitution (the Fourth Republic).

The President has the following executive powers: he appoints the Prime Minister and on his recommendation appoints other members and removes them, he presides over the meeting of the council of ministers, he negotiates and ratifies the treaties with foreign nations, he is the commander in chief of the armed forces and makes appoints to all civil and military posts, he also appoints three members of the constitutional council, he also does the symbolic job of receiving and accrediting foreign ambassadors and envoys.

His legislative powers includes: he is given power to send back any bill for reconsideration to the parliament if certain conditions are met, he can summon extraordinary sessions of the parliament when he wishes, he signs the ordinance and orders decided by the council of ministers, he can dissolve the national assembly in consultation with the Prime Minister and the President of the assemblies, the President can also submit bills of enormous public importance for referendum and thus ratifies it, if it is accepted by majority of the people.

The following are his judicial powers: he has the power to grant pardon, he also presides over the high council of judges to which he nominates some members, and upon President is the responsibility to guarantee the independence of the judiciary.

President has also been given unlimited powers during the emergency. Thus the President can declare emergency and take necessary action to defend the independence and integrity of France. Also only the President can decide when to withdraw the emergency, he can prolong it for any period. President has thus been given sweeping powers in this case.

The President is the arbiter of the constitution, he has the right to interpret the constitution. He should oversee the effective observation of the constitution.

The Prime Minister is appointed by the President. The Prime Minister then selects his ministers who are also appointed by the President. He cannot shuffle the cabinet as he wishes. The Prime Minister is responsible for the conduct of the government affairs. He should ensure the legislations are implemented properly. The Prime Minister is the important link between the executive and the legislation. Though he is not a member of the legislature, he is responsible for that. Legislature too has the power to remove the Prime Minister by passing a no-confidence

motion. Unlike other democracies, the Prime Minister cannot claim to be the head of the council of ministers; it is the President who presides over them.

The council of ministers have the power to enact ordinances. This is one form of delegated legislative powers given to the council of ministers by the legislature. The council of ministers can also declare martial law. The council though not from the parliament is responsible to it. The council with President as its head determine and conduct the policy of the nation. The council of ministers can also promulgate finance bill as an ordinance if the parliament fails to ratify it within the given time frame. Like the Prime Minister, the council too is responsible to the national assembly. Its powers are limited due to the presence of President and their responsibility to the Prime Minister who appoints and removes them to the constitutional responsibility to the national assembly.

7.6.4 Legislature

The French parliament has two houses: the upper senate and the lower national assembly. Unlike the British system, the President is not part of the legislature. The parliament is bound to meet twice a year. The lower house is elected by direct universal adult suffrage and the upper house by indirect election.

The parliament is basically a legislative body, and its important functions lie in passing laws and approving bills. The parliament is given wide powers to make law in various areas like civil rights and fundamental guarantees given to the citizens, national defence, criminal procedure, amnesty, creation of new jurisdiction, tax rates, etc.

The Prime Minister and his council of ministers are responsible to the national assembly. The national assembly can pass a censure motion to challenge the responsibility of the ministers. The other ways of controlling the executives is through commissions, oral or written questions, resolutions, debates and not passing the budget. The parliament has the power to impeach the President for high treason, but it will be investigated by the high court of justice.

The parliament controls the purse of the nation. Both national assembly and the senate enjoy co-equal power in approving the finance bill. The parliament can only delay passing of the budget, and it cannot be more than 70 days after which the government can pass the ordinance. It cannot outrightly reject the budget but can propose amendments.

The President of national assembly and the senate nominate three members each to the constitutional council. Equal members are elected from both national assembly and the senate to the high court of justice from amongst its members.

Some of the other powers are: wars can be declared only after the approval by the parliament, martial law can be extended beyond 7 days after the approval by the parliament, any constitutional amendment bill has to be passed by the parliament, any international treaty needs approval of the parliament, and it can also set up commissions to carry out inquiry. Except in few instances, the senate acts subordinate to the national assembly, which has been given more powers in the Fifth Republic.

7.6.5 Judiciary

The French judiciary is unique and different from the British system. It has codified law for both criminal and civil cases. The judge does not depend upon precedents and is free to give his own judgement, unlike England and USA where precedents play an important role. The French system assigns an insignificant role to it. The important features are Unity, Symmetry and authority.

The judges are not elected but are appointed by high council of judges and by other bodies like the President.

The French system follows dual hierarchy, it has a separate ordinary courts to try civil and criminal cases. Its appeal lies to the court of cassation. The other entity is the administrative courts which take up issues concerning the administrative authorities and also public grievances against them. The top most court is the *Council d' Etat* (the council of state). There is separate court of conflict to deal with disputes between these two separate courts.

French court unlike in the United States derive powers from the parliament and not the constitution. Thus they do not have power to declare any law passed by the parliament as unconstitutional. They, thus, do not possess the power of judicial review. The constitutional council determines the validity of a law on request by either President or Prime Minister or the Presidents of both houses of the parliament.

The office of Parquet is similar to the public prosecutor. They are agents of state who cannot be removed. Both criminal and some civil cases are handled by them. They also monitor the execution of the judgements and decrees.

The French system guarantees independence of judiciary by keeping the executive out from the appointment process. The President is the guarantor for this independence to the judiciary. At lower level, judges are appointed through competitive exams. They are also given training, making the French judges competent and of high calibre.

The Constitution guarantees protection against arbitrary arrest and detention. Judiciary thus acts to protect individual liberty. Unlike in the United States, which adopts the fundamental feature of separation of powers, the French system has made judiciary subversive to executive and the legislature. The judges are made to work under a minister of the judicial department. All judgements are delivered by collegiality of judges, this is to ensure judgements are not corrupted. Only at higher level, there is a separate court to hear appeals of criminal and civil side; in lower levels, there are no separate courts. Thus a court can preside over both civil and criminal cases. There is also provision to create separate courts for issues like industrial disputes, commercial tribunals, etc.

Apart from these, the French Constitution provides for three new courts. They are the Supreme council of judges, High court of justice and the constitutional council. The supreme council of judges is headed by the President of the republic, apart from him there are other members appointed by him. The function of this body is to make appointments to the higher courts like court of cassation, etc. it also acts as the disciplinary council for the judges.

The high court of justice consists of equal number of members appointed by the national assembly and the senate. The President is tried by this body if he is indicted for high treason, other government officials are tried for conspiracy against the security of the state.

The constitutional council decides the constitutionality and validity of an act or law before even passed by the parliament. Unlike the United States, India where judicial review is a fundamental feature, French courts have not been given the power to declare any law to be unconstitutional. Apart from this, they also ensure that election of President is held regularly, examine complaints regarding the election to the President and declare the results of the Presidential election and of the referendums. Though the President is not bound by the advice of council, it is important for him to seek its advice as the council is considered to be the pulse of the French people.