



# POLITY

# PART-1

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# COMPARISON OF THE INDIAN CONSTITUTIONAL SCHEME WITH THAT OF OTHER COUNTRIES

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## 1. Comparison Scheme

Comparison of the Indian Constitutional Scheme with that of Other Countries would center around **two main pivots**:

- 1) *Brief knowledge of the Constitution of the various countries, deemed important owing to their current status or the fact that the Indian Constitution draws implicitly or explicitly from them.*
- 2) *Comparison drawn vis-a-vis features of the Constitution (for example: Fundamental Rights, DPSPs, Federalism et al).*

## 2. British Constitution

### 2.1. Salient Features

#### 2.1.1. Unwritten

One of the most important features of the British Constitution is its unwritten character. There is no codified or structured document which may be called as the British Constitution unlike in India, which is codified into various parts and schedules. Nevertheless many sources of the constitutional law are written and these together with conventions and political traditions form the British Constitution.

Indian Constitution, in comparison, is the lengthiest written constitution in the world.

#### 2.1.2. Evolutionary

The British Constitution is a specimen of evolutionary development. It was never framed by any constituent assembly. It has an unbroken continuity of development over a period of more than a thousand years. It is said that the British Constitution is a product of wisdom and chance.

The Indian Constitution has certain similarities as well as differences on this particular aspect. It differs from the British Constitution to the extent that it is a written document and has well defined provisions. However, it too is open to evolution, given that the provision of amendment is kept such, so as to allow for the Constitution to evolve according to the need and sensibilities of the time.

#### 2.1.3. Flexibility

The British Constitution is a classic example of a flexible constitution. It can be passed, amended and repealed by a Simple Majority (50% of the members present and voting) of the Parliament, since no distinction is made between a constitutional law and an ordinary law. Both the constitutional law and an ordinary law are treated alike. The element of flexibility has provided the virtue of adaptability and adjustability to the British Constitution. This quality has enabled it to grow with needs of the time.

Indian Constitution, in contrast, is both flexible as well as rigid. This complements the basic ideology of the Indian Constitution quite well, wherein certain features like Sovereignty, Secularism, Republic etc. have been held sacrosanct, but otherwise the Constitution lends itself to amendability.

#### 2.1.4. Unitary vs. Federal Features

The British Constitution has a unitary character as opposed to a federal one. All powers of the government are vested in the British Parliament, which is a sovereign body. Executive organs of the state are subordinate to the Parliament, exercise delegated powers and are answerable to it. There is only one legislature. England, Scotland, Wales etc. are administrative units and not politically autonomous units.

The Indian Constitution, on the other hand, is federal.

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<b>Unitary</b>	<b>Federal</b>	<b>Confederation</b>
All power lies with the Centre	Powers is shared by the national and the state governments.	Units come together and form the state. It is opposite to Unitary system.
Centre delegates power to the provincial government.	Powers for Provincial Government comes from the Constitution.	Real power with the units.
Example: Britain	Example: India	Example: EU, USA

### 2.1.5. Parliamentary Executive

**This is one important similarity between the British and the Indian Constitution.**

Britain has a Parliamentary form of government. The King, who is sovereign, has been deprived of all his powers and authority. The real functionaries are Ministers, who belong to the majority party in the Parliament and remain in office as long as they retain its confidence.

The Prime Minister and his Ministers are responsible to the legislature for their acts and policies. Parliamentary system is based on the principle of collaboration and cooperation between the executive and legislative organs. The executive in British has individual legal responsibility whereas in India there is no legal responsibility.

### 2.1.6. Sovereignty of Parliament

The term Sovereignty means Supreme Power. A very important feature of the British Constitution is sovereignty of the British Parliament (a written constitution being absent).

The British Parliament is the only legislative body in the country with unfettered power of legislation. It can make, amend or repeal any law.

Though in India's case, we have legislature at state level too, yet the law making power of the Indian Parliament roughly corresponds to that of the British Parliament.

The courts have no power to question the validity of the laws passed by the British Parliament. The British Parliament may amend the constitution on its own authority, like an ordinary law of the land. It can make illegal what is legal and legalize what is illegal.

Here, there is a marked difference, vis-à-vis the power of Indian Judiciary to keep a tab on the legality of the law framed. Also, the 'Basic Structure' doctrine, lends the Indian Judiciary further power to question the legality of the law (Judicial Review), in light of the fact that the Supreme Court of India is the highest interpreter of the Constitution of India.

### 2.1.7. Role of Conventions

Conventions are known as unwritten maxims (rules) of the Constitution. They provide flexibility and avoid amendments.

Most constitutions of the world have conventions. A necessary corollary to the unwritten character of the British constitution is that conventions play a very vital role in the British political system. For example, while the Queen has the prerogative to refuse assent to a measure passed by the British Parliament, but by convention, she doesn't do so and the same has become a principle of the constitution itself.

However, the legal status of conventions is subordinate to the written law.

Even in India conventions play a vital role in functioning of Parliament. For instance: position of Deputy Speaker is offered to opposition party in India, etc.

## 2.1.8. Rule of Law

Another important feature of the British Constitution is the Rule of Law. Constitutionalism or limited government is the essence of Rule of Law. This checks the arbitrary action on part of the Executive. According to **Dicey**, there are three principles of Rule of Law, found in Britain:

- Protection from arbitrary arrest and the opportunity to defend oneself.
- Equality before Law which means that all persons are equal before law, irrespective of their position or rank. It is different from the concept of Administrative Law, which gives immunity of various types to public servants. In the absence of Constitution and Fundamental Rights in Britain, the judiciary protects this law. So this system is called as the Principle of Common Laws. In *Maneka Gandhi vs Union of India* case (1978) SC held that the 'procedure established by law' within the meaning of Article 21 must be 'right and just and fair' and 'not arbitrary, fanciful or oppressive' otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus, the 'procedure established by law' has acquired the same significance in India as the 'due process of law' clause in America.
- The rights of people in Britain are guaranteed by the judiciary. The Judiciary gives recognition to the common laws. Thus, the people in Britain enjoy rights, even in the absence of a Bill of Rights or Fundamental Rights. The Constitution is the result of rights of the individuals protected by the courts in British Constitution whereas in India, the Constitution is the source of the individual rights.

## 2.1.9. Independence of Judiciary

The Rule of Law in Britain is safeguarded by the provision that judges can only be removed from office for serious misbehavior and according to a procedure established according to which the consent of both the Houses of Parliament is required. So, the judges are able to give their judgments without any fear or favour.

The same has been adopted in India, where independence of the Judiciary is hailed as an unmistakable part of the Constitution (one of the features of the 'Basic Structure' doctrine).

## 2.2. Organs of the State

### 2.2.1. Executive

The Executive in Britain is called as Crown. Earlier, the Crown symbolized King. Now, the King is part of the Crown.

The Crown, as an institution, consists of the following:

- King,
- Prime Minister,
- Council of Ministers (CoM),
- Permanent Executive, the Civil Servants,
- Privy Council.

**Crown:** "King is dead. Long live the King."

In Britain, initially all power lied with the King. Later on, power shifted out of the institution of the King to the institution of CoM headed by the Prime Minister, Permanent Executive and the Privy Council etc. Today, the Crown comprises of all these institutions. Hence, the first part of the statement describes the King as a person, while the second part describes the King or Crown as an institution.

### Nature of Monarchy

Britain has a constitutional monarchy which is not incompatible with democracy. This is because essentially the powers of the monarch as head of the state - currently Queen Elizabeth

II - are ceremonial. The most important practical power is the choice of the Member of Parliament to form a government, but invariably the monarch follows the convention that this opportunity is granted to the leader of the political party or coalition, which has majority in the House of Commons.

Despite its lack of real power, the monarchy still has several important roles to play in contemporary Britain. These include:

- Representing UK at home and abroad,
- Setting standards of citizenship and family life,
- Uniting people despite differences,
- Allegiance of the armed forces,
- Maintaining continuity of British traditions,
- Preserving a Christian morality etc.

In addition, consider the following:

- Parliamentary system requires two heads:
  - First head, as head of the state. He represents the nation and provides continuity to the administration.
  - Second head is the head of the government. He has real powers because the house has confidence in the Prime Minister. The PM is the leader of the House. He represents the majority of the House.
- The institution of kingship is a source of psychological satisfaction. It is said that, "with the King in the Buckingham Palace, the Englishmen sleep peacefully in their houses".
- The King is of great help in critical times. He usually has a very long experience and can give valuable advice in the interest of the country.
- According to Bagehot, the King has three rights:
  - Right to warn,
  - Right to encourage,
  - Right to be informed.
- Abolishing the kingship will require an elected head. An elected head, with no real powers, will have its own set of problems.

In contrast, no provision of Monarchy exists in case of Indian Constitution. Indeed, holding of titles like King etc. are forbidden as per Article 18 of the Fundamental Rights, thus emphasizing equality of all Indian citizens.

### **British Prime Minister and the Council of Ministers**

Britain has a Cabinet form of government. A cabinet is a plural or collegiate form of government. The power doesn't lie in one person, but the entire Council of Ministers. The principle is, "all Ministers sink and swim together". It is based on collective responsibility towards the Lower House.

The Cabinet has its origins in the Privy Council set up to advise the King. The roles of cabinet include the following:

- Approving policy (major policy making body),
- Resolving disputes,
- Constraining the Prime Minister,
- Unifying government,
- Unifying the parliamentary party etc.

Moreover, the Cabinet is the ultimate body of law making in the Parliamentary system. It is formed out of the party/group, which enjoys majority in the House. The cabinet meetings are held in private.

## 1. Position of the Prime Minister

- PM is the captain of the ship of the state.
  - PM is the head of the Cabinet.
  - The party of the PM enjoys majority in the House.
  - He/She is the connecting link between the King and the Cabinet as well as the King and the Parliament.
  - The life of the House depends on the PM as he/she may advise the dissolution of the House.
  - The other Ministers are appointed on the advice of the PM
  - The term of the other Ministers also depends on the PM
2. The **P.M. as first among equals**: this is also called as *Primus Inter Pares* or *Inter Stella Luna Minores*. This explains the PM's position w.r.t. other ministers. In the cabinet system, there is a principle of collective responsibility; hence other ministers are also important but PM remains a 'key stone of the cabinet arch'.

The relative position of the PM and other ministers in a Parliamentary system can be compared to the relative position of the President and his/her secretaries in the Presidential system.

In the Presidential system, members of the Cabinet are chosen by the President. In USA, spoils system exists. The Secretaries are not members of the Congress.

In the Parliamentary system, ministers are also the members of either House. The PM cannot treat them as his/her subordinates. Theoretically, the PM should consider him/herself as only first among equals, must give due respect to other members of the Cabinet and should take decisions in consultation with them.

However, the P.M. is first because:

- He/She is the one who is appointed first, since he/she is the leader of the House of Commons.
- Other ministers are appointed on his/her advice.
- Other ministers can be removed on his/her advice.

## **PM as moon among stars:**

This statement gives a more realistic view of the position of PM In practice, the PM gains prominence and he is not simply the first among equals. Both formal and informal factors are responsible for this.

- Formal Factors: He/She is the link between the Parliament and the King, and ministers are appointed/removed on his/her advice etc.
- Informal Factors: Personality factors, position of his/her party, external/internal emergency like situation.

## **Difference between the British and Indian PM**

Constitutional position of the Indian PM is modeled on the British PM, with one difference. In India, the PM can be a member of either House of Parliament, i.e. Lok Sabha or Rajya Sabha. However, this is not so in Britain. It is a convention in Britain that the PM will always be a member of the Lower House (House of Commons) only.

## **Privy Council**

It has been one of the advisory bodies to the King. It has lost relevance because of the emergence of the Cabinet in the recent times. Cabinet decisions are the decisions of the Privy Council. It has some supervisory role w.r.t. University of Oxford, Cambridge etc. It also has some role in resolution of disputes related to the Church as well as a Court of Appeal in some admiralty cases.

## Permanent Civil Servants/British Bureaucrats

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Indian bureaucracy is modeled on the British bureaucracy.

### Some features:

- Bureaucracy in Britain is generalist.
- They are expected to be politically neutral.
- They are recruited through the competitive exams.
- They enjoy a lot of immunities.
- It is said that the British bureaucracy is not representative and is still elitist in nature.
- Bureaucrats are known as New Despots.
- It is said that the Bureaucracy thrives behind the cloak of ministerial responsibility.
- It has also been compared with Frankenstein's monster (overpowering the Ministers).

### 2.2.2. Legislature

#### ***Essential differences between the two systems:***

There is a natural tendency to compare the Parliament of India with the British Parliament. But our Parliament and Parliamentary Institutions and procedures are not a copy of the Westminster system. There are fundamental differences between the two systems.

British Parliament has grown through some three hundred years of history. In Britain, the Parliament can be said to be the only institution, which exercises sovereign powers and on which there are no limits because there is no written constitution.

India, on the other hand, has a written constitution. Powers and authorities of every organ of the Government and every functionary are only as defined and delimited by the constitutional document. The power of Parliament itself is also clearly defined and delimited by the Constitution. However, within its own sphere, the Parliament is supreme.

Also, Parliament is a representative institution of the people. But it is not sovereign in the sense in which the British Parliament is sovereign and can do or undo anything. The point is that in the sense of constitutional sovereignty, their powers are not limited by a constitutional document.

Moreover, our constitutional document provides for fundamental rights of the individual, which are justiciable in courts of law. And any law passed by the Parliament, which abridges any of the fundamental rights can be declared ultra vires by the courts.

The courts adjudicate the disputes and while doing so, they can interpret the constitution and the laws. Also, the Parliament has the constituent powers and within certain limitations it can suitably amend the constitution.

The British Parliament is bicameral, that is there are two houses or chambers- The House of Lords (strength not fixed) and The House of Commons (strength fixed at 650 members).

### **The House of Lords**

The House of Lords is the second chamber, or upper house, of the United Kingdom's bi-cameral (two chamber) Parliament. The House of Lords has hereditary members. Moreover, it has the largest number of Life Peers, Church/Religious peers (Ecclesiastical Peers) and Law Lords. Together with the House of Commons and the Crown, the House of Lords form the UK's Parliament.

The House of Lords can propose and make changes, known as amendments. However its powers are limited; if it doesn't approve of a piece of legislation, it can only delay its passage into law for up to a year. After that, there are rules to ensure that the wishes of the House of Commons and the Government of the day prevail.

In fact, the House of Lords could be labeled as one of the weakest upper house in the world. Since the passage of the Act of 1919 and 1949, the House of Lords has lost all real legislative powers. It is simply a delaying chamber now. It can delay an ordinary bill for a maximum period of one year and money bill for a maximum period of one month.

In comparison to Rajya Sabha in India, the House of Lords is a weak house. Rajya Sabha has equal powers with Lok Sabha, as far as an ordinary bill is concerned (though, there is provision of a joint session, but it is an extraordinary device).

Rajya Sabha has equal power with Lok Sabha as far as the amendment of the Constitution is concerned. Rajya Sabha is also a delaying chamber, like the House of Lords, as far as a Money Bill is concerned. Rajya Sabha can delay the bill for a maximum of fourteen days. Rajya Sabha does have some special powers, which are not available to Lok Sabha; for example: Articles 249 (power to legislate with respect to a matter in the State List in the national interest) and Article 312 (creation of one or more All India Services).

#### ***Comparison between the House of Lords and Senate of USA***

- Senate is called as the strongest Upper House. It enjoys equal power with the House of Representative in the context of an Ordinary Bill, a Constitutional Bill and even in passage of a Money Bill. It is customary to introduce Money Bill in the Lower House.
- The Senate also enjoys some special powers not available to the House of Representatives. For example, ratification of international treaties, ratification of higher appointments.

The House of Lords did enjoy a privilege that it used to be the highest Court of Appeal in Britain. But this has now ceased to exist, as the Supreme Court has been created by the Constitutional Reform Act, 2005 (SC established in 2009).

### **The House of Commons**

This is the lower chamber, but the one with most authority. It is chaired by the Speaker. Unlike the Speaker in the US House of Representatives, the post is non-political and indeed, by convention, the political parties do not contest the Parliamentary constituency held by the Speaker. The number of members varies slightly from time to time to reflect population change.

In modern practice, the Prime Minister is the head of the Government and is always a member of the majority party or coalition in the House of Commons. The Cabinet comprises primarily leading House of Commons Members of the majority, although Members of the House of Lords have served as Cabinet ministers. In fact, designating someone outside Parliament as a "life peer" has been one recent means of bringing someone essentially from private life into the Government. (In Britain, a life peer is a person who is given a title such as 'Lord' or 'Lady' which they can use for the rest of their life but which they cannot pass on when they die.)

The Prime Minister, although head of the Government and an MP, is now not usually the Leader of the House of Commons. The Leader of the House of Commons, a member of the Government, is the chief spokesman for the majority party on matters of the internal operation of the House of Commons. The Office of the Leader issues announcements of the impending House of Commons schedule, and a routine inquiry from the Opposition's counterpart serves as an occasion for the Leader to announce the business for the next two weeks of session.

In the House of Commons, party organizations (akin to the Republican Conference or Democratic Caucus) meet regularly to discuss policy, and to provide an opportunity for backbench party members to voice their views to ministers or shadow cabinet members in a private forum.

**The Position of Speaker of the House of Commons and its Comparison with the Indian and American Speaker**

### Features of British Speaker

- The position of the Speaker is a position of great prestige and dignity. In UK, there is a convention that once a Speaker, always a Speaker. It means that a Speaker's constituency is unchallenged. Once a person is appointed as a Speaker he/she gives formal resignation from his/her political parties. He/She has a casting vote and ultimate disciplinary powers with respect to the conduct of the House and MPs.

### US Speaker (Speaker of House of Representatives)

- He/She is expected to be a party man, not expected to be neutral; instead he/she favours his party. He/She does not have final disciplinary powers, which lie with the House itself. In USA, the Speaker can vote in the beginning.

### Speaker of Lok Sabha in India

Though the position of Speaker of Lok Sabha in India is midway between the British and the US model, it is theoretically closer to the British model. But similar conventions do not exist. For instance:

- It is not necessary for the Speaker to resign from his party
- If he/she decides to resign, he/she will not be disqualified under the Anti-defection law.
- There is no convention in India that he/she will be elected uncontested.

### 2.2.3. Judiciary

Under the doctrine of Parliamentary sovereignty, the judiciary lacks the intrinsic power to strike down an Act of Parliament. However, the subordination of common law to statute law does not mean the subordination of the judiciary to the executive. Courts in Britain retain certain powers:

- Of interpreting the precise meaning of a statute.
- Of reviewing the actions of ministers and other public officials by applying the doctrine of *ultra vires* (beyond powers).
- Of applying the concept of natural justice to the actions of ministers and others.

Because the Parliament is sovereign, the government can seek to overturn the decisions of the courts by passing amendment legislation. The power of judicial review provides the judiciary with a potentially significant role in the policy process.

In recent decades, there has been an upsurge in judicial activism for several reasons:

- Judges have been more willing to review and quash ministerial action,
- British membership of the EU,
- The incorporation of the ECHR (European Convention on Human Rights) into domestic law,
- Devolution of powers to elected assemblies in Scotland, Wales and Northern Ireland,
- The creation of a Supreme Court in 2009.

### Comparison between the Indian and British Judiciary

#### Similarities

- The actions of Executive can be declared *ultra vires* in both the systems.
- The judiciary is considered the highest interpreter of the Constitution.
- Off late, there has been a spurge in judicial activism in Britain and judiciary is becoming more and more active. A similar evolution of judiciary has been noticeable in the Indian case too.

**Differences**

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- In case of British system, the lack of concept of 'Basic Structure' makes amending power of the Parliament supersede any judicial pronouncement. Whereas, in case of the Indian Judiciary system, the concept of 'Basic Structure' has provided a potent tool to Judiciary by which it can scuttle down any Executive or Legislative action, which it deems as against the basic spirit of the Constitution.
- British legal system is completely based on 'Common Law System'. Common Law System implies that law is developed by the judges through their decisions, orders, or judgments (also referred to as precedents). However, unlike the British system, which is entirely based on the Common Law System, where it had originated from, the Indian system incorporates the Common Law System along with the statutory and regulatory laws.

**Note:** By Constitutional Reform Act, 2005 the Supreme Court has come into existence as the highest Court of Appeal. A National Judicial Appointment Commission has also been introduced.

Brief Synopsis of comparison drawn above:

**British Constitution:**

- Product of history and the result of evolution,
- There is a difference between theory and practice,
- Flexible and unitary constitution,
- Parliamentary government,
- Rule of law and civil liberties applicable.

Indian Constitution	British Constitution
Written	Unwritten
Federal	Unitary
Power is divided between Centre and states	Power is with the Centre
No Monarchy/Republic	Has King/Queen

**Comparison between British Monarch and Indian President**

British Monarch	Indian President
Position of the King is hereditary	Elected
King enjoys absolute immunity; it's said that King can do no wrong	In India the President can be impeached for violation of the Constitution
King has no discretionary powers. He/She is known as 'Golden Zero'	<p>In India, there was a lack of clarity w.r.t. the Indian President. There was confusion whether he/she has any discretionary power or is merely a rubber stamp.</p> <ul style="list-style-type: none"> <li>24<sup>th</sup> Amendment clarifies that he/she doesn't have any discretionary powers. Real power lies with the PM, while the President is merely a 'rubber stamp'.</li> <li>44<sup>th</sup> Amendment Act again changed the stand, providing some scope for Presidential discretion. He/She could now send the request back to the CoM, though only once.</li> </ul>

**Comparison between British Monarch and the US President**

British Monarch	US President
King as titular head	US President is both – a real as well as titular head.
Hereditary	Elected and can be impeached
No discretionary powers	Real executive powers, subject to checks and balances.

### 3. Constitution of the United States of America

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#### 3.1. Salient Features

While the American Constitution is the shortest (of any major government in the world) and the first written constitution, India's Constitution is the lengthiest written constitution in the World.

The American Constitution is a very rigid constitution consisting of only Seven Articles and twenty-seven amendments, so far. Originally, the India Constitution consisted of 395 Articles in 22 Parts, with 8 Schedules. As of January 2020, it consists of 470 articles in 25 parts, 12 schedules, and 5 appendices.

The US Constitution was finalized in a convention held on September 17, 1787, which required its ratification by a minimum of nine States, for it to be enforced. By the end of July 1788, eleven States had ratified it and the Constitution was put into operation on 13th September 1788. The Indian Constitution, on the other hand, was adopted by her Constituent Assembly on 26<sup>th</sup> November 1949, and came into effect on 26<sup>th</sup> January 1950.

America has adopted the doctrine of dual ship in respect of its Constitution and citizenship. It has two Constitutions, one, for America as whole and another for each State. American people have two citizenships, one of USA and another of their respective State. On the other hand, India has one constitution and concept of single citizenship for every citizen of the country.

##### 3.1.1. Nature of the Constitution

The American Constitution is described as a truly Federal Constitution. It was ratified by 50 Independent States. Further, the Federal Government and States have their own Constitutions and do not interfere in each other's functions.

On the other hand, India has only one Constitution, wherein the Central government interferes with functions of State governments in the form of, *inter alia*:

- Appointment of Governors,
- Governor having the power of reserving the States' bills for consent of the President,
- Central government's power to impose President's rule in the States etc.

##### 3.1.2. Nature of Federalism

While the USA is a Dual Federation, India is a Cooperative Federation.

<b>Dual Federation (USA)</b> – both the Centre and state are completely independent. They are complete governments	<b>Cooperative Federation (India)</b> – Interdependence of Centre and state govt. Neither of them is independent of the other. Centre usually has the role of big brother
Centrifugal federalism	Centripetal federalism
Symmetrical federalism – all states are given equal representation in Senate	Asymmetrical federalism – 1. States have been given representation in Rajya Sabha on the basis of their population. 2. Articles 370, 371 provide special provisions to few states.
USA is a Legislative federation. This means that States have dominance in law making.	India is an Executive federation. This means that states are important at the executive level only.
USA is an indestructible union of indestructible states	India is an indestructible union of destructible states
USA constitution provides a role to states in ratifying the international treaties through the Senate	There is no such provision for states in the Indian Constitution

### 3.1.3. Form of Government

#### USA

- America has adopted a Presidential form of government, in which the people directly elect the executive President.
- The President is powerful and not accountable to the House of Congress.
- The term of the American President is 4 years (fixed term).
- One can hold the office of the President for only two terms.
- The President can appoint his own staff, which may be neither from the House of Representative or Senate, in assisting in the administration of the government. The staff is not accountable to the Houses of Congress.

This means that the President is independent in the administration of the government and rather directly responsible to the people of USA.

#### India

- India has adopted a Parliamentary form of government.
- The President of India is the executive head of the Indian government. He is indirectly elected by the legislators of Centre and states, and is not accountable to the Parliament.
- The President runs the government with the aid and advice of the Prime Minister and the Council of Ministers.
- Unlike USA, the Indian President holds the office for five years.
- He can be elected any number of times.

The impeachment of the President by the legislature is the only similarity in both the Constitutions.

## 3.2. President

The position of the American President combines both the Head of State and the Head of Government into one.

### 3.2.1. Qualification

Only a natural born citizen of USA can become the President, and not a person who has acquired the citizenship. Also, he must have attained the age of 35 years and must have stayed in USA for at least 14 years.

On the other hand, the Indian President should be a citizen of India, wherein citizenship might be either natural or acquired.

### 3.2.2. Election of the President

Presidential election is indirect, through Electoral College.

#### Electoral College

- Strength of Electoral College = Total members in House of Representatives + Senate + 3 members from Washington D.C. =  $435 + 100 + 3 = 538$
- Winning Candidate requires an absolute majority ( $50\% + 1$ ) of the total members of the Electoral College, i.e. 270.

In the House of Representatives, members from different states are not fixed, while in Senate members from different states are equal and fixed.

#### Election of Electors

- The voters vote for the members of the Electoral College
- System of election is the List System

- Each state has a responsibility to conduct these elections
- The party that wins the majority of the votes represents the state in entirety
- Electors meet in their respective capital and vote for the Presidential candidate

### 3.2.3. Functions of the President of USA

#### Executive Functions

- Appointments
- Representing the country
- Preparation of the Budget

#### Legislative Functions

- No presence in legislature
- The President doesn't address the legislature
- He cannot dissolve the legislature
- He can send messages to the legislature (the system of sending messages exists in USA because there is Separation of Power. So this is the way that the President can interact. The system of sending messages is found in India also, but the logic of the provision is not clear because the President has no discretionary power and he has to act on the advice of the P.M.)

#### Veto Power

Under the Constitution, the President may respond to a bill passed by the Congress in one of the three ways. He may sign it, veto the bill by returning it to Congress, or do nothing. If he does nothing, the bill becomes a law after the passage of ten days, excluding Sundays. However, if the Congress adjourns sooner than ten days, the bill dies, under the “**pocket veto**” provision. If the President vetoes a bill, the Congress can still enact it into a law bypassing the measure again with two-thirds majority in both the houses. This is known as “**qualified veto**”.

### 3.2.4. Legislative Proposals

The Constitution also authorizes the President to “recommend to Congress’ consideration such measures as he shall judge necessary and expedient.” Unlike the veto, which is a limited and somewhat negative instrument for stopping legislation, the duty to recommend legislation has over time become the primary mechanism, by which the nation’s political agenda is influenced.

#### Indian President

- In India, the President has the power to send back a bill to the Parliament for reconsideration. But, when the Parliament has reconsidered the bill and then passes it with the required majority, the President has no option but to sign the bill.
- Practically, the Prime Minister and his Cabinet almost always enjoy a simple majority, except in a coalition government. So, it does not pose a major hurdle for the Prime Minister and his cabinet to get the consent of the President for the bill.

However, a significant departure from the US Presidential Scheme of things is that unlike the US, the Indian Constitution does not prescribe any time limit for signing the bill by President. Therefore, he can keep the bill without signing it for an indefinite period under the guise of consideration, which can frustrate the Prime Minister and his cabinet. Obviously, this leads us to the question whether the Indian President’s pocket veto is more powerful than the US President’s pocket veto.

### 3.2.5. Date of Retirement and Oath

#### US

- A unique feature of the US Constitution is that it has prescribed the date and timing of retirement of the outgoing President as well as members of the Congress.
- The terms of President and Vice President shall end at noon on the 20<sup>th</sup> day of January.
- It means that the new President and Vice President shall take oath of the office on 20<sup>th</sup> January (or 21<sup>st</sup> January, if 20<sup>th</sup> is a Sunday) at noon of their first year of office.
- The election of the President and Vice president are held in the month of November and in the same month results are announced.

Thus, Americans are informed much earlier about their new President.

Naturally, the question is how this time schedule is maintained. In case of President's death, resignation, or impeachment, the Vice President shall become the President for the remaining period. In this way, duration of the President is kept intact and the next elected President takes oath on the scheduled date.

#### India

- In India, if the President dies or is impeached, or submits resignation, the Vice President becomes the President until fresh elections are held. The newly elected President holds the office for a full term of five years.
- Hence, unlike the American system the time schedule cannot be maintained, in the case of India.

### 3.2.6. Impeachment of the President of USA

- **Reasons:** Treason, Bribery, High Crimes of Misdemeanor. No system of impeachment for violation of the Constitution, unlike the Indian Constitution
- **Process of impeachment**
  - Charges will be leveled against the President in the House of Representatives.
  - It has to be passed by 2/3<sup>rd</sup> majority by the House of Representatives.
  - Senate will be the investigating house.
  - In this process, the Chief Justice of the Supreme Court of USA will be the presiding officer.
  - If convicted, he can be removed only when 2/3<sup>rd</sup> members of the Senate pass a resolution in this context.

## 3.3. Vice President

### 3.3.1. Election of Vice President

The qualification for the President and the Vice President is the same. Since the elections take place simultaneously, the process of elections is also the same.

**Earlier Method:** The candidate coming first used to be declared as the President and second as the Vice President.

**Present Method:** Separate elections, but at the same time and in the same manner.

### 3.3.2. Tenure of a Vice President as a President

A Vice President may become a President because of vacancy in the office of the President. There are two situations:

- If the Vice President has come to the office when the President has already served the office for more than two years. Then the Vice President can be President for the remaining term and in addition for two more terms he can serve as a President

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- If the Vice President came to the office when the remaining term of the outgoing President was more than two years, then he will be eligible for only one more term

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## 3.3.3. Functions of the Vice President of USA

- Ex-officio chairperson of Senate and has casting vote
- The office of the Indian Vice President is modeled on the US office, with some differences
- The office of Vice President is called as **His Superfluous Highness**

## 3.4. US Legislature/US Congress

It consists of two houses: House of Representatives and the Senate.

### 3.4.1. House of Representatives

- One of the weakest lower house in the world
- It consists of 435 members
- System of direct elections
- Representation of people may differ in number from different states

### 3.4.2. SENATE

- Permanent body
- Strongest upper house in the world
- It has equal powers in ordinary bills, amendment bills and money bills.
- Term of a Senator is six years.  $\frac{1}{3}$ rd of the members/Senators retire every two years.

## 3.5. Committee System in USA

USA has the strongest committee system in the world. It is said that the US Congress works in the Committees.

### **Difference from British and Indian System:**

- In Britain and India, a bill is introduced in the House and the first reading takes place and then it is referred to the Committee
- In USA, a bill is introduced and then directly referred to the Committee, before even the first reading

**Pigeon Hole:** A bill in USA may get killed at the Committee stage itself. This is known as Pigeon Holing the bill.

## 3.6. Duration of Representative Bodies at the Centre

### 3.6.1. US

- America's House of Representative and Senate are permanent bodies.
- The terms of the members of the Representative and Senate come to an end on 3<sup>rd</sup>January.

### 3.6.2. India

- In India, during an emergency, the duration of Lok Sabha can be extended by one year, or can be shortened by holding pre-matured elections.
- The ruling party forms opinion based on their party's prospects in the next election. It may recommend for the dissolution of Lok Sabha and suggest the President to hold the election at an appropriate time, which may be based on political expediency.

## 3.7. Doctrine of Separation of Power and the System of Checks and Balances

The theory of Separation of Powers started with John Locke and became popular with Montesquieu (18<sup>th</sup> century philosophers).

## Why Separation of Powers/Functions?

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- According to Montesquieu – liberty is not protected, unless there is Separation of Power.
- Separation of Power with judiciary is a universal feature in all democracies.
- The Presidential system provides Separation of Power w.r.t. all three organs of the government, whereas in the Parliamentary system there is a fusion of legislative and executive powers.

Note: For details about the Separation of Power and the System of Checks and Balances, kindly refer to the separate document on the same topic

### 3.7.1. US

- The US Constitution strictly adheres to the doctrine of Separation of Power proposed by Locke and Montesquieu. Separation of Power is complete in US.
- All the three branches of the government have separate functions.
- The term of Legislature and Executive are fixed and do not depend on each other.
- None of the member of the Legislature can be a member of the Executive.
- The Houses of Congress enact the law; the President executes the law; and the Supreme Court interprets the law.
- The American President has no privilege of law making power. Moreover, he is neither a member of the House of Representative nor that of Senate.
- By confirming veto power but equally not confirming the law-making power to the President, the Congress controls the Presidents and vice versa. In this way, 'Checks and Balance' are maintained.

### 3.7.2. India

- Theoretically, we may say that the doctrine of Separation of Power is adopted in our Constitution, but it is only between the Executive and Judiciary.
- The President is a part of the Union Executive. Yet, it is the Prime Minister and the Council Ministers who are the real executive because the President has to act on the aid and advice of the Council of Ministers.
- They have dual capacity:
  - One, in capacity of executive; and
  - Two, in the capacity of lawmaker.
- The Prime Minister, in his capacity as the leader of the ruling party can enact a law, which his administration executes. Thus, the Prime Minister and his Council Ministers enact the law and the administration executes the same, which is per se, contradictory to the doctrine of Separation of Power.

### 3.7.3. Checks and Balances

No organ of the government can be given complete liberty. Hence there have to be checks and balances.

How are checks and balances achieved in the US Constitution?

- Judiciary checks on other branches of the government, by judicial review of the executive as well as legislative acts.
- How Congress checks the President or powers of the President?
  - It is necessary to ratify the international agreements and higher appointments
  - Principle of no taxation without representation
  - Impeachment of the President
- How President checks the Congress?
  - By the use of veto powers (Congress can pass a bill against Presidential veto with 2/3<sup>rd</sup> majority. So the President doesn't have absolute veto.

- Pocket Veto: Two situations arise –
  - Congress in session for ten days: Bill can be passed even without the assent of the President
  - Congress in session for less than ten days: Bill will lapse.
- President and Congress applying checks on Judiciary
  - Appointment of Judges: appointed by the President and ratified by the Senate
  - Removal of Judges: removed through impeachment by the Congress and approved by the President
  - Salaries and emoluments controlled by the President

### 3.8. Fundamental Rights

While US has incorporated the “Bill of Rights”, India has incorporated “Fundamental Rights” in its Constitution.

However, the American Constitution has provided additional human rights, which are not to be explicitly found in the Indian Constitution.

- Freedom of press is explicitly provided under the 1st amendment of the US Constitution, while in India it is implicitly read under the Article 19[1][a], freedom of speech and expression.

Petition to the Supreme Court is a fundamental right in India, where as in US it is the government that is petitioned (In case of US, the word “government” has a wider connotation and encompasses not only the executive, but also the higher judiciary).

- The Americans have a right to keep arms and guns for the protection of their life and property. This was provided under the 2<sup>nd</sup> Amendment.

Therefore, guns and arms are sold like any other commodity in US without legal hassles, whereas in India it is a total contrast, because apart from not being a fundamental right, it is a highly regulated legal right.

5<sup>th</sup> Amendment to the US Constitution guarantees that an accused will be tried for criminal offence with a system of “Grand Jury”. Grand Jury means that common people are selected by the government randomly, representing the community. They play a part in deciding the guilt of the accused persons. The number of persons selected to be in the grand jury varies from 6 to 12, or even more, if the case is controversial.

On the other hand, in India criminal trials are adjudicated by the Judges only.

- Further, in US, no person’s life and liberty shall be deprived without “due process” of law.
  - Due process means that the content and procedure of law must be just, fair, and equitable, which will be decided by the judiciary.
  - Legislative power of depriving a person’s liberty is restricted and scrutinized and evaluated by the judiciary.
- In India, a person’s life and liberty shall be deprived according to the “procedure established by law”.
  - The word “procedure established by law” gives wide discretionary power to the legislature to restrict the liberty.
  - Nevertheless, the Supreme Court in Maneka Gandhi case (even though the court did not use the word due process) held that the procedure established by law must be fair, just and equitable.
- The Indian Parliament deleted the Right to Property from the list of Fundamental Rights in 1978. Whereas, in US, the right to property is still a fundamental right and no property shall be acquired without just compensation.

- A person accused of crime enjoys certain explicit rights under the 6<sup>th</sup> Amendment to the US Constitution: speedy and public trial, notice of accusation, compulsory process of obtaining witness in his favor and assistance of legal counsel of his choice.
  - All these rights in India are not expressly mentioned in the Constitution. Nonetheless, these rights are provided by the Supreme Court by broadly interpreting the Right to Life and Liberty under Article 21.
- Further, the 8<sup>th</sup> amendment to the US Constitution says that bail shall not be denied to an accused, the imposed fine should not be excessive and inflicted punishment shall not be cruel. These rights are also made available to Indian people because of well-established precedents pronounced by the Supreme Court under Article 21.
- 9<sup>th</sup> amendment to the US Constitution is quite important because it says that mere enumeration of certain rights in the Constitution shall not be interpreted to deny the other rights retained by the American people. In spite of the statutory rights in the Constitution people enjoy other rights, which are given by nature. The American Constitution is highly influenced by Locke's philosophy of inalienable natural rights of human being. The Indian Constitution, on the other hand, does not contain any such notable Article. Therefore, Indians enjoy only those rights recognized by the Constitution, which are based on the philosophy of Austin and Bentham's theory of law.

## 3.9. Distribution of Legislative Power

### 3.9.1. India

Seventh Schedule of the Indian Constitution distributes the legislative power between the Central and State governments. The Central and State governments have exclusive power to make laws on 98 and 59 subjects, listed in the Union and State list respectively. On the 52 matters of Concurrent list both the Centre and State can make laws. In case of conflicting laws, law of the Centre would prevail.

97<sup>th</sup> subject in the Union list says that any subject, which does not belong to any other list would automatically confer power to the Parliament to make a law regarding that subject. Thus, our constitution makers have created stronger Central and weaker State governments, which depend on the Central government for the financial assistance.

### 3.9.2. US

It is quite contrary in the case of US, where no elaborate mechanism is provided. Few expressly mentioned subjects are with the federal and rest of the matters with State governments.

## 3.10. Emergency and Suspension of Writs

In India, an emergency can be declared on the ground of War and Armed Rebellion. During such emergency all fundamental rights except the right to life can be suspended. The American Constitution does not use the phrase of emergency but says that in case of Rebellion and Invasion of Public Safety, the writ of Habeas Corpus can be suspended.

## 3.11. Judiciary

There is no qualification mentioned for the appointment of judges of the Supreme Court. In America, the President has the final say in the appointment of Supreme Court Judges. He suggests the names of judges to the Senate and on the advice and consent of the Senate, judges are appointed by the President. The Judicial Committee of Senate plays a very significant role in evaluating the credentials of the proposed judges of the Supreme Court. They make the investigation of the background of judges, they hold a face-to-face interaction with the judges, the judges are quizzed and grilled and questions are put. The whole process happens in public and in a transparent manner. If a citizen of the US has any information about judges' integrity,

he can send that information, with evidence, to the Senate Judicial Committee, which further investigates to ensure that no unworthy candidate is appointed as a Judge to the Supreme Court. In the appointment of Judges the people of US also participate and the judiciary of US has no role to play in the appointment of judges. The entire process of appointment of judges is crystal clear.

There is no fixed tenure of the judges. However, if they are retiring at the age of 70 years, they will get salary and perks as a working judge.

India, on the other hand, has the collegium system of appointment and transfer of judges of the higher judiciary. While, the collegium system has been criticized on the grounds that it is non-transparent, the National Judicial Appointments Commission (NJAC) Act passed by the Parliament to change the collegium system was struck down by the judiciary as unconstitutional.

### 3.12. Amendment of the Constitution

There are two ways to amend the Constitution:

- Proposed by the Congress and ratified by the States
  - Amendment to be passed by 2/3<sup>rd</sup> majority in both the Houses
  - To be ratified by the State Legislatures of at least 3/4<sup>th</sup> of the States
- Proposed by States and ratified by the States
  - 2/3<sup>rd</sup> of the States should pass a resolution to this effect
  - They will communicate to the Congress. The Congress will call the convention.
  - In the convention, it has to be ratified by 3/4<sup>th</sup> of the States

In case of India, the amendment process is easy and flexible as compared to the US. In India, it is only the Parliament that can propose an amendment to the Constitution and States do not have any role to play in this matter. While some of the Articles can be amended by a simple majority, special majority is required for others, and in some limited Articles, ratification by more than half of the States is also required. Majority here means majority of the Members of the Parliament present on the date of the amendment, and is not related to the total strength of the Parliament.

The fact that the US Constitution got amended only 27 times in the last 225 years, shows how rigid it is to amend the US Constitution, in contrast to the Indian Constitution.

## 4. Chinese Constitution

China is a socialist country. There is supremacy of socialist ideology in China. The Chinese Constitution accepts the leadership of the Communist Party of China (CPC).

Communist Party of China (CPC) is the largest political party in the world, having millions of local level members. It works on the principle of Democratic Centralism. The full meeting of the party is called as National Party Congress (NPC), which is convened once in five years. Though theoretically all power lies with the people, but in practice, it is with the top leaders.

NPC members select the members of the Central Committee. The Central Committee selects the Polit Bureau (around 200 members). The Polit Bureau selects the Standing Committee of the Polit Bureau (at present 24 members; the most powerful members of the party).

### 4.1. Salient Features of the Constitution

#### 4.1.1. Preamble

The paramount position of Marxism, Leninism and Mao's teachings has been acknowledged in relation to ideological goals of the political system. Traditional principle of Democratic Centralism has also been given due place within the Constitutional setup. The old definition of

China as a “Dictatorship of the Proletariat” has been replaced with “People’s Democratic Dictatorship.”

The Preamble clearly recognizes Taiwan as an integral part of China and its liberation is declared as a liability of Chinese People. Five points have been set as the underlying principles to be observed in the field of foreign relations. These include:

- a) Respect and Preservation of the territorial integrity of all nations
- b) Avoidance of aggression
- c) Non-interference in the internal affairs of other countries
- d) Promotion of international cooperation
- e) Peaceful coexistence

#### **4.1.2. Nature of Constitution**

It has close affinity in letter and spirit, with the constitution of the former Soviet Union. It is neither too rigid nor too flexible.

#### **4.1.3. Basic Principles**

Under the Constitution, People’s Republic of China is a Socialist State established in the name of People’s Democratic dictatorship, wherein Communist Party performs a leadership role to guide the people. People are declared as fountain of power and authority and they will exercise it through National People’s Congress.

#### **4.1.4. Unitary System**

The People's Republic of China is a unitary multi-national state created jointly by the people of all its nationalities.

In China, a strong central government exists while regional governments, as distinct entities, have not been created under the Constitution. Therefore, In order to encourage people's participation in policy-making and preserve their interest in public affairs, decentralization has been introduced in the governmental affairs. The central government has delegated much authority and powers to the regional and local administrative units.

#### **4.1.5. Democratic Centralism**

Like the political system of former Soviet Union, the principle of “Democratic Centralism” prevails in People’s Republic of China as well. Keeping in view democratic norms, elective principle has been introduced at all levels not only within the governmental institutions but also within the Party organization. All the citizens have been secured the right to vote on the basis of adult suffrage.

#### **4.1.6. One Party System**

- The Communist Party enjoys almost dictatorial powers within the constitutional framework and has been regarded as the sole source of political authority for all practical purposes.
- Party organization runs parallel to that of the governmental institutions. Party elite hold all top-notch positions in the government.
- In practice, no other political party enjoys real freedom to act.
  - Certain youth organizations, loyal to the party and working groups affiliated with the Party, enjoy the right to participate in decision-making.

#### **4.1.7. Legislature**

- The **National People’s Congress (NPC)** comprises the legislative branch.
- It is a unicameral legislature with more than 3000 members.
- Theoretically, it is the top decision making body in China. It has the ultimate say on policies, amendments and appointment of ministers in the government.

- It has been declared as an organ through which the people exercise state power.
- Congressmen are elected by regional Congresses, by autonomous regions, by Municipalities working under the central government and by People's Liberation Army, each according to its quota.
- The mode of election is based on secret ballot, while the constitution guarantees holding of free and fair elections.
- The real work of NPC is done by a smaller body known as Standing Committee of NPC, consisting around 150 members.

#### **Duration**

The Congressmen are elected for a period of five years but the Congress can be dissolved before the expiry of its term and it can be extended as well. The Standing Committee of the Congress is responsible for making proper arrangements for holding fresh elections prior to the completion of its term.

#### **Sessions**

Sessions of the Congress are held once a year in Beijing. The Standing Committee of the Congress normally summons its session. In addition to it, the Chairman of the Congress can also summon the session on the request of one fifth of its members.

#### **Powers**

The National People's Congress (NPC) is the supreme law-making body, which is fully authorized to enact laws, alter or repeal the existing ones. It also approves the administrative policy for the state.

##### **1. Enactment of Laws**

During its sessions, the Congress enacts new laws and makes necessary alterations in the existing ones, if circumstances so demand. The Constitution can be amended with the support of two-thirds majority of the members of the Congress, whereas ordinary laws are enacted by a simple majority. It is to be noted, that the acts of the Congress cannot be challenged in the Supreme Court.

##### **2. Executive Powers**

National People's Congress is also empowered under the Constitution, to supervise the execution of constitutional laws and statutes. It can affect and control administrative policies through its choice regarding the appointment of superior public officials. All the administrative departments along with their ministers in charge are accountable to the Congress in respect of performing their official functions. Congress also exercises the power to approve National Economic Policy and the annual budget. Congress is fully authorized under the constitution to exercise all such powers as it thinks expedient and necessary within its sphere of action.

##### **3. Elective functions**

NPC holds a pivotal position within governmental structure by virtue of its power to elect the top-notch occupants of the governmental authority. Under the Constitution, it also elects the President and Vice President of the Republic and appoints Premier of the State Council on the recommendation of the President. On the advice of the Premier, it also appoints other ministers. Congress is also empowered to remove the ministers. It also exercises the power to appoint or remove the President of the Supreme Court and Chief Procurator of the Supreme Procurate.

Though the NPC is fully authorized by the Constitution to exercise all the foregoing powers, in practice, it is not an active body. Rather its position, as a free law-making body is merely in theory. Major reasons being:

- Its sessions are rarely held on a regular basis.
  - It meets only once a year, that too for not more than a few days.
- The powers of Congress are virtually exercised by its Standing Committee.

## Standing Committee

The Standing Committee of the Congress is an effective and active body, as it exercises, in practice, most of the Congressional powers. It is outwardly a body subordinate to the Congress, as a matter of principle. It is accountable to the parent body and is bound to present regular reports of its working. All the members of the Committee are elected by the Congress and liable to be removed on its discretion.

### Powers

1. The Committee summons the sessions of the Congress, in addition to the issuance of orders to hold its fresh elections.
2. It performs the function of interpreting the statutes as well as the laws of the Constitution. The performance of this judicial type of function enhances its importance and the scope of power.
3. It supervises the functioning of the State Council, of superior courts and that of Procurator. These functions have been assigned to the Standing Committee by the Constitution.
4. The Committee has the authority to alter or repeal any inappropriate decision of the official departments, autonomous regions, provinces and that of the Municipalities working under the Central government.
5. It is actually the repository of real powers during the interval in which the Congress is out of session. During this period, it wields the authority to issue orders regarding the appointment of new ministers and removal of the previous ones, on the advice of the Premier. It can issue orders for the appointment or removal of the Vice President as well as the Deputy Chief Procurator.

### Chairman

The Chairman of the Committee has been regarded as the most powerful person in the political setup. He presides over the meetings of the Standing Committee. He has also been endowed with the power to issue decrees and promulgate ordinances. His list of duties include:

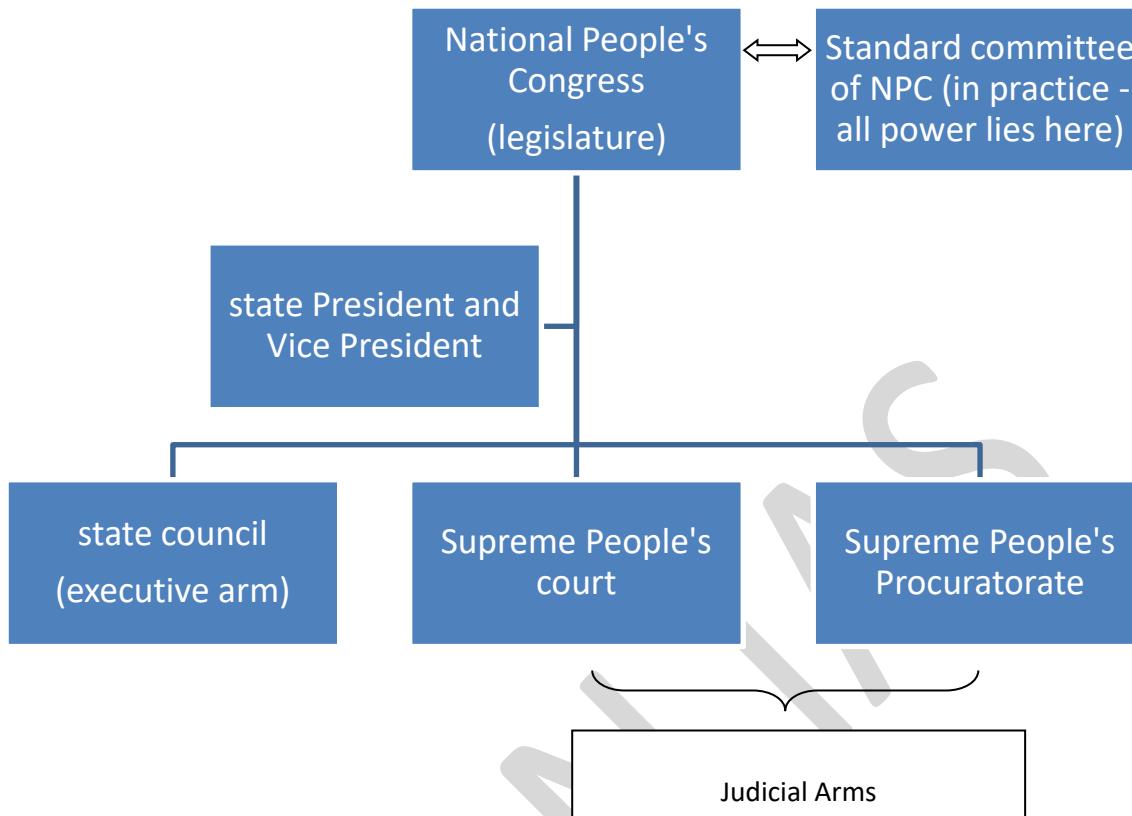
- To receive the diplomatic envoys of other countries;
- Ratification of the treaties made with other countries; and
- Appointment of the members of diplomatic corps assigned to other countries.

### Other Committees

The People's Congress forms a number of Committees during its term, such as National Committee on fiscal and economic affairs, Committee on education, science, culture and health issues, Committee on foreign affairs, Committee on matters relating to Chinese settled abroad. All these committees work under the supervision of the Standing Committee of National People's Congress during the period the latter is not in session.

Keeping in view the aforesaid functions and powers of the Standing Committee, it is apparent that it is a powerful and effective body. As the Congressional annual session lasts a few days only, its powers are virtually exercised by the Standing Committee for the remaining period the parent body is not in session. The Committee's members, being the members of the Chinese Communist Party, perform important role in administrative affairs as well.

An overview of the structure of legislative and executive arm of the government is given below:



#### 4.1.8. Executive

##### State Council

The State Council is the Cabinet or Executive of China. It is headed by the Premier, four Vice Premiers and State Councillors. Under the Constitution, State Council is the chief executive organ of the government. All its members are elected by the Congress and accountable to it. Enforcement of law, formation and execution of the administrative policy is the major function of the Council. The members of the State Council introduce the bills on the floor of the Congress in the form of proposals and later manage to get these translated into law on parliamentary lines.

##### Premier

The Premier performs a very important role as head of the administration and holds a pivotal position within the administrative set up.

##### President

- The President of the Republic is regarded as head of the state.
- He is elected by the Congress for a period of five years.
- The President enjoys the most prestigious position in the administrative setup.

Under the country's constitution, the presidency is a largely ceremonial office with limited powers. However, since 1993, as a matter of convention, the presidency has been held simultaneously by General Secretary of Communist Party of China and also the president will be automatically head of the military. The office is officially regarded as an institution of the state rather than an administrative post. Theoretically, the President serves at the pleasure of the National People's Congress, and is not legally vested to take executive action on its own prerogative.

The President has the power to promulgate laws, select and dismiss Premier as well as ministers of the State Council, grant presidential pardons, declare a state of emergency, issue mass mobilization orders, and issue state honors. In addition, President names and dismisses ambassadors to foreign countries, signs and annuls treaties with foreign entities. According to the Constitution, all of these powers require the approval or confirmation of the National People's Congress.

The President must be a Chinese citizen with full electoral rights who has reached the age of 45. Until 2018, President and Vice-President had two term limit. National People's Congress in March, 2018 passed a constitutional amendment removing presidential term limits, allowing the current president and vice-president to remain in office indefinitely. The limit of two five-year presidential terms was written into China's constitution after Mao Zedong's death in 1976. The system was enacted by Deng Xiaoping, who recognized the dangers of one-man rule and the cult of personality and instead espoused collective leadership. This constitutional revision also enshrines current President Xi Jinping's ideology as "Xi Jinping thought" alongside "scientific development" theory of his predecessor Hu Jintao.

#### 4.1.9. Judiciary

China has a committed Judiciary, i.e. committed to the goal of Socialism. The highest organ is the Supreme People's Court. China also has a Court of Procuratorates – it deals with corruption cases of officials.

Chinese law has never been codified in a systematic form. Most of the disputes and controversies are settled in quasi-judicial institutions. The Chinese judicial system has been held together more by conventions, rather than by laws.

#### 4.1.10. Central Military Commission

- The party and the government maintain control on the military through the Central Military Commission
- Military is also described as the defenders of the Communist Party.

#### 4.1.11. Rights and Duties

##### Rights

- The Chinese Constitution gives Fundamental Rights and prescribes certain duties for its citizens.
- All citizens at least 18 years of age are secured the right to vote. They also enjoy the right to contest elections. Right to secrecy of all correspondence, freedom of speech and expression, freedom to join or form associations, and right to hold public meetings even to the extent of staging demonstration or resorting to strike for articulation of demands, have been secured under the Constitution.
- According to the constitution, the government is under obligation to afford full protection to the preservation of family life in addition to the integrity of a person. All citizens have the right to personal security against illegal detention. The constitution also recognizes equal right of all citizens to education and cultural freedom. Equality of men and women has also been recognized in all areas of life.

##### Duties

The Chinese constitution explicitly prescribes certain duties of the citizens, which are justiciable. It is the first and foremost duty of the citizens to cooperate with the Socialist leadership in every respect, abide by the Constitution and all other state laws. They are required to protect public property and extend a helping hand in the maintenance of law and order. To defend the country against foreign aggression is also another duty of the citizens.

#### **4.1.12. Communist Party of China**

Student Notes:2021

The Chinese Communist Party came into being in 1921. Lenin sent one representative to China to assist in organizing the newly established party. Cheng Tu-hisu was appointed as the first Secretary General of the Chinese Communist Party and within a short period many branches of the Party were established in the towns and cities.

##### **Ideological Foundations**

Ideology of the Chinese Communist Party had been shaped by the teachings of Marx and Lenin right from its inception. It developed a deep linkage with the global Communist Movement in its early phase. Mao also played a pivotal role in the socialist struggle of the Chinese People.

##### **Party Organization**

The party operates on the principle of Democratic Centralism. Accordingly all office bearers of the Party are elected. Primary unit of the Party elects District Congress while District Congress elects the deputies of the Congress of the upper level.

Party members enjoy right to criticize party leadership and may initiate proposals for framing party policies. On the same pattern, primary party branches may lodge complaints for the consideration of higher leadership.

On the other hand, strict party discipline is maintained and strong centralism operates in the decision-making process. It is obligatory on the lower ranked party members to abide by the decisions of the higher ranked party leadership. In practice, most of the decisions are thrust upon by the higher ranks within the central leadership.

##### **Politburo**

The Politburo has been regarded as the most powerful body in the decision-making process, as it makes all-important decisions; so much so that it summons the sessions of the Central Committee. It also has a Standing Committee consisting of seven members. Like its counterpart within the government, the Standing Committee of the Politburo exercises all the powers of the Central Committee when the latter is not in session.

##### **National Congress of the Communist Party of Congress**

National Congress of the Communist Party of Congress holds a pivotal position in the policy-making of the Party. Members of the Congress numbering in thousands with no fixed size are elected by the respective regional and local party congresses for a period of five years.

##### **Central Committee**

The National Congress of the Communist Party of Congress holds its sessions for a few days, once every five years. The Central Executive Committee, comprising limited membership, exercises the power of the Congress when the latter is not in session. The powers of the Central Executive Committee are also exercised in practice, by its Politburo, as the former rarely holds its meetings. The Central Committee elects the members of its Politburo, as well as its Chairman and Vice Chairman.

##### **Other Parties and Groups**

Single party system, on the lines of Soviet Union, has not been adopted in the People's Republic of China; rather such smaller parties, as Kumintang Revolutionary Committee, Democratic League, National Construction Association and various Youth Organizations are allowed to function. Hence, China is a multi-national and multi-party country. In China, the term democratic parties refer to the eight other parties apart from the Chinese Communist Party. These have developed cooperation with the Chinese Communist Party on different levels, since the inception of the new order.

But, the Communist Party enjoys political monopoly in China, while other parties have merely de jure existence. Party Organization runs parallel to that of the government. A person holding

important position as a public official is also assigned office within the Party. The Central leadership of the Party is mainly responsible for chalking out government policies. The importance of any government department can't be assessed keeping in view merely its legal status, since its role within the Party matters.

## 5. French Constitution

### 5.1. Introduction

- France is known as 'Laboratory of Political experiment'.
- It has a unitary form of government and nature of the government is called as semi-Presidential type
- It has some features of Parliamentary system and others of Presidential system
- The French Parliament does not have supremacy even in law making. There is a list for which the legislature can make laws, whereas rest of the matters are taken care of by the President (i.e. he makes the laws).
- This is perhaps the only Democratic Constitution based on the Principle of Supremacy of Executive.
- France suffered from political instability. Hence, the Constitution of the 5th Republic provides a strong President, with a fixed term of 5 years, and he enjoys a lot of powers.

### 5.2. President

- The French President is the most powerful within the French system as well as amongst all other executive across world democracies
- Privileges of the Office of the President of US, i.e. security of tenure and being the head of the Government as well as head of the State is combined with the privileges of the Office of the British P.M. i.e. power to dissolve the Assembly (which the American President doesn't enjoy)
- France has PM as well as President
  - French PM, unlike that in India and Britain, is assistant to the President
  - There is a division of functions, rather than division of power between the two positions
    - The French President deals with foreign policy and national concerns
    - The PM, on the other hand, deals with day to day routine functions of the Government and local domestic issues
- PM is appointed by the President
  - The President doesn't have a completely free-hand in PM's election
  - The person appointed as PM must enjoy the confidence of the House
- Concept of '**Cohabitation**'
  - A situation where the President and the PM belong to different political parties
- PM may choose his cabinet colleagues
- None of the members of the Govt. can be a part of the legislature
- Cabinet is presided over by the President
- The Lower House can pass the 'Censure Motion' against the PM and his CoM, which would imply that they must resign
- The President is elected for a fixed term. Initially the term was 9 years, reduced to 7 years and at present is 5 years.
- They follow Second Ballot system (i.e. absolute majority of the total votes polled is needed)
  - The President of the Republic shall be elected by an absolute majority of votes polled: if in the first round of elections, no person gets absolute majority only the top two candidates remain and the rest are eliminated. Second round of election takes place, in which one person is able to get the absolute majority.

- The President can be impeached on the same ground as the US President. However, the process is ambiguous.
- Article 67 of the Constitution suggests that both the Houses should pass identical motion.
- After this, the President's case will be dealt with by a special body called the High Court of Justice.
- This body also trials cases of corruption and conspiracies against the state by government ministries.

***Emergency Powers of the President***

Article 16 of the Constitution gives the real emergency powers to the President. In this situation he assumes unlimited powers and it is like democratic dictatorship or democratic coup-detat.

***Comparative Analysis of the US and French Presidents***

- The US President cannot dissolve the Assembly, whereas the French President can do so. The only limitation is that he can't do so more than twice a year.
- Unlike the US President, the French President can assume dictatorial powers under Article 16.

***Comparative Analysis of the French President and British P.M.***

- The British P.M. can remain in office only as long as he enjoys majority in the lower house. The President of France, on the other hand, is elected for a fixed term.

### **5.3. The Legislature**

The Legislature is clearly subordinate to the Executive in the French system. Article 37 of the Constitution puts clear limitation on the legislative power of the French Parliament. It mentions that the Parliament can make laws only on the matters enumerated in the Constitution. On all other matters, the government can make laws by simple order or decree.

The President can directly influence the legislative functions of the assembly through the P.M. If the assembly doesn't agree to a particular bill, it can be given for referendum by the President.

The French Parliament is bicameral, consisting of two houses, National Assembly and the Senate

#### **5.3.1. National Assembly**

As is the case with other bicameral Parliaments, the French bicameralism is an unequal system since the National Assembly has much broader powers than those of the Senate:

- It alone can hold the Government accountable by refusing to grant it 'confidence' or by passing a censure motion (following the same idea, only the National Assembly can be dissolved by the President of the Republic).
- In the case of disagreement with the Senate, the Government can decide to grant the National Assembly "the final say" in the legislative procedure (except for constitutional acts and institutional acts concerning the Senate);
- The Constitution provides the National Assembly with a more important role in the examination of the finance bill and the social security financing bill. Thus, the tabling for a first reading of such bills must be before the National Assembly and the time limits granted for their examination are much longer for the National Assembly.

#### **5.3.2. The Senate**

In contrast to the National Assembly, the Senate cannot be dissolved. The fact that Senate is a permanent body plays an important role in accounting for the stability of the Government when the post of the French Republic's President falls vacant. Owing to above, it's the President

of the Senate who is appointed the President of French Republic if the latter is prevented from doing so, if he falls ill or resigns. Thus, a case of power vacuum is prevented, in case the President's office falls vacant.

This interim is limited to the time needed to organize a presidential election (in practice, it lasts around 50 days).

## 5.4. Prominent Features of the French Constitution

- **Organic Law:** An organic or fundamental law is one that forms the foundation of a government or organization. A Constitution is a particular form of organic law for a sovereign state. The French Constitution has certain laws mentioned as organic laws. Laws made by the Parliament and the orders of the Executive must conform to the Organic laws. So these laws have to be reviewed by a body known as the Constitutional Council. It has 9 members – three are representatives of the President, three are representatives of the French National Assembly, and the remaining three are representatives of the Senate.
- **High Council of Justice:** The purpose is the nomination of the judges. This body is headed by the President and the members of the Judiciary. The President is also known as the 'guardian of Judiciary'.
- **Economic and Social Council:** Constitutional advisory body on social and economic issues.
- **Secularism:** France follows the rigid principle of secularism unlike Indian secularism which respects all religions equally. The French model of secularism follows the principle of strict separation of Church and State, freedom of conscience and freedom to exercise any faith. The state does not support religious activities but also not interfere in private religious practices. It prohibits any visible religious symbols in public space. This model leaves no scope for the idea of the state-supported religious reforms.

## 5.5. Amendment of the Constitution

- Rigid process
- Both the Houses of Parliament have to pass a resolution by 3/5<sup>th</sup> majority.
- The President may also choose to refer the amendment to people by referendum.

## 6. Germany's Constitution

- Germany is a federation and the residuary powers in Germany lie with the states.
- The states are referred to as 'Landers'.
- It has a Parliamentary form of Government, modeled on the British Parliamentary form. But it is not just a replicate of the system.
- Germany is called as 'Chancellor's Democracy'.
- Chancellor is the PM.
- President is the Constitutional Head.

### 6.1. Salient Features

#### 6.1.1. Chancellor's Democracy

- The Chancellor has a clear-cut superiority over other Ministers.
- Chancellor Principle: Chancellor has a privilege to determine the broad policy and other ministers are expected to act as per these guidelines. While a minister works under these guidelines, he enjoys a lot of autonomy with respect to his department.

This mechanism ensures the stability of the coalition government.

#### 6.1.2. Cabinet Principle

It comes into existence only when there is a dispute among different departments. In such a situation decision is taken collectively.

### 6.1.3. Constructive Vote of No-Confidence

- The motion of no-confidence against the Chancellor is permitted only when those bringing the notion can prove that they are in a position to form an alternative government.
- This is also to deal with the problems of Hung Assembly (Coalition Government)

### 6.1.4. Parliament

Germany has two houses: The Bundestag and The Bundesrat

#### The Bundestag

The lower house in the German political system is the Bundestag. Its members are elected for a four-year term. The method of election is known as Mixed Member Proportional Representation (MMPR), a more complicated system than First-Past-The-Post (FPTP), but one which gives a more proportional result (a variant of this system known as the additional member system is used for the Scottish Parliament and the Welsh Assembly).

#### *Manner of Elections*

Half of the members of the Bundestag are elected directly from 299 constituencies using the first-past-the post method of election. The other half – another 299 - are elected from the list of the parties on the basis of each Land (the 16 regions that make up Germany).

- The people cast two votes: one for a candidate in their constituency and one for a political party. The process is called a personalized proportional representation system. Simply put, Germans vote to decide how the 598 base seats in the Bundestag will be divided among members of Germany's various political parties.
- "The Germans are all about proportion," said Jackson Janes, president of the American Institute for Contemporary German Studies at Johns Hopkins University. "The two votes boil down to what's their favorite guy who represents them in their districts and what's their favorite team that will represent them in the Bundestag."
- The first vote, on the left side of the ballot, is a direct vote for a member of parliament in that constituency, similar to Americans voting for a congressional representative in their district. There are 299 constituencies in Germany, so direct votes make up roughly half of the seats in the Bundestag.
- The second vote, on the right side of the ballot, is for a political party. Parties in Germany's 16 states put together lists of candidates; the results from the second votes determine which candidates make it off the lists to the remaining 299 seats in parliament. Parties need to receive at least 5 percent of the second votes in a state to qualify for a seat.

The system starts to get complicated when Germans split their votes, meaning they vote for a candidate from one party in the first vote and for a different political party in their second vote. That can throw off the balance of seats in parliament so that one party is more strongly represented than they should be based on the results of the proportionate second votes.

So Germans created "**overhang**" and "**balance seats**." Those are extra seats in the Bundestag that ensure every candidate who was directly elected gets a seat while political parties are still proportionally represented based on the number of votes they received. A German state's population is taken into consideration when votes are converted into seats.

#### **Reason behind adopting the above Election System**

This system is designed to block membership of the Bundestag to small, extremist parties. As a consequence, there are always a small number of parties with representation in the Bundestag.

#### *Comparative analysis of Bundestag*

One striking difference when comparing the Bundestag with the American Congress or the British House of Commons is the lack of time spent on serving constituents in Germany.

- Only 50% of Bundestag members are directly elected to represent a specific geographical district.
- A serving constituency seems not to be perceived, either by the electorate or by the representatives, as a critical function of the legislator.
- There is also a practical constraint on the expansion of constituent service in the form of a limited personal staff of Bundestag members (especially compared to members of the US Congress).

## The Bundesrat

The upper house in the German political system is the Bundesrat.

At a first glance, the composition of the Bundesrat looks similar to other upper houses in federal states such as the US Congress, since the Bundestag is a body representing all the German Lander (or regional states). However, there are two fundamental differences in the German system:

1. Its members are not elected (neither by popular vote nor by the State Parliaments). They are members of the State Cabinets, which appoint them and can remove them at any time. Normally, a state delegation is headed by the head of government in the Land, known in Germany as the Minister-President.
2. The States are not represented by an equal number of delegates, since the population of the respective state is a major factor in the allocation of votes (rather than delegates) to each particular Land. The vote allocation can be approximated as  $2.01 + \sqrt{\text{Land's population}}$  with the additional limit of a maximum of six votes so that it is consistent with something called the Penrose method based on game theory. This means that the 16 states have between three and six delegates.

This unusual method of composition provides for a total of 69 votes (not seats) in the Bundesrat. The State Cabinet may then appoint as many delegates as the state has votes, but is under no obligation to do so; it can restrict the state delegation even to one single delegate. The number of members or delegates representing a particular Land does not matter formally, since in stark contrast to many other legislative bodies, the delegates to the Bundesrat from any one state are required to cast the votes of the state as a bloc (since the votes are not those of the respective delegate). This means that in practice it is possible (and quite customary) that only one of the delegates (the *Stimmeührer* or "leader of the votes" - normally the Minister-President) casts all the votes of the respective state, even if the other members of the delegation are present in the chamber.

Even with a full delegate appointment of 69, the Bundesrat is a much smaller body than the Bundestag with over 600 members. It is unusual for the two chambers of a bicameral system to be quite so unequal in size. But the Bundesrat has the power to veto a legislation that affects the powers of the states.

## 7. Constitution of Japan

- Japan has a Parliamentary system of Government.
- It has a constitutional Monarchy
  - King is more like a 'Rubber stamp' authority while PM is head of the Cabinet
- Election of the PM
  - PM is elected by both the Houses of Japanese Parliament (called Diet).
  - The two houses of the Diet are:
    - House of Representatives; and
    - House of Councillors

- It is not enough for a person to be a leader of the majority party. He has to be elected by both the houses of the Parliament.
  - If no agreement is reached upon between the two houses on a candidate, then the matter is taken care of by a Joint Committee of both the houses. The Committee gets 10 days to arrive upon a decision.
  - After 10 days, if an agreement cannot be reached, then the will of the lower house prevails.
- A significant feature of Japanese Constitution is contained in Article 9.
  - Herein, Japan formally renounces the policy of war for the settlement of international disputes. However, it can keep forces for self-defence.

## 8. Constitution of Canada

The Canadian Constitution encompasses a wide set of principles and values that govern key political relations in the Canadian society.

### 8.1. Salient Features

#### 8.1.1. Constitutional Monarchy

- It is the central component of Canada's constitutional framework.
- The *Constitution Act, 1867* states that executive government and authority in Canada is vested in the **Canadian Monarchy** (which Canada shares with Great Britain and some other former British colonies). The British Queen is the formal head of the state.
  - The Act further provides for the offices of the **Governor General of Canada** (at the federal level) and **Lieutenant Governors** (at the provincial level), recognized as the Monarch's representatives in Canada.
- It is important to note, however, that while the written constitution explicitly places executive authority in the hands of the Monarch and his/her representatives, the unwritten constitutional convention holds that this authority is actually exercised by the Prime Minister and his/her Cabinet.

#### 8.1.2. Parliamentary Government

The Canadian Constitution also provides for a Parliamentary system of government.

##### **Features of Parliamentary Government as given in Constitution Act, 1867:**

- The Act established a federal Parliament, consisting of the Monarchy and two legislative chambers, the **House of Commons** (or Lower House) and the **Senate** (or Upper House).
- The Act further states that the powers and authority of these legislative chambers are to be modeled upon those found in the British Parliament.
- Further, the Act also established legislative chambers at the provincial level.

In addition to the written provisions of the Act, there also exist several unwritten constitution conventions that are fundamental to the operation of Canada's parliamentary system. These include **executive dominance by the Prime Minister and the Cabinet** (at the federal level) and by **the Premier and the Cabinet** (at the provincial level), as well as the practice of **responsible government**.

#### The House of Commons

In the Canadian political system, the lower chamber is the House of Commons, which takes its name from the lower house in the British political system. The Commons consists of 308 members known as - like their British counterparts - Members of Parliament (MPs).

Members are elected by the first-past-the-post system (as in Britain) in each of the country's electoral districts, which are colloquially known as *ridings* (known as 'constituencies' in Britain). Seats in the House of Commons are distributed roughly in proportion to the population of each province and territory, but some ridings are more populous than others and the Canadian constitution contains some special provisions regarding provincial representation.

**Term and Tenure**

The maximum term of MPs is four years, but it is common for a general election to be called earlier.

**Powers**

As in the British political model, the House of Commons is much the more powerful of the two chambers. Although all legislation has to be approved by both chambers, in practice the will of the elected House usually prevails over that of the appointed Senate. The processes and conventions of the Commons reflect very much those of its British namesake.

## **The Senate**

In the Canadian political system, the upper chamber is the Senate, which takes its name from the upper house in the American political system.

The Senate consists of 105 members, appointed by the Governor-General on the advice of the Prime Minister. Seats are assigned on a regional basis, with each of the four major regions receiving 24 seats, and the remaining nine seats being assigned to smaller regions.

### **8.1.3. Federalism**

The Constitution also provides for a **federal system** in Canada, meaning there are two key levels of government: the **federal (or national) government** and the **provincial (or regional) governments**. Canada is a federation with a strong Centre, wherein residuary powers lie with the Centre.

The *Constitution Act, 1867* outlines specific powers and jurisdictions for each of these levels of government, such as what public policy fields each may legislate in, as well as how each level of the government may raise revenue. Over the years, these constitutional provisions have been further clarified and evolved by judicial decisions (first by the British Judicial Committee of the Privy Council, and later by the Supreme Court of Canada).

**Changes in the nature of Canadian Federalism**

There have also been several constitutional amendments that have had significant consequences for Canada's federal system. Over the years there has been a shift towards giving greater powers to the states.

For example, the *Constitution Act, 1930*, transferred ownership of natural resources in Western Canada from the federal government to the Western provinces. Another significant amendment was the *Constitution Act, 1982*, which committed the federal government and provinces to ensuring some level of economic and social equality between Canadian regions. This, in turn, has led to the development of the Equalization Program and the sharing of public funds between governments.

### **8.1.4. Judiciary**

The Supreme Court of Canada is the highest court and final authority on civil, criminal and constitutional matters.

The court's nine members are appointed by the Governor-General on the advice of the Prime Minister and the Minister of Justice. They serve until the age of 75.

Each province operates its own individual court system. The country's legal system is based mainly on English common law, but in the province of Québec, it is modeled on French civil law.

Student Notes:2021

### 8.1.5. Rights

The Canadian Charter of Rights and Freedoms is a bill of rights entrenched in the Constitution of Canada, which forms the first part of the Constitution Act, 1982. The Charter guarantees certain political rights to Canadian citizens and civil rights of everyone in Canada. The Charter applies to government laws and actions (including the laws and actions of federal, provincial, and municipal governments and public school boards), and sometimes to the common law, but not to private activity.

The courts, when confronted with violations of Charter rights, have struck down as unconstitutional, federal and provincial statutes and regulations in whole or in part.

## 9. Constitution of Australia

Australia's system of government is founded in the liberal democratic tradition. Based on the values of religious tolerance, freedom of speech and association, and the rule of law, Australia's institutions and practices of government reflect British and North American models. At the same time, they are uniquely Australian.

- Australian federation is modeled on the US federation. For example, residuary powers are with the states, Governors of the states are elected by the people and formally appointed by the British Queen.
- In Australia, there has been a growth of Cooperative Federalism.

### 9.1. Salient Features

#### 9.1.1. Form of Government

One of the oldest continuous democracies in the world, the Commonwealth of Australia was created in 1901, when the former British colonies—now the six states—agreed to federate. The democratic practices and principles that shaped the pre-federation colonial Parliaments (such as 'one man, one vote' and women's suffrage) were adopted by Australia's first federal government.

The Australian Constitution sets out the powers of government in three separate chapters—the legislature, the executive and the judiciary—but insists that members of the legislature must also be members of the executive. In practice, Parliament delegates wide regulatory powers to the executive.

The popularly elected Parliament consists of two chambers: the House of Representatives and the Senate. Ministers appointed from these Chambers conduct executive government, and policy decisions are made in Cabinet meetings. Apart from the announcement of decisions, Cabinet discussions are not disclosed. Ministers are bound by the principle of Cabinet solidarity, which closely mirrors the British model of Cabinet government responsible to the Parliament.

Although, Australia is an independent nation, Queen Elizabeth II of Great Britain is also formally the Queen of Australia. The Queen appoints a Governor-General (on the advice of the elected Australian Government) to represent her. The Governor-General has wide powers, but by convention acts only on the advice of the ministers on virtually all matters.

#### 9.1.2. Nature of the Constitution

Like the United States, Australia has a written constitution. The Australian Constitution defines the responsibilities of the federal government, which include foreign relations, trade, defence and immigration. Governments of the States and territories are responsible for all matters not assigned to the Commonwealth, and they too adhere to the principles of responsible

government. In the States, the Queen is represented by a Governor for each State.

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The High Court of Australia arbitrates on disputes between the Commonwealth and the states. Many of the court's decisions have expanded the constitutional powers and responsibilities of the federal government.

#### **Procedure of Amendment**

The Australian Constitution can be amended only with the approval of the electorate through a national referendum in which all adults on the electoral roll must participate. A bill containing the amendment must first be passed by both houses of Parliament, or, in certain limited circumstances, by only one House of Parliament. Any constitutional change must be approved by a double majority—a national majority of electors as well as a majority of electors in a majority of the states (at least four of the six). Where any state or states are particularly affected by the subject of the referendum, a majority of voters in those states must also agree to the change. This is often referred to as the 'triple majority' rule.

The double majority provision makes alterations to the Constitution difficult. Since federation in 1901, only eight out of 44 proposals to amend the Constitution have been approved. Voters are generally reluctant to support what they perceive as increases in the power of the federal government. States and territories may also hold referendums.

#### **9.1.3. Parliament**

The government is formed in the House of Representatives by the party able to command a majority in that chamber.

Minority parties often hold the balance of power in the Senate, which serves as a chamber of review for the decisions of the government. Senators are elected for six-year terms, and in an ordinary general election only half the senators face the voters.

In the Australian Parliament, questions can be asked without notice, and there is a strict alternation between Government and Opposition questions to ministers during the Question Time. The Opposition uses its questions to pursue the government. Government members give ministers a chance to put government policies and actions in a favourable light, or to pursue the Opposition.

Anything said in the Parliament can be reported fairly and accurately without fear of a suit for defamation. The rough-and-tumble of Parliamentary Question Time and debates is broadcast and widely reported. This has helped in establishing Australia's reputation for robust public debate, and serves as an informal check on the executive power.

#### **9.1.4. Nature of Elections**

A national general election must be held within three years of the first meeting of a new federal Parliament. The average life of Parliaments is about two-and-a-half years. In practice, general elections are held when the Governor-General agrees to a request from the Prime Minister, who selects the date of the election.

The governing party has changed almost every five years on an average, since federation in 1901. The Liberal Party led a coalition with the longest hold on government—23 years—from 1949 to 1972. Prior to World War II, several governments lasted less than a year, but since 1945 there have been only seven changes in the government.

#### **9.1.5. Voting**

For all citizens over the age of 18 it is compulsory to vote in the election of both federal and state governments, and failure to do so may result in fine or prosecution.

## 9.1.6. Relations Between Levels of Government

Student Notes:2021

State parliaments are subject to the national Constitution as well as their state constitutions. A federal law overrides any state law not consistent with it.

In practice, the two levels of government cooperate in many areas where states and territories are formally responsible, such as education, transport, health and law enforcement. Income tax is levied federally, and debate between the levels of governments about access to revenue and duplication of expenditure functions is a perennial feature of Australian politics. Local government bodies are created by legislation at the state and territory level.

The Council of Australian Governments (COAG) is a forum to initiate, develop and implement national policy reforms requiring cooperative action between the three levels of government: national, state or territory, and local. Its objectives include dealing with major issues by cooperating on structural reform of government and on reforms to achieve an integrated, efficient national economy and a single national market.

- COAG comprises the Prime minister, State Premiers, Chief Ministers of the territories, and the President of the Australian Local Government Association.

In addition, Ministerial Councils (comprising national, state and territory ministers, and, where relevant, representatives of local government and of the governments of New Zealand and Papua New Guinea) meet regularly to develop and implement inter-governmental action in specific policy areas.

## 10. Constitution of Switzerland

- The Spirit of Republicanism is a prominent theme of the Swiss Constitution.
- Another important feature of the Constitution is its federal features.
- Switzerland is known for its direct democracy.
- It is hailed as a Dynamic Constitution (features like protection of individual, welfare state et al)

### *Comparison scheme w.r.t Indian Constitution*

Indian Constitution	Swiss Constitution
Executive vested in the President	Executive vested in the Federal Council
President elected by electoral college	Federal Council elected by Federal Assembly
Party Government	Absent
States cannot conclude treaties	Cantons can conclude treaties
Supremacy of Judiciary	Judiciary cannot rule invalid a federal law
No referendum	Referendum possible

Institutions for Direct Democracy:

1. **Referendum:** It means referring bills for ratification to the people. It is not similar to plebiscite. Plebiscite means taking opinion of the people on any issue.
2. **Initiative:** It is a bill initiated by the people and people conveying it to the assembly.
3. **Recall:** It means calling the representative back at any point of time, if voters are not satisfied by his work.

## 11. Features-Wise Constitutional Comparison Scheme

### 11.1. The Preamble

The Preamble is a brief introductory statement that sets out the guiding purpose and principles of the document.

## 11.2. Written Constitution

The concept of a written constitution has been taken from USA, which was the first written constitution in the world. This allows ease of access and revision, as and when required, and also provides immunity to laws from any arbitrary interference by the government at its free will.

## 11.3. Nominal Head

In Britain	In India
The Queen is the Head of the State. As a Constitutional Monarch, she does not rule the country, but fulfills important ceremonial and formal roles with respect to the Government.	<p>The President of India is:</p> <ul style="list-style-type: none"> <li>Head of the state and the first citizen of India.</li> <li>S/He is also the “formal head” of all the three branches of Indian Democracy - Legislature, Executive and Judiciary.</li> <li>He is also the Supreme Commander of the Indian Armed Forces</li> </ul>

## 11.4. Cabinet System

Both in India and England:

- The Cabinet is the collective decision-making body of the government consisting of the Prime Minister and his Council of Ministers.
- The PM chooses the Cabinet of Ministers, appointed by the head of the state (President in India and Sovereign in England.)

The Cabinet Ministers are at the disposal of PM and can be dismissed at any time on advice of the PM, by the Head of the State.

## 11.5. Bicameral System of Parliament

A bicameral Parliament or bicameral legislature is a legislature, which consists of two chambers or houses

- In England:** There is the House of Commons and House of Lords.
- In India:** There is Lok Sabha (the House of people) and Rajya Sabha (Council of States).

## 11.6. Concept of Lower House Being More Powerful

In England	In India
House of Lords (the Upper House) is restrained from any financial bills.	Money Bills can only be introduced in Lok Sabha
PM loses his post if he loses majority in the House of Commons.	PM loses his post if he loses majority support in lower house, motion of no confidence can only be introduced in Lok Sabha.
Upper House can only delay the bills passed in Lower House for a maximum of two parliamentary terms, but cannot reject it.	With most of the bills (except CAB), Rajya Sabha cannot reject bills passed in Lok Sabha. It can only delay it for a maximum of 14 days.

## 11.7. Speaker in the Lower House

In England	In India
The Speaker of the House of Commons chairs debates in the Commons chamber and the	The Speaker of the Lok Sabha conducts the business in the house.

holder of this office is an MP who has been elected by other members of Parliament.	
The Speaker is the chief officer and highest authority of the House of Commons and must remain politically impartial at all times. During debates they keep order and call MPs to speak.	He/she decides whether a bill is a money bill or a non-money bill.
The Speaker also represents the Commons to the monarch, the Lords and other authorities and chairs the House of Commons Commission.	He/she maintains discipline and decorum in the house and can punish a member for their unruly behaviour by suspending them.
	He/she permits the moving of various kinds of motions and resolutions like motion of no confidence, motion of adjournment, motion of censure and calling attention notice as per the rules

## 11.8. Judiciary Adaptations

### 11.8.1. Concept of Supreme Court

It was adapted from the United States of America. US was the first country to introduce the highest court of justice, called the Supreme Court.

As we know, it is an essential requirement for a federal form of government.

### 11.8.2. Laws on Which Supreme Court Function

This has been adopted from the constitution of Japan

Japanese Constitution	Indian Constitution
The Chief Justice is appointed by Head of the State-Emperor	The Chief Justice is appointed by Head of the State-President
The Supreme Court is the highest judicial authority of the nation	The Supreme Court is the highest judicial authority of the nation
Other judges in the Supreme Court form smaller benches for court or hearing of cases.	Other judges in the Supreme Court form smaller benches for court or hearing of cases.
Supreme court mainly acts as an appellate court, most hearings being appeals and hearings being petitions against unsatisfactory decisions of lower courts.	Supreme court mainly acts as an appellate court, most hearings being appeals and hearings being petitions against unsatisfactory decisions of lower courts.

### 11.8.3. Independence of Judiciary and Judicial Review

- Independence of the judiciary is the principle that the judiciary should be politically shielded from the legislative and the executive power. That is, courts should not be subjected to reprehensible influence from other branches of the government, or from personal or adherent interests.
- Judicial review is the doctrine under which legislative and executive actions are subject to review (and possible invalidation) by the judiciary.

Specific courts with judicial review power must annul the acts of the state when it finds them incompatible with a higher authority such as the constitution.

Both of these principles are adopted from the constitution of USA.

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They are very important to keep a check on the other two branches of the government.

#### 11.8.4. Method of Removal of Supreme/High Court Judges

This has been adopted from the Constitution of United States.

US Constitution	Indian Constitution
It varies from state to state where sometimes recommendation of enquiry committee is enough, while in some majority support by more than two-third members of both houses is required for impeachment of a judge.	Impeachment requires an order of the President passed after an address in each House of Parliament, supported by a majority of the total membership of that House of not less than two-thirds of members present and voting, and presented to the President in the same Session for such removal on the ground of proved misbehavior or incapacity.

### 11.9. Fundamental Rights

The purpose of Fundamental Rights is to act as limitations, not only upon the powers of the Executive, but also upon the power of the Legislature.

In Other Countries	In India
The concept of fundamental comes from USA.	Fundamental rights in the Constitution of India constitute the longest description in the world.
The right to freedom of: speech, assembly and religion have been adopted from USSR	They include: <ul style="list-style-type: none"><li>▪ Right to Equality (14-18)</li><li>▪ Right to Freedom (19)</li><li>▪ Right against Exploitation (23-24)</li><li>▪ Right to Freedom of Religion (25-28)</li><li>▪ Cultural and Educational Rights (29-30)</li><li>▪ Right to Constitutional remedies (32-35)</li></ul>
Right to freedom and equality before law are an adoption from the French rights	

#### 11.9.1. Suspension of Fundamental Rights During Emergency

This concept of suspension of rights during emergency has been adopted from the Weimar constitution of Germany.

This is very important as it vests the supreme power in the head of the state- the President.

- During emergency only 3 rights of the citizens stand valid-Right to Equality, Right to Freedom (in certain cases) and the Right to Life.

### 11.10. Fundamental Duties

The fundamental duties of India seem to be an adoption from the Constitutions of Japan, Yugoslavia, Republic of China as well as the Constitution of Soviet Union (USSR).

Indeed, Japan is the only democratic country to have legally enforceable Fundamental duties.

These have been incorporated in the Indian Constitution to remind every citizen that they should not only be conscious of their rights, but also of their duties.

## 11.11. Scheme of Federation

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This refers to the Distribution of powers between the centre and the states.

It is very significant in the case of a diverse country like India, to handle the local issues effectively.

This has been done in case of both legislative and administrative powers.

### ***Scheme of federation with a strong Centre***

Both the Centre & the states are expected to be co-operative & coordinating institutions, having independence & ought to exercise their respective powers with mutual-adjustment, respect, understanding & accommodation.

Prevention as well as amelioration of conflicts is necessary. Thus, the Indian-federation was devised with a strong-centre.

### ***Comparison of Indian Federalism with American Federalism***

#### ***Indian Constitution***

1. Indian federation is not the result of an agreement between States.
2. There is concept of single citizenship for both the States and Union.
3. Each State sends MPs to the Parliament depending upon the population of the State.
4. There is no principle of equality between the states.
5. There are three Lists- Union List-(First List); State List (Second List); and Concurrent List – (Third List). The Parliament can legislate only the subjects of the State List and Concurrent List. The States are not sovereign. The Union can encroach upon State's Lists.
6. No State can secede from Territory of India.
7. The Parliament, i.e. Center has residuary powers.
8. There is only one Constitution for Union and States.
9. India achieved uniformity in basic civil and criminal laws, except personal laws in some matters.
10. The Indian Union is an indestructible Union of destructible States. The area, identity of a state can be changed by Parliament. The States are destructible. But the Union cannot be changed. The Union is indestructible.
11. The Central Government has the power to form a new State, to increase the area of any State, to diminish the area of any State; to alter the boundaries of any State; to alter the name of any State; and to form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to be a part of any State(Article 3).
12. The word "Federal" is not at all used in our Constitution. The framers described simply "Union".
13. The Supreme Court has been given very wide powers, including appellate (Civil and criminal) jurisdiction.
14. No referendum is necessary. For the amendment of the Constitution, the people need not give their consent. It is sufficient to get the majority of MPs, and in certain cases, the majority of the State legislatures.

#### ***American Constitution***

1. American Federation is the result of an agreement between States.
2. There are dual citizenships- one Federal Citizenship and another State Citizenship.
3. Each State sends equal number of representatives to the Senate.
4. There is principle of equality between the States, irrespective of its population, extent etc.
5. There is a clear division of legislative powers between the Federal Govt. and the Units. The Union as well as each Unit is sovereign in its sphere. The Union and the units are sovereign

- in their respective legislative fields. One cannot strictly trench upon the other's area of power. Each is confined to its own sphere.
6. The State, if wants, can theoretically separate itself from the Federal, the relation being based only on an 'Agreement'. Hence, it is said that the American Union is a destructible Union of indestructible States.
  7. The States have residuary powers.
  8. There are two Constitutions.
  9. There are different civil and criminal laws, differing from State to State.
  10. The word "Federal" is used in the Constitution very often.
  11. The Supreme Court of America has not been given appellate jurisdiction of the same kind as the Supreme Court in India.
  12. For the amendment of Federal Constitution, a referendum must be conducted. Amendment to the Constitution can be made only with the consent of the people.

## 11.12. Freedom of Trade and Commerce

Australia	India
There is a free trade clause under Section 92 of the Australian Constitution, which provides that "on the imposition of uniform duties of customs, trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free."	Article 301 containing the free trade clause in Indian constitution has been taken almost verbatim from section 92 of the Australian constitution
	The court considered that legislature should be given more powers than judiciary and all trade and commerce activities were subjected to reasonable restrictions, imposed by the State as mentioned in the constitution

### *Advantages of this adoption*

Free movement and exchange of goods throughout the territory of the country is essential for the economic unity of the nation

Therefore, in all federations, an attempt is made through constitutional provisions to prevent local barriers to economic activity, to remove the impediments in the way of inter-state trade and commerce and thus to make the country as one in economic resources.

Thus, the base of freedom of trade and commerce was adopted from Australian Constitution with amendments.

## 11.13. Directive Principles of State Policy

These are principles laid down to create social and economic conditions under which citizens can live a good life.

In India, the Directive Principles of State policy have been adopted verbatim from the Constitution of Ireland. The DPSP of Ireland were in turn adopted from Spain.

## 11.14. Election of Members by the President

The upper house in India consists of 250 members from which 12 are nominated by the Nominal head-the President of the country for their exemplary work in their respective fields.

This saves these members from the turmoil of election

This system has been adopted from the constitution of Ireland.

### Complete Overview of the adaptations in Chart form

## **12. Borrowed features of constitution from different countries**

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From U.K.	<ul style="list-style-type: none"> <li>• Nominal Head – President (like Queen)</li> <li>• Cabinet System of Ministers</li> <li>• Post of PM</li> <li>• Parliamentary Type of Govt.</li> <li>• Bicameral Parliament</li> <li>• Lower House more powerful</li> <li>• Council of Ministers responsible to Lower House</li> <li>• Speaker in Lok Sabha</li> </ul>
From U.S.	<ul style="list-style-type: none"> <li>• Written Constitution</li> <li>• Executive head of state known as President and his being the Supreme Commander of the Armed Forces</li> <li>• Vice- President as the ex-officio Chairman of Rajya Sabha</li> <li>• Fundamental Rights</li> <li>• Supreme Court</li> <li>• Provision of States</li> <li>• Independence of Judiciary and judicial review</li> <li>• Preamble</li> <li>• Removal of Supreme court and High court Judges</li> </ul>
From USSR	<ul style="list-style-type: none"> <li>• Fundamental Duties</li> <li>• Five year Plan</li> </ul>
From AUSTRALIA	<ul style="list-style-type: none"> <li>• Concurrent list</li> <li>• Language of the preamble</li> <li>• Provision regarding trade, commerce and intercourse</li> </ul>
From JAPAN	<ul style="list-style-type: none"> <li>• Law on which the Supreme Court function</li> <li>• Procedure established by law</li> </ul>
From WEIMAR CONSTITUTION OF GERMANY	<ul style="list-style-type: none"> <li>• Suspension of Fundamental Rights during the emergency</li> </ul>
From CANADA	<ul style="list-style-type: none"> <li>• Scheme of federation with a strong centre</li> <li>• Distribution of powers between centre and the states and placing Residuary Powers with the centre</li> </ul>
From IRELAND	<ul style="list-style-type: none"> <li>• Concept of Directive Principles of States Policy(Ireland borrowed it from SPAIN)</li> <li>• Method of election of President</li> <li>• Nomination of members in the Rajya Sabha by the President.</li> </ul>

## 13. UPSC Prelims questions

- 1.** Match List I (Item in the Indian Constitution) with List II (Country from which it was derived) and select the correct answer using the codes given below the lists:  
List I List II

A. Directive Principles of State Policy	1. Australia
B. Fundamental Rights	2. Canada
C. Concurrent List in Union-State Relations	3. Ireland
D. India as a Union of States with greater powers to the Union	4. United Kingdom
5. United States of America	

A B C D

(a) 5 4 1 2      (b) 3 5 2 1      (c) 5 4 2 1      (d) 3 5 1 2

2. Consider the following statements:

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1. Article 371 A to 371 I were inserted in the Constitution of India to meet regional demands of Nagaland, Assam, Manipur, Andhra Pradesh, Sikkim, Mizoram, Arunachal Pradesh and Goa.

2. Constitutions of India and the United States of America can envisage a dual policy (The Union and the States) but a single citizenship.

3. A naturalized citizen of India can never be deprived of his citizenship.

Which of the statements given above is/are correct?

(a) 1, 2 and 3

(b) 1 and 3

(c) 3 only

(d) 1 only

## 14. UPSC GS Mains Questions

- India and USA are two large democracies. Examine the basic tenets on which the two political systems are based. (2018)
- What can France learn from the Indian Constitution's approach to secularism?

## 15. Vision IAS GS Mains Test Series Questions

- The Indian constitution wonderfully adopts the via media between the American system of Judicial Supremacy and the British principle of parliamentary supremacy. Explain.***

### Approach:

The statement has been taken from D.D. Basu's discussion on the salient features of the Indian constitution. The question is static and conceptual in nature. The answer should reflect awareness and understanding of Parliamentary supremacy in Britain, Judicial supremacy in USA and a balanced compromise or synthesis of Parliamentary sovereignty and judicial supremacy in the case of India.

### Answer:

Under the British constitution courts cannot nullify any act of Parliament on any ground whatsoever.

- In the United States, on the other hand the Supreme Court has come to acquire apposition wherein it can invalidate a law not only on the ground that it transgresses the scope of legislative power vested in the constitution but also on the basis of prohibitions contained in the bill of rights as well as on the basis of general principles such as due process as defined and interpreted by the court itself.
- As opposed to these extremes the Indian constitution endows the judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the legislature according to the distribution of powers provided by the constitution, or if it is in contravention of the fundamental rights guaranteed by the constitution. At the same it also deprives the judiciary of any power of 'judicial review' as far as the wisdom of legislative policy is concerned.
- Simply put, The Supreme Court in India can declare the parliamentary laws as unconstitutional through its power of judicial review and the Parliament on its part can amend major portion of the constitution through its constituent power.
- Additionally, the scope of power of judicial review in India is narrower than in the case of the Supreme Court in the US ostensibly because the American constitution

- provides for 'due process of law' as opposed to the concept of 'procedure established by law' as enshrined in the Article 21 of the Indian constitution.
- However, it has to be born in mind the Judiciary in India has broadened the ambit of constitutional provisions regarding Judicial review through innovations such as basic structure doctrine.

- 2. *The Upper Chamber of Parliaments across the world are generally considered less powerful vis-à-vis their Lower Chamber. However, they are also vested with certain functions and powers, which enables them to play a decisive role. Critically analyse with special emphasis on India.***

**Approach:**

- Power and status of UC – how it is inferior in powers in legislative, impeachment processes etc.
- Special power – India (article 249 and 312), control over executive etc.
- Conclude by saying that upper chamber is an important institution but has been given less power w.r.t. lower house.

**Answer:**

Upper Chamber (UC) is one of the two chambers of a bicameral legislature. In a unitary system, UC is seen as an advisory chamber while in federal systems, it has been granted nearly equal powers with the lower chamber. Rajya Sabha (RS) of India enjoys co-equal status in all aspects except in certain financial matters.

Reasons for inferior position of UC are multiple. In fact, there were heated debates in the constitutional assembly of almost every country for the need of UC. Thomas Jefferson also opposed the idea of two chambers. It is indirectly elected body, undemocratic and subversive of the will of the people expressed through the elected Lower Chamber (LC). One argued that "if a Second Chamber dissents from the first it is mischievous; if it agrees, it's superfluous". Following are certain powers and status enjoyed by UC across the world:

- In some countries only limited legislative matters, such as constitutional amendments, require its approval. In UK, the House of Lords, UC, can no longer prevent the passage of most bills. In countries where it can veto legislation (like the Netherlands), it may not be able to amend the proposals.
- LC is directly elected by the people and thus given power for matters related to finance. RS can delay a money bill for two weeks only.
- In parliamentary system, UC cannot vote a motion of no-confidence against the government. This is true for India also.
- England has an evolutionary political system where power has gradually shifted from crown to the House of Lords, UC to the House of Commons. Now, UC acts as a revising chamber more or less.

However, federal systems have granted some special powers to the UC. USA has one of the strongest UC in the world. States surrendered their power to the centre and thus, UC enjoys some special powers which are not with the LC. India also supported strong federation initially. But still, RS enjoys certain special power. Some of them are as follows:

- UC of countries like USA may give advice and consent to some executive decisions (e.g. appointments of judges, international treaties or ambassadors).

- UC may have the sole power to try impeachments against officials of the executive. In USA, it is the Senate that finally adjudicates and convict on this issue. RS of India has extra power to remove vice-president of India.
- Prior to 2009, UC of UK served as the court of last resort.
- Article 249 gives power to RS to pass a resolution to empower parliament to enact law on the state subject. Similarly RS can pass a resolution to create a new All-India-service (AIS) under article 312
- RS can extend the life of a Proclamation issued under article 352, 356, and 360 in the events of the dissolution of the Lok Sabha.

Overall, reasons for the UC have always remained a subject of debate. Some call it undemocratic due to its structure (indirect election of members) while others favour it for its revising and other powers. India's RS enjoys equal powers except in money legislations.

- 3. Whereas the legislature is empowered to regulate the ratification of international treaties in the United States, in India it is mostly the domain of the executive. Examine the rationale and benefits of these two approaches with examples.**

**Approach:**

- Briefly explain the treaty making powers in India and USA and contrast it with democracies where Legislature also have a role to play in treaty making.
- In the light of recommendations made by the National Commission to Review the Working of the Constitution and various SC rulings, critically analyze the issues involved.

**Answer:**

Entering into treaties and agreements with foreign powers is one of the attributes of State sovereignty. No State can insulate itself from the rest of the world whether it be in the matter of foreign relations, trade, environment, communications, ecology or finance.

**Treaty making in United States**

- The Constitution of USA provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur".
- The rationale in giving the Senate a share of the treaty power is to give the president the **benefit of the Senate's advice and counsel, check presidential power, and safeguard the sovereignty of the states by giving each state an equal vote in the treaty making process.**
- The Senate does not ratify treaties—the Senate approves or rejects a resolution of ratification. If the resolution passes, then ratification takes place when the instruments of ratification are formally exchanged between the United States and the foreign power(s).
- In addition to treaties, which may not enter into force and become binding on the United States without the advice and consent of the Senate, there are other types of international agreements concluded by the executive branch and not submitted to the Senate. These are classified in the United States as executive agreements, not as treaties, a distinction that has only domestic significance.
- The US Constitution is silent about how treaties might be terminated.

- Under the Indian Constitution, the power to enter into treaties figures in the **Union List** that covers areas on which Parliament has the exclusive right to legislate (**Article 246**), while **Article 73** extends the executive power of the Centre to all matters on which Parliament can legislate.
- For implementing any treaty, Parliament under **Article 253** can legislate on any item even under the State List.
- But in the **absence of a specific provision stipulating the procedure for the negotiation and ratification of treaties**, the exercise of this power has by and large remained a preserve of the executive, which has tended to interpret Article 73 to mean that its authority extends over the subjects included in the Union List.
- On the contrary, the **judiciary has through several pronouncements emphasized that the power to enter into a treaty is essentially political in nature** and therefore called for the enactment of a **separate legislation to govern the conclusion of treaties**.
- The **National Commission to Review the Working of the Constitution** has voiced a similar view and recommended that **Parliament pass a law to regulate the treaty-making power** of the government, but it stopped short of prescribing parliamentary ratification.
- Any process of ratification of international obligations by national parliaments will necessarily be **protracted** in view of conflicting perceptions and interests and various other factors such as the level of development of institutional mechanisms relative to the maturity of democracy. Yet, the requirement of ratification by Parliament will ensure that international agreements and treaties with far reaching implications are subjected to **a closer legislative scrutiny and a wider political and public discussion**.

The exercise of the power of treaty making cannot be absolute or unchartered in view of the federal structure of legislative and executive powers. So Parliament should make a law on the subject of treaty making and implement it through Parliamentary legislation to streamline the procedures involved.

This has been recommended by both **Venkatachallian commission and Punchhi commission**. Punchhi commission also recommends that financial obligations and its implications on state finances arising out of treaties and agreements should be a **permanent term of reference to the finance commission**.

Treaties which affect the rights and obligations of citizens as well as those which directly impinge on subjects in State List should be negotiated with greater involvement of States and representatives in Parliament.

- Ninth amendment to the American Constitution states that the enumeration of certain rights in the Bill of Rights shall not be construed to deny or disparage others retained by the people. Is this statement true with respect to the Constitution of India also? If yes, what is the difference between fundamental rights included in part 3 of our Constitution and the rights mentioned outside part 3?***

#### **Approach:**

Answer all the parts in a specific manner without going into details of American constitution. That has been given only as an example to compare with Indian constitution.

- The above statement rests on the theory of inalienable natural rights which can by no means be denied to an individual in a free society. The guarantee of some of those rights in the written constitution cannot render obsolete any right which was available to the individual even before the constitution.
- The category of fundamental rights under the Constitution of India is exhaustively enumerated in Part 3 of the Constitution. So, the courts cannot impose any limitation upon the legislature or executive on the basis of natural rights. Any expansion of fundamental rights under the Indian Constitution rests on judicial interpretation and the courts have done so by enlarging the scope of many articles especially article 21.
- But the above does not mean that there is no other justiciable right provided by Indian Constitution outside part 3. Limitations upon the state are imposed by other provisions of the Constitution and these limitations give rise to corresponding rights to the individual.
- For example, Article 265 says that “no tax shall be levied or collected except by authority of law”. This gives a right to an individual not to be subjected to arbitrary taxation by the executive. Similarly Article 300A provides that “No person shall be deprived of his property save by authority of law”.
- Though the rights of both the above mentioned classes are equally justiciable, the difference between them lies in the way they can be enforced. The Constitutional remedy by way of an application direct to the Supreme Court under Article 32 is available only in case of fundamental rights mentioned in part 3 of the Constitution.
- If the right follows from some other provisions of the constitution like Article 265 or 300A, the aggrieved person may have his relief by an ordinary suit or by an application under Article 226 to the High Court. But an application under Article 32 shall not lie unless the invasion of non-fundamental right involves the violation of some fundamental right as well.

**5. In comparison with the American constitutional arrangement, where there is strict separation of executive and legislature, the Indian Constitution provides for a fused structure. Do you think this system has worked for India?**

**Approach:**

The answer should contain the following parts –

- Explain briefly the arrangement in India vis-à-vis USA
- The reasons for going with this arrangement
- Explain what are the benefits of this system
- Way forward – How to make this system more efficient and effective

**Answer:**

- The American constitution envisages a strict separation of powers where the executive and the legislature have no overlap. The President in USA, appoints his own staff/council of ministers and does not have anything to do with the legislature unlike India and is not responsible to the legislature like India. But in Indian system, the executive comes from the party, which has the majority in the Lok Sabha. Therefore meaning that the Council of ministers draws members from the legislature thereby diluting the strict watertight compartments between the executive and the legislature.
- The reason why our founding fathers did not adopt a strict separation of legislature and executive is because it could cause unnecessary conflict between the two organs of the government, which our infant democracy could ill-afford.

- This system has served our country well since independence. Firstly, there is no scope for deadlocks between the executive and the legislature as can be the case with the American system. If the President belongs to a party, which doesn't hold majority in the Congress than there is a possibility of a deadlock if the President and the Congress don't agree on that issue. But in Indian system the executive comes from the party, which has the majority in Lok Sabha. Hence, for important bills like money bills there is no scope for deadlock.
- Secondly, a majority in the Lok Sabha doesn't give a free hand to the executive. The Rajya Sabha also functions as another check on the power of the executive. Hence, in our system there is cooperation between legislature and the executive as well as checks and balances on both the organs.
- Going forward, we must strengthen our parliamentary processes. Most bills must be passed through debates and discussion rather than the ruling party forcing them through the Parliament.
- The executive should be held accountable for its actions through various motions, question hour etc. The spirit of cooperation between the two organs must be recognized and embraced.

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# INDIAN CONSTITUTION: HISTORICAL UNDERPINNINGS, EVOLUTION, FEATURES, AMENDMENTS, SIGNIFICANT PROVISIONS AND BASIC STRUCTURE

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# 1. Introduction

## 1.1. Definition

A Constitution is a document of people's faith and aspirations possessing a special legal sanctity. A Constitution is the fundamental law of a country. It is the rulebook of a nation, which regulates the society and its laws.

There are various forms of government prevalent across the world. It is the philosophy embodied in a nation's constitution which determines the kind of government present there.

## 1.2. Functions of the Constitution

A Constitution, whether it is written or unwritten, always has several functions, some of which are as follows:

- a) **Expression of Ideology:** It reflects the ideology and philosophy of a nation state.
- b) **Expression of Basic Law:** A Constitution presents basic laws, which can usually be modified or replaced through a process of amendment. Generally, there are special laws too, which focus upon the rights of the citizens; for instance, rights concerning freedom of speech, religion, assembly, press etc.
- c) **Organizational framework:** It provides an organizational framework for the government. It defines the functions of legislature, executive and judiciary, their inter-relationship, restrictions on their authority etc.
- d) **Levels of Government:** A Constitution generally explains the levels of different organs of the Government. Whether it is federal, confederation or unitary, is usually described by the Constitution. It may also delineate the powers of national and provincial governments.
- e) **Provisions for amendment:** As it would not be possible to foretell all possibilities in future with great degree of accuracy, there must be sufficient provisions for amendment of the Constitution. So, it should contain a set of directions for its own modifications. Inherent capacity to change according to changing times and needs help any system to survive and improve.

*Example:*

The Soviet Constitution was mostly an expression of ideology and was less an expression of organizational set up. The American Constitution is more an expression of governmental organization and a guideline for the power relationship of the regime than an expression of the philosophy of the government of the day.

## 1.3. Understanding the Constitutionalism

The unrestrained/unchecked state power may be exercised arbitrarily by the rulers. A Constitution is created as a defence mechanism over and above the state power. This arrangement, which forces the rulers to stay within the jurisdiction by means of a (generally) written or even unwritten Constitution, is called Constitutionalism.

Constitutionalism implies that the exercise of political power shall be bound by limitations, checks, controls and rules. The concept of Constitutionalism incorporates the principles of 'limited government' and 'rule of law', as against arbitrary and authoritarian discharge of power.

A **limited government** is a political system in which legalized governmental power is restricted by law, usually the constitution. Countries with limited governments have laws about what government can and can't do. Any country that has a democratic governmental system is an example of one that is a limited government. Many countries throughout the world have a limited government, and a few examples are United States, England, Australia, Japan etc. In India, it is constitutionally-limited government, bound to specific principles and actions by the constitution.

- Division of powers
- Acceptance of plurality of interests in society
- No authoritative or dictatorial leadership
- Minimum constraints on individual freedom

According to Carl J Friedrich, the division of powers is the most important basis of Constitutionalism. Constitutionalism may exist in a monarchy or republic, aristocracy or democracy, if there is division of power.

### **1.3.1. Constitutionalism in India**

Constitutionalism in India is an amalgamation of the following underlying principles:

- Written Constitution,
- Responsible Government,
- Parliamentary Democracy,
- Rule of Law,
- Fundamental Rights,
- Separation of Powers and Checks and Balances,
- Flexibility of Constitution and its Basic Structure,
- A Federal Form of Government,
- Independent Judiciary and Judicial Review etc.

The concept of Constitutionalism has been recognised by the Supreme Court in **Rameshwari Prasad v. Union of India**. The Court stated, “The constitutionalism or constitutional system of Government abhors absolutism-it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself.”

In **IR Coelho v. State of Tamil Nadu**, the Court held that Constitutionalism is a legal principle that requires control over the exercise of governmental power to ensure that the democratic principles on which the government is formed shall not be destroyed.

## **2. Historical Underpinnings**

### **2.1. Role of Developments under the British rule**

These events can be summarized under two heads:

- Under the British East India Company (1773 – 1858)
- Under the British Crown (1858 – 1947)

### **2.2. Analysis**

We can study the historical developments from two perspectives:

- General features, and
- Features related in some form with current scheme of the Constitution (marked with '\*' )

#### **2.2.1. Developments under the Company Rule (1773-1858)**

The British government passed many laws and acts in India which elicited different reactions from different parts of the Indian society and played a pivotal role in the modeling of either the Indian polity or the Society. Some of the most important and consequential acts are listed below:

### 1. Regulating Act of 1773

- It designated the Governor of Bengal as Governor General of Bengal. It created an executive council of four members to assist him. Lord Warren Hastings became the first Governor General of Bengal.
- The governors of Bombay and Madras were made subordinate to the Governor-General of Bengal. This started a tendency towards ‘centralization’ of power, which continued up till the Charter Act, 1833.\*
- A Supreme Court was established as the Apex Court at Calcutta in 1774, comprising one Chief Justice and three other judges\*.
- It strengthened the control of British government over the Company by requiring the Court of Directors (governing body of the Company) to report on its revenue, civil and military affairs in India. It prohibited company officials from engaging in private trade and from accepting gifts from Indians.
- It has constitutional importance as it laid the principles of central administration in India.\*

### 2. Pitt's India Act of 1784

- Commercial and political functions of the company were separated. The Court of Directors managed the commercial activities while the Board of Control managed political affairs.
- The Board of Control in England was mandated to supervise the East India Company's affairs. It consisted of six members, which included one Secretary of State from the British cabinet, as well as the Chancellor of the Exchequer.
- The Act reduced the number of members of the Executive Council to three, of whom the Commander-in-Chief was to be one. It also modified the Councils of Madras and Bombay on the pattern of that of Bengal.
- It empowered the Board of Control to supervise and direct all operations of civil and military revenues of the British possessions. Thus, it paved the way for evolution of dual government.
- The Company's territories were for the first time called ‘British possession in India’.

#### Analysis of the Act

As pointed above (through formation of Board of Control), it introduced the Dual System of government: by the Company and by a Parliamentary Board, which lasted till 1858.

- The Board of Control had no independent executive power.
- It had no patronage. Its powers were veiled.
- It had access to all the Company's papers and its approval was necessary for all dispatches that were not purely commercial. Also, in case of emergency the Board could send its own draft to the Secret Committee of the Directors to be signed and sent out in its name.

Thus, the Act placed the civil and military government of the Company in due subordination to the Government in England.

### 3. Charter Act, 1813

- This act did not bring about any significant changes in the administration of India.
- Continental System introduced by Napoleon led to restriction on British's European trade. It forced British companies and merchants to diversify their trade away from Europe. Hence, they wanted end of East India Company's monopoly over Indian trade. In this context, Charter Act ended Company's monopoly in trade with India.
- However, trade in tea and trade with China remained exclusively with Company.
- It had a provision that Company should invest Rs. 1 Lakh every year on the education of Indians. However, this was not implemented in effect.
- It empowered local governments to impose taxes and punish for their non-payment subject to the jurisdiction of Supreme Court.

#### 4. Charter Act, 1833

- Also known as '**Saint Helena Act**', it brought about the final step of 'centralization', as mentioned earlier.
  - It made the Governor-General of Bengal as the Governor-General of India and vested in him all the military and civil powers. Lord William Bentinck was the first Governor-General of India.
  - All law-making powers were conferred on the Governor-General and his Council.
  - Thus, the Act created for the first time, a government of India having authority over the entire territorial area possessed by the British in India.\*
- Laws under previous acts were called as '**Regulations**', while those under Charter Act, 1833 were called as '**Acts**'.
- The Act ended the East India Company's monopoly over trade with India. It became a purely administrative body. Trade with India was open to all British subjects.
- It attempted to codify all the Indian Laws. In this regard, it directed the government to set up an Indian Law Commission. Hence, India's first law commission was set up with Lord Macaulay as its Chairman.
- It **tried** to bring about a system of open competition for selection of Civil Servants. \*
  - The above provision was however **negated** by opposition of the Court of Directors of Company.

#### 5. Charter Act, 1853

It's considered as a significant constitutional landmark:

- For the first time, legislative and executive functions (of the Governor General's Council) were clearly demarcated.
  - It provided for addition of six new members under a body called 'Indian Legislative Council' or 'Central Legislative Council'. Four out of six members were appointed by the provisional governments of Madras, Bombay, Bengal and Agra.
  - Thus, it marked the beginning of Parliamentary system in India.
- It introduced an open competition system for selection and recruitment of civil servants.\*
  - It implied that the 'covenanted' civil services were now open for Indians too.
  - Macaulay Committee was set up to recommend for enforcing the same in 1854.
- It introduced for the first time, local (provincial) representation to Indian Legislative Council. Four members were appointed by the local governments of Madras, Bombay, Bengal and Agra.
- It extended Company's rule and allowed it to retain the possession of Indian territories on trust for British Crown. But, it did not specify any particular period, unlike previous Charters. This was an indication that the Company's rule could be terminated at any time the Parliament liked.

### **2.2.2. Developments under the British Crown's Rule**

#### 1. Government of India Act, 1858

The Act is also known as the '**Act for the Good Government of India**'. After the 1857 revolt, the rule of the company was ended and transferred the powers of government, territories and revenues to the British crown.

The Act was largely confined to improvement of the administrative machinery. It did not alter significantly the system of government that prevailed in India.

Few other important features were:

- It ended the system of double government by abolishing the Board of Control and Court of Directors.
- It established a new office of Secretary of State for complete authority and control over Indian administration.

- The Secretary of State would be a member of the British Cabinet and was responsible to the British Parliament.
- He was assisted by a 15-member Council in India.
  - The Council was an advisory body.
  - The Secretary of State was its chairperson.
- Thus, it established control of British Parliament over Indian affairs. Administration of the country was now highly centralized.

## 2. Indian Councils Acts:

They were total 3 in number: 1861, 1892 and 1909.

### • Act of 1861

- Indians were, for the first time, made a part of the law making process.
  - The Viceroy could now nominate a few Indians as non-official members.
- It initiated the process of decentralization by restoring powers to Bombay and Madras Presidency.\*
- It provided for establishment of new legislative councils for Bengal, North-Western Frontier Province (NWFP) and Punjab, which were established in 1862, 1866 and 1897 respectively.
- It also gave recognition to the '**portfolio system**', introduced by Lord Canning in 1859.\*
- It empowered the Viceroy to issue ordinances.\*

### • Act of 1892

- It increased the number of non-official members in the Central and provincial legislative councils, but maintained official majority in them.
- The Act made a limited and indirect provision for the use of election in filling up some of the non-official seats in both, Central, as well as, Provincial Legislative Councils\*. Thus, the element of election was introduced for the first time. However, the word 'nomination' was used instead of 'elections'.
- It increased the functions of legislative councils:
  - Power of discussing budget was granted.
  - Questions could now be addressed to the Executive.

### • Act of 1909 (Morley-Minto Reforms)

- It increased the number of seats of legislative councils, both at central and provincial levels. The number of members of the Central legislative council was increased from 16 to 60.
- It retained official majority in Central Legislative Council but allowed the provincial legislative councils to have non-official majority.
- Members of legislative councils were given wider deliberative powers. They could now ask supplementary questions, move resolutions on budget et al.\*
- It provided for a provision for Indians to participate in executive councils. Satyendra Prasad Sinha became the first Indian to become listed on the Viceroy's Executive Council. He was appointed as the law member of the British ministry.
- It introduced the system of communal representation for Muslims by accepting the concept of 'separate electorate'. Under this, the Muslim members were to be elected only by the Muslim voters. Thus, the Act 'legalized communalism' and Lord Minto came to be known as **Father of Communal Electorate**.

## 3. The Government of India Act, 1919 (Montagu-Chelmsford Reforms)

In 1917, the British Government declared, for the first time, that its objective was the gradual introduction of responsible government in India (Secretary of state Montagu's declaration). The Government of India Act, of 1919 was thus enacted, though not completely in line with the above stand.

Following are its important features:

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- Relaxation of central control over the provinces by demarcating the central and provincial subjects. Respective legislatures at centre and provinces were authorized to make laws on their respective subjects.\*
  - However, the basic government structure was largely centralized and unitary.\*
- Dyarchy was introduced at the level of provinces.
  - Dyarchy implies division of governance subjects into two parts.
  - These two parts were namely: transferred subjects(to be administered by the Governor with the aid of ministers) and reserved subjects (to be administered by the Governor and his Executive Council without being responsible to the legislature)
- Bicameralism was introduced for the first time. It was introduced at the Centre.
- Direct elections were introduced for the first time.\*
  - Franchise was granted to some limited people on foundation of property, tax and education.
- Separation of central budget from provincial budget.\*
- It provided for the establishment of a Public Service Commission. Hence, a Central Public Service Commission was set up in 1926 (on recommendation of Lee Commission, 1923-24).\*
- It extended the principle of communal representation by providing separate electorates for Sikhs, Indian Christians, Anglo-Indians and Europeans.
- It provided for the appointment of a statutory commission to inquire into and report on its working after ten years of its coming into force.

#### 4. Government of India Act, 1935

In line with the 1919 Act, the British Government announced the appointment of a seven-member statutory commission under the chairmanship of Sir John Simon to report on the condition of India under its new Constitution. All members of the commission were British and, hence, all parties boycotted the commission. To consider the proposals of commission, the British Government convened three round table conferences of the representatives of the British Government, British India and Indian princely states. On the basis of these discussions, a 'White Paper on Constitutional Reforms' was prepared and submitted for consideration of a British Parliamentary Committee. Recommendations of this committee were incorporated (with certain changes) in Government of India Act of 1935. This Act has a singularly important role to play in framing of the Constitution in its current form, purely owing to the fact that several features of this Act have been incorporated, one way or the other, by our Constitution makers. Also, the Act endeavoured to give a written Constitution to the country. Further, after centuries, Indians got an opportunity to assume responsibility of running the administration of their country.

Some of its prominent features were:

- It provided for the establishment of an All-India Federation consisting of provinces and princely states as units. The Act divided the powers between the Centre and units in terms of three lists - Federal List, Provincial List and Concurrent List. Residuary powers were given to the Viceroy. However, the federation never came into being as princely states did not join it.
- It abolished dyarchy introduced in the provinces by the GOI Act, 1919 and introduced 'provincial autonomy' in its place. The provinces were allowed to act as autonomous units of administration in their defined spheres. Moreover, the Act introduced responsible governments in provinces, that is, the Governor was required to act with the advice of ministers responsible to the provincial legislature. This came into effect in 1937 and was discontinued in 1939.

- It provided for adoption of dyarchy at the Centre. Consequently, federal subjects were divided into reserved subjects and transferred subjects. However, this provision of the Act did not come into operation at all.
- Bicameralism was introduced in six out of eleven provinces. Thus, the legislatures of U.P., Bihar, Assam, Bengal, Madras and Bombay came to consist of two houses - the Legislative Assembly and the Legislative Council, whereas other provinces consisted of one House i.e. Legislative Assembly. The membership criteria of these houses varied from province to province. At the centre, the federal legislature consisted of two houses, the Council of States and Federal Assembly consisting of 260 and 375 members respectively. The Council of States (Upper House) was a permanent body, one-third of whose members were to retire every three years.
- A Federal Court was established at the Centre.

Besides the above, it also contained the following provisions:

- Formation of the provinces of Sindh and Orissa.
- It further extended the principle of communal representation by providing separate electorates for depressed classes (scheduled castes), women, and labour (workers).
- Separation of Burma and Aden from India.
- The Indian Council was abolished and a few advisers, varying from 3 to 6, were appointed to advise the Secretary of States in his policy formulation towards India.
- The Secretary was normally not expected to interfere in the Indian affairs, which were to be carried out by Governors.
- With respect to the changes brought in the Federal Government, the Viceroy remained its head. He exercised a wide range of powers concerning administration, legislation and finance.
- The Act created provisions for reserved subjects, to be looked after by the Viceroy through Executive Councilors. Similarly, the transferred subjects were also to be under the Viceroy, aided by Indian ministers, not more than 10 in number, selected from the legislature.
- In case of the provincial government, the Governor carried on the administration with the help of a council of ministers selected by him from among the members of the provincial legislature. The composition of the provincial legislature also varied from one province to the other.
- It provided for the establishment of a Reserve Bank of India to control the currency and credit of the country.
- It extended the franchise and about 10 per cent of the total population got the voting right.

### Critical Analysis of the Act

It is said that the act was nothing but '**sugar-coated quinine'**:

- The proposed scheme for establishing a Federation proved to be a non-starter, as the princely states did not join it.
- Though it introduced Dyarchy in the Centre and autonomy in Provinces, but the powers of the elected or nominated members were limited. The Act had retained control of the Central Government over the Provinces in a certain sphere – by requiring the Governor to act ‘in his discretion’ or in the exercise of his ‘individual judgment’ in certain matters. In such matters the Governor was to act without ministerial advice and under the control and directions of the Viceroy, and, through him, of the Secretary of State.
- The legislative powers of both the Central and Provincial Legislatures were subject to various limitations and neither could be said to have possessed the features of a sovereign Legislature. Consider, for instance, the following:

- Apart from the Viceroy's power of veto, a Bill passed by the Central Legislature was also subject to veto by the Crown.
- The Viceroy might prevent discussion in the Legislature and suspend the proceedings in regard to any Bill if he was satisfied that it would affect the discharge of his 'special responsibilities'.
- Apart from the power to promulgate Ordinances during the recess of the Legislature, the Viceroy had independent powers of legislation, concurrently with those of the Legislature. Thus, he had the power to make temporary Ordinances as well as permanent Acts at any time for the discharge of his special responsibilities.
- No bill or amendment could be introduced in the Legislature without the Viceroy's previous sanction, with respect to certain matters, e.g., if the Bill or amendment sought to repeal or amend or was repugnant to any law of the British Parliament extending to India or any Viceroy's or Governor's Act, or if it sought to affect matters as respects which the Viceroy was required to act in his discretion.

There were similar restraints on the Provincial Legislature.

The Instruments of Instructions issued under the Act further required that Bills relating to a number of subjects, such as those derogating from the powers of a High Court or affecting the Permanent Settlement, when presented to the Viceroy or a Governor for his assent, were to be reserved for the consideration of the Crown or the Viceroy, as the case might be.

### **2.2.3. Other Intermediate Developments**

#### **1. Communal Award**

- After the Second Round Table Conference, in August 1932, the British PM, Ramsay Macdonald gave his 'Communal Award'. According to it, separate representation was to be provided to the forward castes, lower castes, Muslims, Buddhists, Sikhs, Indian Christians, Anglo-Indians, Europeans and Dalits. The Dalits were assigned a number of seats to be filled by election from special constituencies in which voters belonging to the Dalit community only could vote.
- The award was opposed by Mahatma Gandhi, who fasted in protest against it. After lengthy negotiations, Gandhi reached an agreement - called the Poona Pact - with Dr. Ambedkar to have a single Hindu electorate, with Dalits having seats reserved within it.

#### **2. Cripps Mission**

- In March 1942, Sir Stafford Cripps, a member of the British cabinet came with a draft declaration on the proposals of the British Government. These proposals were to be adopted at the end of the Second World War, provided the Congress and Muslim League could accept them.
- According to the proposals:
  - The Constitution of India was to be framed by a Constituent Assembly elected for the purpose by the Indian people.
  - The Constitution should provide India, a dominion status.
  - There should be one Indian Union comprising all the provinces and Indian states.
  - Any province (or Indian state) not accepting the Constitution would be free to retain its constitutional position existing at that time, and with such a non-accepting province, British Government could enter into separate constitutional arrangements.

#### **3. Cabinet Mission**

In March 1946, Lord Clement Atlee sent a Cabinet Mission to India consisting of three Cabinet Ministers, namely Lord Pethick Lawrence, Sir Stafford Cripps and Mr. A.V. Alexander.

The object of Cabinet Mission was to help India achieve its independence as early as possible, and to set up a Constitutional Assembly. According to the Cabinet Mission Plan,

there was to be a Union of India, comprising both British India and the States, having jurisdiction over the subjects of foreign affairs, defence and communication. All residuary powers were to be vested in the provinces and the states.

The Union was to have an executive and a legislature consisting of representatives of the provinces and the states. The provinces could form groups with executives and legislatures, and each group could be competent to determine the provincial subjects.

#### **4. The Mountbatten Plan**

The plan for transfer of power to the Indians and partition of the country was laid down in the Mountbatten Plan. It was given a formal shape by a statement made by the British Government on June 3, 1947.

#### **5. Indian Independence Act, 1947**

On February 20, 1947, the then British Prime Minister, Clement Atlee, declared that the British rule in India would end by June 30, 1948. Other provisions of the Indian Independence Act, 1947 were:

- End of British rule in India was declared independent and sovereign.
- Partition of India and Pakistan.
- Abolition of the post of Viceroy and appointment of a Governor-General for both India and Pakistan.
- Empowering the Constituent Assemblies of both the dominions of India and Pakistan with legislative and executive powers to frame and adopt a Constitution for their respective nations.

### **3. Evolution**

#### **3.1. Two Dimensions**

1. Evolution prior to the adoption of the Constitution (pre 1950 era), and
2. Evolution as an ongoing process (1950 onwards).

##### ***3.1.1. Evolution Prior to the Adoption of the Constitution***

**The Constituent Assembly:** The task of framing the Constitution of a sovereign democratic nation is performed by a representative body of its people. Such a body elected by the people for the purpose of considering and adopting a Constitution is called a Constituent Assembly.

- Genesis of the idea:
  - The idea of Constituent Assembly was implicit in the demand for Swaraj made by the Indian National Congress as early as 1906.
  - In 1936, the Congress resolved, "The Congress stands for a genuine democratic State in India, where power has been transferred to the people as a whole and the government is under their effective control. Such a State can only come into existence through a Constituent Assembly having the power to finally determine the Constitution of the country."
  - On March 15, 1946 Clement Atlee, the Labour Party's Prime Minister categorically admitted the right of Indians to frame their own Constitution.
  - The British Parliament passed the Indian Independence Act, 1947 in July of the same year. As per the Independence Act, the two independent dominions were created w.e.f. August 15, 1947.
  - The Constituent Assembly, which had already been formed, went into action as per the Cabinet Mission plan. Its total membership for entire India was 389, out of which 93 members were from the princely states and 296 were elected from the British Indian provinces.

The Constituent Assembly, when it met for the first time on December 9, 1946 was not a sovereign body. It had to follow the prescribed procedure set up by the Cabinet Mission of the British Parliament.

On December 11, 1946, the Indian National Congress elected Dr. Rajendra Prasad as the permanent Chairman of the Constituent Assembly.

## 1. Composition

The Constituent Assembly was a partly elected and a partly nominated body. The members were elected indirectly by people in the provincial assemblies, who in turn had been elected on the basis of a limited franchise (on the basis of tax, property and education).

Although, it was an indirectly elected body, yet it comprised of representatives of all sections of Indian society - Hindus, Muslims, Sikhs, Parsis and Anglo-Indians.

Further, the Constituent Assembly included all leading personalities of India of the time, with the exception of Gandhi and Jinnah.

## 2. Committees

The Constituent Assembly appointed numerous committees, which were divided as: major and minor committees.

### Major Committees:

1	Union Powers Committee	Jawaharlal Nehru
2	Union Constitution Committee	Jawaharlal Nehru
3	Provincial Constitution Committee	Sardar Vallabhbhai Patel
4	Drafting Committee	Dr. B. R. Ambedkar
5	Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded Areas	Sardar Vallabhbhai Patel
6	Rules of Procedure Committee	Dr. Rajendra Prasad
7	States Committee (Committee for Negotiating with States)	Jawaharlal Nehru
8	Steering Committee	Dr. Rajendra Prasad

### Minor Committees:

1	Committee on the Functions of the Constituent Assembly	G.V. Mavalankar
2	Order of Business Committee	Dr. K.M. Munshi
3	House Committee	B. Pattabhi Sitaramayya
4	Ad-hoc Committee on the National Flag	Dr. Rajendra Prasad
5	Special Committee to Examine the Draft Constitution	Alladi Krishnaswamy Ayyar
6	Credentials Committee	Alladi Krishnaswamy Ayyar
7	Finance and Staff Committee	Dr. Rajendra Prasad.
8	Hindi Translation Committee	
9	Urdu Translation Committee	
10	Press Gallery Committee	
11	Committee to Examine the Effect of Indian Independence Act of 1947	
12	Committee on Chief Commissioners' Provinces	B. Pattabhi Sitaramayya.
13	Commission on Linguistic Provinces	
14	Expert Committee on Financial Provisions	
15	Ad-hoc Committee on the Supreme Court	S. Varadachariar.

### 3. Working of the Constituent Assembly:

The Constituent Assembly held its first meeting on December 9, 1946 that was boycotted by the Muslim League, which insisted on a separate state of Pakistan.

- **Objective Resolutions**

J L Nehru moved the historic ‘Objectives Resolutions’ within the Assembly. The basic idea of the ‘Objective Resolutions’ was to lay down the fundamentals and philosophy of the constitutional structure. Its prominent excerpts were:

- The Constituent Assembly declares its firm and solemn resolve to proclaim India being an independent sovereign republic.
- All the power and also the authority of independent sovereign India, its constituent parts and organs of presidency shall be derived from its people. (Advocating Democracy)
- People shall be guaranteed justice and secured social, economic and political equality of status of opportunity and before law, freedom of thought, expression, belief, faith, worship, vocation, association, action and public morality. (Fundamental Rights)
- Adequate safeguards will be provided for minorities, backward and tribal areas and depressed classes, and other backward classes. (Part X, Part XVI)
- Government at the centre shall maintain the integrity of the territory of the republic of India and its sovereign rights on land, sea and air based on laws of civilized nations of the world.
- India as an ancient land attains its rightful and honoured place in the world and shall make its full contribution to the promotion of world peace and the welfare of mankind.

The ‘Objectives Resolutions’ later became the basis of the Preamble of the Constitution.

### 4. Enactment and Enforcement

After two readings of the draft, during which various alterations were accommodated, Dr. B.R. Ambedkar proposed a motion on **26<sup>th</sup> November, 1949** which has been mentioned as the day ‘people of India in the Constituent Assembly adopted, enacted and gave to themselves the Constitution of India’.

January 26, 1950 was chosen as the ‘date of commencement’ on which the Constitution came into force owing to its historic importance (although some provisions came into force on 26<sup>th</sup> November, 1949 only).

### 5. Criticism of the Constituent Assembly

- **Not a Representative Body:** Members of the Constituent Assembly weren’t directly elected by people according to universal adult franchise.
- **Not a Sovereign Body:** It is said that the Constituent Assembly was formed, based on the proposals of the British Government. Further, it held its sessions with permission of British Government.
- **Domination of Congress members:** Granville Austin, an English constitutional expert, remarked: “The Constituent Assembly was a one-party body in an essentially one-party country. The assembly was the Congress and also the Congress was India.”
- **Lawyer-Politician Domination:** The fact that lawyers and politicians dominated the membership of the assembly is cited as the main reason behind the bulkiness and complicated nature of the Constitution.

#### **3.1.2. Evolution as an Ongoing Process**

Mr. Justice H. R. Khanna in his ‘Making of Constitution’ said: “The framing of a Constitution calls for the highest statecraft. Those entrusted with it have to realize the practical needs of the government and have, at the same time, to keep in view the ideals, which have inspired the nation”.

A Constitution has to be a living thing, living not for one or two generations but for succeeding generations of men and women. It is for this reason that the provisions of the Constitution are couched in general terms, for the great generalities the Constitution have a content and significance that vary from age to age and have, at the same time transcendental continuity about them. A Constitution states, or ought to state, not the rules of the passing hour, but the principles for an expanding future.

A Constitution is lent the vitality of a living organism owing to two given innate features of a Constitution:

1. It is **open to constant changes**. Whether by ratifying the Constitution by a new amendment, or by repealing an existent amendment.

We will take few examples to ascertain our point:

- a) The 42<sup>nd</sup> constitutional amendment mentioned explicitly the concepts of secularism and socialism as a part of the Constitution.
- b) Article 15(4) was added by the 1<sup>st</sup> constitutional amendment act and provides for affirmative action for socially and economically backward sections of society or for SC/STs.
- c) Similarly, Article 15(5) provides for affirmative action for socially and economically weaker sections of society in educational institutions, whether aided or unaided. Article 15(5) was added by the 93<sup>rd</sup> constitutional amendment act.

2. Additionally, the Constitution is **open to constant interpretation by the Supreme Court**. This feature allows the Supreme Court to accord such interpretations so as to make the Constitution:

- a) Increasingly relevant to the time and tenor of the contemporary reality
- b) Reflect to maximum extent possible, needs and aspirations of the people.

Again, the **following examples** illustrate how the Constitutional provisions have been added, modified and reinterpreted to fulfil the needs of the time and aspirations of the citizens:

#### a) Right to Education (Article 21A)

The Right to Education was incorporated through the 86<sup>th</sup> constitutional amendment enacted by the Parliament of India after landmark judgements by the Supreme Court in the Mohini Jain and Unni Krishnan case. This provides one of the many examples where both the above mentioned innate features have worked in tandem to reflect the aspirations of the people, making it 'alive' to the need of the hour

- b) The Supreme Court has taken account of people's aspirations and helped keep the Constitution alive by constantly broadening the span of **Article 21 or the 'Right to Protection of Life and Personal Liberty'**. Starting with its judgment in the Maneka Gandhi vs. Union of India case, 1978, the SC has time and again brought about various judgments so as to tackle various issues crippling normal life of Indian citizens or some other need of the hour. The CNG ruling in Delhi, Ganga river protection, right to adequate shelter, right to privacy as a fundamental right, right to die with dignity as a fundamental right and thus allowing passive euthanasia et al are instances of such rulings.

Thus, in a way the Constitution constantly evolves, just as a living organism would do, learning from its experience and the surrounding environment.

## 4. Salient Features of the Constitution of India

Student Notes:2021

### 1. Lengthiest Written Constitution

The Indian Constitution is the lengthiest written Constitution in the world, among all sovereign countries. In its original form, it consisted of 395 Articles and 8 Schedules, to which changes have been made through subsequent amendments. As of January 2020, the Constitution of India consists of 470 articles in 25 parts, 12 schedules, and 5 appendices. As of January 2020, there have been 126 Amendment Bills and 104 amendments of the Constitution of India.

#### Written and Unwritten Constitution

**Written constitution** is one which is found in legal documents duly enacted in the form of laws. It is precise, definite and systematic. It is the result of conscious and deliberate efforts of people. It is framed by a representative body duly elected by people at a particular period in history. It is always promulgated on a specific date in history. A written constitution is generally rigid and a procedure separate from that of enacting ordinary law is provided for its amendment or revision i.e. a distinction between constitutional law and ordinary law is maintained. The first written constitution framed by a representative constituent assembly was that of the United States of America. This example was followed by France. During 19th century a number of states framed their constitutions, all of which were written, with the exception of England. Indian constitution is an example of written constitution.

**Unwritten constitution** is the one in which no provisions or laws of the constitution are set in writing but they are documented despite not being codified in a structured manner in a single book. It consists of customs, conventions, traditions, and some written laws bearing different dates. It is unsystematic, indefinite and un-precise. Such a constitution is not the result of conscious and deliberate efforts of the people. It is generally the result of historical development. It is not made by a representative constituent assembly at a definite stage of history, nor is it promulgated on a particular date. It is, therefore, sometimes called an evolved or cumulative constitution. The constitution of England is a classic example of an unwritten constitution which is mainly a result of historical growth.

However, **distinction** between written and unwritten constitution is not scientific. There is no constitution which is wholly written. Nor is there any which is completely unwritten. Every written constitution has an unwritten element in it and every unwritten constitution has a written element.

**Point to be noted:** *Although the last article of the Constitution is Article 395, the total number, as of January, 2020 is 470. New articles added through amendments have been inserted in the relevant location in the original Constitution. In order not to disturb the original numbering, the new articles are inserted with alphanumeric enumerations. For example, Article 21A pertaining to Right to Education was inserted by the 86th Amendment Act.*

There are various factors responsible for the length of the Constitution:

- One of the major factors was that the framers of the Constitution borrowed provisions from several sources and several other constitutions of the world.
- Secondly, it was necessary to make provisions for issues particular to India, like the scheduled castes, scheduled tribes and backward regions.
- Thirdly, provisions were made for elaborate centre-state relations in all aspects of their administrative and other activities.
- Fourthly, since Indian states do not have a separate Constitution, provisions regarding the state administration were also included in the Constitution of India.

- Further, a detailed list of individual rights, directive principles of state policy and the details of administration procedure were laid down to make the Constitution clear and unambiguous for the ordinary citizen.

## 2. Blend of Rigidity and Flexibility

The Constitution of India is neither purely rigid nor purely flexible. There is a harmonious blend of rigidity and flexibility. Some parts of the Constitution can be amended by the ordinary law-making process of Parliament. However, certain provisions can be amended, only when a Bill for that purpose is passed in each House of Parliament by a majority of the total membership of that house and by a majority of not less than two-third of the members of that house present and voting. Then there are certain other provisions, which can be amended by the second method described above and must be further ratified by the legislatures of not less than one-half of the states before being presented to the President for his assent. It must also be noted that the power to initiate bills for amendment lies with the Parliament alone, and not with the state legislatures.

However, SC has identified the limited power of Parliament to amend the Constitution as part of basic structure. In other words, parliament cannot amend each and every part of the constitution.

In Pandit Nehru's words spoken in the Constituent Assembly: "*While we want the Constitution to be as solid and permanent as we can make it, there is no permanence in Constitution. There should be certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital organic people....*

*In any event, we could not make this Constitution so rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do today may not be wholly applicable tomorrow.*"

## 3. A Democratic Republic

India is a democratic republic. It means that sovereignty rests with the people of India. They govern themselves through their representatives, elected on the basis of universal adult franchise. The President of India, the highest official of the state is elected for a fixed term. Although, India is a sovereign republic, yet it continues to be a member of the Commonwealth of Nations with the British Monarch as its head. Her membership of the Commonwealth does not compromise her position as a sovereign republic. The Commonwealth is an association of free and independent nations. The British Monarch is only a symbolic head of that association.

### Concept of Parliamentary Sovereignty

**Parliamentary Sovereignty:** It is also known as parliamentary supremacy or legislative supremacy. It makes Parliament the supreme legal authority, which can create or end any law. Also, the judiciary cannot overrule legislation and no Parliament can pass laws that future parliaments cannot change.

Parliamentary sovereignty stands at odds with:

- The doctrine of constitutional supremacy,
- The doctrine of separation of powers (limits the legislature's scope, often to general law-making),
- The doctrine of judicial review (laws passed by the legislature may be declared invalid in certain circumstances).

Parliamentary sovereignty is a principle of the UK Constitution. It makes Parliament the supreme legal authority in the UK.

### **Is the Indian Parliament sovereign?**

Student Notes:2021

The sovereign status of Indian Parliament is not absolute as in case of UK, because it is subject to the provisions of the Constitution. That is to say, the Indian Parliament derives its authority and power from the Constitution itself.

It has pre-defined limitations as defined below:

1. The Parliament can enact laws with respect to only those matters, which are enumerated either in the Union list or the Concurrent list.
2. The laws made by Parliament are also subject to the power of judicial review of the Supreme Court. That means that if a law made by Parliament goes against the provisions of the Constitution, it can be declared null and void by the concerned court.

Thus, in India, the principle of supremacy of the Constitution has been adopted as against the principle of supremacy of Parliament in UK.

#### **4. Parliamentary Form of Government**

India has adopted the Westminster system, a democratic parliamentary system of government modeled after the system followed in the United Kingdom. In this system, the executive is responsible to the legislature, and remains in power only as long as it enjoys the confidence of the legislature. The President of India, who remains in office for five years, is the nominal, titular or constitutional head. The Union Council of Ministers, with the Prime Minister as its head is drawn from the legislature. It is collectively responsible to the House of People (Lok Sabha), and has to resign when it loses the confidence of that house. The President, the nominal executive shall exercise his powers as per the advice of the Union Council of Ministers, the real executive. In the states also, the government is parliamentary in nature.

#### **5. Mixture of Federal and Unitary Features**

Article 1 of the Constitution of India says: "India, that is Bharat, shall be a Union of States." Though the word 'federation' is not used, India is a federal republic.

A state is federal when:

- b) There are two sets of governments and there is distribution of powers between the two;
- c) There is a written Constitution, which is the supreme law of the land; and
- d) There is an independent judiciary to interpret the Constitution and settle disputes between the centre and the states.

All these features are present in India. There are two sets of government, one at the centre, the other at state level and the distribution of powers between them is quite detailed in our Constitution. The Constitution of India is written and is the supreme law of the land. At the apex of a single integrated judicial system, stands the Supreme Court, which is independent from the control of the executive and the legislature.

But, in spite of all these essential features of a federation, the Indian Constitution has certain unitary tendencies. While other federations like USA provide for dual citizenship, the India Constitution provides for single citizenship. There is also a single integrated judiciary for the whole country. The provision of All India Services, like the Indian Administrative Service, the Indian Police Service, and Indian Forest Service prove to be another unitary feature. Members of these services are recruited by the Union Public Service Commission on an all-India basis. Since these services are controlled by the Union Government, to some extent this constitutes a constraint on the autonomy of States.

A significant unitary feature is the emergency provisions in the Indian Constitution. During the time of emergency, the Union Government becomes even more powerful and the Union Parliament acquires the power of making laws for the states. The Governor, placed as the Constitutional head of the State, acts as the agent of the Centre and is intended to safeguard the interests of the Centre. These provisions reveal the centralizing tendency of our federation.

Prof K.C. Wheare has remarked that Indian Constitution provides, "a system of government which is quasi-federal, a unitary state with the subsidiary unitary features".

The framers of the Constitution expressed clearly that there existed a harmony between federalism and unitarism. Dr. Ambedkar said, "The political system adopted in the Constitution could be both unitary as well as federal according to the requirement of time and circumstances".

The United States was the first nation to have a truly federal Constitution and its federal structure is still taken as the reference to judge whether any Constitution is federal or not. However, the conditions under which different constitutions, especially the Indian Constitution, were framed were much different from the conditions in America in 1787. India, at the time of independence had already witnessed a messy partition and fissiparous tendencies existed throughout the breadth of the country. Hence, a strong centre was the need of the day to keep the state existing as a single unit and ultimately weld its people together into a nation.

There are some centralising tendencies, but the Indian states also enjoy a fair degree of power and autonomy. The Law Commission of India has also observed that there is no dichotomy between a strong Union and strong states.

In *S R Bommai case* (1994), SC laid down that Constitution is federal and characterised federalism as its 'basic feature'. It observed that conferring greater power upon Centre does not mean that states are mere appendages of Centre. They have an independent constitutional existence. They are not satellites or agents of Centre. Within the sphere allotted to them, the states are supreme. Federalism in the Constitution is not a matter of administrative convenience but a matter of principle.

The above debate is probably best summarized in Prof. Alexanderowicz's words that "India is a federation but a federation sui generis", i.e. a federation in a class of its own or a unique federation.

To conclude, India has "Cooperative federalism" with central guidance and state compliance. In recent times, the concept of "Competitive Federalism" has emerged where the centre competes with states and vice-versa, and states compete with each other in their joint efforts to develop India.

## 6. Fundamental Rights

"A state is known by the rights it maintains", remarked Prof. H.J. Laski. The Constitution of India affirms the basic principle that every individual is entitled to enjoy certain basic rights and Part III of the Constitution deals with those rights, which are known as Fundamental Rights. Originally there were seven categories of rights, but now they are six in number. They are:

- Right to Equality,
- Right to Freedom,
- Right against Exploitation,
- Right to Freedom of Religion,
- Cultural and Educational rights and
- Right to Constitutional Remedies.

Right to property (Article-31), originally a Fundamental Right, has been removed by the 44th Amendment Act. 1978. It is now a legal right, but not a fundamental right.

Student Notes:2021

Fundamental rights are described as negative obligations of the state and act as limitations against the power of the state. Hence, they are negatively worded.

These fundamental rights are justiciable and the individual can move the higher judiciary, which is the Supreme Court or the High Courts, if there is an encroachment on any of these rights. The right to move to the Supreme Court directly for the enforcement of Fundamental Rights has been guaranteed under Article 32 (Right to Constitutional Remedies). However, the Fundamental Rights in India are not absolute. Reasonable restrictions can be imposed keeping in view the security and other requirements of the state and society.

## **7. Directive Principles of State Policy**

A novel feature of the Constitution is that it contains a chapter on the Directive Principles of State Policy. These principles are in the nature of directives to the government of the day to implement them for establishing social and economic democracy in the country.

It embodies important principles, like adequate means to livelihood, equal pay for both men and women, distribution of wealth so as to sub serve the common good, free and compulsory primary education, right to work, public assistance in case of old age, unemployment, sickness and disablement, the organisation of Village Panchayats, special care to the economically backward sections of the people etc. Most of these principles could help in making India a welfare state. Though not justiciable, these principles have been stated as "**fundamental in the governance of the country**".

## **8. Fundamental Duties**

A new Part, IV (A), following the Directive Principles of State Policy, was incorporated in the Constitution by the 42<sup>nd</sup> Amendment Act, 1976 for Fundamental Duties. The purpose of incorporating the Fundamental Duties in the Constitution is to remind the people that while enjoying their right as citizens, they should also perform their duties, since rights and duties are correlated.

## **9. Secular State**

A secular state is neither religious nor irreligious, or anti-religious. Rather it is neutral in matters of religion. India being a land of many religions, the founding fathers of the Constitution thought it proper to make it a secular state. India is a secular state, because it makes no discrimination between individuals on the basis of religion. It neither encourages nor discourages any religion. On the contrary, the Right to Freedom of Religion is ensured in the Constitution and people belonging to any religious group have the right to profess, practice or propagate any religion they like.

## **10. Independent, Impartial and Integrated Judiciary**

The judiciary occupies an important place in our Constitution and it is also made independent of the legislature and the executive. The Supreme Court of India stands at the apex of a single integrated judicial system. It acts as a protector of fundamental rights of Indian citizens and guardian of the Constitution. If any law passed by the legislature, or action taken by the executive contravenes the provisions of the Constitution, they can be declared as null and void by the Supreme Court. Thus, it has the power of judicial review.

## **11. Single Citizenship**

The Constitution of India recognizes only single citizenship. In the United States, there is provision of dual citizenship. In India, we are citizens of India only, not of the respective

states to which we belong. This provision helps in promoting unity and integrity of the nation and promotes fraternity among people of different regions.

Student Notes:2021

## 12. Universal Adult Franchise

The Article 326 of the Indian Constitution grants Universal Adult Suffrage/ Franchise, according to which, all adult citizens above the age of 18 years, irrespective of their religion, caste, race, colour and sex are entitled to cast vote and participate in the election process.

## 13. Emergency Powers

The emergency powers are introduced in the Indian Constitution so that the entire nation can tackle any emergency situation, the country may be faced with. The emergency powers are vested in the hands of the President of India. There are three kinds of Emergency powers: National Emergency (Article 352); Emergency in a State (Article 356) and Financial Emergency (Article 360).

## 14. Separation of Powers

The basic assumption behind the concept of separation of powers is that when power is concentrated in the hands of one/few, it/they can subvert the state machinery to favour individual or group interests over the common interest. The separation of powers is a way of reducing the amount of power in any group's hands, making it more difficult to abuse.

This doctrine claims that state power is not a single entity but rather a composite of different governmental functions (i.e. legislative, executive, and judicial) carried out by state bodies independently of each other. The legislature enacts laws; the executive enforces those laws; and the judiciary interprets those laws.

The traditional views on separation of powers are presented by **Montesquieu** who vigorously advocated for a "*strict or pure or total or complete or absolute*" separation of powers and personnel between three organs of the state i.e. the Executive, Legislature and Judiciary; power being diffused between three separate bodies exercising separate functions with no overlaps in function or personnel.

However, the Indian state represents a contemporary approach to the doctrine of separation of powers. There is no **strict** separation of powers under our Constitution, both in principle and practice. Since the executive or the council of ministers in parliamentary democracies such as India or UK is also a part of the legislature, a rigid separation of powers cannot exist.

India, in fact, has also adopted the doctrine of checks and balances along with the doctrine of separation of powers. Under this doctrine, separate branches of the government viz. legislature, executive, judiciary are empowered to keep each other in check. Hence in India, each branch of the government, while performing its activities, does not seek to interfere in the sphere of another branch, but at the same time seeks to ensure that the other branch is not misusing its powers or exceeding its mandate. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs.

An important question here is the relation among these three organs of the state, i.e. whether there should be a complete separation of powers or should there be co-ordination among them.

In the words of Dr. Durga Das Basu,

"So far as the courts are concerned, the application of the doctrine (the theory of separation of powers) may involve two propositions: namely,

- a) That none of the three organs of Government, Legislative Executive and Judicial, can exercise any power which **properly** belongs to either of the other two;
- b) That the legislature cannot delegate its powers."

What is significant is the word "**properly**" and therefore conceives of a **broad division of powers** where the **core function** is one, which is exclusively conferred on that particular organ of State, though there may be some overlap in regard to the fringe areas of the topics so entrusted. The pronouncement on this aspect of law by the courts is that under the Indian Constitution there is a **broad** separation of powers.

## 15. Independent Bodies

Indian Constitution not only provides for legislative, executive and judicial organs of government (Central and state) but also establishes certain independent bodies like the Election Commission, Comptroller and Auditor General of India and Union Public Service Commission. They are envisaged by the Constitution as the bulwarks of the democratic system of Government in India.

## 16. Three Tiers of Government

Originally, the Indian Constitution, like any other federal constitution, provided for a dual polity and contained provisions with regard to organisation and powers of the Centre and the states. Later, the 73rd and 74th Constitutional Amendment Acts (1992) have added a third-tier of government in form of Panchayats and Municipalities *which is not found in any other constitution of the world.*

The above are some the important salient features of the Indian Constitution, which makes it one of the most unique and distinct constitutions in the world.

# 5. Amendments

## 5.1. Introduction

The Kesavananda Bharati vs. State of Kerala (1973) case provided the best explanation as to the scope and definition of the word 'amendment'. The court gave a broad definition, where by the word 'amendment' will include any alteration or change.

*"The word 'amendment' when used in connection with the Constitution may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provisions, or to some particular article or clause, and is then used to indicate an addition to, the striking out, or some change in that particular article or clause".*

## 5.2. Provision for Amendment

### Why is it needed?

It has been provided in line with the basic philosophy that the Constitution needs to be alive to the necessity of adapting itself to realities of contemporary changes. The scope for amendments is a must to allow the Constitution to adjust itself to the changing conditions and needs.

## 5.3. Types of Amendment

The procedure of amendment makes the Constitution of India neither totally rigid nor totally flexible, rather a curious mixture of both. Some provisions can be easily changed and for some others, special procedures are to be followed. Despite the fact that India is a federal state, the proposal for amending the Constitution can be initiated only in either of the Houses of Parliament, and the state legislatures have no such power.

In case of ordinary legislation, if both the houses of Parliament disagree, a joint session is convened. But, in case of amendment of constitutional articles, unless both the houses separately agree, it cannot materialize, as in such cases there is no provision for convening the joint session of both the Houses of Parliament.

In fact, there are three methods of amending the Constitution. But, Article 368 of the Constitution, which lays down the procedure for amendment, mentions two methods.

However, the Constitution can be amended in the following three ways:

- **By Simple Majority of Parliament**

- Those provisions of the Constitution, which are outside the scope of Article 368, can be amended through majority of each House, present and voting.
- This is quite similar to the ordinary legislative process.
- Following are few of the provisions amended by the above process:
  - a) Formation of new states and alteration of areas, boundaries or names of existing states.
  - b) Creation or abolition of legislative councils in the states.
  - c) Administration and control of scheduled areas and scheduled tribes.
  - d) The salaries and allowances of the Supreme Court and High Court judges.
  - e) Laws regarding citizenship.

- **By Special Majority of the Parliament**

The majority of the provisions of the Constitution need to be amended by a special majority of the Parliament.

- The method:
  - A majority of the 'total membership' of each house; and
  - A majority of two-third of the members of each House present and voting.

Note: 'Total Membership' implies the total number of members comprising the house, irrespective of the fact whether there are vacancies or absentees. However, the impeachment of President is the only exception where the resolution should be passed by a majority of not less than two-third of the total membership of each house.

- The provisions which can be amended by this way include: (i) Fundamental Rights; (ii) Directive Principles of State Policy; and (iii) All other provisions which are not covered by the first and third categories.

- **By Special Majority of the Parliament and consent of States**

It is employed to amend those provisions, which are related to federal structure

- The method:
  - Special Majority of the Parliament
  - Consent of half of the State Legislatures by a simple majority.
    - It must be noted that not all the states are to participate. As soon as half of the states give their consent (through above mentioned method), the procedure is completed.
- There is no time limit within which the states should give their consent.
- The provisions amended by the above procedure are:
  - a) Manner of election of the President.
  - b) Matters relating to the executive power of the Union and the states.
  - c) Representation of the States in Parliament.
  - d) Matters relating to the Supreme Court and High Courts.
  - e) Distribution of legislative powers between the union and the states.
  - f) Any list in the Seventh Schedule.
  - g) Provisions of Article 368 relating to the procedure for amendment of the Constitution.

## 5.4. Criticism of the Amendment Procedure

Student Notes:2021

1. There is no special body for amending the Constitution. As compared to the US, which has a special body (Amendments Convention), there is no such provision in the case of India. Hence, the Constitution has often been amended to attain political goals and ends.
2. State legislatures cannot initiate a constitutional amendment bill (unlike the US). This is held as a criticism against federal base of India. Even in the one exception to the above point (state legislatures can introduce a resolution for demand of State Legislative Councils), is subject to whims of the Parliament, which can reject such a resolution or may not take any action at all. Major part of the Constitution can be amended by the Parliament alone either by a special majority or by a simple majority. Only in few cases, the consent of the state legislatures is required.
3. There is no time frame for state legislature's ratification or rejection.
4. There is no provision for joint sitting of houses in case of a deadlock between them on the matter of an amendment bill, which is available in the case of an ordinary bill. This seems ironical considering the importance that the amendment process has been accorded in our Constitution.
5. The procedure for amendment is kept too sketchy, leaving a wide scope for judicial intervention, which as we have seen above, has led to various confrontations between the Parliament and the judiciary, which undermines the balance of the Indian polity.

## 6. Sources of the Constitution

From U.K.	<ul style="list-style-type: none"><li>• Nominal Head – President (like Queen)</li><li>• Cabinet System of Ministers</li><li>• Post of PM</li><li>• Single Citizenship</li><li>• Parliamentary Type of Government</li><li>• Bicameral Parliament</li><li>• Lower House more powerful</li><li>• Council of Ministers responsible to Lower House</li><li>• Power of Lok Sabha Speaker</li><li>• Prerogative writs</li><li>• Parliamentary privileges</li></ul>
From U.S.A.	<ul style="list-style-type: none"><li>• Written Constitution</li><li>• Executive head of state known as President and his being the Supreme Commander of the Armed Forces</li><li>• Vice- President as the ex-officio Chairman of Rajya Sabha</li><li>• Fundamental Rights</li><li>• Supreme Court</li><li>• Provision of States</li><li>• Independence of judiciary and judicial review</li><li>• Preamble</li><li>• Removal of Supreme court and High court Judges</li></ul>
From USSR	<ul style="list-style-type: none"><li>• Fundamental Duties</li><li>• The ideal of justice (social, economic and political) in the Preamble</li></ul>
From AUSTRALIA	<ul style="list-style-type: none"><li>• Concurrent list</li><li>• Language of the preamble</li><li>• Provision regarding trade, commerce and intercourse</li><li>• The joint sitting of the two Houses of Parliament</li></ul>
From JAPAN	<ul style="list-style-type: none"><li>• Law on which the Supreme Court function</li><li>• Procedure Established by Law</li></ul>

From WEIMAR CONSTITUTION OF GERMANY	<ul style="list-style-type: none"> <li>Suspension of Fundamental Rights during the emergency</li> </ul>
From CANADA	<ul style="list-style-type: none"> <li>Scheme of federation with a strong centre</li> <li>Distribution of powers between centre and the states and placing.</li> <li>Residuary powers with the centre</li> </ul>
From IRELAND	<ul style="list-style-type: none"> <li>Concept of Directive Principles of States Policy (Ireland borrowed it from SPAIN)</li> <li>Method of election of President</li> <li>Nomination of members in the Rajya Sabha by the President</li> </ul>
From SOUTHAFRICA	<ul style="list-style-type: none"> <li>Procedure of amendment with a two-thirds majority in Parliament</li> <li>Election of members of Rajya Sabha</li> </ul>
From Government of India Act of 1935	<ul style="list-style-type: none"> <li>Federal Scheme</li> <li>Office of governor</li> <li>Judiciary</li> <li>Public Service Commissions</li> <li>Emergency provisions</li> <li>Administrative details</li> </ul>

## 7. UPSC Previous years Prelims Questions

**2005**

1. Consider the following statements:
- The Constitution of India has 20 parts.
  - There are 390 Articles in the Constitution of India in all.
  - Ninth, Tenth, Eleventh and Twelfth Schedules were added to the Constitution of India by the Constitution (Amendment) Acts.
- Which of the statements given above is/are correct?
- 1 and 2
  - 2 only
  - 3 only
  - 1, 2 and 3
- Ans. C**

**2015**

2. Who/Which of the following is the custodian of the Constitution of India?
- The President of India
  - The Prime Minister of India
  - The Lok Sabha Secretariat
  - The Supreme Court of India
- Ans. D**

**2017**

3. The mind of the makers of the Constitution of India is reflected in which of the following?
- The Preamble
  - The Fundamental Rights
  - The Directive Principles of State Policy
  - The Fundamental Duties
- Ans. A**

## 8. UPSC Previous years Mains Questions

Student Notes:2021

1. Describe the emergence of Basic Structure concept in the Indian Constitution. (150 words) 20 marks (1994)
2. What is a Constitution? What are the main sources of the Indian Constitution? (250 words) 30 marks (2007)
3. 'Separation of Powers is essential to ensure individual liberty' Discuss this with regard to the provisions in the Constitution and practices adopted so far.
4. Is the Indian Parliament a "Sovereign" or a "non-Sovereign" legislature or both? 3 marks (1984)
5. Write on Significance of 26th November in the country's polity in about 20 words. 2 marks (2009)
6. Highlight the significance of the Twenty Fourth Amendment to the Constitution of India? 20 marks (1999)
7. What are the main difference between the passage of a Constitution Amendment Bill and other Legislative Bills? 30 marks (2001)
8. How is the Constitution of India amended? Do you think that the procedure for amendment makes the Constitution a play-thing in the hands of the Centre? 30 marks (2002)
9. How would you differentiate between the passage of a Constitution Amendment Bill and of an Ordinary Legislative Bill? 15 marks (2006)
10. What is meant by 'Sovereignty of Parliament'? Consider whether the Indian Parliament is a sovereign body. 20 marks (1982)
11. How will you define 'judicial review'? (1982)
12. What constitutes the doctrine of 'basic features' as introduced into the Constitution of India by the Judiciary? 30 marks (2000)
13. Why is the Indian Constitution called quasi-federal? 3 marks (1987)
14. How did the Government of India Act, 1935 mark a point of no return in the history of constitutional development in India? 30 marks (2006)
15. 'The Supreme Court of India keeps a check on arbitrary power of the Parliament in amending the Constitution.' Discuss critically. 10 marks (2013)
16. Did the Government of India Act, 1935 lay down a federal constitution? Discuss. 12.5 marks (2016)
17. "Parliament's power to amend the Constitution is a limited power and it cannot be enlarged into absolute power." In the light of this statement explain whether Parliament under Article 368 of the Constitution can destroy the Basic Structure of the Constitution by expanding its amending power? 15 marks (2019)

## 9. Vision IAS GS Mains Test Series

1. **A Constitution should not be amended too frequently, rather only when it becomes inevitable to do so. How far have amendments in the Indian Constitution followed this requirement?**

### Approach:

- First discuss the statement of the question. Is it justified? A preferable way of answering would be to consider that the statement holds good. If you negate the statement, the second part of the question will not hold much relevance.
- Also give arguments in support of the stand that you are taking. Here you can also discuss the requirement that a constitution should be dynamic in nature. However, the requirement that changes should not be too frequent, also needs to be discussed.

- Then discuss whether amendments in the Indian Constitution will pass the test of the statement (while discussing this, you have to assume that the statement holds good.)
- Also, provide examples of some constitutional amendments and discuss whether changes have been too frequent, or only when situations arose that made these inevitable.

**Answer:**

It is generally accepted that a Constitution should be a dynamic document. It should be able to adapt itself to the changing needs of society. Sometimes under the impact of new powerful social and economic forces, the pattern of government requires major changes. As political practices change over time, adjustments to the constitutional text keep it aligned with current practices and help ensure its continued relevance. Constitutional change also gives the citizenry a say in how they are governed.

However, it must also be realized that the Constitution is not an instrument for the government to restrain the people. Rather it is an instrument for the people to restrain the government. If a Constitution is changed too often, it may lose its importance, since the safeguards present may be gradually undone by amendments. This could make the Constitution seem like any other law, and lead to erosion of its power. Thus, the basic ideas -- separation of powers, checks and balances, limited government etc. must be necessarily preserved.

The system of government we have, has plenty of flaws because it is run by people. But the flaws can also be fixed without changing the Constitution. As Pt. Nehru appropriately said, "The Constitution should not be changed too frequently. It must be changed when the situation requires it to be changed".

Keeping these factors in mind, the draftsmen of the Indian Constitution incorporated Article 368 in the Constitution. This article deals with the procedure of amendment of the Constitution. It is due to Article 368 that the Indian Constitution can neither be called rigid nor flexible, rather partly rigid and partly flexible.

Articles of the Indian Constitution can be amended through:

- a simple majority in the Parliament;
- special majority i.e. majority of the total membership of each house and majority of not less than two thirds of the members of each house present and voting;
- ratification by atleast half the State Legislatures, in addition to special majority.

Examples of a few major amendments, responding to needs of citizen and society:

- The 52<sup>nd</sup> amendment to the Constitution added the Tenth Schedule, which laid down the process by which legislators may be disqualified on grounds of defection. The main intent of the law was to combat the evil of political defections, which arises due to coalition politics.
- The introduction of the 73rd Constitutional Amendment Act institutionalized the Panchayati Raj System. It unleashed the power of the grassroots, providing representation to voiceless and disadvantaged sections. Thus it initiated India's largest exercise in democratic decentralization.

Some of the amendments have definitely improved the content and quality of the constitutional document in the context of the changed and changing societal, economic or political needs. Others were either inevitable or consequential for implementation of policy decisions. However, there have also been quite a few which were avoidable, unnecessary or motivated by merely political and partisan interest considerations of the ruling majority party (for instance, the 42nd amendment act). In principle, the

Constitution must never be subjected to easy amendments by temporary party majority in legislatures.

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It needs to be understood that the growing disenchantment among public, relating to governance, calls for remedies other than constitutional amendments. The most important areas of reforms, in the electoral laws and processes and in political parties, for example, need no constitutional changes. If there is political will legislation can be passed to address the concerns as and when the need arises.

2. **Though the Constitution-makers vested the power to amend the Constitution in the Parliament, since the Kesavananda Bharati case, the Supreme Court has become a decisive co-sharer in this power. Comment.**

**Approach:**

One should clearly bring out the situation pre Kesavananda Bharati case and how the judgment changed the concept of amending the constitution. Brief elaboration of the basic structure of the constitution is also important.

**Answer:**

Though the Constitution vested the power to amend the Constitution or any of its part (Article 368) to the Parliament, which comprises of the representatives of the people, the court in a landmark judgment adjudged that anything which contravenes the basic structure of the constitution would be declared null and void thereby severely curtailing the powers of the Parliament to amend the Constitution.

Article 368, on a plain reading did not contain any limitation on the power of the Parliament to amend any part of the Constitution. In the Golak Nath Case, Supreme Court was of the opinion that it should be read along with Article 13 of the Constitution but it changed its decision in the Kesavananda Bharati case in 1973.

In Kesavananda Bharati Case, the Judiciary tried to deal with the question that “was the power of the Parliament to amend the constitution unlimited?” Dealing with this question, it came out with the basic structure doctrine through which it was held that Parliament could amend any part of the constitution so long as it did not alter or amend the basic structure of the constitution.

The Supreme Court has not explicitly mentioned what constitutes the ‘basic structure’, further casting a doubt whether any legislation if challenged will pass the judicial scrutiny or not.

But it could be deciphered from subsequent judgments that Preamble, Federalism, Fundamental Rights, Secularism etc. are some of its basic components.

As one commentator has opined – the reality of constitutionalism has been that the legislature and the judiciary are likely to remain Competitors when it comes to interpreting the Constitution. It is by no means settled who has the final word. The parliament can pass any legislation and the court can determine its constitutionality, the Parliament could try to circumvent the court by amending the constitution, the court can pronounce Parliament has limited powers and so on.

There are examples of enactments, which got nullified for violating the basic structure while others like the abolition of Right to property by 44th AA passed the judicial scrutiny.

In conclusion, it can be said that the decline of the Parliament in relation to other competing institution of government is most empathetically felt on the Parliament’s loss to the judiciary as the locus of the **Constituent Power**.

**Approach:**

Give your verdict as to what extent the statement that Indian Constitution is a borrowed constitution, is true and whether you agree with this assertion. Take evidence from sources, which both support and contradict the assertion. Thereafter come to a conclusion, basing your decision on what you consider to be the most important factors and try to justify the stand you have taken.

**Answer:**

Though the framers of the Constitution of India borrowed many ideas from the then existing Constitution, but this was not a slavish imitation of the west. Rather, each provision of the Constitution had to be logically defended and argued upon to show how it was suited to the problems and aspirations of the citizens of India.

While our constitution has been called as a ‘borrowed’ Constitution by some, its framers, as a matter of fact, must be credited for gathering the best features of each of the then existing Constitutions and modifying them with a view to avoid the faults that had been disclosed in their working. Moreover, the Constitution was adapted to suit to the existing condition and needs of the country.

Further, the constitution of India is unique in so many ways that it becomes difficult to fit it in any one particular model. For instance, it is a blend of rigidity and flexibility, federal and unitary features, presidential and parliamentary democracy etc.

While the structural part of the constitution, was to a large extent, derived from the Government of India Act, 1935; its philosophical part had many other sources:

**U.K.:** Nominal Head-President, Cabinet system of ministers, Post of Prime Minister, Parliamentary type of government, Bicameral Parliament, the Lower House being more powerful, Council of Ministers responsible to Lower House, Speaker in Lok Sabha.

**USA:** Written constitution, Executive head of state, known as President and him being the supreme commander of armed forces, Vice President as the ex-officio chairman of Rajya Sabha, Fundamental Rights, Supreme Court, Provision of States, Preamble, Independence of judiciary and judicial review.

**USSR:** Fundamental Duties, five year plan.

**Australia:** Concurrent list, Language of Preamble, Provision regarding trade , commerce and intercourse

**Germany:** Suspension of fundamental rights during emergency

**Canada:** Scheme of federation with strong centre, Distribution of powers between centre and the states and placing residuary powers with the centre

**Ireland:** Concept of Directive Principles of States Policy, Method of election of President.

Despite these, examples of modifications and innovations in Indian constitution abound. Consider, for instance, the following features of the Indian Constitution:

1. The Indian Constitution is a unique blend of rigidity and flexibility: Though Indian constitution is a written constitution, it is not as rigid as the American constitution.
2. Judicial Review: Judiciary in USA has absolute power of judicial review, whereas Britain has Parliamentary supremacy. Indian Constitution effects a compromise between the Doctrines of parliamentary Sovereignty and judicial supremacy.

3. Fundamental rights though influenced by USA's Bill of Right have certain differences:
- Unlike fundamental rights mentioned in the Indian Constitution, declarations in the American Bill of Right are absolute
  - There are no unenumerated rights under our constitution. Fundamental Rights under our Constitution are exhaustively enumerated in Part 3 of the constitution
4. Besides these, we have also many indigenous and innovative features like Panchayats, international peace, and security.

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Thus, while some ideas may have been borrowed from other constitutions of the world, it may not be correct to call the Indian Constitution as a borrowed constitution per se.

#### **4. *Amendment process of the Indian constitution with that of Japan.***

**Answer:**

- a) **India:** The constitution is more flexible than rigid. Only the amendment of few of the provisions of the constitution requires ratification by state legislatures and even then legislation by not less than half of the states would suffice. The rest of the constitution could be amended by a special majority by parliament. There is no separate constituent body provided for by our constitution for the amending process.

**Japan:** Japan's constitution is rigid. Article 96 provides that amendments can be made to any part of the constitution. However, a proposed amendment must first be approved by both houses of the Diet, by at least two-thirds majority of each house. It must then be submitted to a referendum in which it is sufficient for it to be endorsed by a simple majority of votes cast. A successful amendment is finally promulgated by the Emperor, but the monarch cannot veto an amendment.

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# THE PREAMBLE

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## 1. Introduction

The term ‘preamble’ refers to the introduction or preface to the Constitution. It contains the summary or essence of the Constitution. The ideals behind the Preamble were laid down by Jawaharlal Nehru’s Objectives Resolution, adopted by the Constituent Assembly on January 22, 1947.

The Preamble to a written Constitution states the objects, which the Constitution seeks to establish. It also promotes and aids the legal interpretation of the Constitution, where the language is found to be ambiguous. Therefore, for a proper appreciation of the aims and aspirations embodied in our Constitution, we need to turn to the various expressions contained in the Preamble.

The Preamble to the Constitution of India states:

***"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."***

The Preamble to our Constitution serves, two purposes:

- It indicates the source from which the Constitution derives its authority;
- It also states the objects, which the Constitution seeks to establish and promote.

## 2. Key Words in the Preamble

### 2.1. Sovereign

The term *Sovereignty* refers to the independent authority of a State. It means that the State has the power to legislate on any subject; and that it is not subject to the control of any external power.

Consequently, the term *Sovereign* in the Preamble of India implies that India is neither a dependency nor a dominion of any other nation, but an independent state. There is no authority above it, and it is free to conduct its own affairs, both internal and external.

India’s declaration to continue her full membership of the Commonwealth of Nations in 1949 does not affect India’s sovereignty in any manner. This declaration is *extra-legal* and there is no mention of it in the Constitution. It is a voluntary declaration and indicates a free association and no obligation. This association was an honorable association between independent states. It accepts the crown of England only as a *symbolic* head of the Commonwealth, and having no claim to the allegiance of citizens of India. As Pandit Jawaharlal Nehru explained:

*"It is an agreement by free will, to be terminated by free will"*

#### 2.1.1. Sovereignty and Globalization

India has always been a supporter of international institutions. It is a founding member of the United Nations. It has also actively participated in evolution of international law. Does this compromise sovereignty of our nation?

It has to be realized that sovereignty is a legal fiction. In practice, it is often compromised. However, the view that globalization **dilutes** sovereignty needs to be revisited. Globalization is not a dilution of sovereignty, but a modification of the manner in which sovereignty is exercised. Globalization requires a more responsible use of sovereignty.

The Government of India continues to ensure its strategic autonomy in international sphere and is vigilant in protecting the interests of the people of India. The recent debate in WTO with regards to the food subsidy is a case in point.

## **2.2. Socialist**

The Constitution had a socialist content in the form of certain Directive Principles of State Policy (esp. Arts. 39(b) and 39(c)), even before the term was added by the 42nd Amendment Act in 1976. However, the 'socialism' envisaged by the Indian Constitution is not the usual scheme of State socialism, which involves 'nationalisation' of all means of production, and the abolition of private property. Instead, Indian Socialism is 'democratic Socialism', influenced by Fabianism. It is a peaceful gradual transformation of the society in participation with the state and not against the state.

Though the word 'Socialism' may seem to be vague, our Supreme Court has observed that its principal aim is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people. The Indian Constitution, therefore, does not seek to abolish private property altogether but seeks to put it under restraints so that it may be used in the interests of the nation, which includes the upliftment of the poor. Instead of a total nationalization of all property and industry, it envisages a 'mixed economy', where both private and public sector grow side by side.

However, some have argued that the Indian state is deviating from its path of Socialism. The following have been cited as reasons behind this line of argument:

- Adoption of neo-liberal economic policy: The new economic policy (1991) of liberalization, privatization and globalization has diluted the socialist credentials of the Indian state.
- From 1991 onwards, the trend has been away from socialism to privatization. Investment in many public enterprises has been divested in favour of private persons. Many industries and services, which were reserved for the government sector, have been thrown open for private enterprise.
- Growth, which happened after the reforms of 1990s exacerbated inter-state and intra-state disparities. Further, this growth has been without any meaningful job creation. (Jobless growth)
- The Indian state has failed to end mass poverty

However, it should be noted that these developments have been in keeping with the worldwide trend after the collapse of socialism in the USSR and East European countries. Also, the constitutional obligation to pay compensation to the private owner for State acquisition has been taken away by repealing Art. 31 by the Constitution (44<sup>th</sup> Amendment) Act, 1978. Further, the limitations of the neo-liberal economic model are being realized and the ideal of inclusive growth has been brought back into the fold of policy making.

## **2.3. Secular**

The Constitution guaranteed secular polity through various constitutional provisions, even before the term was added in 1976. The unity and fraternity of the people of India, professing numerous faiths, has been sought to be achieved by enshrining the ideal of a 'secular state'. A secular state, in the context of India, means that the State protects all religions equally and does not uphold any religion as the State religion. The term "secular" was added by the 42<sup>nd</sup> Amendment Act, 1976.

This is one of the glowing achievements of Indian democracy given that her neighbors such as Pakistan, Bangladesh, Sri Lanka, uphold particular religions as State religions.

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The reasons for the necessity of secularism in India are as follows:

- India is a heterogeneous society.
- The idea of India as a secular state has been challenged by states like Pakistan.
- We may be subjected to international propaganda (terrorism and related problems).

### **2.3.1. Constitutional Provisions Regarding Secularism**

- The Indian state has no religion.
- All citizens are equal in the eyes of the law. Articles 14, 15 and 27 establish the secular nature of the state. Article 15 is a specific instruction that the state shall not discriminate among the citizens only on the grounds of religion, race, caste, sex or place of birth. Affirmative action is allowed, but not on the grounds of religion only.
- Fundamental Rights mentioned in Arts. 25–28 guarantee to all individuals, the freedom to profess, practice and propagate their religion, and assure strict impartiality on the part of the state and its institutions towards all religions.
- Religion is subordinate to the state rather than the state being subordinate to the religion. It also implies that the state can interfere in religious affairs for the purpose of social reforms.
- A special feature of Indian secularism emerging from historical context is that special protection is granted to the minorities with respect to the conservation of their culture and traditions.

## **2.4. Democratic**

The ‘democratic republic’, which the Preamble envisages is democratic not only from a political standpoint but also from a social standpoint. Thus, it envisages not only a democratic form of government but also a democratic society, infused with the spirit of ‘justice, equality and fraternity’.

The form of government envisaged by our Constitution is a representative democracy. The people of India are to exercise sovereignty through the Parliament at the Centre and Legislature in each State, which are elected on the basis of universal adult franchise. The real Executive, namely the Council of Ministers, shall be responsible to the Parliament. Though there shall be an elected President at the head of the Union and a Governor nominated by the President at the head of each state, neither of them can exercise any political function without the advice of Council of Ministers. The Council of Ministers is collectively responsible to the people’s representatives in the respective Legislatures (excepting the functions which the Governor is authorized by the Constitution itself to discharge in his discretion or on his individual responsibility).

In essence, Parliamentary democracy envisages the following:

- Representation of People
- Responsible Government
- Accountability of the Council of Ministers to the Legislature

## **2.5. Republic**

A democratic polity can be classified into two categories – monarchy and republic. In a monarchy, the head of the state (usually king or queen) enjoys a hereditary position (example: Britain, Japan). In a republic, the head of the state is always elected directly or indirectly for a fixed period (example: US, India)

The Preamble declares that source of all authority under the Constitution is the people of India

and there is no subordination to any external authority. While, Pakistan remained a British Dominion until 1956, India ceased to be a dominion and declared herself a 'Republic' since enacting the Constitution in 1949.

We have an elected President as the Head of State and all offices including that of the President are open to all citizens.

## 2.6. Liberty

The term liberty means an absence of restraints on the activities of individuals and at the same time, providing opportunities for the development of individual personalities.

The Constitution secures to all citizens liberty of thought, expression, belief, faith and worship through Fundamental Rights, which are enforceable in Court of Law. However, reasonable restrictions are placed on liberty by the Constitution itself.

The ideals of liberty, equality and fraternity are taken from the French Revolution.

## 2.7. Equality

The term 'equality' means absence of special privileges to any section of the society and the provision of adequate opportunities for all individuals without any discrimination.

The Preamble secures to all citizens equality of status and opportunity. This provision embraces three dimensions of equality – civic, political and economic.

The following Fundamental Rights ensure **civic equality**:

- Equality before Law (Art. 14)
- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (Art. 15)
- Abolition of Untouchability (Art. 17)
- Abolition of titles (Art. 18)

There are two provisions in the Constitution, which seek to achieve **political equality**:

- No person is to be declared ineligible for inclusion in electoral rolls on the grounds of religion, race, caste or sex (Art. 325).
- Elections to the Lok Sabha and the state assemblies are to be conducted on the basis of adult suffrage (Art. 326).

The following provisions seek to achieve **economic equality**

- The Directive Principles (Art. 39) secure to men and women equal right to an adequate means of livelihood and equal pay for equal work.
- Equality of Opportunity in matters of public employment (Article 16)

## 2.8. Fraternity

Fraternity means a sense of brotherhood. The Constitution promotes this feeling of fraternity by the system of single citizenship. Also, the Fundamental Duties (Art. 51A) say that it shall be the duty of every citizen to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic, regional and sectoral diversities.

According to the Preamble, fraternity assures two things – the dignity of the individual and the integrity of the nation. The word 'integrity' was added by the 42<sup>nd</sup> Amendment Act, 1976.

According to K.M Munshi, the phrase 'dignity of the individual' signifies that the Constitution not only ensures material betterment and maintains a democratic set-up, but that it also recognizes that the personality of every individual is sacred.

The phrase ‘unity and integrity of the nation’ embraces both psychological and territorial dimensions of national integration. Art. 1 of the Constitution describes India as a ‘Union of States’ to make it clear that the States have no right to secede from the Union, implying the indestructible nature of the Indian Union. It aims at overcoming hindrances to national integration like communalism, regionalism, casteism, secessionism etc.

### **Trinity – Liberty Equality and Fraternity**

According to Dr. BR Ambedkar, these principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.

Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.

Together these principles would help us ensure our vision of social democracy which is very important for political democracy as well. Political democracy cannot last unless there lies at the base of it social democracy.

## **2.9. Justice**

Justice, as a concept involves fair, moral, and impartial treatment of all persons. In its most general sense, it means according individuals what they actually deserve or merit, or are in some sense, entitled to.

The term ‘justice’ as imbibed in the Preamble embraces three distinct forms –social, economic and political. These are secured through various provisions of Fundamental Rights and Directive Principles.

Social justice denotes equal treatment of all citizens without any distinction based on caste, color, race, religion, sex and so on. It means absence of privileges to any section of the society and at the same time making provisions for the improvement of backward sections (SCs, STs and OBCs) and women.

Economic justice denotes non-discrimination between people on the basis of economic factors. It involves the elimination of glaring inequalities in wealth, income and property.

Political justice implies that all citizens should have equal political rights, equal access to all political offices and equal voice in the government.

The ideal of justice – social, economic and political has been taken from the Russian Revolution.

## **3. Status of the Preamble**

### **3.1. Traditional View**

The traditional view is that it is not a necessary part of the Constitution, but an ornamental part. This means that if we drop it from the statute, it will not impact the provisions of the law or enactment.

### **3.2. Modern View**

The modern view is that the Preamble is a part of the Constitution and it is subject to amendment by the Parliament.

### 3.3. Status of The Preamble in India

#### 3.3.1. Berubari Union Case, 1960

- The Supreme Court said that the Preamble shows the general purposes behind the several provisions in the Constitution, and is thus a key to the minds of the makers of the Constitution. Further, where the terms used in any article are ambiguous or capable of more than one meaning, some assistance at interpretation may be taken from the objectives enshrined in the Preamble.
- Despite this **recognition of the significance of the Preamble**, the Supreme Court held that the Preamble is **not a part of the Constitution**. It is also not the source to prohibit the power, which is given explicitly in the Constitution. Further, the Preamble is not enforceable in a Court of Law.

#### 3.3.2. Kesavananda Bharati case, 1973

In the Kesavananda Bharati case (1973), the Supreme Court rejected the earlier opinion (in the Berubari Case) and held that the Preamble is **a part of the Constitution**. It observed that the Preamble is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.

Explanation provided by the Supreme Court:

- The Preamble may not be an essential part of ordinary statute, but it is an essential part of Constitutional Law.
- Supreme Court admitted that a few facts regarding the Preamble were not noticed in the Berubari Case. These facts established Preamble as a part of the Constitution.
  - It has been adopted by the Constituent Assembly in the same manner as other parts.
  - The motion by which the Preamble was adopted said: "The question is that Preamble stands part of the Constitution".
  - The Preamble was enacted after rest of the Constitution was already enacted. The Preamble was inserted in the end to ensure that there is no inconsistency between the Preamble and other provisions of the Constitution. This was unlike USA where the Preamble was enacted first.

#### 3.3.3. S R Bommai Case, 1994

- The Supreme Court again held that the Preamble is an integral part of the Constitution.

## 4. Amendability of the Preamble

The question regarding the amendability of the Preamble was raised in the Kesavananda Bharati Case (1973). The argument of the petitioner was that the Preamble is not a provision of the Constitution, hence it cannot be amended.

Supreme Court's view: Preamble is an essential and integral part of the Constitution. Hence, it can be amended; otherwise the harmony of the Constitution may get disturbed. It held that the Preamble could be amended, subject to the condition that no amendment is done to the 'basic features' of the Constitution.

Consequently the Preamble was amended by the 42<sup>nd</sup> Amendment Act, 1976. It added three new words: **Socialist, Secular and Integrity** to the Preamble.

## 5. Preamble as an Aid to the Interpretation of the Constitution

### 5.1. Berubari Case

- Preamble has limited significance in the interpretation of the Constitution.

- The Preamble cannot be invoked when the provisions of the Constitution are explicit. (A. K Gopalan case, 1950). In the Gopalan case, the SC clarified that the Preamble will not be invoked to explain or interpret explicit provisions. In this case, the SC held that the term 'law' used in Article 21 (life & liberty) denotes a 'law made by the State' and not 'natural law'.
- It however acknowledged that the Preamble may be used if there is an ambiguity in the provisions of the Constitution. According to the SC, Preamble is the key to unlock the minds of the Constituent Assembly.

## 5.2. Kesavananda Bharati Case

- Preamble is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.
- SC clarified that Preamble can be used in the interpretation of the relationship between Fundamental Rights and Directive Principles.
- SC utilized the above approach in examining the validity of 25<sup>th</sup> Amendment Act, 1971, which added Article 31C.

## 6. UPSC Previous Years Prelims questions

**2013**

- "Economic Justice" as one of the objectives of the Indian Constitutional has been provided in
  - the Preamble and the Fundamental Rights
  - the Preamble and the Directive Principles of State Policy
  - the Fundamental Rights and the Directive Rights and the Directive Principles of State Policy
  - None of the above

**2015**

- To uphold and protect the Sovereignty, Unity and Integrity of India' is a provision made in the
  - Preamble of the Constitution
  - Directive Principles of State Policy
  - Fundamental Rights
  - Fundamental Duties
- The ideal of "Welfare State" in the Indian Constitution is enshrined in its
  - Preamble
  - Directive Principles of State Policy
  - Fundamental Rights
  - Seventh Schedule

**2017**

- Which one of the following objectives is not embodied in the Preamble to the Constitution of India?
  - Liberty of thought
  - Economic liberty
  - Liberty of expression
  - Liberty of belief
- The mind of the makers of the Constitution of India is reflected in which of the following?
  - The Preamble
  - The Fundamental Rights
  - The Directive Principles of State Policy
  - The Fundamental Duties

## 7. UPSC Previous Years GS Mains Questions

Student Notes:2021

1. What are the major commitments of the Constitution of India as incorporated in its preamble? (in about 150 words) (88/II/4a/20)
2. Why is India called a Republic? (88/II/8f(B)/3)
3. The Preamble to the Constitution is aimed to embody the fundamental values and the philosophy on which the Constitution is based. Elucidate. (In about 75 words) (97/I/3c/10)
4. What is the significance of a preamble to a constitution? Bring out the philosophy of the Indian polity as enshrined in the Preamble of the Indian Constitution. (in about 250 words) (04/I/6a/30)
5. Discuss each adjective attached to the word 'Republic' in the 'Preamble'. Are they defendable in the present circumstances? (2016/12.5)

## 8. Vision IAS GS Mains Test Series Questions

1. *In light of the controversy over Preamble, discuss the views that have emerged on its status and amendability. In this context, discuss the purpose that the Preamble to the Constitution serves in our polity.*

### Approach:

- Briefly discuss about Preamble of the constitution.
- Discuss the status of Preamble and its amendability as opined by the Supreme Court in various cases.
- Briefly discuss the recent controversy. .
- Discuss the purposes served by the preamble of the constitution in Indian polity.

### Answer:

The Preamble embodies the basic philosophy and fundamental values on which the Constitution is based. After independence, one of the controversies about the Preamble is as to whether it is a part of the Constitution or not. Judiciary in different cases provided different interpretations. For example:

- In the Berubari Union case, the Supreme Court said that the Preamble shows the general purposes behind the several provisions in the Constitution, however, didn't consider it as a part of the Constitution.
- In the Kesavananda Bharati case, the Supreme Court rejected the earlier opinion and held that Preamble is a part of the constitution.

### Amendability of Preamble:

- In Keshvanandan Bharti case, SC upheld that Preamble can be amended, subject to the condition that the amendment doesn't alter the basic structure of the constitution.

The preamble has been amended only once so far in 1976 by 42<sup>nd</sup> constitutional Amendment Act which added three new words – socialist, secular and integrity to the preamble.

Recently, a controversy regarding the status of the preamble erupted after the government issued an advertisement where the original preamble of the constitution was mentioned, which did not contain the words Secular and Socialist. The controversy can largely be considered as a political gimmick by parties as a tool for vote bank. This can be understood from the following points:

- Secularism is a basic feature of Indian constitution as opined by the SC. The status of India as a secular state is established under Article 25. The substance of secularism lies in fundamental rights and not the preamble.
- The significance of the word Socialist state has been diluted significantly as the economy today is dominated by the private sector.

Significance of Preamble in Indian Polity:

- It embodies the source of the Constitution i.e., the people of India.
- The terms sovereign, socialist, secular, democratic, republic in the Preamble suggests the nature of the state.
- The ideals of justice, liberty, equality, fraternity reflects the objectives of the Constitution.
- It contains the grand and noble vision of the Constituent Assembly, and reflects the dreams and aspirations of the founding fathers of the Constitution. Thus it is also a guiding source for the judges to understand the minds of founding fathers.

## **2. *Stating the preamble to the Indian constitution comment on its nature and scope.***

**Approach:**

- Briefly explain the crux of the Preamble.
- Discuss its nature and the role it plays in our Constitution.
- Discuss its scope that encompasses various aims and objectives of the Constitution.

**Answer:**

The Preamble to the Indian Constitution states: 'We, the people of India, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens

JUSTICE social, economic and political;

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

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

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

In our Constituent Assembly, this 26th day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.'

### **Nature of the Preamble**

The Preamble outlines the aims of the Constitution makers and aspirations of our founding fathers. It envisions India as a democratic Republic not only from the political but also from the social standpoint i.e. a democratic society which seeks both economic as well as social justice.

The Preamble declares that India being an independent and sovereign democratic republic has the power to legislate on any subject and that it is not subject to the control of any other State or external power. The term 'Republic' connotes that we have an elected President as the Head of the State and all offices, including that of the President, are open to all its citizens.

The unity and fraternity of the people of India, professing numerous faiths, has been sought to be achieved by enshrining the ideal of a secular state, which means that the State protects all religions equally and does not itself uphold any religion as state

religion. Also, the Preamble states that people are the ultimate authority and the Constitution emerges from them.

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### Scope of the Preamble

Unlike the Constitution of Australia, Canada or the U.S.A., the Constitution of India has an elaborate Preamble. The Preamble does not grant any power but it gives direction and purpose to the Constitution. It serves as a guiding light for holistic understanding of the Indian Constitution.

It envisages for citizen's liberty, equality and fraternity which has to be secured and protected along with social justice, economic empowerment and political justice.

Though Preamble is a part of the Constitution and is not enforceable in a Court of Law by itself, nonetheless it aids in the legal interpretation of the Constitution where language is found to be ambiguous. Further, the scope and utility of the Preamble has been pointed out in several decisions of the Supreme Court where it held that the Preamble defines the 'Basic structure' of our Constitution and imposes a limitation on the misuse of the amending power of legislatures.

3. *The philosophical underpinnings of the Indian constitution can be best understood through its preamble inspired by the Objectives Resolution in the constituent assembly. Elaborate.*

#### Approach:

- Discuss the broad features of the historic Objectives Resolution.
- Highlight how the resolution reflects itself in the Indian Constitution, especially the Preamble of the Constitution.
- Discuss, in detail, how the Preamble informs the basic philosophical framework of the Indian Constitution.
- Conclude on the basis of the aforementioned points

#### Answer:

The Preamble is the keynote to the Constitution, that embodies the basic philosophy and fundamental values on which our Constitution is based. It draws heavily from the vision of the founding fathers of our Constitution, as documented in the historic Objectives Resolution adopted by the Constituent Assembly on 22<sup>nd</sup> January, 1947.

#### Preamble as a derivative of the Objectives Resolution:

The historic Objectives Resolution envisioned the **sovereign republic** of India, as a **union** of states that derives its **power & authority from the people**. It also delved into aspects of the **division of powers** between the states and the Union. It guaranteed and secured social, economic and political **justice; equality** of status and opportunities and equality before law; and **fundamental freedoms** – of speech, expression, belief, faith, worship, vocation, association and action – subject to law and public morality. Besides, it assured **provision of safeguards** for minorities, backward classes and tribals as well.

#### Preamble as the philosophical framework guiding the Indian Constitution:

The Preamble is a guiding light to the minds of the makers of our Constitution. For a proper appreciation of the aims & aspirations embodied in our Constitution, we must turn to the expressions contained in the Preamble.

- **Sovereign:** The Preamble envisages a sovereign India that is free to conduct its own affairs without control from any other state or external power.
- **Republic:** It means vesting of **political sovereignty in the people** and thus India has an elected head called the President.

- **Democratic:** It envisages not just political but social democracy as well. Consequently, the Indian Constitution provides for a parliamentary democracy that is representative, responsible, and accountable and that stands for the good of all people.
- **Justice:** The ideal of **political, economic and social justice** enshrined in the Preamble is sought to be achieved through universal adult suffrage, creation of welfare state, removal of social inequalities etc.
- **Liberty:** The Preamble mentions certain minimal rights to every member of the society, as essential for a **free and civilised existence**. The Constitution guarantees these rights against all authorities of the state in the form of freedom of thought, belief, expression, faith and worship **[Articles 19, 25-28]** subject to certain restrictions like morality, public health and order etc.
- **Equality:** The ideals of **equality of status and opportunity** envisaged by the Preamble are guaranteed by the Constitution that seeks to banish all inequality through **fundamental right to equality** **[Articles 14-18]**, directive principles of the state policy **[Article 39]** and other similar provisions.
- **Fraternity:** The Preamble calls for a spirit of brotherhood amongst all sections of people. This has sought to be achieved by enshrining the ideals of a '**secular**' state. Besides, the Constitution assures the **dignity of the individual** through provision of justiciable fundamental rights and certain directives like **Article 39(a), 42 & 43**. By including **Article 51A**, the Constitution makes it a fundamental duty of the citizens to uphold the **unity & integrity of the nation**.

Thus, we see that the ideals contained in the Objectives Resolution, were embodied in the Preamble. These ideals went on to shape the political philosophy of the Indian Constitution in subsequent stages. Consequently, these determined the nature and course of the India in the forthcoming years as a liberal, democratic, egalitarian and secular nation.

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# 1. Constitutional Provision: Article 1-4 (Part-I)

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Articles 1 to 4 under Part-I of the Constitution deal with the Union and its territory.

## 1.1. Article 1

- Article 1(1) – India, that is Bharat, shall be a Union of States.
- Article 1(2) – The states and territories thereof shall be as specified in the First Schedule.
- Article 1(3) – The territory of India shall comprise:
  - The territories of the States
  - The Union territories specified in First Schedule; and
  - Such other territories as may be acquired.

### 1.1.1. Federation Versus Union

The Drafting Committee had a purpose while choosing the word “Union”, in preference to “Federation”. They were of the view that the word “Union” better expresses the fact that the Union of India is not the outcome of an agreement among the old provinces and it is not open to any State or a group of States to secede from the Union or to vary the boundary of their States on their own free will.

The Federation is a Union because it is **indestructible**. Though the country and the people can be divided into different States for convenience of administration, the country is one integral whole, its people living under a single imperium derived from a single source.

### 1.1.2. Territory of India

The territory of India, which is described in clause (3) falls under three categories:

- (i) State Territories
- (ii) Union Territories
- (iii) Territories which may be acquired by the Government of India

The names of States and Union Territories and their territorial extent are mentioned in the first schedule of the Constitution. At present, there are 28 states and 8 union territories.

The expression ‘Union of India’ should be distinguished from the expression ‘Territory of India’. While the former includes only states which enjoy the status of being member of the federal system and share a distribution of powers with the Union, the “territory of India” includes the entire territory over which the sovereignty of India, for the time, extends and such territories are directly administered by the Central Government.

A territory can be said to have been acquired when the Indian Union acquires sovereignty over such territory according to the modes recognized by International law, i.e. purchase, treaty, cession or conquest. If there was any public notification, assertion or declaration by which the Government of India had declared or treated a territory as part and parcel of India, the Courts would be bound to recognise an ‘acquisition’ as having taken place, with the consequence that the territory would be part of the territory of the Union within Article 1(3)(c).

## 1.2. Article 2

**Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.**

There are two powers given to Parliament by Article 2, namely:

- (i) The power to admit new States into the Union; and
- (ii) The power to establish new States.

The first refers to the admission of duly organised political communities (states which are

already in existence), while the second to the formation of state where none existed before, i.e. Article 2 refers to the admission or establishment of new states **that are not part of the Union of India**. Parliament admitted the French settlements of Pondicherry, Karaikal, etc. by using this power.

Further, it should be noted that Article 2 gives complete discretion to Parliament to admit or establish new States on such terms and conditions as "it thinks fit". Such terms and conditions must, however, be consistent with the foundational principles or the basic structure of the Constitution. There is nothing in the Constitution, which would entitle a new State, after its formation or admission into the Union, to claim complete equality of status with an existing state.

### 1.3. Article 3

#### **Formation of new States and alteration of areas, boundaries or names of existing States**

Parliament may by law:

- i. Form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
- ii. Increase the area of any State
- iii. Diminish the area of any State
- iv. Alter the boundaries of any State
- v. Alter the name of any State

**A Bill under Article 3 must satisfy 2 conditions:**

- It shall be introduced in either House of Parliament only on the recommendation of the President.
- If the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has to be referred by the President to the Legislature of the State for expressing its views thereon. The President shall specify the period within which the State Legislature must express its views. If the views of the State Legislature are not received within the specified or extended period, the second condition stands fulfilled.

The President (or Parliament) is not bound by the views of the State Legislature and may either accept or reject them, even if the views are received in time. Further, it is not necessary to make a fresh reference to the State Legislature every time an amendment to the bill is moved and accepted in Parliament.

Article 3 empowers the Parliament to alter the territory or integrity of the states without their consent or concurrence, which differentiates the Indian Federal system with that of the traditional system. In other words, the Parliament can redraw the political map of India according to its will. Hence, the territorial integrity or continued existence of any state is not guaranteed by the Constitution. Therefore, India is rightly described as "**an indestructible Union of destructible states**".

While in America, where the federal system is the result of a compact or agreement between independent states, it is obvious that the agreement could not be altered without the consent of states, who are party to it. That is why American Federation has been described as "**an indestructible Union of indestructible States**".

In the Indian context, DD Basu argues that such liberal powers were granted to the Indian Parliament because the grouping of the Provinces under the Government of India Acts was based on historical and political reasons rather than social, cultural and linguistic divisions of the people themselves. The question of reorganising the units according to natural alignments was indeed raised at the time of making of the Constitution but, then, there was not enough time to undertake the huge task, considering the magnitude of the problem.

There are instances where the State Legislatures have passed resolution for creating new states. But constitutionally, states cannot initiate the process of creation of states etc. It has to start from the Union Council of Ministers advising the President to recommend the introduction of the Bill in the Parliament. The motion passed by Uttar Pradesh Assembly in November 2011, to divide the state into 4 parts – Poorvanchal, Paschim Pradesh, Awadh Pradesh and Bundelkhand had only suggestive value but no material significance in Constitutional terms.

The power of centre in this regard can be seen from the Telangana issue. In case of creation of the state of Telangana, the Andhra Pradesh Reorganisation Bill, 2013 was decisively rejected by the Andhra Pradesh Legislative Assembly and Council. But the same did not deter the Government from going ahead with the passage of the Andhra Pradesh Reorganisation Act, 2014 (Telangana) in the Parliament.

While the legal interpretation of Article 3 is clear, i.e. the views of the Andhra Pradesh Assembly had no legal effect; the formation of Telangana was solely the prerogative of the Government of India but this position should be reconsidered in the light of the evolving meaning of Indian Federalism.

## 1.4. Article 4

Laws made under Articles 2 and 3 to provide for the amendment of the First and Fourth Schedule or containing supplemental, incidental and consequential provisions are not to be deemed to be an amendment of this Constitution for the purposes of the Article 368. This means that such laws can be passed by a simple majority and by the ordinary legislative process.

### 1.4.1. Does Cession of an Indian Territory need a Constitutional Amendment?

This question came up for examination before the Supreme Court in a reference made by the President in 1960. The decision of the Central government to cede part of a territory known as **Berubari Union** (West Bengal) to Pakistan (Nehru-Noon Agreement of 1958) led to political agitation and controversy and thereby necessitated the Presidential reference. The Supreme Court held that the power of Parliament to diminish the area of a state (under Article 3) *does not cover cession of Indian territory to a foreign country*. Since the implementation of the agreement would result in the reduction in the total area of India, Article 1 as well as relevant portions of the First Schedule of the Constitution would have to be amended. Hence, Indian territory can be ceded to a foreign state only by **amending the Constitution under Article 368**. Consequently, the 9th Constitutional Amendment Act (1960) was enacted to transfer the said territory to Pakistan.

During 2011, a protocol was signed to exchange enclaves under the Land Boundary agreement of 1974. The Agreement envisaged a transfer of 111 Indian enclaves to Bangladesh in return of 51 enclaves to India. However, the same needed to be ratified by the Parliament. In accordance with this, the Constitutional (119<sup>th</sup> Amendment) Bill was passed in 2015. The Bill amends the First Schedule of the Constitution to give effect to the agreement. The Bill amends the paragraphs relating to the territories of Assam, West Bengal, Meghalaya, and Tripura in the First Schedule. On the other hand, the Supreme Court in 1969 ruled that settlement of a boundary dispute between India and another country does not require a constitutional amendment. It can be done by executive action as it does not involve cession of Indian territory to a foreign country.

**Katchatheevu Island:** India ceded Katchatheevu island to Sri Lanka through treaties concluded between the two neighbours in 1974 and 1976. As per the position stated in the Berubari Union case, an Indian territory can be ceded to a foreign power only by a constitutional amendment. The cession of Katchatheevu to Sri Lanka was challenged in 2012 in the Supreme Court for

## 2. Evolution of States and Union Territories

Post-independence, the reorganization of the states on the basis of language became a major aspect of national consolidation and integration. It was a huge task to integrate the provinces, whose boundaries were drawn in a haphazard manner by the Britishers, along with the integration of princely states in post-independence period, which further added to the heterogeneity.

British India had two types of territories

- Provinces, governed directly by British Officials who were responsible to the Governor-General of India
- Princely states under the control of local hereditary rulers having British government as the sovereign but enjoying autonomy based on treaty.

When India gained Independence on 15<sup>th</sup> August, 1947, the British Government dissolved their treaty relations with the over 600 princely states, who had the option of acceding to either India or Pakistan. Most of the princely states joined India either voluntarily or by armed intervention.

Subsequently, during the period 1947-50, these states were politically integrated into the Indian Union by either merging with the existing provinces or by organising into new provinces. i.e. on 26<sup>th</sup> January 1950, when the new constitution came into existence, the constituent units of Indian Union were classified into four classes:

- The Part A states included the erstwhile Governor's provinces. The nine part A states were Assam, Bihar, Bombay, Madhya Pradesh, Madras, Orrisa, Punjab, Uttar Pradesh and West Bengal.
- The Part B states were former princely states or group of Princely states, governed by Rajpramukh, who was often a former prince, along with an elected legislature. The Rajpramukh was appointed by the President of India. The Part B states were Hyderabad, Jammu & Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union (PEPSU), Rajasthan, Saurashtra, Travancore-Cochin and Vindhya Pradesh
- The Part C states included both the former chief commissioner's provinces and some princely states except Andaman and Nicobar Islands. The Part C states were Ajmer, Bhopal, Bilaspur, Cooch-Behar, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur and Tripura.
- The Part D included only Andaman and Nicobar Island and was administered by the Lieutenant Governor.

## 3. History of the Demand of Reorganisation of States

The boundaries of provinces in pre-1947 India had been drawn in a haphazard manner as the British conquest of India had proceeded for nearly a hundred years. No heed was paid to linguistic and cultural cohesion so that most of the provinces were multilingual and multicultural. There has been a constant demand for reorganisation of states on the linguistic lines. The Indian National Congress recognised this anomaly as early as 1917 and decided to structure its state units on linguistic basis. But after Independence, having witnessed a partition on the basis of religion, the demands for new states on linguistic basis were seen with suspicion.

In the wake of demands from all quarters for new states, a Linguistic Provinces Commission (also called Dhar Commission), under the Chairmanship of S.K. Dhar, was set up by the President of the Indian Constituent Assembly in 1948 to consider the question of reorganization of states in India. The Commission in its report recommended that the reorganization of states

should be on the basis of administrative convenience rather than on linguistic basis.

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The Indian National Congress in its Jaipur Session set up a high level committee called **Linguistic Provinces Committee** – consisting of Jawaharlal Nehru, Vallabhbhai Patel and Pattabhi Sitaramiah (JVP Committee) to consider the Dhar Commission's recommendation. In its report, the committee counselled utmost caution in proceeding with the proposal for the linguistic reorganization of States.

However, the Government of India, in 1953 was forced to create the first linguistic state, the state of Andhra, by separating the 16-Telugu speaking districts of Madras state, comprising of the Coastal Andhra and Rayalaseema Regions, following the long drawn agitation and death of Potti Sriramulu, after a 56 day hunger strike for the cause.

This sparked off agitations all over the Union of India, where the various linguistic and religious regions demanded separate statehoods. Subsequently, Jawaharlal Nehru appointed the States Reorganization Commission (1953), under the chairmanship of Fazl Ali to examine the whole question. The other two members of the Commission were KM Panikkar and HN Kunzru. In 1955, the Commission submitted its report. While laying down that due consideration should be given to administrative and economic factors, it recognized for the most part the linguistic principle and recommended redrawing of state boundaries on that basis.

The four criteria laid down by the State Reorganisation Commission (SRC) for accepting the demand by a region for the formation of a state are:

- States are to be formed on the basis of linguistic and cultural unity
- Creation of states should strengthen and preserve national unity
- Formation of new states should also be governed by financial, administrative and economic viability
- It should aid the process of implementation of Five Year Plans.

The State Reorganisation Act was passed by the Parliament in November 1956. It provided for fourteen states and six centrally administered territories. The Constitutional (Seventh) Amendment Act was passed to replace the four types of states, known as Part A, B, C and D with a single class of states.

The reorganisation of existing state boundaries since the consolidation of Indian Union in 1950 can be broadly classified under three broad waves of reorganisation.

- The first major reorganization occurred in 1956 following a nationwide movement for the creation of linguistically compact provinces. Kashmir had already been incorporated within the Indian union based on the special status granted to it by Article 370.
- The second major initiative came in the 1970s, when the Northeast was split up and several new states were created following the establishment of Nagaland in 1963.
- The third phase marked the creation of Jharkhand, Uttaranchal and Chhattisgarh in the Northern provinces of India.

Each phase of re-organisation was based on a new balance of political power between the Centre and its federal Units. Reorganization resulted in rationalizing the political map of India, without seriously weakening its unity. The Linguistic reorganization during 1950's was a major development in incorporating cultural identities into political and administrative units. By reorganizing the states on Linguistic lines, the national leadership removed a major grievance which could have led to fissiparous tendencies. States reorganisation is, therefore, 'best regarded as clearing the ground for national integration.'

### 3.1. Timeline- Creation of New States in India

Andhra Pradesh	Created by the Andhra State Act (1953) by carving out some areas from the
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	State of Madras. Kurnool was the capital and high court was established at Guntur.
Gujarat and Maharashtra	The State of Mumbai was divided into two States i.e. Maharashtra and Gujarat by the Mumbai (Reorganisation) Act 1960
Kerala	Created by the State Reorganisation Act, 1956. It comprised Travancore and Cochin areas
Karnataka	Created from the Princely State of Mysore by the State Reorganisation Act, 1956. It was renamed Karnataka in 1973
Nagaland	It was carved out from the State of Assam by the State of Nagaland Act, 1952
Haryana	It was carved out from the State of Punjab by the Punjab (Reorganisation) Act, 1966
Himachal Pradesh	The Union Territory of Himachal Pradesh was elevated to the status of State by the State of Himachal Pradesh Act, 1970
Meghalaya, Manipur and Tripura	First carved out as a 'sub-State' or 'autonomous state' within the State of Assam by 22 <sup>nd</sup> Constitutional Amendment Act, 1969. Later in 1971, it received the status of a full-fledged State by the North-Eastern Areas (Reorganisation) Act 1971. Both these States were elevated from the status of Union-Territories by the North-Eastern Areas (Reorganisation) Act 1971. The two union territories of Mizoram and Arunachal Pradesh (originally known as North-East Frontier Agency—NEFA) came into being.
Sikkim	Sikkim was originally a Protectorate of India. Sikkim was first given the Status of Associate State by the 35th Constitutional Amendment Act 1974 while it was under the rule of 'Chogyal'. It got the status of a full State in 1975 by the 36th Amendment Act, 1975 which was passed after Sikkim assembly adopted a resolution in 1975, abolishing the institution of the Chogyal (royalty) and declaring Sikkim as a constituent unit of India.
Mizoram	It was elevated to the status of a full State by the State of Mizoram Act, 1986
Arunachal Pradesh	It received the status of a full state by the State of Arunachal Pradesh Act, 1896
Goa	Goa was separated from the Union-Territory of Goa, Daman and Diu and was made a full-fledged State of Goa, Daman and Diu Reorganisation Act 1987. But Daman and Diu remained as Union Territory
Chhattisgarh	Formed by the Constitutional Amendment Act, 2000 by dividing Madhya Pradesh on November 1, 2000
Uttarakhand	Formed by the Constitutional Amendment Act, 2000 by dividing Uttar Pradesh on November 9, 2000
Jharkhand	Formed by the Constitutional Amendment Act, 2000 by dividing Bihar on November 15, 2000
Telangana	Formed by Andhra Pradesh Reorganisation Act, 2014. The new states were created on June 2, 2014.

### 3.2. Creation of Union Territories in India

The Union Territories are eight in number – Delhi; Andaman & Nicobar Islands; Dadra and Nagar Haveli and Daman & diu; Lakshadweep; Jammu &Kashmir; Ladakh; Pondicherry and Chandigarh.

The union territories have been created for a variety of reasons:

1. Political and administrative consideration—Delhi and Chandigarh.
2. Cultural distinctiveness—Puducherry, Dadra and Nagar Haveli, and Daman and Diu.
3. Strategic importance—Andaman and Nicobar Islands and Lakshadweep.
4. Special treatment and care of the backward and tribal people—Mizoram, Manipur, Tripura and Arunachal Pradesh which later became states.

#### DADRA AND NAGAR HAVELI AND DAMAN AND DIU

The Portuguese ruled Dadra and Nagar Haveli territory until its liberation in 1954. Subsequently, the administration was carried on till 1961 by an administrator chosen by the people themselves. It was converted into a union territory of India by the 10th Constitutional Amendment Act, 1961.

Goa and Daman and Diu India were also acquired from the Portuguese by means of a police action in 1961. They were constituted as a union territory by the 12th Constitutional Amendment Act, 1962. Later, in 1987, Goa was conferred a statehood. Consequently, Daman and Diu was made a separate union territory.

As of 26 January 2020, both the UTs – Dadra & Nagar Haveli; and Daman & Diu have been merged. The merged Union Territory will be named as Dadra and Nagar Haveli and Daman and Diu. The merger of the two UTs, located along the western coast near Gujarat, is being done for better administration and to check duplication of various works.

#### JAMMU & KASHMIR; LADAKH

The two Union territories of Jammu and Kashmir and Ladakh came into existence on National Unity Day from the erstwhile state of Jammu and Kashmir which has now officially ceased to exist. The UT of Jammu and Kashmir will have a legislature like Puducherry with an elected legislative assembly and a chief minister. Ladakh, on the other hand, will be a UT without legislature like Chandigarh.

The Centre will be in direct control of the police and law and order in Jammu and Kashmir but land and other subjects will be under the purview of the elected government there.

#### PUDUCHERRY; DELHI

The territory of Puducherry comprises the former French establishments in India known as Puducherry, Karaikal, Mahe and Yanam. A treaty of cession was signed by India and France in 1956. Until 1962, when the French Parliament ratified the agreement, it was given the status of an ‘acquired territory’. It finally got the status of a Union Territory in 1962, when India and France exchanged instruments of ratification under which France ceded to India full sovereignty over the territories it held. Further, in 2006, the Parliament passed a Bill to rename the Union Territory of Pondicherry as Puducherry in response to the wishes of the people of the Union Territory.

For the Union Territory of Pondicherry, the Parliament has by enacting a law, viz. Pondicherry (Administration) Act, 1962 under Art. 239A made provision for a legislature etc.

By an amendment to the constitution two new articles, viz. 239AA and 239AB were inserted in 1992 providing for a legislature and a ministry for Delhi, which has been named as National

The establishment of legislatures in the union territories does not diminish the supreme control of the president and Parliament over them.

- The Parliament can make laws on any subject of the three lists (including the State List) for the union territories. This power of Parliament also extends to Puducherry and Delhi
- But, the legislative assembly of Puducherry can also make laws on any subject of the State List and the Concurrent List.
- Similarly, the legislative assembly of Delhi can make laws on any subject of the State List (except public order, police and land) and the Concurrent List

**Union Territories** other than Delhi, Puducherry and J&K, do not have legislatures. They are centrally administrated areas, to be governed by the President, acting through an 'Administrator' appointed by him, and issuing Regulations for their good government [Arts. 239-240].

#### Should statehood be granted to Delhi?

##### YES

- In 1991, when the 69th Amendment created the Legislative Assembly of Delhi, the city's population was much smaller. Today, there are nearly two crore people in Delhi and nowhere in any democracy are two crore people represented by a government with restricted powers.
- With time, Goa, Manipur, Himachal Pradesh and Tripura have also been granted statehood after some transition time
- It would also provide equal right of people for representation and self-governance.
- An elected government representing a massive population need to have a say in law and order and land management.

##### NO

- The support for full statehood has not been a national compulsion, but a call fuelled by Delhi's local political ambitions and Delhi is the national capital and must necessarily be viewed from the prism of the interests of the entire country.
- Delhi is home to vital institutions such as the president's estate, the Parliament and foreign embassies which are the sole responsibility of the Union Government and not of any one particular state legislative assembly
- Indian government must have some territory under its control; it cannot possibly be an occupant or a tenant of a state government.
- India's national capital belongs to every citizen of the country and not just those who reside in the city.

## 4. Issues in Reorganisation of States

### 4.1. Demand for New States - Is it a Threat to the Unity of the Nation?

Ramachandra Guha argues that the creation of linguistic states has safeguarded the unity of India. Pakistan was divided, and Sri Lanka subject to protracted Civil War, because Bengali speakers in the former and Tamil speakers in the latter case were denied the autonomy and dignity they wanted and deserved. On the other hand, the fact that in India citizens were free to educate and administer themselves in their own language has created a feeling of comfort and security.

Eminent scholars and other many are of the view that linguistic states were necessary in the

early stages of Indian independence, but now it may be time for a further reorganisation of states. The proponents of Vidarbha and Gorkhaland also have a robust case like Telangana. Their regions are well defined in an ecological and cultural sense, and have historically been neglected by the more powerful or richer part of the states.

After 65 years of Independence, there need no longer be any fear about the unity of India. The country is not about to Balkanise(break up). The real problems in India today have to do with the quality of governance. Smaller states may be one way to address the problem.

## **4.2. Is There a Need for 2nd State Reorganisation Commission?**

The increasing demand for new states raises a number of questions with regard to the well-being of India's federal democratic polity. There are four measures that must be considered while devising any framework to address the issue of federal reorganisation.

- The constitution of a permanent State Reorganisation Commission
- Amendment of the Constitution to ensure that the demand for a new state emanates from the state legislature and not at the centre
- Examination of economic and social viability rather than political considerations
- Clear-cut safeguards to encourage democratic concerns like development and governance rather than religion, caste and language as valid grounds for a new state

There have long been calls for the establishment of a second States Reorganisation Commission (SRC) to take a more comprehensive look at the shape and size of India's states. If one were to be established, a new SRC might address the following range of questions.

### **4.2.1. Does India Need More States?**

India sits at the bottom of the federal league table of numbers of states per capita population. It has an average of over 35 million people per state. That compares to about 7 million people in Brazil, 6 million in the US or 4 million in Nigeria. However, in geographical terms, the size of its states is less startling. India's states are an average of about 110,000 square kilometres in size compared to almost 200,000 sq km in the US and over 300,000 sq km in Brazil. German Länder are much smaller, at an average of 22,000 sq km, while Swiss cantons are an average of only 1,588 sq km. So, in per capita terms, it lags behind other federal systems, but it is not an outlier in terms of geographical area.

Further creating more states may have some issues associated with it such as – power capture by dominant community/ caste/ tribe; increased probability of intra-regional rivalries among the sub-regions; possibility of increase in the inter-State water, power and boundary disputes; instability in government as small group of legislators could make or break a government; and inefficient usage of financial resources by duplication of work in different capitals as well as in establishment of new capitals and officials.

### **4.2.2. Does Small State Mean Better Governance?**

Secondly, a new commission might ask whether smaller states are likely to improve governance. One thing that the creation of new states is likely to do is to increase the density of the states. New states require new capitals, administrative structures, courts and personnel to man them. While this idea of a "gravy train" is one of the reasons that critics sometimes rail against the expense and inefficiency of creating new states, an increase in the depth of the state may improve its capacity.

India has one of the lowest rates of public sector employment among G20 countries. Gaps in the public workforce undermine the ability of the Indian state to tax, deliver justice, security and basic goods like education and healthcare. Yet, filling vacancies depends critically on improving skills and higher education — new states hold no guarantees in this regard.

There is no necessary connection between reducing the size of states and improving

governance. Those who see a link between state size and governance often do so on the assumption that smaller states will be more geographically compact, more socially cohesive and thus will help to improve the efficiency of public spending.

It is also assumed that smaller states can improve accountability by reducing the distance between elected representatives and voters. Yet if one looks at the states that perform better in terms of economic growth, or in terms of poverty reduction, we do not see a clear relationship between state size and performance. Nor is it the case that the "newness" of a state is likely to give a boost in itself — the mixed experience of India's newest states, Chhattisgarh, Jharkhand and Uttarakhand, demonstrates this.

#### **4.2.3. Alternatives to Creation of New States**

A third question for a new SRC is that if the ground for creation of new states is administrative efficiency then are there any other alternatives to creating new states that could address some of the concerns. In some cases, a better distribution of Central resources or a better devolution of power to Panchayati Raj Institutions at state level may give desired result rather than creating a new state. Here, it might be noted that states have extremely mixed records in the extent to which they have empowered sub-state institutions such as municipal corporations, autonomous regional councils or Panchayati raj institutions.

Other important issues include the administration of big cities and their relationship to state governments, which continue to address large rural electorates too. These questions also affect other metros, and we are likely to observe more demands in coming years for new administrative set-ups in big cities such as Mumbai or Bangalore in order to increase their autonomy from state governments. A future SRC could usefully consider the place of cities and mega-cities within new state set-ups.

#### **4.2.4. Who Should Decide if New States are to be Created?**

Fourth, a new SRC might wish to ask who should decide whether new states are created. It is an interesting feature of India's constitutional settlement that despite the centralised nature of Article 3, which effectively gives the Central government the power to make or break states, the real battles over state division are fought in state level arenas. A new SRC might consider whether a state assembly's resolution supporting bifurcation should be made a necessary requirement.

#### **4.2.5. Adjudicating the Existing Demands of Statehood**

Lastly, any future SRC would need to adjudicate on other actually existing demands for statehood — in Gorkhaland, Vidarbha, Bodoland, Bundelkhand, Harit Pradesh and elsewhere. A question that any future SRC would — or should — not easily find an answer to is that of the "right" size of a state. There is no one-size-fits-all or abstract answer to which regions should become states. States can only emerge as a compromise or balance between regional political cultures, identities and demands for recognition, geographies and economic factors.

### **4.3. Gorkhaland Issue**

There have been total shutdowns in Darjeeling and instances of frequent violence over demand for creation of Gorkhaland in recent times due to problems in functioning of GTA (Gorkhaland Territorial Administration). The leaders have accused state govt. of interference and not devolving enough financial resources to GTA.

#### **History of Demand for Gorkhaland**

Gorkhaland consists of Nepali-speaking people of Darjeeling, Kalimpong, Kurseong and other hilly districts. The people belonging to these areas hardly have any connection with the Bengali community and are different in ethnicity, culture and language.

Following the agitation of 1986, a tripartite agreement was reached between Government of India, Government of West Bengal, and Gorkha National Liberation Front in July 1988. Under this, an **autonomous Darjeeling Gorkha Hill Council** (DGHC) under a State Act was set up for "the social, economic, educational, and cultural advancement of the people residing in the Hill areas of Darjeeling District". The Council covered the three hill sub-divisions of Darjeeling district and a few Mouzas within the Siliguri sub-division.

However, it did not fulfill the aspiration of Indian Gorkha identity. The Council was given limited executive powers but in the absence of legislative powers the aspirations of the people of the region could not be addressed. The non-inclusion of the Dooars region in the Council became a major reason of discontent.

Then **Gorkhaland Territorial Administration (GTA)** was created in 2012 through a tripartite agreement signed by Gol, Govt. of West Bengal and Gorkha Janmukti Morcha (GJM). It replaced the Darjeeling Gorkha Hill Council. It is a semi-autonomous administrative body. It has administrative, executive and financial powers but no legislative powers. GTA presently has three hill subdivisions Darjeeling, Kurseong and Mirik and some areas of Siliguri subdivision of Darjeeling district and the whole of Kalimpong district under its authority.

However, lack of legislative powers means that the people of the region have no control over laws to govern themselves by. Dooars again has been left out and instead a verification team has been set to identify "Gorkha majority" areas in the Dooars.

### Way forward

The agitation for a separate Gorkhaland state must be brought to a swift end through a solution which meets the aspirations of the Nepali-speaking people without hurting the sentiments of the Bengali-speaking majority, which is largely against the division of the state. The possible steps include:

- Gorkhaland on its own is not financially viable. Except tourism it doesn't have much of its own resources. Tea industry is also facing crisis. The functioning of GTA needs to be improved and made accountable.
- The Government at the centre as well as the state needs to be more sensitive towards needs and aspirations of Gorkhas.
- Economic development of the region. Hospitals, schools, public services must be set up and existing ones need to be improved.
- Creation of an Autonomous State of Gorkhaland within an undivided West Bengal can be considered. Article 244 A provides for an autonomous state for certain tribal areas in Assam with its own legislature and council of ministers. By a constitutional amendment, the applicability of this article can be extended to West Bengal. Alternatively, through a constitutional amendment, an Article similar to Article 244 A, can be inserted as a new chapter in Part VI of the Constitution. This will enable the establishment of an Autonomous State of Gorkhaland, with a legislature and council of ministers within the existing state of West Bengal without bifurcating it.

At the same time agitators should also keep in mind that smaller and smaller states cannot be created on the basis of ever narrowing ethnic identities. Solutions need to be devised that are pragmatic as well as inclusive of the interests of all the inhabitants. Else, the ever increasing demands of new states will threaten the stability of the country by perpetuating the cycle of violence, counter-violence and protests.

## 5. UPSC Previous Years Prelims Questions

Student Notes:2021

**2001**

1. If a new state of the Indian Union is to be created, which one of the following schedules of the Constitution must be amended?
  - (a) First
  - (b) Second
  - (c) Third
  - (d) Fifth

**2009**

1. Consider the following statements:
  1. The Governor of Punjab is concurrently the Administrator of Chandigarh
  2. The Governor of Kerala is concurrently the Administrator of LakshadweepWhich of the above statements is/are correct?
  - (a) 1 only
  - (b) 2 only
  - (c) Both 1 and 2
  - (d) Neither 1 nor 2

## 6. UPSC Previous Years GS Mains Questions

1. Many State Governments further bifurcate geographical administrative areas like Districts and Talukas for better governance. In light of the above, can it also be justified that more number of smaller States would bring in effective governance at State level? Discuss. (2013)

## 7. Vision IAS GS Mains Questions

1. *While some argue that Article 3 provides usurping powers to the center at the cost of states, according to others it enables the Parliament to maintain and preserve federalism as enshrined in the constitution. Discuss. Is it time to have a relook at Article 3 in the spirit of co-operative federalism?*

**Approach:**

- Briefly mention provisions of Article 3.
- Explain both sides of the argument.
- Drawing from the explanation, discuss whether Article 3 needs to be rechristened and the direction of such changes.

**Answer:**

Article 3 authorizes the Parliament to create a new state, unite two or more states or their parts, increase, decrease, alter boundaries or rename any state. A Bill to implement such changes will originate in parliament but needs to be referred to concerned state legislatures. However, their view is not binding. For a union territory even reference need not be made to the concerned legislature.

Thus, Parliament can redraw the political map of India according to its will. Hence, the territorial integrity or continued existence of any state is not guaranteed by the Constitution implying India is an 'indestructible union of destructible states'. The Union government can destroy the states whereas the state governments cannot destroy the Union. This was important for the unity of India in the context of fissiparous tendencies post partition and even today when many regions are demanding newer states on ever narrowing ethnic and tribal identities which is practically impossible.

Also, union has been liberal in accepting demands regarding creation of new states based on linguistic, administrative and development aspirations of people. This formula has been pretty successful in maintaining the 'unity in diversity'.

But, it is also against the spirit of cooperative federalism which demands co-equal distribution of power between centre and states but makes states mere appendages of the union as they have almost no say in their own existence. It undermines the will of the locals and is against the concepts of diversity and pluralism. It creates dissent amongst people and alienates them from political leadership and constitutional machinery. The resentment in Andhra region post formation of Telangana and continued insurgency in North-East are some examples.

Hence, a relook seems plausible. Possible alternatives can be:

- Parliament must follow the will of state legislature in case of special majority.
- The changes if any should originate in the state legislature unless special circumstances demand otherwise.

But any change in the provisions of the Article 3 can have unimagined consequences. Hence, discussion with all the stakeholders should be done. Meanwhile, use of article 3 should be judiciously mixed with the provisions of the 5<sup>th</sup> and 6<sup>th</sup> schedules for greater incorporation of local needs and aspirations while maintaining the unity of the country.

**1. *The State Reorganization Commission had to operate within certain 'limiting factors' while reorganizing the country on linguistic grounds. Discuss these limiting factors.***

**Approach:**

- Explain the factors which created concern in linguistic reorganization in India.

**Answer:**

The language and culture of an area are undoubtedly important as they represent a pattern of living which is common in that area. While examining the related issues the Commission looked into minimum of internal cohesion and scope of positive expression of the collective personality of a people in inhabiting a state or region. Common language may not only promote the growth of such regional consciousness but also cause administrative convenience. Moreover, in a democracy it is the duty of the Government to ensure that the administration is conducted in a language which the people can understand. But the Commission had to operate within certain 'limiting factors' as well. The limiting factors were:

1. A linguistic State with its regional language as its official language may easily develop into an independent nationality. The road between an independent nationality and an independent State is very narrow.
2. India has been for several millennia a multilingual and multicultural country. There are a large number of bilingual belts between different linguistic zones.
3. Not all the language groups are so placed that they can be grouped into separate states.
4. There exist areas with a mixed population even within unilingual area.
5. There is not a single major modern Indian language whose speakers do not employ at least three contact languages and not a single speech-community which has less than at least three distinct linguistic codes in its verbal repertoire.
6. All major languages of India exist beyond their home-territory. As such speakers maintain their native (home) language and also speak the dominant local language, providing a clear case of grass-root bi-lingualism.

7. Different zones might have been declared uni- or bi-lingual for administrative convenience but basically each of them is a multilingual and multicultural complex entity.
8. Border areas of almost all the zones offer a diffusion belt, emerging out of contact patterns with languages belonging to different families.

Because of such limitations, a considerable number of people speaking languages other than the dominant language of a state remain a minority in the state. It required several safeguard for the interests of these people.

**2. *The State Reorganization Commission turned language from a dividing force to a cementing and integrating one. Critically evaluate.***

**Approach:**

- Discuss the apprehensions for organizing states on linguistic lines.
- Analyze events after the acceptance of the SRC report and linguistic reorganization.
- Point out failures of reorganization in terms of resolving fissiparous tendencies.

**Answer:**

The post-independence resurgence of regionalism in many parts of India baffled the observers of Indian politics, and offered as the basis of prediction of the country's 'imminent balkanization'.

- The national leadership decided to postpone state reorganization on linguistic line. It was felt that linguistic states may foster separatism and create pressure on newly independent nation. Local leaders opposed this decision.
- Demands were raised in Madras and Bombay presidency. The death of congress worker fasting for Separate Telugu state in Andhra led to unrest and violent outburst. Andhra Pradesh was formed in 1952 to calm the situation. However, this led to series of struggles for separate states which threatened the stability.
- The State Reorganization Commission (SRC) was constituted to study this question in detail. The passing of the State Reorganization Act in 1956 on recommendation of SRC led to creation of numerous linguistic states.
- Events after 1956 clearly showed that loyalty to a language was quite consistent with, and was rather complementary to, loyalty to the nation. By reorganizing the states on linguistic lines, the SRC removed a major grievance which could have led to fissiparous tendencies. States reorganization is, therefore, 'best regarded as clearing the ground for national integration'.
- Linguistic reorganization of the states has not in any manner adversely affected the federal structure of the Union or weakened or paralysed the Centre as many had feared.
- States' reorganization did not, of course, resolve all the problems relating to linguistic conflicts. Disputes over boundaries between different states, linguistic minorities and economic issues such as sharing of waters, and power and surplus food still persist. Linguistic chauvinism also finds occasional expression.
- There are demands for creation of separate states within linguistically organized state. Creation of the Telangana suggests that language no more acts as cementing force it used to be. Socio-economic factors, disparities within state and prospects of development forms basis for state demands.

But it's equally true that the reorganization on linguistic lines has removed language as a major factor affecting cohesion of the country.

3. *The demands for state formation in India have changed their bases from linguistic to backwardness, ethnicity etc. Examine this transformation of the bases for state reorganization.*

Student Notes:2021

**Approach:**

- First mention how the demands of linguistic states had been met.
- Then mention various aspirations of statehood emerging from larger states in terms of administrative negligence, backwardness, self-assertiveness.
- Examine merits and demerits from both the perspectives and conclude suitably.

**Answer:**

- Just after independence, the Vishalandhra Movement had demanded a separate state for Telgu speaking people from Madras Province.
- Potti Sriramulu took fast unto death for Andha Cause. His death after 56 days of fast had resulted in violent outburst which compelled the government of India to declare Andhra Pradesh as a separate state in December 1952.
- This inspired other leaders of different states to demand linguistic state of their own. Government formed states reorganisation commission in 1953 to look into the demands of linguistic states. The commission accepted the linguistic principles for state formation which resulted in creation of 14 states and 6 Union Territories in 1956.
- In North-East Region, various tribes demanded their own state on the basis of their culture, which was fulfilled by Union Governments. Nagaland state was created in 1960, Meghalaya, Manipur and Tripura in 1972 while Arunachal Pradesh and Mizoram became separate states in 1986. In this way, this region had undergone considerable political reorganisation.
- In contemporary times the separate statehood demand has changed its hue drastically. In late 1990's NDA coalition accepted the prolonged demands of Jharkhand, Chhattisgarh, Uttaranchal [later Uttarakhand] which has different motivations such as tribal state (Jharkhand), administrative inconvenience (Uttarakhand) etc.
- But, there are still long pending demands for state formation on the different basis viz ethnicity, lack of development, administrative inconvenience etc. These separate statehood demands are Gorkhaland (WB), Kamatpur state for Koch Rajbangsi (Assam), Bodoland (Assam), Vidharbha (Maharashtra), Saurashtra (Gujarat), fourfold division of Uttar Pradesh in the form of Harit Pradesh, Awadh Pradesh, Purvanchal and Bundelkhand (UP+MP).
- Demands of separate statehood on various grounds show that language is not the sole bond that can bind people together. Now, some regions are aspiring for preservation of their ethnic culture in the form of separate state and on the other hand some regions are aspiring for better development after prolonged apathy and backwardness.

4. *Ethnic similarities are as important as territorial boundaries in promoting the feeling of common brotherhood among the citizens of a country. In context of the above statement, examine the problems faced by people from North-East in other parts of India. Also analyse the steps taken by the government in this regard.*

**Approach:**

Examine the various instances of name-calling e.g. Nido Tania murder case in Delhi and Bangalore exodus to portray how lack of ethnic similarity of North-East Indians creates a foreign feeling among the people from those of mainland and how this leads to

friction among them. Further one should give an account of the measures taken by government and also suggest further measures.

Student Notes:2021

**Answer:**

The mysterious death of Loitam Richard in Bangalore, the murder of Ramchanphy Hongray in New Delhi, the suicide by Dana Sangma and other such incidents serve as reminders of the insecure conditions under which people, particularly the young, from the north-east of India have to live with in the metros of this country. Major problems faced by people from north east in other parts of the country are:

- Pervasive racial discrimination that people from the region face in metropolitan India.
- Despite hailing from an integral part of India, these survivors of racial abuse feel compelled to overlook instances of mental, physical and verbal assault on a daily basis.
- People from North-East have to suffer jibes and verbal or non-verbal abuse due to their different facial look.
- Time and again, male students from the northeast have been compelled to relocate elsewhere after the locals ganged up against them.

**Some of the steps taken by the government**

- Delhi Police has announced an array of steps, including setting up of a new unit and a helpline number to address any grievance faced by people from the north east.
- Ministry of Home Affairs constituted a committee in February, 2014 to look into the various concerns of persons hailing from the North Eastern States who are living in different parts of the country, especially the Metropolitan areas, and to suggest suitable remedial measures which could be taken by the Government
- The Government has already encouraged to include history of North-East in school curriculum which can be a way to bring North-east closer to the main stream.

**Some other possible steps**

- Unless there is legal protection for the north easterners, their rights will always be trampled by those who have no regard for their existence. An anti-racism law is an important measure that the Indian government must take.
- Racism is a social problem and it can only be solved at the societal level. This can be done through awareness, campaign, educating the mainland people about the unique history, culture, languages of north-east India.
- A great initiative to end this disjuncture of knowledge would be by introducing more information about the North Eastern region or the southern region, or any other regions which have been ignored since years, into the curriculum of state education boards and other central educational boards, especially NCERT books.
- The responsibility of the police also lies in registering an FIR and then taking quick action in cases of racial abuse.
- Another important step could be to create sustainable employment opportunities in the North Eastern Region to prevent the distress migration of the people from north east.

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## 1. Introduction

There are two classes of people in any modern country – **citizens and aliens**.

- A **citizen** of a given state is a person **who enjoys full membership** of the political community or the State. He/she enjoys all civil and political rights in that state.
- An **alien** or mere resident is a person who is a citizen of some other political community or State. Thus, he/she **do not enjoy all the rights** which go to make full membership of the State. Aliens are of **two types**:
  - **Friendly aliens**- Those aliens which are citizens of friendly countries.
  - **Enemy aliens**- Those aliens which are citizens of enemy countries. The enemy aliens are denied some of the rights that the friendly aliens enjoy.

In this context, **the Citizens of India** have the following rights conferred to them by the Constitution of India, which are not available to aliens-

- Some **Fundamental Rights** belong to citizens alone, such as-
  - **Article 15**- Right against discrimination on grounds of religion, race, caste, sex or place of birth.
  - **Article 16**- Right to equality of opportunity in the matter of public employment.
  - **Article 18(2)**- No citizen of India will accept any title from any of the foreign States.
  - **Article 19**- Right to freedom of speech and expression, assembly, association, movement, residence and profession.
  - **Article 29**- Protection of interests of minorities
  - **Article 30**- Right of minorities to establish and administer educational institutions
- Only citizens are **eligible for certain offices**, such as-
  - The **President** of India
  - The **Vice-President** of India
  - The **Judge** of Supreme Court of India
  - The **Judge** of High Court in the states.
  - The **Governor** of a state.
  - The **Attorney General** of India.
  - The **Advocate General** of the state.
- Only citizens hold the **right to vote in elections** to the Lok Sabha and State Legislative Assemblies.
- Only citizens have the right to become a **Member of Parliament** (MP) in the Parliament and **Member of Legislative Assembly** (MLA) in the State legislatures.

However, apart from enjoying these exclusive rights, the citizens also need to **fulfill certain duties towards the Indian State**, as for example, paying taxes, respecting the national flag and national anthem, defending the country and so on.

## 2. Constitutional Provisions

The provisions relating to the Citizenship have been dealt in **Part II** of the Constitution of India under **Articles 5 to 11**. However, these provisions do not contain either **any permanent or any elaborate provisions** towards Citizenship. It only identifies the persons who became citizens of India at its commencement (i.e., on January 26, 1950). They can be seen as follows-

### 2.1. Article 5- Citizenship at the commencement of the Constitution

Under this, every person who had his domicile in the territory of India at the commencement of the Constitution of India, **shall be a citizen of India**, provided he fulfilled any of the following three conditions, i.e.-

- If **he was born** in the territory of India; or

- If either of his **parents was born** in the territory of India; or
- if he has been ordinarily **resident in the territory of India for not less than five years** immediately preceding such commencement.

## 2.2. Article 6- Rights of citizenship of certain persons who have migrated to India from Pakistan

Notwithstanding anything in Article 5, a person **who has migrated to the territory of India from the territory now included in Pakistan** shall be deemed to be a citizen of India at the commencement of the Constitution of India, if he or either of his parents or any of his grandparents were born in **undivided India** as defined in the Government of India Act, 1935.

Apart from this, he should fulfil any of the following two conditions-

- **If he migrated before 19<sup>th</sup> July, 1948-** He should have been **ordinarily resident** in the territory of India since the date of his migration, or
- **If he migrated after 19<sup>th</sup> July, 1948-** He should have been **registered** as a citizen of India by the Government of India. However, a person shall be so registered only if he has been resident in the territory of India for **at least six months immediately preceding** the date of his application.

## 2.3. Article 7- Rights of citizenship of certain migrants to Pakistan

Notwithstanding anything in Articles 5 and 6, a person who migrated to Pakistan from India after March 1, 1947, but **later returned to India for resettlement** could become an Indian citizen. For this, he had to be **resident in India for six months** preceding the date of his application for registration

## 2.4. Article 8- Rights of citizenship of certain persons of Indian origin residing outside India

This provision covers the overseas Indians who may want to acquire Indian citizenship. A person needed to fulfill following conditions to become a citizen under this provision, i.e.-

- He or either of his parents or any of his grandparents were **born in undivided India** as defined in the Government of India Act, 1935. But he has been ordinarily residing in any country outside India.
- He has been registered as a citizen of India **by the diplomatic or consular representative** of India in the country where he is residing, whether before or after the commencement of the Constitution.

## 2.5. Article 9- Persons voluntarily acquiring citizenship of a foreign state not to be citizens

No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he **has voluntarily acquired the citizenship of any foreign State**.

## 2.6. Article 10- Continuance of the rights of citizenship

Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, **subject to the provisions of any law that may be made by Parliament**, continue to be such citizen.

## 2.7. Article 11- Parliament to regulate the right of citizenship by law

Student Notes:2021

Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

Other than these provisions, the Constitution of India does not deal with the problem of acquisition or loss of citizenship subsequent to its commencement. It empowers the Parliament to enact a law to provide for such matters and any other matter relating to citizenship. Accordingly, the Parliament of India enacted the Citizenship Act, 1955, which has been amended many times subsequently in 1957, 1960, 1985, 1986, 1992, 2003, 2005, 2015 and 2019.

## 3. Acquisition of Citizenship

The Citizenship Act, 1955 confers the right to acquire citizenship in India in the following ways-

- By Birth
- By Descent
- By Registration
- By Naturalization
- By acquisition of territory

### 3.1. Citizenship by Birth (Section 3)

A person born inside India-

- Between 26th January 1950 and 1st July 1987- is citizen of India by birth irrespective of the nationality of his parents.
- Between 1st July, 1987 and 3rd December 2004- is considered citizen of India by birth if either of his parents is a citizen of India at the time of his birth
- On or after 3<sup>rd</sup> December 2004- is considered citizen of India by birth if-
  - both the parents are citizens of India or
  - one of the parents is a citizen of India and the other is not an illegal migrant at the time of his birth.

A person shall not be a citizen of India by virtue of this section if at the time of his birth, if he is

- Either his father or mother is a foreign diplomat and he/she is not a citizen of India.
- Either his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.

### 3.2. Citizenship by Descent (Section 4)

A person born outside India will be considered as Citizen of India be descent, if

- Between 26th January 1950 and 10th December 1992- if his father was a citizen of India by birth at the time of his birth.
- Between 10th December 1992 and 3rd December 2004- if either of his parents was a citizen of India by birth at the time of his birth.
- On or after 3rd December 2004- only if his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the expiry of the said period. Further, the parents of such a person have to register his birth and declare in writing that the minor does not hold passport of another country.

### 3.3. Citizenship by Registration [Section 5]

Indian Citizenship by registration can be acquired (**not for an illegal migrant**). For this section, a person shall be **deemed to be a Person of Indian origin** if he, or either of his parents, was born in undivided India or in such other territory which became part of India after 15th day of August 1947.

To acquire citizenship by registration, a person should fulfil the following conditions-

- Persons of Indian origin who are **ordinarily resident in India for SEVEN YEARS** before making application under this section. (Throughout the period of twelve months immediately before making application and for SIX YEARS in the aggregate in the EIGHT YEARS preceding the twelve months).
- Persons of Indian origin who are **ordinarily resident in any country** or place outside undivided India under this section.
- Persons who are **married to a citizen of India** and who are **ordinarily resident** in India for **SEVEN YEARS** before making application under this section.
- **Minor children whose both parents are Indian citizens** under this section.

Further, Persons of full age and capacity can also acquire Indian citizenship under this section, if-

- **Both their parents are registered** as citizens of India.
- He or either of the parents were **earlier citizen of Independent India** and residing in India for **ONE YEAR** immediately before making application.
- He has been registered as an **Overseas Citizen of India (OCI)** for **5 years** and residing in India for **ONE YEAR** before making application.

All the above categories of persons **must take an oath of allegiance** before they are registered as citizens of India

### 3.4. Citizenship by Naturalization (Section 6)

Citizenship of India by naturalization can be acquired **by a foreigner (not illegal migrant)** who is ordinarily resident in India for **TWELVE YEARS** (throughout the period of twelve months immediately preceding the date of application and for **ELEVEN YEARS** in the aggregate in the **FOURTEEN YEARS** preceding the twelve months) and **other qualifications** as specified in Third Schedule to the Act, such as-

- He should not be subject or citizen of any country where **citizens of India are prevented from becoming subjects or citizens** of that country by naturalization.
- If he is a citizen of any country, he **undertakes to renounce the citizenship of that country** in the event of his application for Indian citizenship being accepted.
- He is of **good character**.
- He has an **adequate knowledge of a language** specified in the **Eighth Schedule** to the Constitution.
- He intends to reside in India, or to enter into or continue in, service under a Government in India or under an international organization of which India is a member.

The Government of India, **may waive all or any of the above conditions for naturalization**, if in its opinion, the person has rendered distinguished services to the cause of **science, philosophy, art, literature, world peace or human progress** generally. Recently, the period of residence to acquire citizenship under this section was reduced for some special cases under the **Citizenship (Amendment) Act 2019** (taken up in detail later in this chapter).

All such persons who acquire citizenship by naturalization, shall take **an oath of allegiance** to the Constitution of India.

### 3.5. Citizenship by Incorporation of Territory (Section 7)

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If any **foreign territory becomes a part of India**, the Government of India, may by orders notified in the Official Gazette, specify the persons who shall be citizens of India by reasons of their connection with that territory, and those persons shall be citizens of India as from the date to be specified in the order. E.g. when Pondicherry became a part of India, people of Pondicherry became the citizens of India under the **Citizenship (Pondicherry) Order, 1962**, issued under the Citizenship Act, 1955.

## 4. Loss of Citizenship

Termination of Citizenship is covered in **Section 9 of the Citizenship Act, 1955**. It prescribes **three ways** in which a person may **lose his citizenship**, whether acquired under this Act or prior to it under the Constitution of India.

### 4.1. Renunciation of Citizenship (Section 8)

If any citizen of India of full age and capacity, who is also a citizen or national of another country, makes a declaration renouncing his Indian citizenship, then that person shall cease to be a citizen of Indian. Provided that if any such declaration is **made during any war in which India may be engaged**, registration thereof shall be withheld until the Government of India otherwise directs.

Where a person ceases to be a citizen of India, **every minor child of that person shall there upon cease to be a citizen of India**, provided that any such child **may, within one year after attaining eighteen years of age**, make a declaration that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India.

### 4.2. Termination of Citizenship (Section 9)

Any citizen of India who **voluntarily acquires**, or has at any time between the 26th January 1950 and the commencement of this Act **voluntarily acquired**, the citizenship of another country, cease to be a citizen of India. However, this provision does not apply **during any war in which India may be engaged**.

If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf. The acquisition of another country's passport is also deemed under the **Citizenship Rules, 1956** to be voluntary acquisition of another country's nationality.

### 4.3. Deprivation of Citizenship (Section 10)

The Government of India can deprive any citizen of Indian Citizenship if it is satisfied that:

- The citizen has obtained citizenship by means of **fraud, false representation or concealment** of any material fact; or
- That citizen has shown himself by act or speech to **be disloyal or disaffected** towards the Constitution of India as by law established; or
- That citizen has, during the war in which India may be **engaged, unlawfully traded or communicated with an enemy** or been engaged in or associated with, any business that was to his knowledge carried on in such manner as to assist any enemy in that war;
- That citizen has, **within five years after registration or naturalization**, been sentenced in any country to **imprisonment for a term of not less than two years**; or
- That citizen has been ordinarily resident out of India for a continuous period of seven years. However, **this will not apply**, if he has been at any time a **student of any educational institution in a country outside India** or in the **service of a Government of India** or of an

**International organization** of which India is a member, or has **registered annually** in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.

The Central Government shall not deprive a person of citizenship unless it is satisfied that it is not conducive to **the public good** that person should continue to be a citizen of India.

## 5. Concept of Dual Citizenship

Citizenship is generally defined based on some common factors. One could be a citizen of a country for one or more of the following reasons

- **Right of the Soil**- if he was born in the territory (within the borders) of that country
- **Right of Blood**- If one or both of his parents are citizens of that country.
- **By Marriage** - If he is married to a person who is a citizen of that country (this is no longer an automatic process - he still needs to apply for citizenship)
- **Naturalization** - If he obtained citizenship of the country by going through the legal process of naturalization.

As there are various ways to acquire citizenship of a country, it is possible for someone to be considered a **citizen under the laws of two or more countries** at the same time. This is dual citizenship. Dual citizens can **carry two passports** and essentially live work and travel freely within their native and naturalized countries. **Some countries do not allow dual citizenship**. For example, **South Korean and American** citizenship cannot be carried on hand in hand.

Initially, India also **did not allow** for the any rights to people of Indian origin who are residents of other countries now. However, the Government setup a **High-Level committee on Indian Diaspora** under the Chairmanship of **L.M. Singhvi** to do comprehensive study of the global Indian Diaspora and to recommend measures for a constructive relationship with them. Based on the recommendations, the Indian Parliament amended the Citizenship Act in 2002 and provided for two special status-

- **Person of Indian Origin Card (PIO) Scheme**, for persons who, or any of their ancestors, were Indian nationals and who are presently holding another country's citizenship/nationality i.e. he/she is holding foreign passport.
- **Overseas Citizenship of India** for the above PIOs, who have migrated from India and acquired citizenship of a foreign country (other than Pakistan and Bangladesh), are eligible for certain benefits, "**as long as their home countries allow dual citizenship in some form or the other under their local laws**".

### 5.1. Overseas Citizen of India Cardholder

Both the schemes were running in parallel even though the OCI card scheme had become more popular. This was causing unnecessary confusion in the minds of applicants. Keeping in view some problems being faced by applicants and to provide enhanced facilities to them, the Government of India decided to formulate one single scheme after merging the PIO and schemes. Consequently, the **Citizenship (Amendment) Act, 2015**, modified the provisions pertaining to the OCI in the Principal Act. It has introduced a new scheme called "**Overseas Citizen of India Cardholder**" by merging the PIO card scheme and the OCI card scheme.

#### Benefits of Merger

- **Simplification** of the rules under a single umbrella.
- PIO cardholders are now **eligible for benefits already enjoyed** by OCI cardholders.
- Facilitate **visa-free travel** to India, rights of residency and participation in business and educational activities in the country.
- Resolve the **complaints of visits by PIOs to local police stations** and stringent visa norms that debarred them from buying property in India, in comparison to those holding OCI card.

- It also does away with the **clause of foreigners** who marry Indians to continuously stay in the country for a period of one year before they get Indian citizenship.
- It gives foreigners a **relief of 30 days** in a year when they can travel outside the country.

### Rights of people with Overseas Citizen of India Card

Such people shall be entitled to such rights, as the Government of India may specify in this behalf. However, such persons **shall not have the following rights** as given to Citizens of India, which include-

- **Right to equality** of opportunity in matters of public employment.
- **Eligibility for election** as President of India, Vice President of India, Member of the Lok Sabha, Member of Rajya Sabha, Member of State Legislative Assemblies or Councils.
- **Eligibility for appointment** as a Supreme Court Judge, High Court Judge. He shall not be eligible for appointment to public services and posts in connection with affairs of the Union or of any State except for appointment in such services and posts as the Central Government may specify.

### Renunciation of Overseas Citizen of India Card

This status may be terminated for such persons, if they make in prescribed manner a **declaration renouncing the Card** registering them as an Overseas Citizen of India Cardholder and such a declaration is registered by the Government of India.

When a person ceases to be an OCI Cardholder, that person's **spouse, minor children** also cease to be an Overseas Citizen of India Cardholder.

### Cancellation of Overseas Citizen of India Card

The Government of India may cancel the registration of a person as an Overseas Citizen of India Cardholder, if it is satisfied in the following conditions-

- He has **obtained the status by means of fraud**, false representation or the concealment of any material fact; or
- He has shown **disaffection towards the Constitution of India**; or
- He has, during any war in which India may be engaged, unlawfully traded or **communicated with an enemy**; or
- He has, within five years after registration, been **sentenced to imprisonment** for a term of not less than two years; or
- It is necessary so to do in the **interests of the sovereignty and integrity of India**, the security of India, friendly relations of India with any foreign country, or in the interests of the general public; or
- The **marriage of an Overseas Citizen of India Cardholder**-
  - has been dissolved by a competent court of law or otherwise; or
  - has not been dissolved but, during the subsistence of such marriage, he has solemnised marriage with any other person.

## 5.2. Other Steps taken towards Indian Diaspora

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- Pravasi Bharatiya Divas (PBD) is celebrated on **9th January** every year to mark the contribution of Overseas Indian community in the development of India. January 9 was chosen as the day to celebrate this occasion since it was on this day in 1915 that Mahatma Gandhi, the greatest Pravasi, returned to India from South Africa, led India's freedom struggle and changed the lives of Indians forever.
- PBD conventions are being **held every year since 2003**. Since 2015, its format has been revised to celebrate the PBD **once every two years** and to hold **theme based PBD Conferences** during the intervening period with participation from overseas diaspora experts, policy makers and stakeholders. These conventions provide a platform to the overseas Indian community to engage with the government and people of the land of their ancestors for mutually beneficial activities. These conventions are also very useful in networking among the overseas Indian community residing in various parts of the world and enable them to share their experiences in various fields.
- During the event, individuals of exceptional merit are honoured with the prestigious **Pravasi Bharatiya Samman Award** to appreciate their role in India's growth. The event also provides a forum for discussing key issues concerning the Indian Diaspora.



PBD 2020 was held in **New Delhi** on 9th January 2020 in which EAM interacted with Diaspora in eight countries through Video Conference. The event was webcast live to all Indian Missions and Posts abroad.

### The Indian Diaspora

#### Major concentrations of overseas Indian community

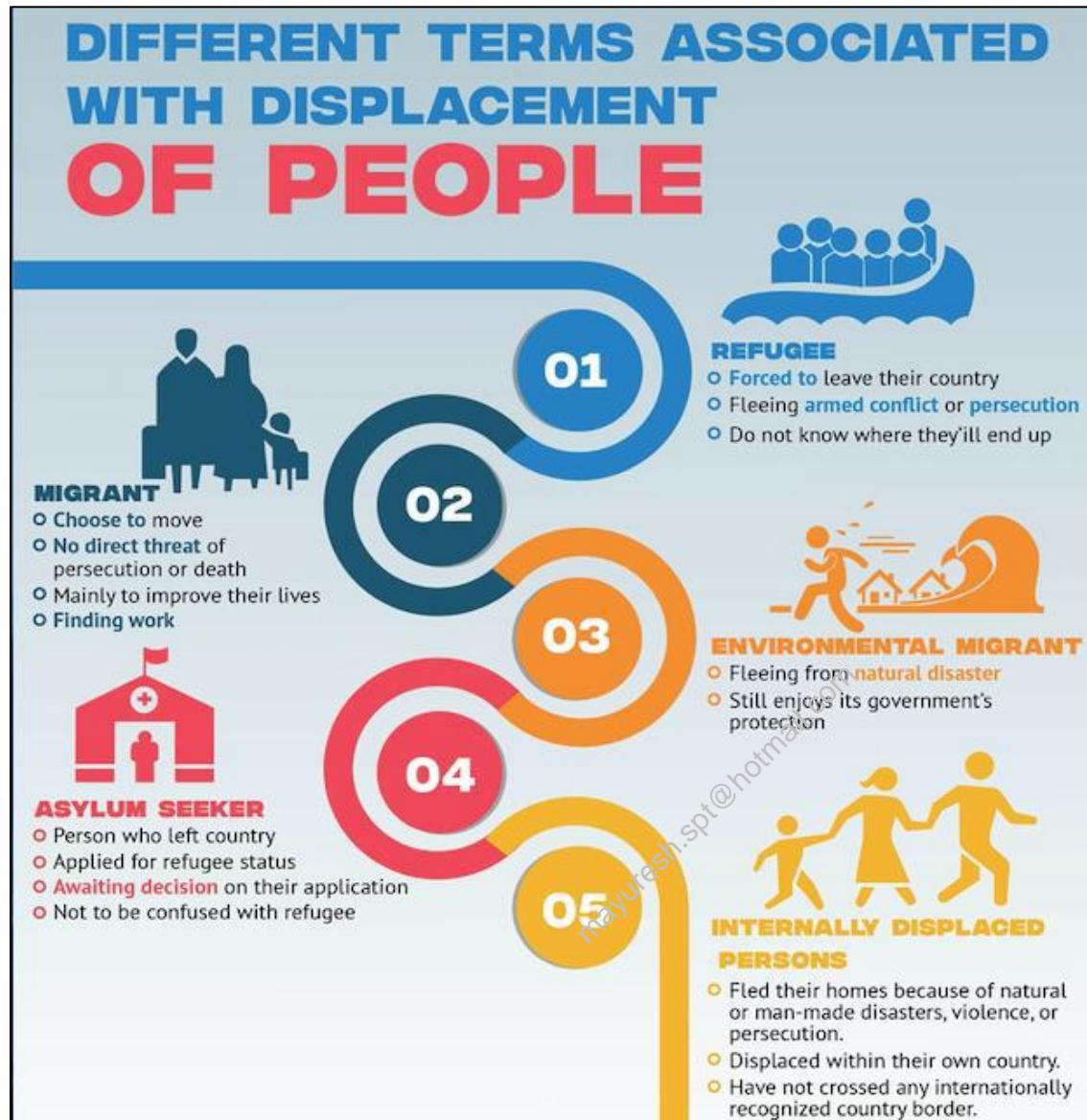


### Ministry of Overseas Indian Affairs

The Ministry of Overseas Indian Affairs (MOIA), dedicated to the multitude of Indian Nationals settled abroad was established in May 2004 as the **Ministry of Non-Resident Indians' Affairs**, it was renamed as the Ministry of Overseas Indian Affairs (MOIA) in September 2004. Driven by a mission of development through coalitions in a world without borders, MOIA seeks to connect the Indian Diaspora community with its motherland.

Positioned as a Services' Ministry, it provided information, partnerships and facilitations for all matters related to Overseas Indians (comprising Persons of Indian Origin (PIOs) and Non-Resident Indians (NRIs). Besides dealing with all matters relating to Overseas Indians, the Ministry was engaged in several initiatives with them for the promotion of trade and investment, emigration, education, culture, health and science & technology.

In 2016, this ministry was merged with **Ministry of External Affairs** because majority of its activities were done through MEA only. It was felt that a separate ministry was not needed and the same can be done by a division under MEA. Hence, currently **division of Overseas Indian Affairs exists** performing the functions done by erstwhile ministry.



## 6. Status of Refugees in India

India has **not signed** the 1951 United Nations Refugee Convention on the Status of Refugees, or its 1967 Protocol. The lack of specific refugee legislation in India has led the government to adopt an **adhoc approach to different refugee influxes**. The status of refugees in India is governed mainly by political and administrative decisions rather than any codified model of conduct. The ad hoc nature of the Government's approach has led to varying treatment of different refugee groups. Some groups are granted full range of benefits including legal residence and the ability to be legally employed, whilst others are criminalized and denied access to basic social resources.

The legal status of refugees in India is governed mainly by the **Foreigners Act 1946** and the **Citizenship Act 1955**. These Acts do not distinguish refugees and apply to all non-citizens equally. Under the Acts it is a criminal offence to be without valid travel or residence documents. These provisions render refugees liable to deportation and detention.

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The head office of UNHCR's mission in India is based in New Delhi. Once recognized, Afghan, Burmese, Palestinian and Somali refugees receive protection from the UNHCR. Many refugees receive a small monthly subsistence allowance, and all have access to the services provided by the UNHCR's implementing partners in Delhi, such as the YMCA, Don Bosco and the Socio-Legal Centre (SLIC).

The largest refugee populations in India do not fall under the UNHCR's mandate but are nonetheless considered refugees by the government. There are over 1,50,000 Tibetans and 90,000 Sri Lankans who have fled violence and persecution and sought refuge in India. These groups are accommodated and assisted in accessing education, healthcare, employment and residence to varying degrees.

#### Refugees from different countries in India

- **Tibetan Refugees-** Following the Chinese incursion in 1951, in 1959, many Tibetans fled to India. Tibetans who arrived in India in the late 1950s and early 1960s were accorded refugee status by the Indian government. These Tibetans were issued registration certificates, which must be renewed once or twice a year. Tibetans who were born in India are also eligible to obtain a registration certificate once they are 18 years old.
- **Sri Lankan Refugees-** Sri Lankans who are considered to be a threat to national security are deemed to be militants and detained in 'special camps' in Chengalpet or Vellore. Nonetheless, in general the Government of India recognizes Sri Lankans fleeing violence at home to be refugees and accordingly grants them protection.
- **Bhutanese Refugees-** Since 1949, Bhutanese citizens have been permitted to move freely across the Indian border. An open border between India and Nepal and India and Bhutan is provided for by a treaty between the respective states, last updated in February 2007. The right to residence, study, and work are guaranteed without the need for identity papers.
- **Hindu Pakistani Refugees-** Roughly 1,15,000 people displaced from Pakistan have arrived in India since 1965. They can avail Indian citizenship as per the recent amendments made in the Citizenship Act in 2019.
- **Rohingyas-** Rohingya are people who reside in Rakhine State, Myanmar. In August 2017, the Government of India had announced that it was planning to deport all 40,000 Rohingya refugees living in the country. In a petition before the Supreme Court, it has been alleged that Rohingya trying to enter India were being forcefully pushed back to Myanmar in violation of their human rights. A bench led by the Chief Justice of India is hearing a batch of petitions filed by some Rohingyas against their deportation home in the face of imminent death.
- **Chakmas and Hajongs-** Chakmas and Hajongs are ethnic people who lived in the Chittagong Hill Tracts, most of which are located in Bangladesh. They had to leave their homeland bordering India and Myanmar because of **Kaptai dam** project in 1960s.
  - They allegedly faced religious persecution and entered India through Lushai Hills district of Assam (now Mizoram). The Centre had moved majority of them to North Eastern Frontier Agency (now Arunachal Pradesh).
  - Now the Centre has decided to provide citizenship to Chakma (Buddhist) and Hajong (Hindus) refugees as per the Supreme Court's 2015 order. However, this is being opposed by the indigenous people of Arunachal. In light of these protests, the Centre has decided to grant 'limited citizenship' to them. They will not get land rights or be recognised as a Scheduled Tribe in Arunachal Pradesh so that the rights of the indigenous people are not diluted

- Palestinian Refugees-** 160 Palestinians are currently seeking refugee status and are the most recent refugee group to arrive in India. The UN High Commission for Refugees (UNHCR) in Delhi has recognized some of the Palestinians as refugees and other applications are under consideration. These refugees have not been issued residence permits by the Indian government.

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## 7. Refugee vs. Asylum Seeker

When people flee their own country and seek sanctuary in another country, they apply for asylum – **the right to be recognized as a refugee and receive legal protection and material assistance**. An asylum seeker must demonstrate that his or her fear of persecution in his or her home country is well-founded. Hence **refugee is an asylum seeker whose application has been successful**.

Although India has provided shelter to one of the largest refugee populations in South Asia, it **lacks a uniform asylum policy**.

**In contemporary time need of a uniform asylum policy is felt due to following reasons:**

- Due to absence of a uniform policy the government has to consider requests on case to case basis which is **lengthy and time consuming process**.
- India seeks to have a seat in permanent seat in UNSC and membership of groups like NSG; For a **global leader it is necessary to have a refugee policy** in place which will enhance its good will.
- By having an asylum policy India will be in a better situation to **deal with issues like Baluchistan** as it would get support from those leaders who fight for Humanitarian cause. This will also help in dealing with Pakistan strategically.
- Although existing provisions might serve the need of asylum seeker but compiling them into a uniform law will project a **positive picture of the country before international arena**.
- Since India is one of the **largest contributor of troops in UN Peace keeping mission**, having a policy for asylum will complement these efforts.

**However, same time adoption of a uniform asylum policy can create some challenges like:**

- Borders in South Asia are extremely porous and any conflict can result in a **mass movement of people** leading to a strain on local infrastructure and resources and also upsetting the demographic balance
- It will be **bound by law not to repatriate a single refugee against their will** which is sometime necessary to deal with political crisis
- Giving shelter to every refugee may **create new problems like human trafficking and drug trafficking and abuse**. It will put additional financial and administrative burden on the State.

India has already faced a surge of refugees and it has dealt the matter well to the large extent possible without any formal policy. The recently enacted Citizenship Amendment Act 2019 is a step towards making well framed asylum policy but it is still narrow. In this context a lot needs to be done to wider its ambit so that it can cover all asylum related cases comprehensively.

## 8. Citizenship Amendment Act, 2019

Recently, the Citizenship Amendment Act (CAA), 2019 was enacted by the Parliament that seeks to amend the Citizenship Act, 1955.

### Background

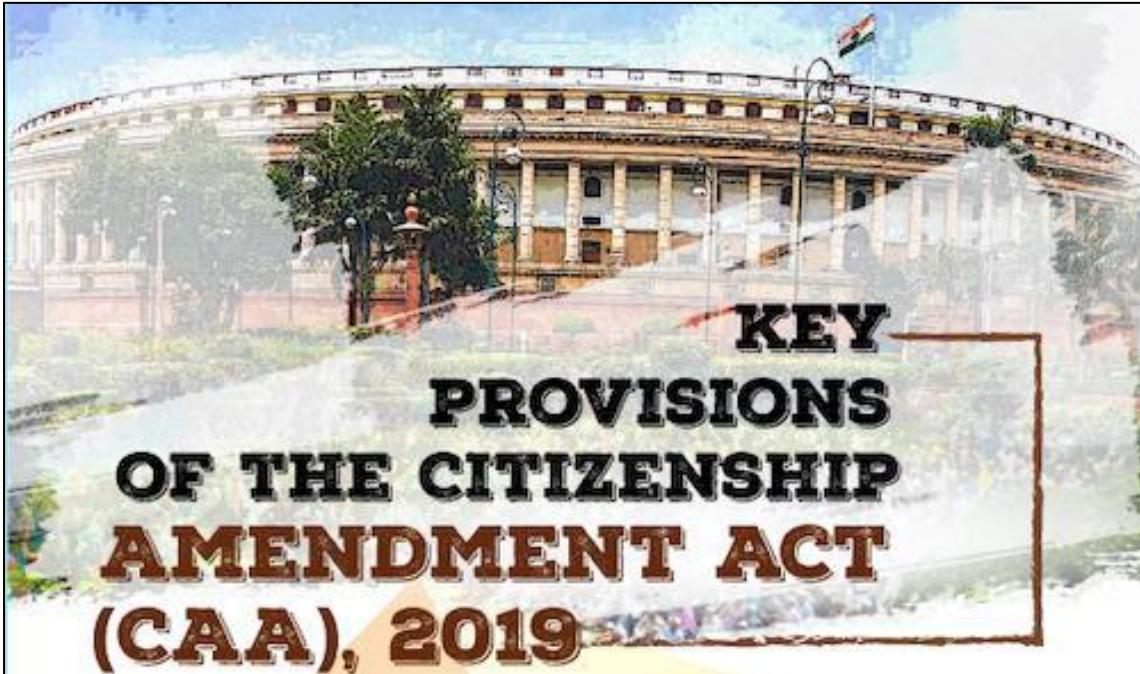
- **Citizenship (Amendment) Act, 2003** provided that 'illegal migrants' will not be eligible to apply for citizenship by either registration or naturalisation.
- **Section 2(1)(b)** of Citizenship Act, 1955 defines illegal migrant as a foreigner who:

- enters the country without valid travel documents, like a passport and visa or
- enters with valid documents but stays beyond the permitted time period.
- However, considering the plight of minorities in these countries, some concessions have been given in recent times, such as:
  - **Foreigners Act, 1946** (regulates the entry and departure of foreigners in India) and the Passport (Entry into India) Act, 1920 (mandates foreigners to carry passport) empower the central government to imprison or deport illegal migrants.
  - In 2015 and 2016, two notifications were issued by Central government exempting certain groups of illegal migrants from provisions of the 1946 and the 1920 Acts. These groups are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who arrived in India on or before December 31, 2014.
  - This implies that these groups of illegal migrants will not be deported or imprisoned for being in India without valid documents.

#### **Arguments in favour of the Amendment Act**

- **Religious persecution**- Nehru-Liaquat pact, also known as the Delhi Pact, signed in 1950, sought to provide certain safeguards and rights to religious minorities like unrecognition of forced conversions and returning of abducted women and looted property etc.
  - However, Afghanistan, Pakistan and Bangladesh have a state religion with discriminatory blasphemy laws, religious violence and forced conversions which has resulted in religious persecution of minority groups.
  - For instance, in 1951, the Non-Muslim minorities population 23.20% in Bangladesh which is around 9.6% in 2011.
- **Illegal immigration** from neighboring countries has been a contentious issue for decades.
  - E.g. During the 6- year long agitation that started in 1979 in Assam, the protestors demanded the identification and deportation of all illegal foreigners – predominantly Bangladeshi immigrants.
  - This act would differentiate between illegal immigrants and persecuted communities seeking refuge.

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- ◆ **Illegal migrants who fulfil four conditions will not be treated as illegal migrants-**
  - they are Hindus, Sikhs, Buddhists, Jains, Parsis or Christians
  - they are from Afghanistan, Bangladesh or Pakistan
  - they entered India on or before December 31, 2014
  - they are **not in certain tribal areas of Assam, Meghalaya, Mizoram, or Tripura** included in the Sixth Schedule to the Constitution, or areas under the "Inner Line" permit, i.e., Arunachal Pradesh, Mizoram, and Nagaland.
  - ◆ These tribal areas include Karbi Anglong (in Assam), Garo Hills (in Meghalaya), Chakma District (in Mizoram), and Tripura Tribal Areas District.
- ◆ All legal proceedings against above category of migrants in respect of their illegal migration or citizenship will be closed.
- ◆ The period of naturalization to obtain citizenship has been reduced from 11 years to 5 years for above category of migrants.
- ◆ The Central government may cancel registration of OCIs, if the OCI has violated Citizenship Act or any other law so notified by the central government. Also, the cardholder has to be given an opportunity to be heard. The Act provides that the central government may cancel registration of OCIs on five grounds including
  - registration through fraud,
  - showing disaffection to the Constitution,
  - engaging with the enemy during war,
  - necessity in the interest of sovereignty of India, security of state or public interest,
  - if within five years of registration the OCI has been sentenced to imprisonment for two years or more.

#### Arguments against the Amendment Act

- **Classification of countries:** It is not clear why migrants from these countries are differentiated from migrants from other neighboring countries such as Sri Lanka (Buddhism is the state religion) and Myanmar (primacy to Buddhism).
  - Sri Lanka has had a history of persecution of a linguistic minority in the country, the Tamil Eelams.
  - Myanmar has had a history of persecution of a religious minority, the Rohingya Muslims.

- **Classification of minority communities:** The amendment simply mentions the 6 ‘minority communities’ and there is no mention of ‘persecuted minorities’ or ‘religious persecution.’ So, ideally it should not differentiate between religious persecution and political persecution. Moreover, exclusion of Muslims, Jews and Atheists from CAA is said to be violation of Article 14 of the constitution. For example:
  - **Persecution of co-religionists** like Shias, Hazaras or Ahmadiyya Muslims in Pakistan (who are considered non-Muslims in that country).
  - The murder of atheists in Bangladesh has also been noticed.
- **Classification based on date of entry:** CAA also offers differential treatment to migrants based on their date of entry into India, i.e., whether they entered India before or after December 31, 2014.
- **Against the letter and spirit of Assam Accord:** The Assam accord put the date of detection and deportation of foreigners as March 25 1971, whereas, for other states, it was 1951.
  - CAA **extends the cut-off date for NRC** from 25th March 1971 to 31st Dec 2014. CAA extends the cut-off date for NRC from 25th March 1971 to 31st Dec 2014.
- **Cancellation of OCI registration:** giving the central government the power to prescribe the list of laws whose violation result in cancellation of OCI registration, may amount to an excessive delegation of powers by the legislature.
- **Implication on external relations:** The amendment implies that religious persecution of the Hindu minority in Bangladesh as one of the reasons for the amendment and also implies that Muslim migrants from Bangladesh will be “thrown out”.
  - This invites trouble from Bangladesh with bearing on bilateral issues. India’s strong commitment to civic nationalism and religious pluralism, have been important pillars on which India’s strategic partnerships with the US and the West have been built, which may be imperiled.

### Way Forward

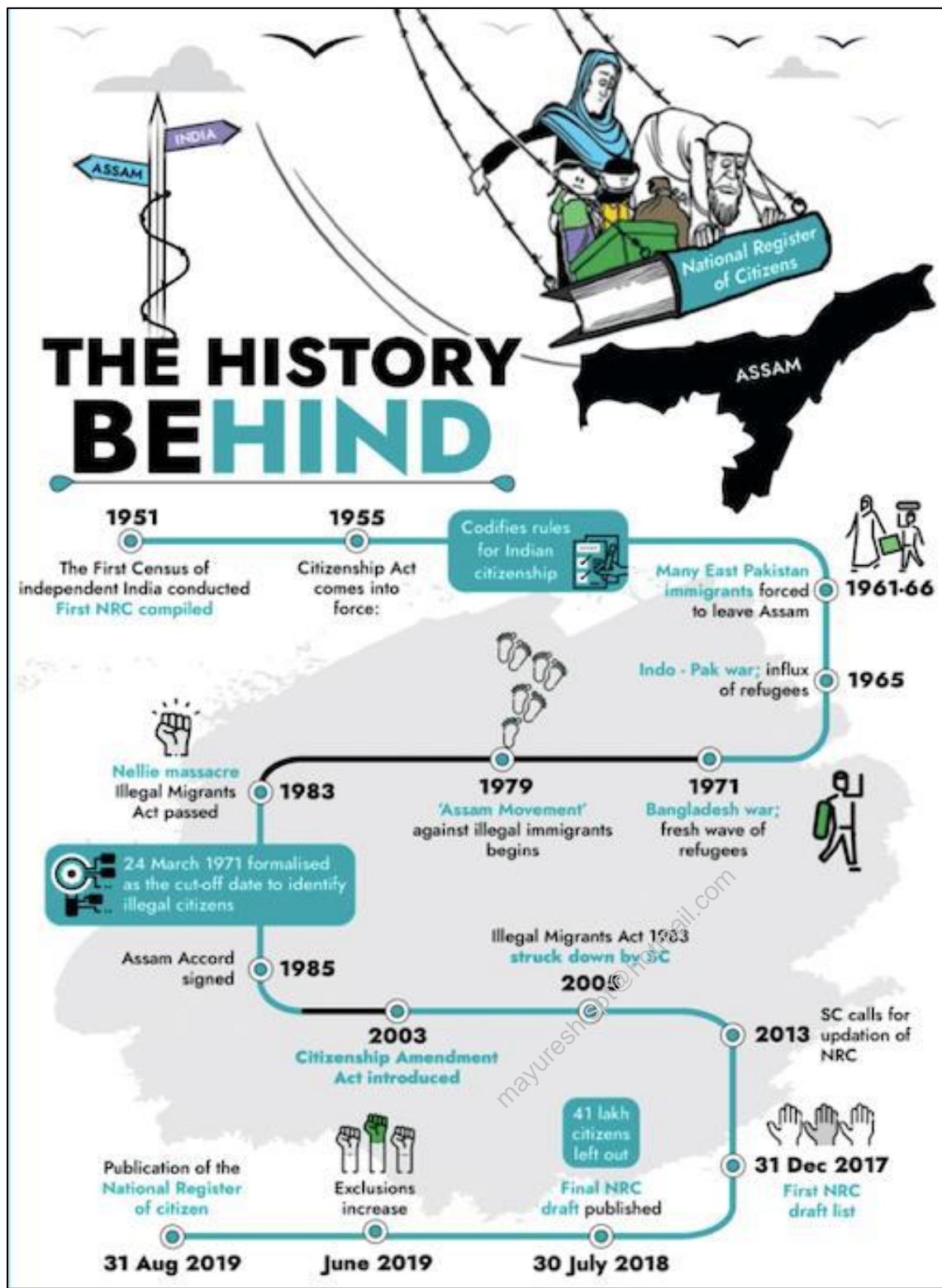
Indian democracy is based on the concept of welfare and secular state and a progressive constitution where Article 21 provides the Right of a dignified life. So, it becomes a moral obligation of the state to allay the fears of minority communities, if any. Hence, the classification done in CAA on the basis of country of origin and religious minorities can be made more inclusive.

## 9. National Register of Citizens

- It is a list of Indian citizens to **decide bona fide Indian citizens** and those who fail to enlist in the register will be deemed illegal migrants.
- **National Register of Citizens, 1951** was prepared after the conduct of the Census of 1951 in respect of each village, showing the houses or holdings in a serial order and indicating against each house or holding the number and names of persons staying therein. These registers covered each and every person enumerated during the Census of 1951.
- **NRC Vs Census:** The census is conducted every decade, on a national level and gives the state a window into the size and nature of Indian population. But the NRC is a unique exercise for the **onus to prove citizenship lies with the citizens**. They have to, through a documentary evidence, show how they have come to be citizens of India.

### 9.1. NRC Updation in Assam

Recently, the NRC for the first time was updated only in Assam.



### Background

The NRC has its roots in the **Memorandum of Settlement, or the Assam Accord** signed between the Assam State Students Union and the Government of India in 1985. The accord was an outcome of the violent anti-migrant movement of the 1980s and contained various clauses to curb illegal migration.

- It contained a provision that all 'foreigners' who came to Assam after March 25, 1971 **should be detected and deported** under the Illegal Migration Determination (by Tribunals) (IMDT) Act, 1983.

- It also talked about the deletion of foreigners' names from the electoral rolls.

Student Notes:2021

The **Citizenship Act of 1955 was amended after the Assam Accord** for all Indian-origin people who came from Bangladesh before January 1, 1966 to be deemed as citizens. Those who came between **January 1, 1966 and March 25, 1971** were eligible for citizenship after registering and living in the State for 10 years while those entering after March 25, 1971, were to be deported. However, nothing much happened over the decades.

In 2014, the **Supreme Court asked the state government to update the 1951 NRC** in a time-bound manner. The exercise was conducted under the supervision of the Supreme Court.

**NRC updation** is the process of enlisting the names of those persons (or their descendants) whose names appear in either of the following-

- any of the Assam's Electoral Rolls within up to 24th March 1971, or
- 1951 NRC, or
- any of the admissible documents stipulated such as land or tenancy record, citizenship certificate or permanent residential certificate etc.

In August, 2019, the updated and final National Register of Citizens, which validates bonafide Indian citizens of Assam has was released with over **19 lakh applicants** having failed to make it to the list.

#### **Significance of having an NRC**

- **A long-term solution:** Established measures to curb illegal migration from Bangladesh, such as diplomatic and border management efforts failed to bring any results. The two main reasons for this are:
  - Bangladesh does not recognise any infiltration taking place from its territory to India;
  - The porous border between India and Bangladesh hinders effective border management. Thus, an NRC is being viewed as an alternate and a far-sighted administrative solution to the menace.
- **A deterring tool:** It is expected to deter future migrants from Bangladesh from entering Assam illegally as publication of the draft itself had created a perception that staying in Assam without valid documentation will attract detention/jail term and deportation.

#### **Provisions for people having missed out the NRC list**

- The Assam government assured people that those who find their names missing from the final NRC **will not immediately be termed "foreigners"** or illegal immigrants.
- Such people will be allowed to register protests with the **Foreigners Tribunal**. They can even approach the High Court or even the Supreme Court for further appeal in the matter.
- The State government will also provide **legal aid to the poor** who find their names missing.

Supreme Court held that a **Foreigners' Tribunal's order** declaring a person as an illegal foreigner would be binding and would prevail over the government decision to exclude or include the name from the National Register of Citizens (NRC) in Assam. Foreigners' Tribunals (FTs) are **quasi-judicial bodies** meant to determine whether a person is or is not a foreigner under Foreigner's Act, 1946.

- FTs were first setup in 1964 and are unique to Assam. In rest of the country, a foreigner apprehended by the police for staying illegally is prosecuted in a local court and later deported/put in detention centres.
- Each FT is headed by a member who can be a retired judicial officer, bureaucrat or lawyer with minimum seven years of legal practice.

# LEGAL OPTIONS AVAILABLE, ONCE A PERSON IS EXCLUDED FROM NRC IN ASSAM



**Aug 31**

Final List of Assam's residents



Section 8 of the **Schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003** empowers you to appeal against the exclusion

## Where to appeal

The Foreigners' Tribunals (FTs)

Deadline 120 days (By 31 Dec 2019)

Cases to be disposed of within

**6 months**



Challenge FTs decision



In High Court



In Supreme Court



**SC decision to be final**

## HELP AT HAND



Assam govt has announced legal aid to 'bonafide' citizens through District Legal Services Authorities (DLSA)



Political parties and NGOs have also volunteered to help



"Non-inclusion of person's name in the final list of National Register of Citizens (NRC) does not by itself amount to him or her being declared a foreigner"

**Union Home Ministry**

## Challenges

- Government has brought **Citizenship (Amendment) Act, 2019** which seeks to grant citizenship to Hindu Bangladeshis, who have entered Assam illegally post-1971. But once NRC exercise will be completed, a lot of Hindu Bangladeshi might not appear in the list, thus, **will be designated as illegal migrants**. Thus, it will lead to confusion and moreover harden the resolve of people not to assimilate Hindu Bangladeshi in Assam according to NRC.
- It could lead to **exclusion and inclusion errors** and large number of legitimate Indian citizens could end up being denied their rights.
- Assam has experienced **communal tension** in recent times. Exclusion of some people might raise apprehensions of exclusion of a particular community creating new fault lines leading to social unrest.
- Illegal migrants out of NRC will be sent back to Bangladesh, however, India does not have any **deportation treaty with Bangladesh**.
- There are apprehensions, that India will end up **creating the newest cohort of stateless people**, raising the spectre of a homegrown crisis that will echo that of the Rohingya people who fled Myanmar for Bangladesh.

- **Regarding finally excluded individuals:** They would officially be non-citizens but India has no fixed policy for “stateless” persons. They will surely not have voting rights but certain facilities on “humanitarian grounds” may be provided to them such as right to work etc.
- **Tackle issue of illegal migration comprehensively:** Solving illegal migrants’ issue in Assam will not solve the whole issue as they may very well come through states like West Bengal and then move on to the other parts of the country. Thus, following steps should be taken:
  - **Comprehensive border management:** including fencing, total surveillance 24x7, use of new imaging technology etc.
  - **Forging bilateral agreement** with neighbouring countries that provide for taking back nationals who stay illegally in the other country after due verification.
  - **Assistance from international organisations:** such as United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and other concerned international agencies with experience in this kind of complex issue.
  - **Establish a SAARC convention:** India should take the initiative to encourage other countries in the SAARC region to develop a SAARC convention or declaration on refugees in which member states would agree to ratify the 1951 Refugee Convention.

## 9.2. Nationwide NRC

The Government of India in 2019 also signaled its intent of carrying out a nationwide NRC.

### Link between CAA and NRC/NRIC

According to Section 14A of the Citizenship Act, 1955 (inserted by Citizenship (Amendment) Act, 2003):

- The Central Government **may compulsorily register every citizen of India** and issue national identity card to him.
- The Central Government may maintain a **National Register of Indian Citizens (NRIC)** and for that purpose establish a **National Registration Authority**.
  - **Registrar General, India**, appointed under Registration of Births and Deaths Act, 1969 shall act as the National Registration Authority and he shall function as the Registrar General of Citizen Registration.
- To implement CAA, citizens and illegal migrants have to be identified. So, a National Register of Indian Citizens (NRIC) is the necessary first step.

### Link between NRC and NPR

- The National Population Register (NPR) is a list of “usual residents of the country”. A “usual resident of the country” is one who has been residing in a local area for at least the last six months or intends to stay in a particular location for the next six months. So, NPR may have foreigners as well.
- However, after a list of residents is created, if a nationwide NRC is needed, it could be done by verifying the citizens from that list. So, a NRC, if undertaken, would flow out of NPR.

# RATIONALE BEHIND THE NATIONWIDE

# NRC

**Ascertaining the identity of citizens:** NRC will provide a much-needed perspective on the extent of illegal migration. The fear that illegal immigrants will change the demography of the country and influence the politics of different states will also be done away with.



**Demand from some stakeholders-** such as the NGOs like the Assam Public Works (APW), which had petitioned the Supreme Court for upgrading the previous NRC.

**Statutory obligation of the state-** as the **Section 14A** in the Citizenship Act of 1955 provides in sub-section (1) that "The Central Government **may compulsorily register** every citizen of India and issue national identity card to him".

The procedure to prepare and maintain **National Register of Indian Citizens (NRIC)** is specified in the **Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003**.

**Move towards solving the immigration issue-** as it is expected to deter future migrants from entering the country.

It can also aid the agencies in effective border management, especially with Nepal and Bangladesh.



## Issues with nationwide National Register of Citizens

- **Existence of deportation provisions-** as immigrants are subject to laws like the Foreigners Act, 1946 and Passport (Entry into India) Act, 1920 and tribunals are already empowered to detect, detain and deport them.
- **Legal infirmities-** The last time the Central government tried to make an identity enrolment mandatory was the Aadhaar project and this was struck down as excessive (except in limited and justifiable cases). The NRIC scheme, as proposed, would thus be directly in violation of the K.S. Puttaswamy judgment on **right to privacy**.
- **Not learning from Assam's experience-** considering the complications that have cropped up in the previous NRC such as-
  - **No clarity over previous results-** on what the end results mean for the 19 lakh plus people who find them outside the NRC, potentially stateless and at risk of "deportation" to Bangladesh, which refuses to acknowledge the same.
  - **Wastage of public resources-** as many critics are questioning the expenditure of the taxpayers' money which were spent on the previous NRC.
  - **Lack of capacity-** Assam's first detention centre is being constructed, but it will only house 3,000 people against the need for 19 lakh people excluded from the final NRC. Further, media reports have been stating that these detention camps are infamous for their inhumane living conditions.

- **Protests-** Many sections of Assam, like Bodoland students, have been protesting against the repetition of NRC in Assam.
- **Concerns of minorities:** There are fears that such an exercise could end up targeting minorities in the country.
  - **The Citizenship (Amendment) Act, 2019** which makes Hindu illegal migrants and those from certain other minority communities in Afghanistan, Bangladesh and Pakistan eligible for Indian citizenship further creates apprehensions about alienation of minorities in the process.
- **Implementation anomalies-** as the NRC will take a gigantic toll on people's **time, money and productivity**, especially of the **poor and illiterate** sections.
  - Under the Foreigners Act of 1946, the burden of proving whether an individual is a citizen or not, lies upon the individual applicant and not on the state. Also, the details of how such an exercise will be carried out are **not yet known**.
  - Further, there is **poor documentary culture** in India and here around 125 crore Indians will have to produce documentary proof of their ancestors up to a certain date to create a legacy tree.
- **No specific policy in ascertaining the fate of people:** The government has not prepared a post NRC implementation plan, as the possibility of deportation of illegal migrants to Bangladesh is bleak as the people excluded from the list should be proven citizens of Bangladesh, and that will require cooperation from that country.
- **Allegations of human rights violations-** as at a US Congress hearing on human rights in South Asia, not just Kashmir issue was raised but Assam's NRC also came up.

### Way Forward

- **Set a common Cut-off date to maximum two generations** - which will ease up the process for citizens to show documentary proofs.
  - The problem in Assam was the cut-off year of 1971, which made it near impossible for many to get documents that went so far back in the past.
  - The NRC should attempt to prevent further arrivals of illegal migrants. Past arrivals cannot easily be wished away without causing needless human misery and also disrupting micro-economies in the states where the illegals reside and work.
- **Synchronize NRC with Census 2021**- as much as possible, as the Census 2021 will kick off from September 2020, there is enough time to tell people to get their documents ready and hand them over for verification to census workers, who can then remit them to the designated tribunals or benches that look into the validity of the documents.
- **Bring a fair process-** There were allegations that some sections had submitted false documents during Assam's NRC exercise. A nationwide NRC is expected to learn from this.
- **Tackle issue of illegal migration comprehensively-** by focussing on comprehensive border management, assistance from international organisations such as United Nations High Commissioner for Refugees (UNHCR) among others.
  - Government of India can work with other governments to get authenticated copies of their own voter and citizenship records. This can be done under a large SAARC convention too.
- **Maximize use of technology-** such as utilization of digital lockers. Citizens should be told to get all their documents authenticated in digital lockers, so all they would need to do is provide access to this documentation when the NRC happens.
  - By appropriately using artificial intelligence and data analytics, governments can match residents suspected of being immigrants fairly easily using multiple databases.

## 10. National Population Register (NPR) vs Aadhaar

Student Notes:2021

The National Population Register (NPR) was a project that aimed to create a **comprehensive identity database of every usual resident** in the country. The database was to contain demographic as well as biometric particulars. It was being prepared at the local (Village/sub-Town), sub-District, District, State and National level.

It was launched during **2009-2010**. The idea was to freeze the population register after giving people three chances to enroll. Anyone who came to get enrolled later would have to explain the delay. It was hoped that this would make it difficult for fresh immigrants to get into the register.

There was a simultaneous launch of **AADHAAR Project in 2009** under which **UIDAI** was established by the government with a mandate to issue a unique 12-digit number to all residents of India and maintain the **UID number database**. The programme is aimed at ensuring inclusive growth by providing a form of identity to those who do not have any. The idea is to harness technological solutions and cooperative participation with the private sector to lead to a larger social good of providing sharper and focused assistance to those yet to get on the bandwagon of growth.

### Background

A group of ministers created after the Kargil war recommended **compulsory registration of all residents in India**, to facilitate the preparation of a national register of citizens and curb illegal migration. It had said that all Indian citizens should be given a **multi-purpose national identity card (MPNIC)** and non-citizens should be issued identity cards of a different colour and design.

In 2010 Registrar General of India collected data for a National Population Registry during Census 2011 enumeration. In 2015, this data was further updated by conducting a door-to-door survey. However, the government picked out **Aadhaar** as the key vehicle for transfer of government benefits in 2016, while putting NPR on hold due to slow progress of NPR.

Through recent notification in August 2019 by the Registrar General of India, the idea has now been revived and exercise of updating the 2015 NPR with additional data has begun and was to be completed in 2020.

# WHAT IS NATIONAL POPULATION REGISTER?

- The NPR is a list of "usual residents of the country".
  - ⇒ According to the Ministry of Home Affairs, a "usual resident of the country" is one who has been residing in a local area for **at least the last six months**, or intends to stay in a particular location for the next six months.
- The NPR is being prepared under provisions of the **Citizenship Act 1955** and the **Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003**.
  - ⇒ The Citizenship Act 1955 was amended in 2004 by inserting Section 14A which provides for the following-
    - ✓ The Central Government **may compulsorily register every citizen of India** and issue National Identity Card.
    - ✓ The Central Government may maintain a **National Register of Indian Citizens (NRIC)** and for that purpose establish a National Registration Authority.
    - ✓ Out of the universal data set of residents, the subset of citizens would be derived after due verification of the citizenship status. Therefore, it is also **compulsory for all usual residents to register under the NPR**.
- NPR will be conducted at the local, **sub-district, district, state and national levels**.
- It will be conducted in **conjunction** with the first phase of the **Census 2021**, by the Office of the Registrar General of India (RGI) under the Home Ministry.
  - ⇒ Only Assam will not be included, given the recently completed NRC.
- There is also a proposal to issue Resident Identity Cards to all usual residents in the NPR of 18 years of age.

## Benefit of NPR

- **Database of residents:** It will help to create a comprehensive identity database of its residents with relevant demographic details and also streamline data of residents across various platforms.
- **Better implementation:** It will help the government formulate its policies better and also aid national security.
  - Not only will it help target government beneficiaries in a better way, but also further **cut down paperwork and red tape** in a similar manner that Aadhaar has done.
  - Ministry of Home Affairs has argued that the NPR would be more suited for distributing subsidies than the UID, as the NPR has data linking each individual to a household.
- **Remove any errors:** For e.g. It is common to find different date of birth of a person on different government documents. NPR will help eliminate that.
- **Avoid duplication:** With NPR data, residents will not have to furnish various proofs of age, address and other details in official work. It would also eliminate duplication in voter lists, government insists.

There are **genuine divergences** in the objectives of NPR and UIDAI.

Their worldviews are from different eras. While one is rooted in a mindset of exclusion and security, the other is inclusive and participative.

NPR has always been an exercise in achieving and establishing greater control over people.

Aadhaar is an exercise in de-bureaucratization to empower every single Indian to delink himself from the rent-seeking bureaucracy that was siphoning off his benefits in collusion with contractors and politicians.

The progress of the two overlapping identity databases was stymied by a tug of war between the home ministry and the UIDAI, after both tried to independently procure biometric data. Led by founder chairman Nandan Nilekani, UIDAI hit the ground running – leaving the bureaucracy-driven NPR far behind. NPR was also slow because it enrolled people in accordance with households, not just individuals.

# NPR vs Aadhar

The data collected in NPR will be sent to UIDAI for de-duplication and issue of Aadhaar Number.

- **Voluntary vs. Mandatory:** It is compulsory for all Indian residents to register with the NPR, while registration with the UIDAI is considered voluntary.
- **Number vs. Register:** UID will issue a number, while the NPR is the prelude to the National Citizens Register. Thus, it is only a Register.
- **Authentication vs. Identification:** The UID number will serve as an authenticator during transactions. It can be adopted and made mandatory by any platform. The National Resident Card will signify resident status and citizenship. It is unclear what circumstances the card will be required for use in.
- **UIDAI vs. RGI:** The UIDAI is responsible for enrolling individuals in the UID scheme, and the RGI is responsible for enrolling individuals in the NPR scheme.
- **Door to door canvassing vs. Center enrollment:** Individuals will have to go to an enrollment center and register for the UID, while the NPR will carry out part of the enrollment of individuals through door to door canvassing.
- **Prior documentation vs. Census material:** The UID will be based off of prior forms of documentation and identification, while the NPR will be based off of census information.

### How is it different from Census and NRC?

- The exercise is **different from the decennial Census** and is **not linked to the National Register of Citizens (NRC)**.
- **Census** doesn't ask for individual identity details, and at the end of the day, is a macro exercise. The NPR, on the other hand, is designed to collect identity details of every individual.
  - Census data is protected by a **confidentiality clause**. The government has committed that it will not reveal information received from an individual for the headcount. NPR would serve as the mother database to verify citizenship if a nationwide NRC is carried out later.
- Unlike the NRC, the NPR is not a citizenship enumeration drive, as it would record even a foreigner staying in a locality for more than six months.

### Issues regarding NPR

- **Privacy issue:** Even as issues of privacy associated with Aadhaar continue to be debated in the country, the NPR is on a drive to collect detailed data on residents of India. There is as yet no clarity on the mechanism for protection of this vast amount of data.
  - In the past, reports have stated that Aadhaar data has been compromised on multiple occasions even as the UIDAI continues to deny that there have been breaches.
- **Legality of sharing data:** Both the legality of the UID and NPR collecting data and biometrics has been questioned. For example, it has been pointed out that the collection of biometric information through the NPR, is beyond the scope of subordinate legislation.
- **National security:** It can raise national security threats, given the size of the databases that will be created, the centralized nature of the databases, the sensitive nature of the information held in the databases, and the involvement of international agencies.
- **Issues similar to NRC:** NPR will be the base for a nationwide National Register of Citizens and will be similar to the list of citizens of Assam. During the NRC exercise, there were

- several instances where some members of a family featured in the draft list while the others did not.
- **Duplication of projects:** It is unclear why the government would feel the need to subject India's citizenry to another identification drive when over 90 per cent of them are covered by Aadhaar, which was an elaborate, time-consuming exercise.
    - With these multiple projects like Aadhar, NRC, NPR, census etc it has created confusion regarding the idea of citizenship in the country.
  - **Uncounted people:** The census does not cover the entire population, which leaves unanswered the questions of the status of those citizens who are not visited by a census officer.
    - It also leaves ambiguity over migrant labour, who may well be citizens but would not qualify as "usual residents".

The Centre has made it clear that the home ministry-run population register should not expect the Unique Identification Authority of India (UIDAI) to give it the biometric data of millions of people, collected for the purpose of obtaining the 12-digit Aadhaar number. As of now, NPR's funding has been stopped by the government and is as good as dead.

#### Way Forward

There needs to clarity over the privacy concerns surrounding the amount of data being collected in NPR and it also needs to learn lesson from such similar exercise in Assam i.e. NRC. Then only it will be able to serve as the mother database to verify citizenship if a nationwide NRC is carried out later

## 11. The Idea of Citizenship – An Analysis

A paradigm shift has taken place in the understanding of citizenship in India. For about 40 years, citizenship in India had a **philosophical and ideological basis**. Everyone born in the territory of India after Independence had the right to become a citizen. The **basis for granting this right was associational**: the founders of the Constitution wanted to adopt a concept of citizenship that was large enough to accommodate everyone (without any distinction) who was born on Indian territory. Indeed, citizenship in many republican countries is guaranteed to persons merely on the grounds of having been born within their territories after independence.

Apart from this, those who claimed Indian citizenship could do so by virtue of either of their parents having been born in the territory of India or their having been ordinarily a resident in the territory of India for not less than five years immediately preceding the adoption of the Constitution in 1950.

However, India began gradually to shift its commitment to this ideal meaning of citizenship. While the Citizenship Act of 1955 laid down that every person born in India on or after January 26, 1950, was to be a citizen of India by birth, the Citizenship (Amendment) Act, 1986, provided that every person born in India would be a citizen of India only if either of his/her parents was a citizen of India at the time of his/her birth, prioritising, thereby, Indian parentage.

The recent amendments have further broadened the scope of citizenship as well as drawn some sharp criticisms regarding the same philosophical and ideological basis which served as the benchmark of citizenship at the time of independence.

## 12. UPSC Previous Years Prelim Questions

### 2005

1. Consider the following statements:
  1. Article 371 A to 371 I were inserted in the Constitution of India to meet regional demands of Nagaland, Assam, Manipur, Andhra Pradesh, Sikkim, Mizoram, Arunachal Pradesh and Goa.

Student Notes:2021

**Ans (d)**

## **13. UPSC Previous Years Mains Questions**

- 1.** Two parallel run schemes of the Government viz. the Adhaar Card and NPR, one as voluntary and the other as compulsory, have led to debates at national levels and also litigations. On merits, discuss whether or not both schemes need run concurrently. Analyse the potential of the schemes to achieve developmental benefits and equitable growth. (2014)

## 14. Vision IAS GS Mains Test Series Questions

- 1. Critically examine the provisions of the recently introduced Citizenship Amendment Bill 2016. Are some provisions of the bill against India's secular principles?**

### ***Approach:***

- Enumerate the latest amendments briefly.
  - Highlight the merits and demerit of the amendments.
  - In light of the changes introduced, discuss whether those are good or bad for India's secular fabric.

*Answer:*

- India has always provided refuge to displaced communities, such as that during the Bangladesh war in 1971. Refugees and problem of immigrants is becoming a global pressing concern, be it the Rohingya Muslims in south east Asia or people escaping war torn Syria and the Middle eastern countries.
  - The Citizenship Amendment Bill, 2016 proposes to make minority communities such as Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan eligible for applying for Indian citizenship. Under the provision for citizenship by naturalization, the bill relaxes the minimum stay requirement from 11 years to 6 years.
  - **Merits:**
    - The new amendments especially with respect to the changes made toward naturalization will benefit communities such as Chakmas and Hajongs of Bangladesh
    - The provisions favour the implementation of the 1985 Assam Accord, which stipulates 1971 as the cutoff date for detection and deportation of foreigners.
    - It will also ensure India gives more impetus to its policy on refugees which recognizes and protects the rights of refugees;
  - **Demerits:**
    - However, citizenship provisions should not be granted on the basis of religion as it inhibits the secular principles with which our Constitution was established.
    - It must be noted that the provisions must be extended to Ahmadis in Pakistan and Rohingyas from Myanmar, the Malaiha Tamils etc and other persecuted minorities so as to make the provisions more holistic and in concurrence with provisions under Article 14 and 21

- Also, Assam may face the additional burden of Bengali Hindus while it is already overpopulated and affected by illegal migration from Bangladesh.
- To conclude, the provisions if implemented well will boost India's reputation of extending a helping hand toward international peace and security by adhering to Article 51 of the DPSP and providing refuge to migrants from neighboring countries. However, a proper policy should be in place so as to avoid security, law and order issues as has been seen in the light of unwarranted cases of EU migrants and refugees especially in context of Paris attacks last year.

**2. "The recent plight of Hindu and Sikh refugees from Pakistan and the Rohingya Muslims from Myanmar again highlight the need to enact a specific refugee law in India." What are the provisions in Indian law, which currently deal with refugees? Also discuss.**

**Answer:**

- It is a common failure to obscure the distinction between refugees — those forced to flee their countries and unable to return for fear of persecution — and migrants, who leave in the hope of a better life.
- Refugees are victims of challenging social circumstances such as civil war, violence and discrimination over which they have no control, and the importance of a uniform and humanitarian policy towards them cannot be overstated.
- Despite India being a signatory to a slew of international conventions on human rights, some of which implicitly endorse the principle of non-refoulement — does not have a specific statute dealing with refugees.
- As a result, refugees are covered by the omnibus Foreigners Act 1946, an archaic piece of legislation that governs the stay and exit of non-nationals as a homogenous category.
- A 2004 amendment introduced by the erstwhile National Democratic Alliance government prescribes stiff imprisonment for any foreigner who enters without valid papers or who overstays his or her visa.
- In the absence of enlightened, rational policy, ad hocism prevails. Some classes of refugees — for example, Tibetans and Sri Lankan Tamils — have historically fared better than others. Security considerations, heightened by the presence of extremist groups in some neighbouring countries, are often cited to argue against the desirability of a refugee law. But this is something of a red herring.
- All laws relating to refugees involve a thorough scrutiny of the evidence provided by the asylum seeker, with additional corroborative safeguards, as a part of the determination process. But since there is no refugee law in India, there is no process and no clear standards for the lakhs of de facto refugees whose presence the Indian state tolerates but whose status it will not formalise.
- Given its pre-eminence in South Asia, and the fact that it shelters a large refugee population, India should show the way by acceding to the 1951 Refugee Convention and enacting a refugee law that is humanitarian, equitable and consistent with its international obligations.

**3. Citizenship is the right to have rights.**

**Approach:**

- Discuss the concept of citizenship.
- Discuss the common characteristics of citizenship and how it is related to rights.
- Briefly discuss ongoing debate on the idea of citizenship and its evolution.
- Conclude appropriately.

The most basic, prevalent meaning of Citizenship is a certain sort of membership in a political community. While the nature and scope of political communities have ranged from city-state to empire, citizenship has always been associated with political relations. In the current era, sovereign states decide who would be their citizens based on certain parameters such as birth, naturalization, residence etc.

Most **common characteristics of citizenship** include equal legal status, political voice and participation, the freedom to enter and exit one's home country and notions of identity, belonging and a sense of home for every citizen. States' domestic laws decide on the associated rights and obligations of their citizens. For example, right to equality in public employment (Article 16) and right to freedom of expression (Article 19) in India are enjoyed only by the citizens of India. Similarly, Article 51A lists the duties of a citizen towards the state. In this context, it has been said that **citizenship** brings an inherent **right to have rights**. Rights and obligations exist to ensure effective functioning of the state and welfare of its citizens.

On the other hand, a **denial of citizenship** deprives a person's right to demand other rights necessary for meaningful life. For e.g. refugees in a country as observed in case of Rohingyas. Since they have become stateless, there is no state protection for their other rights. Loss of citizenship also rules out hopes of any future emancipation of these people.

But, there are certain rights which all persons are entitled to by virtue of being human i.e. human rights. These rights transcend a person's citizenship in a territory. For example, right to life under Article 21 extends even to non-citizens. Thus, there are natural rights which do not depend on affiliation of a state.

Also, globalization is changing the long standing idea that citizenship's necessary context is the sovereign territorial state. The state's right to determine who is accepted as a member is being questioned. Such debates contest that citizenship can be exercised in a multiplicity of 'sites' both below (regional levels) and above (cosmopolitan) the nation-state. Notwithstanding the evolving concept of citizenship, inability of stateless people to enjoy their rights is well established. Further, it is for the protection of rights of all people - whether stateless or migrants – that the citizenship debate continues.

#### **4. How is an asylum seeker different from a refugee? Discuss the need for a uniform asylum policy in India.**

##### **Approach:**

- Explain difference between asylum seeker and refugee with examples.
- Discuss why India should have uniform asylum policy and related challenges.

##### **Answer:**

According to United Nations Human Rights Council (UNHCR), a refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries.

When people flee their own country and seek sanctuary in another country, they apply for asylum – the right to be recognized as a refugee and receive legal protection and material assistance. An asylum seeker must demonstrate that his or her fear of

persecution in his or her home country is well-founded. Hence refugee is an asylum seeker whose application has been successful.

Although India has provided shelter to one of the largest refugee populations in South Asia, it lacks a uniform asylum policy. India has not signed the 1951 United Nations Refugee Convention on the Status of Refugees, or its 1967 Protocol. In contemporary time need of a uniform asylum policy is felt due to following reasons:

- Due to absence of a uniform policy the government has to consider requests on case to case basis which is lengthy and time consuming process.
- India seeks to have a seat in permanent seat in UNSC and membership of groups like NSG; For a global leader it is necessary to have a refugee policy in place which will enhance its good will.
- By having an asylum policy India will be in a better situation to deal with issues like Baluchistan as it would get support from those leaders who fight for Humanitarian cause. This will also help in dealing with Pakistan strategically.
- Although existing provisions might serve the need of asylum seeker but compiling them into a uniform law will project a positive picture of the country before international arena.
- Since India is one of the largest contributor of troops in UN Peace keeping mission, having a policy for asylum will complement these efforts.

However, same time adoption of a uniform asylum policy can create some challenges like:

- Borders in South Asia are extremely porous and any conflict can result in a mass movement of people leading to a strain on local infrastructure and resources and also upsetting the demographic balance
- It will be bound by law not to repatriate a single refugee against their will which is sometime necessary to deal with political crisis
- Giving shelter to every refugee may create new problems like human trafficking and drug trafficking and abuse. It will put additional financial and administrative burden on the State.

India has already faced a surge of refugees and it has dealt the matter well to the large extent possible without any formal policy. The present Citizenship Amendment bill is a step towards making well framed asylum policy but it is still narrow. In this context a lot needs to be done to widen its ambit so that it can cover all asylum related cases comprehensively.

- 5. Do you think nation states owe a responsibility towards asylum seekers? What are the considerations that should, in your opinion, go into the making of a refugee policy? Provide arguments with contemporary examples.**

**Approach:**

- Briefly define asylum seekers and provide suitable arguments supported by contemporary examples as to why nation states owe a responsibility towards them.
- Building on your above viewpoint, enlist the considerations for a refugee policy and conclude accordingly.

**Answer:**

Asylum seekers are those who escape their country out of fear and seek protection elsewhere. For example, people from Syria, Iraq and African nations are knocking at the European shores as their countries suffer from civil strife, war and lack of resources. Similarly, Bangladesh and India have been recently facing influx of Rohingyas from Myanmar.

Generally, the response of countries to asylum seekers has been xenophobic in nature. Arguments, such as, drain on economic resources, fear of loss of jobs, entry of extremist elements and so on, are given to oppose entry to refugees. For example, in Europe, Germany had a welcoming attitude towards refugees despite only a partial public support, whereas other countries such as Hungary and Italy opposed entry to refugees.

However, humanitarianism demands that humans should be accorded respectful treatment and meaningful assistance to fellow beings in the event of distress. Humanity is an end in itself and should not be treated as a means to achieve narrow gains. Additionally, every human being has equal right on resources of earth. Thus, principle of non-refoulement which forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution, has become a norm. Also, given the principle of international solidarity and burden sharing, nation states do owe a responsibility of protection and basic care towards vulnerable asylum seekers.

In this context, following considerations should be kept in mind for designing a refugee policy:

- It must be pragmatic while at the same time guided by principles of humanism and empathy.
- Case-to-case basis consideration for provision of asylum to individuals and families keeping in mind the threats towards national security.
- Distinction must be made between refugees who flee to save themselves from prosecution and those who migrate for better opportunities. Priority should be given to the former as they are the emergency cases.
- Proper resettlement and livelihood policies accompanied by short-term courses to learn local language and customs should be institutionalised by taking help from international agencies.
- Nations should voluntarily declare their capacity to help and come out with periodic regional reports on this subject supported by logical arguments and evidences.

Refugees are not just the responsibility of the nations they seek protection from but rather collective concern of all the nations. One should not see the repeat of a lifeless toddler Aylan Kurdi lying face down on the seashore.

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# FUNDAMENTAL RIGHTS

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## 1. Concept of Rights

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Rights are entitlements to perform or not to perform certain actions, OR to be or not to be in certain states; OR entitlements that others perform or not perform certain actions OR to be or not to be in certain states.

The modern understanding of what actions are permissible and which institutions are just, are dominated by the discourse on rights. Rights structure the form of governments, the content of laws, and the shape of morality. By accepting a set of rights, one approves a distribution of freedom and authority, and also endorses a certain view around what may, must, and must not be done.

Rights acquire meaning only in context of a society. Each society makes certain rules to regulate the conduct of its constituents. These rules inform its constituents about what is right and what is not. The things that are recognized by the society as rightful become the basis of rights. This is why the notion of rights changes over a period of time and varies from one society to another.

It is only when the socially recognized claims are written into a law, that they acquire real force. In absence of this, they merely remain what are called natural or moral rights. When laws recognize some claim, they become enforceable and their enforcement can then be demanded. When fellow citizens, institutions or the government do not respect these rights, it is referred to as the violation or infringement of our rights. In such circumstances, citizens can approach courts to protect their rights. Thus, rights can be defined as the **reasonable claims of persons recognized by society and sanctioned by law**.

## 2. Categories of Rights



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## CATEGORIES OF RIGHTS

Rights are commonly classified together on the basis of common attributes. For instance, they can be compartmentalized according to:

- **Who** is alleged to have the right: For example, Children's rights, animal rights, workers' rights, states' rights, the rights of peoples etc.
- **What actions or states or objects** the asserted right pertains to: Rights of free expression, to pass judgment; rights of privacy, to remain silent; property rights, bodily rights etc.
- **Why** the right-holder (allegedly) has the right: For instance, Moral rights are grounded in moral reasons, legal rights derive from the laws of the society, customary rights exist by local convention.
- **How the asserted right can be affected** by the right-holder's actions: The inalienable right to life, the forfeitable right to liberty, and the waivable right that a promise be kept.

Sometimes, these categories have sub-categories. For instance, natural rights are the sub-class of moral rights that humans have because of their nature. It is therefore important to highlight a few key rights available to right-holders.

## 2.1. Natural Rights

These are status-based rights that become available to the individuals by virtue of their birth as human beings. They are supposed to be given by nature or GOD to human beings and thereby, are intrinsic to human lives. They are not conferred by law but only enforced by law. For example, Right to Life and Liberty.

## 2.2. Human Rights

Human rights are those rights which are considered so fundamental to human dignity and well-being that every person should possess these rights. These are plural, universal and high-priority rights that aspire to protect all people everywhere from severe political, legal, and social abuses. Examples of human rights are the right to freedom of religion, the right to a fair trial when charged with a crime, the right not to be tortured, and the right to education.

It is a common assumption that natural rights theory underlines the contemporary human rights doctrine. Consequently, many scholars tend to conflate Human Rights with Natural Rights. Additionally, the formulation of 'rights of man' creates further confusion. However, there are subtle differences between the three.

Natural rights stress upon a grounding in only human nature and lay emphasis on the endowment of humans with rights by nature. The 'rights of man' suggests man as the source of rights and hence, views man not only as merely natural but also rational and moral.

In contrast, Human Rights like 'rights of man' suggest derivation of rights from the complex moral notion of humanity, but not as explicitly. The normative justification of human rights is rather more complex in the sense that these rights are thought to be grounded in multiple aspects like prudential reasons, practical reasons, morality, human well-being, fundamental interests, human needs, agency and autonomy, dignity, fairness, equality and positive freedom.

## 2.3. Legal rights

Legal rights are rights that exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them. To put simply, legal rights are those rights, which are conferred by the statutes enacted by the legislature.

## 2.4. Constitutional Rights

These are the rights enshrined in the constitution. Some are given special status like Fundamental Rights, while others enjoy ordinary status only. For instance, at present, right to property is merely a constitutional right under the Indian Constitution.

## 2.5. Civil and Political Rights

These rights are the cornerstones of modern liberal constitutions across the world. Those rights concerned with the structures of government and the institutions of public power are labelled political rights. While the ones inherently connected to the concept of real citizenship and participation in the political process are called as civil rights.

Civil rights are the basic legal rights a person must possess in order to ensure equal citizenship for all citizenry. They are the rights that constitute free and equal citizenship and include personal, political, and economic rights. These are those rights, which are available to the citizens of a country and are conferred to them either by law of the land or the constitution itself. For example, Right to Freedom.

Until the middle of the 20<sup>th</sup> century, civil rights were usually distinguished from 'political rights'. The former included the rights to own property, make and enforce contracts, receive due process of law, and worship one's religion; freedom of speech and the press. But they did not include the right to vote or to hold public office. These were thought to be political rights, reserved to adult males.

The civil-political distinction was used to classify citizens into different categories. However, the ideology that a certain segment of the adult citizenry could legitimately possess one bundle of rights, while another segment would have to make do with an inferior bundle, became increasingly implausible. In the end, the civil-political distinction has not withstood the test of time.

## 2.6. Negative and Positive Rights

The conceptual understanding of positive and negative rights revolves around their application. The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to provision of some good or service. A right against assault is a classic example of a negative right, while a right to welfare assistance is a positive right.

Negative rights protect us from against something and are hence, easier to enforce, because it simply requires striking down the action that violated them. In contrast, positive rights are difficult to implement since it may be difficult or even impossible to fulfill everyone's positive rights if the sum of people's claims outstrips the resources available.

## 3. Understanding Fundamental Rights

Some rights, which are **fundamental to our life**, are given a **special status**. They are not only listed in a constitution, but also specially protected. Such rights are called **Fundamental Rights**. They are called "fundamental" because they are essential for the all-round development of an individual and also because they are guaranteed by the fundamental law of the land i.e. the constitution itself.

In the Constitution of India, Fundamental Rights are enshrined in Part III, from Articles 12 to 35. These not only guarantee political freedom in the country, but are also a check against arbitrary actions of the state. Further, they help in establishing the Rule of Law instead of Rule of Men, which means that the state cannot act in an arbitrary manner.

In fact, Fundamental Rights serve as the foundation of the Rule of Law by acting as a check on the arbitrary action of the state. Further, an independent judiciary, with the power of judicial review, acts as a protector of the Fundamental Rights as well as a guardian and guarantor of the Rule of Law.

## 4. Evolution of Fundamental Rights

The inspiration for incorporating fundamental rights into the Constitution was the result of a long struggle for freedom and learning from the experiences of world's leading democracies particularly from the Constitution of USA i.e. the Bill of Rights.

In 1928, a series of All Party Conferences headed by Motilal Nehru drafted a constitutional scheme, called the Nehru Report. It called for establishing India into a Parliamentary democracy and giving protection to minorities.

The famous resolution of 1931 Karachi Session further committed itself to issues of individual rights and liberties. This included fundamental civil rights, socio-economic rights like ensuring minimum wages and abolition of untouchability and serfdom.

However, the Simon Commission and the Joint Parliamentary Committee, which were responsible for the Government of India Act, 1935, had rejected the idea of enacting declarations of fundamental rights on the ground that "abstract declarations are useless, unless there exist the will and the means to make them effective". But nationalist opinion, since the time of the Nehru Report, was in favour of a Bill of Rights because the experience gathered from the British regime was that a subservient Legislature might serve as a handmaid to the Executive in committing inroads upon individual liberty.

Regardless of the British opinion, therefore, the makers of our Constitution adopted Fundamental Rights to safeguard individual liberty and also for ensuring (together with the Directive Principles) social, economic and political justice for every member of the community. The Constituent Assembly was also inspired by the Bill of Rights of USA and UK as well as France's Declaration of the Rights of Man.

# Features of Fundamental Rights



The following are the characteristic features of the Fundamental Rights guaranteed by the Constitution of India:

1. These rights are not absolute. Instead, they are subject to certain reasonable restrictions. The question around whether these restrictions are reasonable or not, is to be decided by the Judiciary. Thus, there is fair degree of balance between rights of an individual and overall good of society.
2. Some of these rights (under Article 15, 16, 19, 29 and 30) are available to Indian citizens only, while the rest are available to all persons whether citizens, foreigners or legal entities e.g. Article 14, 20, 21, 23, 25, 27, 28.
3. They are not sacrosanct. The Parliament can abridge or take them away through a constitutional amendment as long as such an amendment doesn't alter the 'basic structure' of the Constitution.
4. All of these rights are available against the arbitrary action of the State. It is now settled that rights guaranteed by Article 19 and 21 are guaranteed against state action as against violation of these rights by private individuals. There are only legal and no Constitutional remedies in cases where these rights available against State's action are violated by private individuals.
5. Certain rights place limitation upon the authority of the State and are hence negative in character like Article 14, 15(1), 16(2), 18(1) etc. On the other hand, some confer privileges on people and are hence positive in nature like Article 25, 29(1), 30(1).
6. Fundamental Rights are justiciable since they allow persons to move the courts for their enforcement, if and when they are violated.
7. An aggrieved person can directly go to the Supreme Court in case his Fundamental Rights are violated.
8. The scope of these rights is further limited by Articles 31A, 31B, 31C, 33, 34, and 35
9. These can be suspended during the national emergency except for Articles 20 and 21. The six rights guaranteed under Article 19 can be suspended only when an emergency is declared on the grounds of war and external aggression, and not on the grounds of armed rebellion.
10. Their application to members of armed forces, paramilitary forces, police forces, intelligence agencies and analogous services can be restricted or abrogated by the Parliament.
11. Their application can be restricted while martial law (i.e. Military Rule imposed under abnormal circumstances to restore order) is in force in any area.

## 5. Classes of Fundamental Rights

The fundamental rights as enshrined in part III are generally categorized into following six classes:

- Right to Equality (Art. 14-18)
- Right to Freedom (Art. 19-22)
- Right against Exploitation (Art. 23-24)
- Right to Freedom of Religion (Art. 25-28)

- Cultural and Educational Rights (Art. 29-30)
- Right to Constitutional Remedies (Art. 32)

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## 6. Details of Fundamental Rights

### 6.1. Article 12 – Definition of State

#### 6.1.1. Text

In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

#### 6.1.2. Description

Article 12 seeks to define the scope of “State” for the purpose of Part III of the Constitution. A citizen can approach the Supreme Court on violation of Fundamental Rights by any of the bodies included within the definition of the State. In other words, for the purposes of Part III of the constitution, the state comprises of the following:

1. Government and Parliament of India i.e the Executive and Legislature of the Union
2. Government and Legislature of each State i.e the Executive and Legislature of the various States of India
3. All local or other authorities within the territory of India
4. All local and other authorities who are under the control of the Government of India

It includes the Parliament, Union Government, State legislature, State Executive, Local Authorities etc.

**Local Authority:** The term Local authority includes the following:

- **Local government:** According to Entry 5 of the List II of VII Schedule ‘local government’ includes a municipal corporation, improvement trust, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.
- **Village Panchayat:** In the case of *Ajit Singh v. State of Punjab*, it was held that within the meaning of the term local authority, village panchayat is also included.

In *Mohammad Yasin v. Town Area Committee*, the Supreme Court held that to be characterized as a ‘local authority’ the authority concerned must;

1. Have a separate legal existence as a corporate body
2. Not be a mere government agency but must be legally an independent entity
3. Function in a defined area
4. Be wholly or partly, directly or indirectly, elected by the inhabitants of the area
5. Enjoy a certain degree of autonomy (complete or partial)
6. Be entrusted by statute with such governmental functions and duties as are usually entrusted to locally (like health, education, water, town planning, markets, transportation, etc.)
7. Have the power to raise funds for the furtherance of its activities and fulfilment of its objectives by levying taxes, rates, charges or fees

**Other Authorities:** The term ‘other authorities’ in Article 12 has not been defined either in the Constitution or in the general clauses Act, 1897 or in any other statute of India. Therefore, its interpretation has caused a good deal of difficulty, and judicial opinion has undergone changes over time. Judicial pronouncements have given a wide scope to the expression “other authorities” but still the list is not exhaustive.

The functions of a government can be performed either by the governmental departments and officials or through autonomous bodies which exist outside the departmental structure. Such autonomous bodies may include companies, corporations etc.

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## DOES STATE INCLUDE PRIVATE BODIES ALSO?

Increasing delegation of public functions to the private bodies including management of public resources has led to a persistent question whether private companies, corporations, cooperatives etc., performing such functions are included under the definition of state under Article 12. Such questions have come up before the courts, which have been decided on a case by case basis whether a body is to be included under the definition of state.

The judgment that comes closest to touching upon this question is where both Delhi HC and Indian Supreme Court ruled that CAG can audit private telecom firms that share their revenues with government. As per the courts, such a scrutiny is crucial for ensuring that government got its "legitimate share" for allowing private telecom operators to use valuable natural resources.

The Court observed that while dealing with a natural resource belonging to people, it has to give a purposive interpretation to Article 149, which deals with duties and powers of CAG. The ruling has extended the reach of CAG from government and public sector companies to any entity that may be using a public resource in its business and sharing revenue with government.

However, it has not commented upon whether and under what conditions a private entity will be considered as state. Unfortunately, a conclusive answer is yet to be decided.

# DOES STATE INCLUDE JUDICIARY?



Article 12 of the Constitution does not specifically define 'judiciary'. This gives the judicial authorities the power to pronounce decisions which may be contravening to the Fundamental Rights of an individual.

To answer this question, one must appreciate the distinction between the judicial and non-judicial functions of the courts. When the courts perform their non-judicial functions, they fall within the definition of the 'State'. When the courts perform their judicial functions, they would not fall within the scope of the 'State'.

So, it can be noted that the judicial decision of a court cannot be challenged as being violative of fundamental rights. But, an administrative decision or a rule made by the judiciary can be challenged as being violative of fundamental rights.

In the case of *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967, a 9-judge bench of the Supreme Court held that a judicial decision pronounced by a judge of competent jurisdiction in or in relation to a matter brought before him for adjudication cannot affect the fundamental rights of the citizens since what the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. Therefore, such a judicial decision cannot be challenged under Article 13.

Hence, for the purpose of determining what 'other authorities' fall under the scope of State, the judiciary has given several judgements as per the facts and circumstances of different cases:

- In the **University of Madras v. Shanta Bai**, the Madras High Court evolved the principle of 'ejusdem generis' i.e. of the like nature. It means that only those authorities are covered under the expression 'other authorities' which perform governmental or sovereign functions. Further, it cannot include persons, natural or juristic, for example, Unaided universities.
- In the case of **Ujammabai v. the State of U.P.**, the court rejected the above restrictive scope and held that the 'ejusdem generis' rule could not be resorted to in interpreting 'other authorities'. The bodies named under Article 12 have no common genus running through them and they cannot be placed in one single category on any rational basis.
- In **Rajasthan Electricity Board v. Mohan Lal**, the Supreme Court held that 'other authorities' would include all authorities created by the constitution or statute on whom powers are conferred by law. Such statutory authority need not be engaged in performing government or sovereign functions. The court emphasized that it is immaterial that the power conferred on the body is of a commercial nature or not.
- In the case of **R. D. Shetty v/s International Airport Authority**, the Court laid down five tests for a body to be considered "other authority" :
  - Entire share capital is owned or managed by State.
  - It enjoys monopoly status.

- Department of Government is transferred to Corporation.
- Functional character is governmental in essence.
- Deep and pervasive State control.

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## 6.2. Article 13



### What is included in **ARTICLE 13?**

#### **Article 13: Laws inconsistent with or in derogation of the fundamental rights-**

- ❖ All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- ❖ The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
- ❖ In this article, unless the context otherwise requires,
  - ❖ "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
  - ❖ "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
- ❖ Nothing in this article shall apply to any amendment of this Constitution made under article 368.

#### 6.2.1. Description

Article 13 deals with powers of judicial review. It makes the judiciary the guardian of Fundamental Rights in the country. It aims to secure the paramount status of the Constitution in case of Fundamental Rights. Judicial review is the power of the judiciary to declare any act of legislature as ultra vires (beyond the competence of the legislature to make the law) or null and void (illegal).

## 6.2.2. Judicial Review

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It is the power of the judiciary to declare any act of Parliament and State Legislature as “null & void” (particular law or a part of it not valid) or “ultra-vires” (doesn’t have authority).

It emerged in USA as an implied power of judiciary in Marbury v/s Madison case, 1803.

Indian Constitution grants the power of judicial review against executive as well as legislative explicitly to protect the fundamental rights.

### 6.2.2.1. Provisions

Pre-constitution laws and Fundamental Rights: The pre-constitution laws are not declared invalid ab-initio (from the start). They are invalid only when they are inconsistent with any of the fundamental rights.

## 6.2.3. Doctrine of Eclipse

Article 13(1) states that pre-constitutional laws will be void if they are inconsistent with any Fundamental Right. However, if such a Fundamental Right, which ‘eclipses’ the pre-constitutional law, is amended to the extent that the pre-constitutional law is no more inconsistent with the amended Fundamental Right, then such a law becomes valid again. Such a law is said to have come out of the eclipse caused by the Fundamental Rights. This judgment was given in Bhikhaji Narayan case(1955).

In the State of Gujarat vs Ambika Mills (1974) case and in Dulare Lodh vs ADJ Kanpur (1984) case, the Supreme Court opined that the Doctrine of Eclipse is applicable to both pre and post-constitutional laws.

However, this stance was reversed in the K.K. Poonacha vs State Of Karnataka & Others (2010) case, wherein the Supreme Court observed that the doctrine of eclipse will apply to only pre-Constitution laws which are governed by Article 13(1) and would not apply to post-Constitution laws which are governed by Article 13(2).

## 6.2.4. Doctrine of Severability

If any legislature passes a law that violates any provision of the Constitution, then such a law is declared void by the Court “to the extent of such inconsistency”. Instead of declaring the entire law as illegal, only that portion of the law may be removed, which is inconsistent. This is the doctrine of severability.

In Minerva Mills Case (1980), the Supreme Court invalidated clause 4 and 5 of Article 368, which were added by 42<sup>nd</sup> Amendment Act in 1976.

### 6.2.4.1. Motor General Trades v/s State of A.P. 1984

- If a valid section of a law can be separated from the invalid section and the valid section can be considered to form an independent statute, then this section remains valid.
- If the valid and invalid sections are so mixed up that they cannot be separated then the whole is declared void.
- After omitting the invalid part, if what remains is very thin and what emerges out is something different, then the entire law is invalid.



## Amendability of FRs

- Article 13(2) states that the State should not make any law, which abridges the Fundamental Rights. The controversy pertains to whether "any law" includes a Constitutional Amendment also. The following are the important events involved in the controversy of amendability of Fundamental Right.
- **Sankari Prasad Case(1951):** In Sankari Prasad case, the Supreme court opined that a Constitutional Amendment is not an ordinary law. The term 'any law', therefore, does not include a Constitutional amendment and hence Parliament has the power to amend Fundamental Rights.
- **Golaknath case(1967):** The Supreme Court changed its earlier position and stated that Fundamental Rights have been given a "transcendent position" in our Constitution. Therefore they cannot be amended.
- **24<sup>th</sup> Constitutional Amendment Act, 1971:** This act inserted Clause 13(4) in the Constitution, which clarified that the term "any law" does not include a constitutional amendment. Therefore, the State once again had the power to amend the Constitution.
- **Kesavananda Bharati case (1973):** This case is well known for its remarkable judicial innovation in the form of the doctrine of 'Basic Structure of the Constitution'. According to the basic structure doctrine, there are certain features of the Constitution, which cannot be amended. The court upheld the validity of the 24<sup>th</sup> amendment and stated that the Parliament is empowered to abridge or take away any of the Fundamental Rights, as long as such Fundamental Rights do not form a part of the basic structure of the Constitution.
- **Minerva Mills case (1980):** In this verdict, the Supreme Court invalidated Article 368(4) and 368(5) as it curtailed judicial review, which is a basic feature of the Constitution. Thus at present, Fundamental Rights can be amended to the extent that they do not form part of the basic structure.
- **IR Coehlo case (2007):** It deals with validity of laws placed in the 9<sup>th</sup> Schedule. The Doctrine of Basic Structure will be applied on acts placed in the schedule from the date of Kesavananda Bharati verdict, since judicial review is part of the basic structure of the Indian constitution.

### 6.2.5. Doctrine of Waiver

Doctrine of waiver means voluntary relinquishment of a known right. It is when a person intentionally and with full knowledge, gives away his right to exercise or chooses not to exercise that right which the person would otherwise possess. By waiving a right, a person no longer gets to assert that right and is precluded from challenging the constitutionality of that law for the benefit of which, the right is waived.

This doctrine is based on the principle that a person is the best judge of his own interest and when given full knowledge, the person should be allowed to decide for himself. In India, a person can waive rights conferred by a statute or rights arising out of a contract, but cannot waive constitutional rights or rights guaranteed by the constitution itself.

## 6.2.6. Doctrine of Basic Structure

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According to this doctrine there are certain basic structures or basic features of the Constitution, which can't be abridged or taken away by the Parliament by way of constitutional amendment.

Through various verdicts the judiciary has enunciated the following, among others, as basic features of the Constitution:

- Supremacy of the Constitution
- Republican and Democratic form of government
- Secular character
- Separation of Powers
- Judicial Review
- Sovereignty
- Rule of Law
- Principle of Equality

## 6.2.7. Doctrine of Prospective Over-Ruling

An innovation of the United States of America, this was first pronounced by the Supreme Court in the Golaknath case, 1967. The SC can overrule its earlier judgment, but the impact will apply from the prospective effect and not retrospectively.

## 6.3. Article 14 – Right to Equality

### 6.3.1. Text

The State shall not deny to **any person** Equality before Law or Equal Protection of Law within the territory of India.



**RULE  
OF  
LAW**

The concept of equality before law is an element of Rule of Law given by A.V. Dicey. It consists of the following three elements:

(1) Absence of arbitrary power, that is, no man can be punished except for a breach of law.  
(2) Equality before law, that is, subjecting all citizens to the law equally.  
(3) Constitution is not the source, but the consequence of rights of the individual as individual rights are enjoyed even before the emergence of the Constitution.

The first and the second notion apply in India but not the third. In the Indian system, the Constitution is the source of individual rights. The Supreme Court has stated that Rule of Law is a basic feature of our Constitution.

### 6.3.2. Description

#### 6.3.2.1. Equality before Law

- This implies that all citizens are equal in the eyes of law. It means that-
  - There will be **absence of any special privileges** in favour of any person,
  - There will be **equal subjection of all persons** to the ordinary law of the land administered by ordinary law courts,
  - There will be **no person above the law**, whether rich or poor, high or low, official or non-official.
- It has been borrowed from the **British tradition**.
- It is negative in its orientation as the State is **restricted from making any discrimination between two citizens**.

#### 6.3.2.2. Equal Protection of Law

- It implies that the State should ensure that every citizen gets equal protection of law and no one should be deprived of justice because of poverty or any other reason. It means that-
  - There will be **equality of treatment under equal circumstances**, both in the privileges conferred and liabilities imposed by the laws.
  - The **like shall be treated alike** without any discrimination. As per the Supreme Court, where equals and unequals are treated differently, Article 14 does not apply.
- It is borrowed from the **American Constitution**.
- It is a positive concept as it implies that people **who are in similar circumstances will be treated similarly**, but differently from people in different circumstances.

#### 6.3.3 Applicability

Art. 14 grants Right to Equality to all persons whether Indian citizens, foreigners, or even legal entities such as a Company. This right is available against state action only.

#### 6.3.4. Exceptions

- Under **Article 31-C**, the laws made by the state for implementing DPSPs contained in **Article 39 (b)** and **Article 39 (c)** cannot be challenged on the ground that they are violative of Article 14.
- The **President of India** and **Governors of States** enjoy immunity from prosecution under **Article 361**.
- Under **Article 361-A**, no person shall be punished for publishing a substantially true report of any proceedings of any legislature in any media (newspaper/ radio/ television).
- The **MPs** and **MLAs** enjoy privileges in the legislature (**Article 105** and **194**).
- The foreign sovereigns (rulers), ambassadors and diplomats enjoy immunity from criminal and civil proceedings.
- The **UNO and its agencies** enjoy the diplomatic immunity.

### 6.4. Article 15 – Right against Discrimination on Certain Grounds

#### 6.4.1. Text

- The State **shall not discriminate** against any citizen on **grounds only of religion, race, caste, sex, place of birth or any of them**
- No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, **be subject to any disability**, liability, restriction or condition with regard to—
  - a) access to shops, public restaurants, hotels and places of public entertainment; or
  - b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

## 6.4.2. Applicability

This right is available to Indian citizens only. Hence foreign nationals can be discriminated against vis-à-vis Indian citizens by the Indian state. Similarly, legal entities can also be discriminated against. Further while Art. 15(1) is a direction only to the State, Art. 15(2) is available against private individuals as well.

## CONSTITUTIONAL AMENDMENTS TO ARTICLE 15

► **1st Constitutional Amendment Act**- This amendment added **Article 15(4)** which provides for affirmative action for socially and economically backward sections of society or for SC/STs. Article 29(2) states that the State will not discriminate in admission to educational institutions on the basis of religion, race, caste, sex or place of birth. Affirmative action was held violative of this provision in Champakam Dorairajan case (1951). In the Champakam Dorairajan case - for the first time, dispute between FRs and DPSPs arose.

- Articles, which were questioned in this case, were - Article 46 (Promotion of educational and economic interests of SCs/STs/and other weaker sections), which was found to be in violation of Article 14 and 15.
- Hence, the first constitutional amendment was enacted.

► **93rd Constitutional Amendment Act (2005)**- This amendment added **Article 15(5)** which provides for affirmative action for socially and economically weaker sections of society in educational institutions whether aided or unaided. While Article 15(4) is general in nature, Article 15(5) is specific and pertains to education. The Minority educational institutions are an exception to the clause.

## 6.4.3. Exceptions

- The state can make any **special provision for women and children**. E.g. reservation of seats for women in local bodies or provision of free education for children.
- The State from making any special provision for the **advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes**. E.g. reservation of seats in legislatures and public educational institutions.
  - The State can make any special provision for them in so far as such special provisions relate to their **admission to educational institutions including private educational institutions**, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.
- The State can make special provisions for the **advancement of any economically weaker section of citizens**, including reservations in educational institutions.

#### 6.4.4. Reservation Policy

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It is a form of affirmative action whereby a percentage of seats are reserved in the government service and educational institutions for the socially and educationally backward communities and the Scheduled Castes and Tribes who are inadequately represented in these services and institutions.

- Reservation is provided to **Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs)** at the rate of **15%, 7.5% and 27%** respectively in case of direct recruitment on all India basis by open competition.
- **Persons with Disability Act, 1995** provides for reservation for persons with disabilities in India. Under the Act, persons with disabilities got 3% reservation in both government jobs and higher educational institutions.
- **10% Reservation to Economically Weaker Sections (EWS)** was recently provided by 103rd Constitutional Amendment Act, 2018. It amended Articles 15 and 16 to provide reservation to economically weaker section in admission to educational institutions and government posts.

#### Judicial pronouncements regarding Reservation

- **State of Madras vs Champakam Dorairajan (1951)**
  - The Supreme Court upheld decision of Madras High Court, which struck down a Government Order of 1927 regarding caste-based reservation in government jobs and educational institutions.
    - This judgement also made basis of adding Article 15(4) by the First Constitutional Amendment Act, 1951.
- **Indra Sawhney vs. Union of India (1992)**
  - The Judge Constitution Bench of the Supreme Court by 6:3 majority held that the decision of the Union Government to reserve 27% Government jobs for backward classes – with elimination of Creamy Layer- is constitutionally valid.
  - The reservation of seats shall only confine to initial appointments and not to promotions, and the total reservations shall not exceed 50 per cent.
- **M. Nagaraj vs. Union of India (2006)**
  - A five-judge constitution bench of the Supreme Court validated parliament's decision to extend reservations for SCs and STs to include promotions with three conditions:
    - State has to provide proof for the backwardness of the class benefitting from the reservation.
    - State has to collect quantifiable data showing inadequacy of representation of that class in public employment.
    - State has to show how reservations in promotions would further administrative efficiency.
- **Jarnail Singh v. Lachhmi Narain Gupta (2018)**
  - The Supreme Court held that the government **need not collect quantifiable data to demonstrate backwardness** of public employees belonging to the Scheduled Castes and the Scheduled Tribes (SC/STs) to provide reservations for them in promotions.
- Recently the Supreme Court upheld **Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2018**. The enactment provides for **consequential seniority** to SCs and STs with retrospective effect from 1978.
  - Consequential seniority allows reserved category candidates to retain seniority over general category peers. If a reserved category candidate is promoted before a general category candidate because of reservation in promotion, then for subsequent promotion the reserved candidate retains seniority. In effect, consequential seniority

undoes the 'catch-up rule' that allowed general category candidates to catch-up to reserved category candidates.

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#### 6.4.4.1 Controversy related to reservation in Private Educational Institutions

- **Inamdar vs. State of Maharashtra and TMA Pai Foundation vs. State of Karnataka:** The Supreme Court opined that government can not introduce quota in private unaided educational institutions as it was violative of Fundamental Rights under Article 19(1)(g), that is, freedom of profession.
  - The 93<sup>rd</sup> amendment was enacted to override this verdict.
  - Supreme Court upheld the validity of the above constitutional amendment.
  - The central government then passed Central Educational Institutions Act, 2006 to give effect to the provisions of the Constitution.
- **Ashok Kumar Thakur vs. Union of India case:** upheld the validity of 93<sup>rd</sup> amendment and Central Educational Institutions Act, 2006. The status of quota in private unaided institutions was left open to be decided in the future.
- **Society for unaided private schools for Rajasthan vs. Union of India case 2013**—upheld the validity of introduction to quota under Right to Education Act, 2009 even in private unaided institutions. Arguments given by Supreme Court:
  - Education cannot be treated as a purely commercial enterprise.
  - Article 21A is an obligation on the State.
  - Right to Education is a child-centered act rather than an institution-centered act.

#### 6.4.4.2 Controversy related to reservation for Economically Weaker Sections

As per the amendment, up to 10% of seats may be reserved for such sections for admission in educational institutions. Such reservation will not apply to minority educational institutions. The reservation of up to 10% for the EWS will be in addition to the existing reservation cap of 50% reservation for SC, ST and OBCs. The central government will notify the "economically weaker sections" of citizens on the basis of family income and other indicators of economic disadvantage.



For the very first time, economic class is constitutionally recognized as vulnerable section & would form the basis of affirmative action programme. It is a departure from traditional centrality of caste in deciding affirmative action.

##### Arguments in favour of reservation based on economic status

- **Need for new deprivation assessment criteria:** Caste, while prominent cause of injustice in India, should not be the sole determinant of the backwardness of a class. This is because of the weakening links between the caste and class in changing circumstances.
- In **Ram Singh v. Union of India** (2015), SC asserted that social deficiencies may exist beyond the concept of caste (e.g. economic status / gender identity as in transgenders). Hence, there is a need to evolve new yardsticks to move away from caste-centric definition of backwardness, so that the list remains dynamic and most distressed can get benefit of affirmative action.
- **Increasing dissatisfaction among various sections:** Politically, the class issues have been overpowered by caste issues. This has created a sense of dissatisfaction amongst communities with similar or poorer economic status but excluded from caste-based reservation.

- **Against equality norm:** To balance the equality of opportunity of backward classes ‘against’ the right to equality of everyone else, a cap of 50% was put on the reserved seats. When the quota exceeds 50% limit, it breaches the equality norm.
  - In **M. Nagaraj v. Union of India** (2006), a Constitution Bench ruled that equality is part of the basic structure of the Constitution. The 50% ceiling is a constitutional requirement without which the structure of equality of opportunity would collapse.
- **No under-representation:** The upper caste is adequately represented in public employment. It is not clear if the government has quantifiable data to show that people from lower income groups are under-represented in its service.
- **Problem with the ceiling:** By fixing income ceiling for eligibility at ₹8 lakh a year — same as the ‘creamy layer’ limit above which OBC candidates become ineligible for reservations — a parity has been created between socially & economically backward classes with limited means.
- **Definition of EWS and allotment of quota:** The issue with current definition of EWS is that it is too broad and would include large sections of population. Further, it also puts families below poverty line and the ones with income of 8 lakh/annum in the same category.
  - Reservation for SCs/STs and non-creamy layer amongst OBCs has correlation with their respective populations. While there is no such clarity on arriving at the 10% EWS quota.
- **Challenges in the identification of beneficiaries:** In a country where taxable population is still very low due to misrepresentation of income, implementing economic eligibility criteria would be a bureaucratic nightmare.
- **‘Pandora’s box’ of demands:** There may be demand from sections of the SCs/STs and OBCs to introduce similar sub-categorization, based on economic criteria, within their respective quotas. It might also fuel demands for new caste-based censuses to expand quota limits based on SC/ST or OBC proportions in the population, or to extend the reservations to private sector jobs. Quota in promotions may also gain widespread acceptability, both among the public and the judiciary.
- **Shrinking public sector:** With steadily shrinking jobs pool in the Central Government, Central Public Sector Enterprises (CPSEs) and even banks, 10% reservation will not fulfill expectations.
- **Anti-Merit:** In common perception, reservation has also become synonymous with anti-merit. With extension of reservation, this opinion might get further ingrained in public psyche.
- **Tool of populism:** Offering reservations has increasingly become tool for political gains in politics. This affects their credibility as a tool for social justice.
- **Passage of the Bill:** The Bill was not circulated ahead of being introduced, it was not examined by a parliamentary committee & there was hardly any time between its introduction and final discussion.
- Also, the **Sinho Commission report of 2010**, which the Centre has been citing as the basis for its legislation to grant 10 % reservation to the EWS, never explicitly recommended a reservation for EWS but was only emphatic about ensuring that the EWS get access to all welfare schemes.

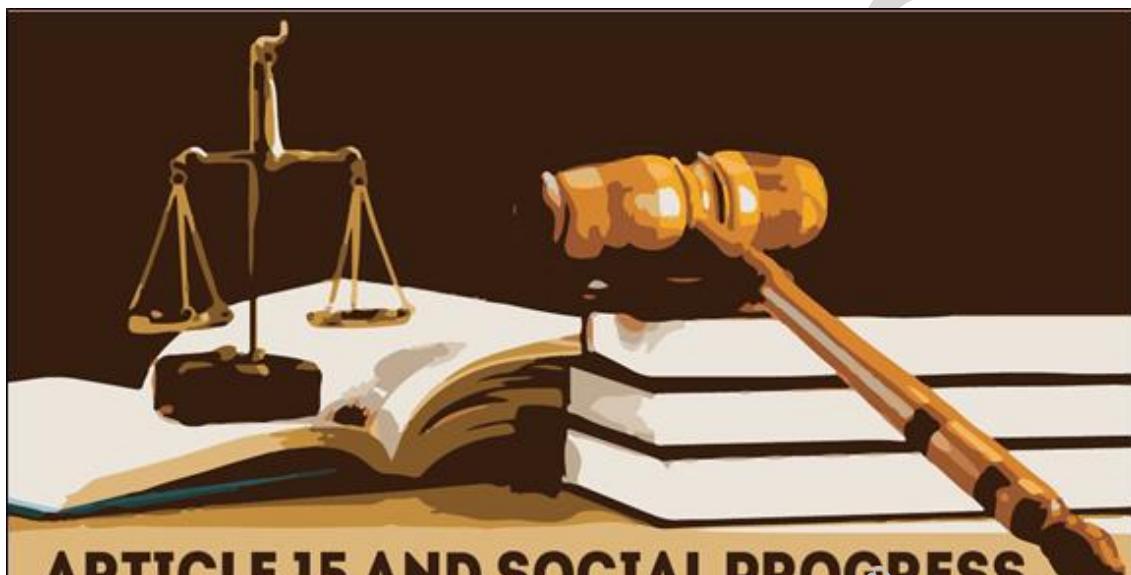
### Way Forward

A 9-judge bench of Supreme Court in Indira Sawhney case (1992) had struck down a provision that earmarked 10% for the economically backward on the grounds that Constitution only provides for addressing social backwardness. However, any such step should carefully be preceded by following considerations-

### Pending Bills

The Women’s Reservation Bill that is being nationally debated since 1996 is also based on the protective provisions of the Article 15. Constitution (108) Amendment Bill, which was introduced in the Rajya Sabha in 2008 was also an attempt to empower woman.

- 50% ceiling was put in place to **check populism in granting quotas** by the political class. There must be an institutional mechanism that recommends classes for reservation.
- Based on the affidavits furnished by the candidates, **independent, transparent and non-intrusive verification methods** have to be devised so that reservation provisions cannot be misused easily.
- The logic of providing reservation to economically backward people can further be carefully extended to **exclude the creamy layers among SC/ST groups**.
- The demand for reservation must be seen in light of the quality of private sector jobs and wages available to aspirational India. The only way out of the quota quagmire is to create an enabling environment for the **formalization and creation of more and better jobs in the private sector**.
- For a long-term solution, it is important to address the major issues like caste divisions majorly in rural areas, job creation in private sector, skill creation and education.



## ARTICLE 15 AND SOCIAL PROGRESS

Article 14 establishes equality before law but historical facts of inequality mandate special treatment for the disadvantaged groups. The Constitution recognizes this and therefore in Art. 15 there are provisions in favor of the marginalized sections of the society.

Preferential treatment in favor of SC/ST and OBC candidates regarding educational and other facilities is a social reform that is based on Article 15. At the same time the SC sought to balance it with general social good by limiting the quantitative extent of reservation permissible to 50%. Also, in case of socio-economically backward classes, SC introduced the concept of creamy layers.

Regarding women and their social progress on the basis of Article 15, the following needs to be noted:

- According to SC, reservation of posts exclusively for women is valid under Article 15(3) as it covers every dimension of the state action.
- Provisions in the criminal law and procedural law in favor of women have been accepted by the courts in view of their social weakness.
- Reservation for women in the local bodies and educational institutions has been supported by Article 15.
- In *Vishakha v/s State of Rajasthan* (1997), Supreme Court suggested measures to eliminate sexual harassment in the work place as it violates Article 14, 15, and Article 23.

## 6.5. Article 16- Right to Equality of Opportunities in Matters of Public Employment

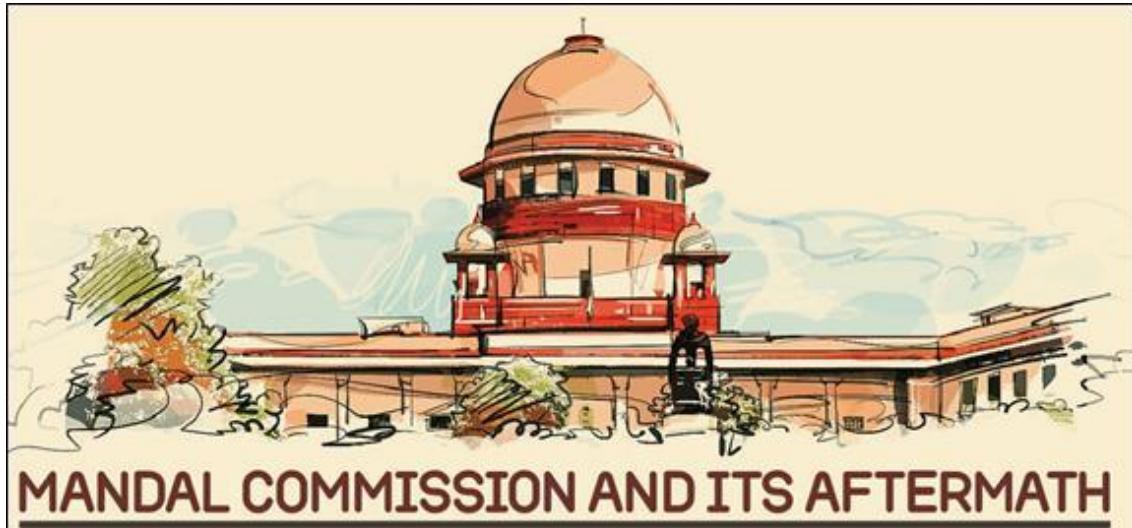
### 6.5.1. Text

- There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

- No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

### 6.5.2. Applicability

Right to equality of opportunity in matters of public employment is available only to Indian citizens.



## MANDAL COMMISSION AND ITS AFTERMATH

The Mandal Commission was appointed in 1979 under Article 340 to investigate the conditions of socially and educationally backward sections of population and to suggest measures for their advancement. The Commission identified nearly 52% of the population as backward. In 1990, the V.P. Singh government gave 27% reservation in government jobs to OBCs.

In 1991, the Narsimha Rao government introduced the concept of most backward classes within the backward classes. Also, 10% reservation was provided to poorer sections of upper castes.

**Indira Sawhney vs. Union of India**—in this verdict, SC upheld the government's policy of providing reservation for backward classes. It is popularly known as the Mandal case.

⦿ In this, the Court overruled its earlier judgment in Balaji v/s State of Mysore case, 1963 in which it held that caste can't be the main criteria. Instead, poverty should be treated as the main criteria.

⦿ Caste was considered as the sole criteria for reservation because in India, caste is intricately related to class. It also introduced the **creamy layer concept**.

⦿ Reservation of **upper castes on the basis of economic backwardness** was rejected because they do not suffer from social backwardness despite being poor.

⦿ Reservation would be given only at entry level and **not at promotion level**.

⦿ There are certain jobs where **merit alone** is the sole criteria.

⦿ In one year, reservation shall not be more than 50%.

It directed the government to constitute a statutory body (National Commission for Backward Classes) to decide on the criteria of inclusion and exclusion of a caste from reservation.

### 6.5.3. Exceptions

- The State can make any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
- The State can make any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

- The State can consider any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.
- The State can prescribe residence as a condition for certain employment or appointment in a state or union territory or local authority or other authority.
- The State can provide that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

#### 6.5.4. Issue of reservation in promotions

Although, the SC in **Indira Sawhney Case** had held that the reservation policy cannot be extended to promotions, but it was overruled by the **77<sup>th</sup> Constitutional Amendment Act, 1995**. This amendment introduced **Article 16(4A)**, which provided reservation in promotion to SC/STs.

- In **Ajit Singh vs. State of Punjab**, the Supreme Court upheld the validity of 77<sup>th</sup> amendment act and directed to introduce “**catch up rule**”. The court restored their seniority once promoted at par with the SC/ST candidates who got quick promotions ahead of their batch mates.
- The Parliament again amended the Constitution through the **85<sup>th</sup> Amendment Act, 2001**, to negate the catch up rule directed by Supreme Court. It introduced **promotion with consequential seniority**. This act was brought with retrospective effect from 1995.
  - **Consequential Seniority** means elevation to a senior position consequential to circumstances, and not through normal rules. Illustrating it, suppose there are 100 sanctioned posts in a department, out of which 30 are occupied by unreserved candidates, 15 are occupied by reserved candidates and 55 remain ‘vacant’. The reservation is 30%, which implies that 30 posts must be manned by reserved category employees. So, if a reserved category employee is junior to a general category employee, but there is vacancy for reserved category at a senior position, so reserved category employee will be considered senior and promoted above the general category employee.
- In 2002, Karnataka had brought a similar law, but was struck down by the Supreme Court in 2006 in **M. Nagaraj vs. Union of India Case**. The Supreme Court validated the state's decision to extend reservation in promotion for SCs and STs, but gave direction that the state should provide proof on the following three parameters to it-
  - **Empirical Data on Backwardness**- of the class benefitting from the reservation.
  - **Empirical Data on Inadequate Representation**- in the position/service for which reservation in promotion is to be granted.
  - **Impact on efficiency**- how reservations in promotions would further administrative efficiency.
- Many stakeholders and petitioners were not satisfied with these criteria and various review petitions were filed on this judgment. It was again taken up in **Jarnail Singh Case** which upheld the 2nd and 3rd criteria of Nagaraj Case. But observed that there is no longer need to collect quantifiable data on the backwardness of SCs and STs. Although it stated that the **exclusion of creamy layer** while applying the principle of reservation is justified, even in the case of SCs and STs.
- **Faculty Association of AIIMS vs. Union of India, July 2013**- In this case, a five judge bench of the Supreme Court ruled that there are certain jobs for which merit alone should be the sole criteria.
  - The Union Government appealed against this judgment and in the review petition a five-judge bench in January 2014, threw the ball back into the Central Government's

court saying that the Government was free to amend the Constitution to provide reservation in faculty for superspeciality posts and that the previous judgment did not place any restriction on the Government to decide whether or not there should be reservation in superspeciality posts.

- In 2019, the Supreme Court had permitted the Central government for reservation in promotion to SC/ST employees working in the public sector in "accordance with law".
- The Karnataka government set up the Ratna Prabha Committee to submit a report on the three criteria and based on its report had come up with the revised bill. This time, the court has upheld it constitutionally.

## SHOULD WE HAVE RESERVATIONS IN PROMOTIONS?



**Arguments in favour of reservation in promotions**

For equality of opportunity- Along with the Constitution the Supreme Court has also, time & again, upheld any affirmative action seeks to provide a level playing field to the oppressed classes with the overall objective to achieve equality of opportunity.

Skewed SC/ST representation at senior levels- The representation of SCs/STs, though, has gone up at various levels, representation in senior levels is highly skewed against SCs/STs due to prejudices. Over the years Institutions has failed to promote equality and internal democracy within them. There were only 4 SC/ST officers at the secretary rank in the government in 2017.

**Case of Efficiency and Merit-**

- Overall efficiency in government is sometimes hard to quantify, and the reporting of output by officers is not free from social bias. For ex. In Maharashtra, a public servant was denied promotion because his 'character and integrity were not good'.
- The **administrative efficiency** is an outcome of the actions taken by officials after they have been appointed or promoted and is not tied to the selection method itself.
- A "meritorious" candidate is not merely one who is "talented" or "successful" but also one whose appointment fulfills the constitutional goals of uplifting the members of the SCs and STs and ensuring a diverse and representative administration. A system that promotes substantive equality promotes merit.
- Further, under the **Karnataka Civil Services General Recruitment Rules 1977**, the candidate on promotion has to serve a statutory period of officiation before being confirmed; this ensures that the efficiency of administration is, in any event, not adversely affected, the bench concluded.

**Arguments against the reservation in promotions**

Not a fundamental right- Provisions under articles 16(4), 16 (4A) and 16 (4B) of the Constitution are only enabling provisions, and not a fundamental right. Neither was it ever envisaged by the constitutional makers, as can be made out from the debates and statements during the drafting of constitution.

Gaining employment and position does not ensure the end of social discrimination and, hence, should not be used as a single yardstick for calculating backwardness.

The reservation in promotion may affect the efficiency of administration.

### Way Forward

- Caste is not a matter of identity or right, when it comes to administrative policy. At difference levels, studies and empirical data should be collected to decide the level of promotions needed.
- The Constitution envisages not just a formal equality of opportunity but also the achievement of substantive equality. Currently, there is ambiguity in promotion process. Thus, there is a need for a new, comprehensive law to be enacted.

### 6.5.5 Issue of Local Reservation in Private Sector Jobs

Recently, Haryana Cabinet cleared a draft ordinance that seeks to reserve 75% of the jobs in private enterprises for local residents to address the aspect of unemployment of the local population on a priority basis.

#### Background

- A survey done by the Centre for the Study of Developing Societies (CSDS) in 2016 showed that nearly two- third of respondents were in favour that people from the state should be given priority vis-à-vis employment opportunities.
- Similar demands are being raised in other states like Andhra Pradesh, Madhya Pradesh, Karnataka, Gujarat, Maharashtra etc. o Last year similar 75% job reservation to locals was

given in Andhra Pradesh but the matter is sub judice and AP High Court has indicated that it may be unconstitutional.

- Such moves are considered mainly to promote Inclusive Development. For example, in Germany, every village has a factory. India could also have industries in villages and provide jobs to the local people for an all-round development. However, there should be an overarching framework at the Union level to promote such development.

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## Reasons behind demand for local jobs

- Rising unemployment-** With unemployment figures likely to rise drastically in the backdrop of pandemic and lack of access to skills and low employability, these demands are only going to rise in future.
- Agrarian Distress-** The agrarian sector is under tremendous stress across the country, and young people are desperate to move out of the sector, hence seeking local jobs.
- Displacement of landowners-** Since most of the land requirement is met by acquiring private agricultural lands, the landowners are being displaced and deprived of their occupation and thereby the associated loss of income generates demand for local level jobs.
- Lack of participation of all sections in the workforce-** Several reports like, the State of Working India 2018 have shown that discrimination is one of the reasons for under-representation of Dalits and Muslims in the corporate sector. Reservation could help these sections overcome this discrimination.
- Perception that Central devolution is insufficient-** especially in the southern states, as they feel successive finance commissions accord a high weightage to poverty and population vis-a-vis development thus majority share goes to the northern states. In this context, local reservation provides them a sense of indirect economic justice.
- Extent of migration:** According to some estimates drawn from 2011 Census, NSSO surveys and Economic Survey suggests that there are a total of about 65 million inter-state migrants, and 33 per cent of these migrants are workers. These migrants increase the labour market competition which fuels the demand for reservation.

### Issues with implementation of the ordinance

- May not pass the legal scrutiny-** It is violative of Article 14 (Right to equality) and Art 16 (Right to equal opportunity). Moreover, Article 16 does not empower the state government but rather the Parliament to provide reservation in jobs on the basis of residence but that too is limited to public sector.
- Dangerous for unity of the country-** Such moves could lead to a Pandora's box where other states start implementing such policies, which result in fractures in the unity of India.
- Concerns of the Industry-** Although, most of the units employ locals only, however, there are certain sectors like chemical technology, textile and biotechnology, where it may be difficult to find locals for the jobs and the units are forced to search outside.
  - It will likely facilitate corruption and create another barrier to ease of doing business.

- **Difficult to attract investments-** Such a decision may lead to relocation of industries elsewhere and also alienate the potential investors. Lack of investments could further drop the job creation.
- Plan may not impact micro or smaller units as they can still engage localites. However, medium and large- scale companies and MNCs like Auto industry which contributes more than 25% of the state GDP of Haryana will be adversely impacted.
- Since these industrial units cannot ‘import’ labourers from elsewhere; the burden of imparting the requisite skills to, and of employing, locals will fall on the units.

### Way Forward

- **Need to tackle the core issues-** of unemployment by more job creation and industrialisation rather than such moves.
- Governments should provide incentives to industries for more investments and create an enabling environment for it. The Economic Survey 2018-19 also alerts the policy makers against such policy uncertainties for the industries, which may rather impact economic development.
- Government should focus on making the youth of a state employable with proper investments in education, health and skill development.
- **Need to promote labour intensive industries-** to make use of the labour surplus in the country, rather than simply forcing any industry for the locals.
- **Need to promote entrepreneurship-** where people are themselves motivated to create livelihood for them. State can provide incentives and help here such as done for Dalit entrepreneurs in Maharashtra.
- **Need to move towards economy-based reservation-** rather than further expansion of reservation policies using unproductive rationales.

### Conclusion

Job reservation for locals may not enhance their economic opportunities in the long run. Only, raising the standard of education and skilling youth alongside the necessary structural reforms is the only way to increase the size of the economic pie in the absolute sense.

### 6.5.6 Job Reservations, Promotion Quotas Not A Fundamental Right

Recently, the Supreme Court take a case pertaining to decision by the Uttarakhand government in 2012. Back then, the government had decided to fill up posts in public services without providing reservation to members of the Scheduled Caste (SC) and Scheduled Tribe (ST) communities. The Uttarakhand High Court directed the state government in 2019 to implement reservations in promotion by promoting only SCs and STs to maintain the quota earmarked for the said categories.

The Court held that Article 16 (4) and 16 (4-A) are in the **nature of enabling provisions**, vesting a **discretion on the State Government** to consider providing reservations, if the circumstances so warrant. It is settled law that the state cannot be directed to give reservations for appointment in public posts. The order further adds that the state is not bound to make a reservation for SCs and STs in matters of promotions. The court said that no mandamus can be issued by the court directing state governments to provide reservations.

However, if the state wishes to exercise its discretion and make such provision, it has to collect quantifiable data showing ‘inadequacy of representation of that class in public services. If the decision of the state government to provide reservations in promotion is challenged then the state concerned will have to place before the court the quantifiable data that reservations became necessary on account of inadequacy of representation of SCs and STs without affecting general efficiency of administration as mandated by Article 335.

- The fact that reservation cannot be claimed as a fundamental right is a settled position under the law and has been pointed out by several judgments in the past.
  - In 1967, a five-judge bench in **C.A. Rajendran v. Union of India** held that the government is under no constitutional duty to provide reservations for SCs and STs, either at the initial stage of recruitment or at the stage of promotion.
  - The position went on to be reiterated in several other decisions, including the nine-judge bench ruling in **Indra Sawhney v. Union of India** (1992) and the five-judge bench decision in **M Nagaraj v. Union of India** (2006).
- Although this position of law is a settled one, it is nonetheless at odds with certain other principles at the heart of the **constitutional vision of equality**.
  - In **NM Thomas judgement** (1976), the Supreme Court held that the Constitution was committed to an idea of substantive equality, i.e. it had to take the **actual circumstances of people** into account when determining what constituted “equal treatment”.
  - The **principled reason for this position** was that groups of people who face structural and institutional barriers towards being able to compete on “equal terms” with others in society — for reasons that are historical, but whose effects are enduring — must be treated in a way that mitigates those existing conditions of inequality.
  - **Reservations** — under this understanding — were a means to bring about genuine and true equality, and not a set of privileges or gifts.
- To interpret the obligations of the state purely from the textual foundations of Article 16 is not an appropriate approach. Fundamental rights are not isolated provisions and ought to be looked into as an interconnected whole.
- As there are **less avenues for the direct appointment in higher posts**, reservations play a major role for the representation of backward classes in higher posts.
  - According to a Parliament reply last year, only one of the 89 secretaries posted at the Centre belonged to the SC, while three belong to the ST. The court order may go against the substantive equality in higher posts.
- The Supreme Court is **not wrong** in saying that a **writ of mandamus cannot be granted** by any court in order to enforce an enabling provision. The writ of mandamus is issued only to compel an authority to discharge a binding duty.

## Conclusion

It is a settled principle of law that a **discretionary power cannot be exercised in a fickle manner**. Simply because the exercise of a power is optional for the government does not mean that it can be exercised in a whimsical manner. Article 14 of the Indian Constitution has been interpreted to prohibit all kinds of arbitrary decisions by the government. Thus, the **courts are entitled to examine if a discretionary power has been exercised in a judicious manner**.

## 6.6. Article 17 – Abolition of Untouchability

### 6.6.1. Text

The Constitution abolishes ‘untouchability’ and forbids its practice in any form. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.

### 6.6.2. Description

Untouchability is banned in any form in our country. Under **Article 35**, the Parliament has made **2 enabling Acts** to enforce this provision. Notably, the Constitution has not defined the term “untouchability”. However, the Mysore High Court held that the subject matter of Article 17 is not untouchability in its literal or grammatical sense but the ‘practice as it had developed

historically in the country'. It refers to the social disabilities imposed on certain classes of persons by reason of their birth in certain castes. Hence, it does not cover social boycott of a few individuals or their exclusion from religious services, etc.

### 6.6.3. The Protection of Civil Rights Act, 1955

Initially named as **Untouchabilities (Offences) Act, 1955**, it was amended in 1976 and renamed as The Protection of Civil Rights Act. It makes provisions against untouchability stronger. Further, a person convicted of the offence of untouchability is disqualified as a candidate for elections to the Parliament and State Legislature.

Untouchability is a cognizable offence (police officer can arrest the accused without a magisterial warrant) and a non-compoundable offence (cases which cannot be withdrawn even if a compromise is reached between disputing parties; the State becomes a party). It provides for a special court for speedy trial. The act declares the **following acts as offences**:

- Preventing any person from entering any place of public worship or from worshipping therein;
- Justifying untouchability on traditional, religious, philosophical or other grounds;
- Denying access to any shop, hotel or places of public entertainment;
- Insulting a person belonging to scheduled caste on the ground of untouchability;
- Refusing to admit persons in hospitals, educational institutions or hostels established for public benefit;
- Preaching untouchability directly or indirectly; and (g) refusing to sell goods or render services to any person.

The Supreme Court held that the right under Article 17 is available against private individuals and it is the constitutional obligation of the State to take necessary action to ensure that this right is not violated.

### 6.6.4. The Schedule Caste and Schedule Tribe Prevention of Atrocities Act, 1989

- Its main objective is prevention of atrocities by increased surveillance, collecting licenses of upper castes etc.
- Provides relief and rehabilitation measures for the victims.
- Provides for special court and special police.
- In some situations, police can even provide arms to members of SC and ST community for self-defence.

#### Recent Developments

To curb the misuse of Scheduled Castes and Tribes (Prevention of Atrocities POA) Act, 1989, Supreme Court in March 2018 diluted the Act in **Subhash Kashinath Mahajan vs State of Maharashtra case**.

- **Anticipatory Bail:** Supreme Court laid down safeguards, including provisions for anticipatory bail and a "preliminary enquiry" on whether complaint under the 1989 law is "frivolous or motivated" before registering a case.
- **FIR:** Neither is an FIR to be immediately registered nor are arrests to be made without a preliminary inquiry. An arrest could only be made if there is "credible" information and police officer has "reason to believe" that an offence was committed.
- **Permission:** Even if a preliminary inquiry was held and a case registered, arrest is not necessary, and that no public servant is to be arrested without the written permission of the appointing authority.

This judgment had triggered widespread protests and violence and the **government had to amend the Act** to negate the effect of the apex court ruling. In August 2018, amendment **restored the bar against anticipatory bail and nullifying the apex court verdict**.

- A new section 18A was inserted in the Act of 1989, which does away with the **court-imposed requirements of undertaking preliminary inquiry and of procuring approval prior to making an arrest**.

- It also asserted that in cases under the Atrocities Act, **no procedure other than that specified under the Act and Cr. P. C. shall apply.**

Later on, Supreme court reserved its verdict on the petitions challenging the validity of 2018 amendments to The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989. It **restored the earlier position of the law by recalling two directions in the March, 2018 verdict**, which provided no absolute bar on grant of anticipatory bail and prior inquiry before effecting arrest of public servant and private individual under the Act.

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## 6.7. Article 18

### 6.7.1. Text

Abolition of titles.

- No title, not being a military or academic distinction, shall be conferred by the State.
- No citizen of India shall accept any title from any foreign State.
- No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.
- No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

### 6.7.2. Description

- It is a restriction on the powers of the State, citizens and non-citizens.
- The State must not give any titles except a military or an academic one.
- No citizen of India is allowed to accept any title from a foreign state.
- A foreign citizen holding any office of profit or office of trust under the Indian State is not allowed to accept any title, present, emolument, or office of any kind from a foreign state without the permission of the President of India.

### 6.7.3. Case of Bharat Ratna and Padma Awards

In **Balaji Raghavan case**, the SC allowed the State to give Bharat Ratna and Padma awards but made it clear that these couldn't be used as a title. These National Awards were instituted in 1954. The Janata Party government headed by Morarji Desai discontinued them in 1977. But they were again revived in 1980 by the Indira Gandhi government.

## 6.8. Article 19 – Right to Freedom

### 6.8.1. Text

All citizens shall have the right—

- to freedom of speech and expression;
- to assemble peaceably and without arms;
- to form associations or unions;
- to move freely throughout the territory of India;
- to reside and settle in any part of the territory of India; and
- to practise any profession, or to carry on any occupation, trade or business.

Originally, Article 19 contained seven rights. But, the right to acquire, hold and dispose of property was deleted by the 44th Amendment Act of 1978.

### 6.8.2. Applicability

Rights under Article 19 are protected against only state action and not private individuals. Moreover, these rights are available only to the citizens and to shareholders of a company but not to foreigners or legal persons like companies or corporations, etc. The State can impose

'reasonable' restrictions on the enjoyment of these six rights only on the grounds mentioned in the Article 19 itself and not on any other grounds.

Article 19 is suspended automatically if proclamation is on ground of external aggression, and remains so, as long as emergency is in operation. However, after the 44<sup>th</sup> Amendment, it cannot be suspended if the emergency is declared on the grounds armed rebellion.

### 6.8.3 Freedom of Speech and Expression

Under this article, every citizen has the right to express his **views, opinions, belief and convictions freely by word of mouth, writing, printing, picturing or in any other manner**. The Supreme Court held that the freedom of speech and expression includes the following:

- Right to propagate one's views as well as views of others.
- Freedom of the press.
- Freedom of commercial advertisements.
- Right against tapping of telephonic conversation.
- Right to telecast, that is, government has no monopoly on electronic media.
- Right against bundh called by a political party or organisation.
- Right to know about government activities.
- Freedom of silence.
- Right against imposition of pre-censorship on a newspaper
- Right to demonstration or picketing but not right to strike

The State can **impose reasonable restrictions** on the exercise of the freedom of speech and expression **on the grounds of** sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, and incitement to an offence.

### 6.8.4. Freedom of Assembly

Under this article, every citizen has the right to assemble peaceably and without arms. It includes the right to hold public meetings, demonstrations and take out processions. This freedom can be exercised only on public land and the assembly must be peaceful and unarmed. This provision does not protect violent, disorderly, riotous assemblies, or one that causes breach of public peace or one that involves arms. This right does not include the right to strike.

The State can impose **reasonable restrictions** on the exercise of right of assembly on two grounds, namely, sovereignty and integrity of India and public order including the maintenance of traffic in the area concerned.

- Under **Section 144 of Criminal Procedure Code (1973)**, a magistrate can restrain an assembly, meeting or procession if there is a risk of obstruction, annoyance or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or any affray.
- Under **Section 141 of the Indian Penal Code**, an assembly of five or more persons becomes unlawful if the object is-
  - to resist the execution of any law or legal process;
  - to forcibly occupy the property of some person;
  - to commit any mischief or criminal trespass;
  - to force some person to do an illegal act; and
  - to threaten the government or its officials on exercising lawful powers.

### 6.8.5. Freedom of Association

Under this, all citizens have the right to form associations or unions or **co-operatives** (97<sup>th</sup> Amendment Act) has been added. It includes the right to form political parties, companies, partnership firms, societies, clubs, organisations or any body of persons. It not only includes the right to start an association or union but also to continue with the association or union as such.

Further, it covers the negative right of not to form or join an association or union.

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**Reasonable restrictions** can be imposed on the exercise of this right by the State on the grounds of **sovereignty and integrity of India, public order and morality**. The Supreme Court held that the trade unions have no guaranteed right to effective bargaining or right to strike or right to declare a lock-out. The right to strike can be controlled by an appropriate industrial law.

#### 6.8.6. Freedom of Movement

Under this, every citizen can move freely from one state to another or from one place to another within a state. This right underlines the idea that India is one unit so far as the citizens are concerned. Thus, the purpose is to promote national feeling and not parochialism.

**Reasonable restrictions** on this freedom are two, namely, the interests of general public and the protection of interests of any scheduled tribe. The entry of outsiders in tribal areas is restricted to protect the distinctive culture, language, customs and manners of scheduled tribes and to safeguard their traditional vocation and properties against exploitation.

The Supreme Court held that the freedom of movement of prostitutes can be restricted on the ground of public health and in the interest of public morals. The Bombay High Court validated the restrictions on the movement of persons affected by AIDS.

The freedom of movement has two dimensions, viz, **internal** (right to move inside the country) and **external** (right to move out of the country and right to come back to the country). **Article 19** protects only the first dimension. The second dimension is dealt by **Article 21** (right to life and personal liberty).

#### 6.8.7. Freedom of Residence

Every citizen has the right to reside and settle in any part of the territory of the country. This right has two parts:

- The right to reside in any part of the country, which means to stay at any place temporarily, and
- The right to settle in any part of the country, which means to set up a home or domicile at any place permanently.

This right is intended to remove internal barriers within the country or between any of its parts. This promotes nationalism and avoids narrow mindedness. The State can impose **reasonable restrictions on the exercise of this right on two grounds**, namely, the **interest of general public and the protection of interests of any scheduled tribes**.

The right of outsiders to reside and settle in tribal areas is restricted to protect the distinctive culture, language, customs and manners of scheduled tribes and to safeguard their traditional vocation and properties against exploitation. In many parts of the country, the tribals have been permitted to regulate their property rights in accordance with their customary rules and laws.

The Supreme Court held that certain areas can be banned for certain kinds of persons like prostitutes and habitual offenders.

#### 6.8.8. Freedom of Profession

Under this, all citizens are given the right to practise any profession or to carry on any occupation, trade or business. This right is very wide as it covers all the means of earning one's livelihood. The State can impose reasonable restrictions on the exercise of this right in the interest of the general public. Further, the State is empowered to:

- Prescribe professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business; and
- Carry on by itself any trade, business, industry or service whether to the exclusion (complete or partial) of citizens or otherwise

Thus, no objection can be made when the State carries on a trade, business, industry or service either as a monopoly (complete or partial) to the exclusion of citizens (all or some only) or in competition with any citizen. The State is not required to justify its monopoly. This right does not include the right to carry on a profession or business or trade or occupation that is immoral (trafficking in women or children) or dangerous (harmful drugs or explosives, etc.). The State can absolutely prohibit these or regulate them through licencing.

### 6.8.9. Issues related to Rights under Article 19

#### 6.8.9.1 Status of Freedom of Press

Unlike several countries such as USA, there is no separate provision guaranteeing the freedom of press, but the Supreme Court in Sakaal paper v/s Union of India case, has held that the freedom of press is included in the “freedom of expression” under Article 19(1) (a). In Brij Bhushan case, SC clarified that there is no prior censorship on the media, i.e., no prior permission is needed.

44<sup>th</sup> amendment, 1976 introduced Article 361A that provides protection to a person publishing proceedings of the Parliament and State Legislatures.

In Indian Express case, it was clarified that the Freedom of Press includes:

- Right to Information
- Right to Publish
- Right to Circulate

In 1997, **the Prasar Bharti Act** granted autonomy to Doordarshan and All India Radio (which means it can criticize the state policies and actions).

In 1966, **Press Council of India** was created to regulate the print media. PCI has a retired SC judge as its chairperson (by convention) and 28 other members.

- 20 members are the representatives from the media
- 5 members are nominated by Parliament
- 3 members – one each come from UGC, Sahitya Kala Academy and Bar Council of India

The National Commission to Review the Working of Constitution (NCRWC) recommended that Freedom of Press be explicitly granted and not be left implied in the Freedom of Speech.

#### 6.8.9.2 Control of Social and Broadcast Media

Media in India is against external regulation. But it is realized that self-regulation may turn out to be no regulation at all. Hence PCI sought to bring electronic and social media under its ambit.

According to PCI chairperson, there is difference between regulation and control.

There are two rights on which media claims independence –

- Article 19(1) (a) – Under freedom of speech expression
- Article 19(1) (g) – Freedom to practice any profession, occupation, trade or business

Neither of these rights is absolute. Moreover, media cannot claim to be a purely commercial venture.

Levenson Report on Media in Britain – also calls for regulation of media.

#### 6.8.9.3. Freedom of Speech and Civil Servants

According to the Supreme Court, freedom of speech for civil servants can be curtailed in the interests of discipline even though such a restriction is not mentioned in Article 19 (2). Service rules are essential for discipline within services. The objective here is not to curb the freedom of speech of civil servants but to ensure that they are able to effectively discharge their duties. Hence, there is balance to be maintained between organizational functioning and freedom of

# SECTION 66A OF IT ACT



Section 66A added in 2008 to IT Act created controversies because of vagueness in its provisions. According to section 66A, messages, which are offensive and menacing in character can attract fines and up to 3 years of imprisonment. The terms offensive and menacing are however not defined by the Act. As per the new guidelines, only a DCP or IG level officer can register a FIR under provisions of IT Act.

In 2011, government instructed some Internet Service Providers to remove content, which was harmful to minors. This provision was also used to arrest political dissidents criticizing government or its functionaries.

The SC struck down Section 66A as unconstitutional in its entirety declaring it to be a draconian provision. It stated that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

However, it turned down a plea to strike down sections 69A and 79 of the Act, which deal with the procedure & safeguards for blocking certain websites and exemption from liability of intermediaries in certain cases, respectively.

The Court said that liberty of thought and expression was a cardinal value under Constitution. Three concepts fundamental in understanding the reach of this right were discussion, advocacy and incitement. Discussion, or even advocacy, of a particular cause, no matter how unpopular it may be, is at the heart of the right to free speech and it was only when such discussion or advocacy reached the level of incitement that it could be curbed on the ground of causing public disorder.

## 6.8.9.4. Sedition

As per Section 124A of IPC, Sedition is an act that brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India by words, either spoken or written, or by signs, or by visible representation, or otherwise. As per this Section, a person is liable to be punished with imprisonment for life or imprisonment up to three years with fine.

The section 124A of Indian Penal Code is a pre- independence provision, which covers sedition charges against government. Various verdicts by Indian Judiciary have led to re-interpretation and re-examination of 'sedition' in light of Article 19 of the Constitution. There has been an effort to strike a balance between right to free speech and expression and power of State to impose reasonable restrictions (Article 19(2)).

### Views of the Supreme Court

- In 1962, the Supreme Court in **Kedar Nath Singh vs. State of Bihar** upheld Section 124A and held that it struck a "correct balance" between fundamental rights and the need for public order.
- The court had significantly reduced the scope of Sedition law to only those cases where there is incitement to imminent violence towards overthrow of the state.

- Further, the Court held that it is not mere against government of the day but the institutions as symbol of state.
- Various verdicts in Romesh Thappar, Kanahiya Kumar case re-defined a seditious act only if it had essential ingredients as:
  - Disruption of public order,
  - Attempt to violently overthrow a lawful government,
  - Threatening the security of State or of public

## SHOULD WE HAVE SECTION 124A?

### ARGUMENTS IN FAVOR OF SECTION 124A

- **Not really a draconian law-** Now after the Supreme Court directions, its jurisdiction has been narrowed down. It can be applied only on grounds laid down by the court.
- **Application is a part of reasonable restrictions-** provided under the Article 19 (2)
- **Does not really curb free speech-** One can use any kind of strong language in criticism of the government without inviting sedition. However, such dissent should not be turned into some kind of persuasion to break the country.
- **Threats to unity and integrity of nation** due to presence of anti-national elements and divisive Forces such as naxals, separatists who are receiving support from inside and outside the country.
- **Mere misuse cannot be a ground of repeal-** rather provisions should be made where such misuse is eliminated

### ARGUMENT AGAINST SECTION 124A

- **Against democratic norms-** It stifles the democratic and fundamental right of people to criticize the government.
- **Inadequate capacity of State Machinery** - The police might not have the "requisite" training to understand the consequences of imposing such a "stringent" provision.
- **Possibility of Misuse-** It has been used arbitrarily to curb dissent. In many cases the main targets have been writers, journalists, activists who question government policy and projects, and political dissenters.
- **The draconian nature of this law**— as the crime is non-bailable, non-cognisable and punishment can extend for life—it has a strong deterrent effect on dissent even if it is not used.
- **Used to gag press-** The press should be protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

### Views of the Law Commission

- While it is essential to protect national integrity, it should not be misused as a tool to curb free speech. Dissent and criticism are essential ingredients of a robust public debate on policy issues as part of vibrant democracy.
- Hence, Section 124A should be invoked only in cases where the intention behind any act is to disrupt public order or to overthrow the government with violence and illegal means.

### Way Forward

- The guidelines of the SC must be incorporated in Section 124A as well by amendment to IPC so that any ambiguity must be removed. A private member bill was introduced in 2015 to amend this section. The Bill suggested that only those actions/words that directly result in the use of violence or incitement to violence should be termed seditious.
- The state police must be sufficiently guided as to where the section must be imposed and where not.

- Need to include provisions where the government can be penalized, if it misuses the section. This will ensure that section 124 A of IPC strikes a balance between security and smooth functioning of state with the fundamental right of freedom of speech and expression.

### 6.8.9.5. Hate Speech

Hate speech poses complex challenge to freedom of speech and expression. However, the question is what should be considered as a hate speech without curbing the freedom of speech and expression. In this regard, Law Commission has defined it as “incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like”. Thus, “hate speech is any word written or spoken, signs, visible representations within the hearing or sight of a person with the intention to cause fear or alarm, or incitement to violence.”

**T.K. Viswanathan committee**, constituted by the Centre, has recommended introducing stringent provisions for hate speech.

#### Observations of the Committee

- It was of the opinion that it was more effective to insert the substantive provisions in the IPC instead of the IT Act, since the IT Act was primarily concerned with e-commerce regulation.
- **Section 78 of the IT Act** primarily ‘dealt with capacity building’ and needs to be relooked to sensitize the officers and give them support with electronic expertise, computer- forensics and digital-forensics.
- It has **recommended amendments in CrPC** to enable each state to have a **State Cyber Crime Coordinator** (Sec 25B) and a **District Cyber Crime Cell** (Sec 25C).
- The offensive speech should be “highly disparaging, abusive or inflammatory against any person or group of persons”, and should be uttered with the intention to cause “fear of injury or alarm”.
- The committee also expressed the desirability of having **guidelines in place to prevent the abuse of provisions by investigation agencies** and to safeguard innocent users of social media.
- Many recommendations were taken from the Law Commission report, which are-
  - Insertion of Section 153C to prohibit incitement of hatred through online speech on grounds of religion, caste, community, gender, sexual orientation, tribe, language, place of birth etc.
  - Section 505A was proposed to be inserted by the Law Commission to prevent causing of alarm, fear, provocation of violence etc. on grounds of identity.
  - It was clarified that the need for intent has to be established.

#### Concerns associated with Committee's recommendations –

- The Law Commission identifies the status of the author of the speech, the status of victims of the speech, the potential impact of the speech, in order to qualify something as **Hate Speech**. However, these concerns are apparently **not well reflected in the committee report**.
- Besides, **extremely broad** terms like, highly disparaging, indecent, abusive, inflammatory, false or grossly offensive information, etc., have been used by the report which takes us back to the ambiguity that the section 66A held.

#### Conclusion

- It is vital to examine the **context in which speech is made** in order to properly determine the motivation behind it – and the effect it is likely to have. The dangerousness of speech

cannot be estimated outside the context in which it was made or disseminated, and its original message can become lost in translation.

- Supreme Court in **Pravasi Bhalai Sangathan v. Union of India in 2014**, states that hate speech must be viewed through the lens of the right to equality. However, few loopholes need to be plugged when it comes to regulation of hate speeches, so as to transform our country from being a procedural democracy to also a substantive one.

### 6.8.9.6 Defamation

In 2016, Supreme Court upheld the constitutional validity of the country's colonial-era criminal defamation laws, ruling that they are not in conflict with the right to free speech. Under sections 499 and 500 of the Indian Penal Code, defamation is a criminal offence. Defamatory acts can include "words either spoken or intended to be read", signs or visible representations, which are published or put up in the public domain. The offence is punishable with up to two years imprisonment, a fine or both.

#### Why it should be retained?

- Reputation** of an individual, constituent in **Article 21** is an equally important right as free speech.
- Criminalization of defamation to protect individual dignity and reputation is a "**reasonable restriction**"
- Editors have to take the responsibility of everything they publish as it has far-reaching consequences in an individual and country's life
- The acts of expression should be looked at both from the perspective of the speaker and the place at which he speaks, the audience etc.
- It has been part of statutory law for over 70 years. It has neither diluted our vibrant democracy nor abridged free speech
- Protection for "legitimate criticism" on a question of public interest is available in the
  - Civil law of defamation &
  - Under exceptions of Section 499 IPC
- Mere misuse or abuse of law can never be a reason to render a provision unconstitutional rather lower judiciary must be sensitized to prevent misuse
- Monetary compensation in civil defamation is not proportional to the excessive harm done to the reputation

#### Significance of this judgement

- The judgement raises reputation to the level of "shared value of the collective" and elevates it to the status of a fundamental right under Article 21 of the Constitution.
- According to the judgement, the theory of balancing of rights dictates that along with the right to freedom of speech and expression, there is a correlative duty on citizens not to interfere with the liberty of others, as everyone is entitled to the dignity of person and of reputation.

#### Why it should be retained?

- Freedom of speech and expression of media is important for a vibrant democracy and the threat of prosecution alone is enough to suppress the truth. Many times the influential people misuse this provision to suppress any voices against them.
- Considering anecdotal evidence, every dissent may be taken as unpalatable criticism.
- The right to reputation cannot be extended to collectives such as the government, which has the resources to set right damage to their reputations.
- The process in the criminal cases itself becomes a punishment for the accused as it requires him to be personally present along with a lawyer on each date of hearing.

- Given that a civil remedy to defamation already exists, no purpose is served by retaining the criminal remedy except to coerce, harass and threaten.
- It goes against the global trend of decriminalizing defamation
  - Many countries, including neighbouring Sri Lanka, have decriminalized defamation.
  - In 2011, the Human Rights Committee of the International Covenant on Civil and Political Rights called upon states to abolish criminal defamation, noting that it intimidates citizens and makes them shy away from exposing wrongdoing.

### 6.8.9.7 Banning of films and books

In India, there have been regular protests and violence over the publication of a book, cartoon or release of a movie which certain sections claim as to be offensive to them. They resort to violence, protests and shutdowns resulting in damage to life and property. As a result, governments often ban such expression of arts citing law and order problem. This directly surmounts to curbing the freedom of speech and expression of the artists and stifling the free speech in the country. In this context, SC in several judgments has held such bans to be illegal. It has opined that once an expert body has cleared the film, it is no excuse to say that there may be a law and order situation. It is for the government to see that law and order is maintained. In any democratic society there are bound to be divergent views. Merely because a small section of the society has a different view and choose to express their views by unlawful means can be no ground for such bans. It is the duty of the government to ensure law and order.

### 6.8.9.8. Right to access internet

Recently, Supreme Court has delivered verdict on a bunch of petitions challenging the restrictions imposed on internet services and movement of people in Jammu and Kashmir.

#### Internet shutdowns

- India tops the list** of Internet shutdowns globally. According to Software Freedom Law Center's tracker, there have been 381 shutdowns since 2012, 106 of which were in 2019.
- The ongoing **shutdown in Kashmir is the longest ever** in any democratic country.
- Legislative provisions:**
  - Suspension of Internet services are dealt with under the Information Technology Act, 2000, the Criminal Procedure Code (CrPC), 1973 and the Telegraph Act, 1885.
  - Before 2017**, Internet suspension orders were issued under Section 144 of the CrPC. But, in 2017, the central government notified the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules under the Telegraph Act to govern suspension of Internet.
    - Despite the 2017 rules, the government has often used the broad powers under Section 144 CrPC.
- Economic cost:** India lost over \$1.3 billion in internet shutdowns across the country in 2019 — making it the third-most economically affected country after Iraq and Sudan.
- Justifications for shutdowns:**
  - The shutdown is based on analysis of intelligence inputs. This is a preventive measure used by the law & order administration as a last resort to address mass protests, civil unrest, so as to ensure peace.
  - In certain extreme situations where rumours through WhatsApp and other social media start playing a disruptive role, it may become necessary to have internet shutdowns.

#### Arguments against

- Internet activists, law experts, and human rights agencies suggest that there is **no real evidence of Internet shutdown actually helping in preventing mass protests** or civil unrest.
- Internet shutdowns make **human rights a hostage to the whims of the executive**: the fundamental rights to speech, conduct business, access healthcare, express dissent, and movement of the people in a state, are compromised.

- Shutting the internet results in an information blackout that **can also create hysteria, panic** and can result in even more discord.

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#### **Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017 (Suspension Rules)**

- These Rules were framed by ministry of communications and derive their powers from **Section 5(2) of the Indian Telegraph Act**, which talks about interception of messages in the “interests of the sovereignty and integrity of India”.
- It empowers the government to **block transmission of messages** in case of a public emergency or for public safety in any part of the country.
- Any order suspending internet under the Rules, **can be only for a temporary duration** and not for an indefinite period.
- Directions to suspend the telecom services shall not be issued except **by Home Secretary of the country and a secretary of a state's home department** and that order should be taken up by a review committee within five days.

#### **UN Resolution on Internet Shutdown**

- In 2016, the United Nations Human Rights Council released a non-binding resolution condemning intentional disruption of internet access by governments.
- The resolution reaffirmed that "the same rights people have offline must also be protected online".

#### **Supreme Court's observation On Internet shutdown**

- Freedom of speech and expression through the medium of internet is a fundamental right under Article 19(1)(a) of the Constitution.
- The restrictions on internet have to follow the principles of proportionality under Article 19(2).
  - Doctrine of proportionality is a principle that is prominently used as a ground for judicial review in cases of administrative action.
  - The doctrine essentially signifies that the punishment should not be disproportionate to the offence committed or the nature and extent of the State's interference with the exercise of a right must be proportionate to the goal it seeks to achieve.
- Freedom of trade and commerce through internet is also a constitutionally protected right under Article 19(1)(g).
- Suspension of internet for indefinite period not permissible. It can only be for a reasonable duration and periodic review should be done. Government should publish all orders of prohibition to enable affected persons to challenge the same.

#### **On Section 144 of CrPC:**

- The power under Section 144, cannot be used to suppress legitimate expression of opinion or grievance or exercise of any democratic rights
- When Sec 144 is imposed for reasons of apprehended danger, that danger must be an “emergency”.
- The imposition of Sec 144 must strike a balance between the rights of the individual and the concerns of the state.
- Powers under Sec 144 should be exercised in a reasonable and bona fide manner, and the order must state material facts in order to enable judicial review.

#### **Conclusion**

- Expression through the Internet has gained contemporary relevance and is one of the major means of information diffusion. **Before completing blocking the Internet, it is essential to conduct a proportionality and necessity test.** It is crucial to consider whether the same objective can be achieved by a less intrusive and more effective solution such as deployment of the police force and running advisories on media.
- At the same time, **in the interest of transparency, government should document the reasons, time, alternatives considered, decision-making authorities and the rules** under which the shutdowns were imposed and release the documents for public scrutiny.

## 6.8.9.9. Caste Rallies

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19 (1)(b) itself mentions the restriction, that is, Freedom to assemble peacefully without arms. Other restrictions are found in 19(3), which are as follows:

- Sovereignty and integrity of India
- Public Order

Lucknow bench of Allahabad HC in 2013 has banned caste rallies on the ground that they disturb public order and creates animosity between castes. This order is being contested as it seems to violate Art. 19(1)(b).

## 6.8.9.10. Right to strike in case of Govt. Officials

Trade Unions have the right to strike under certain circumstances in Industrial Disputes Act.

However, for the government officials, SC has held that right to strike is available only as a last resort, when all other channels of communication have failed. However, it can not be deemed to be coming under the cover of Fundamental Rights. Hence, the government can invoke Essential Services Maintenance Act in such situations and force to call off the strike.

SC in T.K. Rangarajan vs. State of Tamil Nadu held that govt. officials don't have the fundamental right to strike.

## 6.9. Article 20- Protection in respect of Conviction for Offences

### 6.9.1. Text

Protection in respect of conviction for offences.

- 1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
- 2) No person shall be prosecuted and punished for the same offence more than once.
- 3) No person accused of any offence shall be compelled to be a witness against himself.

### 6.9.2. Description

Article 20(1) guarantees rights against ex-post facto laws. Only a law in force at the time of commission of the said offence can be used to punish an accused. However, such a protection is available only in case of criminal laws and not civil laws.

Article 20(2) provides protection from double jeopardy. It states that an individual can be punished for an offence only once. Departmental inquiries are however not treated as violation of this principle.

Article 20(3) protects an individual from self-incrimination. Every person has the right to defend himself. In Selvi vs. State of Karnataka SC has put restrictions on narco analysis and brain mapping. However, DNA testing and other samples can be taken.

### 6.9.3. Controversies

#### 6.9.3.1. Vodafone case

In 2012, the Government of India made budgetary proposal to amend the Income Tax Act with retrospective effect from 1962 to assert the government's right to levy tax on merger and acquisition (M&A) deals involving overseas companies with business assets in India. It was partly to override the Supreme Courts' ruling favoring Vodafone in a tax dispute. Notably, the government could bring in such an amendment because it was a tax law, not a criminal law. However, the Parthasarathi Shome committee later recommended that either the

retrospective tax amendment be withdrawn or penalty/interest, if covered under taxes, be waived off.

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### 6.9.3.2. Aftermath of 16th December 2012, Nirbhaya incident

After the notorious gang rape incident in Delhi, even though public sentiment favored harsher punishment for all the six accused in the Nirbhaya gang rape case — one of them being a minor — any revision in the juvenile age would not help the case as the amendment shall not apply with retrospective effect.

### 6.9.4. Applicability

Applies to all – individuals whether Indian citizens or foreigners.

## 6.10. Article 21 – Right to Life and Liberty

### 6.10.1. Text

*Protection of life and personal liberty.*

*No person shall be deprived of his life or personal liberty except according to procedure established by law.*

### 6.10.2. Description

This article is a check on arbitrary powers of the State. The State must act according to a procedure while depriving an individual of his liberty.

Procedure established by law has been borrowed from the British tradition. It checks whether the law is procedurally correct. However, judiciary is not allowed to challenge the intentions of the law.

Due process of law is a facet of American judiciary. Judiciary can challenge the law not only on procedural grounds but also on the basis of its reasonableness.

### 6.10.3. Due Process of Law

It implies that law has to be fair and reasonable. If it is not, then it is liable to be struck down even if the prescribed procedure is followed. It is also known as Principle of Natural justice. The constitutional guarantee of due process of law, found in fifth and fourteenth amendment to the US Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty and property. It is because of this principle that the Supreme Court of USA has acquired more powers than Apex Courts in other countries, including India.

# WHAT CONSTITUTES RIGHT TO LIFE?

In the Maneka Gandhi case, the Supreme Court also ruled that "life" under Article 21 meant more than a mere "animal existence". It would include the right to live with human dignity and all other aspects, which made life "meaningful, complete and worth living". Subsequent judicial interpretation has broadened the scope of Article 21 to include within it a number of rights, including:



Right to Elementary Education



Right to livelihood



Right to life with dignity



Right to water



Right to speedy justice



Right to privacy



Right to health



Right to travel abroad



Right to shelter



Right to free legal aid



Right against bonded labor

Note: In the Hussainara Khatoon Case 1979, which saw the emergence of PIL in India, it was laid down that speedy trial is the essence of criminal justice and, therefore, the Supreme Court for the first time talked of the necessity of free legal aid to poor persons to make the justice system mount a meaningful protection of their rights.

## 6.10.4. Status in India

### 6.10.4.1. Maneka Gandhi case (1978)

Supreme Court accepted that due process is inherent in procedure established by law. SC in this case applied the American principle of "due process of law" for the first time. It applied the following arguments:

- Article 19 and 21 can't be understood as watertight compartments and the same criteria of reasonableness must be applied for Article 21 too.
- Merely following the procedure established by law is not enough. The courts have the right to review and question the reasonableness of the law itself.
- Restrictions must be reasonable, just and fair and shouldn't be arbitrary.

In India, traditionally we followed the principle of "procedure established by law", as it prevailed in Britain. However since 1978, we have followed both in India.

## 6.10.4.2. A.K. Gopalan Case (1950)

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The Supreme Court held that due process of law is not available in India. Hence, it implied that the right only protects life and liberty of an individual from arbitrary executive action, and not from legislative action. Further, it was enough if the procedure was followed and the courts could not inquire into the reasonableness of the procedure.

## 6.10.5. Impact of National Emergency and Applicability

Rights under Article 20 and 21 are never suspended and both are available to all individuals whether Indian citizens or foreigners.

## 6.10.6. Right to Death/Suicide

In Gyan Pal case, SC has settled the controversy by clearly establishing that there is no right to suicide and death. Thus section 309 of IPC, which criminalizes attempt to suicide doesn't violate Article 21.

## 6.10.7. Death Penalty/Capital Punishment

While global trend is in favor of abolition of death penalty, India continues to find itself in mix of countries such as China, Iran, Pakistan, USA where it has not been completely abolished.

The proponents of death penalty hail it for its deterrent capacity. Further, there are some crimes, which are so heinous that nothing short of death penalty meets the ends of justice. In cases like terrorism, if terrorists are not executed then they continue to pose a grave threat to national security.

However following arguments are made in favor of abolishing death penalty.

- No sufficient data to support the deterrent logic.
- Study conducted in USA shows that the state abolishing death penalty had witnessed the fall in murders.
- The principle of revenge (eye for an eye) cannot be the basis of justice in any civilized society
- The purpose of punishment should be to reform rather than to punish
- In Bachan Singh case, the Supreme Court sought to strike a balance. It proclaimed that death penalty is an exception not a rule. It proclaimed the doctrine of "rarest of the rare".
- There is also possibility of error in judgment as admitted by the SC in 2009 in "Santosh Kumar v/s State of Maharashtra case". It admitted that there are at least 13 cases in which death penalty was awarded, the doctrine of "rarest of the rare" was not applied. Out of these, 2 persons have already been executed.
- United Nation's Declaration on Human Rights also expects the state to abolish torturous punishments and death penalty.

It is argued that for heinous crimes such as rape and murder, life imprisonment can be a better option.

## 6.10.8. Right to Privacy

In Justice K. S. Puttaswamy (retd.) vs Union of India (2017), a nine-judge Constitution Bench of the Supreme Court ruled that right to privacy is an intrinsic part of life and liberty under Article 21. However, the court held that privacy is not an absolute right.

# Key Features of K. S. Puttaswamy Judgement on Right to Privacy



**Expands the individual's fundamental rights** - by guaranteeing it in Article 21 and including freedom from intrusion into one's home, the right to choice of food, freedom of association etc.

**Ensures dignity** - as it is not possible for citizens to exercise liberty and dignity without privacy.

**Etches firmer boundaries for the state** - Now right to privacy cannot be curtailed or abrogated only by enacting a statute but can be done only by a constitutional amendment.

**Increase responsibility of state to protect data** - as any data breach in national programmes involving collection of personal data would have to be compensated unlike in a police state.

**Shows an admirable capacity of judiciary to self-correct** - This judgment overrules its previous stand in 6 and 8-judge benches.

**Independent external monitoring** - Now citizen can directly approach Supreme Court or High Courts for violation of his fundamental right under Articles 32 and 226. Thus ensuring that the right is subject to reasonable restrictions of public health, morality and order only.

**Informational privacy is a facet of this right** - Government must put in place a robust regime for data protection.

## Concerns arising from judgement

**Bearing on government's welfare schemes & other cases** - such as Aadhaar, Section 377, WhatsApp privacy policy, restriction on eating practices etc.

**Bearing on RTI** - A fine balance is difficult to be maintained between right to privacy & right to information such that disclosure of information does not encroach upon someone's personal privacy

**Possible misuse by accused in investigations by accused** - on using personal information by law enforcement agencies

**Contours of privacy cannot be defined** as it pervades all other fundamental rights. It is a cluster of rights including surveillance, search and seizure, telephone tapping, abortion, transgender rights etc.

**Undermines Separation of Power** - as it is not the job of court to amend fundamental rights. Inclusion or exclusion of fundamental rights is only the proviso of Parliament.

## HEART OF THE MATTER

### SALIENT POINTS

- Privacy is a constitutionally protected right emerging primarily from the guarantee of life and liberty in Article 21 of the Constitution
- Privacy is not an absolute right, but any invasion must be based on legality need and proportionality
- It includes the preservation of personal intimacies sanctity of family life, marriage, procreation, the home and sexual orientation
- Informational privacy is a facet of this right. Dangers to this can originate from both state and non-state actors
- Privacy connotes a right to be left alone. It safeguards individual autonomy and recognises one's ability to control vital aspects of his/her life
- Government must put in place a robust regime for data protection. It must bring about a balance between individual interests and legitimate state concerns

The government can introduce a law which "intrudes" into privacy for public and legitimate state reasons. Legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge and preventing the dissipation of social welfare benefits. But a person can challenge this law in country's constitutional courts for violation of his fundamental right to privacy.

### 6.10.9. Euthanasia/Mercy killing

Aruna Shanbag case, SC permitted passive euthanasia but not active euthanasia.

### 6.10.9.1. Active Euthanasia

Means ending the life of a person by giving him active means like lethal injections, drugs etc.

### 6.10.9.2. Passive Euthanasia

Means taking out the life support systems. It is allowed by SC to be done under guarded circumstances only.

In March, 2018, Supreme Court ruled that the **right to die with dignity** is a fundamental right, saying that an individual could make an advance "living will" that would authorize passive euthanasia under certain circumstances. The Court held that passive euthanasia and living will were legally valid.

### 6.10.9.3. Living Will

Living will is a written document that allows a patient to give explicit instructions in advance about the medical treatment to be administered when he or she is terminally-ill or no longer able to express informed consent.

### 6.10.9.4. Guarded Circumstances

Once request for mercy killing is made by the patient or close relatives, the case is considered by a committee of HC judges of at least two members. This committee will make recommendation on the basis of opinion of three-member committee of doctors.

### 6.10.10. Right to choose

Right to Choose guarantees individuals the right to personal autonomy, which means that a person's decisions regarding his or her personal life are respected so long as he/she is not a nuisance to society. However, higher judiciary has taken differing opinions on this right.

- Supreme Court in ***Hadiya Case*** in 2018 held that a person's right to choose a religion and marry is an intrinsic part of a person's meaningful existence. Neither the State nor "patriarchal supremacy" can interfere in his/her decision. Freedom of faith is essential to his/her autonomy; choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme.
- Patna High Court in the ***Confederation of Indian Alcoholic Beverage Companies v State of Bihar (2016)*** held the imposition of "prohibition" in Bihar as unconstitutional. It addressed the question of imposition of prohibition in terms of its impact on the right to life and liberty of a citizen. Supreme Court, however, has stayed the operation of the Patna High Court judgment.
- Bombay High Court in ***High Court on Its Own Motion v State of Maharashtra (2016)***, read in "choice" as a ground on which a woman may lawfully seek an abortion, even though the Medical Termination of Pregnancy Act, 1971 only permits abortions on the ground that the pregnancy might affect the mental health of the woman.
- Bombay High Court, in ***Shaikh Zahid Mukhtiar v State of Maharashtra (2016)***, struck down the sections of Maharashtra Animal Preservation Act, 1976, on the grounds that it is a breach of Article 21, specifically the right to consume food of one's choice in private.
- Supreme Court overturned Delhi High Court's judgment decriminalizing voluntary homosexual acts on the premise (among other things) that it was a violation of the right to privacy of the individual, which is part of the right to life of a person (***Suresh Kumar Koushal v Naz Foundation (2014)***). It refused to even engage in the argument that LGBTQ persons may have rights.

## 6.11. Article 21A

### 6.11.1. Text of Right to education

*The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.*

### 6.11.2. Description/Historical Evolution

In 1992, the Supreme Court held in Mohini Jain case that the “right to education” is part of “right to life” and hence is a fundamental right under Part III of the Constitution.

The Supreme Court Judgment in Unni Krishnan case further reinforced the same when it affirmed that right to education flows from the right to life guaranteed under Article 21 and draws its support from the Directive Principles of the Constitution, Article 41 and 45.

Article 41 provides for right to education. Article 45 originally required the State to make provisions within 10 years for free and compulsory education for all children until they achieved the age of 14 years. It has been replaced by 86<sup>th</sup> Amendment Act.

Notably, SC held that this too is not an absolute right. It shall depend on the state to determine the manner in which it shall implement the right.

The demand for RTE was first made by Gopal Krishna Gokhale during British times. After 100 years of this, RTE came into existence.

### 6.11.3. 86<sup>th</sup> Amendment Act

The 86<sup>th</sup> Amendment Act brought about the following changes to the Constitution:

- Under Article 21A, every child between the age of 6-14 has a fundamental right to education, which the State shall provide “in such a manner as the State may, by law, determine”
- Early childhood care and protection (for children in the age group of 0-6) is provided for as a directive principle of State Policy under Article 45 of the Constitution.
- Article 51 (K) provides a duty on those who are parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age 8-14.

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# SALIENT FEATURES OF RTE

- All children between the ages of six and 14 years shall have the right to free and compulsory elementary education in a neighborhood school.
- Even those who have been deprived of this opportunity, this act provides for 8 years of schooling. Those who have missed i.e. non-admitted children will be admitted to the class appropriate to their age.
- Kendriya Vidyalayas, Navodaya Vidyalayas, Sainik Schools, and unaided schools shall admit at least 25% of students from disadvantaged and economically weaker groups.
- No child shall be held back, expelled, or required to pass a board examination until the completion of elementary education.
- Schools may not screen applicants during admission or charge capitation fees.
- All schools to follow the norms of teacher qualification within 5 years. A fixed teacher to pupil ratio of 1:30 is to be achieved.
- All schools except for those private unaided, will constitute School Management Committees. 75% of its members would be parents or guardians.
- National Commission for the Protection of Child Rights will act as watchdog. States to constitute similar state bodies at the state level.
- Central and state government to share the funding:
  - ▷ Center may ask the Finance Commission to allocate additional resources to states.
  - ▷ Funding gaps can be arranged in partnership with civil society
  - ▷ Curriculum development in accordance with the constitutional rights

## 6.11.4. Evaluation of RTE

- There are no specific penalties if the authorities fail to provide the right to elementary education.
- Both the state government and the local authority have the duty to provide free and compulsory elementary education. Sharing of this duty may lead to neither government being held accountable.
- The Bill provides for the right to schooling and physical infrastructure but does not guarantee that children learn. It exempts government schools from any consequences if they do not meet the specified norms.
- The Bill legitimizes the practice of multi-grade teaching. The number of teachers shall be based on the number of students rather than by grade.
- Enrolment has reached universal levels but the problem of dropouts and absenteeism continues
- Also, the act doesn't provide for those who cannot go to school
- Hence, it is said that it is a right to schooling instead of the right to education

- Bulk of the schools fail to meet the targets of improving infrastructure
- There is a big deficit in the country with respect to the availability of untrained teachers
- Some people believe that not failing a child is not a good option as it relieves the teachers from responsibility.

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### **6.11.5. Applicability**

Applies to all children in the relevant age group whether Indian citizens or not.

## **6.12. Article 22- Protection against Arrest and Detention in Certain Cases**

### **6.12.1. Text**

Protection against arrest and detention in certain cases.

- 1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
- 2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
- 3) Nothing in clauses (1) and (2) shall apply—
  - a) to any person who for the time being is an enemy alien; or
  - b) to any person who is arrested or detained under any law providing for preventive detention.
- 4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—
  - a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or
  - b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).
- 5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a (b) to any person who is arrested or detained under any law providing for preventive detention.
- 6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

### **6.12.2. Description**

Article 22 provides for 2 kinds of detentions-

- Preventive detention; and
- Punitive detention

Protection in case of punitive detention is available to citizens and no-citizens but not to enemy aliens. A person must be informed of the grounds of his arrest so that he can prepare for his defense. The person also has the right to consult and be defended by the legal practitioner of his choice. Such an individual must be presented before a magistrate within 24 hours so that any wrong action of the executive can be corrected.

The objective of preventive detention is to prevent a person from committing a crime. Certain rights are available to such a person as well. He must be informed of the grounds of his arrest. Police cannot detain a person beyond 3 months unless it has permission from an advisory board. Such an advisor board will consist of 3 judges of SC. Parliament can also prescribe a law providing for detention beyond 3 months.

### **6.12.2.1. Criticism of Preventive Detention**

In India, there has been a misuse of such laws and so it has become a human rights concern. It represents the police power of the State. No other democratic country mentions preventive detention in its constitution and such laws come into effect only under emergency conditions.

### **6.12.2.2. Arguments given in favor of Preventive detention**

Areas in context of which preventive laws can be made are laid down in the Constitution itself in Union List entry 9 related to defense, foreign affairs and security of the country and Concurrent List entry 3 for maintenance of public order, security of state and maintaining essential supply and services. Thus, it checks the arbitrary action by the State.

### **6.12.3. Legislations**

The below mentioned acts have a provision to detain beyond three months:

- National Security Act,
- Conservation of Foreign Exchange and Prevention of Smuggling Act (COFEPOSA); and
- Prevention of Terrorism Act (POTA) Likewise, many states have come up with similar acts. Both at the central and state level, there are around forty laws in the statute book of India authorizing preventive detention.

### **6.12.4. Court Judgments**

- In case of arrest of Anna Hazare in 2011, SC held that preventive detention law can be invoked only if there is "imminent danger to peace" and a person sought to be arrested is likely to commit a cognisable offence. Otherwise it would violate the victim's fundamental right.
- In another judgment, SC held that rhetorical incantation of word "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. It quashed preventive detention of a man who was accused of selling spurious chilli seeds to farmers. It observed that when sufficient remedies for offence were available under ordinary laws, preventive detention must not be invoked. It cannot be an alternative to normal legal process. Order of preventive detention affects the life and liberty of citizen under Articles 14, 19, 21 and 22 and hence should be used cautiously. It came down heavily on the practice of states to use preventive detention laws to avoid efforts in investigation and prosecution.

## **6.13. Article 23 – Prohibition of Traffic in Humans and Forced Labor**

### **6.13.1. Text**

Prohibition of traffic in human beings and forced labor.

- 1) Traffic in human beings and begar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
- 2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

### 6.13.2. Description

Article 23(1) abolishes any form of bonded labor, forced labor and trafficking in human beings. It has special significance for SC/STs and women. “Begar” is described as labor or service, which a person is forced to give without receiving any remuneration for it. It is also known as “debt bondage”.

Article 23(2) states that State can impose compulsory service if there is a need for the same.

Notably, Devadasi system has been abolished because of the prohibition of above article.

### 6.13.3. Legislations

To check human trafficking, following legislations have been made:

- Immoral Traffic Prevention Act (ITPA), 1956
- Bonded Labor System (Abolition) Act, 1976
- Juvenile Justice (Care and Protection) Act, 2000

### 6.13.4. Applicability

It is available both to citizens and non-citizens.

## 6.14. Article 24 – Prohibition of employment of children

### 6.14.1. Text

Prohibition of employment of children in factories, etc.—No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

### 6.14.2. Description

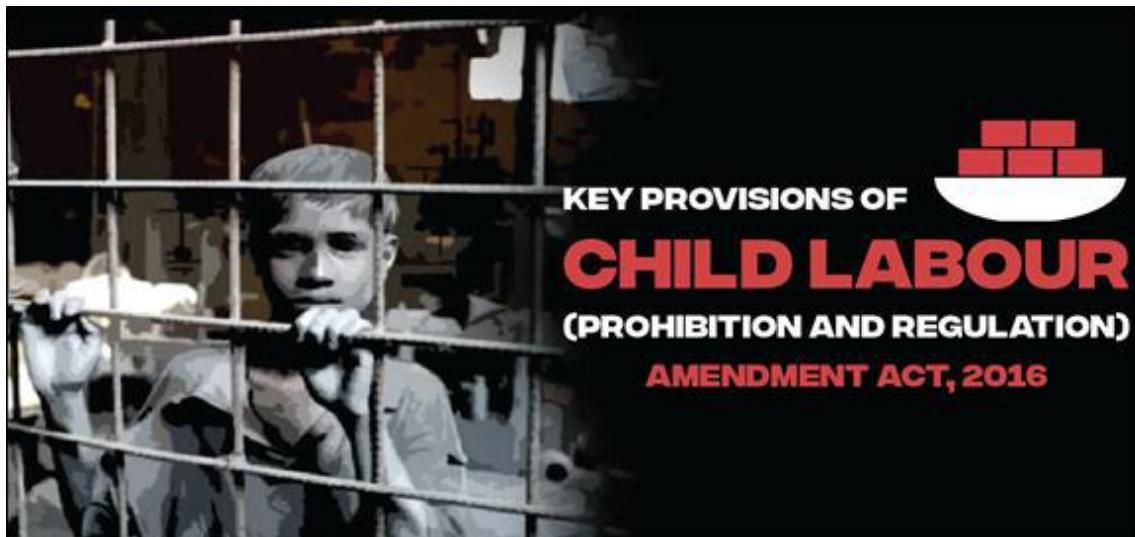
Article 24 prohibits the employment of children in hazardous occupations. However, it does not prohibit their employment in harmless work.

**Note:** Article 23 and 24 are complemented by Article 39(e) and 39(f).

### 6.14.3. Legislations

Child Labor (Prohibition and Regulation) Act, 1986 is the legislation to check child labor. The Act prohibits employment of children below 14 years in certain occupations such as automobile workshops, bidi-making, carpet weaving, handloom and power loom industry, mines and domestic work.

In 2016, Parliament passed **Child Labour (Prohibition and Regulation) Amendment Act, 2016**. It amends 1986 Act to widen its scope against child labour and stricter punishments for violation.



- It prohibits employment of children below 14 years in certain occupations such as automobile workshops, bidi-making, carpet weaving, handloom and power loom industry, mines and domestic work.
- In light of the Right of Children to Free and Compulsory Education Act, 2009, the Act seeks to prohibit employment of children below 14 years in all occupations except where the child helps his family after school hours or is working in entertainment industry.
- It bans employing anybody below 18 years in hazardous occupation.
- Adds a new category of persons called "adolescent". An adolescent means a person between 14 and 18 years of age. The Act prohibits employment of adolescents in hazardous occupations as specified (mines, inflammable substance and hazardous processes).
- Central government may add or omit any hazardous occupation from the list included in the Act.
- Enhances the punishment for employing any child in an occupation. It also includes penalty for employing an adolescent in a hazardous occupation.
- Penalty for employing a child was increased to imprisonment between 6 months and two years (from 3 months-one year) or a fine of Rs 20,000 to Rs 50,000 (from Rs 10,000-20,000) or both.
- Penalty for employing an adolescent in hazardous occupation is imprisonment between 6 months and two years or a fine of Rs 20,000 to Rs 50,000 or both.
- Government may confer powers on a District Magistrate to ensure that the provisions of the law are properly carried out.
- It empowers government to make periodic inspection of places at which employment of children and adolescents are prohibited.

The Commission for Protection of Child Rights Act, 2005 was enacted to provide for speedy trials of offences committed against children and violation of child rights.

In 2006, government banned the employment of children as domestic servants or working establishments like hotels. It warned that anyone employing children below the age of 14 years is liable for penal action.

#### **6.14.4. Applicability**

It is available to all children regardless of citizenship status.

#### **6.15. Article 25**

Freedom of conscience and free profession, practice and propagation of religion.

- 1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
- 2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

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## Bedrock of **Secularism** in India

The **freedom of conscience** refers to the inner freedom of an individual to mould his religious belief and faith. The state cannot interfere in this inner freedom of the individual. When this inner freedom takes an outward expression, then it takes the form of right to profess, practice and propagate a religion of one's choice.

The **right to profess** means the right of an individual to express openly his religious belief and faith. For instance, right of Sikhs to carry kirpan is considered as their right to profess.

The **right to practice** means the performance of religious worship, rituals, ceremonies and exhibition of beliefs and ideas.

The **right to propagate** implies the transmission and dissemination of one's religious beliefs to others or exposition of the tenets of one's religion. But, it does not include a right to convert another person to one's own religion. Forceful conversions impinge on the 'freedom of conscience' guaranteed to all the persons alike.

### 6.15.1. Description

**Explanation I.** The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

**Explanation II.** In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

### 6.15.2. Applicability

Also, these rights are **available to all persons**—citizens as well as non-citizens.

# ISSUE OF RELIGIOUS CONVERSIONS IN INDIA

- Indian constitution in its Part III (Articles 25 to 28) endorses the freedom of religion in India (for Indian citizens and anyone who resides in India) along with specified limitations. However, the term religion is **nowhere defined in the Indian Constitution** but it has been given expansive content by way of judicial pronouncements.
- Although Indian position on the freedom of religion entails limited & permissible interference of the state in religious matters, various state governments (Uttarakhand, Jharkhand, MP, Odisha etc.) have **enacted anti-conversion laws** with the purported aim of preventing conversions brought about by coercion or inducements. Such laws have been a subject of intense criticism and have been alleged as infringing on one's right to freedom of religion.
- What further compounds the issue is the absence of any explicit right to convert in the provisions relating to the concerned fundamental right in the Constitution. Court judgements in various cases have brought a certain crucial understanding on the matter of conversion in the country in light of freedom of religion and the individual's right to choice.



## 6.15.3. Important Judgments

### 6.15.3.1. Jagadishwaranand case, 1984

The Supreme Court held that the Anand Margi practice of dancing with skulls is not essential to its religion and could be reasonably restricted. Similarly, cow slaughter is not considered essential to Islam on Bakrid Day. Thus, the state can regulate what constitutes the essential religious practices and what does not and outlaw the latter if it is anti-social.

### 6.15.3.2. Stainislau v/s State of MP, 1977

Constitution bench of the Supreme Court ruled that Article 25(1) doesn't give the right to convert but only the right to spread tenets of one's own religion.

Thus, only voluntary conversions are valid in India. In fact, some states have passed anti-conversion laws prohibiting forced conversions.

## 6.16. Article 26

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### 6.16.1. Text

Freedom to manage religious affairs—subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

- a) to establish and maintain institutions for religious and charitable purposes;
- b) to manage its own affairs in matters of religion;
- c) to own and acquire movable and immovable property; and
- d) to administer such property in accordance with law.

### 6.16.2. Description

Article 26 states that a religion has a right to

- Establish and maintain its institutions for religious and charitable purposes,
- Manage its own affairs and
- Acquire property for the same.
- The State can make laws to regulate the administration of such property, but it cannot take away the right to administration altogether.

This freedom is, however, subject to **public order, morality and health**.

**Note-** The “*religious denomination*” must satisfy three conditions. It must be a collection of individuals who has a system of beliefs or doctrine which they regard as conducive to their spiritual well-being. These include a **common faith, common organisation and designation by a distinctive name**.

**Note** – while right to property of an individual is not a Fundamental Right anymore, for religious denomination it continues to be a Fundamental Right.

**Note:** In a January 2014 verdict the Supreme Court quashed the Tamil Nadu government's order appointing executive officer to manage the affairs and properties of the ancient Sri Sabhanayagar Temple, better known as Nataraja temple, in Chidambaram in Tamil Nadu. The SC Bench held that the temple will be managed by priests and cannot be taken over by the state government over allegations of mismanagement of temple properties.

### 6.16.3. Relation with Article 25

Article 25 gives freedom to an individual, while Article 26 deals with an entire religious denomination or any of its section.

### 6.16.4. Sabarimala Temple Issue

Recently, the Supreme Court has deferred its decision on review of “2018 Sabarimala verdict” until a Seven Judges’ Bench examines broader issues such as essentiality of religious practices and constitutional morality.

#### Background of the issue

- Sabarimala temple’s age-old practice **barred** women in their reproductive phases (when they were at the menstruating phase) from entering the temple on the ground that the **presiding deity** was a complete celibate.
- In the “**Indian Young Lawyers Association & Others vs The State of Kerala & Others**” case, 2018, a five-judge bench had delivered a landmark 4:1 ruling setting aside the decades-old restrictions on the entry of women of reproductive age inside Sabarimala Temple.
  - The judgment remarked that ban on the entry of women in Sabarimala is a **kind of untouchability**, and thus violative of Article 17.

- However, **Sabarimala Temple Board** had argued that these were matters of “faith”, “belief” and cannot be termed as regressive, anti-women and had therefore urged the court not to interfere with the practice
- **Justice Indu Malhotra also had dissented against the majority verdict** on the ground that courts should not sit on judgement over harmless religious beliefs unless they were pernicious practices such as sati.
- Recently, review pleas were filed against above order. The petitioners contended that the 2018 judgments suffered from an error apparent since **constitutional morality is a vague concept** which cannot be utilised to undermine belief and faith.
- However, the court did not stay its earlier verdict which allowed women between the ages of 10 and 50 to visit Sabarimala temple.
- Now, the larger Bench would also consider the entry of women into mosques and the practice of female genital mutilation, prevalent among the Dawoodi Bohras Sect.

### **Implications of the Supreme Court's fresh examination of the Sabarimala Case**

- **Will raise various key Constitutional questions:** The seven-judges' Bench will examine:
  - Question of balancing the freedom of religion under Articles 25 and 26 of the Constitution with other fundamental rights, particularly the Right to equality (Article 14).
  - Should “**essential religious practices**” or the “doctrine of essentiality” be accorded constitutional protection under Article 26 (freedom to manage religious affairs)?
  - What is the “permissible extent” of judicial recognition a court should give to PILs filed by people who do not belong to the religion of which practices are under the scanner?
  - Whether a court can probe whether a practice is essential to a religion or should the question be left to the respective religious head?
- The **constitutional debate on gender equality** will be reopened with the larger issue of whether any religion can bar women from entering places of worship.

#### **Constitutional Morality**

- The term ‘morality’ or ‘constitutional morality’ has not been defined in the Constitution.
- As per the Supreme Court, the **magnitude and sweep** of **constitutional morality** is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a **wide magnitude** such as that of ushering a pluralistic and inclusive society, while adhering to the other principles of constitutionalism.
- In the 2018 Sabarimala verdict, the majority opinion defined ‘**morality**’ in Article 25 to mean **constitutional morality**.
  - Article 25 reads, “Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion”.
- As per the Supreme Court, “when there is a violation of the fundamental rights, the term ‘**morality**’ naturally implies **constitutional morality** and any view taken by the courts, must be in conformity with the principles and basic tenets of the concept of Constitutional morality.”

### **Understanding Doctrine of Essentiality and related debates**

- **Doctrine of essentiality:** The doctrine of “essentiality” was invented by a seven-judge Bench of the Supreme Court in the ‘Shirur Mutt’ case in 1954 in which the court held that the term “religion” will cover all rituals and practices “integral” to a religion, and took upon itself the responsibility of determining the essential and non-essential practices of a religion.
- **Surrounding debates:**
  - **Essentiality vs right to freedom of religion:** The Supreme Court in ‘Ratilal Gandhi vs the State of Bombay’ (1954) acknowledged that “every person has a fundamental right to

- entertain such religious beliefs as may be approved by his judgment or conscience". However, the Essentiality test impinges on this autonomy.
- The apex court has itself emphasised autonomy and choice in its Privacy (2017), 377 (2018), and Adultery (2018) judgments.
  - **Issue of Judicial overreach:** The doctrine has been criticised by several constitutional experts as it has tended to lead the court into an area that is beyond its competence, and given judges the power to decide purely religious questions which should be decided by the theologians.
  - **Issues with the conception:** The concept of providing constitutional protection only to those elements of religion, which courts consider "essential" is problematic. Such an approach assumes that one element or practice of religion is independent of the others.
  - **Arbitrariness in its application:** Over the years, courts have been inconsistent on this question — in some cases they have relied on religious texts to determine essentiality, in others on the empirical behaviour of followers, and in yet others, based on whether the practice existed at the time the religion originated.
  - **Group rights vs Individual Rights:** The Supreme Court has itself acknowledged that "every individual has a fundamental right to entertain such religious beliefs". However, the essential practices test is antithetical to the individualistic conception of rights. Under the test, the court privileges certain religious practices over others, thus protecting the group's rights.

Thus, there should be a balance in terms of determining religious freedom as well as constitutional morality while dealing under Article 26.

## 6.17. Article 27

### 6.17.1. Text

*Freedom as to payment of taxes for promotion of any particular religion.—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.*

### 6.17.2. Description

Article 27 prohibits the State from spending any public money collected by way of tax for promotion of any religion. It is one of the essential consequences of secularism. The State cannot patronize any particular religion or religious denomination. In other words, the state should not spend the public money collected by way of tax for the promotion or maintenance of any particular religion. This provision prohibits the state from favoring, patronizing and supporting one religion over the other. This means that the taxes can be used for the promotion or maintenance of all religions.

This provision prohibits only levy of a tax and not a fee. This is because the purpose of a fee is to control secular administration of religious institutions and not to promote or maintain religion. Thus a fee can be levied on pilgrims to provide them some special service or safety measures. Similarly, a fee can be levied on religious endowments for meeting the regulation expenditure.

**Note:** In 2012, the Supreme Court directed the Union government to gradually reduce and abolish Haj subsidy in 10 years and invest the amount in education and other measures for social development of the minority community.

## 6.18. Article 28

### 6.18.1. Text

Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

- 1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
- 2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.
- 3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

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### **6.18.2. Description**

According to Article 28,

- No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
- However, this provision does not apply to institutions administered by the state but established under any endowment or trust, which requires imparting religious instructions.
- Further, in an educational institution recognized by the State, religious instructions can be provided to a person but only with his consent. In case he is a minor, his guardian's consent is required.

## **6.19. Article 29**

### **6.19.1. Text**

Protection of interests of minorities.

- 1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
- 2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

### **6.19.2. Description**

Article 29(1) recognizes the right of an individual to preserve his culture, his language and script. Article 29(2) prohibits the State from making discrimination while granting access to educational institutions.

Note: Article 15 doesn't mention language as a ground of discrimination, but it is included in Article 29.

Article 29 grants protection to both linguistic and religious minorities. SC has held that the scope of this article is not restricted to minorities only and is available to "all sections" of the population, including majority.

In Champakam Dorairajan case (1951) the reservation provided to backward sections was challenged on the ground that it violated Article 29(2). The 1<sup>st</sup> Amendment Act was then enacted, inserting Article 15(4) for providing reservation.

### **6.19.3. Applicability**

Both article 29 and 30 are available to Indian citizens only.

## **6.20. Article 30**

### **6.20.1. Text**

Right of minorities to establish and administer educational institutions.

- 1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
  - a) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
- 2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

### **6.20.2. Description**

Under Article 30, minorities (linguistic or religious) have the right to establish and administer educational institutions of their choice. The State cannot impose any restrictions on the right of the minorities except for making regulations, which promote excellence in education.

In case a minority's property is acquired by the State, it shall be provided adequate compensation for the same.

The State cannot discriminate while providing aid to such institutions.

The term minority has not been defined by the Constitution but literally it means a non-dominant group.

In Presidential reference to Kerala Education Bill, and later on Guru Nanak Dev University, the judiciary has established parameters to determine the minority status. At union level, it means those groups, which have less than 50% population at all India level. At state level, it means groups forming less than 50% population within the state.

### **6.20.3. Relation between Article 29 and 30**

While Article 29 is a general protection available to all sections of the population, Article 30 is protection available only to the linguistic or religious minorities.

### **6.20.4. Applicability**

Articles 29 and 30, both, are available to Indian citizens only.

### **6.20.5. Minority Educational Institutions**

#### **What are minority educational institutions (MEIs)?**

These are the institutions established to protect and promote the unique culture and traditions of minority groups. The minority groups can either be linguistic or religious.

#### **What are the criteria?**

- The NCMEI has issued a set of guidelines for the determination of minority status of educational institutions under Article 30.
- Effectively, there are two conditions that a school must fulfill in order to obtain minority status:
  - Most of Board or trust members must belong to the minority community.
  - It must declare explicitly that it has been established for the benefit of the minority community.
- The state authorities have prescribed similar criteria.

# WHO GIVES MINORITY STATUS TO EDUCATION INSTITUTION?

- As held by Supreme Court recently, National Commission for Minority Educational Institutions (NCMEI) currently regulates the certification of minority educational institutions all over India. Some states have their own guidelines for recognition & certification.
- It gives the minority status to the educational institutions on the basis of six religious communities notified by the Ministry of HRD under the NCMEI Act, 2004 Muslims, Christians, Sikhs, Buddhists, Zoroastrians (Parsis) and Jains only.
- It was established by Parliament in 2004 through National Commission for Minority Educational Institution (NCMEI) Act. While in 2006 powers of appeal against orders of the competent authority was provided to the NCMEI.

## Recent controversies

- In 2016 the Central government has filed a fresh affidavit in SC saying a Central University, cannot be granted minority status.
- SC was hearing an appeal against Allahabad high court Judgement 2006 in which the minority status accorded to Aligarh Muslim University (AMU) was revoked.
- The Law Ministry has recommended revoking the 2011 order of NCMEI declaring Jamia Millia Islamia as a religious minority institution on the same ground.

## Why Provision of minority status should be retained?

- Art 26(a) states that religious denominations can establish institutions for religious and charitable purposes. AMU and JMIU has been instrumental in bringing social change in minority community by providing education to Muslim youth which can be considered as charitable work under art 26 (a).
- Art 38 mandates the state to reduce inequalities among different section of society and such MEIs AMU and JMIU act as an agent of change among minority in providing quality and formal education
- In Azeez Basha case, 1967SC ruled that universities come under the definition of "educational institution" in Article 30(1). Thus, in a way, it also made obligatory on government to recognize such MEIs through statute.
- In Kerala Education bill case SC restricted the power of state in revoking minority status and depriving the minority from establishing and managing such institutions.

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- It is a quasi-judicial body and has been endowed with the powers of a Civil Court. It is to be headed by a Chairman who has been a Judge of the High Court & three members are to be nominated by Central Government.
  - The Commission has 3 functions namely adjudicatory, advisory and recommendatory.
  - It decides on disputes regarding affiliation of a minority educational institution to a university.
  - It has power to enquire, suo motu, into complaints regarding deprivation or violation of rights of minorities to establish and administer educational institutions of their choice.
  - It specifies measures to promote and preserve the minority status and character of institutions of their choice established by minorities.
  - It can also cancel the minority status granted to institutions if they are found to have violated the conditions of the grant.
  - The Commission's authority does not extend to educational institutions established by linguistic minorities.

## POWER AND FUNCTIONS OF NCMEI

- A university cannot be conferred Minority status because it can be incorporated only by act of Parliament. Since AMU and JMIU are established through a statute, these institutions cannot be considered as MEIs
- Universities receiving direct funding from states cannot be accorded minority status as this is in direct conflict with Art 27 which says that no proceeds of any taxes shall be utilized for promotion or maintenance of any particular religion or religious denomination.
- Universities established under parliament act has to follow the reservation policy of central government but AMU and JMIU do not provide any reservation to Scheduled Castes, Scheduled Tribes and Other Backward Classes. Hence the minority tag provided to such institutions is unconstitutional and illegal.
- Article 15 of the Constitution prohibits discrimination by state on grounds of religion and conferring minority status to any institution set up by a parliament or state would be in contravention.
- In Azeez Basha case, 1967 case, the SC upheld that AMU was not a minority educational institution as it was set up by British legislature, and not by Muslims.
- The right under Article 30(1) is not an absolute right and it seems to be in contradiction to Article 29(2), which prohibits denial of admission to any citizen into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”

**Privileges accorded under Minority status**

- Article 30 provides that in case of compulsory takeover of property by state, due compensation must be provided to institution.
- MEIs are out of purview of reservation policy under Art 15. Recently, Bombay High Court came to the aid of MEIs and held that they need not reserve seats for backward class students.
- Sect 12 of Right to Education Act (RTE) 2009, which mandates 25% reservation for children belonging to economically weaker section (EWS), is also not applicable on MEI.
- In TMA Pai vs State of Karnataka 2002 case
  - SC allowed MEIs to have separate, fair, and transparent and merit-based admission process.
  - They can also have separate fee structure but not allowed to charge capitation fee.

**Challenges faced by MEIs**

- MEIs hardly have any substantial autonomy as they receive funds from the government. For e.g. while the president of India can nullify any decision of these universities, he has no such power in respect of private universities.
- The real issue is the maladministration of minority institutions. Many private unaided minority institutions are in a mess and suffering from mismanagement, corruption etc. For e.g. selling minority seats to non-minority candidates.
- Exemption from RTE act obligations has led to rent-seeking behaviour among schools. Poorer sections among minority groups are not able to take admission in such institutions which render the purpose of establishing such institutions defeated.
- National level Entrance exams like National Eligibility and Entrance Test (NEET) and common counselling have now virtually taken away the minority institutions' right to admit students of their choice.
- Many Schools have resorted to acquire fake minority certificate to avoid obligations under RTE act 2009.

- The minority status should not be revoked due to mere technical lacunae. After all Minorities invest their resources, properties and time and also educate 50% non-minorities in their institutions.
- The ambiguities and gaps in the current administrative setup must be removed so that minority status' is not hijacked for private interests at the expense of minority welfare and equitable education
- More autonomy must be given to such universities in curriculum design and operation.
- The court has consistently maintained that the receipt of governmental aid does not mean the surrender of minority character. Hence Government may provide funding to MEIs in tune with other universities.
- The Supreme Court's decision to exempt all minority schools from the RTE need to be reviewed.
- The separate criteria for linguistic minorities must be evolved as criteria formulated by the NCMEI for religious minorities cannot be applied indiscriminately on linguistic minorities. For e.g. the medium of instruction in the linguistic minority institution must be in its language. At present, only Maharashtra has such a requirement.

### **6.20.6. Important judgments**

#### **6.20.6.1. St. Stephens v/s University of Delhi, 1992**

The Supreme Court ruled that minority institutions should make available at least 50% of their annual admission intake for other communities. The admission of other communities should be done purely on the basis of merit.

#### **6.20.6.2. Unnikrishnan v/s State of Andhra Pradesh, 1993**

Supreme Court ordered for the introduction of three types of seats:

- 15% seats are management seats and fee is not limited.
- 35% seats, wherein State government fixed fees
- 50% are free seats based on merit established by a common entrance examination

#### **6.20.6.3. TMA Pai Foundation and others v/s State of Karnataka, 2002**

Following are the essential features of the landmark judgment:

- All citizens have the rights to establish and administer educational institutions
- The right to administer MEI (Minority Educational institution) is not absolute
- The State can apply regulations to unaided MEIs also to achieve educational excellence
- Percentage of non-minority students to be admitted to an aided MEI to be decided by the state or university.
- Fees to be charged by unaided MEIs can't be regulated, but no institution can charge capitation fee.

#### **6.20.6.4. Islamic Academy of education v/s State of Karnataka, 2003**

In this case, the Supreme Court clarified its judgment in TMA Pai case. The ruling says that Article 30 confers on linguistic and religious minorities the unqualified right to establish educational institutions, but the government could exercise control and regulation on them for maintaining good standards.

#### **6.20.6.5. St. Joseph College Case, 2018**

Supreme Court in April, 2018 ruled that the National Commission for Minority Educational Institutions (NCMEI) has the power to grant an academic organisation the "valid" and binding status of a minority institute. Section 11(f) (of the NCMEI Act) confers jurisdiction on the NCMEI

### 6.20.7. The Lacuna

The issue acquires importance because the Constitution doesn't define the words "majority" and "minority" – a lacuna that has induced many Hindu sects like Arya Samajists, and Ramkrishnaites to acquire the status of a minority. It is notable that Hindus are minority in five states –Jammu and Kashmir, Punjab, Nagaland, Mizoram, Meghalaya.

### 6.21. Article 31

It was originally the right to property but **was repealed in 1978** by the 44<sup>th</sup> Amendment Act and made into an ordinary right under Article 300A.

#### Background

- The Constitution originally provided for the **Right to Property** as a fundamental right (F.R.) under Articles 19 and 31.
  - **Article 19(1) (f)** guaranteed to the Indian citizens a right to acquire, hold and dispose of property.
  - **Article 31** of Indian Constitution stated that no person can be deprived of his property without the consent of a proper authority.
  - Also, **Article 31(2)** had put two limitations on State power of acquisition of land viz.
    - Firstly, the compulsory acquisition or requisitioning of land should be for public purpose.
    - Secondly, the law enacted in that behalf should provide for compensation.
  - However, after independence, it resulted in numerous litigations between the government and citizens. Major contentious issues were:
    - Laws enacted by government in relation to land reform measures to provide housing to the people in the urban area
    - Regulation of private enterprises
    - Nationalization of some commercial undertakings.
  - To narrow its scope it was modified several times by the constitutional amendments namely **1st, 4th, 17th, 25th and 42nd Constitutional Amendment Acts**.
  - However, it was continued to be seen as a roadblock in socio-economic development of the country.
  - Finally, **44th Constitutional Amendment Act** repealed the entire Article 31 and Article 19(1)(f) & inserted Article 300A.

#### Right to Property under Article 300A

- **Article 300-A** states that no person shall be deprived of his property save by authority of law. This means that-
  - Property is no longer a Fundamental Right, i.e. the aggrieved individual would not be competent to move to Supreme Court under Article 32, for any violation of Art 300A.
  - Also, a law will be necessary to deprive a person of his property.
- One can't move to the Supreme Court or High Court in case this right is violated.
- Further, it protects individuals from arbitrary executive action only, not from arbitrary legislative action.
- The state is not constitutionally bound to pay any compensation in case of acquisition.

# CONSTITUTIONAL AMENDMENTS RELATED TO RIGHT TO PROPERTY



- The First amendment added two **Articles 31-A & 31-B and Ninth schedule** to the Constitution.
  - **Article 31-A** included provisions for saving of certain laws providing for acquisition of estates from Articles 14, 19.
  - **Ninth Schedule** was added to the constitution so that government could park certain laws which were to be kept immune from judicial review. It was mainly done to secure the constitutional validity of zamindari abolition laws.
- The **Fourth amendment** extended the scope of **Article 31-A** by adding a few more categories of deprivation of property which were to be immune from litigation under **Articles 14, 19 & 31**.
- The **Seventeenth amendment** further elaborated the definition of 'estate' in Article 31-A.
- The **Twenty Fifth amendment** amended Article 31 and added a new Article 31-C
  - **Article 31-C** provided for saving of laws giving effect to certain directive principles (Article 39(b) and 39(c) were given precedence over Articles 14, 19 and 31).
- The **Forty Second amendment** amended Article 31-C to give precedence to all DPSPs over Articles 14, 19 and 31.
  - This was deemed unconstitutional by the judiciary in the *Minerva mills v Union of India Case*.

## Arguments in favour of Right to property to be reinstated as Fundamental Right

- **It would protect citizens from unwarranted state action in the name of acquisition:** Compulsory land acquisition and mass displacement in the name of development have given rise to certain socio-economic issues. Thus, there is a need of stronger checks on the government.
- **It will provide support to the judiciary:** As of now the development of the Supreme Court's doctrinal jurisprudence is only safeguard against the fear of arbitrariness of State action. For example- **The Fair Balance test**.
  - The elevated status of Right to Property will aid Judiciary for effective delivery of justice.
- **Tackling manipulative practices in calculating fair compensation:** Land owners are at times deprived of a fair compensation due to vagueness in laws relating to land acquisitions.
- **Insecure Titles and Poor Land Records and Administration:** Many citizens lack a clear title to their land and it is accompanied by poor maintenance of land records by state organizations. For instance, the land rights of indigenous tribes were not recognized by the state, despite these people living in the land for generations.

## Arguments in favour of Right to property remaining a legal right

- **It leads to smoother Land Acquisition:** India is developing country and for this purpose land acquisition should become swifter which is facilitated by Article 300A.
- **It has eased up judicial burden:** Previously, the judiciary was burdened with litigations related to property rights. However, it has come down significantly.

- **It aids government in its welfare objectives:** Given the government provides a fair compensation, land acquisition is necessary for fulfilling welfare purposes such as ensuring road connectivity, making electricity accessible to all etc.

#### **Right to Property as a Human Right**

- In several cases, the Supreme Court of India has held that the right to property is not just a statutory right but is also a human right.
- **Universal Declaration of Human Rights 1948** under Section 17(i) and (ii) also recognizes right to property. It states that-
  - Everyone has the right to own property alone as well as in association with others,
  - No-one shall be arbitrarily deprived of his property.
- **Significance:**
  - provides safeguards against arbitrariness of state
  - gives due importance to property as a tool of self-protection
  - allows people to be entrepreneurial

#### **Fair Balance Test**

According to it taking of property without payment of an amount reasonably related its value would normally constitute a disproportionate interference which could not be considered as justiciable.

#### **Recent Developments-**

Recently, the Supreme Court has reiterated that forcible dispossession of a person of his private property without due process of law is a human right violation.

#### **Conclusion**

There is a need to balance the right to property with the development of the society and the country as a whole. **Few steps that can be taken in this regard are:**

- Land records should be computerized.
- There is a need to develop institutions and processes that are easily accessible and provide mechanisms to the people to definitely establish their land titles.
- Government must follow guidelines prescribed by the Supreme Court whilst calculating fair compensation. LARR Act can be reformed in this regard.
- Large scale displacements must be avoided. But if necessary, then appropriate rehabilitation must be provided and the compensation should cover the social cost of displacement as well.

## **6.22. Article 31A**

Article 31A saves 5 categories of laws from being challenged and invalidated on the ground of contravention of Fundamental Rights conferred by Article 14 and Article 19. They are related to agricultural land reforms, industry and commerce.

Added by 1<sup>st</sup> Amendment Act, it allows the State to nationalize private property. The idea was to give effect to land reforms.

Both Parliament and State Legislatures can make laws. This article, however doesn't immunize a state law unless it has been reserved for the consideration of the President and has received his assent.

This article also provides for payment of compensation at market value when the state acquires a land held by a person for cultivation below the statutory ceiling limit.

## **6.23. Article 31B – Validation of Certain Acts and Regulations**

Article 31B protects the laws in the ninth schedule from invalidation on the ground of contravention of rights under Article 14 and 19.

## 6.23.1. Controversy with respect to IX Schedule

Student Notes:2021

The Ninth Schedule was created by a Constitution Amendment in 1951 by former Prime Minister Jawaharlal Nehru to push land reforms. The basic purpose of the Schedule was to abolish zamindari system. However, in recent times it has been misused. Not just land reforms laws, the Ninth Schedule today includes several controversial legislation like the 69 per cent reservation law of Tamil Nadu, which violates the Apex Court's 50 per cent ceiling on quotas.

Article 31B, which gives blanket protection to all items in the 9th Schedule, is also retrospective in nature. So, even if a statute, which has already been declared unconstitutional by a court of law is included within the schedule, it is deemed to be constitutional from the date of its inception.

However, in IR Coehlo case (2007), the Apex Court ruled that laws placed under Ninth Schedule after April 24, 1973 (the date of Kesavananda Bharati verdict) shall be open to challenge in court if they violated fundamental rights guaranteed under Articles 14, 19, 20 and 21 of the Constitution. The apex court also said that if the law put in the Ninth Schedule abridges or abrogates fundamental rights resulting in the violation of the basic structure of the Constitution, such laws have to be invalidated.

## 6.24. Article 31C- Saving of laws giving effect to directive principles

Article 31C was inserted by the 25<sup>th</sup> Amendment Act in 1971 and protects laws implementing Directive Principles under 39(b), 39(c) from invalidation on the ground of violation of Article 14, 19 and 31.

Article 31-C had two parts. The first part protected a law giving effect to the policy of the state towards securing the principles specified in Articles 39 (b) and (c) from being challenged on the ground of infringement of the Fundamental Rights under Article 14, 19 and 31. The second part of Article 31 C originally sought to oust the jurisdiction of the courts to find out whether the law in question gave effect to the principles of Articles 39 (b) and 39 (c).

The second part was struck down in the Kesavananda Bharati case 1973, as it took away the powers of judicial review, which was held to be a basic feature of the constitution by the Supreme Court.

The scope of this Article was further extended through 42<sup>nd</sup> Amendment Act, in which the immunity was provided in favor of all the DPSPs against any of the fundamental rights. It provided that no law which gives effect to any of the directive principles (not just 39(b) and 39(C)) can be invalidated on the ground of violation of the Article 14 and 19.

However, the Apex Court in the Minerva Mill case, 1980 struck down the above provision and thereby restored the balance between fundamental rights and directive principles.

## 6.25. Article 32

### 6.25.1. Text

Remedies for enforcement of rights conferred by this Part.

- 1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- 2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- 3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

- 4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Student Notes:2021

## 6.25.2. Description

Article 32(1) gives the right to move the SC for the enforcement of Fundamental Rights. However, it mentions the right to move by appropriate proceedings.

It is the duty of SC and right of persons.

SC can determine what appropriate proceedings are. The traditional approach is that the person moving the courts should have a locus standi. However, the SC has liberalized this approach and admits:

### 6.25.2.1. Public Interest Litigation

- Adopted from the USA social interest litigation.
- It's not private interest litigation, nor a political interest litigation
- It is not a fundamental right

(Please refer to PIL portion in the document on Supreme Court for more information)

### 6.25.2.2. Epistolary jurisdiction

- Taking action on the basis of post card, letter.

### 6.25.2.3. Suo moto

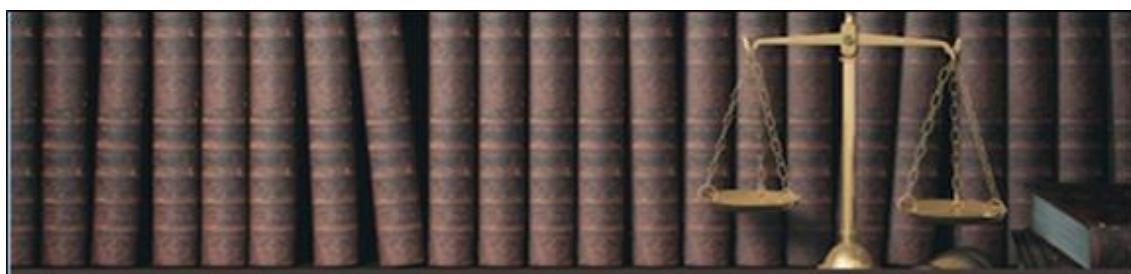
- SC can take action on its own

### 6.25.3. Doctrine of Laches

- SC protects the rights of those who are vigilant about their rights.
- In case of unnecessary delay in approaching the courts for enforcing the rights, SC may deny the issue of writs.

### 6.25.4. Doctrine of Res Judicata

- According to the dictionary meaning, 'res judicata' means a case or suit involving a particular issue between two or more parties already decided by a court. Thereafter, if either of the parties approaches the same court for the adjudication of the same issue, the suit will be struck by the law of 'res judicata'.
- If a person goes first to a High Court under Article 226 and his petition is dismissed on merits, he cannot approach the SC under Article 32 because of 'res judicata'. He can reach the SC only by way of appeal. If, however, high court dismisses his or her writ petition not on merits, then 'res judicata' does not apply and petitioner can move the SC
- This doctrine is applied to give recognition to the decision of courts of competent jurisdiction.
- Same person however, can approach the SC on the same cases, if some new facts have emerged which have not been examined by HC.



# VARIOUS TYPES OF WRITS

A writ means an order. A warrant is also a type of writ. Anything that is issued under an authority is a writ.

## 1. Habeas Corpus

By Habeas Corpus writ the Supreme Court or High Court can cause any person who has been detained or imprisoned (this means violation of his fundamental right to liberty) to be physically brought before the court. The court then examines the reason of his detention and if there is no legal justification of his detention, he can be set free.

## 2. Mandamus

Mandamus means "we order". The Supreme Court or High Court orders to a person, corporation, lower court, public authority or state authority to perform their specific duty.

## 3. Certiorari

Literally, Certiorari means to be certified. The writ of certiorari can be issued by the Supreme Court or any High Court for quashing the order already passed by an inferior court, tribunal or quasi-judicial authority.

- There are **several conditions** necessary for the issue of writ of certiorari.
  - There should be court, tribunal or an officer having legal authority to determine the question with a duty to act judicially.
  - Such a court, tribunal or officer must have passed an order, acting without jurisdiction or in excess of the judicial authority vested by law in such court, tribunal or officer.
  - The order could also be against the principles of natural justice or the order could contain an error of judgment in appreciating the facts of the case.

## 4. Prohibition

The writ of Prohibition means to forbid or to stop and it is popularly known as stay order. This writ is issued when a lower court or a body tries to transgress the limits or powers vested in it. The writ of Prohibition is issued by any High Court or the Supreme Court to any inferior court, or quasi-judicial body prohibiting the latter from continuing the proceedings in a particular case, where it has no jurisdiction to try. After the issue of this writ, proceedings in the lower court etc. come to a stop.

### Difference between Prohibition and Certiorari:

While the writ of Prohibition is available during the pendency of proceedings, the writ of Certiorari can be resorted to only after the order or decision has been announced. Both the writs are issued against legal bodies.

## 5. Quo warranto

- Quo warranto means "by what warrant"? The word Quo-Warranto literally means "by what warrants?" or "what is your authority"? It is a writ issued with a view to restrain a person from holding a public office to which he is not entitled. The writ requires the concerned person to explain to the Court by what authority he holds the office.
- The conditions** for issue of Quo-Warranto:
  - The office **must be public** and it **must be created by a statute** or by the constitution itself.
  - The office **must be a substantive one** and not merely the function or employment of a servant at the will and during the pleasure of another.
  - There **must have been a contravention of the constitution** or a statute or statutory instrument, in appointing such person to that office.

The Constitution allows the Parliament to empower any other court to issue these writs. However, no such provision has been made so far. Thus, the **Supreme Court** (under Article 32) and the **High Courts** (under Article 226) can issue **all the above** writs, and not any other court.

Before 1950, only the High Courts of Calcutta, Bombay and Madras had the power to issue the writs. Article 226 now empowers all the high courts to issue the writs.

### **6.25.5.1 Difference between writ jurisdiction of SC and HC**

Student Notes:2021

The Supreme Court can issue writs **only for the enforcement of fundamental rights** whereas a high court can issue writs not only for the enforcement of Fundamental Rights **but also for any other purpose**. The expression ‘for any other purpose’ refers to the enforcement of an ordinary legal right. Thus, the **writ jurisdiction of the High Court is wider than that of Supreme court.**

Also, the Supreme Court can issue writs **against a person or government throughout the territory of India** whereas a high court can issue writs against a person residing or against a government or authority located within its territorial jurisdiction only or outside its territorial jurisdiction, only if the cause of action arises within its territorial jurisdiction.

Further, a remedy under Article 32 is in itself a Fundamental Right and hence, the **Supreme Court may not refuse to exercise its writ jurisdiction**. On the other hand, a remedy under Article 226 is discretionary and hence, a **high court may refuse to exercise its writ jurisdiction**. Hence, the Supreme Court is constituted as a defender and guarantor of the fundamental rights.

### **6.25.6. Importance of Article 32**

Mere declaration of the fundamental right is meaningless until and unless there is an effective machinery for enforcement of the fundamental rights. So, a right without a remedy is a worthless declaration. The framers of our constitution adopted the special provisions in the article 32 which provide remedies to the violated fundamental rights of a citizen. SC in IR Coehlo case (2007), mentioned that Article 32 is integral part of the basic structure. This article also established SC as the guardian of Fundamental Rights. It also shows the SC’s powers of judicial review. According to Dr. Ambedkar, this Article is the soul of part-III.

### **6.25.7. Article 32(3)**

Parliament can authorize any other court also to enforce Fundamental Rights.

#### **Conditions:**

- Without negatively effecting the powers of SC
- The other court which has been authorized to issue writs; its powers are limited within the local limits of its jurisdiction.

### **6.25.8. Article 32(4)**

It provides for the suspension of Article 32, in special manner as prescribed in Article 359.

#### **6.25.7.1. Article 359-Suspension of FRs during the proclamation of national emergency**

Except rights given under Article 19, whose enforcement is automatically suspended with the proclamation of national emergency on grounds of external aggression or war; the suspension of other rights doesn’t happen automatically.

Rights under Article 20 and 21 are never suspended. Rest of the rights can be suspended only when the President issues an order to suspend a right. In his order, the President has to specify which rights, for what period and for what geographical limits.

## **6.26. Article 33**

### **6.26.1. Text**

Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.—Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,—

- a) the members of the Armed Forces; or
- b) the members of the Forces charged with the maintenance of public order; or

- c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
- d) person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

### 6.26.2. Description

Article 33 empowers the Parliament to restrict or abrogate the application of the fundamental rights in relation to the armed forces, paramilitary forces, police etc. But it does not mean that the article itself would abrogate any rights. The operation of this article depends upon the parliamentary legislation, though these legislations don't need to refer this article. Such legislation by parliament of India may restrict the operation of any fundamental rights such as Equality, Freedom of Expression, Freedom of association, Personal Liberty etc. One such article is Police Forces (Restriction of Rights) Act, 1966. This act was challenged in Supreme Court but was held valid.

## 6.27. Article 34

### 6.27.1. Text

Restriction on rights conferred by this Part while martial law is in force in any area.— Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

### 6.27.2. Description

Article 34 pertains to the restrictions on the fundamental rights while martial law is in force in any area. (Martial law means law made by military authorities. Such a law is imposed by the President, since he is the supreme commander of armed forces). The article gives indemnity by law in respect to acts done during operations of martial law. Here we have to note that the Constitution does not have a provision of authorizing the proclamation of martial law. The article simply means that if there is a Government servant on duty, then he/ she is indemnified for the acts done by him or her in connection with maintenance of law and order in the area where martial law is in force. This act of indemnity cannot be challenged in any court on the ground of contravention with any of the fundamental rights.

<b>MARTIAL LAW VS NATIONAL EMERGENCY</b>	
 <b>Martial Law</b>	 <b>National Emergency</b>
It affects only Fundamental Rights.	It affects not only Fundamental Rights but also Centre-State relations, distribution of revenues and legislative powers between Centre and States and may extend the tenure of the Parliament.
It suspends the government and ordinary law courts.	It continues the government and ordinary law courts.
It is imposed to restore the breakdown of law and order due to any reason.	It can be imposed only on three grounds - war, external aggression or armed rebellion.
It is imposed in some specific area of the country.	It is imposed either in the whole country or in any part of it.
It has no specific provision in the Constitution. It is implicit.	It has specific and detailed provision in the Constitution. It is explicit.

## 6.28. Article 35

Student Notes:2021

### 6.28.1. Text

Legislation to give effect to the provisions of this Part.

Notwithstanding anything in this Constitution,

- a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—
  - i. with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and
  - ii. for prescribing punishment for those acts which are declared to be offences under this Part; and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);
- b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation—In this article, the expression "law in force" has the same meaning as in article 372.

### 6.28.2. Description

Article 35 states that power to make laws to give effect to FR shall vest only in the Parliament and not State Legislatures. This would ensure that there is uniformity throughout the territory of India in both the laws made and the punishments prescribed for offences against Fundamental Rights.

The image is a composite graphic. It features a black and white photograph of the Constitution of India book on the left. In the center, there's a stylized watermark-like graphic of the Indian Parliament building with the text 'THE CONSTITUTION OF INDIA' overlaid. Below these images is a dark banner with the text 'SIGNIFICANCE OF FUNDAMENTAL RIGHTS' in large, bold, white letters. To the right of the banner is a list of bullet points detailing the significance of fundamental rights.

**SIGNIFICANCE OF FUNDAMENTAL RIGHTS**

- They constitute the bedrock of democratic system in the country.
- They provide necessary conditions for the material and moral protection of man.
- They serve as a formidable bulwark of individual liberty.
- They facilitate the establishment of rule of law in the country.
- They protect the interests of minorities and weaker sections of society.
- They strengthen the secular fabric of the Indian State.
- They check the absoluteness of the authority of the government.
- They lay down the foundation stone of social equality and social justice.
- They ensure the dignity and respect of individuals.
- They facilitate the participation of people in the political and administrative process.

## 7. Are Fundamental Rights Absolute

Student Notes:2021

Fundamental Rights don't give absolute powers to an individual. They are restricted rights. In Gopalan case, 1950, SC held that there cannot be any such thing as absolute or unmonitored liberty, for that would lead to anarchy. On other hand, if the state has absolute powers, then that would lead to tyranny. The purpose of Fundamental Rights is to establish rule of law and hence there should be a balance between individual rights and social needs. That's why constitution empowers the Parliament to provide reasonable and fair restrictions on the Fundamental Rights.

**Grounds of reasonable restrictions are as follows:**

- The grounds mentioned in article 19(2).
- Advancement of SC, ST, OBC and other weaker sections of society including women and children.
- In the interest of general public, public order, decency and morality
- Sovereignty and integrity of India
- Security of the state
- Friendly relation with foreign state

## 8. Criticism of Fundamental Rights

- Although called fundamental rights, these are subject to lot of restrictions. Further what constitutes "reasonableness" is subject to differing interpretations by courts.
- These rights provide only political rights. However political freedom is meaningless unless there is social and freedom also.
- These rights are not sacrosanct. They can be abridged by the Parliament. Most of these get suspended during the operation of national emergency.
- The remedy in case Fundamental Rights are violated, is costly, time consuming and in practice inaccessible to vast majority of the population.

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# Fundamental RIGHTS at a GLANCE

**RIGHT TO EQUALITY (Articles. 14 - 18)**

- Equality before law.
- Prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth.
- Equality of opportunity in matters of public employment.
- Abolition of Untouchability.
- Abolition of titles.

**RIGHT TO FREEDOM (Articles. 19 - 22)**

- Protection of certain rights regarding freedom of speech, etc.
  - (a) to freedom of speech and expression;
  - (b) to assemble peaceably and without arms;
  - (c) to form associations or unions;
  - (d) to move freely throughout the territory of India;
  - (e) to reside and settle in any part of the territory of India;
  - (g) to practise any profession, or to carry on any occupation, trade or business,
- Protection in respect of conviction for offences.
- Protection of life and personal liberty.
- Right to education
- Protection against arrest and detention in certain cases. It is to be noted the Supreme Court of India has ruled that the 'Right to Privacy' is an integral part of the right to life and personal liberty guaranteed in Article 21 of the Constitution.

**RIGHT AGAINST EXPLOITATION (Articles. 23 - 24)**

- Prohibition of traffic in human beings and forced labour.
- Prohibition of Employment of children in factories, etc.

**RIGHT TO FREEDOM OF RELIGION (Articles. 25 - 28)**

- Freedom of conscience and free profession, practice and propagation of religion.
- Freedom to manage religious affairs.
- Freedom as to payment to taxes for promotion of any particular religion.
- Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

**CULTURAL AND EDUCATIONAL RIGHTS (Articles. 29 - 30)**

- Protection of interests of minorities,
- Right of minorities to establish and administer educational institutions.

**RIGHT TO CONSTITUTIONAL REMEDIES (Articles. 32 - 35)**

This right deals with remedies for enforcement of rights conferred by Part III. It includes the right to move the courts to issue directions or orders or writs for enforcement of rights.

## 9. Previous year UPSC GS Mains Questions

- In many democratic countries radio and television are not under the control of the state. Do you think that the same policy should be adopted in India? Mention briefly the points in favour of and against such a step. (Not more than 200 words) (80/I/14/25)
- The Press in India is free to publish any news and views except those, which are objectionable from the point of view of the security of state, friendly relations with Foreign States etc. What steps have been taken recently by Government to prevent monopoly of the management of the newspaper, to encourage the growth of small newspapers and to prevent the exploitation of working journalists and other employees of Indian newspapers? (Not more than 150 words) (81/I/6/25)

3. Bring out the significance of the Fundamental rights provided in the Constitution of India. The right to acquire, hold and dispose of property has ceased to be a fundamental right. Examine the purpose of the change involved. (in about 150 words) (81/II/4a/20)
4. Why has there been reservation of seats for Scheduled Castes and Tribes in the legislatures and in public services? Has the purpose been achieved? Indicate recent developments. (in about 150 words) (81/II/4b/20)
5. Differentiate between Fundamental Rights and Directive Principles of State Policy. Do you think that the latter have been adequately implemented? Give reasons for your views (in about 150 words) (82/II/5c/20)
6. Consider the recommendations of the Mandal Commission and offer your comments, referring to the situations obtaining in the country. (in about 150 words). (83/II/4c/20)
7. What is meant by Habeas Corpus? What is the purpose of a writ of Habeas Corpus? (83/II/8a(B)/2)
8. What is the present status of the Right to Property? (84/II/8a(B)/3)
9. What is dealt with in Articles 25 of Indian Constitution? What was the controversy about it recently? (Not more than 100 words) (84/I/9a/20)
10. What are the main causes of anti-reservation stir in Gujarat? What are the provisions in our Constitution regarding reservation? Do you consider the policy of reservation justified? (About 200 words) (85/I/11/35)
11. What do you understand by "preventive detention"? (86/II/8f(B)/3)
12. Discuss the importance of Article 32 of the Indian Constitution. (in about 150 words) (87/II/4c/20)
13. Define the writ of Certiorari. (87/II/8a(B)/3)
14. What do you understand by 'positive discrimination'? (87/II/8b(B)/3)
15. Explain the concept of Minorities in the India Constitution and mention the safeguards provided therein for their protection. (150 words) (88/II/4b/20)
16. What are the "reasonable restrictions" mentioned in the Indian Constitution accompanying the fundamental rights? (in about 150 words) (90/II/4d/20)
17. Explain the significance of Prasar Bharati Corporation in the context of Modern mass media. (90/II/8a(B)/3)
18. Define writ of Mandamus. Explain its importance. (90/II/8e(B)/3)
19. Discuss the secular nature of Indian polity and the position of minorities in India. (in 150 words) (91/II/4c/20)
20. The writ of Mandamus will not be granted against certain persons. Who are they? (92/II/4c/20)
21. Distinguish between preventive detention and punitive detention. (93/II/8a(B)/3)
22. When and why was the National Literacy Mission founded? (93/II/8c(B)/3)
23. What is meant by 'equal protection of law'? (93/II/8d(B)/3)
24. What is the purpose of Article 24 of the Constitution of India? (93/II/8f(B)/3)
25. Difference between the 'due process of law' and 'the procedure established by law' in the context of deprivation of personal liberty in India. (94/II/8a(B)/3)
26. Explain the meaning of ex post-facto legislation (94/II/8b(B)/3)
27. Indicate the provisions of Indian Constitution relating to Secularism. (94/II/8e(B)/3)
28. What are the constitutional rights of the citizens of India? What do you think about the demand of the NRIs for dual citizenship? (150 words) (95/II/4c/20)
29. What is the present status of the right to property as a Fundamental Right? (95/II/8b(B)/3)
30. Why is Article 32 considered as the cornerstone of the Constitution? (95/II/8c(B)/3)
31. The writ of Mandamus cannot be granted against certain persons. Who are they? (96/II/8c(B)/3)
32. What are the provisions regarding the protection of Linguistic minorities in the Constitution? (in about 75 words) (97/I/3d/10)
33. What is Social Justice? How can reservation of seats for women in Parliament contribute to the establishment of a socially just society in India? (97/II/1b/40)

- 34.** What, according to the Supreme Court, Constituted 'The Basic Features' which is upheld in case known as  
 ○ Keshavanand Bharati v/s. State of Kerala (1990)  
 ○ Minerva Mills v/s. Union of India (1990)? (in about 150 words) (97/II/4c/20)
- 35.** What specific provisions exist in the Constitution of India about child labour? (97/II/8e(B)/3)
- 36.** What are the circumstances leading to the promulgation of Prasar Bharti Ordinance in August 1998? (in about 50 words) (98/I/7a/6)
- 37.** State the amplitude of Article 21 of the Constitution. (98/II/8c(B)/3)
- 38.** On what grounds does Article 15 of the Indian Constitution prohibit discrimination? Indicate the way the concept of 'Special protection' has qualified this prohibition, and contributed to social change. (in about 250 words) (99/II/1b/40)
- 39.** What is the status of the right to Property in the Indian Constitution? (in about 25 words) (99/II/9e/3)
- 40.** Discuss the constitutional provisions regarding the rights of children. (in about 150 words) (01/I/8c/15)
- 41.** Discuss how the Constitution of India provides equal rights. (in about 250 words) (04/I/7a/30)
- 42.** What is Habeas Corpus? (20 words) (04/I/9a/2)
- 43.** What is the special facility provided to the linguistic minorities under Article 350 A? (04/I/9c/10)
- 44.** Give your views on the right to freedom of religion as enshrined in the Indian Constitution. Do they make India a secular State (250 words) (05/I/7b/30)
- 45.** What are the constitutional limitations on the free movements of Indians throughout the country? (150 words) (05/I/8a/15)
- 46.** What is meant by 'double jeopardy'? (20 words) (05/I/9a/2)
- 47.** What is right to life and personal liberty? How have the courts expanded its meaning in recent years ? (in 250 words) (06/I/6a/30)
- 48.** Bring out the difference between the Fundamental Rights and the Directive Principles of State Policy. Discuss some of the measures taken by the Union and State Governments for the implementation of the Directive Principles of State Policy. (250 words) (07/I/6b/30)
- 49.** What is the importance of Right to Constitutional Remedies? (07/I/9e/2)
- 50.** 'As we live in a plural society we need the greatest freedom to express our opinions even if others find it offensive' – Do you agree? Discuss with reference to some recent incidents in the Indian context. (09/I/9c/15)
- 51.** Discuss Section 66A of IT Act, with reference to its alleged violation of Article 19 of the Constitution. (2013)
- 52.** What do you understand by the concept "freedom of speech and expression"? Does it cover hate speech also? Why do the films in India stand on a slightly different plane from other forms of expression? Discuss. (2014)
- 53.** Khap Panchayats have been in the news for functioning as extra-constitutional authorities, often delivering pronouncements amounting to human rights violations. Discuss critically the actions taken by the legislative, executive and the judiciary to set the things right in this regard. (2015) Examine the scope of Fundamental Rights in the light of the latest judgement of the Supreme Court on Right to Privacy. (2017)

## 10. Previous year UPSC Prelims Questions

### 2015

- In India, if a religious sect/community is given the status of a national minority, what special advantages it is entitled to?
  - It can establish and administer exclusive educational institutions.
  - The President of India automatically nominates a representative of the community to Lok Sabha.

3. It can derive benefits from the Prime Minister's 15-Point Programme.

Which of the statements given above is/are correct?

- (a) 1 only
- (b) 2 and 3 only
- (c) 1 and 3 only
- (d) 1, 2 and 3

**Ans (c)**

**2017**

1. Right to vote and to be elected in India is a
  - (a) Fundamental Right
  - (b) Natural Right
  - (c) Constitutional Right
  - (d) Legal Right

**Ans (c)**

2. Which of the following are envisaged by the Right against Exploitation in the Constitution of India?

- 1. Prohibition of traffic in human beings and forced labour
- 2. Abolition of untouchability
- 3. Protection of the interests of minorities
- 4. Prohibition of employment of children in factories and mines

Select the correct answer using the code given below:

- (a) 1, 2 and 4 only
- (b) 2, 3 and 4 only
- (c) 1 and 4 only
- (d) 1, 2, 3 and 4

**Ans (c)**

3. In the context of India, which one of the following is the correct relationship between Rights and Duties?
  - (a) Rights are correlative with Duties.
  - (b) Rights are personal and hence independent of society and Duties.
  - (c) Rights, not Duties, are important for the advancement of the personality of the citizen.
  - (d) Duties, not Rights, are important for the stability of the State.

**Ans (a)**

4. One of the implications of equality in society is the absence of
  - (a) Privileges
  - (b) Restraints
  - (c) Competition
  - (d) Ideology

**Ans (a)**

5. Which one of the following statements is correct?
  - (a) Rights are claims of the State against the citizens.
  - (b) Rights are privileges which are incorporated in the Constitution of a State.
  - (c) Rights are claims of the citizens against the State.
  - (d) Rights are privileges of a few citizens against the many.

**Ans (c)**

**2018**

1. Which of the following are regarded as the main features of the "Rule of Law"?

- 1. Limitation of Powers
- 2. Equality before law
- 3. People's responsibility to the Government
- 4. Liberty and civil rights

Select the correct answer using the code given below:

- (a) 1 and 3 only
- (b) 2 and 4 only
- (c) 1, 2 and 4 only
- (d) 1, 2, 3 and 4

**Ans (c)**

2. Right to Privacy is protected as an intrinsic part of Right to Life and Personal Liberty. Which of the following in the Constitution of India correctly and appropriately imply the above statement?
- (a) Article 14 and the provisions under the 42nd Amendment to the Constitution
  - (b) Article 17 and the Directive Principles of State Policy in Part IV
  - (c) Article 21 and the freedoms guaranteed in Part III
  - (d) Article 24 and the provisions under the 44th Amendment to the Constitution

**Ans (c)****2019**

1. Which Article of the Constitution of safeguards one's right to marry the person of one's choice?
- (a) Article 19
  - (b) Article 21
  - (c) Article 25
  - (d) Article 29

**Ans (b)****2020**

1. Which one of the following categories of Fundamental Rights incorporate protection against untouchability as a form of discrimination?
- (a) Right against Exploitation
  - (b) Right to Freedom
  - (c) Right to Constitutional Remedies
  - (d) Right to Equality

**Ans (d)**

2. Other than the Fundamental Rights, which of the following parts of the Constitution of India reflect/reflects the principles and provisions of the Universal Declaration of Human Rights (1948)?
1. Preamble
  2. Directive Principles of State Policy
  3. Fundamental Duties
- Select the correct answer using the code given below:
- (a) 1 and 2 only
  - (b) 2 only
  - (c) 1 and 3 only
  - (d) 1, 2 and 3

**Ans (d)**

## **11. Previous Year Vision IAS GS Mains Test Series Questions**

1. '*It is not necessary that everyone receives equal treatment, but everyone must be treated as equal.*' Explain Article 14 of the Indian Constitution in light of the above statement.

**Approach:**

- There should be clear understanding of the distinction between equality before the law and equal protection of the laws.

- Also a clear understanding of what kind of classification is allowed by the constitution while making laws. Quoting some examples will make answer more relevant.
- No general discussion on equality before the law or rule of law and its importance as the question specifically asks about its application.

**Answer:**

- Article 14 is a declaration of equality of all persons within the territory of India, implying thereby the absence of any privilege in favor of any individual. It means that no man is above the law of the land and that every person irrespective of his rank or status is subject to the ordinary law.
- But the concept of equality before law does not involve the idea of absolute equality amongst all. This article includes the phrase 'equal protection of the laws' which means right to equal treatment in similar circumstances.
- What Article 14 prohibits is 'class legislation' and not classification for the purpose of legislation. But the classification should not be arbitrary. It should be reasonable and be based on qualities and characteristics that have relation to the object of legislation. So Article 14 does not mean that every person shall be taxed equally, but that persons under the same character should be taxed by the same standard.
- In order to be reasonable and not arbitrary, a classification must satisfy two conditions. First the classification should be found on an intelligible difference which distinguishes those that are grouped together from others. Second the difference must have a rational relation to the object sought to be achieved by the act.
- Also the guarantee of equal protection is applicable not only in the making of laws but also their administration and implementation. So a procedure different from that laid down by the ordinary law can be prescribed for a particular class of persons if the discrimination is based on a reasonable classification.

**2. *The government cannot condition receipt of public benefits on waiver of fundamental rights. Discuss this statement in context of the recent issues raised in the Aadhaar petitions.***

**Approach:**

This question is based on Supreme Court's examination of Aadhaar Card implementation by Government of India. So the answer should consist of these points:

- Briefly discuss past directives of Supreme Court regarding Aadhar Card.
- Examine the current controversy surrounding this matter.
- Also, discuss the benefits of Aadhaar
- In conclusion discuss the way ahead.

**Answer:**

In the context of the use of Aadhar card for welfare schemes, there is an ongoing debate in the country between the privacy rights of citizens and their protection for rich and poor alike.

In 2013, Supreme Court had directed that no person should suffer for not getting Aadhaar. The present government requested the Supreme Court to revoke its order as it intends to use Aadhaar for various services.

Supreme Court stated that Aadhaar will not be used for any other purposes except PDS, kerosene and LPG distribution system and made it clear that even for availing these facilities Aadhaar card will not be mandatory.

**Issues with Aadhar:**

- As gleaned from various SC judgements Right to Privacy is an integral aspect of the Right to Life and Liberty. In this context, the Supreme Court restrained the central government and the UIDAI from sharing data with any third party without the consent of the Aadhaar-holder in writing.
- Government's argument that poor must be prepared to surrender their right of privacy to continue receiving the subsidy payments and other benefits was rejected by the SC.
- There is no comprehensive legislation on privacy issues raised by Aadhar.
- Every government's most basic obligation is to protect its citizens' rights — both their right to sustenance and their right to the privacy that enables freedom equally.

On the other hand, Aadhar has a huge potential in redrawing the public service delivery mechanism. It carries with it a large group of advantages including better targeting, plugging leakages etc. Aadhar is the central plank of a plethora of ambitious projects mooted by government like Digi locker, e-sign etc.

The need of the hour is to address the privacy concerns of citizens by incorporating adequate and necessary safeguards. Without parliamentary sanction and legislative backing, the process is legally untenable and unacceptable.

**3. *Reservation policy is a logical and useful strategy for ensuring justice and providing equal opportunity to the socially oppressed groups. Discuss.***

**Approach:**

- Explain how it ensures justice and equal opportunity.
- Flip side of current reservation policy.
- Conclusion based on your analysis.

**Answer:**

The reservation policy was a corrective step towards the castes that were subjugated and marginalized since centuries. Since, they were not in position to compete openly for the employment and education opportunities, reservation came as a great equalizer.

It has been useful in ensuring justice and equal opportunity to the socially oppressed groups due to following reasons:

- Increase opportunities** – It provides greater opportunities for the backward classes to break the shackles of oppression in a society where still caste plays a dominant role.
- Equitable distribution of benefits of development** – It increases the possibility of distributing the benefits of development equally and reduce inequality in the society.
- New social order** – It helps in securing a just position to the underprivileged in the society and an opportunity to rise on social scale.
- Political and economic power** – It has led to emergence of political and economic leaders among the lower castes giving them confidence that had been missing for centuries.

However, reservation has been a matter of continuous debate in Indian polity. It is opposed due to following reasons:

- Hardening caste identities and promoting caste based politics.
- Replacing of merit by mediocrity especially in cases of promotion.
- Political attempts to include more and more castes in the reserved list for votes

- Reservation and anti-reservation agitations triggering violence like that in Haryana and Gujarat.
- Increasing discontent among advanced castes due to misuse of this policy.
- Concentration of reservation of benefits by the well to do segments of the lower castes rather than benefitting the needy amongst them.

Thus, without doubt the policy has been proved to be a great equalizer, but it is also true that it has been misused. Moreover, it leaves out the poor and marginalized of other sections that need a push. Hence, it would be judicious to review the policy by improving its accessibility to every stratum of the lower castes. A gradual movement towards reservation based on economic criteria is now a feasible idea with the advent of ICT tools like ADHAAR.

**4. *Discuss the issue of reservation in promotions for SCs and STs in public employment in the light of various judicial pronouncements and constitutional amendments.***

**Approach:**

- Introduce by briefly touching upon reservation as a policy for upgrading the depressed classes in India.
- Highlight the introduction of reservation in promotions in India in the aftermath of the Indira Sawhney judgement.
- Discuss the progress on the matter of promotions in public employment by highlighting the subsequent legislations and judicial interventions around the same.
- Conclude with a brief remark on the latest judicial explanation on the matter.

**Answer:**

Reservation in India is part of the world's largest affirmative action programme for the depressed classes. However, it has always remained a contentious issue especially in the matter of promotions in public employment.

In the **Indira Sawhney & Others vs Union of India, 1992** case, the Supreme Court held that the reservation in appointments, under Article 16(4) of the Constitution, do not apply to promotions. However, subsequent to this judgement, a series of constitutional amendments and judicial pronouncements were made, which negated this judgement:

- The **77th Constitution Amendment Act, 1995** inserted Article **16(4A)**, which enabled the state to make any law regarding reservation in promotions for the SCs and STs. Also, **Article 16(4B)** provided that reserved promotion posts for SCs and STs that remain unfilled can be carried forward to the subsequent year.
- In the **M Nagaraj case**, the Supreme Court also upheld the validity of the Parliament's decision to extend reservations in promotions. However, it introduced three conditions, essentially necessitating the state to:
  - Provide **proof for the backwardness** of the class benefitting from the reservation,
  - Provide **proof for its inadequate representation** in the position/service; and
  - Show how reservations in promotions would further the **administrative efficiency** as mandated by Article 335.

However, the first condition was rejected in **Jarnail Singh vs Lachhmi Narain Gupta** case.

- The Nagaraj judgement was further used in **BK Pavitra vs Union of India-I** case to strike down the legislation passed subsequent to the 85th Constitution Amendment Act, 2001 by the Karnataka assembly in 2002 that provided for **consequential seniority**.

- The court held that the government had not collected quantifiable data on the three parameters – inadequacy of representation, backwardness and the impact on overall administrative efficiency – before extending reservations in promotions.
- However, in the recent Supreme Court judgement in **BK Pavitra vs Union of India-II**, it upheld the validity of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation Act, 2018. The Act gives a one-time promotion to SC/ST employees, and is referred to as a “catch-up” clause.
  - The court held that Article 16 (4A) enables the state to provide for reservation in matters of promotion to SC/ST. Further, the opinion regarding the adequacy of representation of the SCs and STs in the state public services is a matter which forms a part of the subjective satisfaction of the state.

The latest 2018 judgement has also examined various associated issues related to reservation in promotion debate such as -

- **Issue of merit and efficiency:** The court held that the efficiency of administration must be defined in an inclusive sense, where a ‘**meritorious’ candidate** is not merely one who is ‘talented’ or ‘successful’ but also one whose appointment fulfills the constitutional goals of uplifting members of the SCs and STs and ensuring a diverse and representative administration.
- **Notion of substantive equality:** It also held that Indian Constitution envisages not just a formal equality of opportunity but the achievement of substantive equality.
- **Issue of creamy layer:** It held that progression in a cadre based on promotion cannot be treated as the acquisition of creamy layer status.

Overall, the judgment asserts that the policy of reservations is a tool to achieve substantive equality and due representation in public services.

##### **5. Freedom of expression is a right, however, it does not grant the right to defame any person. Discuss the statement in the light of various Supreme Court judgments.**

###### **Approach:**

- Discuss freedom of expression as right and the reasonable restriction on it.
- Justify right to defame is not included in freedom of expression with the help of various Supreme Court’s judgements.

###### **Answer:**

The freedom of expression is guaranteed as fundamental right by the Indian Constitution under Article 19(1) (a). It implies that every citizen has right to express his views, opinions, belief and convictions freely.

However, this right is not absolute. The Constitution (Article 19(2)) has imposed certain reasonable restrictions on the exercise of the freedom of expression including defamation.

Defamation refers to the act of publication of defamatory content that lowers the reputation of an individual or an entity when observed through the perspective of an ordinary man. It can be done by words, spoken or written or visual representation.

Defamation in India is both a civil and a criminal offence. Defamation as a criminal offence is listed under section 499 of the Indian Penal Code.

Recently, the Supreme Court, in **Subramanian Swamy vs Union of India** case upheld the constitutionality of criminal defamation. As per SC, the right to free speech does not

mean that a citizen can defame the other. The judgement has underlined individual's fundamental right to live with dignity and reputation.

- Protection of reputation is a fundamental right under Art-21, right to life with dignity and also a human right.
- Criminalization of defamation to protect individual dignity and reputation is a "reasonable restriction"

In another case, **R. Rajagopal versus State of Tamil Nadu**, famously known as the Auto Shankar Case, Supreme Court said that the newspaper could publish the life story or autobiographies of people so far as it appears from the public records even without the consent or authority. But if they go beyond the public record and publish, they may be invading the privacy and causing defamation of the officials named in the publication which is unacceptable.

According to these judgments, the theory of balancing of rights dictates that along with the right to freedom of speech and expression, there is a correlative duty on citizens not to interfere with the liberty of others, as everyone is entitled to the dignity of person and of reputation.

- 6. Criticism about the judiciary should be welcomed, so long as criticisms do not hamper the "administration of justice". In this context discuss whether the power of contempt of court given to the higher judiciary limits the freedom granted by Article 19(1)(a) and whether these two can be reconciled.**

**Approach:**

- In the introduction briefly address the key concern of the statement and link it to the argument on power of contempt and freedom of speech and expression.
- Discuss the need of contempt powers with judiciary.
- Discuss the implications of contempt powers on freedom of speech.
- Discuss how these two can be reconciled.

**Answer:**

Administration of justice requires strong safeguards for the judiciary. Thus:

- Article 129 and 215 of the Constitution of India empower the Supreme Court and High Court respectively to punish people for their contempt.

The Contempt of Court Act, 1971 delineate contempt powers of judiciary to:

- Prevent scandalisation or lowering the authority of any court.
- Prevent interference with the due course of any judicial proceedings.
- Strengthen court's image as legal authority and that no one is above the law.
- Ensure one could not defy court orders according to one's own free will.

In the context freedom of speech and expression, a right underpinned by article 19 1(a), contempt of court is considered a reasonable restriction under Article 19 (2), which empowers contempt laws.

Critics observe that:

- Judiciary has routinely invoked its contempt powers to punish expressions of dissent on grounds of such speech undermining or scandalising the judiciary's authority.
- Acts of speech and expression that do not necessarily impede with the actual administration of justice have been punished invoking the idea of reputation of judiciary in the eyes of the public.

- Empower citizens to express their opinion which is necessary for good public policies.
- Are important in themselves for ensuring a good life, also enshrined under Article 21 of the constitution.

Thus, it becomes imperative to reconcile the freedom of speech and the contempt power of the courts. It can be ensured by taking the following into consideration:

- Judiciary itself underlined guidelines that envisage economic use of the jurisdiction on the one hand and harmonization between free criticism and the judiciary, e.g. Mulgaonkar case 1978. Also, of note are observations in cases such as Ram Dayal Markarha v. state of Madhya Pradesh 1978; Conscientious Group v. Mohammed Yunus 1987; P.N. Duda b. P. Shiv Shankar 1988; Sanjay Narayan, Hindustan Times v. High Court of Allahabad 2011.
- The 2006 amendment in the Contempt of Courts Act, 1971 states that “court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bonafide”.

International standards and laws of other democracies would be informative and enable us to arrive at the right standards. e.g. in European democracies such as Germany, France, Belgium, Austria, Italy, there is no power to commit for contempt for scandalising the court. In the U.K., the offence of scandalising the court has become obsolete. In the United States, contempt power is used against the press and publication only if there is a clear imminent and present danger to the disposal of a pending case.

**7. *The Supreme Court in its judgment on 26/11 slammed the media for its lust for TRPs, which jeopardized the security of the nation. Can the actions of media be justified in the context of right to freedom and speech? Discuss the principles and concerns that the media should keep in mind while covering such incidents.***

**Approach:**

In introduction some background about the role of electronic media during 26/11 attack and Supreme Court's observation should be provided. Then discuss the rightness or wrongness of media actions in context balancing freedom of speech with national security and right to life. Then outline few principles, which should be adhered to by media while covering such sensitive incidents.

**Answer:**

In hunger of TRP and in a blind rush to present the news before any other news channel the media during the 26/11 attack on Mumbai worked utterly irresponsibly. They kept providing instant news update which kept the terrorist and their cross border handlers informed and updated about the security operation and put many lives at risk.

About the role of media Supreme Court observed that it is not possible to find out whether the security forces actually suffered any casualty or injuries on account of the way their operations were being displayed on the TV screen. But it is beyond doubt that the way their operations were freely shown made the task of the security forces not only exceedingly difficult but also dangerous and risky.

Any attempt to justify the conduct of the TV channels by citing the right to freedom of speech and expression would be totally wrong and unacceptable in such a situation as national security when many lives are at risk cannot be held hostage to the claim of a

right which is being misused. The visuals that were shown live by the TV channels could have also been shown after all the terrorists were neutralized. But, in that case the TV programmes would not have had the same shrill, scintillating and chilling effect and would not have shot up the TRP ratings of the channels. It must, therefore, be held that by covering live the terrorists attack on Mumbai in the way it was done, the Indian TV channels were not serving any national interest or social cause. On the contrary they were acting in their own commercial interests putting the national security in jeopardy.

There are still no regulations in place by the government regarding coverage of news live which could compromise national interest. But then, do we need to wait for a regulation? When it comes to national interest, you don't wait for a regulation, you just act responsibly.

**Principles:** There can be some principles which media should keep in mind while covering an incident which affects national security or can result in loss of life; such as:

- Human life must be given utmost importance, media should over look TRP and commercial interest when human life is at stake.
- National security must never be compromised in name of freedom of speech and expression. Media must act sensibly and responsibly.
- Live telecast of such incident can wait for some time, if it can help in saving life or serving justice.
- Sensationalisation of security issue should never be done.

#### **Concerns:**

This irresponsible behaviour can do much harm to the argument that any regulatory mechanism for the media must only come from within. And it can hamper freedom of speech and expression. This kind of behaviour may also dilute the role of media as fourth pillar of democracy. Therefore, media must keep the safety of security agency as well as secrecy of intelligence agencies at work while reporting such incidences.

- 8.** *The principle of accountability is an essential part of the rule of law. In this context, discuss the lacunae in government's approach and judiciary's response to the phenomenon of extrajudicial killings in India.*

#### **Approach:**

- Explain the meaning of the given statement and establish a link between accountability and Rule of Law.
- In the context of extra-judicial killings, discuss the lacunae in the government's approach.
- Mention correctives suggested and taken by the Judiciary to rectify the situation.

#### **Answer:**

Rule of Law is a principle of governance in which entities, including the state itself is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. Accountability is an essential part of Rule of Law.

#### **Extra judicial killings**

An extrajudicial killing is the killing of a person by governmental authorities without the sanction of law. There have been allegations and instances of judicial killings by the police and the armed forces in India.

This has raised serious concerns in handling extrajudicial killings in India, which include lacunae in government's approach:

- Inadequate investigation of extrajudicial killing due to absence of an independent body to investigate such complaints.
- Limited success of NHRC as guidelines outlined by NHRC are often not implemented by the government.
- Doctrines of sovereign and official immunity which protect officials: Legal barriers for the prosecution of public servants, including the requirement for 'prior sanction' from the government.
- Failure of government to ratify UN Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearances.
- Lack of adequate compensation system for the families of victims of extrajudicial killings.
- Low conviction rates and lack of transparency regarding internal disciplinary hearings in armed forces. Judicial delays also make conviction difficult at times.
- AFSPA takes away some accountability on part of public officials in the national interest.

#### **Judiciary's response:**

- R.S. Sodhi vs State of U.P. 1992: In this judgement, the Supreme Court held that every police encounter must be investigated.
- In 2014, the SC provided detailed guidelines to check extra judicial killings.
  - Independent investigation into encounters, by the CID or police team of another police station under the supervision of a senior officer.
  - Probe report shall be forwarded to the court concerned so that a magisterial inquiry is carried out and a final report submitted.
  - No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence.
  - If an incriminating chargesheet is filed against the police officers, the trial must be concluded expeditiously, apart from initiating disciplinary action against such officers and placing them under suspension.
  - The relatives of a victim can also approach a Sessions Court if the authorities fail to comply with the Supreme Court directives

Recently, the Supreme Court ordered a CBI investigation into cases of suspected extra-judicial killings in Manipur based on a PIL. Similarly, the court had last year ruled that the armed forces cannot escape investigation for excesses even in places where they enjoy special powers under AFSPA. The court also addressed the Centre to take note of the NHRC's concerns and remedy the situation. By doing so, the court has reiterated that the principle of accountability is an essential part of the rule of law.

#### **9. *Highlight the importance of Right to Education. Also, discuss the issues linked with the 'No detention' policy.***

##### **Approach:**

- Giving a brief background of the RTE Act, discuss its significance.
- Analyze the no-detention policy under this act and highlight the issues involved with this policy.
- Give some suggestions to resolve the issues relating to the no detention policy.

##### **Answer:**

The Right of Children to Free and Compulsory Education Act, 2009 is a Central legislation that details the aspects of the right of children within the age group of six to fourteen years i.e. to free and compulsory elementary education, under Article 21-A inserted by the 86<sup>th</sup> Amendment Act, 2002.

This Act serves as a building block to ensure that every child has his or her right (as an entitlement) to get a quality elementary education. In fact, it also mandates private schools to admit at least 25% of the children without any fee. The Act seeks to promote child-friendly school through measures such as compliance with infrastructure and teacher norms for an effective learning environment.

Section 30(1) of the Act introduced that a child cannot be detained in any class till the completion of elementary education to prevent damage to their self-esteem, increased dropouts and increased social problems like begging and petty crimes. It was aimed at increasing Gross Enrolment Ratio.

However, recently, the Lok Sabha has passed an amendment bill to abolish the No-Detention policy. Two committees of Geeta Bhukkal and TSR Subramaniam also recommended it to be removed in a phased manner. Issues with this policy are:

- It leads to a situation where there remain **no incentives for children to learn and for teachers to teach**. This leads to students lacking required educational competence, knowledge and skills relevant to higher classes. For e.g. the number of students failing in class 9 examination has been on an increase in many States.
- It **affects the quality of classroom teaching** as well because at higher levels, teacher is unable to teach the curriculum at an expected pace due to promotion of all students with difference in capabilities and understanding.
- It also affects teachers' ability to control students as teacher loses leverage over students and many government schools turn into mere "mid-day meal" providers.
- Fall in learning outcomes and automatic promotion of children **only rolls over and postpones the problem of dropouts** as seen from shoot up of dropouts in class 8 at the end of elementary stage.

In this context, the no-detention policy is being scrapped. At the same time, there are equally strong arguments against the scrapping of the no-detention policy:

- This will mean that the State is blaming students (many of whom are first-generation learners) for their failure to learn in class.
- The RTE Act made a range of other promises such as upgrading quality of teaching, regular assessment through Continuous and Comprehensive Evaluation (CCE). All these along with no-detention policy had to go hand in hand. No-detention policy does not mean no evaluation.
- Further, bringing back the old pass-fail system without making proper course correction in other areas may undermine the egalitarian promise of the RTE.

To conclude, detention should be resorted to only after giving the child remedial coaching and extra chances to prove his capability. Education should be inclusive and should have a common curriculum, so that all children become familiar with the basic concepts, tenets, principles and ethos of the Indian education.

- 10. *The right to live with dignity under Article 21 includes the right to die with dignity. Discuss in light of various judicial pronouncements by the Apex Court on this matter. Also, critically examine the various issues associated with the Medical Treatment of Terminally Ill Patients Bill 2016.***

**Approach:**

The student has to understand what is being asked here specifically, especially because Euthanasia has been in the news in recent months.

- Introduce the debate on Euthanasia. Mention the provisions of Article 21 of the constitution.

- Give the arguments for or against along with some contemporary examples.

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**Answer:**

**Article 21** gives people the right to lead a meaningful, complete and dignified life. In case of terminally ill patients though, this right cannot be justly exercised. Thus, it has been argued that in consonance with right to live with dignity, a person who cannot do so, must have a right to die with dignity at least. **Euthanasia** or assisted suicide has been argued as a means to put the ‘patients out of their misery’. In the 2011 **Aruna Shaunbaug** judgement, the Supreme Court allowed passive euthanasia, subject to safeguards and fair procedure requiring mandatory approval of a High Court bench in every case based on consultation with a panel of experts. Passive euthanasia refers to withholding or withdrawing treatment necessary to maintain life.

As per the ruling in **Gian Kaur v. State of Punjab, 1996**, true meaning of the word ‘life’ in Article 21 means life with human dignity. The ‘Right to Die’ if any, is inherently inconsistent with the “Right to Life” as is “death” with “Life”.

The **196th report of the Law Commission of India** spoke in favour of passive euthanasia.

- Arguments for euthanasia:
  - it is a civil right
  - it is a question of personal autonomy
  - it is necessary to ensure that no one dies in painful agony
  - Protective guidelines can be made to prevent misuse of such a law
- Arguments against:
  - Assisted dying may be used illegally for personal gains
  - It may be promoted as a cheaper alternative to medicinal care
  - Hospital care and proper treatment provide morally acceptable answers
- Both euthanasia and assisted suicide are legal in Netherlands, Belgium and Luxembourg, while euthanasia is legalised in Columbia.

The **Medical Treatment of Terminally Ill Patients Bill 2016** seeks to codify the framework decided in the Aruna Shaunbaug judgement. Some concerns are:

- It does not employ enough safeguards for proper execution of advance directives
- It allows a child to take a decision on the matter of life and death
- The framework of obtaining permission from a High Court can delay the cases
- The classification of patients may not pass the test of judicial scrutiny.

11. ***Despite the phrase 'due process of law' not being included in Article 21, the Supreme Court, over the years, has adopted the doctrines of 'procedural due process' and 'substantive due process' into Indian constitutional law. Comment.***

**Approach:**

- Giving a brief account of Article 21, bring out the difference between the procedure established by law and due process of law.
- Then give reasons due to which due process was not incorporated into the Indian Constitution.
- Bring out various judgements to establish the facts that India judiciary over the time has established its conformity towards the principle of due process over procedure established by law.

**Answer:**

Article 21, of Indian Constitution provides that “No person shall be deprived of his life or personal liberty except according to the procedure established by law”. Procedure established by law, a positive law concept means that a law that is duly enacted by the legislature is valid if correct procedure has been followed.

As incorporated in the US Constitution, due process checks if a law is fair, just and not arbitrary, thus ensuring a fair treatment.

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Substantive due process prohibits the government from infringing on fundamental constitutional liberties. By contrast, procedural due process refers to the procedural limitations placed on the manner in which a law is administered, applied, or enforced. Thus, procedural due process prohibits the government from arbitrarily depriving individuals of legally protected interests without first giving them notice and the opportunity to be heard.

The Indian Constitution by incorporating ‘procedure established by law’ adopts a healthy synthesis of Parliamentary Sovereignty and Judicial Supremacy. However despite the textual choices of the framers of Indian Constitution, the “due process” found a back door entry into Indian Constitutional interpretation in late 1970s through the right to equality.

Until the decision in Maneka Gandhi case, the view which prevailed in the Supreme Court was that there was no guarantee in the Constitution against arbitrary legislation encroaching upon personal liberty. This case overturned the majority in A.K. Gopalan vs State of Madras where the majority decision adopted a narrow interpretation of ‘procedure established by law’.

Contrastingly the Maneka Gandhi Case took the view that:

- A law coming under Art. 21 must also satisfy the requirements of Art 19.
- Once the test of reasonableness is imported to determine the validity of law depriving a person of his liberty, it follows that such laws shall be invalid if it violates the principles of natural justice.

Over a course of judgments, the Courts indicated that “due process” has firmly become a part of the Indian Constitutional law recently reflected in Judgements such as Selvi vs State of Karnataka, where constitutionality of investigative narco-analysis was challenged, held it to be permissible only with the consent of the ‘subject’.

Under a wide construction of Article 21, Judiciary’s view on issues such as Khap Panchayat, Custodial death, Right to die, Right to education etc. gave supremacy to ‘due process’ over ‘procedure established by law’.

## 12. Article 22 of the Indian Constitution is a necessary evil. Discuss.

**Approach:**

- Briefly state the provision of Article 22 in the Indian Constitution.
- Give arguments related to contentious provisions in the Article 22.
- Explain why these provisions are necessary
- Conclude based on the aforesaid points.

**Answer:**

**Article 22** of the Indian Constitution provides that no person who is arrested shall be detained in custody without being informed about the grounds of the same. It further contains:

- **Article 22 (1)** which says that the person detained has the right to be informed about the grounds of his/her arrest, along with the right to consult/defend by a legal practitioner.
- **Article 22 (2)** which provides other safeguards such as the detained person should be produced before the nearest magistrate within 24 hours of the arrest.

**However, there are contentious provisions in the Article, which include:**

- The Article 22 (3) denies the rights provided in Article 22 (1) and Article 22 (2) to the person who is an 'enemy alien' or if a person is arrested or detained under a law providing for preventive detention.
- It bases the formulation of preventive detention laws in the name of '**national security**' and '**maintenance of public order**', which are **not clearly defined** in the Constitution.
- It **undermines the principle of 'innocent until proven guilty'** by sanctioning the use of past criminality as a basis for imposing coercive force on citizens (by extorting them) without them actually being adjudged guilty of committing a criminal act.

However, under certain circumstances the freedom of the individual needs to be superseded in the interests of the state. Its necessity can be understood from the following:

- In the Constituent Assembly debates, Dr B.R. Ambedkar argued that the government shall have to detain a person **endangering the security of the nation and public services**.
- **Secessionist movements**, which threaten national security and integrity require a strict law to enable the state to counter them.
- The Supreme Court has held that in the matter of preventive detention, once the **detaining authority is subjectively satisfied** about the various offences labelled against the detenu, habitually in continuing the same, difficulty in controlling him under normal circumstances, **he/she is free to pass appropriate order to detain him/her**.

Further, safeguards have been provided in the Article 22 itself in case of preventive detention such as limit on the duration of detention, communication of grounds of detention, affording him the earliest opportunity of making a representation against the order etc.

In a diverse country like India where a lot of subversive activities are carried out within the country and there is a threat from other non-state actors, the idealism needs to be balanced by the adoption of realism. Also, timely judicial intervention and further strengthening of procedural safeguards would prevent the space for misuse.

**13. *Is the freedom to profess, practice and propagate religion, provided under article 25 of the Indian constitution a historical mistake committed by constituent assembly, discuss in view of the recent controversy on religious conversions?***

**Approach:**

Discuss briefly the socio-political context of constituent assembly debates. Discuss Article 25 in context of spate of recent religious conversions and debates it ignited.

**Answer:**

Historically, the defining characteristic of Indian society has been that it remained accommodative of variety of religious views and practice. Unfortunately it created the condition during freedom struggle of religion being used as potent political tool leading to communalization of politics and partition of nation. However, makers of constitution took the liberal view of religion considering it as the matter of individual conscience in which state has no role to play. This secular stand is reflected in article 25 of the constitution.

The Article 25 of the constitution guarantees the freedom of religion as fundamental right. It consists of two parts, freedom of conscience with respect to religion and free profession, practice and propagation of religion. However, enjoyment of these rights is subjected to public order, morality and health. The recent debates on religious conversions have brought the two provisions of the article into conflict. The right to freely profess, practice and propagate their religion has been used as by some religious organizations belonging to majoritarian religion to manufacture conversions by using external means of force or allurement. It impinges on freedom of conscience with respect to religious beliefs and practice. Further right to freely profess, practice and propagate their religion was conceived to give space to minority religions to exist in hindu majoritarian society. The constitutional makers were apprehensive of minority religions might lose its identity under influence of majority religion which goes against spirit of unity and diversity. Supreme Court also dismissed many anti-conversion laws in MP and Odisha as unconstitutional. Hence our constitutional makers have very broad vision and subtle understanding of how power operates in the deeply religious society like India.

**14. Right to freedom of religion cannot be allowed to deny right to equality and individual dignity. Discuss in the light of constitutional provisions and recent judicial pronouncements.**

**Approach:**

- In introduction, mention the provisions of the Constitution that deal with religious freedoms.
- Mention the recent judgments that deal with balancing religious rights with other fundamental rights of the Constitution.
- Analyze their impact.

**Answer:**

The Constitution of India under Article 25 read with the preamble gives **equal entitlement to all persons** regarding freedom of conscience and freely professing, practicing and propagating religion. However, the Article itself subjects this freedom **to other provisions of fundamental right**.

Similarly, Articles 26-28 deal with the matters of religion. Article 26 allows religious denominations to determine for itself the manner in which it manages its religious affairs provided that it follows three criterion – system of belief conducive to their spiritual well-being, common organization and distinctive name. Article 15 also bars discrimination on the grounds of religion.

Thus, right to freedom of religion has to be balanced with other rights such as equality and non-discrimination prescribed under Articles 14, 15 read with Article 21 of the Constitution.

In this light, various judicial pronouncements in recent times have provided further impetus to the argument:

- Mumbai HC judgment removed the ban on the entry of women in **Shani Shingnapur temple and Haji Ali Darga**.
- Supreme Court 4:1 verdict, in *Indian Young Lawyers Association v. State of Kerala*, opened the doors of the Sabarimala temple to women of all ages who were hitherto banned from entering the temple.
- The Supreme Court struck down Triple Talaq on the grounds of violating right to equality and discrimination between women belonging to different communities.

- The Supreme Court has further ruled that the Muslim women have a right to legally adopt children, even though their personal law do not give them that right.

In these verdicts Supreme Court have stood by the women and enabled gender justice. Also, in the context of mob lynchings and cow vigilantism, the apex Court observed that the State has a positive obligation to protect the fundamental rights and freedoms of all individuals irrespective of race, caste, class or religion.

- 15. *Special rights are not privileges but they are granted to make it possible for minorities to preserve their identity, culture and traditions. Elaborate in the context of India with examples.***

**Approach:**

- Bring out the need for extending special rights to minorities.
- Discuss these special rights in the context of India (viz. constitutional protection to minorities).
- Give examples of government policies/institutions contributing to preservation of minorities in India.

**Answer:**

In a democratic setup, there is always a tendency of majoritarian domination. In a polity based on rule of law, this means that every group of citizens must be given sufficient protections, especially with regard to preserving their identity and culture. Special rights granted to minorities ensure these. Also, idea of rights of minorities does not include any special political privileges. The idea is not to treat minorities as privileged section of the population but to give them a sense of security. These rights are universally accepted and are laid down in United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

In India, the safeguards for minorities under the constitution of India are in the form of fundamental rights:

- Article 14 provides for equality before the law and equal protection of law. Thus minorities cannot be put to any legal disability vis- a-vis the majority.
- Articles 15 and 16 prohibit discrimination ONLY on certain grounds (religion, race, caste, sex or place of birth).
- Article 29 explicitly provides the right to every section of citizens having distinct language, script or culture to conserve the same.
- Article 30 accords the rights to religious/linguistic minorities to establish and administer educational institutions.

Further, following articles deal exclusively with linguistic minorities:

- Art. 347- Power of President to direct a language to be included as an official language of a state if a substantial proportion of the state population desires
- Art. 350- Representation of a grievance to a Union/State authority in any of the languages used in the Union/State as the case may be.
- Art. 350A- Facilities for instruction in mother-tongue at primary stage
- Art. 350 B- Provision of special Officer for Linguistic Minorities

Examples of protection of minority rights:

- Provision of National Commission for Minorities, National Commission for Minority Educational Institutions and National Minorities Development Finance Corporation (NMDFC)
- Instruction through mother tongues at the Primary stage of education

- Implementation of Three-language Formula.
- Prime Minister's New 15 Point Programme for Welfare of Minorities
- Developmental schemes like Nai Manzil, USTAAD, Humari Darohar,Jiyo Parsi , Maulana Azad National Fellowship For Minority Students , Nalanda Project etc.
- Dissemination of information in vernacular languages.

These provisions do not give any privilege to minorities. They ensure that their progress is not stalled because of ideology of the government in power. These rights recognize their special conditions as well as possible challenges of a democracy. Their implementation is the constitutional/statutory responsibility of the State to ensure inclusive growth and development.

**16. *Where there is a right, there is a remedy. In this context, discuss the nature and significance of writs in India with adequate examples.***

**Approach:**

- In introduction briefly highlight the significance of the above statement in the context of various kinds of writs in Indian Constitution.
- Mention the various kinds of writs and their usage.
- Cite relevant case laws.

**Answer:**

Article 32 and 226 of the Indian Constitution provide for Right to Constitutional Remedies, for the enforcement of fundamental rights, which has been regarded as "Heart and Soul" of Indian Constitution by Dr. B.R. Ambedkar. It is done by the higher judiciary through five kinds of writs.

The nature of these writs:

- **Habeas Corpus:** Literally meaning to have the body, this writ is considered to be the 'bulwark of individual liberty' against illegal and unjustifiable detention. It can be filed by any person on behalf of the other person and can be issued against both public authorities and private individuals..
- **Certiorari:** It means to 'to certify or to inform' and is enforced against the decision of a sub-ordinate authority exercising judicial or quasi judicial powers, improperly. For example, the Supreme Court exercised Certiorari in *A.K Kraipak v. U.O.I*, in which selection process was quashed on the ground of bias.
- **Prohibition:** It is issued by the court prohibiting the authority from continuing the proceedings if such authority has no power or jurisdiction to decide the case. It is an extraordinary prerogative writ of a preventive nature.
- **Mandamus:** it is a judicial remedy which is in the form of an order from a superior court to any governmental agency, court or public authority to do or forbear from doing any specific act which that body is obliged to do under the law.
- **Quo Warranto:** It literally means 'by what authority' and is issued against the person who occupies a public seat without any qualification for appointment.

**Significance of these writs**

- Writs are crucial in the defence of fundamental rights; without them, Part III would be meaningless, because they give teeth to the rights.
- They are powerful checks against the excesses committed by the state as under article 12.
- Using them, judiciary has interpreted many other rights as inseparable adjuncts to other fundamental rights. For example, right to dignified life in *Maneka Gandhi Case 1978*.

- Powers of the Supreme Court under Article 32 of the constitution are limited only to the enforcement of fundamental rights, whereas under article 226 High Court can exercise such powers for any other purpose also apart from the enforcement of fundamental rights

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The importance of writs lies in creating permissible areas of exercise of power, authority and jurisdiction over administrative actions enforced by any State. Thus writs as constitutional remedies operate as a check and keeps the administration of government within the bounds of law.

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# FUNDAMENTAL DUTIES

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# 1. Genesis of Fundamental Duties in India

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For any polity, its people are the ultimate custodians of its Constitution. It is in these citizens that sovereignty vests and specifically for India, it is in their name that the Constitution was adopted. Therefore, the Constitution seeks to empower the citizen. However, it is a reciprocal relationship, in the sense, that the citizen also empowers the Constitution. They do it by following it in letter and spirit, by adhering to it, by protecting it, and by persevering to make it more meaningful with words and deeds.

The Constitution of India envisaged a holistic approach towards civic life in a democratic polity. It guaranteed certain rights to the citizen as Fundamental Rights. Since human conduct cannot be confined to the realm of Fundamental Rights, the Constitution also envisaged certain duties, which are correlated to the rights, and those duties have been described as Fundamental Duties.

## **Recommendations of Swaran Singh Committee that were not accepted**

- (a) The Parliament may provide for the imposition of such penalty or punishment as may be considered appropriate for any non-compliance with or refusal to observe any of the duties;
- (b) No law imposing such penalty or punishment shall be called in question in any court on the ground of infringement of any of Fundamental Rights or on the ground of repugnancy to any other provision of the Constitution;
- (c) Duty to pay taxes should also be a Fundamental Duty of the citizens.

It is to be borne in mind that the framers of the Constitution did not deem it appropriate to incorporate those duties in the text of the Constitution when it was originally promulgated. There may be myriad reasons for such omission:

- Firstly, the concept of *Dharma* is deeply rooted in the Indian society. Citizens practice certain duties as basic values irrespective of a threat of penalty.
- Secondly, the preamble to the Constitution itself encapsulates the duties of citizens by including not only the aspirations of the people i.e. the goals of the nation, but also the assurances of the Constitution. Hence, it is implied that whatever is required for the fulfillment of these goals be undertaken by every citizen as his duty.
- Additionally, the Fundamental Rights enlisted in the Constitution logically bring in an inference of a set of duties which are essential for their realization. If these rights are to be available to people, they are obligated to perform their corresponding duties.

However, after around a quarter century in the history of independent India, it was thought fit to have a framework of duties in the Constitution itself. **Sardar Swaran Singh committee** was constituted by Indira Gandhi soon after emergency was imposed in the country. The objective of this committee was to study the question of amending the constitution in the light of past experiences and recommend amendments.

Consequently, the 42nd Amendment Act, also called the "Mini Constitution", added a new part in the Constitution, Part IVA. It incorporated ten (now eleven) Fundamental Duties by inserting a new article 51A below article 51. The objective of incorporating the fundamental duties is to place before the country a code of conduct, which the citizens are expected to follow.

## 2. List of Fundamental Duties

The eleven Fundamental Duties incorporated in Article 51A, by the 42<sup>nd</sup> and 86<sup>th</sup> Amendment of the Indian Constitution are as under:

- a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

- c) to uphold and protect the sovereignty, unity and integrity of India;
- d) to defend the country and render national service when called upon to do so;
- e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- f) to value and preserve the rich heritage of our composite culture;
- g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- i) to safeguard public property and to abjure violence;
- j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;
- k) who is a parent or guardian, to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

*The NCRWC recommended that following new fundamental duties should be included in Article 51-A:*

- *Duty to vote at elections, actively participate in the democratic process of governance and to pay taxes;*
- *To foster a spirit of family values and responsible parenthood in the matter of education, physical and moral well-being of children;*
- *Duty of industrial organizations to provide education to children of their employees.*

### 3. Nature of Fundamental Duties

- A. As the Directive Principles are addressed to the state, the fundamental duties are addressed to the citizens. The citizens enjoying the fundamental rights must respect the ideals of the constitution, to promote harmony and spirit of the brotherhood.
- B. Fundamental Duties are non-justiciable. It means the citizens cannot be forced to observe them. Some of them, are however part of the enforceable law. For example, Prevention of Insults to National Honor Act, 1971, and so on. However, if a citizen violates Fundamental Duties, his Fundamental Rights may not be restored when he approaches courts.
- C. While some of the fundamental duties are moral duties e.g. to promote a spirit of patriotism and to uphold the unity of India; cherishing the noble ideals of freedom struggle etc, there are others that are civic duties, for instance, respecting the National Flag and National Anthem.
- D. Fundamental Duties consist of tasks essential to the Indian way of life by incorporating precepts reflecting the values of the Indian tradition.
- E. Fundamental duties are extended only to Indian citizens and not foreigners, in a stark contrast with certain Fundamental Rights.

### 4. Enforcement of Fundamental Duties

There is no provision in the Indian Constitution for the direct enforcement of Fundamental Duties and also, no sanction to prevent their violation. However, for the purpose of ascertaining the constitutionality of any law, if a Court finds that the law seeks to give effect to any of these Fundamental Duties, it may consider the law 'reasonable' in relation to Article 14 or 19. Fundamental Duties also serve as a warning to erring citizens as a guard against preventing anti-social activities like burning of the Constitution, destroying public property etc.

The Supreme Court of India may issue suitable guidelines along these matters in appropriate cases. For instance, the Supreme Court adopted the principle of "sustainable development" to give effect to fundamental duties enshrined under Article 51-A(g) read with Article 21, 47 and 48 A. It also held that "precautionary principle" and "polluter pays principle" are acceptable as part of the law of the country.

In effect, one must understand that Parts III, IV and IV-A have a common thread flowing through them. While one enumerates the Fundamental Rights and another declares principles

fundamental to governance, the part IV-A lays down Fundamental Duties of the citizen. Hence, while interpreting any of these provisions; it is advisable to examine the scope and impact of such interpretation on all the three Constitutional aspects emerging from these parts.

Hence, even as Fundamental duties have not been made enforceable by a writ issued by the Court, one must not lose sight of the fact that the duty of every citizen is the collective duty of the State.

## **4.1. Available Legal Provisions for Enforcement of Fundamental Duties**

Any non-operationalization of Fundamental Duties is not necessarily because of the lack of concern or non-availability of legal and other enforceable provisions; but it is more a case of lacuna in the strategy of implementation. Some of the legal provisions available in regard to enforcement of Fundamental Duties are as under:

- In order to ensure that no disrespect is shown to the National Flag, Constitution of India and the National anthem, the Prevention of Insults to National Honour Act, 1971 was enacted.
- The Emblems and Names (Prevention of Improper Use) Act 1950 was enacted soon after independence, inter alia, to prevent improper use of the National Flag and the National Anthem.
- In order to ensure that the correct usage regarding the display of the National Flag is well understood, the instructions issued from time to time on the subject have been embodied in Flag Code of India, which has been made available to all the State Governments, and Union territory Administration (UTs).
- There are a number of provisions in the existing criminal laws to ensure that the activities which encourage enmity between different groups of people on grounds of religion, race, place of birth, residence, language, etc. are adequately punished. Writings, speeches, gestures, activities, exercise, drills, etc. aimed at creating a feeling of insecurity or ill-will among the members of other communities, etc. have been prohibited under Section 153A of the Indian Penal Code (IPC).
- Imputations and assertions prejudicial to the national integration constitute a punishable offence under Section 153 B of the IPC.
- A Communal organization can be declared unlawful association under the provisions of Unlawful Activities (Prevention) Act 1967.
- Offences related to religion are covered in Sections 295-298 of the IPC (Chapter XV).
- Provisions of the Protection of Civil Rights Act, 1955 (earlier the Untouchability (Offences) Act 1955) "provide for punishments for offences related to caste and religion."
- Sections 123(3) and 123(3A) of the Representation of People Act, 1951 declares that soliciting of vote on the ground of religion and the promotion or attempt to promote feelings of enmity or hatred between different classes of citizens of India on the grounds of religion, race, caste, community or language is a corrupt practice. A person indulging in a corrupt practice can be disqualified for being a Member of Parliament or a State Legislature under Section 8A of the Representation of People Act, 1951.

## **5. Committees and Judicial Pronouncements**

### **5.1. Justice Verma Committee Report**

In 1998, the Government of India set up a Committee under the Chairpersonship of Justice J.S Verma to work out a strategy as well as methodology of operationalizing a countrywide programme for teaching fundamental Duties in every educational institution as a measure of inservice training. The Committee made the following recommendations:

- A. It sought to **optimize benefits from the existing schemes/programmes on national integration and communal harmony, culture and values, and environment**, by further activating and monitoring the work of the institutions and NGOs who are sanctioned these schemes by the concerned ministries of Home, Human Resource Development and Environment and Forests.
- B. **Towards protection and improvement of environment**, it recommended coordination between all the law enforcement agencies, enforcing strict compliance of the various legal provisions and filling legislative vacuum, if any.
- C. **Towards reorienting approaches to school curriculum**, the Committee reiterated the need for a fundamental transformation in the direction and approach to curricula for teaching Fundamental Duties in school and teacher education institutions.
- D. **In order to ensure dignity of women**, it recommended that gender biases and sex-stereotyping must be eliminated from all school and colleges textbooks and this should be given as a mandate to all curriculum development agencies, both at national and state levels.
- E. **Towards reorienting teacher education**, it recommended a sensitization module based on Fundamental Duties to be made an integral part of all teacher education programmes, organised by National, State and District level institutions and planning large scale teacher orientation programmes on this theme.
- F. **Towards incorporating Fundamental Duties in the courses and programmes of higher and professional education**, it suggested that the Human Rights Education Initiative of the UGC should be referred to as 'Human Rights and Fundamental Duties Education Initiative' and the UGC may advise on incorporating Fundamental Duties as an essential component of their respective proposals while giving grants to Universities.
- G. **Towards the responsibilities of people's representative**, the Committee recommended that special efforts should be made to ensure that our legislators are aware of the Fundamental Duties as the same are also their duties as citizens by organizing special programmes at the parliamentary and state assembly levels and involving the Corporation, Town Area Committees and the Panchayati Raj institutions in this effort.
- H. **Towards the obligation of public administration and civil servants**, the Committee recommended that a module on Fundamental Duties should be adopted for inclusion in the Courses of different Training Institutions connected with the training of civil servants. It also recommended fixing responsibility of the senior public servants to project the image of administration as people-friendly and responsive to the problems and sufferings of the citizens and giving greater access to information and promoting transparency on part of the Government.
- I. **Towards the administration of justice**, the Committee recommended that a Judicial Academy should be set up to provide facilities for continuing education of Judges, to focus their attention on Constitutional Values and Fundamental Duties, to foster constructive interaction between the Bar and the Bench and to facilitate application of modern techniques of management to the transaction of judicial business in the Court.
- J. **Towards the role of business and industry**, the Committee recommended vigorous formulation and pursuit of ethical conduct for business dealings.
- K. **Towards the role of Media**, the Committee recommended that media should constantly educate people about Constitution and the symbols of sovereignty; harness its potential for rural development, empowerment of women, distance education, environmental protection, civic consciousness and human rights awareness; formulating a comprehensive media policy.

In 2003, the Supreme Court has directed the center to enact a law for the enforcement of fundamental duties by citizens as suggested by the Justice Verma Committee (2000).

The former Chief Justice of India, Ranganath Mishra, in a letter to the Chief Justice of India, requested the apex court to issue necessary directions to the State to educate its citizens in the

matter of fundamental duties so that a right balance emerged between rights and duties. The letter was treated as a writ petition.

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National Commission to Review the Working of the Constitution (NCRWC) Report in 2002 recommended the implementation of the Justice Verma Committee recommendations. It recommended that the first and foremost step that was required to be taken by the Union and State governments was to sensitize the people and create a general awareness of the provisions of fundamental duties amongst citizens.

## 5.2. Important Judicial Pronouncements

- **Mohan Kumar Singhania & Ors. Vs. Union of India & Ors., (1992):** The officers in All-India Services (Administrative, Forest, Police, etc.) were not taking the training seriously resulting in deterioration of the services. Service Rules were amended so as to give weightage to the training and penalize failure. On a challenge being laid to the constitutionality of the amendment in the Rules in Mohan Kumar Singhania & Ors. Vs. Union of India & Ors., (1992), in order to uphold the validity of the amendment, Rathnavel Pandian, J. drew strength from article 51A.

Referring to clause (j), which commands every citizen of India to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement, it was held that the effort taken by the Government in giving utmost importance to the training programme of the selectees so that this higher civil service being the topmost service of the country is not wasted and does not become fruitless during the training period is in consonance with the provisions of article 51A (j). The constitutionality of the amendment was, thus, upheld.

- **Rural Litigation and Entitlement Kendra & Ors. Vs. A State of Uttar Pradesh & Ors., (1985):** In Rural Litigation and Entitlement Kendra, Dehradun & Ors. Vs. State of U.P. & AIR 1985 SC, in order to prevent imbalance to ecology and hazard of healthy environment being created due to working of lime-stone quarries, the Supreme Court directed the quarries lessees being cancelled and lime-stone quarries being closed down permanently. The directions were issued in face of fundamental right to trade and business and the right to earn livelihood.

Assigning paramount significance to Fundamental Duties and rather placing the Fundamental Duties owing to people at large above the fundamental right of a few individuals the court held that such closure would undoubtedly cause hardship, "but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimum disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment".

- **M.C.Mehta (II) Vs. Union of India & Ors., (1998):** In this case, article 51A containing Fundamental Duties of citizens was read casting duties on the government and for issuing certain directions consistently with article 51A. Directions were:

- the Central Government shall direct to the educational institutions throughout India to teach at least for one hour in a week, lessons relating to protection and the improvement of the natural environment including forests, lakes, rivers and wild life in the first ten classes;
- the Central Government shall get text books written for the said purpose and distribute them to the educational institutions free of cost;
- the children shall be taught about the need for maintaining cleanliness and with the cleanliness of the house, both inside and outside and the street in which they live;
- the Central Government shall consider training of teachers who teach this subject by the introduction of short-term courses for such training;

- the Central Government, the Government of the States and all the Union Territories shall consider desirability of organizing “Keep the city/town/village clean” week;
- to create a national awareness of the problems faced by the people by the appalling all round deterioration of the environment.
- **Vellore Citizens' Welfare Forum Vs. Union of India, (1996):** In Vellore Citizens' Welfare Forum Vs. Union of India, (1996) 5 SCC 647 and Bandkhali and Surajkund Lakes matter, the Supreme Court recognized 'The Precautionary Principle' and the 'The Polluter pays' principle as essential features of 'Sustainable Development' and part of the environment law of the country. Article 21, Directive Principles and Fundamental Duty clause (g) of article 51A were relied on by the Supreme Court for spelling out a clear mandate to the State to protect and improve the environment and to safeguard the forests and wild life of the country. The court held it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation.
- **Bijoe Emmanuel vs State of Kerala, AIR 1987:** In this case, it has been held that there is no provision of law which obliges anyone to sing the National Anthem nor is it disrespectful to the National Anthem if a person who stands up respectfully when the National Anthem is sung does not join the singing.

Proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing. It was observed that there was no law enacted by Parliament making it obligatory to comply with article 51A(a). The Supreme Court allowed the petition filed by the children and directed the authorities to re-admit the children into the school.

### 5.3. Recent Developments

- A plea was filed before SC to direct the Central government to frame a national policy under Article 51A to promote and propagate the National Anthem, the National Flag and a 'national song'. However, the court did not accept the plea. It said that Article 51A only mentions National Flag and National Anthem and does not refer to a national song.

Moreover, **Prevention of Insults to National Honour Act, 1971** (amended in 2005) prohibiting the desecration of or insult to the country's national symbols, including the National Flag, The Constitution and the National Anthem is already in place.

- Recently, the State of Karnataka proposed a new flag of the State. Apart from the contentions raised regarding unity and federalism, several quarters voiced their opposition to the move on the premise that it is disrespectful to national flag and hence undermines Fundamental Duty.

However, SC in S.R. Bommai v/s Union of India case had stated that federalism is a basic feature of the Constitution and States are supreme in their sphere. So, State flag is not unauthorized. However, the manner in which State flag is hoisted should not dishonor the national flag. Thus, demands to withdraw the state flag do not hold merit on the ground of fundamental duty.

## 6. Criticism of Fundamental Duties

The Fundamental Duties mentioned in Part IVA of the Constitution have been subjected to criticism on the basis of the following:

- a) The list of duties is not exhaustive since some key duties are found amiss like casting vote, family planning etc.
- b) Duties as enshrined in the Constitution represent no consistent underlying theme.
- c) They have been criticized as being vague, ambiguous and mere moral percepts having little practical value due to their non-enforceable character. For instance, following the noble ideals of the freedom struggle, the phrase 'composite culture' etc.

- d) Some critics feel that it would have been more appropriate to include duties alongside FRs since adding Fundamental Duties in a separate part of the Constitution has reduced their value.

Student Notes:2021

## 7. Significance of Fundamental Duties

Fundamental Duties were incorporated in the constitution through 42<sup>nd</sup> Amendment Act, 1976 with the purpose to:

- Promote patriotism in citizens
- Help them to follow a code of conduct that would strengthen the nation
- Protects its sovereignty and integrity
- Help the State in performing its diverse duties
- Promote ideas of harmony
- To ensure citizens commitments towards the State
- And to check indiscipline prevailing at that time

Despite the criticism from various corners, these fundamental duties have also proved significant on the following counts:

- a) They remind citizens of their duties to the country, the society and fellow citizens while enjoying their rights.
- b) They are an important warning against anti-social activities.
- c) They are a formidable source of inspiration to the citizens and promote a sense of discipline and commitment amongst them.
- d) The Supreme Court has variously used these duties to assess the constitutionality of laws enacted by the legislature.
- e) Violation of fundamental duties is punishable since there are legal provisions available for their enforcement.

## 8. UPSC Prelims Questions

**2010**

1. Which reference to the Constitution of India, consider the following:

1. Fundamental Rights
2. Fundamental Duties
3. Directive Principles of State Policy

Which of the above provisions of the Constitution of India is/are fulfilled by the National Social Assistance Programme launched by the Government of India?

- (a) 1 only
- (b) 3 only
- (c) 1 and 3 only
- (d) 1, 2 and 3

**Ans:** (b)

**2012**

2. Which of the following is/are among the Fundamental Duties of citizens laid down in the Indian Constitution?

1. To preserve the rich heritage of our composite culture.
2. To protect the weaker sections from social injustice.
3. To develop the scientific temper and spirit of inquiry.
4. To strive towards excellence in all spheres of individual and collective activity.

Select the correct answer using the codes given below:

- (a) 1 and 2 only
- (b) 2 only

- (c) 1, 3 and 4 only
- (b) 1, 2, 3 and 4

**Ans:** (c)

**2013**

3. According to the Constitution of India, which of the following are fundamental for the governance of the country?
- (a) Fundamental Rights
  - (b) Fundamental Duties
  - (c) Directive Principles of State Policy
  - (d) Fundamental Rights and Fundamental Duties

**Ans:** (b)

**2014**

4. In the Constitution of India, promotion of international peace and security is included in the
- (a) Preamble to the constitution
  - (b) Directive Principles of State Policy
  - (c) Fundamental Duties
  - (d) Ninth Schedule

**Ans:** (b)

**2015**

5. 'To uphold and protect the Sovereignty, Unity and Integrity of India' is a provision made in the
- (a) Preamble of the Constitution
  - (b) Directive Principles of State Policy
  - (c) Fundamental Rights
  - (d) Fundamental Duties

**Ans:** (d)

**2017**

6. Which of the following statements is/are true of the Fundamental Duties of an Indian citizen?
1. A legislative process has been provided to enforce these duties.
  2. They are correlative to legal duties.

Select the correct answer using the code given below:

- (a) 1 only
- (b) 2 only
- (c) Both 1 and 2
- (d) Neither 1 nor 2

**Ans:** (d)

7. The mind of the makers of the Constitution of India is reflected in which of the following?
- (a) The Preamble
  - (b) The Fundamental Rights
  - (c) The Directive Principles of State Policy
  - (d) The Fundamental Duties

**Ans:** (a)

8. Other than the Fundamental Rights, which of the following parts of the Constitution of India reflect/reflects the principles and provisions of the Universal Declaration of Human Rights (1948)?

1. Preamble
2. Directive Principles of State Policy
3. Fundamental Duties

Select the correct answer using the code given below:

- (a) 1 and 2 only
- (b) 2 only
- (c) 1 and 3 only
- (d) 1, 2 and 3

**Ans: (d)**

## 9. UPSC Previous Years' Questions

1. Identify the major Fundamental Duties. (in about 150 words) (03/I/8b/15)
2. Enumerate the Fundamental Duties incorporated in the Constitution after the 42nd Amendment. (08/I/6a/15)

## 10. Vision IAS GS Mains Test Series Questions

1. *Critically appraise the utility of fundamental duties in the Constitution of India.*

**Approach:**

Identify the important issues surrounding the utility of Fundamental Duties (FDs) in the Constitution of India.

**Answer:**

Fundamental Duties were inserted in Article 51A through the 42nd Amendment Act. The legal utility of these duties is similar to that of the DPSP. DPSP are addressed to the state without any sanction, so are the duties addressed to the citizens without any legal sanction for their violation.

What is right in regard to one's self is a duty in regard to others. This way Fundamental Rights are strengthened by the Fundamental Duties.

However, this part of the constitution contains certain weaknesses, which harm its utilities. The duties enumerated are so vague that a number of interpretations are available for them. For example, cherishing the ideals of freedom movement, irrespective of the fact that the freedom movement had a number of contradictory ideals, like revolutionary terrorism and non-violence. This raises questions on which ones are to be cherished.

Some scholars questioned the utility of FD in a law abiding society. How can the state ask citizens to perform some duties until the state thinks that they are not following the law of the land?

In such a scenario, it is best that their utility be enhanced by generating awareness in the society, as NCRCW has recommended.

- 2. While Fundamental Rights are crucial to the survival of a vibrant democracy, Fundamental Duties are equally important. While enumerating the Fundamental Duties, discuss the statement.**

Student Notes:2021

**Approach:**

- Enumerate fundamental duties summarily.
- Briefly make a comparison of Fundamental Rights and Fundamental Duties.
- Discuss the importance of Fundamental Duties for a vibrant democracy.

**Answer:**

Based on the suggestions of Swaran Singh Committee, 42nd Constitutional Amendment Act (1976) included ten Fundamental Duties in the constitution.

According to Article 51 A, it shall be the duty of every citizen of India to: abide by the Constitution and respect its ideals and institutions, National Flag and Anthem, cherish and follow the noble ideals that inspired the national struggle for freedom, uphold and protect the sovereignty, unity and integrity of India, defend the country and render national service when called upon to do so, promote harmony and the spirit of common brotherhood amongst the people of India, respect women, value the rich heritage and culture, protect and improve natural environment, develop scientific temper, humanism and the spirit of inquiry and reform, safeguard public property and abjure violence, strive towards excellence, provide opportunities for education to children.

Rights and duties of the citizens are correlative and inseparable. Fundamental Rights are meant for promoting the ideal of political democracy and prevent an authoritarian and despotic rule. It protects the liberties and freedoms of the people against the invasion by the State. They further limit the arbitrary powers of state, and ensure some basic inalienable rights for the development of the people. While Fundamental duties act as reminder to citizens that while enjoying their rights, they should also be conscious of duties towards their country, society and fellow citizens. Thus, they instill democratic ethos by invoking duty based approach.

They serve as a warning against the anti-national and antisocial activities and serve as a source of inspiration for the citizens and promote a sense of discipline and commitment among them. They create a feeling that the citizens are not mere spectators but active participants in the realisation of national goals.

In 1992, Supreme Court ruled that in determining the constitutionality of any law, if a court finds that the law in question seeks to give effect to a fundamental duty, it may consider such law to be reasonable in relation to Article 14 or Article 19 and save such law from unconstitutionality.

Thus, they are equally important, if not less than fundamental rights in sustaining democracy. They invoke and stir conscience and thus build a proactive value system in the people unlike the reactive nature of fundamental rights.

- 3. Fundamental Duties, though significant, have certain limitations. Examine.**

**Approach:**

- The first part of the answer, after briefly introducing fundamental duties, should focus on its importance.
- The second part should contain the primary drawbacks which hinder its unanimous acceptance.

The fundamental duties were enshrined in the constitution via the 42nd amendment (1976). They aim at presenting a set of obligations for every citizen of India.

Its continuance since decades speaks of its relevance. Its serves as a reminder to the citizens that while enjoying their rights, they must be aware of their duties.

The fundamental duties have underpinned various legislative developments.

The judiciary has also several times, found consolations in the projections of the FDs.

Additionally the way of natural justice is propagated amongst the citizens.

The anti-national &anti-social activities are restrained under the umbrella of fundamental duties.

However, there are certain inhibitions which affect its universal acceptability. They are

- Primarily non justiciable, flouting of the fundamental duties doesn't draw legal action.
- The exact nature of the fundamental duties seems to be lost amongst the vague descriptions, hence its impact is narrow
- As not many initiatives are available for creating awareness regarding its importance, conscious realisation of fundamental duties is absent amongst the citizens.
- Being part of the appendage to part IV of the constitution, diminishes the merit of the FDs as it lacks the importance ordained upon the FRs.

Inspite of the restrictions which mellow down the true essence of FDs, a developing nation like India requires a consolidated effort to balance the rights and duties of a citizen.

**4. *The value of fundamental duties lies in establishing a democratic balance by making the people conscious of their duties equally as they are conscious of their rights. Analyze.***

**Approach:**

- Briefly describe fundamental duties and their broad features.
- Highlight the significance of fundamental duties in establishing a democratic balance.
- Discuss the critique of the fundamental duties.
- Conclude by suggesting a few more duties to add.

**Answer:**

The Fundamental Duties (FDs) were added in Part IV A of the Constitution of India by the 42<sup>nd</sup> Amendment on the recommendations of the Swaran Singh Committee. Their inclusion is inspired by the erstwhile USSR Constitution and the rule of jurisprudence i.e. where there is a right there must be a corresponding duty..

**Salient features of FDs**

- A mixture of moral liabilities (that cherish ideals of freedom struggle) and civic duties (that respect the Constitution).
- Codification of tasks, which have historically been integral to the Indian way of life.
- Applicable for citizens only.

- Non-justiciable.

The Fundamental Duties maintain a democratic balance, as they are complementary to Fundamental Rights which guarantee **constitutional** rights of the citizens against the State and the DPSPs that impose **moral** duties upon the State. Fundamental Duties gain significance, as they:

- Remind citizens of their duties while enjoying rights – therefore help strengthen democracy.
- Serve as a warning against anti-national and anti-social elements.
- Become source of inspiration for citizens, making them active participants in realization of national goals.
- Can be used by the courts to determine the Constitutional validity of a law.
- Can be enforced by law of the Parliament – e.g. the Prevention of Insults to National Honor Act, 1971.

However, their balancing role is questioned due to following reasons:

- The list of duties is not exhaustive – important duties such as paying taxes, casting vote etc. are not included.
- Being non-justiciable, they are reduced to a code of moral precepts.
- Some duties are vague, ambitious and difficult for the common man to understand – e.g. promote scientific temper.
- FDs should have been added after part III to keep them at par with Fundamental Rights.

Though introduced by an amendment in the wake of emergency, the subsequent government did not undo this change. The 86<sup>th</sup> Constitutional Amendment further added an 11<sup>th</sup> duty. This strengthens the societal and political acceptance and approval of having a set of duties enshrined in the Constitution. The Parliament should timely review the scope of duties to retain their essence.

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## 1. Directive Principles of State Policy

Political democracy is fragile unless the socio-economic foundation is strengthened with policies that aim to establish a welfare state, i.e. one that takes primary responsibilities for the welfare of the people, particularly those who are weak and vulnerable. It is a state that seeks to minimize disparities and ensure equitable development. Individual rights can be enjoyed meaningfully when social security and economic wellbeing is ensured.

Directive Principles of State Policy as enshrined in part IV of the constitution (Article 36 – 51) represent a comprehensive program of ushering in social and economic democracy in the country. These represent a set of principles that governments of the day – both federal and state must keep in mind while making state policies. Though, not justiciable, they are supposed to be fundamental to the governance of the country.

Notably some important rights such as right to work, social security etc that are not mentioned in Part III of the Constitution, find place in DPSP's.

## 2. Historic Evolution

The genesis of both Fundamental Rights and Directive Principles lies in our struggle for freedom against the British rule. Our leaders realized the importance of political and civil rights of the individual, as being absolutely essential for the dignity of man and development of his full personality. At the same time, they were conscious that in the prevailing socioeconomic conditions in the country, only a minuscule fraction of people would be able to enjoy these civil and political rights.

The only solution for making these rights meaningful to them was to engineer the material conditions and bring in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured. The national leaders, therefore, laid the greatest stress on the necessity of bringing about socio-economic regeneration and ensuring social and economic justice.

One of the challenges that the framers of the Constitution faced while framing provisions relating to Fundamental Rights was to classify rights on the basis of their justiciability. In this regard, the Sapru committee appointed by the “All Party Conference” in 1944 submitted its report in 1945. Similarly, B.N. Rau, the Constitutional Advisor to the Constituent Assembly also recommended similar classification of the rights of an individual. The Constituent assembly drew from its recommendations in formulating fundamental rights and other rights in Indian constitution.

The committee suggested two categories of rights – justiciable and non-justiciable. The former are found as Fundamental Rights and other rights in the Indian constitution. The latter are mentioned in Part IV of the constitution as DPSP's, which are largely in the nature of “instrument of instructions” to the government in making appropriate policies of socio-economic change.

## 3. Influences

DPSP's as enshrined in the Indian constitution are influenced by number of factors:

- The idea of DPSP itself was borrowed from the Constitution of Ireland.
- Government of India Act, 1935 contained a set of “Instrument of Instructions”.
- The leadership of Indian freedom struggle representing liberal democratic ideas of the west chose to include them in the Indian Constitution as moral guidelines for public policies of the welfare state.
- The contemporary socialist ideas also impacted the framers of the constitution. For example, some DPSP's related to worker welfare.

- Constituent Assembly was also influenced by ideas of Mahatma Gandhi's vision of India. For example – directive principles related to Panchayats, promotion of village industries etc.

Student Notes:2021

## 4. Characteristics of DPSP's

### 4.1. Ideals to be followed by the State

These are constitutional recommendations/instructions to the State in legislative, executive and administrative matters that denote the ideals that the State should keep in mind while formulating policies and enacting laws.

### 4.2. Limitation on arbitrary exercise of power

According to Dr. Ambedkar, these are limitations on any one coming to power. It is a check against political majority making attempts to hijack the vision of the Constituent Assembly with respect to the future Indian State.

### 4.3. Non-Enforceable

According to Article 37, DPSP's are not automatically enforceable in a court of law. They become enforceable only when a law giving effect to some directive principles exists. For example – MGNREGA for the Right to Work. However, Article 37 also holds these principles as being fundamental to the governance of the country and imposes a duty upon the state to apply these principles while making laws.

As held by Dr. Ambedkar, these cannot be considered to be mere pious declaration. If there is no force of law, there is political force of public opinion. No government in India can overlook these directions.

### 4.4. Amplification of Preamble

DPSP's amplify values enshrined in the preamble to the Indian Constitution. For instance – it is DPSP's that give meaning to the "socialist democracy" as enshrined in the Preamble. The word "socialist" added through the 42<sup>nd</sup> Amendment Act, was given meaning through Articles 38 and 39. Similarly, the ideal of "Secularism" was given meaning through Article 44 – wherein the goal of uniform civil code is mentioned.

### 4.5. Moral Obligation

The Directive Principles impose a moral obligation on the state authorities for their application. However, it is equally important to highlight that the main force behind them is political in nature. This is because no government in power that rests on public opinion/popular vote can ignore these principles while formulating policies.

## 5. Classification and Details of Directive Principles

Though not classified in the constitution, on the basis of their content, conventionally DPSP's can be classified into the following categories:

- Socialistic:** Reflecting the ideology of socialism, these principles provide the framework for a democratic socialist state, aim at providing social and economic justice, and direct towards creation of a welfare state. For instance, articles 38, 39, 39A etc.
- Gandhian:** Based on Gandhian ideology, these principles represent the programme of reconstruction as envisioned by Gandhiji during the national movement. To fulfill the dreams of Gandhiji, some of his ideas were included as Directive Principles. For instance, Article 43, 43B, 46, 47, 48.

- **Liberal-intellectual:** The principles included in this category represent the ideology of liberalism. For instance, articles 44, 45, 48, 48A, 49, 51.
- **International Principles:** The principles included in this category give effect to values that promote internationalism and furthering and maintenance of global peace and harmony. For instance, Articles 51A, 51B, 51C, 51F.

## 5.1. Article 36

### 5.1.1. Text

Definition—In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III. Consequently, the definition of “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India

## 5.2. Article 37

### 5.2.1. Text

Application of the principles contained in this Part—the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

### 5.2.2. Description

Article 37 provides that DPSP's will be non-justiciable i.e. they are not automatically enforceable in any court of law. However, their utility lies in giving directions to the State regarding the nature and direction of public policy. The violation of DPSP's however, cannot be challenged in any Court.

## 5.3. Article 38

### 5.3.1. Text

State to secure a social order for the promotion of welfare of the people.

- (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
- (2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

### 5.3.2. Description

Article 38 is socialistic in its orientation. It seeks to minimize the inequality between people as well as regions in our country. It also outlines economic, social and political justice as the goal of the State. The difference in status, which exists in our society due to the caste system is sought to be eliminated. The state must also try to ensure equality in opportunity of education as well as employment.

## 5.4. Article 39

### 5.4.1. Text

Certain principles of policy to be followed by the State—The State shall, in particular, direct its policy towards securing:

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

### **5.4.2. Description**

Article 39 is also socialistic in its orientation. It is a specific direction to State while formulating its policies.

Any law, which implements article 39(b) and 39(c) cannot be held illegal on the ground that it violates Fundamental Rights under Article 14 and 19. (Article 31C)

The State is required to ensure equality between men and women in terms of their pay when they are performing the same duties.

Use of resources should be in public interest and should not unduly benefit a private citizen.

State must ensure that the wealth generated in the country is not concentrated and everyone enjoys the prosperity of the nation.

## **5.5. Article 39A**

### **5.5.1. Text**

Equal justice and free legal aid—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

### **5.5.2. Description**

Article 39A directs the State to ensure that the judicial system of the country is available to all. The State should provide free legal aid for accomplishing the same. Notably, the union govt. has passed National Legal Services Authority Act, 1987 to achieve the same. It was inserted by the Constitution 42nd amendment act, 1976

## **5.6. Article 40**

### **5.6.1. Text**

Organisation of village panchayats: The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

### **5.6.2. Description**

It is a Gandhian Directive Principle that requires the State to set up local bodies as institutions of self-govt. It also requires that such local bodies should be given adequate power for them to be self-sufficient. Notably, the govt. has passed 73<sup>rd</sup> and 74<sup>th</sup> amendment acts, which provide for local bodies as the third tier of government.

## **5.7. Article 41**

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### **5.7.1. Text**

Right to work, to education and to public assistance in certain cases. —The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

### **5.7.2. Description**

Within the State's resources, it is required to undertake welfare programs especially for those who cannot fend for themselves such as the old and the disabled. The State is undertaking National Social Assistance programs for such people, providing them monthly pensions. Right to work has been made a legal right under MGNREGA and it partially fulfills this right.

## **5.8. Article 42**

### **5.8.1. Text**

Provision for just and humane conditions of work and maternity relief—The State shall make provision for securing just and humane conditions of work and for maternity relief.

## **5.9. Article 43**

### **5.9.1. Text**

Living wage, etc., for workers.—The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

### **5.9.2. Description**

Article 43 says that the state will attempt to secure to all workers (agricultural, industrial or otherwise) work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure & social cultural opportunities and in particular promote cottage industries on an individual or cooperative basis in rural areas, through suitable legislations or economic organizations or in other ways.

## **5.10. Article 43A**

### **5.10.1. Text**

Participation of workers in management of industries—The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry.

### **5.10.2. Description**

Article 43 A was inserted by 42nd amendment act 1976. This article says that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of industry.

## **5.11. Article 43B**

### **5.11.1. Text**

Promotion of co-operative societies—The state shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of the co-operative societies.

## 5.11.2. Description

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The article was inserted by the 97<sup>th</sup> Constitutional Amendment Act, 2011. It aims to encourage economic activities of cooperatives which in turn contribute to the progress of rural India. It is expected to not only ensure autonomous and democratic functioning of cooperatives, but also the accountability of the management to the members and other stakeholders.

## 5.12. Article 44

### 5.12.1. Text

Uniform civil code for the citizens—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

### 5.12.2. Description

Personal laws relate to marriage, divorce, maintenance, succession, adoption. Different religions in India have different personal laws. A uniform civil code would imply the same personal law being followed by all the people of the country.

SC has repeatedly rejected petitions seeking direction to the center to apply uniform civil code stating that it is a matter of policy that the court is not competent to venture in.

### 5.12.3. Constitutional Provisions in support of Uniform Civil Code

**Article 44** under Directive Principles of State Policy: The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

**Clause (2) of Article 25** under Fundamental Rights: It empowers the State to frame any law to regulate or restrict “secular activity which may be associated with religious practice”

**Article 14** under Fundamental Rights: The inconsistency in personal laws has been challenged on the touchstone of Article 14, which ensures the right to equality. Litigants have contended that their right to equality is endangered by personal laws that put them at a disadvantage.

### 5.12.4. Debate Around Uniform Civil Code

A Uniform civil code seeks to replace personal laws based on the scriptures and customs of a religious community with a common set of laws governing every citizen. At its core, Uniform Civil Code (UCC) deals with issues of secularism, equality and women's rights. The secular argument is that the laws of the state should not be religion, caste or community specific. Further, a modern state should treat all citizens equally and should not discriminate against women.

In the Constituent Assembly, a UCC was supported by leaders such as Nehru, Ambedkar and women members but due to stringent opposition from other members, it was included only in the form of Directive Principles as a compromise.

The demand for UCC , however, reached its peak in the mid -80s after the Supreme Court verdict in the famous Shah Bano case in which SC granted her maintenance for life under Section 125 of the Cr.P.C.

In October 2015, A Supreme Court bench questioned the government about its mandate on framing the Uniform Civil Code so that unvarying standards are ushered in and all religions are regulated by the same yardsticks in matters of law.

### 5.12.5. Recent Supreme Court judgments

1. SC held that fatwas issued by Muslim shariat courts (Dar-ul-Qazas) do not have legal sanctity and cannot be enforced if they infringed on the fundamental rights of an individual. The Bench said fatwas on rights, status and obligation of individual Muslims, in its opinion, would not be permissible unless asked for by the person concerned or, in cases where the person is unable to do it, by the person interested.

Personal laws ought to be administered by the regular law courts and cannot be enforced in derogation of fundamental rights by religious courts that lack legal sanctity.

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The judgment is a welcome step towards gradual rationalization and acclimatization of our custom-driven and extra-legal judicial system (which often works in contradiction to our established and widely regarded constitutional values) to the contemporary realities of a modern democratic society — in which there is no place for any kind of gender-based discrimination and dehumanising arbitrariness. The state can come to the rescue of an individual if he or she is being victimised in terms of a violation of fundamental rights in the name of Personal laws.

The Supreme Court has preserved the religious character of these Sharia courts, noting that they do not constitute a parallel judiciary, but an “informal justice delivery system with the objective of bringing about amicable settlement between parties.” It is important that the Supreme Court’s intervention, at the instance of a petitioner who wanted Sharia courts to be banned, is understood in the correct perspective.

2. In August 2017, the Supreme Court of India declared the practice of Triple Talaq or ‘talaq-e-biddat’ as unconstitutional. Its judgment said, “We direct, the Union of India to consider appropriate legislation, particularly with reference to ‘talaq-e-biddat’. We hope and expect, that the contemplated legislation will also take into consideration advances in Muslim ‘personal law’ – ‘Shariat’, as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason for an independent India, to lag behind. Measures have been adopted for other religious denominations even in India, but not for the Muslims.”

The judgment outlines true meaning and spirit of the Quran on the anvil of individualism, the rule of law and human rights enunciated in the constitution. This judgment is not against any institution, organisation nor it is against the religion of Islam. It is a judgment in favour of justice based on women’s rights as human rights.

#### **5.12.6. Benefits of Uniform Civil Code**

- All the laws related to marriage, inheritance, family, land etc. would be equal for all Indians.
- It will help in improving the condition of women in India. Indian society is patriarchal and by allowing old religious rules to continue to govern the family life, condemns all Indian women to subjugation and mistreatment.
- It will help the society move forward and take India towards its goal of becoming a developed nation where women are treated fairly and given equal rights.
- The various personal laws have loopholes exploited by those who have the power. Informal bodies like Khap Panchayats continue to give judgments that are against our constitution. Human rights are violated through honor killings and female feticide throughout our country.
- It will also help in reducing vote bank politics. If all religions are covered under the same laws, the politicians will have less to offer to communities in exchange of their vote.
- It will help in integration of India - A lot of the animosity is caused by preferential treatment by the law of certain religious communities.
- This could in time induce custodians of faith to look inwards and seek to codify and reform age-old personal laws in conformity with current modernizing and integrative tendencies or risk losing their flock.

#### **5.12.7. Challenges in implementing Uniform Civil Code**

- India has a strong and long history of personal laws and it cannot be given up easily.
- A broad consensus must be drawn among different communities to facilitate such a

- landmark step in India's religious, social, political and most importantly judicial history.
- The biggest obstacle in implementing the UCC, apart from obtaining a consensus, is the drafting. Should UCC be a blend of all the personal laws or should it be a new law adhering to the constitutional mandate? There is a lot of literature churned out on UCC but there is no model law drafted.

Going forward, an evaluation survey of all communities must be conducted to suggest reforms within personal laws on modern and liberal lines. Communities should be convinced that UCC is to bring reforms not suppress them. There is a need of piecemeal reform rather than a holistic reform starting with what minorities are most comfortable of doing away with.

## 5.13. Article 45

### 5.13.1. Text

Provision for early childhood care and education to children below the age of six years—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

### 5.13.2. Description

It was inserted by the 86<sup>th</sup> amendment, 2002 when the earlier DPSP under article 45(elementary education) was guaranteed by Article 21A.

## 5.14. Article 46

### 5.14.1. Text

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

### 5.14.2. Description

The government has tried to implement this directive principle by providing reservation to socially and educationally backward sections of our society, particularly the SC/STs.

## 5.15. Article 47

### 5.15.1. Text

Duty of the State to raise the level of nutrition and the standard of living and to improve public health—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

### 5.15.2. Description

It is a Gandhian principle. Mid-day meal scheme can be said to be fulfilling this directive principle. The Food Security Act passed in 2013 can be a step towards fulfilling this directive principle.

## 5.16. Article 48

### 5.16.1. Text

Organisation of agriculture and animal husbandry.—The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take

## 5.17. Article 48A

### 5.17.1. Text

Protection and improvement of environment and safeguarding of forests and wild life—The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.

### 5.17.2. Description

Article 48A was added by the constitution by 42nd amendment act 1976. The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.

## 5.18. Article 49

### 5.18.1. Text

Protection of monuments and places and objects of national importance—It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoiling, disfigurement, destruction, removal, disposal or export, as the case may be.

### 5.18.2. Description

It is a liberal-intellectual principle requiring the State to protect monuments of national importance. The Archaeological Survey of India is charged with this exercise.

## 5.19. Article 50

### 5.19.1. Text

Separation of judiciary from executive—The State shall take steps to separate the judiciary from the executive in the public services of the State.

### 5.19.2. Description

Separation of powers is necessary for the system of checks and balances. It also ensures the independence of the judiciary.

It is also a liberal-intellectual principle. It has been fulfilled by amending the CrPC in 1973. This amendment repealed CrPC, 1898 and gave effect to the separation of the executive from the judiciary in administration of criminal justice, provided for the distinction between executive and judicial magistrates and their respective functions.

## 5.20. Article 51

### 5.20.1. Text

Promotion of international peace and security—The State shall endeavour to—

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

Article 51 of the Constitution is based on the principle of internationalism. It seeks the promotion of global harmony and security through just and honorable relations between nations. Besides, it calls for respecting international law and treaty obligations and settlement of international disputes through instruments like arbitration.

## 6. Relation with Fundamental Rights

The Fundamental Rights and DPSP's constitute the conscience of the Constitution. The purpose of FR's is to confer on individuals the rights necessary for their development, free from coercion. DPSP's are essential for a welfare society. According to Justice Chandrachud, the Constitution aims to bring about a synthesis between the two and together they constitute, not individually, the conscience of the Constitution. The Supreme Court has hence pronounced the 'doctrine of harmonious construction' to establish the relation between FR's and DPSP's.

The tension between FR and DPSP has been evident ever since the commencement of the Constitution. Initially, the comparative status of FR's and DPSP's was not clear. It was believed that they were contradictory in nature. It was in the Champakam Dorairajan case, in 1952 that the debate first came to the fore. A series of judicial pronouncements and constitutional amendments have altered the balance between the two since the commencement of the constitution.

**Champakam Dorairajan case (1951)** The Supreme Court held that **Article 37 expressly says that the directive principles are not enforceable by court**. The Supreme Court mandated that the chapter on Fundamental Rights in the constitution is sacrosanct and the directive principles have to conform to and run subsidiary to the chapter on Fundamental Rights. This means that **Fundamental Rights were given superiority over the Directive principles**. It also held that the Fundamental Rights could be amended by the Parliament by enacting constitutional amendment acts.

- In **Golaknath case (1967)** however, the SC reversed its decision stating that FR's have been given a transcendental position and cannot be abridged. The doctrine of Prospective Overruling was applied in the Golaknath case, whereby the SC could overrule its own decision.
- **24<sup>th</sup> Amendment Act, 1971** was enacted to overcome the Golaknath case. It added Article 13(4) to the Constitution, whereby Constitutional amendment could modify a FR.
- In the **Kesavananda Bharati case (1973)**, the SC gave the Doctrine of basic structure, whereby FR's could be abridged only to the extent that they did not form part of the basic structure.
- **42<sup>nd</sup> Amendment Act, 1976** passed by Parliament gave precedence to DPSP's over FR's and extended the scope of Article 31C, which provided for protection of laws implementing DPSP's 39(b), 39(c) from illegality on ground of being violative of the constitution. This amendment included within the protection provided by Article 31C, any law to implement any of the Directive Principles and not merely those specified in Article 39 (b) and (c).
- In the **Minerva Mills case (1980)**, the SC held that powers of the Parliament to amend the Constitution are limited by the basic structure doctrine. The Supreme Court held that the Constitution exists on the balance of Part III and Part IV. Giving absolute primacy to one over the other will disturb the harmony of the Constitution. This took the Article 31(C) to its prior condition that "a law would be protected by article 31C only if it has been made to implement the directive in article 39(b) and (c) and not any of the articles included in Part IV".
- Thus, the final status of FR's and DPSP's with respect to each other is following:
  - They form an integrated scheme
  - They are not supplementary but complementary in nature

- Together they provide the basis for inclusive democracy in India
- Supreme Court has pronounced the doctrine of Harmonious Construction
- FR's have a superior legal status but it doesn't undermine the importance of DPSP's
- Over a period of time by using the doctrine of "liberal interpretation" Supreme Court has included number of directive principles under Article 21.
- To examine the validity of a particular law giving effect to directive principles which abridge FR's, SC applies the doctrine of –
  - Basic Structure and
  - The Golden Triangle of rights – Article 14, 19, and 21.

### **Doctrine of Harmonious Construction**

This doctrine is used to avoid any inconsistency and repugnancy within a section or between a section and other parts of a statute. The rule follows a very simple premise that every statute has a purpose and intent as per law, and should be read as a whole. The interpretation which is consistent with all the provisions and makes the enactment consistent shall prevail. The doctrine follows a settled rule that an interpretation that results in injustice, hardship, inconvenience, and anomaly should be avoided. The interpretation with the closest conformity to justice must be picked.

The Supreme Court laid down 5 main principles of the 'Doctrine of Harmonious Construction' -

1. The courts must avoid a 'head of clash' of contradictory provisions and they must construe the contradictory provisions so as to harmonize them.
2. When it is not possible to completely reconcile the differences in contradictory provisions, the court must interpret them in such a way so as to give effect to both provisions as much as possible.
3. Courts must keep in mind that the interpretation which reduces one provision to a useless standing is against the essence of 'Harmonious Construction'.
4. To harmonize the provisions is not to render them fruitless or destroy any statutory provision.
5. The provision of one section cannot be used to render useless the other provision, unless the court, despite all its efforts, finds a way to reconcile the differences.

## **7. Difference between Directive Principles of State Policy and Fundamental Rights**

According to B.N. Rau, legal advisors to the constituent assembly, FR's and DPSP's are integrated in scheme. They were presented as a single scheme in constituent assembly. Even in Motilal Nehru report they formed one unit. It is for avoiding constitutional crisis – inability to enforce DPSP's because of lack of resources, that they have been separated. The following table highlights the important differences between the two:

Basis	Fundamental Rights	Directive Principles
<b>Philosophy</b>	FR's are based on philosophy of liberalism granting protection to individual and his rights	Different DPSP's reflect different ideologies for example – that of welfare state, Fabian Socialism, Gandhism, Environmentalism, Internationalism etc.
<b>Nature</b>	FR's are prohibitions on the state in general and in certain cases on private individuals also.	DPSP's are positive obligations on the state. Union, state governments as well as other authorities are expected to consider the

		DPSP's as fundamental guidelines to be observed in policy making.
<b>Enforceability</b>	FR's are enforceable in court of law. Right to constitutional remedies itself is a fundamental right. Judiciary is empowered to declare any law null and void if it abridges any of the fundamental rights.	As per Article 37, DPSP's are not enforceable in a court of law. Constitutional remedies, thereby are not available.
<b>Outcome</b>	FR's establish political democracy and gives civil rights.	DPSP's seek to establish socio-economic democracy in the country
<b>Focus</b>	FR's are individual centric	DPSP's are group centric

## 8. Implementation of Directive Principles of State Policy

Since the commencement of the constitution, there have been substantial legislations to implement the DPSP's. Some of those are listed below –

- First constitutional amendment was for implementing land reforms. It was followed by 4<sup>th</sup>, 17<sup>th</sup>, 25<sup>th</sup>, 42<sup>nd</sup>, and 44<sup>th</sup> amendment acts (Article 39).
- The 73<sup>rd</sup> amendment to the constitution was done in pursuit of implementing the article 40.
- Right to work has been made a legal right under MGNREGA. National Social Assistance Program of government of India is another step in implementing the directives under Article 41.
- The Minimum Wages Act (1948), Child Labour Prohibition and Regulation Act (1986) etc. seeks to protect the interests of the workers. Similarly the Maternity Benefit Act (1961) and Equal Remuneration Act (1976) have been implemented to protect the interests of women workers. Handloom Board, Handicrafts Board, Coir Board, Silk Board have been set up for the development of cottage industries. These are some steps towards implementation of Article 42 and 43.
- 86<sup>th</sup> amendment act 2002 makes provisions for early childhood care and education (Article 45).
- The policy of preferential treatment to weaker sections including women, SCs, STs, OBCs, has been a consistent plank of the government welfare policies. One important step in this regard has been implementation of Mandal Commission's recommendation in pursuit of Article 46. The 93<sup>rd</sup> Amendment Act 2006 is another step in the same direction.
- Integrated Rural Development Programme (1978), Jawahar Rozgar Yojana (1989), Swarnajayanti Gram Swarozgar Yojana (1999), Sampoorna Gram Rozgar Yojana (2001), Mahatma Gandhi National Rural Employment Guarantee Programmes (2006) etc have been implemented to improve the living standard of the people.
- Regarding Article 48, the green revolution and the research in biotechnology are aimed at modernizing agriculture and animal husbandry, among other things.
- The National Forest Policy (1988) aims at the protection, conservation and development of forests. The Environment Protection Act, 1986; The Wildlife (Protection) Act, 1972; are also some important steps towards fulfilling directives under Article 48A.
- The Archaeological Survey of India is charged with the work of protection of the monuments like Taj Mahal.
- Separation of judiciary from executive has been completed by amending the CrPC, in 1973.
- The efforts of India to secure international peace are many like participating in the peacekeeping missions through the UN. India also pioneered the Non-Aligned movement to defuse cold war after the Second World War.

- A number of programmes like Save the Tiger, project Rhino, elephant, etc. are being implemented in pursuance of the directive principle which relates to protection and improvement of environment and safeguarding of forests and wildlife.

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## 9. Directives and Constitutional Amendments

Since the Indian constitution came into force, there have been number of amendments – addition, and modification from the part IV of the constitution.

Affected Article	Change	Through
38 (2)	Added	44 <sup>th</sup> Amendment Act, 1978
39 (f)	Added	42 <sup>th</sup> Amendment Act, 1976
39A	Added	42 <sup>th</sup> Amendment Act, 1976
43A	Added	42 <sup>th</sup> Amendment Act, 1976
43B	Added	97 <sup>th</sup> Amendment Act, 2011
45	Modified Text*	86 <sup>th</sup> Amendment Act, 2002
48A	Added	42 <sup>nd</sup> Amendment Act, 1976

\*Article 45 which originally stated:

*"The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years"*

was substituted by

"The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years."

## 10. Reasons behind Directive Principles being made non-justiciable and legally non-enforceable

The framers of the Constitution made the Directive Principles non-justiciable and legally non-enforceable because of the following reasons:

- The country did not possess sufficient financial resources to implement them.
- The presence of vast diversity and backwardness in the country would stand in the way of their implementation.
- The newly born independent Indian State with its many preoccupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them.

The Constitution makers, therefore, taking a pragmatic view, refrained from giving teeth to these principles. They believed more in an awakened public opinion rather than in court procedures as the ultimate sanction for the fulfillment of these principles.

## 11. Criticism of DPSP's

- Critics point out the lack of consistency in the DPSP's. Apparently greatly important directives have been mixed with seemingly less important ones. Further, they have not been arranged in a logical manner based on a consistent philosophy. According to N. Srinivasan, 'the Directives are neither properly classified nor logically arranged. The declaration mixes up relatively unimportant issues with the most vital economic and social questions. It combines rather incongruously the modern with the old and provisions suggested by the reason and science with provisions based purely on sentiment and prejudice'.
- Also, their non-enforceable nature leaves their implementation on the discretion of the government of the day.

- c) They have been criticized as a dustbin of sentiments – as they contain merely the vision of constitution makers without any instrumentalities to achieve it
- d) It has been argued that since the Constitution is the basic law of the land, it should not contain anything, which is non-justiciable.
- e) Also, they have been criticized on the ground that they disturb the federal structure – directives are instructions to both union and state governments. Much of the directives deal with those subjects, which come under state list. K. Santhanam has pointed out that the Directives lead to a constitutional conflict:
  - Between the Centre and the States
  - Between the President and the Prime Minister, and
  - Between the Governor and the Chief Minister

According to him, the Centre can give directions to the states with regard to the implementation of these principles, and in case of non-compliance, can dismiss the state government. Similarly, when the Prime Minister gets a bill (which violates the Directive Principles) passed by the Parliament, the President may reject the bill on the ground that these principles are fundamental to the governance of the country and hence, the ministry has no right to ignore them. The same constitutional conflict may occur between the governor and the chief minister at the state level.

## 12. Significance of DPSP's

The DPSP's aim to establish an India where the ideals of not only political democracy, but also social and economic democracy have been realized. They provide a broad direction to the ruling regime regardless of its political complexion and hence help in maintaining some consistency in policy direction despite change in governments. DPSP's have also functioned as beacons to the judiciary. Above all, they have an educative value.

According to M C Setalvad, the former Attorney General of India, the Directive Principles, although confer no legal rights and creates no legal remedies, are significant and useful in the following ways:

- a) They are like an 'Instrument of Instructions' or general recommendations addressed to all authorities in the Indian Union. They remind them of the basic principles of the new social and economic order, which the Constitution aims at building.
- b) They have served as useful beacon-lights to the courts. They have helped the courts in exercising their power of judicial review, that is, the power to determine the constitutional validity of a law.
- c) They form the dominating background to all State action, legislative or executive and also a guide to the courts in some respects.
- d) They amplify the Preamble, which solemnly resolves to secure to all citizens of India justice, liberty, equality and fraternity.
- e) They facilitate stability and continuity in domestic and foreign policies in political, economic and social spheres in spite of the changes of the party in power.
- f) They are supplementary to the fundamental rights of the citizens. They are intended to fill in the vacuum in Part III by providing for social and economic rights.
- g) Their implementation creates a favourable atmosphere for the full and proper enjoyment of the fundamental rights by the citizens. Political democracy, without economic democracy, has no meaning.
- h) They enable the opposition to exercise influence and control over the operations of the government. The Opposition can blame the ruling party on the ground that its activities are opposed to the Directives.
- i) They serve as a crucial test for the performance of the government. The people can examine the policies and programmes of the government in the light of these constitutional declarations.

- j) They serve as a common political manifesto. A ruling party, irrespective of its political ideology, has to recognize the fact that these principles are intended to be its guide, philosopher and friend in its legislative and executive acts.

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## 13. UPSC Previous Years Mains Questions

1. Briefly state the stages through which the present position of the Directive Principles vis-a-vis the Fundamental Rights has emerged. (98/II/1a/40)
2. What is the importance of Directive Principles of State Policy? Mention, which Directive Principles of State Policy have got primary over the Fundamental Rights. (in about 150 words) (99/II/4a/20)
3. What is the constitutional position of Directive Principles of State Policy? How has it been interpreted by the judiciary after the emergency in 1975-77? (in about 250 words) (01/I/7a/30)
4. Discuss the constitutional provisions relating to the non-justiciable directives binding upon the states. (in about 150 words) (02/I/8a/15)
5. Discuss the possible factors that inhibit India from enacting for its citizens a uniform civil code as provided for in the Directive Principles of State Policy. (2015)

## 14. Vision IAS GS Mains Test Series Questions

1. ***How can Directive Principles be seen as both complementary and supplementary to Fundamental Rights?***

### Approach:

- First discuss the nature of both FR and DPSP briefly.
- Thereafter analyze whether FR and DPSP are indeed both complementary and supplementary to each other or not.
- Support the answer with the help of suitable examples.

### Answer:

The emphasis in the entire scheme of the Constitution under the headings of the Fundamental Rights and the Directive Principle is on building an egalitarian society and on the concept of socio-economic justice. However, there are some basic differences between the fundamental rights and the directives.

- The fundamental rights contained in Part III deal with justice in its dimensions as individual, political and civil rights, while directive principles contained in Part IV, spell out justice at the social level and deal with social and economic progress.
- Fundamental rights operate as a source of restriction on the powers of the 'State'. The powers of the state are subject to those rights. Directive principles, on the other hand, are incorporated in the Constitution to guide the State in matters of legislation and administration. They can be treated as provisions that streamline the legislative and administrative activities of the State.

Thus Fundamental rights and directive principles represent the negative and positive aspects of State obligations. As a sequel to such a difference, the Constitution also provides that the fundamental rights are enforceable through courts of law while the directive principles are outside the pale of judicial enforcement. In short, fundamental rights and directive principles differ in colour, content and character.

In spite of all these differences between them, there is a common thread running through fundamental rights and directive principles. They have a common origin and share common objectives i.e. 'to ensure the welfare of the society envisaged by the Preamble. It cannot be disputed that both strive for justice. Directive Principles deal with the concept of justice at macro level while fundamental rights lay down the

concept at micro level. Further, directive principles form the distributive aspect of justice while fundamental rights constitute its corrective aspect .Thus both complement each other.

Mostly, directive principles have been used to broaden and to give depth to some fundamental rights and to imply some more rights therein for the people over and what are expressly stated in the fundamental rights. For instance by reading article 21 with the directive principles, the Supreme Court has expanded the horizon of article 21 and derived there from different rights of the citizen. Some of them are;

- Right to life includes the right to enjoy pollution free water, air and environments. The court has derived this right by reading article 21 with article 48A.
- Right to education under article 21A is to be understood with reference to directive principles contained in article 41 and 45.

Thus both fundamental right and Directive Principle aim at the same goal of bringing about a social revolution of a welfare state and complement and supplement each other towards this goal.

**2. *"The Directive Principles of State Policy are socialistic in their direction and content."***  
**Examine.**

**Approach:**

Discuss how the directive principles act as a guiding light in public policy formulation and reflect the socialistic principles. The answer need not discuss socialism or its characteristics or a general discussion on directive principles.

**Answer:**

Though the word socialism is vague, Supreme Court of India has observed that its principal aim is to eliminate inequality of income and to provide a decent standard of life to the people.

Directive Principles embody the object of the state to be a 'welfare state'. Most of the Directives aim at the establishment of social and economic democracy which is pledged for in the Preamble.

Art. 38(1) provides that the State shall promote the welfare of the people by securing and protecting as it may a social order in which justice – social, economic, and political shall inform all the institutions of national life. Art.38(2) provides that the State shall strive to minimize the inequalities in income and try to eliminate inequalities in status, facilities and opportunities among individuals and groups engaged in different vocations within the country.

Art. 39A has been inserted to enjoin the state to provide free legal aid to the poor and to take suitable steps to ensure equal justice to all. Other articles direct the state to ensure the participation of workers in the management of industry. There are other provisions like right to adequate means of livelihood, right against economic exploitation and right to human conditions of work which clearly establish the socialistic orientation of the Directive principles of State Policy.

Though these directives are not enforceable by courts, yet these principles have been declared to be fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

3. ***"The sanction behind Directive Principles of State Policy is in fact political". Explain. How has the issue of priority in case of conflict between the provisions of Part III and IV of the Constitution evolved over the years?***

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**Approach:**

- Introduction should highlight the position of DPSP in constitutional scheme of things.
- Explain the political sanction in light of the non-justiciability of these and their role in guiding the government policies.
- Last part of the answer should clarify the question of priority based on judicial pronouncements over the years.
- Conclude by stressing on the importance of DPSP.

**Answer:**

Unlike the Fundamental Right the Directive Principles contained in Articles 36-51, Part IV of the Indian constitution are not legally enforceable. Nonetheless, they have been deemed "fundamental in the Governance of the Country". Article 37 enjoins that it is the duty of the state to apply these principles in making laws. Thus, it has been argued that the sanction behind these principles is political rather than juridical for "if any government ignore them, they will certainly have to answer for them before the electorate at the election time", as argued by Dr Ambedkar.

It has been noted that declarations made in Part IV of the constitution are in many cases wider in import than the declarations made in Part III of the constitution i.e. the Fundamental Rights. In this context the question of priority in case of conflict between these two classes of provisions is pertinent. The DPSP have, through important constitutional amendments (25<sup>th</sup>, 42<sup>nd</sup> etc.), become the benchmark to insulate legislation enacted to achieve social objectives. The present position is that only Article 39 (b) and Article 39 (c) can be given precedence over Article 14, 19 and not all the Directive Principles.

- In this context, the Supreme Court first in State of Madras v. Champakam Dorairajan (1951) case, observed, "The directive principles have to conform to and run subsidiary to the chapter on fundamental rights."
- In Kesavananda Bharati Case (1973) the court observed that: "In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles."
- In State of Kerala V/S N.M. Thomas Case (1976) the court held that the fundamental rights and DPSP are complementary, "neither part being superior to the other".
- In the Minerva Mills Case (1980) the court observed that "Fundamental rights are not an end in themselves but are ... means to an end". These ends are identified by the Directive Principles.

The DPSP are seen as aids to interpret the Constitution, and more specifically to provide the basis, scope and extent of the content of a fundamental right. In this sense both have been deemed to be complementary and supplementary to each other.

4. ***Discuss how Directive Principle of State Policy have shaped the policy making process in India. Do you think it has been successful in achieving its objective. Analyse.***

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**Approach:**

- Define very briefly about DPSP in the introduction. Bring out its main objectives and classification.
- Mention various policies, which are derived from the implementation of DPSP principles.
- Trace the evolution of these policies.
- In the second section, discuss the success and failures of state in achieving the ideals enshrined in the DPSP. Since, the ideal situation is difficult to achieve, try not to be very critical of the process. Rather, the focus should shift towards the progress and finally Suggestions to overcome the lacunae.
- Conclude with summing up the whole situation.

**Answer:**

The Directive Principles of State Policy, although non-justiciable, lays down the principles, which are considered fundamental in the governance of the country, making it the duty of the State to apply these principles in making laws to establish a just society in the country. The DPSP draws its power from multiple sources (Irish Constitution) including Gandhian principles and the constitution framers enshrined many principles in order to establish a new social order in which justice – social, economic and political shall prevail.

**Implementation of DPSP**

**Socio-economic principles**

- Land reforms and abolition of Zamindari System.
- National Commission for the Welfare of Women has been established.
- Ceiling has been placed on land and property to fix the limit of person's holdings.
- The rules require that both men and women be paid equal wages for equal work.
- Schemes like MGNREGA (Right to work), SABLA, ICDS, National Social Assistance, Mid-day meal etc. are examples of state attempt to follow the principles embodied in the articles 39,41.

**Gandhian Principles**

- Through 73rd and 74th Amendments to the constitution, (1991 & 1992 respectively), Panchayati Raj has been given the constitutional status with more powers. (Article 40)
- Sincere efforts have been made for the upliftment of the SCs ,STs and of other Backward Classes.

**International Principles**

- India has also been actively co-operating with the U.N. to promote international peace and security. (Article 51)

The above steps on the part of the central and state governments indicate that many Directive Principles of State Policy have been implemented. However, still there is a long way to go to achieve all of them in full. For instance:-

- The concentration of wealth has increased. (India's top 1% holds close to half of the country's total wealth, Credit Suisse's Global Wealth Databook 2014).

- Although the school enrollment has almost reached universal, the high dropout rate (60 lakh students are out of school with 77 percent in rural areas) and quality of education remains an area of concern.
- PRI suffers from the lacunae of Funds, Functions and Functionaries.
- Women labour force participation rate have come down to 32 percent (ILO global employment trends report 2013).

There are many hindrances in the non-implementation of Directive Principles of State Policy.

The main reasons are:

- Limited material resources.
- Lack of political will,
- Lack of awareness and organized action on the part of the people.

Though much has been achieved but still there is a long way to go to accomplish this objective of a welfare state. The DPSP have long shaped the policy making in India and will continue to do so, as the principles enshrined are fundamental in nature. The recent enactment of right to education, Housing for All scheme, Mission Indradhanush etc. showcase the vigils of the state to abide by the DPSP.

**5. *Directive Principles can be considered as even more important than the Fundamental Rights because they provide a positive thrust towards welfare. Examine.***

**Approach:**

- In the introduction, briefly write about the significance of Directive Principles and Fundamental Rights.
- Highlight the importance of directive principles.
- Also, bring out the importance of Fundamental Rights in democracy.
- Provide a balanced conclusion.

**Answer:**

In the words of Granville Austin, 'Directive Principles (DPs) and Fundamental Rights (FRs) are the conscience of the Indian Constitution.' While FRs ensure minimum basic rights to ensure a dignified life to citizens, DPs are considered fundamental in the governance of the country as it seeks to establish economic and social democracy.

In the *Kesavananda Bharati Case*, 1973 the Supreme Court highlighted the importance of Directive Principles as:

- They contain the basic philosophy of the Constitution which needs to be reflected in the government policies and laws made by the Parliament.
- Unlike Fundamental Rights, these principles do not put any limitations on the powers of the state.
- It covers almost every section of society. For example – children, women, old age, disabled, scheduled caste and scheduled tribes, and therefore helps in the establishment of a welfare state.
- It also provides a list of areas of governance to be considered. For example - free legal aid, workers participation, and equal pay for equal work, environment protection and uniform civil code.

However, the Supreme Court in *Minerva Mills case*, 1980 held that absolute primacy to one over other disturbs the harmony of the Indian Constitution. The role of the fundamental rights is also crucial as they:

- Are essential for holistic development of individuals as it provides necessary conditions for material and moral protection of man. For e.g. right to freedom of religion, right against exploitation etc.
- Help in the establishment of the rule of law. For e.g. right to constitutional remedies.
- Serve as formidable bulwark of individual liberty. For e.g. right to life and personal liberty (article 21).
- Protect the interests of minorities and weaker sections of society (article 29 to 31).
- Act as limitations on the executive and the legislature and prevent it from becoming autocratic.
- Unlike DPs which have moral and political sanctions, the FRs are justiciable and do not require any legislation for their implementation.

Hence, both have similar objectives and a balance between the two is necessary to realize the vision of a welfare state and in pursuance of this the Supreme Court also held that it is the balance between DPSPs and FRs that constitutes the basic structure and not any one of them separately.

**6. *Directive Principles of State Policy, though not legally enforceable in a court of law, are perceived as 'conscience of the Constitution' and are fundamental to governance of the country. Comment.***

**Approach:**

- Introduce in brief the rationale behind DPSP, and its criticism of being non-justiciable.
- List provisions that make them 'fundamental' for good governance.
- Enumerate some legislation that operationalized DPSP to highlight their relevance.

**Answer:**

The Directive Principles of State Policy (Art 36-51) are 'novel features' of Indian Constitution which advance socio-economic rights to citizens. They are labeled as the conscience of the Constitution because they are recommendations from the constitutional makers to future lawmakers and administrators for good governance. DPSP were however made non-justiciable because of lack of financial resources and state capacity for their implementation just after independence.

**Article 37** states that they are 'fundamental in the governance of the country and it shall be the duty of the state to apply them.' This is because they –

- Promote the ideal of **welfare state** – to achieve justice, liberty, equality and fraternity as outlined in the Preamble.
- Supplementary to fundamental rights (political rights) – as they create a conducive environment for enjoying these rights.
- Serve as **beacons** for executive, legislature and judiciary to fulfill the constitutional vision of socio-economic justice.
- Serve as **litmus test** – for citizens to gauge the performance of any government.

Their significance in governance is evident from the following laws that were enacted to operationalize some of these principles -

- Right to free legal aid (Article 39 A) – Legal Services Authorities Act, 1987
- Organization of panchayats (Article 42) – 72<sup>nd</sup> and 73<sup>rd</sup> Constitutional Amendment Act.

- Right to work and public assistance (Article 41) – Minimum Wages Act, Old age and disability pension, etc.
- Just and humane conditions of work (Article 42) – Maternity Benefit Act
- Early childhood care and education (Article 45)– National Food Security Act, Right to Education
- Promotion of interest of backward classes (Article 46) – policy of affirmative action, National Commission for SC and ST (Article 338 and 338A)
- Separation of Judiciary from Executive (Article 50) – Criminal procedure code, 1973

The judiciary has also recognized the **primacy of Article 39 (b) and (c)** over certain fundamental rights. Though non-justiciable, a government that rests on popular vote can hardly ignore the DPSP while shaping its policy and will have to answer before the electorate. Hence, awakened public opinion (and not judicial proceedings) is the key to fulfilling these principles.

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