

# Classroom Study Material

# POLITY & CONSTITUTION

## PART-1



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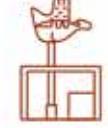
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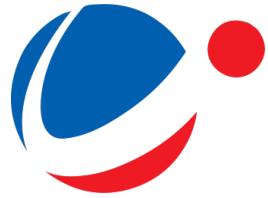
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## POLITY PART 1

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

Student Notes:

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# 1. Comparison Scheme

Student Notes:

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.

<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

Student Notes:

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.

Student Notes:

## 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.

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**

- 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.

- 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

Student Notes:

#### 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

Student Notes:

#### 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

Student Notes:

### 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

Student Notes:

#### 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

- 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

Student Notes:

### 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. 1/3<sup>rd</sup> 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?

- 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.

Student Notes:

- 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.

Student Notes:

## 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.”

Student Notes:

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.

Student Notes:

#### **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.

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**

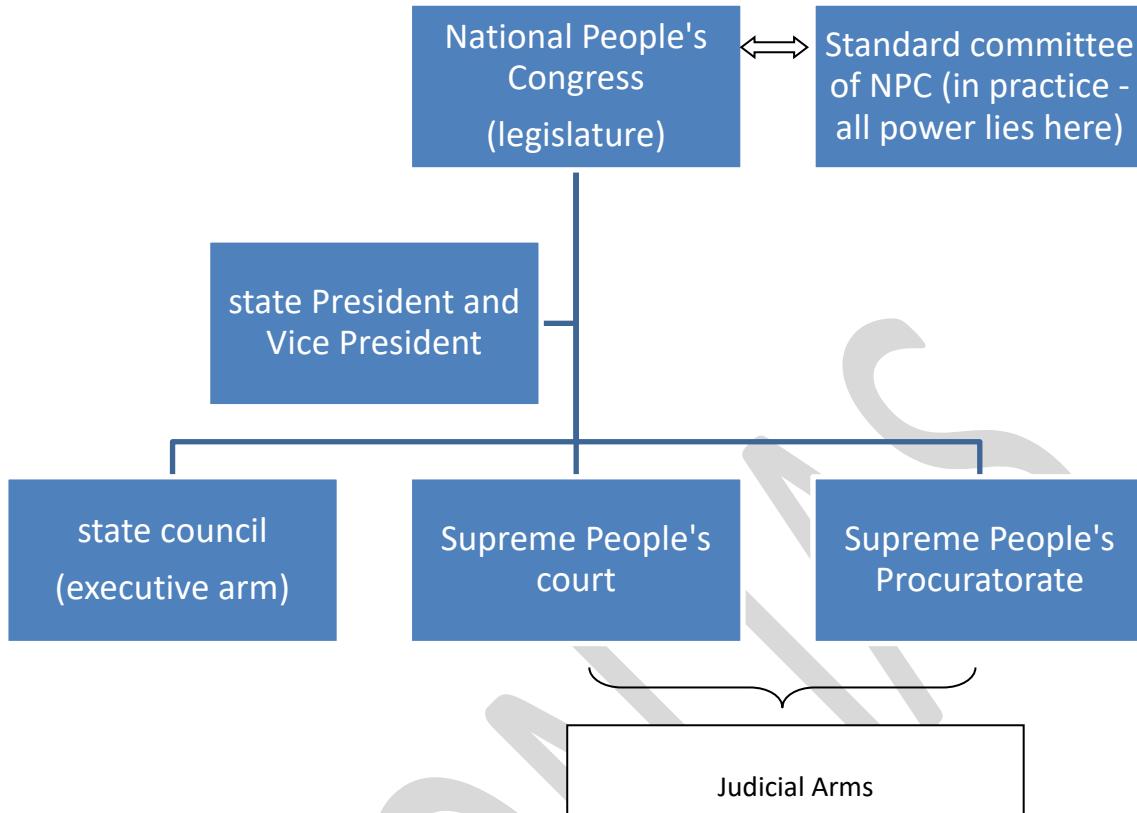
The Chairman of the Committee has been regarded as the most powerful person in the political setup. He presides over the meetings of the Standing Committee. He has also been endowed with the power to issue decrees and promulgate ordinances. His list of duties include:

- 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.



#### 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:

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.

Student Notes:

## 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).

Student Notes:

## 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.

This is so because:

Student Notes:

- 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  $2.01 + \text{the square root of the Land's population in millions}$  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.

Student Notes:

## 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).

## **Manner of Election**

Student Notes:

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:

### 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.

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.

Student Notes:

#### **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:

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.

The language and the structural format of the Preamble of India have been derived from the United States of America.

Student Notes:

## 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.	The President of India is: <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.		Student Notes:
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.

Student Notes:

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

Student Notes:

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 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.

Student Notes:

## 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

Student Notes:

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:

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

Student Notes:

## 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.

**Treaty making in India**

- 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 **Venkatachalliah 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.

- 4. 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.

**Answer:**

- 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:**

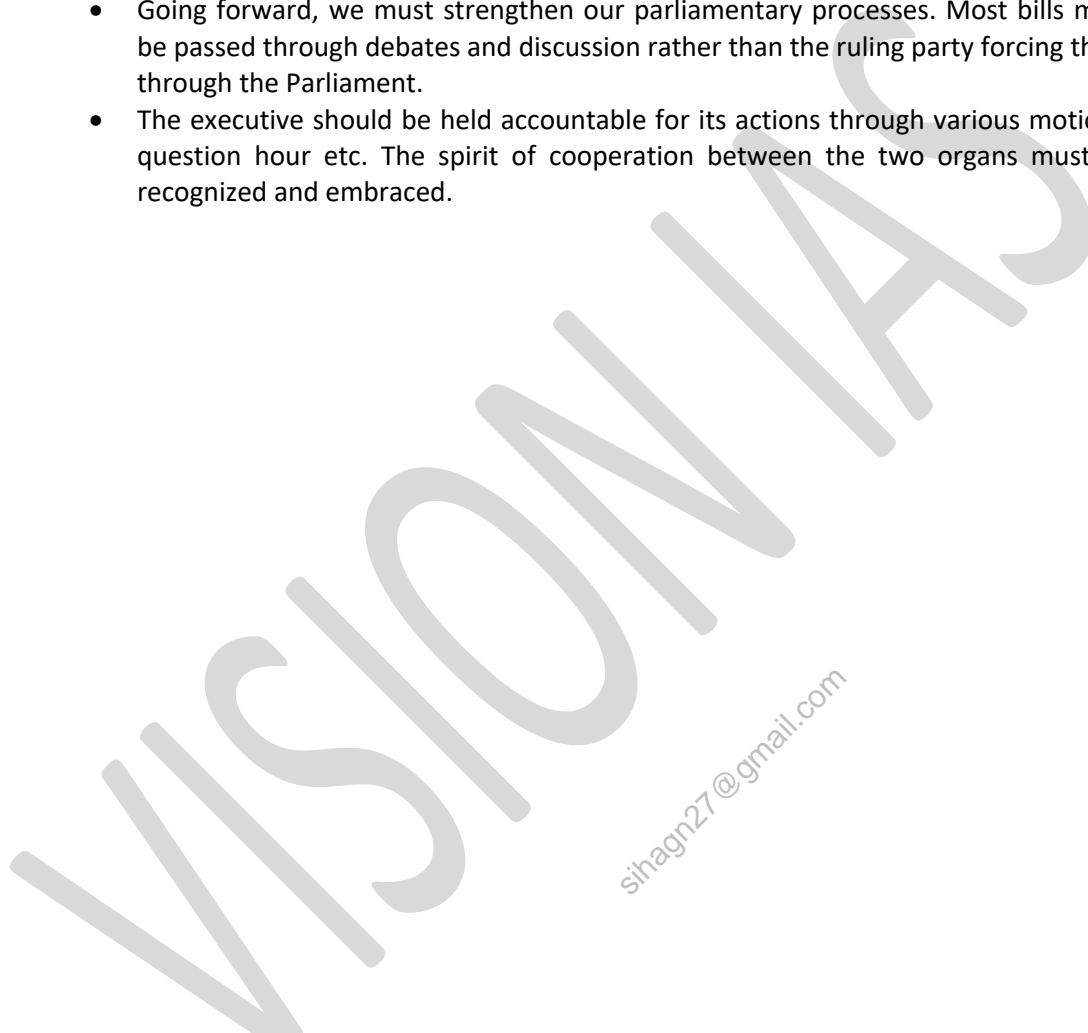
The answer should contain the following parts –

- 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

Student Notes:

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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.

According to K C Wheare and W G Andrews, Constitutionalism implies:

Student Notes:

- 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

Student Notes:

- 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:

Student Notes:

- 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.

Student Notes:

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-acceding 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.

Student Notes:

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.

Student Notes:

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:

### 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.

Student Notes:

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

Student Notes:

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:

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:

## 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."

Student Notes:

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:

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>	Student Notes:
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:

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.

Student Notes:

**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.

Student Notes:

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**.

**3. Indian constitution is a borrowed constitution. Evaluate.**

Student Notes:

**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.

Student Notes:

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

Student Notes:

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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.

Student Notes:

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

Student Notes:

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

Student Notes:

#### 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.

Student Notes:

## 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:

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.

Student Notes:

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.

Student Notes:

### 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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# UNION AND ITS TERRITORY

Student Notes:

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

Student Notes:

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.

Student Notes:

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.

Student Notes:

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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	<p>State of Madras. Kurnool was the capital and high court was established at Guntur.</p>	Student Notes:
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 Asom 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	<p>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.</p> <p>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.</p>	
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**

Student Notes:

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.

Student Notes:

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, Bundeckhand, 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:

**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.

Student Notes:

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:

**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:

**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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FROM VARIOUS PROGRAMS OF **VISION IAS**



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