A COMPARISON OF THE FRENCH AND INDIAN CONSTITUTION, AND CONTEMPORARY DEVELOPMENTS

Bhavana Rao

Faculty, School of Law, University of Petroleum and Energy Studies, Pune, India.

INTRODUCTION

The Constitution of India has been compared by numerous authors many times with the Constitutions of UK and America and also with the countries of the South Pacific or those of the Commonwealth but not much has been done to compare it with a successful republic like France with a relatively equal historical connection within Europe and the international connections. In this paper attempt is to compare the important constitutional provisions and the related Governmental structure of France and India. The reason and objective of the study is to understand the success of a particular feature with respect to the social set up of these countries. Examining each of the provisions is a heavy task and therefore this paper will limit it to the most important provisions of the documents which make the country what it is and how it responds to the institutional machinery born out of those provisions, for e.g. by its very nature the Constitution of India had had a federal stint and on the other hand France has gone through a plethora of changes. It recommends a unitary structure in the current form that is the form of the Constitution of the Fifth Republic as it is called now. Going by its provisions it should be seen that how much of it is federal and what factum makes it unitary in reality.

An Introduction to French Constitution

There is separation of powers in both India and France but both embody a different kind of set up. France, in juristic circles is rightly named as the Constitutional laboratory and trialling and testing has been done by this Republic many a times to go well with the dynamics of a moving and never stopping people in a State. The French have experienced a superfluity of Constitutions, instituting probable arrangements and differences of all forms of government, including majestic or imperial and authoritarian or dictatorial. What does it demonstrate? It shows a swiftness and speed of political consciousness of the people. It follows that the modification of or rewriting of any Constitution is an element of and attributable to the rough currents in the people's political consciousness which cannot be restrained and chained even by itself, and the intensifying and growing torrent of political awareness, responsiveness and wakefulness possibly will even find that the Constitution once given by the older generation would not be able to meet the confrontations of a new clime.

France is rightly called the laboratory of Constitutions. The French have experienced a plethora of Constitutions, instituting possible variations and combinations of all forms of government, including dictatorial and imperial. This shows the velocity of political consciousness of the people.

It follows that alteration of or rewriting of any Constitution is attributable to the shifting currents in the people's political consciousness which cannot be fettered even by it and the rising stream of political consciousness may even find that the constitution once given by the older generation would not be able to meet the challenges of a new clime.[1]

Rigidity and Rule of Law

It has been well established that a Constitution is something made by the people of a society. It is not any metaphysical subtlety.[2] Social perpetuity is not the same as metaphysical eternity. Human consciousness always evolves.[3] So it may be assumed that rewriting the Constitution could be an option for the ever evolving countries. However rigidity has its virtues. A rigid constitution could be better suited in a political scenario where the amendments could be made for the purpose of specific character ignoring the welfare of the general community at large and overriding the basic constitutional principles for the same. Rigidity also comes with a written Constitution by virtue of it being written and not being amenable to changes as wished by any organ of the government or the power houses. Jennings stated that a written constitution goes a long way in upholding the reign of law and is very important for the country. He also states that all authorities take their powers directly from the Constitution. He says, A written Constitution is thus the fundamental law of the country, the express embodiment of the doctrine of the reign of law. All public authorities, legislative and judicial, take their powers directly from the Constitution.[4]

Difference between Statutory and Constitutional laws in General

American jurisprudence records that a statue and Constitution both rest on the will of the people and though of unequal dignity are both laws. There is a unique amendatory clause in the Indian Constitution and it will be compared with the amending provisions of the French Constitution in the forthcoming section. A particular feature in a document of a particular country may be successful and highly rated as a fundamental principle when developing a draft or document for the benefit of a particular nation but it may be the worst principle embodied in the new set of socio political set up. Some highly rated principles in a particular set up may not be so important in another set up. The Constitution of a country is the supreme document of that country and is instrumental in the making of a country either from an old system or from an entirely new birth of a country. It is the core document which regulates all laws of a country in the social economic and political arena and thus shapes the country and makes it what it is. Therefore a study of the Constitutions of India and France will lead to an understanding of the various aspects of the document to reveal the advantages or disadvantages it offers to the respective system. So some highly rated principles may be a big loophole in another State. Therefore whether a Constitution leads to a Unitary State, a Federation or a Confederation as essential aspect which can be studied is one important factor. The Constitution of France had 92 articles and a preamble whereas

[1] R.G.Chaturvedi and M.S.Chaturvedi, *Amendment of the Constitution- Philosophy and Practice,* The Institute for Research and Advanced Studies,Jaipur,1985
[2] *Ibid*
[3] *Ibid*
[4] Jennings, *Law and the constitution* , 51, 10th Edition

the Constitution of India is the longest written constitution for a country, containing 444 articles, 12 schedules, 94 amendments and 117,369 words

Difference between Unitary and Federal Constitutions

A State may reveal such features in reality as those which are neither embodied in the constitution nor envisaged by the constitution makers. So a federal Constitution does not mean a federal form in practice and a unitary need not necessarily be a unitary one considering the real scene.
In general a federal constitution has the following features:

Constitution should be in Written Rigid procedure of Amendment Distribution of powers between State and CentreSupremacy of the Judiciary

It generally guarantees all the freedoms which are fundamental
A unitary system is administered constitutionally as a single unit, with only constitutionally created legislature. The power is top down. A unitary state is a independent state governed as one single unit in which the government at the centre is supreme and any organizational divisions exercise only powers that the central government chooses to hand over or farm out. In a unitary state, sub national units are created and abolished and their powers may be widened and tapered, by the central government. Although political power in unitary states may be allotted from side to side devolution to local government by statute, the central government remains absolute and supremacy of the central government cannot be questioned; it may abrogate the acts of devolved governments or curtail their powers. Many states in the world have a unitary system of government. In France the Constitution amounts to little more than a document as the most important code in France is the French Civil Code. On the other hand the Constitution of India is the Supreme document which cannot be departed or swerved away from. Current research focuses and relies heavily on the substantive and formal Constitutional differences. The Substantive Constitution is the set of rules that deal with the distribution of powers. The formal constitution is different. Largely the objective of writing this paper is to draw the distinctions of the theoretical and practical aspects of the Constitutions of France and that of India.

COMPARISON OF FEATURES OF THE CONSTITUTIONS OF INDIA AND FRANCE

The Preamble- a Comparison

France
The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004. By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development. The Preamble of the French Constitution refers to three

external documents – the bill of rights, the Constitution of 1948 and the charter for the environment of 2004. On the other hand the Constitution of India does not. It is the only bible of guidance of the governance of the country. Though one may say it drew a lot from the previous Act of 1935 but it exists independent of any historical connections mentioned in the Preamble as is done by the French Constitution. Liberty, equality and Fraternity[5] are the principles which can be seen in the Indian as well.

India

The Preamble of the Indian constitution on the other hand has incorporated the words
WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

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

EQUALITY of status and of opportunity;

and to promote among them all

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

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.[6]

The Kesavananda case, recognised that the preamble can be used to interpret uncertain and unclear parts or areas of the constitution where different interpretations present themselves. In the 1995 case of Union Government Vs LIC of India also the Supreme Court has once again held that the Preamble is an integral part of the Constitution. As originally enacted the preamble described the state as a "sovereign democratic republic". In 1976 the Forty-second Amendment changed this to read, “Sovereign Socialist Secular Democratic Republic.”[7]

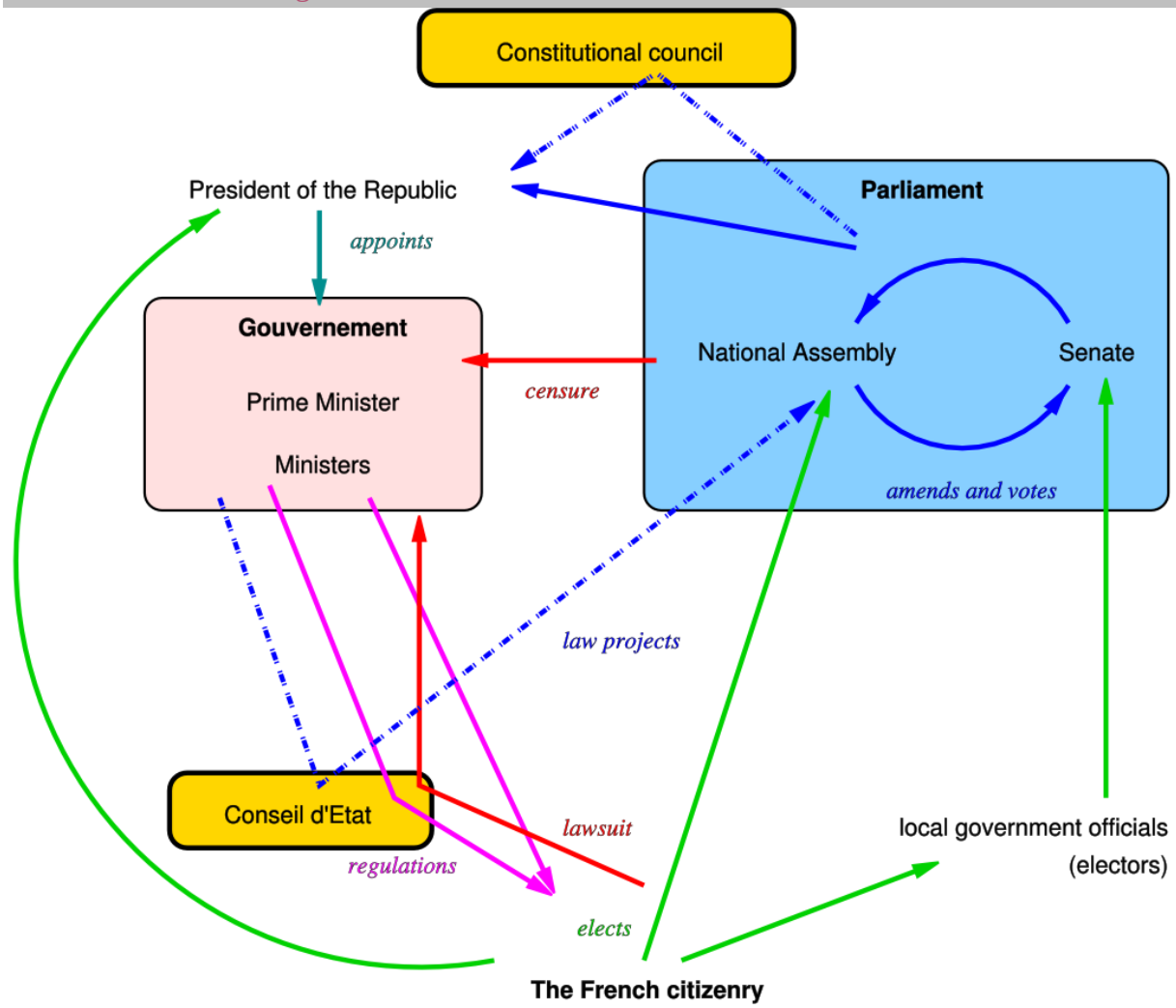
Constitutional Structure of France

The French Republic has a unitary semi presidential kind of government and its current constitution was adopted in October 1958.It typically is known as the Constitution of the Fifth Republic and had replaced the Constitution of the Fourth Republic of 1946. Since then the Constitution has been amended eighteen times and the recent amendment was in 2008.
The French Constitution provides for the election of the Parliament and the President and their powers and their inter-relation. Also it provides for the selection procedure of the Government. It further provides for the judicial authority and a High Court which is for judging the President, an Economic and Social Council, a Constitutional Council. A politically strong President is envisaged by the Constitution of France. The Constitution also facilitates the ratification of International Treaties and those connected with the European Union. It also sets out methods for the amendment

[5] The Constitution of the Fifth Republic of France
[6] Preamble, The Constitution of India
[7] The Constitution of India (42nd Amendment),1976

of the Constitution itself in two ways. One by referendum and the other by a Parliamentary Process with the consent of the President.

Please turn over for diagram



The Division of Powers in France[8]

Basic Principles

A well-liked and popular referendum approved the Constitution of the Fifth Republic of France in 1958 which greatly strengthened the power of the presidency and the executive with respect to Parliament. The Constitution does not enclose a bill of rights in itself. However its preamble mentions that France has to pursue the principles of the Declaration of the Rights of Man and of the Citizen, just as those of the preamble to the constitution of the Fourth Republic. This has been evaluated to mean that the principles laid out in those texts have constitutional value, and that

[8] http://en.wikipedia.org/wiki/Government_of_France visited on 29/09/2013

legislation breaking those principles should be found unconstitutional when remedy is filed before the Constitutional Council. Recent modifications of the Constitution have added a mention in the preamble to an Environment charter that has complete constitutional worth, and a right for citizens to challenge the constitutionality of a law before the Constitutional Council. The first principles of the constitution include: the equality of all citizens before law, and the rejection of special class privileges such as those that existed preceding the French Revolution; presumption of innocence; freedom of speech; freedom of opinion including freedom of religion; the guarantee of property against arbitrary seizure; the accountability of government agents to the citizenry.

Constitutional Structure of India

The Constitution of India lays down the framework defining fundamental political principles, establishes the structure, procedures, powers, and duties of government institutions, and sets out fundamental rights, directive principles, and the duties of citizens. The Constitution is federal in nature. Each State and each Union territory of India have their own government. Analogues to President and Prime Minister, is the Governor in case of States, Lieutenant Governor for Union territories and the Chief Minister. The 73rd and 74th Amendment Act also introduced the system of Panchayati raj in villages and municipalities. Also, Article 370 of the Constitution gives special status to the state of Jammu and Kashmir.

A COMPARISON OF THE STRUCTURE

It is important to compare the structure of two countries in terms of division of powers which are related to the social set up of the country itself and equally important is the comparison of the following. The power and procedure of enforcement of fundamental rights and the powers of the Executive, Legislature and the Judiciary

Before dealing with each let me begin by quoting Guy Carcassonne's paragraph from his article of May 2002[9]

The French Republic has one explicit principle and one only, set forth in the fifth line of article 2 of the Constitution and directly borrowed from Lincoln: "Government of the people, by the people and for the people". But no matter how well expressed and how inspiring, this principle is the one the Republic has espoused, without in fact always showing an equally effective concern for its implementation. But the principle of the Republic is not that of the Constitution, which wisely refrains from reducing itself to a single formula. And it is principles, in the plural, that it expresses, sometimes with a flourish, sometimes discreetly; principles which it enshrines explicitly, or that follow from it implicitly. These principles are, all in all, pretty simple, and it is this very simplicity which makes them akin to the best traditions of European democracy.

A Constitution must guarantee rights

It must also provide for the separation of powers

A rationalized parliamentary system

[9] Guy Carcassonne, The Principles of the French Constitution , published online in May 2002 for the Embassy of France in Britain, http://www.ambafrance-uk.org/ visited on 29/09/2013

So whatever be the principles enshrined or not enshrined what is important is the effective implementation of those which the French constitution has seemingly done well. In contrast in India we have been explicit in embodying the idea of rights which are fundamental, and the principle of separation of powers, yet there have been constant tussles between the three organs and fundamental rights are ensured only by invoking the power of courts most of the times. All those historical cases starting from the sixties to the seventies have time and again been a manifestation of the tussle between the executive and the judiciary and the tussle continues till date with the ever increasing importance attached to the accountability of each wing of the Government in Indian set up. In France a legislation which is contrary to the basic rights of man and the Constitutional principles are void ab initio and therefore the courts come into picture not as frequently as in India. In India the Supreme Court and High courts have original jurisdiction to dispense justice to cases of infringement of Fundamental Rights of Citizens. On the other hand the French structure has both a Constitutional Council which takes cognizance of those laws which infringe the rights of the citizens just as the courts do. Reason for this is division of powers between the different units may differ in reality from the actual division envisaged based on the powers of Judicial Review, Amendments and Judiciary. The Indian Constitution is federal in nature but is it really a Federal one? If we go by what is accepted now as it being a Quasi federal Constitution then how far is it different from a Unitary State like of France. Now again, is France really Unitary in nature? These are the questions which is asked can lead to futile debates but a comparison of the Constitution and the Constitutional machinery as well as the Government committees and the judicial committees of both these countries would at least bring out the advantages or disadvantages of both in terms of what is needed to be done to ensure that the governance is of the best possible combination in a given combination of set up in a State or a national unit.

A reality check would ensure the understanding of the problems faced by these two national units and suggest remedies for the problems by drawing from the each other on that aspect as which is working well in the other.

THE POWER AND PROCEDURE OF ENFORCEMENT OF FUNDAMENTAL RIGHTS

First, the fundamental rights are those without which no Constitution is worthy of the name. At the same time as many countries have preferred to pencil in a wide-ranging and up to sate and the latest list of these rights, France has chosen to stare to its past. The French preamble to the Constitution of 4 October 1958 clearly refers to two preceding documents, to which the French persons seriously announce their affection: the 1789 Declaration of the Rights of Man and the Citizen, and the preamble to the 1946 Constitution. The foremost of these two texts has endured the ordeal of time. For the reason that it is a true agreement of individual liberties, it is both never ending and everlasting and partial: everlasting because nothing can last which is not founded on the indefeasible rights of every human being; partial because it lacks the dimension of collective rights, the exceptional rights we find a century and half after 1789 - in the preamble to the 1946 Constitution - elevated to the same level. Liberty and equality are enshrined, being equally affirmed generally and in some occurrences spelled out, and in the light of experience, enriched, with the belief of human dignity, reflecting and consolidating the people's economic and social

rights, practised together as well as individually by the people. By means of the seventeen articles of 1789 and eighteen paragraphs of 1946, France and the French are thus gifted and endowed with rights which are fundamental and freedoms, defined in terms adequately exact to meet the expense of protection, and adequately untied to be modified to progress and expansion in group and collective consciousness and awareness and, more colourlessly , technical evolution: despite the exceptional revolution of the media, the stipulations and provisions in which freedom of expression was enshrined in 1789 have aged and matured not one grain. So it remains only to guarantee and give assurance of those rights in all conditions, or nearly and virtually the entire. That assurance or guarantee has lived in place since 1971, with the Constitutional Council answerable and accountable for making certain that all laws approved and passed by Parliament are in agreement with and confirms to these lawful Constitutional documents and texts. Also in India the fundamental rights are enshrined in the Constitution itself.

THE EXECUTIVE, THE LEGISLATURE AND THE JUDICIARY

Executive

The executive in France has two heads unlike one in India. This is upsetting and confusing for the distant spectator as well as sometimes is for the French national himself, who do not at all times appreciate the reason and sense of the association and the relationship stuck between Prime Minister and the President. The head of State is the President of the Republic and is the personification of the country, its unity and integrity and history. He has significant control, power and authority, such as the authority to appoint and employ the Prime Minister, and on the latter's suggestion, the other affiliates and members of the government. He is capable to call a referendum, suspend or dissolve the National Assembly, discuss and approve treaties, and ratify them, and even initiate the plan of recommending or proposing a modification or alteration in the nature of revision of the Constitution. His power largely however, shoots out from the manner and way he is elected by express and direct universal suffrage. If a runner gains a complete and absolute majority that is over half the votes cast, he is straightaway and immediately elected, or else there is a subsequent second round, concerning only the two candidates who got ahead and led in the first round. Then, one of the two will necessarily attain an absolute majority, technically speaking. The reality that over half complete voters have designated their vote for him individually gives the head of State an unsurpassed political power and therefore authority to control which justifies the faith shown in the candidate. As the unquestionable and undisputed boss of the camp which follows him, he is aggressively and actively supported and backed by the government which he appoints and also by the parliamentary majority which supports him. As a result, he can not only exercise and put into effect his own powers, but also choose to resort to those of the government and the Parliament which, out of political camaraderie, plant them at his disposal. Yet, at the same time as the President proceeds and acts as stimulation to the legislative majority, it is the Prime Minister who is its routine and everyday leader. The administration and regime remains officially and legitimately parliamentary, in that the government is responsible and accountable to the National Assembly which in principle has the strength and power to transport it down it at any time, just as in the United Kingdom, for example, or even in India. In conditions as these, while

the Parliamentary majority does belong to the related group or camp as the President of the Republic, the Prime Minister is a connection between the two. It is he who runs the government and directs the work of Parliament, and the President is the head of State who in fact sets out the main lines of policy, at least on the most important subjects. So it is the President of the Republic who holds the bulk of the executive power and has the lion's share of legislative power at his disposal, albeit indirectly. [10] All this changes when the President is unable to find, and loses the support of the parliamentary majority, of course. A situation as this which got hold of France from 1986 to 1988, from 1993 to 1995 and between 1997 and 2002, is called as "cohabitation" because it compels a President and a Prime Minister to cohabit at the head of the executive in spite of being political rivals or adversaries who will more often than not be running against each other in the subsequent elections. In such situation the President is confined largely to the use of his own powers, powers or authority which politically he can put together for little use as soon as he is personally disowned by the voters in parliamentary elections triumphed by his opponents. It is the Prime Minister, by distinction, who after that turns out to be the country's actual and factual political superior. It is consequently a variable-geometry system. Usually it guarantees the pre-eminence of the President. However, that primacy is for all times rigorously and strictly comparative and proportional to his support in the legislature. If the President enjoys the unconditional support of that majority, his primacy is unconditional. If this support is qualified or conditional, so is his primacy. And if the support disappears, the primacy disappears with it. But the most important thing in this strange arrangement is that the variations in question are always decided by the citizens themselves, and by them alone. It is they who directly choose a President, and they again who, in parliamentary elections, give him or deny him a majority in Parliament. Given that henceforth the head of State is to be elected for the same term - five years - as the National Assembly deputies, French voters will probably find themselves making these two choices at more or less the same time, which logically should take some of the heat out of the electoral calendar. Barring accidents, the French President and National Assembly will in future be elected once and for all for a five-year term.[11] The President is not directly elected by the people but through elected members of the Parliament of India as of the state legislatures and serves for a term of five years. Historically, ruling party that is the majority in the Lok Sabha nominees elected unanimously. Serving Presidents are allowed and permitted to stand for re-election. A formula is used to allocate votes so that there is equilibrium amid the population of every state and the number of votes Assembly members from a state can cast and also to give an like balance among State Assembly members and the members of the Parliament. Also if no contender is able to receive a majority of votes, there is a scheme by which losing candidates are done away with from the race and their votes are transferred to other candidates, pending the time till one gets a majority. Even though Article 53 of the Constitution[12] states that the President can exercise his or her powers directly or by subordinate authority leaving few exceptions all of the executive authority vested in the President are in reality and practice employed and exercised by the widely and popularly elected Government headed by the Prime Minister. This Executive power is

[10] Guy Carcassonne, The Principles of the French Constitution , published online in May 2002 for the Embassy of France in Britain, http://www.ambafrance-uk.org/ visited on 29/09/2013

[11] *Ibid*

[12] Art 53 of the Constitution of India

exercised by the Prime Minister with the help of Council of Ministers. If the President ignores the advice of Union Council of Ministers enjoying the confidence of the Lok Sabha, it may resign and lead to a constitutional crisis.

Legislature

In France the legislature is unequally divided between the two Chambers, the National Assembly and the Senate. Largely the tenet is that the government agencies and, the civil service are at the disposal of the government, or cabinet. Nevertheless, different agencies are independent agencies autorités administratives indépendantes that are statutorily barred from the executive's authority or power, although they go in the executive division. These self-governing agencies have exacting regulatory supremacy, a modest executive power, and little quasi-judicial power or authority. They are also on many occasions consulted by the government or the French Parliament in the hunt for suggestion before fixing and regulating by-law. They can impose sanctions that are named "administrative sanctions" or sanctions administratives. Their verdict can still be challenged by a judicial court or an administrative court. In France the parliament is separated into two houses, one, the National Assembly which has 577 members and the 321 members form the Senate. Working as the legislative limb of government the parliament is busy primarily in the debate and adoption and acceptance of laws. Legislation related to government revenues and spending is particularly vital. Another main responsibility of parliament is to supervise the government's use of executive authority or power, though this oversight capability was limited quite by the 1958 constitution. Members of the National Assembly are directly elected for five years. The candidates for the National Assembly are elected by majority vote in single-member electoral districts. Surplus elections are required if no contender receives more than fifty per cent of the votes. The candidates who win at least 12.5 per cent of the primary round vote are qualified and eligible to run in subsequent round. The members of the Senate are chosen indirectly for nine years by an electoral college. One third of the Senate is elected in every three years. The National Assembly and the Senate share equal legislative power in principle. However, in practice, the legislative authority is slanted to the National Assembly, since the Senate may hold-up, although not put off, the passage of legislation. If the two chambers diverge on a bill, final resolution rests with the National Assembly which might either admit the Senate's version or subsequent to a specified time, re-adopt its own. The Economic and Social Council functions in an advisory capacity, on economic and budgetary matters, to the National Assembly and also, the government. It consists of representatives from worker and employer groups and, from professional and cultural organizations. The Constitution of the Fifth Republic brings in two characteristic measures projected to make more efficient the legislative process. The first measure grants the government the power and authority to insist an up-or-down vote on a whole bill or any piece of a bill, in either chamber. This measure lessens the opportunity for members of parliament to recommend incessant alteration or amendments to bills they go up against. Next, the second measure authorizes the government to succeed in adoption of a bill in the National Assembly without an actual vote. For doing this the government proclaims that it regards negative response or rejection of the bill to be equivalent to a vote of no confidence in the government. If challengers of the bill do not succeed to submit and win a majority vote on a motion of no confidence, the bill is adopted. Laws have

got to be promulgated by the French president to be given effect to. The president could ask parliament to reassess a law or a few of its articles, and parliament ought to respect and honour the request. The president could as well ask or request the Constitutional Council to rule on the law's constitutionality. In such situations the law might not be put into practice in anticipation of the court making its judgment. Before the Fifth Republic, laws adopted by parliament were not subject to judicial review.

India has two levels of Legislature. One the Union Legislature i.e. The Parliament and the second, State legislature.The Parliament consisting of Lok Sabha and Rajya Sabha follows the procedure as follows. Members of Lok Sabha are directly elected by the eligible voters. Members of Rajya Sabha are elected by the elected members of State Legislative Assemblies in accordance with the system of proportional representation by means of single transferable vote. The normal life of every Lok Sabha is 5 years only while Rajya Sabha is a permanent body.Lok Sabha is the House to which the Council of Ministers is responsible under the Constitution. Money Bills can only be introduced in Lok Sabha. Also it is Lok Sabha which grants the money for running the administration of the country.Rajya Sabha has special powers to declare that it is necessary and expedient in the national interest that Parliament may make laws with respect to a matter in the State List or to create by law one or more all-India services common to the Union and the States.[13]

The Constitution permits states to have either a unicameral or bicameral legislature. A state is said to be unicameral if it has simply one house of parliament. In a state with a bicameral legislature, the lower house is known as the Legislative Assembly or the Vidhan Sabha and the upper house is called the Legislative Council or the Vidhan Parishad. The upper house, as per law cannot be greater than one third the size of the lower house. However it must have greater than forty seats. The upper house, Vidhan Parishad has partial legislative powers, and was mainly planned for consultation and cannot seize up legislation passed by the lower house for more than a few months. The Legislative Assembly is made up of members elected straight from individual constituencies and, the upper house, the Legislative Council consists of members indirectly chosen by the Lower House, members nominated for by the State government, and members elected from specially designated teacher's and graduate's constituencies.

Judicial Review in France

Judicial review in France is carried out by the Constitutional Council. The Constitution of France in Article 61 states that all organic laws, as well as those proposed statutes that garner sufficient parliamentary opposition must pass before it at the end of the legislative process. The Constitutional Council can strike down the controversial bill in full or in part, and its decisions cannot be appealed.[14] The difficulty with this machinery is that in France, the Constitutional Council is the only judicial body having authority for judicial review. It cannot be held by ordinary citizens, who also cannot appeal or pray for striking down, or invoke unconstitutionality of a law as a defence. This implies that unconstitutional laws cannot be challenged anymore if they one way or another avoid the Constitutional Council, for instance, if it is not seized by the Parliament during the one-month delay allowed by the Constitution). In practice, the French supreme courts

[13] http://www.parliamentofindia.nic.in/ls/intro/p1.htm visited on 01/10/2013

[14] http://www.worldwizzy.com/library/Judicial_review#Judicial_review_in_France visited on 01/10/2013

who deal with individuals, Conseil d'état and Cour de Cassation, do their best to interpret the law in a manner consistent with the Constitution. In particular, French administrative law defines a category of case law known as principles of constitutional value principles à valeur constitutionally, such as human dignity and continuity of the state, that rule over the executive branch of the government even if the legislator omits to say so in statute law.[15]

Judicial Review in India

The fundamental function of the courts is to adjudicate disputes connecting individuals and the state, between the states and the union and at the same time as so adjudicating, the courts may be wanted to interpret the provisions of the constitution and the laws, and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. There is no appeal against the judgement of the Supreme Court. In Shankari Prasad vs. Union of India[16] (1951) the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2).The Supreme Court rejected the contention and unanimously held. The terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever. In the context of Article 13 law must be taken to mean rules or regulations made in exercise of ordinary legislative power and amendments to the constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368. In Sajan Singh's case (1964), the ability of parliament to pass 17th amendment was confronted before the Constitution Bench comprising of five judges on the ground that it violated the Fundamental Rights under Article 31 (A).Supreme Court reiterated its earlier stand taken in Shankari Prasad's case and held, when article 368 confers on parliament the right to amend the constitution the power in question can be exercised over all the provisions of the constitution, it would be unreasonable to hold that the word law' in article 13 (2) takes in Amendment Acts passed under article 368.

CONTEMPORARY RELEVANCE IN RELATION TO A NEW SOCIO POLITICAL SET UP IN POST REVOLUTIONARY FRANCE AND THE DEVELOPMENTS IN INDIA

The Constitution of France has established itself in proving noteworthy in its capacity to settle in an ever-changing societal and fiscal conditions and standards. The post revolutionary France has witnessed fifteen different constitutions and has evolved through amendments, decisions of the Constitutional Council and also the intergovernmental practice. This concoction of judicial, political and customary practice of changes in conformity with the standards of legitimate principles has led to an important role play by the Constitution in promoting the rule of law and promoting integration of the country socially and politically. The extensive constitutional amendments of July 2008 continue the “constitutionalization” of French law and politics. Rejecting calls for a more radical restructuring, the French Parliament pursued a cautious, evolutionary route to reform. Following for the most part the recommendations of a commission

[15] *Ibid*

[16] *Shankari Prasad* v. *Union of India,* 1951 AIR 458, 1952 SCR 89

established by President Sarkozy (the Balladur Commission), Parliament amended the Constitution to better define the powers of the president of the Republic, to better balance the relationship between the Government (the executive branch) and Parliament, and to better protect the rights of citizens.[17]

Change is humble in some areas for example defining the powers of the president and his relationship to the prime minister in a better way. Change may be significant or not in other areas, depending on the ability and willingness of institutions to use their new competences .and resources in the vein of the association between Parliament and the Government. In some areas transformation is considerable like permitting individuals to have the issue of the constitutionality of a law previously or already in force determined by the Constitutional Council at some stage in litigation in ordinary or administrative courts. Since 1958 the constitutional developments in France give an outstanding case in point of the evolution of and giving headway to constitutionalism in a land which had protractedly been unreceptive to the government of judges by a grouping of political and judicial techniques that give surety to permanence and authenticity to basic alterations in structures, legal and political, and principles. France has celebrated the fifty fifth anniversary of the Constitution of its Fifth Republic in 2013. The Constitution stimulated by and drafted for General Charles de Gaulle 18 subsequent to his call to authority and power in the period of a political emergency at the juncture of a revolt of French armed forces in Algeria, was not likely to outlast the general or his resolution of the Algerian matter. Knowing constitutional history, prospects or expectations of non permanence were very right. All from end to end the period between the French Revolution of 1789 and the embracing of the Constitution of 1958, France had fifteen varied constitutions, shifting from parliamentary democracy to totalitarian rule. The most enduring rule during this stage was the Third Republic, which went on from 1870 to 1940, although the regime wrestled for its existence through much of that time and eventually was not capable of providing an efficient structure and agenda for government.19

The success of the 1958 constitution is due to various factors. The Constitution did not stand for the imposition of only one outlook of government or one place of values, as past constitutions had and was in consequence the creation of extensive past experience, merging elements of parliamentary government with a muscular executive and the inclusion in its preamble of Enlightenment values (the Declaration of the Rights of Man and the Citizen of 1789), the republican principles of the Third Republic20 and the social and humanitarian values of the post-World War II period (the preamble of the 1946 Constitution). Also, importantly, the 1958

17 Martin A. Rogoff , "Fifty years of constitutional evolution in France: The 2008 amendments and beyond", http://www.juspoliticum.com/Fifty-years-of-constitutional visited on 03/10/2013

18 General de Gaulle presented the broad outline of his ideas for a constitution in two important speeches in 1946. See Charles de Gaulle, Speech Delivered at Bayeux (June 16, 1946), in Charles de Gaulle, Mémoires d'Espoir, suivi d'un choix d'allocutions et messages sur la IVe et la Ve Républiques: 1946-1969, at 309 (1970) ; Charles de Gaulle, Speech Delivered at Épinal (September 29, 1946). See also Michel Debré, Speech before the Council of State of August 27, 1958, in Didier Maus (ed.), Les grands textes de la pratique constitutionnelle de la Ve République 2-8 (La Documentation française, 1998)

19 H.S. Jones, *The French State in Question: Public law and political argument in the Third Republic*, 1993

20 The "fundamental principles recognized by the laws of the Republic" are principles that provide the basis for laws of the Republic that predate the Constitution of 1946 and that are recognized as having constitutional status (valeur constitutionnelle) by the Constitutional Council.

Constitution was sufficiently flexible to allow for development and adaptation through amendment, interpretation, and practice.

The French experience with the Constitution of 1958, however, allows us to focus on an aspect of constitutionalism that is equally, if not more, important in the long run: the entrenchment of constitutionalism in a nation that lacked that tradition, and was even hostile to it, through the peaceful evolution of institutional structures and the expansion and judicial enforcement of protected values. The dynamics of this constitutional evolution, occurring as it did through a combination of constitutional amendment, constitutional jurisprudence, and the practice of established institutions allows us to observe the process of legal adaptation to new political, economic, and social perspectives and realities that is often so troublesome for political societies. The instituting of constitutional order does not mark the finishing of history, politics, together inside the recognized order and confrontations or challenges to it, or economic, social, demographic, ideological, or cultural change. A vital investigation concerning all constitutional systems is 'how finely' a particular scheme is capable of accommodating such changes inside established structures, important for the reason that the substitution of single constitutional rule with a new more often than not occurs after a time period of instability which has passed, often which went together with violence, during which the established order is not capable of adapting to or to accommodate change.

Subsequent to General de Gaulle's withdrawal from the political scene with his resignation in 1969 (after French voters had rejected by referendum a proposal he had supported for modification of the Senate), and with new political, legal, economic, demographic, and social realities confronting the nation, the institutional arrangements established by the Constitution of 1958 appeared more and more unsuitable. Particularly significant developments were the growth of European law and institutions, several alternances and three "cohabitations", the desire to decentralize the highly centralized decision-making and administrative structures and processes of the French state, the rise of liberal economic theories, the increasing ethnic and religious diversity of French society, and the prominence of new values (like increased emphasis on democracy, pluralism, and the equality of men and women, increased concern for the protection of individual rights, and increased concern for the protection of the environment). In response to these changes and the perceived inability of existing political structures to accommodate them, many people called for the adoption of a new Constitution and the establishment of a Sixth Republic. Between 1958 and February 2008, the Constitution was amended twenty-three times, sixteen of those amendments since 1996. In July 2008, the Constitution was substantially amended to take account of these new developments, needs, ideas, and values. The principal thrusts of the July 2008 amendments were to better define and control the power of the executive, to increase the powers of Parliament, and to better assure the protection of fundamental rights.

The French experience as that of America provides excellent example of how constitutional system responds to change or alterations in the social factors. In support of the most part, while the American system has been victorious in holding change within well-known structures. Until the establishment of the Fifth Republic in 1958, and really not until the famous Freedom of Association decision of the Constitutional Council in 1971 and the equally crucial 1974 constitutional amendment that allowed opposition legislators to refer a parliamentary enactment to the Council, France did not have an effective system for the judicial application and

modification of its Constitution through interpretation. Throughout its post-revolutionary history prior to the adoption of the Constitution of 1958, constitutional change was effected either by legislative amendment or by the adoption of a new constitution. It is hard to speak of a true constitutional order if the constitution can be altered by ordinary law; in such case, the constitution is continually subject to the vicissitudes of the political process. Moreover, if the constitution cannot be interpreted to accommodate change, it ceases to be a useful framework for political life. It is thus no accident that since the Revolution, France has had so many different constitutions. In almost all cases, the adoption of a new constitution was accompanied by significant political and social disorder, and often by violence. In effect, the winners impose a constitutional order on the losers. Since constitution-making is not regarded as a one-time enterprise, the losers can look forward to other chances in the future. Why, then, give one's allegiance to the particular constitution that has been adopted? After all, it represents the triumph of the political opposition. Rather than being the symbol of the nation, as is the Constitution in the United States, in France the Constitution has historically been a "contested document." [21]

Presidential power has waxed and waned in France however. The Prime Minister's power has augmented through periods of "cohabitation," at the same time as the President does not belong to the party of the parliamentary majority.[22] During such periods, Prime Ministers have dominated domestic lawmaking. Though Presidents have retained significant control over foreign and defense policy during periods of cohabitation, leadership in these areas, too, has been shared with the Prime Minister. In 1986, then-Prime Minister Jacques Chirac set a precedent in this regard by accompanying then-President François Mitterrand to the G7 summit. During the cohabitation between 1993 and 1995, when Mitterrand's political power had waned considerably, Prime Minister Édouard Balladur's government was extremely active in foreign policy, including the situations in Rwanda and the former Yugoslavia. And in !999, President Chirac and Prime Minister Lionel Jospin jointly managed the Kosovo crisis.In short, the precise balance of power during the different cohabitation periods has varied substantially, "showing how the political resources possessed by the two major actors affect the division of power between them."[23] The Real Scenario of the sanctity of the French Constitutional Principles is that the constitutional principles are manipulated to suit the ruling party or the decisions affecting politics. For example, reason giving is limited to a minimum in most of the decisions of the Constitutional COURT in France not in total missing. Contrary to a widespread belief, the French constitutional council does not, ignore politics. It has a special way of trading with strategy and policy arguments in a mainly deductive approach to settlement of disputes and adjudication. [24] Since the constitutional reform of 2008, a new mechanism permits individuals to challenge statutes already in force that infringe their constitutional rights: If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms, guaranteed by the Constitution, the matter may be referred by the Conseil d'Etat or by the Cour de cassation to the constitutional

[21] Martin A. Rogoff , "Fifty years of constitutional evolution in France: The 2008 amendments and beyond", http://www.juspoliticum.com/Fifty-years-of-constitutional visited on 03/10/2013

[22] Andrew Knapp & Vincent Wright, "The Government And Politics Of France", 113, 4th edition,2001

[23] *Ibid*

[24] http://www.juspoliticum.com/Constitutional-Justice-and.html visited on 03/10/2013

council, within a determined period. This new procedure of preliminary reference, known as Question prioritaire de constitutionnalité, has not, however, induced the court to significantly alter the way in which its cases are drafted. The court's 'style' has remained essentially the same. [25] In India the Constitution has more or less been a bible for the common people but the political reasons of amendments and dealing with it cannot be overlooked. This document has withstood the test of time to a large extent but the changes which we see today in this organic and dynamic document have always been due to the tussle between the various organs of governance as well as to a larger extent to the politics of the nation. Here though not short of examples yet, it is better to look at the latest examples. Since its inception the planning commission dominated the process of economic development and the states struggled for rise in revenue availabilities. But development priorities were not decided by the states. The National Development Council was formed in which states participated along with the center. However the meetings of the council soon became a formality. The constitution also provides for a Finance commission that would decide revenue distribution between the center and the states and among the states. Till the eighties, under the strong influence of the planning commission, the central government reduced functions of the Finance Commission to a very technical level. Issues of equitable distribution of financial powers became more relevant for the states under the changing political context after 1967. Agrarian interests that suffered due to the industrial bias of planning process looked for independent mobilizations outside the Congress. As a result the congress lost political power in many states for the first time after the 1967 elections. The party leadership chose to curtail opposition, within and outside, by using harsh political and constitutional measures. The position of the governor and emergency powers of the president were brazenly used to topple the non-congress ministries. The states demanded serious revisions in federal arrangements, especially vis-à-vis status of article 356. Non-congress governments in Tamil Nadu and West Bengal appointed commissions to review federal provisions. The central government neglected these demands throughout the seventies. It was in 1983 that the center appointed an advisory commission (Sarkaria commission) to undertake a comprehensive review of center state relations. However nothing much came out of these efforts. Finally, the Supreme Court intervened in the issue in early nineties to bring the near discretionary presidential emergency powers under the scope of judicial review (Bommai). The central government's inability to institutionally process regional claims led to serious consequences in some regions. Regional autonomy movements, with demands for secession from the Indian state emerged in regions of Punjab (Brass, 1991), Assam (Baruah, 1999) and Jammu and Kashmir (Navlakha, 1998). Politics in Jammu and Kashmir had an independent trajectory due to the relations with Pakistan overtly involved in it. The other two regional autonomy movements were outcomes of neglect of economic-institutional as well as political-ethnic claims of representation. The politics in these states soon acquired a complex character and the state was unable to respond to it from within the democratic framework. Instead it used two strategies. State coercion through armed forces became rampant in these regions for a long time. The Congress as a ruling party at the center used institutional and political instruments freely to pit contesting groups in the state against each other. The state's coordinating as well as regulative capacities

[25] *Ibid*

failed and it had to engage in 'accords' with contesting parties. Conflicts were left simmering in these states that remain as serious threats to Indian federalism.[26] The earlier possibilities of resolving democratic contestations through negotiations and institutional mechanisms were lost. Instead the state became a contesting party in democratic conflicts. Federal situation in the nineties saw contestations emerging on an altogether different terrain. This time it was a competition for access to resources among different states rather than between the center and the states. Changing political context of the nineties (in terms of rise of regional parties and a competitive party system) contributed to the changing nature of federal strains. But more than that it is the New Economic Policy that has led to emergence of 'competitive federalism' (Saez, 2002). With an increasing emphasis on liberalization and privatization, the focus of economic decision- making is gradually shifting to the states. States are competing with each other for greater share of Foreign Direct Investments. A serious controversy regarding the work of the Finance commission in the recent years was about the gap in revenue transfers between the more developed and the less developed states. Transfers from the center have generally been sensitive to the needs of the poorer states. This has been resisted by the rich states on the ground that their economic progress and rational management is punished through fewer distribution to them. The new economic policies of the state have affected regional economic interests in various ways. However there is no common basis, which could transform the discontent into a unified programme for opposition to reform. At the same time the regional elites have developed a direct access to the central decision-making process through coalition politics. The process has resulted in fragmentation of regional interests. Issues related to federalism are pushed to the background. The Indian state, with its new economic logic and with the logic of democracy has been successful in suppressing the federal strains for the moment.

ADVANTAGES AND DISADVANTAGES OF THE TWO

France compared to the American presidency, has a system of checks and balances through mutual dependence that is similar to American system. Both France and the United States have a constitutional system that aims to prevent the executive and legislature having too much power. In the United States this is achieved through the separation of powers which encourages competition for the share of governing authority. The fact that both the legislature and executive approve legislation checks and balances political authority and that prevents authoritarian rule forcing compromise. Similarly in France the chain of dependence forces compromise and prevents one executive from having too much power and becoming autocratic. In France the checks and balances are rooted in the principle that in order to govern efficiently the prime minister and president need mutual support. Mutual reliance creates political stability in the French semi - presidential system which is furthered by the fact that semi - presidentialism prevents authoritarian rule in the dual executive and the legislature.[27] In France the problem is that the constitutional roles of the president and prime minister are unclear. For example the constitution states that the president is "given foreign policy responsibility under article 52," and the prime minister has

[26] http://www.ukessays.com/essays/politics/advantages-and-disadvantages-of-mixed-presidential-systems.php#ixzz2hsMcn56L visited on 07/10/2013

[27] *Ibid*

"control over defence issues," which implies that both have constitutional authority when it comes to national defence issues. This ambiguity can cause tension between the president and the prime minister especially considering that often the roles of the prime minister and the president overlap. The Indian scene shows a powerful PM and the cabinet though the President has his role to play. In France, despite the potential for there to be confusion, the ambiguity over who has authority in defence issues forces the prime minister and president to work together. The fact that both have a constitutional right to authority in defence means that in order for there to be an effective defence policy and execution compromise is essential. It can therefore be said that despite the problems of constitutional ambiguity the disadvantages of semi - presidentialism can be minimised. Semi - presidentialism also poses the problem of the potential for there to be too strong an executive[28] which is not the case in India.

CONCLUSION AND AMENDMENT PROPOSED

To summarise:

The attempt in this paper has been to compare the Constitutions of France and India in terms both of structure and contemporary developments taking the period from 1958 for France and 1950 for India. It is impossible to explain the whole in one paper but attempt has been made to cover the main aspects and code of belief of the nations as a whole and the impact of politics too on the interpretation given to the Constitutions. Attempt has also been made to explain the important role the judiciary plays whether is be a unitary state as France or the federal set up of India. The importance of a structure as the Constitutional Council has attracted the writing of this paper and seems to be a great way of avoiding declaration of the various statutes as unconstitutional after they have come in to force. Thus saving a lot of time and the related chaos in the litigations, it seems thus that the Indian Constitution could take cognizance of this feature and incorporate something like the Constitutional Council of France which would reduce unnecessary litigations and thereby reduce the pressure on the judiciary as well as prevent conflicts between the judiciary and the executive wings of the government owing to possible objections by the legislature and the executive being that the same has been approved by voting in Parliament. The Indian scene shows a powerful PM and the cabinet though the President has his role to play. In France, despite the potential for there to be confusion, the ambiguity over who has authority in defence issues forces the prime minister and president to work together. The fact that both have a constitutional right to authority in defence means that in order for there to be an effective defence policy and execution compromise is essential. It can therefore be said that despite the problems of constitutional ambiguity the disadvantages of semi - presidentialism can be minimised. Semi - presidentialism also poses the problem of the potential for there to be too strong an executive[29] which is not the case in India. France compared to the American presidency, has a system of checks and balances through mutual dependence that is similar to American system. Both France and the United States have a constitutional system that aims to prevent the executive and legislature having too much

[28] *Ibid*

[29] *Ibid*

power. In the United States this is achieved through the separation of powers which encourages competition for the share of governing authority. The fact that both the legislature and executive approve legislation checks and balances political authority and that prevents authoritarian rule forcing compromise.

Amendment proposed:

What is interesting in France in terms of a possibility of imbibing in the Constitution of India is the Constitutional Council which pre-checks the laws made by the legislature and ratifies it before the actual execution unlike in India.

So something like the independent Constitutional Council could be established in India

-with powers to quash the Law before controversies arise and

-this could be done in a way where a law passed by the Constitutional Council or a body as such could be presumed to be valid just as we presume the validity of Statutes

- So a double check on the legislature in the nascent stage would help in saving a plethora of cases from coming to the court in the form of petitions

-to protect or save the Fundamental rights of the people

This body could be established

-by a process of Constituting an independent body

-by direct elections in the beginning and

-later a system of rolling chair from among its members

-taken from the Judiciary and the common man.

-Make the draft structure and rules

-Approve it through a referendum

and start working just like any other Constitutionally created body.

Nevertheless in the end as is maintained by all jurists, what is most important is THE EFFECTIVENESS OF THE WHOLE SYSTEM which could work only by countering corruption and maintaining transparency.So if we could say that the supreme document is the one which guides us throughout, we should also ensure that it does not merely become a document.

BIBLIOGRAPHY

PRIMARY SOURCES

1. The Constitution of India
2. The Constitution of the Fifth Republic-France
3. The Constitution of the European Union
4. The Constitution(Twenty Fourth Amendment) Act,1971

SECONDARY SOURCES

Books

1. Jeffery Goldsworthy, Interpreting Constitutions- A Comparative Study, Oxford University Press, Oxford, 2006
2. K.C. Wheare, Federal Government, London, OUP, 4th ed., 1963
3. H.R.Khanna, Federal Element in the Indian Constitution, Pune, Poona University Press, 1984
4. Bell John,Sophie Boyon and Simon Whittaker,Principles of French Law,Oxford University Press, Oxford, 1998
5. George A Bermann, Introduction to French Law,Columbia University Press, New York,
6. 2008
7. Baranger Denis,le droit Constitutionnel, Presses Universitaries de France,Paris,3rd Edidion, 2006

Articles

1. S.P. Sathe, "India: From Positivism to Structuralism" in Jeffery Goldsworthy, Interpreting Constitutions: A Comparative Study, OUP, 2006
2. George A Bermann,Constitutionalism in Federal Systems: The European Example (paper presented at 2005 annual meeting of American Society of Comparative Law, University of Hawaii, Honolulu, Hawaii, Oct. 28, 2005)

Cases

1. Keshavananda Bharati v. State of Kerala,AIR 1973 SC 1473
2. Indira Gandhi v. Rajnarain, AIR 1975 SC 2299

Lectures

1. George A Bermann,Introduction to 19th World Congress of Comparative Law (Law schools of American University, George Washington University and Georgetown University, Washington DC,July 25, 2010

Further Readings and References:

1. R.G.Chaturvedi and M.S.Chaturvedi, Amendment of the Constitution- Philosophy and Practice, The Institute for Research and Advanced Studies,Jaipur,1985
2. The Constitution of the Fifth Republic of France
3. Preamble, The Constitution of India
4. The Constitution of India (42nd Amendment),1976
5. http://en.wikipedia.org/wiki/Government_of_France visited on 29/09/2013

6. Guy Carcassonne, The Principles of the French Constitution, published online in May 2002 for the Embassy of France

7. France in Britain, http://www.ambafrance-uk.org/

8. Art 53 of the Constitution of India

9. http://www.parliamentofindia.nic.in/ls/intro/p1.htm visited on 01/10/2013

10. http://www.worldwizzy.com/library/Judicial_review#Judicial_review_in_France visited on 01/10/2013

11. Shankari Prasad v. Union of India, 1951 AIR 458, 1952 SCR 89

12. Martin A. Rogoff , "Fifty years of constitutional evolution in France: The 2008 amendments and beyond",
13. http://www.juspoliticum.com/Fifty-years-of-constitutional visited on 03/10/2013

14. H.S. Jones, The French State in Question: Public law and political argument in the Third Republic, 1993

15. Martin A. Rogoff , "Fifty years of constitutional evolution in France: The 2008 amendments and beyond",

16. http://www.juspoliticum.com/Fifty-years-of-constitutional visited on 03/10/2013

17. Andrew Knapp & Vincent Wright, "The Government And Politics Of France", 4th edition,2001

18. http://www.juspoliticum.com/Constitutional-Justice-and.html

19. http://www.ukessays.com/essays/politics/advantages-and-disadvantages-of-mixed-presidential-systems.php