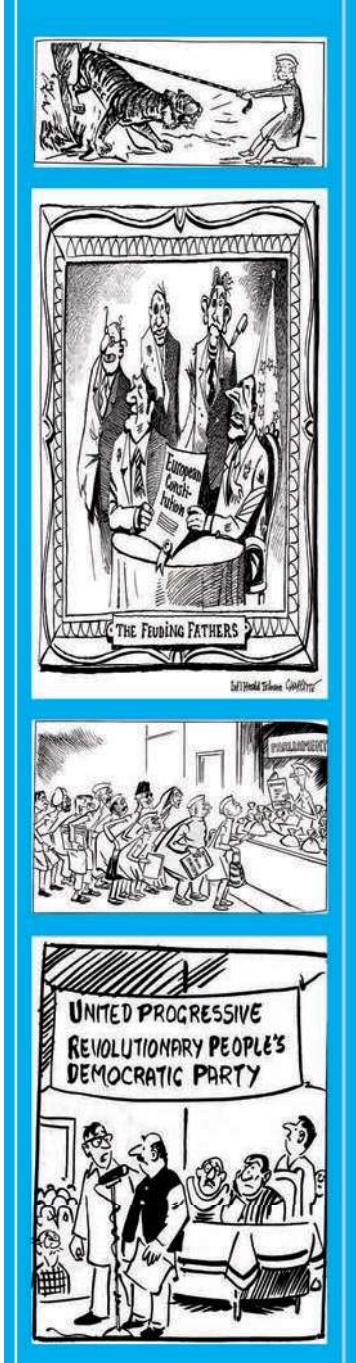


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Chapter Six

JUDICIARY

INTRODUCTION

Many times, courts are seen only as arbitrators in disputes between individuals or private parties. But judiciary performs some political functions also. Judiciary is an important organ of the government. The Supreme Court of India is in fact, one of the very powerful courts in the world. Right from 1950 the judiciary has played an important role in interpreting and in protecting the Constitution. In this chapter you will study the role and importance of the judiciary. In the chapter on fundamental rights you have already read that the judiciary is very important for protecting our rights. After studying this chapter, you would be able to understand

- ❖ the meaning of independence of judiciary;
- ❖ the role of Indian Judiciary in protecting our rights;
- ❖ the role of the Judiciary in interpreting the Constitution; and
- ❖ the relationship between the Judiciary and the Parliament of India.

WHY DO WE NEED AN INDEPENDENT JUDICIARY?

In any society, disputes are bound to arise between individuals, between groups and between individuals or groups and government. All such disputes must be settled by an independent body in accordance with the principle of rule of law. This idea of rule of law implies that all individuals — rich and poor, men or women, forward or backward castes — are subjected to the same law. The principal role of the judiciary is to protect rule of law and ensure supremacy of law. It safeguards rights of the individual, settles disputes in accordance with the law and ensures that democracy does not give way to individual or group dictatorship. In order to be able to do all this, it is necessary that the judiciary is independent of any political pressures.

What is meant by an independent judiciary? How is this independence ensured?

Independence of Judiciary

Simply stated independence of judiciary means that

- ❖ the other organs of the government like the executive and legislature must not restrain the functioning of the judiciary in such a way that it is unable to do justice.
- ❖ the other organs of the government should not interfere with the decision of the judiciary.
- ❖ judges must be able to perform their functions without fear or favour.

Independence of the judiciary does not imply arbitrariness or absence of accountability. Judiciary is a part of the democratic political structure of the

R K Laxman in *The Times of India*.

READ A CARTOON



... as an eminent lawyer you ought to know that your action is tantamount to, under section 18, Sub-section 5, VI(X), read along with I.P.C. 147(1)(B), notwithstanding ...

No fisticuffs please, this is rule of law!



I remember the case of Machal mentioned in chapter two. Don't they say, 'justice delayed is justice denied'? Somebody should do something about this.

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country. It is therefore accountable to the Constitution, to the democratic traditions and to the people of the country.

How can the independence of judiciary be provided and protected?

The Indian Constitution has ensured the independence of the judiciary through a number of measures. The legislature is not involved in the process of appointment of judges. Thus, it was believed that party politics would not play a role in the process of appointments. In order to be appointed as a judge, a person must have experience as a lawyer and/or must be well versed in law. Political opinions of the person or his/her political loyalty should not be the criteria for appointments to judiciary.

The judges have a fixed tenure. They hold office till reaching the age of retirement. Only in exceptional cases, judges may be removed. But otherwise, they have security of tenure. Security of tenure ensures that judges could function without fear or favour. The Constitution prescribes a very difficult procedure for removal of judges. The Constitution makers believed that a difficult procedure of removal would provide security of office to the members of judiciary.

The judiciary is not financially dependent on either the executive or legislature. The Constitution provides that the salaries and allowances of the judges are not subjected to the approval of the legislature. The actions and decisions of the judges are immune from personal criticisms. The judiciary has the power to penalise those who are found guilty of contempt of court. This authority of the court is seen as an effective protection to the judges from unfair criticism. Parliament cannot discuss the conduct of the judges except when the proceeding to remove a judge is being carried out. This gives the judiciary independence to adjudicate without fear of being criticised.



Activity

Hold a debate in class on the following topic.

Which of the following factors do you think, work as constraints over the judges in giving their rulings? Do you think these are justified?

- ❖ Constitution
- ❖ Precedents
- ❖ Opinion of other courts
- ❖ Public opinion
- ❖ Media
- ❖ Traditions of law
- ❖ Laws
- ❖ Time and staff constraints
- ❖ Fear of public criticism
- ❖ Fear of action by executive

Appointment of Judges

The appointment of judges has never been free from political controversy. It is part of the political process. It makes a difference who serves in the Supreme Court and High Court—a difference in how the Constitution is interpreted. The political philosophy of the judges, their views about active and assertive judiciary or controlled and committed judiciary have an impact on the fate of the legislations enacted. Council of Ministers, Governors and Chief Ministers and Chief Justice of India—all influence the process of judicial appointment.

As far as the appointment of the Chief Justice of India (CJI) is concerned, over the years, a convention had developed whereby the senior-most judge of the Supreme Court was appointed as the Chief Justice of India. This convention was however broken twice. In 1973 A. N. Ray was appointed as CJI superseding three senior Judges. Again, Justice M.H. Beg was appointed superseding Justice H.R. Khanna (1975).



I am afraid, I am getting confused. In a democracy, you can criticise the Prime Minister or even the President, but not the judges! And what is this contempt of court? But am I being guilty of contempt if I asked about these matters?



But I think, finally the Council of Ministers would have greater say in appointing judges. Or is it that the judiciary is a self-appointing body?

The other Judges of the Supreme Court and the High Court are appointed by the President after ‘consulting’ the CJI. This, in effect, meant that the final decisions in matters of appointment rested with the Council of Ministers. What then, was the status of the consultation with the Chief Justice?

This matter came up before the Supreme Court again and again between 1982 and 1998. Initially, the court felt that role of the Chief Justice was purely consultative. Then it took the view that the opinion of the Chief Justice must be followed by the President. Finally, the Supreme Court has come up with a novel procedure: it has suggested that the Chief Justice should recommend names of persons to be appointed in consultation with four senior-most judges of the Court. Thus, the Supreme Court has established the principle of collegiality in making recommendations for appointments. At the moment therefore, in matters of appointment the decision of the group of senior judges of the Supreme Court carries greater weight. Thus, in matters of appointment to the judiciary, the Supreme Court and the Council of Ministers play an important role.

Removal of Judges

The removal of judges of the Supreme Court and the High Courts is also extremely difficult. A judge of the Supreme Court or High Court can be removed only on the ground of proven misbehaviour or incapacity. A motion containing the charges against the judge must be approved by special majority in both Houses of the Parliament. Do you remember what special majority means? We have studied this in the chapter on Elections. It is clear from this procedure that removal of a judge is a very difficult procedure and unless there is a general consensus among Members of the Parliament, a judge cannot be removed. It should also be noted that while in making appointments, the executive plays a crucial role; the legislature has the powers of removal. This has ensured

both balance of power and independence of the judiciary. So far, only one case of removal of a judge of the Supreme Court came up for consideration before Parliament. In that case, though the motion got two-thirds majority, it did not have the support of the majority of the total strength of the House and therefore, the judge was not removed.

Unsuccessful Attempt to Remove a Judge

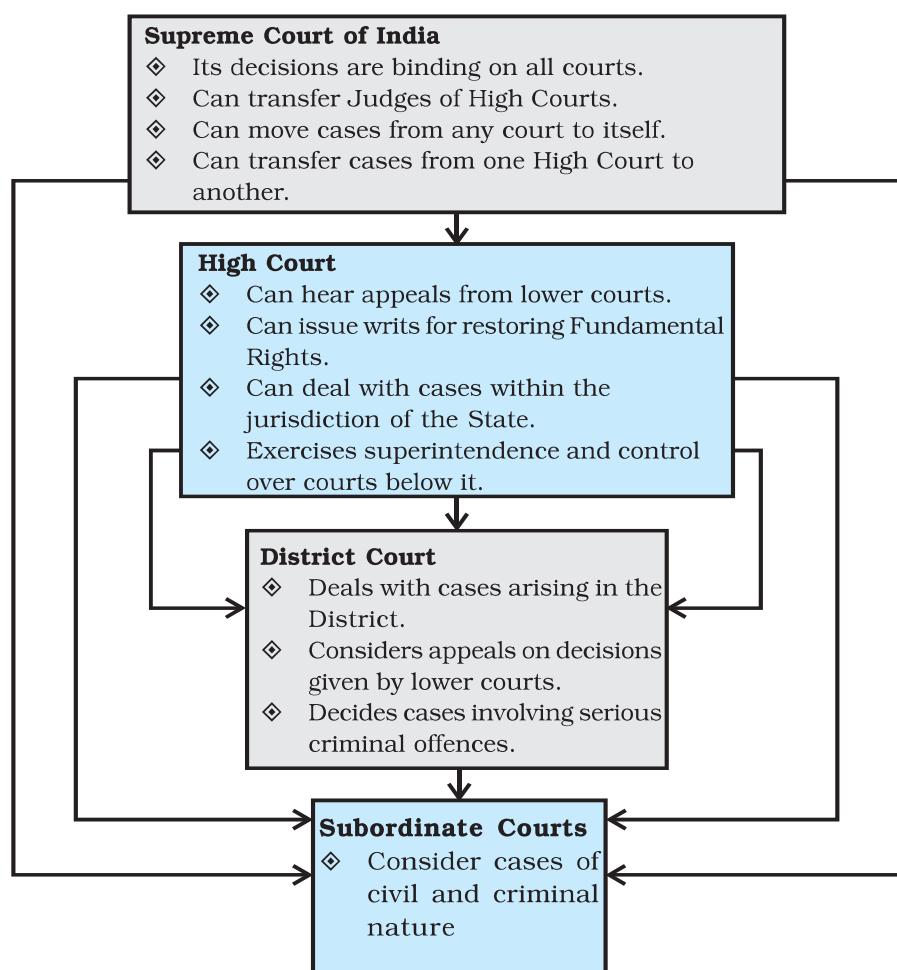
In 1991 the first-ever motion to remove a Supreme Court Justice was signed by 108 members of Parliament. Justice V. Ramaswami, during his tenure as the Chief Justice of the Punjab and Haryana High Court was accused of misappropriating funds. In 1992, a year after Parliament had started the removal proceedings, a high-profile inquiry commission consisting of Judges of the Supreme Court found Justice V. Ramaswami “guilty of wilful and gross misuses of office . . . and moral turpitude by using public funds for private purposes and reckless disregard of statutory rules” while serving as the Chief Justice of the Punjab and Haryana High Court. Despite this strong indictment, Ramaswami survived the parliamentary motion recommending removal. The motion recommending his removal got the required two-thirds majority among the members who were present and voting, but the Congress party abstained from voting in the House. Therefore, the motion could not get the support of one-half of the total strength of the House.

Check your progress

- ❖ Why is independence of the judiciary important?
- ❖ Do you think that executive should have the power to appoint judges?
- ❖ If you were asked to make suggestions for changing the procedure of appointing judges, what changes would you suggest?

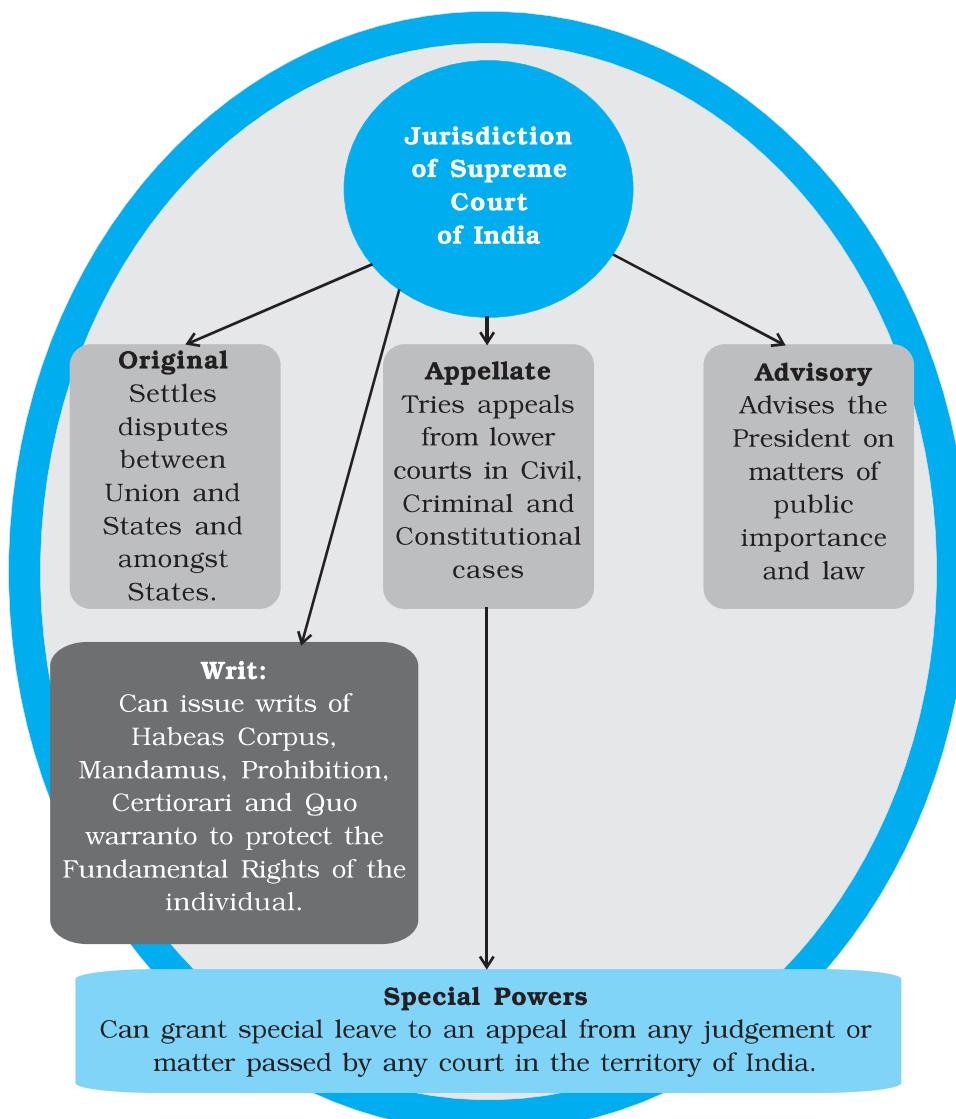
STRUCTURE OF THE JUDICIARY

The Constitution of India provides for a single integrated judicial system. This means that unlike some other federal countries of the world, India does not have separate State courts. The structure of the judiciary in India is pyramidal with the Supreme Court at the top, High Courts below them and district and subordinate courts at the lowest level (*see the diagram below*). The lower courts function under the direct superintendence of the higher courts.



Jurisdiction of Supreme Court

The Supreme Court of India is one of the very powerful courts anywhere in the world. However, it functions within the limitations imposed by the Constitution. The functions and responsibilities of the Supreme Court are defined by the Constitution. The Supreme Court has specific jurisdiction or scope of powers.



Original Jurisdiction

Original jurisdiction means cases that can be directly considered by the Supreme Court without going to the lower courts before that. From the diagram above, you will notice that cases involving federal relations go directly to the Supreme Court. The Original Jurisdiction of the Supreme Court establishes it as an umpire in all disputes regarding federal matters. In any federal country, legal disputes are bound to arise between the Union and the States; and among the States themselves. The power to resolve such cases is entrusted to the Supreme Court of India. It is called original jurisdiction because the Supreme Court alone has the power to deal with such cases. Neither the High Courts nor the lower courts can deal with such cases. In this capacity, the Supreme Court not just settles disputes but also interprets the powers of Union and State government as laid down in the Constitution.

Writ Jurisdiction

As you have already studied in the chapter on fundamental rights, any individual, whose fundamental right has been violated, can directly move the Supreme Court for remedy. The Supreme Court can give special orders in the form of writs. The High Courts can also issue writs, but the persons whose rights are violated have the choice of either approaching the High Court or approaching the Supreme Court directly. Through such writs, the Court can give orders to the executive to act or not to act in a particular way.

Appellate Jurisdiction

The Supreme Court is the highest court of appeal. A person can appeal to the Supreme Court against the decisions of the High Court. However, High Court must certify that the case is fit for appeal, that is to say that it involves a serious matter of interpretation of law or Constitution. In addition, in criminal cases, if the lower court has sentenced a person to death then an appeal can be made to the High Court or Supreme Court. Of course, the Supreme Court holds the powers to decide whether to admit appeals even when appeal is not allowed by the High Court. Appellate jurisdiction means that the Supreme Court will reconsider the case and the legal issues involved

in it. If the Court thinks that the law or the Constitution has a different meaning from what the lower courts understood, then the Supreme Court will change the ruling and along with that also give new interpretation of the provision involved.

The High Courts too, have appellate jurisdiction over the decisions given by courts below them.

Advisory Jurisdiction

In addition to original and appellate jurisdiction, the Supreme Court of India possesses advisory jurisdiction also. This means that the President of India can refer any matter that is of public importance or that which involves interpretation of Constitution to Supreme Court for advice. However, the Supreme Court is not bound to give advice on such matters and the President is not bound to accept such an advice.

What then is the utility of the advisory powers of the Supreme Court? The utility is two-fold. In the first place, it allows the government to seek legal opinion on a matter of importance before taking action on it. This may prevent unnecessary litigations later. Secondly, in the light of the advice of the Supreme Court, the government can make suitable changes in its action or legislations.



Article 137

..... the Supreme Court shall have power to review any judgment pronounced or order made by it.



Article 144

..... All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.



Isn't it funny that giving advice is optional and accepting that advice is also optional? I thought that the Courts gave decisions that were binding!



Why is the Supreme Court allowed to change its own ruling? Is it because courts can also make mistakes? Is it possible that the same judge is part of the 'Bench' that revises the ruling and was also on the Bench that gave the ruling in the first place?

Read the articles quoted above. These articles help us to understand the unified nature of our judiciary and the powers of the Supreme Court. Decisions made by the Supreme Court are binding on all other courts within the territory of India. Orders passed by it are enforceable throughout the length and breadth of the country. The Supreme Court itself is not bound by its decision and can at any time review it. Besides, if there is a case of contempt of the Supreme Court, then the Supreme Court itself decides such a case.

Check your progress

Match the following

Dispute between State of Bihar and Union of India will be heard by

High Court

Appeal from District court of Haryana will go to

Advisory Jurisdiction

Single Integrated Judiciary

Judicial review

Declaring a law unconstitutional

Original Jurisdiction

Supreme Court

Single Constitution

JUDICIAL ACTIVISM

Have you heard of the term judicial activism? Or, Public Interest Litigation?

Both these terms are often used in the discussions about judiciary in recent times. Many people think that these two things have revolutionised the functioning of judiciary and made it more people-friendly.



Do you know that in recent times the judiciary has ruled that bandhs and hartals are illegal?

The chief instrument through which judicial activism has flourished in India is Public Interest Litigation (PIL) or Social Action Litigation (SAL). What is PIL or SAL? How and when did it emerge? In normal course of law, an individual can approach the courts only if he/she has been personally aggrieved. That is to say, a person whose rights have been violated, or who is involved in a dispute, could move the court of law. This concept underwent a change around 1979. In 1979, the Court set the trend when it decided to hear a case where the case was filed not by the aggrieved persons but by others on their behalf. As this case involved a consideration of an issue of public interest, it and such other cases came to be known as public interest litigations. Around the same time, the Supreme Court also took up the case about rights of prisoners. This opened the gates for large number of cases where public spirited citizens and voluntary organisations sought judicial intervention for protection of existing rights, betterment of life conditions of the poor,



I have heard someone say that PIL means 'private interest litigation'. Why would that be so?

protection of the environment, and many other issues in the interest of the public. PIL has become the most important vehicle of judicial activism.

Judiciary, which is an institution that traditionally confined to responding to cases brought before it, began considering many cases merely on the basis of newspaper reports and postal complaints received by the court. Therefore, the term judicial activism became the more popular description of the role of the judiciary.

Some Early PILs

- ❖ In 1979, newspapers published reports about 'under trials'. There were many prisoners in Bihar who had spent long years in jail, longer than what they would have spent if they had been punished for the offences for which they were arrested. This report prompted an advocate to file a petition. The Supreme Court heard this case. It became famous as one of the early Public Interest Litigations (PILs). This was the Hussainara Khatoon vs. Bihar case.
- ❖ In 1980, a prison inmate of the Tihar jail managed to send a scribbled piece of paper to Justice Krishna Iyer of the Supreme Court narrating physical torture of the prisoners. The judge got it converted into a petition. Though later on, the Court abandoned the practice of considering letters, this case, known as Sunil Batra vs. Delhi Administration (1980) also became one of the pioneers of public interest litigation.

Through the PIL, the court has expanded the idea of rights. Clean air, unpolluted water, decent living, etc., are rights for the entire society. Therefore, it was felt by the courts that individuals as parts of the society must have the right to seek justice wherever such rights were violated.

Secondly, through PIL and judicial activism of the post-1980 period, the judiciary has also shown readiness to take into consideration rights of those sections who

cannot easily approach the courts. For this purpose, the judiciary allowed public spirited citizens, social organisations and lawyers to file petitions on behalf of the needy and the deprived.

It must be remembered that the problems of the poor ...are qualitatively different from those which have hitherto occupied the attention of the Court and they needa different kind of judicial approach. If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights. — Justice Bhagwati in *Bandhua Mukti Morcha vs. Union of India*, 1984.

Activity



Find out the details about at least one case involving a PIL and study the way in which that case helped in serving public interest.

Judicial activism has had manifold impact on the political system. It has democratised the judicial system by giving not just to individuals but also groups access to the courts. It has forced executive accountability. It has also made an attempt to make the electoral system much more free and fair. The court asked candidates contesting elections to file affidavits indicating their assets and income along with educational qualifications so that the people could elect their representatives based on accurate knowledge.

There is however a negative side to the large number of PILs and the idea of a proactive judiciary. In the first place it has overburdened the courts. Secondly, judicial activism has blurred the line of distinction between the executive and legislature on the one hand and the judiciary on the other. The court has been involved in resolving questions which belong to the executive. Thus, for



I think judicial activism is more about telling the legislature and the executive what they should do. What will happen if the legislature and executive started giving justice?

instance, reducing air or sound pollution or investigating cases of corruption or bringing about electoral reform is not exactly the duty of the Judiciary. These are matters to be handled by the administration under the supervision of the legislatures. Therefore, some people feel that judicial activism has made the balance among the three organs of government very delicate. Democratic government is based on each organ of government respecting the powers and jurisdiction of the others. Judicial activism may be creating strains on this democratic principle.

YOU ARE THE JUDGE

A group of citizens from a city have approached the court through a PIL asking for an order to the city municipal authorities to remove slums and beautify the city in order to attract investors to the city. They argue that this is in the 'public interest.' The residents of the slum localities have responded by saying that this will encroach on their right to life. They argue that right to life is more central to 'public interest' than the right to a clean city.

Imagine that you are the judge.



Write a judgement deciding if the PIL involves 'public interest'.

JUDICIARY AND RIGHTS

We have already seen that the judiciary is entrusted with the task of protecting rights of individuals. The Constitution provides two ways in which the Supreme Court can remedy the violation of rights.

- ❖ First it can restore fundamental rights by issuing writs of Habeas Corpus; mandamus etc. (article 32). The High Courts also have the power to issue such writs (article 226).
- ❖ Secondly, the Supreme Court can declare the concerned law as unconstitutional and therefore non-operational (article 13).

Together these two provisions of the Constitution establish the Supreme Court as the protector of fundamental rights of the citizen on the one hand and interpreter of Constitution on the other. The second of the two ways mentioned above involves judicial review.

Perhaps the most important power of the Supreme Court is the power of judicial review. Judicial Review means the power of the Supreme Court (or High Courts) to examine the constitutionality of any law if the Court arrives at the conclusion that the law is inconsistent with the provisions of the Constitution, such a law is declared as unconstitutional and inapplicable. The term judicial review is nowhere mentioned in the Constitution. However, the fact that India has a written constitution and the Supreme Court can strike down a law that goes against fundamental rights, implicitly gives the Supreme Court the power of judicial review.

Besides, as we saw in the section on jurisdiction of the Supreme Court, in the case of federal relations too, the Supreme Court can use the review powers if a law is inconsistent with the distribution of powers laid down by the Constitution. Suppose, the central government makes a law, which according to some States, concerns a subject from the State list. Then the States can go to the Supreme Court and if the court agrees with them, it would declare that the law is unconstitutional. In this sense, the review power of the Supreme Court includes power to review legislations on the ground that they violate fundamental rights or on the ground that they violate the federal distribution of powers. The review power extends to the laws passed by State legislatures also.

Together, the writ powers and the review power of the Court make judiciary very powerful. In particular, the review power means that the judiciary can interpret the Constitution and the laws passed by the legislature. Many people think that this feature enables the judiciary to protect the Constitution effectively and also to protect the rights of citizens. The practice of entertaining PILs has further added to the powers of the judiciary in protecting rights of citizens.



I think I'd rather become a judge! Then, I won't have to worry about elections and public support, and can still have really lots of power.

Did you know that the practice of public interest litigation is now becoming more and more acceptable in many other countries? While many courts across the world, particularly in South Asia and Africa practice some form of judicial activism comparable to that of the Indian judiciary, the constitution of South Africa has incorporated public interest litigation in its bill of rights. Thus, in South Africa, it is a fundamental right of the citizen to bring before the Constitutional Court, cases of violation of other persons' rights.

Do you remember that in the chapter on rights we mentioned the right against exploitation? This right prohibits forced labour, trade in human flesh and prohibits employment of children in hazardous jobs. But the question is: how could those, whose rights were violated, approach the court? PIL and judicial activism made it possible for courts to consider these violations. Thus, the court considered a whole set of cases: the blinding of the jail inmates by the police, inhuman working conditions in stone quarries, sexual exploitation of children, and so on. This trend has made rights really meaningful for the poor and disadvantaged sections.

Check your progress

- ❖ When does the Court use the review powers?
- ❖ What is the difference between judicial review and writ?

JUDICIARY AND PARLIAMENT

Apart from taking a very active stand on the matter of rights, the court has been active in seeking to prevent subversion of the Constitution through political practice. Thus, areas that were considered beyond the scope of judicial review such as powers of the President and Governor were brought under the purview of the courts.

Chapter 6: Judiciary

There are many other instances in which the Supreme Court actively involved itself in the administration of justice by giving directions to executive agencies. Thus, it gave directions to CBI to initiate investigations against politicians and bureaucrats in the hawala case, the Narasimha Rao case, illegal allotment of petrol pumps case etc. You may have heard about some of these cases. Many of these instances are the products of judicial activism.

The Indian Constitution is based on a delicate principle of limited separation of powers and checks and balances. This means that each organ of the government has a clear area of functioning. Thus, the Parliament is supreme in making laws and amending the Constitution, the executive is supreme in implementing them while the judiciary is supreme in settling disputes and deciding whether the laws that have been made are in accordance with the provisions of the Constitution. Despite such clear cut division of power the conflict between the Parliament and judiciary, and executive and the judiciary has remained a recurrent theme in Indian politics.

We have already mentioned the differences that emerged between the Parliament and the judiciary over right to property and the Parliament's power to amend the Constitution. Let us recapitulate that briefly:

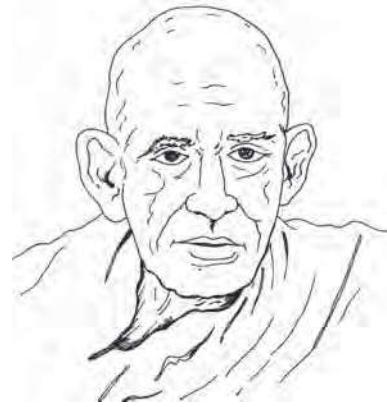
Immediately after the implementation of the Constitution began, a controversy arose over the Parliament's power to restrict right to property. The Parliament wanted to put some restrictions on the right to hold property so that land reforms could be implemented. The Court held that the Parliament cannot thus restrict fundamental rights. The Parliament then tried to amend the Constitution. But the Court said that even through an amendment, a fundamental right cannot be abridged.

The following issues were at the centre of the controversy between the Parliament and the judiciary.

- ❖ What is the scope of right to private property?
- ❖ What is the scope of the Parliament's power to curtail, abridge or abrogate fundamental rights?
- ❖ What is the scope of the Parliament's power to amend the constitution?
- ❖ Can the Parliament make laws that abridge fundamental rights while enforcing directive principles?

"While there can be no two opinions on the need for the maintenance of judicial independence, ...it is also necessary to keep in view one important principle. The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive. The judiciary is there to interpret the Constitution or adjudicate upon the rights..."

Alladi Krishnaswami Ayyar, CAD, Vol. XI, p. 837, 23 November 1949



During the period 1967 and 1973, this controversy became very serious. Apart from land reform laws, laws enforcing preventive detention, laws governing reservations in jobs, regulations acquiring private property for public purposes, and laws deciding the compensation for such acquisition of private property were some instances of the conflict between the legislature and the judiciary.

In 1973, the Supreme Court gave a decision that has become very important in regulating the relations between the Parliament and the Judiciary since then. This case is famous as the Kesavananda Bharati case. In this case, the Court ruled that there is a basic structure of the Constitution and nobody—not even the Parliament (through amendment)—can violate the basic structure. The Court did two more things. First, it said that right to property (the disputed issue) was not part of basic structure and therefore could be suitably abridged. Secondly, the Court reserved to itself the right to decide whether various matters are part of the basic structure of the Constitution. This case is perhaps the best example of how judiciary uses its power to interpret the Constitution.

This ruling has changed the nature of conflicts between the legislature and the judiciary. As we studied earlier, the right to property was taken away from the list of fundamental rights in 1979

and this also helped in changing the nature of the relationship between these two organs of government.

Some issues still remain a bone of contention between the two — can the judiciary intervene in and regulate the functioning of the legislatures? In the parliamentary system, the legislature has the power to govern itself and regulate the behaviour of its members. Thus, the legislature can punish a person who the legislature holds guilty of breaching privileges of the legislature. Can a person who is held guilty for breach of parliamentary privileges seek protection of the courts? Can a member of the legislature against whom the legislature has taken disciplinary action get protection from the court? These issues are unresolved and are matters of potential conflict between the two. Similarly, the Constitution provides that the conduct of judges cannot be discussed in the Parliament. There have been several instances where the Parliament and State legislatures have cast aspersions on the functioning of the judiciary. Similarly, the judiciary too has criticised the legislatures and issued instructions to the legislatures about the conduct of legislative business. The legislatures see this as violating the principle of parliamentary sovereignty.

These issues indicate how delicate the balance between any two organs of the government is and how important it is for each organ of the government in a democracy to respect the authority of others.

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Why can't the Court tell us once and for all what are those aspects that are 'basic structure' of the Constitution?

Check your progress

The main issues in the conflict between the judiciary and the Parliament have been:

- ❖ Appointment of judges
- ❖ Salaries and allowances of judges
- ❖ Scope of Parliament's power to amend the Constitution
- ❖ Interference by the Parliament in the functioning of the judiciary

Conclusion

In this chapter, we have studied the role of the judiciary in our democratic structure. In spite of the tensions that arose from time to time between the judiciary and the executive and the legislature, the prestige of the judiciary has increased considerably. At the same time, there are many more expectations from the judiciary. Ordinary citizens also wonder how it is possible for many people to get easy acquittals and how witnesses change their testimonies to suit the wealthy and the mighty. These are some issues about which our judiciary is concerned too.

You have seen in this chapter that judiciary in India is a very powerful institution. This power has generated much awe and many hopes from it. Judiciary in India is also known for its independence. Through various decisions, the judiciary has given new interpretations to the Constitution and protected the rights of citizens. As we saw in this chapter, democracy hinges on the delicate balance of power between the judiciary and the Parliament and both institutions have to function within the limitations set by the Constitution.

READ A CARTOON



At last, I've been honourably acquitted! It was a nightmare all this time! I swear I'll never again indulge in corruption!

How active is the judiciary in trying to curb corruption in public life?

NATIONAL NETWORK

RAJYA SABHA Election of members from states they do not belong to challenged

SC to hear petition by month-end

EXPRESS NEWS SERVICE
NEW DELHI, FEBRUARY 2

Listing a petition challenging a common practice in Rajya Sabha polls for hearing this month-end,

Sabha member Falu Nariman informed the apex bench of the need for urgency in the matter since polls to the Upper House were slated to begin by February 28.

In fact, Navvar's petition

MANMOHAN SINGH TOPS THE list of such persons having been elected to the Upper House from Assam, the state which does not belong to. The Congress and BIP too have such members of the Upper House.

“Bharatiya Janata leaders M Venkaih and Rajagopal were...”

Cash-for-query: Centre wants cases of MP.

Judiciary a partner in development: Kalam

President inaugurates the Golden Jubilee celebrations of the Punjab and Haryana High Court

नियुक्तियों के मामले में न्यायपालिका का कोई दखल नहीं: हाई कोर्ट

नियुक्ति विधायक सभान दे दिया गया राजनीति

Supreme Court indicts Governor

Exercises

1. What are the different ways in which the independence of the judiciary is ensured? Choose the odd ones out.
 - i. Chief Justice of the Supreme Court is consulted in the appointment of other judges of Supreme Court.
 - ii. Judges are generally not removed before the age of retirement.
 - iii. Judge of a High Court cannot be transferred to another High Court.
 - iv. Parliament has no say in the appointment of judges.
2. Does independence of the judiciary mean that the judiciary is not accountable to any one? Write your answer in not more than 100 words.
3. What are the different provisions in the constitution in order to maintain the independence of judiciary?
4. Read the news report below and identify the following aspects:
 - ✓ What is the case about?
 - ✓ Who has been the beneficiary in the case?
 - ✓ Who is the petitioner in the case?
 - ✓ Visualise what would have been the different arguments put forward by the company.
 - ✓ What arguments would the farmers have put forward?

Supreme Court orders REL to pay Rs 300 crore to Dahanu farmers

Our Corporate Bureau 24 March 2005

Mumbai: The Supreme Court has ordered Reliance Energy to pay Rs. 300 crore to farmers who grow the chikoo fruit in the Dahanu area outside Mumbai. The order comes after the chikoo growers petitioned the court against the pollution caused by Reliance's thermal power plant.

Dahanu, which is 150 km from Mumbai, was a self-sustaining agricultural and horticultural economy known for its fisheries and forests just over a decade ago, but was devastated in 1989 when a thermal power plant came into operation in the region. The next year, this fertile belt saw its first crop failure. Now, 70

per cent of the crop of what was once the fruit bowl of Maharashtra is gone. The fisheries have shut and the forest cover has thinned. Farmers and environmentalists say that fly ash from the power plant entered ground water and polluted the entire eco-system. The Dahanu Taluka Environment Protection Authority ordered the thermal station to set up a pollution control unit to reduce sulphur emissions, and in spite of a Supreme Court order backing the order the pollution control plant was not set up even by 2002. In 2003, Reliance acquired the thermal station and re-submitted a schedule for installation process in 2004. As the pollution control plant is still not set up, the Dahanu Taluka Environmental Protection Authority asked Reliance for a bank guarantee of Rs. 300 crores.

5. Read the following news report and,
 - ✓ Identify the governments at different levels
 - ✓ Identify the role of Supreme Court
 - ✓ What elements of the working of judiciary and executive can you identify in it?
 - ✓ Identify the policy issues, matters related to legislation, implementation and interpretation of the law involved in this case.

Centre, Delhi join hands on CNG issue

By Our Staff Reporter, The Hindu 23 September 2001

NEW DELHI, SEPT. 22. The Centre and the Delhi Government today agreed to jointly approach the Supreme Court this coming week... for phasing out of all non-CNG commercial vehicles in the Capital. They also decided to seek a dual fuel policy for the city instead of putting the entire transportation system on the single-fuel mode "which was full of dangers and would result in disaster."

It was also decided to discourage the use of CNG by private vehicle owners in the Capital. Both governments would press for allowing the use of 0.05 per cent low sulphur diesel for running of buses in the Capital. In addition, it would be pleaded before the Court that all commercial vehicles, which fulfil the Euro-II standards, should be allowed to ply in the city. Though both the Centre and the State would file separate affidavits, these would contain common points. The Centre would also go out and support the Delhi Government's stand on the issues concerning CNG.

These decisions were taken at a meeting between the Delhi Chief Minister, Ms. Sheila Dikshit, and the Union Petroleum and Natural Gas Minister, Mr. Ram Naik.

Ms. Dikshit said the Central Government would request the court that in view of the high powered Committee appointed under Dr. R.A. Mashelkar to suggest an “Auto Fuel Policy” for the entire country, it would be appropriate to extend the deadline as it was not possible to convert the entire 10,000-odd bus fleet into CNG during the prescribed time frame. The Mashelkar Committee is expected to submit its report within a period of six months.

The Chief Minister said time was required to implement the court directives. Referring to the coordinated approach on the issue, Ms. Dikshit said this would take into account the details about the number of vehicles to be run on CNG, eliminating long queues outside CNG filling stations, the CNG fuel requirements of Delhi and the ways and means to implement the directive of the court.

The Supreme Court had ...refused to relax the only CNG norm for the city’s buses but said it had never insisted on CNG for taxis and auto rickshaws. Mr. Naik said the Centre would insist on allowing use of low sulphur diesel for buses in Delhi as putting the entire transportation system dependent on CNG could prove to be disastrous. The Capital relied on pipeline supply for CNG and any disruption would throw the public transport system out of gear.

6. The following is a statement about Ecuador. What similarities or differences do you find between this example and the judicial system in India?

“It would be helpful if a body of common law, or judicial precedent, existed that could clarify a journalist’s rights. Unfortunately, Ecuador’s courts don’t work that way. Judges are not forced to respect the rulings of higher courts in previous cases. Unlike the US, an appellate judge in Ecuador (or elsewhere in South America, for that matter) need not provide a written decision explaining the legal basis of a ruling. A judge may rule one way today and the opposite way, in a similar case, tomorrow, without explaining why.”

7. Read the following statements: Match them with the different jurisdictions the Supreme Court can exercise - Original, Appellate, and Advisory.
- ✓ The government wanted to know if it can pass a law about the citizenship status of residents of Pakistan-occupied areas of Jammu and Kashmir.
 - ✓ In order to resolve the dispute about river Cauvery the government of Tamil Nadu wants to approach the court.
 - ✓ Court rejected the appeal by people against the eviction from the dam site.
8. In what way can public interest litigation help the poor?
9. Do you think that judicial activism can lead to a conflict between the judiciary and the executive? Why?
10. How is judicial activism related to the protection of fundamental rights? Has it helped in expanding the scope of fundamental rights?





Chapter Seven

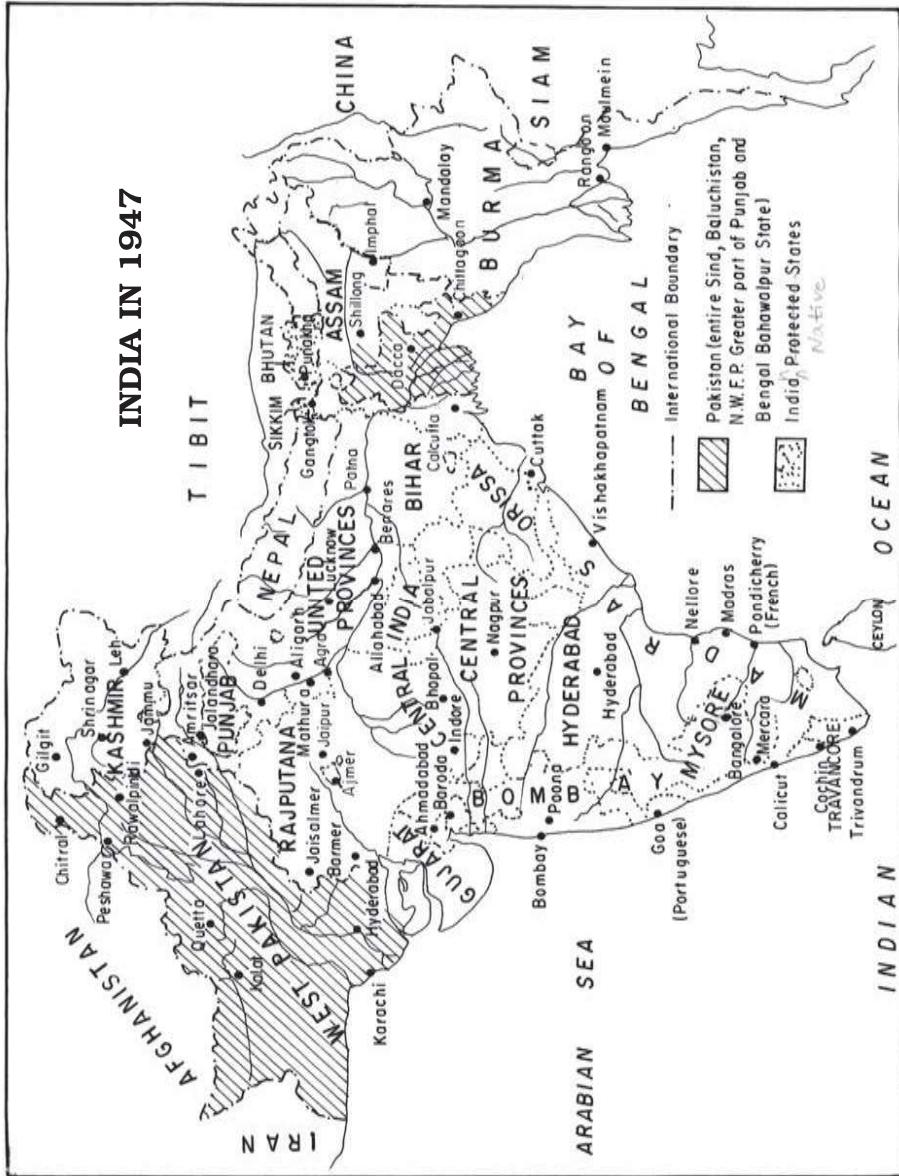
FEDERALISM

INTRODUCTION

Look at the political maps (on next two pages) of India 1947 and 2017. They have changed dramatically over the years. Boundaries of States have changed, names of States have changed, and the number of States has changed. When India became independent, we had a number of provinces that the British government had organised only for administrative convenience. Then a number of princely states merged with the newly independent Indian union. These were joined to the existing provinces. This is what you see in the first map. Since then boundaries of States have been reorganised many times. During this entire period, not only did boundaries of States change, but in some cases, even their names changed according to the wishes of the people of those States. Thus, Mysore changed to Karnataka and Madras became Tamil Nadu. The maps show these large scale changes that have taken place in the span of over seventy years. In a way, these maps also tell us the story of functioning of federalism in India.

After studying this chapter you will be able to understand the following:

- ❖ what is Federalism;
- ❖ the federal provisions in the Indian Constitution;
- ❖ the issues involved in the relations between the centre and the States; and
- ❖ the special provisions for certain States having a distinct composition and historical features.





WHAT IS FEDERALISM?

USSR was one of the world's super powers, but after 1989 it simply broke up into several independent countries. One of the major reasons for its break up was the excessive centralisation and concentration of power, and the domination of Russia over other regions with independent languages and cultures of their own e.g. Uzbekistan. Some other countries like Czechoslovakia, Yugoslavia, and Pakistan also had to face a division of the country. Canada came very close to a break up between the English-speaking and the French-speaking regions of that country. Isn't it a great achievement that India, which emerged as an independent nation-state in 1947 after a painful partition, has remained united over six decades of its independent existence? What accounts for this achievement? Can we attribute it to the federal structure of governance that we in India adopted through our Constitution? All the countries mentioned above, were federations. Yet they could not remain united. Therefore, apart from adopting a federal constitution, the nature of that federal system and the practice of federalism must also be important factors.

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Federalism in West Indies

You may have heard about the cricket team of West Indies. But is there a country called West Indies?

Like India, West Indies was also colonised by the British. In 1958, the federation of West Indies came into being. It had a weak central government and the economy of each unit was independent. These features and political competition among the units led to the formal dissolution of the federation in 1962. Later, in 1973 by Treaty of Chiguaramas the independent islands established joint authorities in the form of a common legislature, supreme court, a common currency, and, to a degree, a common market known as the Caribbean Community. The Caribbean Community has even a common executive, and Heads of the governments of member countries are members of this executive.

Thus, the units could neither live together as one country, nor can they live separately!

India is a land of continental proportions and immense diversities. There are more than 20 major languages and several hundred minor ones. It is the home of several major religions. There are several million indigenous peoples living in different parts of the country. In spite of all these diversities we share a common land mass. We have also participated in a common history, especially, when we fought for independence. We also share many other important features. This has led our national leaders to visualise India as a country where there is unity in diversity. Sometimes it is described as unity with diversity.

Federalism does not consist of a set of fixed principles, which are applied, to different historical situations. Rather, federalism as a principle of government has evolved differently in different situations. American federalism – one of the first major attempts to build a federal polity – is different from German or Indian federalism. But there are also a few key ideas and concepts associated with federalism.

- ❖ Essentially, federalism is an institutional mechanism to accommodate *two sets of polities*—one at the regional level and the other at the national level. Each government is autonomous in its own sphere. In some federal countries, there is even a system of dual citizenship. India has only a single citizenship.
- ❖ The people likewise, have *two sets of identities* and loyalties—they belong to the region as well as the nation, for example we are Gujaratis or Jharkhandis as well as Indians. Each level of the polity has distinct powers and responsibilities and has a separate system of government.
- ❖ The details of this dual system of government are generally spelt out in a *written constitution*, which is considered to be supreme and which is also the source of the power of both sets of government. Certain subjects, which concern the nation as a whole, for example, defence or currency, are the responsibility of the union or central government. Regional or local



I get it! It's like our school. We have our identity as students of class XI or XII and so on. And we also have competition among the various divisions. But we all belong to the school and are proud of it.



Federalism in Nigeria

If the regions and various communities do not trust each other, even a federal arrangement can fail to produce unity. The example of Nigeria is instructive:

Till 1914, Northern and Southern Nigeria were two separate British colonies. At the Ibadan Constitutional Conference of 1950 Nigerian leaders decided to form a federal constitution. The three major ethnic groups of Nigeria—Yoruba, Ibo and Hausa-Fulani—controlled the regions of the West, the East and the North respectively. Their attempt to spread their influence to other regions led to fears and conflicts. These led to a military regime. In the 1960 constitution, both federal and regional governments jointly controlled the Nigerian police. In the military-supervised constitution of 1979, no state was allowed to have any civil police.

Though democracy was restored in Nigeria in 1999, religious differences along with conflicts over who will control revenues from the oil resources continue to present problems before the Nigerian federation. Local ethnic communities resist centralised control of the oil resources. Thus, Nigeria is an example of overlap of religious, ethnic and economic differences among the units.

Check your progress

- ❖ Who decides the powers of the central government in a federation?
- ❖ How are conflicts between the central government and the States resolved in a federation?

FEDERALISM IN THE INDIAN CONSTITUTION

Even before Independence, most leaders of our national movement were aware that to govern a large country like ours, it would be necessary to divide the powers between provinces and the central government. There was also awareness that Indian society had regional diversity and linguistic diversity. This diversity needed recognition. People of different regions and languages had to share power and in each region, people of that region should govern themselves. This was only logical if we wanted a democratic government.

The only question was what should be the extent of powers to be enjoyed by the regional governments. In view of the agitation of the Muslim League for greater representation to the Muslims, a compromise formula to give very large powers to the regions was discussed during the negotiations before Partition. Once the decision to partition India was taken, the Constituent Assembly decided to frame a government that would be based on the principles of unity and cooperation between the centre and the States and separate powers to the States. The most important feature of the federal system adopted by the Indian Constitution is the principle that relations between the States and the centre would be based on cooperation. Thus, while recognising diversity, the Constitution emphasised unity.

Do you know for example, that the Constitution of India does not even mention the word federation? This is how the Constitution describes India —



**Article 1: (1) India, that is Bharat, shall be a Union of States.
(2) The States and the territories thereof shall be as specified in the First Schedule.**





I feel that States would have very little money of their own. How can they manage their affairs? It is like some families where the money is with the husband and the wife has to manage the household.

Division of Powers

There are two sets of government created by the Indian Constitution: one for the entire nation called the union government (central government) and one for each unit or State called the State government. Both of these have a constitutional status and clearly identified area of activity. If there is any dispute about which powers come under the control of the union and which under the States, this can be resolved by the Judiciary on the basis of the constitutional provisions. The Constitution clearly demarcates subjects, which are under the exclusive domain of the Union and those under the States. (Study the chart given on the next page carefully. It shows how powers are distributed between the centre and the States.) One of the important aspects of this division of powers is that economic and financial powers are centralised in the hands of the central government by the Constitution. The States have immense responsibilities but very meagre revenue sources.

Check your progress

- ❖ Do you think that there is a need for mentioning Residuary powers separately? Why?
- ❖ Why do the States feel dissatisfied about the division of powers?

Constitution of India

Union List

Includes subjects like,

- ❖ Defence
- ❖ Atomic Energy
- ❖ Foreign Affairs
- ❖ War and Peace
- ❖ Banking
- ❖ Railways
- ❖ Post and Telegraph
- ❖ Airways
- ❖ Ports
- ❖ Foreign Trade
- ❖ Currency & Coinage

Union Legislature alone can make laws on these matters.

State List

Includes subjects like

- ❖ Agriculture
- ❖ Police
- ❖ Prison
- ❖ Local Government
- ❖ Public Health
- ❖ Land
- ❖ Liquor
- ❖ Trade and Commerce
- ❖ Livestock and Animal Husbandry
- ❖ State Public Services

Normally only the State Legislature can make laws on these matters

Concurrent List

Includes subjects like,

- ❖ Education
- ❖ Transfer of Property other than Agricultural land
- ❖ Forests
- ❖ Trade Unions
- ❖ Adulteration
- ❖ Adoption and Succession

Both Union and State Legislature alone can make laws on these matters.

Residuary Powers

Include all other matters not mentioned in any of the Lists.

- ❖ Cyber Laws

Union Legislature alone has the power to legislate on such matters

FEDERALISM WITH A STRONG CENTRAL GOVERNMENT

It is generally accepted that the Indian Constitution has created a strong central government. India is a country of continental dimensions with immense diversities and social problems. The framers of the Constitution believed that we required a federal constitution that would accommodate diversities. But they also wanted to create a strong centre to stem disintegration and bring about social and political change. It was necessary for the centre to have such powers because India at the time of independence was not only divided into provinces created by the British; but there were more than 500 princely states which had to be integrated into existing States or new States had to be created.

"Let me tell my honourable Friends in the House that the drift... in all constitutions has been towards the centre... because of circumstances that have now come into being that the States have become, ...federal or unitary, welfare states from being Police States and the ultimate responsibility as for the economic well-being of the country has become the paramount responsibility of the centre."

T.T. Krishnamachari, CAD, Vol. XI, p. 955-956, 25 November 1949



Besides the concern for unity, the makers of the Constitution also believed that the socio-economic problems of the country needed to be handled by a strong central government in cooperation with the States. Poverty, illiteracy and inequalities of wealth were some of the problems that required planning and coordination. Thus, the concerns for unity and development prompted the makers of the Constitution to create a strong central government.

Let us look at the important provisions that create a strong central government:



I now understand why our Constitution is not only about borrowing from others. It must have designed federalism according to our needs.

- ❖ The very existence of a State including its territorial integrity is in the hands of Parliament. The Parliament is empowered to 'form a new State by separation of territory from any State or by uniting two or more States...'. It can also alter the boundary of any State or even its name. The Constitution provides for some safeguards by way of securing the view of the concerned State legislature.
- ❖ The Constitution has certain very powerful emergency provisions, which can turn our federal polity into a highly centralised system once emergency is declared. During an emergency, power becomes lawfully centralised. Parliament also assumes the power to make laws on subjects within the jurisdiction of the States.
- ❖ Even during normal circumstances, the central government has very effective financial powers and responsibilities. In the first place, items generating revenue are under the control of the central government. Thus, the central government has many revenue sources and the States are mostly dependent on the grants and financial assistance from the centre. Secondly, India adopted planning as the instrument of rapid economic progress and development after independence. Planning led to considerable centralisation of economic decision making. Planning commission appointed by the union government is the coordinating machinery that controls and supervises the resources management of the States. Besides, the Union government uses its discretion to give grants and loans to States. This distribution of economic resources is considered lopsided and has led to charges of discrimination against States ruled by an opposition party.
- ❖ As you will study later, the Governor has certain powers to recommend dismissal of the State government and the dissolution of the Assembly. Besides, even in normal circumstances, the Governor

has the power to reserve a bill passed by the State legislature, for the assent of the President. This gives the central government an opportunity to delay the State legislation and also to examine such bills and veto them completely.

- ❖ There may be occasions when the situation may demand that the central government needs to legislate on matters from the State list. This is possible if the move is ratified by the Rajya Sabha. The Constitution clearly states that executive powers of the centre are superior to the executive powers of the States. Furthermore, the central government may choose to give instructions to the State government. The following extract from an article of the Constitution makes this clear.



Article 257 (1): The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.



Oh! The central government appears to me to be all-powerful. Don't the States complain about it?



- ❖ You have already studied in the chapter on executive that we have an integrated administrative system. The all-India services are common to the entire territory of India and officers chosen for these services serve in the administration of the States. Thus, an IAS officer who becomes the collector or an IPS officer who serves as the Commissioner of Police, are under the control of the central government. States can neither take disciplinary action nor can they remove these officers from service.

Chapter 7: Federalism

- ❖ Articles 33 and 34 authorise the Parliament to protect persons in the service of the union or a state in respect of any action taken by them during martial law to maintain or restore order. This provisions further strengthens the powers of the union government. The Armed Forces Special Powers Act has been made on the basis of these provisions. This Act has created tensions between the people and the armed forces on some occasions.

Check your progress

- ❖ Give two reasons for the claim that our Constitution has a unitary bias.
- ❖ Do you think that:
 - ✓ a strong centre makes the States weak?
 - ✓ strong States will weaken the centre?

CONFLICTS IN INDIA'S FEDERAL SYSTEM

In the previous section, we have seen that the Constitution has vested very strong powers in the centre. Thus, the Constitution recognises the separate identity of the regions and yet gives more powers to the centre. Once the principle of identity of the State is accepted, it is quite natural that the States would expect a greater role and powers in the governance of the State and the country as a whole. This leads to various demands from the States. From time to time, States have demanded that they should be given more powers and more autonomy. This leads to tensions and conflicts in the relations between the centre and the States. While the legal disputes between the centre and the States (or between States) can be resolved by the judiciary, demands for autonomy are of political nature and need to be resolved through negotiations.

Centre-State Relations

The Constitution is only a framework or a skeleton, its flesh and blood is provided by the actual processes of politics. Hence federalism

in India has to a large extent been influenced by the changing nature of the political process. In the 1950s and early 1960s the foundation of our federalism was laid under Jawaharlal Nehru. It was also a period of Congress dominance over the centre as well as the States. Except on the issue of formation of new States, the relations between the centre and the States remained quite normal during this period. The States were hopeful that they would be making progress with the help of the grants-in-aid from the centre. Besides, there was considerable optimism about the policies of socio-economic development designed by the centre.

In the middle of the 1960s Congress dominance declined somewhat and in a large number of States opposition parties came to power. It resulted in demands for greater powers and greater autonomy to the States. In fact, these demands were a direct fallout of the fact that different parties were ruling at the centre and in many States. So, the State governments were protesting against what they saw as unnecessary interference in their governments by the Congress government at the centre. The Congress too, was not very comfortable with the idea of dealing with governments led by opposition parties. This peculiar political context gave birth to a discussion about the concept of autonomy under a federal system.

Finally, since the 1990s, Congress dominance has largely ended and we have entered an era of coalition politics especially at the centre. In the States too, different parties, both national and regional, have come to power. This has resulted in a greater say for the States, a respect for diversity and the beginning of a more mature federalism. Thus, it is in the second phase that the issue of autonomy became very potent politically.



This is quite interesting. So, laws and constitutions alone do not decide everything. After all, actual politics decides the nature of our government!

Demands for Autonomy

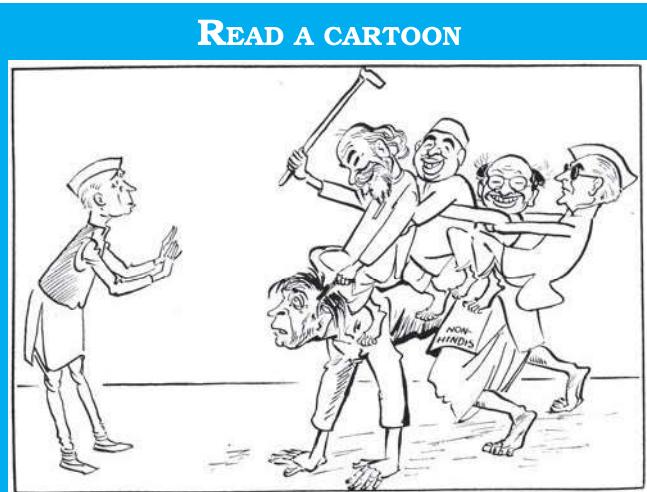
Many States and even many political parties have, from time to time, demanded that States should have more autonomy vis-à-vis the central government. However,

'autonomy' refers to different things for different States and parties.

- ❖ Sometimes, these demands expect that the division of powers should be changed in favour of the States and more powers and important powers be assigned to the States. Many States (Tamil Nadu, Punjab, West Bengal) and many parties (DMK, Akali Dal, CPI-M) have made demands of autonomy from time to time.
- ❖ Another demand is that States should have independent sources of revenue and greater control over the resources. This is also known as financial autonomy. In 1977, the Left Front Government in West Bengal brought out a document demanding a restructuring of centre-State relations in India. In the autonomy demands of Tamil Nadu and Punjab also, there was an implicit support to the idea of greater financial powers.
- ❖ The third aspect of the autonomy demands relates to administrative powers of the States. States resent the control of the centre over the administrative machinery.
- ❖ Fourthly, autonomy demands may also be related to cultural and linguistic issues. The opposition to the domination of Hindi (in Tamil Nadu) or demand for advancing the Punjabi language and culture are instances of this. Some States also feel that there is a domination of the Hindi-speaking areas over the others. In fact, during the decade of 1960s, there were agitations in some States against the imposition of the Hindi language.



Yes, I know that Hindi is India's official language. But many of my friends from different parts of the country don't know Hindi.



Shankar. Copyright: Children's Book Trust.

During discussion on the national language in the Constituent Assembly, Nehru had to appeal to the Hindi-speaking provinces to show greater tolerance towards others.

Don't spare me Shankar, p.24

READ A CARTOON

27 April 1952

"When Nehru was appointing governors, some were reluctant to quit ministerial chairs."

Don't spare me Shankar, p.89

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most controversial articles in the Constitution is Article 356, which provides for President's rule in any State. This provision is to be applied, when 'a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.' It results in the takeover of the State government by the Union government. The President's proclamation has to be ratified by Parliament. President's rule can be extended till three years. The Governor has the power to recommend the dismissal of the State government and suspension or dissolution of State assembly. This has led to many conflicts. In some cases, State governments were dismissed even when they had a majority in the legislature, as had happened in Kerala in 1959 or without testing their majority, as happened in several other States after 1967. Some cases went to the Supreme Court and the Court has ruled that constitutional validity of the decision to impose President's rule can be examined by the judiciary.

READ A CARTOON



Toppling the State governments.
Everyone loves to play this game!

Article 356 was very sparingly used till 1967. After 1967 many States had non-Congress governments and the Congress was in power at the centre. The centre has often used this provision to dismiss State governments or has used the office of the Governor to prevent the majority party or coalition from assuming office. For instance, the central government removed elected governments in Andhra Pradesh and Jammu and Kashmir in the decade of 1980s.

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Demands for New States

The other dimension of tension in our federal system has been the demand to create new

States. The national movement not only created a pan-Indian national unity; it also generated distinct unity around a common language, region and culture. Our national movement was also a movement for democracy. Therefore, in the course of the national movement itself, it was decided that as far as possible, States would be created on the basis of common cultural and linguistic identity.

This ultimately led to the demand for the creation of

READ A CARTOON



26 July 1953

Flood of demands for creating new States

linguistic States after Independence. In December 1953, the States Reorganisation Commission was set up and it recommended the creation of linguistic States, at least for the major linguistic groups. In 1956, reorganisation of some States took place. This saw the beginning of the creation of linguistic States and the process is still continuing. Gujarat and Maharashtra were created in 1960; Punjab and Haryana were separated from each other in 1966. Later, the North Eastern region was reorganised and new States like Manipur, Tripura, Meghalaya, Mizoram and Arunachal Pradesh were created.



Activity

Make a list of the States of India and find out the year in which each of the States was created.



So, federalism is all about conflicts! First, we talked about Centre-State conflicts and now conflict among States. Can't we live together peacefully?



In 2000, some of the larger States were further divided both to meet the demands for a separate State as well as to meet the need for greater administrative efficiency. Thus Madhya Pradesh, Uttar Pradesh and Bihar were divided to create three new States. They are: Chhattisgarh, Uttarakhand and Jharkhand respectively. Some regions and linguistic groups are still struggling for separate Statehood like Vidarbha in Maharashtra.

Interstate Conflicts

While the States keep fighting with the centre over autonomy and other issues like the share in revenue resources, there have been many instances of disputes between two States or among more than two States. It is true that the judiciary acts as the arbitration mechanism on disputes of a legal nature but these disputes are in reality not just legal. They have political implications and therefore they can best be resolved only through negotiations and mutual understanding.

Broadly, two types of disputes keep recurring. One is the border dispute. States have certain claims over territories belonging to neighbouring States. Though language is the basis of defining boundaries of the States, often border areas would have populations speaking more than one language. So, it is not easy to resolve this dispute merely on the basis of linguistic majority. One of the long-standing border disputes is the dispute between Maharashtra and Karnataka over the city of Belgaum. Manipur and Nagaland too, have a long-standing border dispute. The carving out of Haryana from the erstwhile State of Punjab has led to dispute between the two States not only over border areas, but over the capital city of Chandigarh. This city today houses the capital of both these States. In 1985, the then Prime Minister Rajiv Gandhi reached an understanding with the leadership of Punjab. According to this understanding, Chandigarh was to be handed over to Punjab. But this has not happened yet.

While border disputes are more about sentiment, the disputes over the sharing of river waters are even more serious, because they are related to problems of drinking water and agriculture in the concerned States. You might have heard about the Cauvery water dispute. This is a major issue between Tamil Nadu and Karnataka. Farmers in both the States are dependent on Cauvery waters. Though there is a river water tribunal to settle water disputes, this dispute has reached the Supreme Court. In another similar dispute Gujarat, Madhya Pradesh and Maharashtra are battling over sharing the waters of Narmada river. Rivers are a major resource and therefore, disputes over river waters test the patience and cooperative spirit of the States.



Activity

Collect information about at least one dispute about river waters involving two or more States.

Yes, conflict over Governors, over language, over borders and over water....and yet we manage to live together!



Check your progress

- ❖ Why do States want more autonomy?
- ❖ What is the difference between autonomy and secession?

SPECIAL PROVISIONS

The most extra-ordinary feature of the federal arrangement created in India is that many States get a differential treatment. We have already noted in the chapter on Legislature that the size and population of each State being different, an asymmetrical representation is provided in the Rajya Sabha. While ensuring minimum representation to each of the smaller States, this arrangement also ensures that larger States would get more representation.

In the case of division of powers, too, the Constitution provides a division of powers that is common to all the States. And yet, the Constitution has some special provisions for some States given their peculiar social and historical circumstances. Most of the special provisions pertain to the north eastern States (Assam, Nagaland, Arunachal Pradesh, Mizoram, etc.) largely due to a sizeable indigenous tribal population with a distinct history and culture, which they wish to retain (Art 371). However, these provisions have not been able to stem alienation and the insurgency in parts of the region. Special provisions also exist for hilly States like Himachal Pradesh and some other States like Andhra Pradesh, Goa, Gujarat, Maharashtra, Sikkim and Telangana.

Jammu and Kashmir

The other State which has a special status is Jammu and Kashmir (J&K) (Art. 370). Jammu and Kashmir was one of the large princely states, which had the option of joining India or Pakistan at the time of Independence. Immediately

I now understand what they meant by 'intelligent and balanced design' in the first chapter.

after Independence Pakistan and India fought a war over Kashmir. Under such circumstances the Maharaja of Kashmir acceded to the Indian union.

Most of the Muslim majority States joined Pakistan but J&K was an exception. Under these circumstances, it was given much greater autonomy by the Constitution. According to Article 370, the concurrence of the State is required for making any laws in matters mentioned in the Union and Concurrent lists. This is different from the position of other States. In the case of other States, the division of powers as listed through the three lists automatically applies. In the case of Jammu and Kashmir, the central government has only limited powers and other powers listed in the Union List and Concurrent List can be used only with the consent of the State government. This gives the State of Jammu and Kashmir greater autonomy.

In practice, however the autonomy of Jammu and Kashmir is much less than what the language of article 370 may suggest. There is a constitutional provision that allows the President, with the concurrence of the State government, to specify which parts of the Union List shall apply to the State. The President has issued two Constitutional orders in concurrence with the Government of J&K making large parts of the Constitution applicable to the State. As a result, though J&K has a separate constitution and a flag, the Parliament's power to make laws on subjects in the Union List now is fully accepted.

The remaining differences between the other States and the State of J&K are that no emergency due to internal disturbances can be declared in J&K without the concurrence of the State. The union government cannot impose a financial emergency in the State and the Directive Principles do not apply in J&K. Finally, amendments to the Indian Constitution (under Art. 368) can only apply in concurrence with the government of J&K.

Many people believe that a formal and strictly equal division of powers applicable to all units (States) of a federation is adequate. Therefore, whenever such special provisions are created, there is some opposition to them. There is also a fear that such special provisions may lead to separatism in those areas. Therefore, there are controversies about such special provisions.

Conclusion

Federalism is like a rainbow, where each colour is separate, yet together they make a harmonious pattern. Federalism has to continuously maintain a difficult balance between the centre and the States. No legal or institutional formula can guarantee the smooth functioning of a federal polity. Ultimately, the people and the political process must develop a culture and a set of values and virtues like mutual trust, toleration and a spirit of cooperation. Federalism celebrates both unity as well as diversity. National unity cannot be built by streamlining differences. Such forced unity only generates greater social strife and alienation and tends finally to destroy unity. A responsive polity sensitive to diversities and to the demands for autonomy can alone be the basis of a cooperative federation.

Exercises

1. From the list of following events which ones would you identify with the functioning of federalism? Why?
 - ✓ The Centre on Tuesday announced Sixth Schedule status to GNLF-led Darjeeling Gorkha Hill Council, which would ensure greater autonomy to the governing body in the Hill district of West Bengal. A tripartite Memorandum of Settlement was signed in New Delhi between the Centre, West Bengal government and the Subhas Ghising-led Gorkha National Liberation Front (GNLF) after two days of hectic deliberations.
 - ✓ Government for action plan for rain-hit States: Centre has asked the rain-ravaged States to submit detailed plans for reconstruction to enable it to respond to their demands for extra relief expeditiously.
 - ✓ New Commissioner for Delhi: The Capital is getting a new municipal commissioner. Confirming this, present MCD Commissioner Rakesh Mehta said he has received his transfer orders and that he is likely to be replaced by IAS officer Ashok Kumar, who is serving as the Chief Secretary in Arunachal Pradesh. Mehta, a 1975 batch IAS officer, has been heading the MCD for about three-and-a-half years.

- ✓ CU Status for Manipur University: Rajya Sabha on Wednesday passed a Bill to convert the Manipur University into a Central University with the Human Resource Development Minister promising such institutions in the North Eastern States of Arunachal Pradesh, Tripura and Sikkim as well.
 - ✓ Funds released: The Centre has released Rs. 553 lakh to Arunachal Pradesh under its rural water supply scheme. The first instalment was of Rs. 466.81 lakh.
 - ✓ We'll teach the Biharis how to live in Mumbai: Around 100 Shiv Sainiks stormed J. J. Hospital, disrupted daily operations, raised slogans and threatened to take matters into their own hands if no action was taken against non-Maharashtrian students.
 - ✓ Demand for dismissal of Government: The Congress Legislature Party (CLP) in a representation submitted to State Governor recently, has demanded dismissal of the ruling Democratic Alliance of Nagaland (DAN) government for its alleged financial mismanagement and embezzlement of public money.
 - ✓ NDA government asks naxalites to surrender arms: Amid a walkout by opposition RJD and its allies Congress and CPI (M), the Bihar government today appealed to the naxalites to shun the path of violence and reaffirmed its pledge to root out unemployment to usher in a new era of development in Bihar.
2. Think which of the following statements would be correct. State why.
- ✓ Federalism enhances the possibility of people from different regions to interact without the fear of one's culture being imposed upon them by others.
 - ✓ Federal system will hinder easier economic transaction between two different regions that have distinct types of resources.
 - ✓ A federal system will ensure that the powers of those at the centre will remain limited.
3. Based on the first few articles of Belgian constitution – given below – explain how federalism is visualised in that country. Try and write a similar Article for the Constitution of India.

Title I: On Federal Belgium, its components and its territory.

Article 1 : Belgium is a Federal State made up of communities and regions.

Article 2 : Belgium is made up of three communities: The French Community, the Flemish Community and the German Community.

Article 3 : Belgium is made up of three regions: The Walloon region, the Flemish region and the Brussels region.

Article 4 : Belgium has four linguistic regions: The French-speaking region, the Dutch-speaking region, the bilingual region of Brussels Capital and the German-speaking region. Each «commune» (county borough) of the Kingdom is part of one of these linguistic regions.

Article 5 : The Walloon region is made up of the following provinces: The Walloon Brabant, Hainault, Liege, Luxemburg and Namur. The Flemish region is made up of the following provinces: Antwerp, the Flemish Brabant, West Flanders, East Flanders and Limburg.

4. Imagine that you were to rewrite the provisions regarding federalism. Write an essay of not more than 300 words making your suggestions about:
 - a. division of powers among the centre and the States,
 - b. distribution of financial resources,
 - c. methods of resolving inter-State disputes and
 - d. appointment of Governors
5. Which of the following should be the basis for formation of a State? Why?
 - a. Common Language
 - b. Common economic interests
 - c. Common religion
 - d. Administrative convenience
6. Majority of people from the States of north India – Rajasthan, Madhya Pradesh, Uttar Pradesh, Bihar—speak Hindi. If all these States are combined to form one State, would it be in tune with the idea of federalism? Give arguments.
7. List four features of the Indian Constitution that give greater power to the central government than the State government.
8. Why are many States unhappy about the role of the Governor?

Chapter 7: Federalism

9. President's rule can be imposed in a State if the government is not being run according to the provisions of the Constitution. State whether any of the following conditions are a fit case for imposition of President's rule in the State. Give reasons.

- ✓ two members of the State legislative assembly belonging to the main opposition party have been killed by criminals and the opposition is demanding dismissal of the State government.
- ✓ Kidnapping of young children for ransom is on rise. The number of crimes against women are increasing.
- ✓ No political party has secured majority in the recent elections of the State Legislative Assembly. It is feared that some MLAs from the other parties may be lured to support a political party in return for money.
- ✓ Different political parties are ruling in the State and at the centre and they are bitter opponents of each other.
- ✓ More than 2000 people have been killed in the communal riots.
- ✓ In the water dispute between the two States, one State government refused to follow the decision of the Supreme Court.

10. What are the demands raised by States in their quest for greater autonomy?

11. Should some States be governed by special provisions?
Does this create resentment among other States? Does this help in forging greater unity among the regions of the country?



Chapter Eight

LOCAL GOVERNMENTS

INTRODUCTION

In a democracy, it is not sufficient to have an elected government at the centre and at the State level. It is also necessary that even at the local level, there should be an elected government to look after local affairs. In this chapter, you will study the structure of local government in our country. You will also study the importance of the local governments and ways to give them independent powers. After studying this chapter, you will know:

- ❖ *the importance of local government bodies;*
- ❖ *the provisions made by the 73rd and 74th amendments; and*
- ❖ *functions and responsibilities of the local government bodies.*

WHY LOCAL GOVERNMENTS?

Geeta Rathore belongs to Jamonia Talab Gram Panchayat, Sehore district, Madhya Pradesh. She was elected Sarpanch in 1995 from a reserved seat; but in 2000, the village people rewarded her for her admirable work by electing her again - this time from a non-reserved seat. From a housewife, Geeta has grown into a leader displaying political farsightedness - she has harnessed the collective energy of her Panchayat to renovate water tanks, build a school building, construct village roads, fight against domestic violence and atrocities against women, create environmental awareness, and encourage afforestation and water management in her village. —Panchayati Raj Update, Vol. XI, No. 3, February 2004.

There is another story of yet another woman achiever. She was the President (Sarpanch) of a Gram Panchayat of Vengaiwasal village in Tamil Nadu. In 1997, the Tamil Nadu government allotted two hectares of land to 71 government employees. This piece of land fell within the vicinity of this Gram Panchayat. On the instructions of higher authorities the District Collector of Kancheepuram directed the President of the Gram Panchayat to pass a resolution endorsing the allotment of the said land for the purpose already decided. The President and the Gram Panchayat refused to pass such an order and the Collector issued an order to acquire the land. The Gram Panchayat filed a writ petition in the Madras High Court against the Collector's action. The single judge bench of the High Court upheld the Collector's order and ruled that there was no need to take the Panchayat's consent. The Panchayat appealed to the Division bench against the single judge's order. In its order, the Division Bench reversed the order of the single judge. The judges held that the government order amounted to not only infringement of the powers of the Panchayats but a gross violation of the constitutional status of the Panchayats. — Panchayati Raj Update, Vol. XII, June 2005.

Both these stories are not isolated incidents. They are representative of a larger transformation that is taking place across India especially after constitutional status was accorded to local government institutions in 1993.



But aren't there cases of male members of the village panchayat harassing the woman Sarpanch in some places? Why are men not happy when women assume positions of responsibility?

Local government is government at the village and district level. Local government is about government closest to the common people. Local government is about government that involves the day-to-day life and problems of ordinary citizens. Local government believes that local knowledge and local interest are essential ingredients for democratic decision making. They are also necessary for efficient and people-friendly administration. The advantage of local government is that it is so near the people. It is convenient for the people to approach the local government for solving their problems both quickly and with minimum cost. In the story of Geeta Rathore, we noticed that she was able to bring about a significant change in Jamonia Talab because of her pro-active role as Sarpanch of the Gram Panchayat. Vengaivasal village is able to still retain its land and the right to decide what to do with it because of the relentless efforts of its Gram Panchayat President and members. So, local governments can be very effective in protecting the local interests of the people.

Democracy is about meaningful participation. It is also about accountability. Strong and vibrant local governments ensure both active participation and purposeful accountability. Geeta Rathore's story is one of committed participation. Vengaivasal village Gram Panchayat's relentless efforts to secure its rights over its own land were an example of a mission to ensure accountability. It is at the level of local government that common citizens can be involved in decision making concerning their lives, their needs and above all their development.

It is necessary that in a democracy, tasks, which can be performed locally, should be left in the hands of the local people and their representatives. Common people are more familiar with their local government than with the government at the State or national level. They are also more concerned with what local government does or has failed to do as it has a direct bearing and impact on



Is it possible that we only had governments at the local level and a coordinating body at the national level? I think Mahatma Gandhi advocated some ideas along these lines.

their day-to-day life. Thus, strengthening local government is like strengthening democratic processes.

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Check your progress

- ❖ How does local government strengthen democracy?
- ❖ In the example given above, what do you think the Government of Tamil Nadu should have done?

GROWTH OF LOCAL GOVERNMENT IN INDIA

Let us now discuss how local government has grown in India and what our Constitution says about it. It is believed that self-governing village communities existed in India from the earliest times in the form of 'sabhas' (village assemblies). In the course of time, these village bodies took the shape of Panchayats (an assembly of five persons) and these Panchayats resolved issues at the village level. Their role and functions kept on changing at different points of time.

In modern times, elected local government bodies were created after 1882. Lord Rippon, who was the Viceroy of India at that time, took the initiative in creating these bodies. They were called the local boards. However, due to slow progress in this regard, the Indian National Congress urged the government to take necessary steps to make all local bodies more effective. Following the Government of India Act 1919, village panchayats were established in a number of provinces. This trend continued after the Government of India Act of 1935.

During India's freedom movement, Mahatma Gandhi had strongly pleaded for decentralisation of economic and political power. He believed that strengthening village panchayats was a means of effective decentralisation. All development initiatives must have local involvement in



I don't know about the past, but I suspect that a non-elected village panchayat would naturally be dominated by the village elders, the rich and men from upper strata.

order to be successful. Panchayats therefore were looked upon as instruments of decentralisation and participatory democracy. Our national movement was concerned about the enormous concentration of powers in the hands of the Governor General sitting at Delhi. Therefore, for our leaders, independence meant an assurance that there will be decentralisation of decision making, executive and administrative powers.

The independence of India should mean the independence of the whole of India...Independence must begin at the bottom. Thus every village will be a republic... It follows therefore that every village has to be self-sustained and capable of managing its affairs. In this structure composed of innumerable villages, there will be ever-widening, ever-ascending circles. Life will be a pyramid with the apex sustained by the bottom - Mahatma Gandhi

When the Constitution was prepared, the subject of local government was assigned to the States. It was also mentioned in the Directive Principles as one of the policy directives to all governments in the country. As you have read in Chapter 2, being a part of the Directive Principles of State Policy, this provision of the Constitution was non-justiciable and primarily advisory in its nature.

It is felt that the subject of local government including panchayats did not receive adequate importance in the Constitution. Do you know why this happened? A few reasons can be advanced here. Firstly, the turmoil due to the Partition resulted in a strong unitary inclination in the Constitution. Nehru himself looked upon extreme localism as a threat to unity and integration of the nation. Secondly, there was a powerful voice in the Constituent Assembly led by Dr. B.R. Ambedkar which felt that the faction and caste-ridden nature of rural society would defeat the noble purpose of local government at the rural level.

However, nobody denied the importance of people's participation in development planning. Many members of the Constituent Assembly wanted Village Panchayats to be the basis of democracy

in India but they were concerned about factionalism and many other ills present in the villages.

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"... in the interests of democracy, the villages maybe trained in the art of self-government, even autonomy... We must be able to reform the villages and introduce democratic principles of government there..."

Ananthasayanam Ayyangar, CAD, Vol. VII, p. 428, 17 November 1948



Local Governments in Independent India

Local governments got a fillip after the 73rd and 74th Constitution Amendment Acts. But even before that, some efforts in the direction of developing local government bodies had already taken place. First in the line was the Community Development Programme in 1952, which sought to promote people's participation in local development in a range of activities. In this background, a three-tier Panchayati Raj system of local government was recommended for the rural areas. Some States (like Gujarat, Maharashtra) adopted the system of elected local bodies around 1960. But in many States those local bodies did not have enough powers and functions to look after the local development. They were very much dependent on the State and central governments for financial assistance. Many States did not think it necessary to establish elected local bodies. In many instances, local bodies were dissolved and the local government was handed over to government officers. Many States had indirect elections to most local bodies. In many States, elections to the local bodies were postponed from time to time.



Why are people afraid of factionalism at the village level when all the political parties and organisations or even my class has factions? Are groups and factions always so bad?

After 1987, a thorough review of the functioning of local government institutions was initiated. In 1989 the P.K.Thungon Committee recommended constitutional recognition for the local government bodies. A constitutional amendment to provide for periodic elections to local government institutions, and enlistment of appropriate functions to them, along with funds, was recommended.

Check your progress

- ❖ Both Nehru and Dr. Ambedkar were not very enthusiastic about local government bodies. Did they have similar objections to local governments?
- ❖ What was the constitutional provision about local governments before 1992?
- ❖ Which were the States that had established local government during the 1960s and 1970s ?

73RD AND 74TH AMENDMENTS

In 1989, the central government introduced two constitutional amendments. These amendments aimed at strengthening local governments and ensuring an element of uniformity in their structure and functioning across the country.

The Constitution of Brazil has created States, Federal Districts and Municipal Councils. Each of these is assigned independent powers and jurisdiction. Just as the Republic cannot interfere in the affairs of the States (except on grounds provided by the constitution), states are prohibited from interfering in the affairs of the municipal councils. This provision protects the powers of the local government.

Later in 1992, the 73rd and 74th constitutional amendments were passed by the Parliament. The 73rd Amendment is about rural local governments (which are also known as Panchayati Raj Institutions

or PRIs) and the 74th amendment made the provisions relating to urban local government (Nagarpalikas). The 73rd and 74th Amendments came into force in 1993.

We have noticed earlier that local government is a 'State subject'. States are free to make their own laws on this subject. But once the Constitution was amended, the States had to change their laws about local bodies in order to bring these in conformity with the amended Constitution. They were given one year's time for making necessary changes in their respective State laws in the light of these amendments.

73rd Amendment

Let us now examine the changes brought about by the 73rd amendment in Panchayati Raj institutions.

Three Tier Structure

All States now have a uniform three tier Panchayati Raj structure. At the base is the 'Gram Panchayat'. A Gram Panchayat covers a village or group of villages. The intermediary level is the Mandal (also referred to as Block or Taluka). These bodies are called Mandal or Taluka Panchayats. The intermediary level body need not be constituted in smaller States. At the apex is the Zilla Panchayat covering the entire rural area of the District.



Does a Gram sabha mean the democratic forum of the entire village? Do Gram sabhas actually meet regularly?

The amendment also made a provision for the mandatory creation of the Gram Sabha. The Gram Sabha would comprise all the adult members registered as voters in the Panchayat area. Its role and functions are decided by State legislation.

Elections

All the three levels of Panchayati Raj institutions are elected directly by the people. The term of each Panchayat body is five years. If the State government dissolves the Panchayat before the end of its five year term,



If I understand this correctly, the centre forced local government reforms on the States. This is funny: you adopt decentralisation through a centralised process!

fresh elections must be held within six months of such dissolution. This is an important provision that ensures the existence of elected local bodies. Before the 73rd amendment, in many States, there used to be indirect elections to the district bodies and there was no provision for immediate elections after dissolution.

Reservations

One third of the positions in all panchayat institutions are reserved for women. Reservations for Scheduled Castes and Scheduled Tribes are also provided for at all the three levels, in proportion to their population. If the States find it necessary, they can also provide for reservations for the other backward classes (OBCs).

It is important to note that these reservations apply not merely to ordinary members in Panchayats but also to the positions of Chairpersons or 'Adhyakshas' at all the three levels. Further, reservation of one-third of the seats for women is not merely in the general category of seats but also within the seats reserved for Scheduled Castes, Scheduled Tribes and backward castes. This means that a seat may be reserved simultaneously for a woman candidate and one belonging to the Scheduled Castes or Scheduled Tribes. Thus, a Sarpanch would have to be a Dalit woman or an Adivasi woman.

Transfer of Subjects

Twenty-nine subjects, which were earlier in the State list of subjects, are identified and listed in the Eleventh Schedule of the Constitution. These subjects are to be transferred to the Panchayati Raj institutions. These subjects were mostly linked to development and welfare functions at the local level. The actual transfer of these functions depends upon the State legislation. Each State decides how many of these twenty-nine subjects would be transferred to the local bodies.



Article 243G. Powers, authority and responsibilities of Panchayats.—....., the Legislature of a State may, by law, endow the Panchayats with such powers and authority..... ...with respect to—.....the matters listed in the Eleventh Schedule.

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Some subjects listed in the eleventh schedule

1. Agriculture, ...
3. Minor irrigation, water management and watershed development.
....
8. Small scale industries, including food processing industries.
....
10. Rural housing.
11. Drinking water.
....
13. Roads, culverts,....
14. Rural electrification,....
....
16. Poverty alleviation programme.
17. Education, including primary and secondary schools.
18. Technical training and vocational education.
19. Adult and non-formal education.
20. Libraries.
21. Cultural activities.
22. Markets and fairs.
23. Health and sanitation, including hospitals, primary health centres and dispensaries.
24. Family welfare.
25. Women and child development.
26. Social welfare, ...
27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes.
28. Public distribution system.



Why are subjects only from State list to be transferred? Why can't we transfer some subjects from the Union List also?

The provisions of the 73rd amendment were not made applicable to the areas inhabited by the Adivasi populations in many States of India. In 1996, a separate act was passed extending the provisions of the Panchayat system to these areas. Many Adivasi communities have their traditional customs of managing common resources such as forests and small water reservoirs, etc. Therefore, the new act protects the rights of these communities to manage their resources in ways acceptable to them. For this purpose, more powers are given to the Gram Sabhas of these areas and elected village panchayats have to get the consent of the Gram Sabha in many respects. The idea behind this act is that local traditions of self government should be protected while introducing modern elected bodies. This is only consistent with the spirit of diversity and decentralisation.

State Election Commissioners

The State government is required to appoint a State Election Commissioner who would be responsible for conducting elections to the Panchayati Raj institutions. Earlier, this task was performed by the State administration which was under the control of the State government. Now, the office of the State Election Commissioner is autonomous like the Election Commissioner of India. However, the State Election Commissioner is an independent officer and is not linked to nor is this officer under the control of the Election Commission of India.



State governments themselves are poor. In the last chapter we read that they ask for money from the Central government. How can they give money to the local government?



State Finance Commission

The State government is also required to appoint a State Finance Commission once in five years. This Commission would examine the financial position of the local governments in the State. It would also review the distribution of revenues between the State and local governments on the one hand and between rural and urban local governments on the other. This innovation ensures that allocation of funds to the rural local governments will not be a political matter.

Activity



- ❖ Identify some of the powers that your State government has delegated to panchayats.

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74th Amendment

As we mentioned earlier, the 74th amendment dealt with urban local bodies or Nagarpalikas.

What is an urban area? It is very easy to identify a big city like Mumbai or Kolkata, but it is not so easy to say this about some very small urban areas that are somewhere between a village and a town. The Census of India defines an urban area as having: (i) a minimum population of 5,000; (ii) at least 75 per cent of male working population engaged in non-agricultural occupations and (iii) a density of population of at least 400 persons per sq. km. As per the 2011 Census, about 31% of India's population lives in urban areas.

In many ways the 74th amendment is a repetition of the 73rd amendment, except that it applies to urban areas. All the provisions of the 73rd amendment relating to direct elections, reservations, transfer of subjects, State Election Commission and State Finance Commission are incorporated in the 74th amendment also and thus apply to Nagarpalikas. The Constitution also mandated the transfer of a list of functions from the State government to the urban local bodies. These functions have been listed in the Twelfth Schedule of the Constitution.

IMPLEMENTATION OF 73RD AND 74TH AMENDMENTS

All States have now passed a legislation to implement the provisions of the 73rd and 74th amendments. During the ten years since these amendments came into force (1994-2004) most States have had at least two rounds of elections to the local bodies. States like Madhya Pradesh, Rajasthan and a few others have in fact held three elections so far.



Can I hope that these urban local bodies will do something for better housing for the slum dwellers? Or at least provide them toilets?

READ AN IMAGE



This flag is a symbol of the expectations of the people about local governments. People don't want only formal laws. They want genuine implementation of those laws. Write briefly what you think about this slogan — We are the government here in the village!

Today there are more than 600 Zilla Panchayats, about 6,000 block or intermediary Panchayats, and 2,40,000 Gram Panchayats in rural India and over 100 city Corporations, 1400 town Municipalities and over 2000 Nagar Panchayats in urban India. More than 32 lakh members are elected to these bodies every five years. Of these, at least 13 lakhs are women. In the State Assemblies and Parliament put together we have less than 5000 elected representatives. With local bodies, the number of elected representatives has increased significantly.

The 73rd and 74th amendments have created uniformity in the structures of Panchayati Raj and Nagarpalika institutions across the country. The presence of these local institutions is by itself a

significant achievement and would create an atmosphere and platform for people's participation in government.

The provision for reservation for women at the Panchayats and Nagarpalikas has ensured the presence of a significant number of women in local bodies. As this reservation is also applicable for the positions of Sarpanch and Adhyaksha, a large number of women elected representatives have come to occupy these positions. There are at least 200 women Adhyakshas in Zilla Panchayats, another 2000 women who are Presidents of the block or taluka panchayats and more than 80,000 women Sarpanchas in Gram Panchayats.

N.Y., JANUARY 25, 2006

Panchayati raj only in name in Lakshadweep: Minister

An action plan to revive the movement on the anvil

A Correspondent

—

NEDUMBASSER: Union Minister for Petroleum and Natural Gas and Panchayati Raj Mani Shankar Aiyar on Tuesday expressed shock at the state of the panchayati raj system in Lakshadweep.

Mr. Aiyar said that it was a tragedy that the governance was virtually concentrated in the hands of bureaucrats rendering the panchayats mere appendages to a wholly Government-run administrative system of planning and representation.

—

Mr. Aiyar said that it was a

officials and a spectrum of elected

village and district panchayat

bifurcated in Delhi.

He said he would visit Lakshadweep in October to see the

progress towards making it a

model of panchayati raj among

we

—

The east under the Panchayat

We also have more than 30 women Mayors in Corporations, over 500 women Adhyakshas of Town Municipalities and nearly 650 Nagar Panchayats headed by women. Women have gained more power and confidence by asserting control over resources. Their presence in these institutions has given many women a greater understanding of the working of politics. In many cases, they have brought a new perspective and a greater sensitivity to discussions at local bodies. In many cases, women were unable to assert their presence or were mere proxies for the male members of their family who sponsored their election. Such instances, however are becoming fewer.

READ AN IMAGE



Look at this photograph. The local Sarkar is sitting out in the sun. Is there any other feature that strikes you?

While reservations for Scheduled Castes and Tribes are mandated by the constitutional amendment, most States have also made a provision to reserve seats for Backward Castes. As the Indian population has 16.2 per cent Scheduled Castes and 8.2 per cent Scheduled Tribes, about 6.6 lakh elected members in the urban and local bodies hail from these two communities. This has



So, the law is good but it is mostly on paper. Is this what they call the gap between theory and practice?

significantly altered the social profile of local bodies. These bodies have thus become more representative of the social reality they operate within. Sometimes this leads to tensions. The dominant social groups which controlled the village earlier do not wish to give up their power. This leads to intensification of struggle for power. But tension and struggle is not always bad. Whenever there is an attempt to make democracy more meaningful and give power to those who did not enjoy it earlier, there is bound to be some conflict and tension in society.

The Constitutional amendments assigned as many as 29 subjects to the local governments. All these subjects are related to functions linked to local welfare and development needs. The experience with the functioning of local government in the past decade has shown that local governments in India enjoy limited autonomy to perform the functions assigned to them. Many States have not transferred most of the subjects to the local bodies. This means that the local bodies cannot really function in an effective manner. Therefore, the entire exercise of electing so many representatives becomes somewhat symbolic. Some people criticise the formation of the local bodies because this has not changed the way in which decisions are taken at the central and the State level. People at the local level do not enjoy much powers of choosing welfare programmes or allocation of resources.

Bolivia is frequently cited as one of the most successful cases of democratic decentralisation in Latin America. In 1994, the Popular Participation Law decentralised power to the local level, allowing for the popular election of mayors, dividing the country into municipalities, and crafting a system of automatic fiscal transfers to the new municipalities. Bolivia is divided into 314 municipal governments. These governments in Bolivia are headed by popularly-elected mayors (*presidente municipal*) and a municipal council (*cabildo*). Local elections occur nationwide every five years.

Bolivian local governments have been entrusted with building local health and education facilities, as well as maintenance of this infrastructure. In Bolivia, 20% of nationwide tax collections are distributed among municipalities on a per capita basis. While these municipalities may levy taxes on motor vehicles, urban property, and large agricultural properties, fiscal transfers provide the bulk of the operating budget for these units.

Local bodies have very little funds of their own. The dependence of local bodies on the State and central governments for financial support has greatly eroded their capacity to operate effectively. While rural local bodies raise 0.24% of the total revenues collected, they account for 4% of the total expenditure made by the government. So they earn much less than they spend. That makes them dependent on those who give them grants.

Conclusion

This experience suggests that local governments continue to be agencies implementing the welfare and development schemes of the central and State government. Giving more power to local government means that we should be prepared for real decentralisation of power. Ultimately, democracy means that power should be shared by the people; people in the villages and urban localities must have the power to decide what policies and programmes they want to adopt. As you have studied earlier, democracy means decentralisation of power and giving more and more power to the people. The laws about local governments are an important step in the direction of democratisation. But the true test of democracy is not merely in the legal provisions but in the practice of those provisions.

Exercises

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1. Constitution of India visualised village panchayats as units of self-government. Think over the situation described in the following statements and explain how do these situations strengthen or weaken the panchayats in becoming units of self-government.
 - a. Government of a State has allowed a big company to establish a huge steel plant. Many villages would be adversely affected by the steel plant. Gram Sabha of one of the affected villages passed a resolution that before establishing any big industries in the region, village people must be consulted and their grievances should be redressed.
 - b. The government has decided that 20 % of all its expenditure would be done through the panchayats.
 - c. A village panchayat kept on demanding funds for a building for village school, the government officials turned down their proposal saying that funds are allocated for certain other schemes and cannot be spent otherwise.
 - d. The government divided a village Dungarpur into two and made a part of village Jamuna and Sohana. Now village Dungarpur has ceased to exist in government's books.
 - e. A village panchayat observed that water sources of their region are depleting fast. They decided to mobilise village youth to do some voluntary work and revive the old village ponds and wells.
2. Suppose you are entrusted to evolve a local government plan of a State, what powers would you endow to the village panchayats to function as units of self-government? Mention any five powers and the justification in two lines for each of them for giving those powers.
3. What are the provisions for the reservations for the socially disadvantaged groups as per the 73rd amendment? Explain how these provisions have changed the profile of the leadership at the village level.
4. What were the main differences between the local governments before 73rd amendment and after that amendment?
5. Read the following conversation. Write in two hundred words your opinion about the issues raised in this conversation.

Alok: Our Constitution guarantees equality between men and women. Reservations in local bodies for women ensure their equal share in power.

Neha: But it is not enough that women should be in positions of power. It is necessary that the budget of local bodies should have separate provision for women.

Jayesh: I don't like this reservations business. A local body must take care of all people in the village and that would automatically take care of women and their interests.

6. Read the provisions of the 73rd Amendment. Which of the following concerns does this amendment address?
 - a. Fear of replacement makes representatives accountable to the people.
 - b. The dominant castes and feudal landlords dominate the local bodies.
 - c. Rural illiteracy is very high. Illiterate people cannot take decisions about the development of the village.
 - d. To be effective the village panchayats need resources and powers to make plans for the village development.
7. The following are different justifications given in favour of local government. Give them ranking and explain why you attach greater significance to a particular rationale than the others. According to you, on which of these rationales the decision of the Gram panchayat of Vengaivasal village was based? How?
 - a. Government can complete the projects with lesser cost with the involvement of the local community.
 - b. The development plans made by the local people will have greater acceptability than those made by the government officers.
 - c. People know their area, needs problems and priorities. By collective participation they should discuss and take decisions about their life.
 - d. It is difficult for the common people to contact their representatives of the State or the national legislature.
8. Which of the following according to you involve decentralisation? Why are other options not sufficient for decentralisation?
 - a. To hold election of the Gram Panchayat.
 - b. Decision by the villagers themselves about what policies and programmes are useful for the village.

Chapter 8: Local Governments

- c. Power to call meeting of Gram Sabha.
 - d. A Gram Panchayat receiving the report from the Block Development Officer about the progress of a project started by the State government.
9. A student of Delhi University, Raghavendra Parpanna, wanted to study the role of decentralisation in decision making about primary education. He asked some questions to the villagers. These questions are given below. If you were among those villagers, what answer would you give to each of these questions?
- A meeting of the Gram Sabha is to be called to discuss what steps should be taken to ensure that every child of the village goes to the school.
- a. How would you decide the suitable day for the meeting? Think who would be able to attend / not attend the meeting because of your choice.
 - (i) A day specified by the BDO or the collector
 - (ii) Day of the village haat
 - (iii) Sunday
 - (iv) Naag panchami / sankranti
 - b. What is a suitable venue for the meeting? Why?
 - (i) Venue suggested by the circular of the district collector.
 - (ii) Religious place in the village.
 - (iii) Dalit Mohalla.
 - (iv) Upper caste Tola
 - (v) Village school
 - c. In the Gram Sabha meeting firstly a circular sent by the district collector was read. It suggested what steps should be taken to organise an education rally and what should be its route. The meeting did not discuss about the children who never come to school or about girls' education, or the condition of the school building and the timing of the school. No women teacher attended the meeting as it was held on Sunday.

What do you think about these proceedings as an instance of people's participation?
 - d. Imagine your class as the Gram Sabha. Discuss the agenda of the meeting and suggest some steps to realise the goal.



Chapter Nine

CONSTITUTION AS A LIVING DOCUMENT

INTRODUCTION

In this chapter, you will see how the Constitution has worked in the last sixty-eight years and how India has managed to be governed by the same Constitution. After studying this chapter you will find out that:

- ❖ *the Indian Constitution can be amended according to the needs of the time;*
- ❖ *though many such amendments have already taken place, the Constitution has remained intact and its basic premises have not changed;*
- ❖ *the judiciary has played an important role in protecting the Constitution and also in interpreting the Constitution; and*
- ❖ *the Constitution is a document that keeps evolving and responding to changing situations.*

ARE CONSTITUTIONS STATIC?

It is not uncommon for nations to rewrite their constitutions in response to changed circumstances or change of ideas within the society or even due to political upheavals. The Soviet Union had four constitutions in its life of 74 years (1918, 1924, 1936 and 1977). In 1991, the rule of the Communist Party of Soviet Union came to an end and soon the Soviet federation disintegrated. After this political upheaval, the newly formed Russian federation adopted a new constitution in 1993.

But look at India. The Constitution of India was adopted on 26 November 1949. Its implementation formally started from 26 January 1950. More than sixty-eight years after that, the same constitution continues to function as the framework within which the government of our country operates.

Is it that our Constitution is so good that it needs no change? Was it that our Constitution makers were so farsighted and wise that they had foreseen all the changes that would take place in the future? In some sense both the answers are correct. It is true that we have inherited a very robust Constitution. The basic framework of the Constitution is very much suited to our country. It is also true that the Constitution makers were very farsighted and provided for many solutions for future situations. But no constitution can provide for all eventualities. No document can be such that it needs no change.

France had numerous constitutions in the last two centuries. After the revolution and during the Napoleonic period, France underwent continuous experimentation about a constitution: The post-revolution constitution of 1793 is called the period of the first French republic. Then commenced the second French republic in 1848. The third French republic was formed with a new constitution in 1875. In 1946, with a new constitution, the fourth French republic came into being. Finally, in 1958, the fifth French republic came into being with yet another constitution.

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It seems to me that constitutional changes are very closely linked to political developments.

Then how does the same Constitution continue to serve the country? One of the answers to such questions is that our Constitution accepts the necessity of modifications according to changing needs of the society. Secondly, in the actual working of the Constitution, there has been enough flexibility of interpretations. Both political practice and judicial rulings have shown maturity and flexibility in implementing the Constitution. These factors have made our Constitution a living document rather than a closed and static rulebook.

In any society, those responsible for drafting the constitution at a particular time would face one common challenge: the provisions of the constitution would naturally reflect efforts to tackle the problems that the society is facing at the time of making of the constitution. At the same time, the constitution must be a document that provides the framework of the government for the future as well. Therefore, the constitution has to be able to respond to the challenges that may arise in the future. In this sense, the constitution will always have something that is contemporary and something that has a more durable importance.

At the same time, a constitution is not a frozen and unalterable document. It is a document made by human beings and may need revisions, changes and re-examination. It is true that the constitution reflects the dreams and aspirations of the concerned society. It must also be kept in mind that the constitution is a framework for the democratic governance of the society. In this sense, it is an instrument that societies create for themselves.

This dual role of the constitution always leads to difficult questions about the status of the constitution: is it so sacred that nobody ever can change it? Alternatively, is it so ordinary an instrument that it can be modified just like any other ordinary law?

The makers of the Indian Constitution were aware of this problem and sought to strike a balance. They placed the Constitution above ordinary law and expected that



I know that the Constitution of the US came into existence more than 200 years ago and so far it has been amended only 27 times! Isn't that very interesting?



the future generations will respect this document. At the same time, they recognised that in the future, this document may require modifications. Even at the time of writing the Constitution, they were aware that on many matters there were differences of opinion. Whenever society would veer toward any particular opinion, a change in the constitutional provisions would be required. Thus, the Indian Constitution is a combination of both the approaches mentioned above: that the constitution is a sacred document and that it is an instrument that may require changes from time to time. In other words, our Constitution is not a static document, it is not the final word about everything; it is not unalterable.

Check your progress

After reading the section above, a number of students in the class were confused. They made the following statements. What would you say about each of these statements?

- ❖ The Constitution is like any other law. It simply tells us what are the rules and regulations governing the government.
- ❖ The Constitution is the expression of the will of the people, so there must be a provision to change the Constitution after every ten or fifteen years.
- ❖ The Constitution is a statement of the philosophy of the country. It can never be changed.
- ❖ The Constitution is a sacred document. Therefore any talk of changing it is against democracy.

How to AMEND THE CONSTITUTION?



Article 368:

...Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

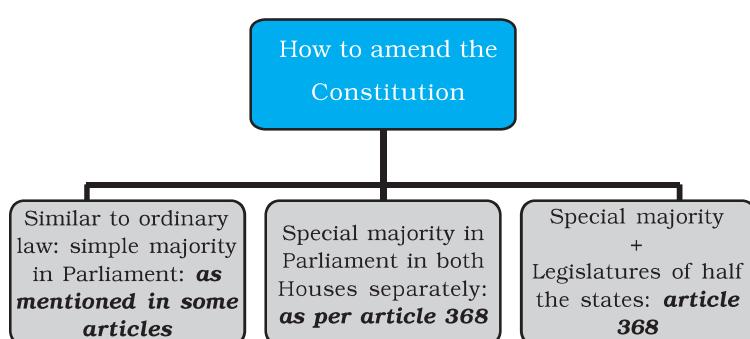


We have already seen that the makers of our Constitution wanted to strike a balance. The Constitution must be amended if so required. But it must be protected from unnecessary and frequent changes. In other words, they wanted the Constitution to be 'flexible' and at the same time 'rigid'. Flexible means open to changes and rigid means resistant to changes. A constitution that can be very easily changed or modified is often called flexible. In the case of constitutions, which are very difficult to amend, they are described as rigid. The Indian Constitution combines both these characteristics.

The makers of the Constitution were aware of the fact that there may be some faults or mistakes in the Constitution; they knew that the Constitution could not be totally free of errors. Whenever such mistakes would come to light, they wanted the Constitution to be easily amended and to be able to get rid of these mistakes. Then there were some provisions in the Constitution that were of temporary nature and it was decided that these could be altered later on once the new Parliament was elected. But at the same time, the Constitution was framing a federal polity and therefore, the rights and powers of the States could not be changed without the consent of the States. Some other features were so central to the spirit of the Constitution that the Constitution makers were anxious to protect these from change. These provisions had to be made rigid. These considerations led to different ways of amending the Constitution.



I don't understand how a constitution can be flexible or rigid. Isn't it the politics of that period which makes the constitution rigid or flexible?



There are many articles in the Constitution, which mention that these articles can be amended by a simple law of the Parliament. No special procedure for amendment is required in such cases and there is no difference at all between an amendment and an ordinary law. These parts of the Constitution are very flexible. Read carefully the following text of some articles of the Constitution. In both these articles, the wording '*by law*' indicates that these articles can be modified by the Parliament without recourse to the procedure laid down in Article 368. Many other articles of the Constitution can be modified by the Parliament in this simple manner.



**Article 2: Parliament
may by law admit into
the unionnew
states....**



**Article 3: Parliament
may by law... b) increase
the area of any state....**

For amending the remaining parts of the Constitution, provision has been made in Article 368 of the Constitution. In this article, there are two methods of amending the Constitution and they apply to two different sets of articles of the Constitution. One method is that amendment can be made by special majority of the two houses of the Parliament. The other method is more difficult: it requires special majority of the Parliament and consent of half of the State legislatures. Note that all amendments to the Constitution are initiated only in the Parliament. Besides the special majority in the Parliament no outside agency—like a constitution commission or a separate body—is required for amending the Constitution.

Similarly, after the passage in the Parliament and in some cases, in State legislatures, no referendum is required for ratification of the amendment. An amendment



What happens if some States want an amendment to the Constitution? Can't they propose an amendment? I think this is another example of favouring the centre against the States!

bill, like all other bills, goes to the President for his assent, but in this case, the President has no powers to send it back for reconsideration. These details show how rigid and complicated the amending process could have been. Our Constitution avoids these complications. This makes the amendment procedure relatively simple. But more importantly, this process underlines an important principle: only elected representatives of the people are empowered to consider and take final decisions on the question of amendments. Thus, sovereignty of elected representatives (parliamentary sovereignty) is the basis of the amendment procedure.

Special Majority

In the chapters on Election, Executive and Judiciary, we have come across provisions that require 'special majority'. Let us repeat again what special majority means. Ordinarily, all business of the legislature requires that a motion or resolution or bill should get the support of a simple majority of the members voting at that time. Suppose that at the time of voting on a bill, 247 members were present in the house and all of them participated in the voting on the bill. Then, the bill would be passed if at least 124 members voted in favour of the bill. Not so in the case of an amendment bill. Amendment to the Constitution requires two different kinds of special majorities: in the first place, those voting in favour of the amendment bill should constitute at least half of the total strength of that House. Secondly, the supporters of the amendment bill must also constitute two-thirds of those who actually take part in voting. Both Houses of the Parliament must pass the amendment bill separately in this same manner (there is no provision for a joint session). For every amendment bill, this special majority is required.

Can you see the significance of this requirement? In the Lok Sabha there are 545 members. Therefore, any amendment must be supported by a minimum of 273 members. Even if only 300 members are present at the time of voting, the amendment bill must get the support of 273 out of them. But imagine that 400 members of Lok Sabha have voted on an amendment bill. How many members should support the bill to get the bill passed?

In addition to this, both the Houses must pass the amendment bill (with special majorities) separately. This means that unless there

Two principles dominate the various procedures of amending the constitutions in most modern constitutions.

- ❖ One is the principle of special majority. For instance, the constitutions of U.S., South Africa, Russia, etc. have employed this principle: In the case of constitution of US, it is two-thirds majority, while in South Africa and Russia, for some amendments, three-fourths majority is required.
- ❖ The other principle that is popular among many modern constitutions is that of people's participation in the process of amending the constitution. In Switzerland, people can even initiate an amendment. Other examples of countries where people initiate or approve amendment to the constitution are Russia and Italy, among others.

is sufficient consensus over the proposed amendment, it cannot be passed. If the party in power enjoys very thin majority, it can pass legislation of its choice and can get budget approved even if the opposition does not agree. But it would need to take at least some opposition parties into confidence, if it wanted to amend the Constitution. So, the basic principle behind the amending procedure is

I am fed up with this business of special majority. It forces you to make difficult calculations all the time. Is it politics or maths?



"If those who are dissatisfied with the Constitution have only to obtain a 2/3 majority and if they cannot obtain even (that)..., their dissatisfaction with the Constitution cannot be deemed to be shared by the general public."

Note that Dr. Ambedkar is talking here not only of parliamentary majority. He refers to 'sharing (of the views) by the general public'. This indicates that behind the majority there is the principle of public opinion that governs decision-making.

Dr. Ambedkar, CAD, Vol. XI, p. 976, 25 November 1949



that it should be based on broad support among the political parties and parliamentarians.

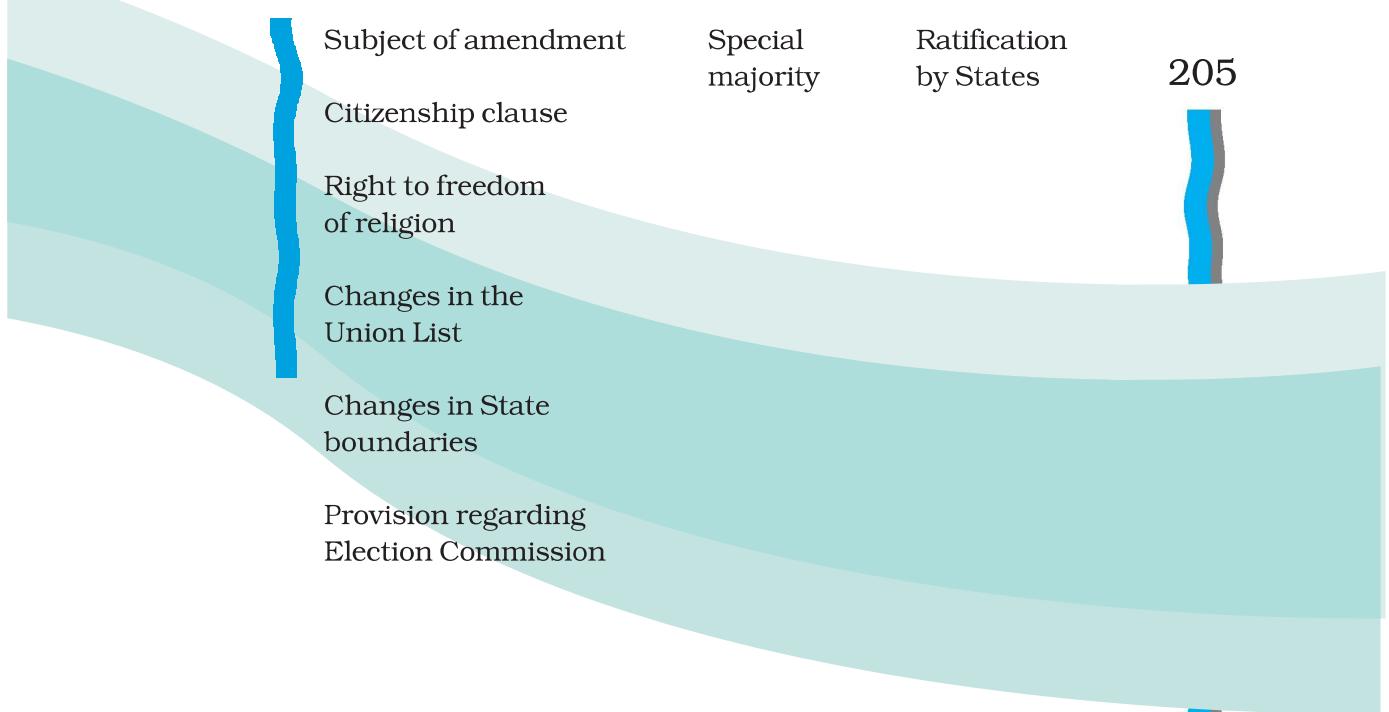
Ratification by States

For some articles of the Constitution, special majority is not sufficient. When an amendment aims to modify an article related to distribution of powers between the States and the central government, or articles related to representation, it is necessary that the States must be consulted and that they give their consent. We have studied the federal nature of the Constitution. Federalism means that powers of the States must not be at the mercy of the central government. The Constitution has ensured this by providing that legislatures of half the States have to pass the amendment bill before the amendment comes into effect. Apart from the provisions related to federal structure, provisions about fundamental rights are also protected in this way. We can say that for some parts of the Constitution, greater or wider consensus in the polity is expected. This provision also respects the States and gives them participation in the process of amendment. At the same time, care is taken to keep this procedure somewhat flexible even in its more rigid format: consent of only half the States is required and simple majority of the State legislature is sufficient. Thus, the amendment process is not impracticable even after taking into consideration this more stringent condition.

We may summarise that the Constitution of India can be amended through large-scale consensus and limited participation of the States. The founding fathers took care that Constitution would not be open to easy tampering. And yet, future generations were given the right to amend and modify according to the needs and requirements of the time.

Check your progress

For making the following amendments to the Constitution of India, what conditions need to be fulfilled? Place a tick mark in the chart wherever applicable.



WHY HAVE THERE BEEN SO MANY AMENDMENTS?

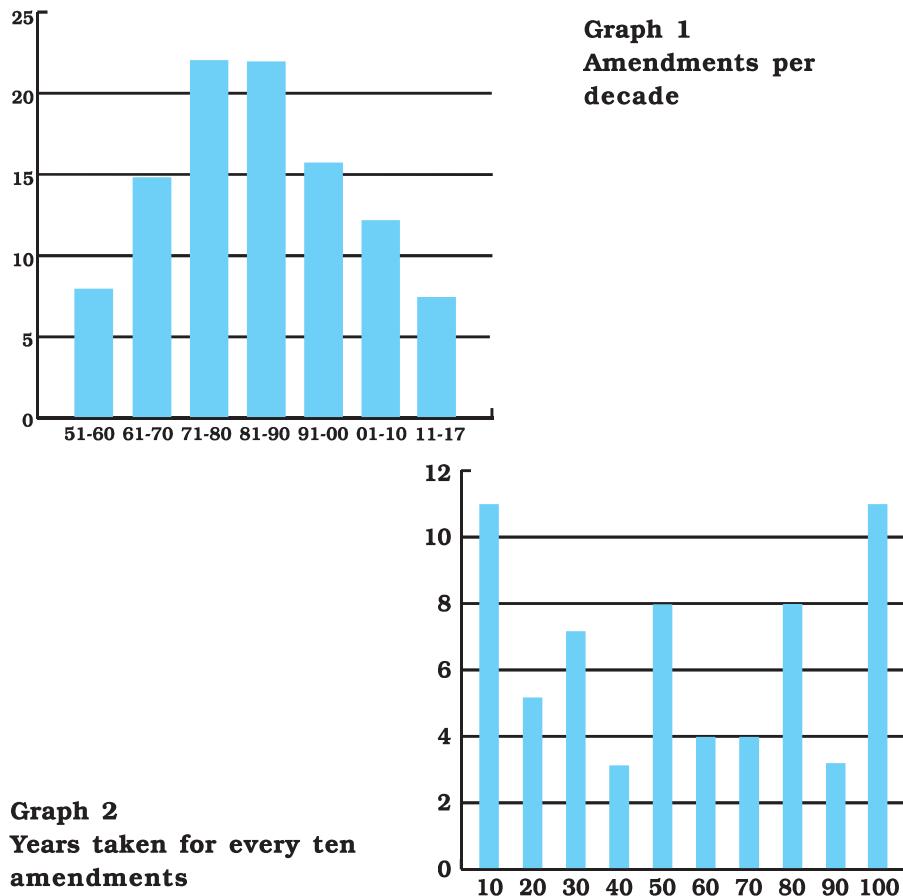
On 26 January 2018, the Constitution of India completed 68 years of its existence. In these years, it was amended 101 times. Given the relatively difficult method of amending the Constitution, the number of amendments appears quite high. Let us try to find out how it is that so many amendments took place and what it means.

Let us first look at the brief history of the amendments: look carefully at the graphs below. The same information is presented in two different ways. The first graph depicts the number of constitution amendments made every ten years; the bar indicates the number of amendments in that period. The second graph depicts the time taken for every ten amendments; the bar depicts the years taken for ten amendments. You will notice that the two decades from 1970 to 1990 saw a large number of amendments. On the other hand, the second graph tells one more story: ten amendments took place between a short span of three



Why was our Constitution amended so many times? Is there something wrong with our society or with the Constitution?

years between 1974 and 1976. And again, in just three years, from 2001 to 2003, ten amendments took place. In the political history of our country, these two periods are remarkably different. The first was a period of Congress domination. Congress party had a vast majority in the Parliament (it had 352 seats in the Lok Sabha and a majority in most State Assemblies). On the other hand, the period between 2001 and 2003 was a period marked by coalition politics. It was also a period when different parties were in power in different States. The bitter rivalry between the BJP and its opponents is another feature of this period. And yet, this period saw as many as ten amendments in just three years. So, the incidence of amendments is not dependent merely on the nature of majority of the ruling party alone.



There is always a criticism about the number of amendments. It is said that there have been far too many amendments to the Constitution of India. On the face of it, the fact that 101 amendments took place in 68 years does seem to be somewhat odd. But the two graphs above suggest that amendments are not only due to political considerations. Barring the first decade after the commencement of the Constitution, every decade has witnessed a steady stream of amendments. This means that irrespective of the nature of politics and the party in power, amendments were required to be made from time to time. Was this because of the inadequacies of the original Constitution? Is the Constitution too flexible?

Contents of Amendments made so far

Amendments made so far may be classified in three groups. In the first group there are amendments, which are of a technical or administrative nature and were only clarifications, explanations, and minor modifications etc. of the original provisions. They are amendments only in the legal sense, but in matter of fact, they made no substantial difference to the provisions.

This is true of the amendment that increased the age of retirement of High Court judges from 60 to 62 years (15th amendment). Similarly, salaries of judges of High Courts and the Supreme Court were increased by an amendment (55th amendment).

We may also take the example of the provision regarding reserved seats in the legislatures for scheduled castes and scheduled tribes. The original provision said that these reservations were for a period of ten years. However, in order to ensure fair representation of these sections, it was necessary to extend this period by ten years. Thus, after every ten years an amendment is made to extend the period by another ten years. This has led to five amendments so far. But these amendments have not made any difference to the original provision. In this sense, it is only a technical amendment.



Yes, I think we should be looking at the changes rather than the number of amendments. That is what we should be doing as students of politics.

Do you remember the discussion in chapter four about the role of the President? In the original Constitution, it was assumed that in our parliamentary government, the President would normally abide by the advice of the Council of Ministers. This was only reiterated by a later amendment when Article 74 (1) was amended to clarify that the advice of the Council of Ministers will be binding on the President (*President shall act in accordance with the advice of the Council of Ministers*). In reality, this amendment did not make any difference because, that is exactly what has been happening all through. The amendment was only by way of explanation.

Differing Interpretations

A number of amendments are a product of different interpretations of the Constitution given by the judiciary and the government of the day. When these clashed, the Parliament had to insert an amendment underlining one particular interpretation as the authentic one. It is part of the democratic politics that various institutions would interpret the Constitution and particularly the scope of their own powers in a different manner. Many times, the Parliament did not agree with the judicial interpretation and therefore, sought to amend the Constitution to overcome the ruling of the judiciary. In the period between 1970 and 1975 this situation arose frequently.

In the chapter on the Judiciary, you have already studied the issues of difference between the Judiciary and the Parliament: one was the relationship between fundamental rights and directive principles, the other was the scope of right to private property and the third was the scope of Parliament's power to amend the Constitution. In the period 1970-1975, the Parliament repeatedly made amendments to overcome the adverse interpretations by the judiciary.

It may be kept in mind that during this period (1970-75) many political events were unfolding and thus this history of our constitutional development can be fully



I am still confused. If there is a written constitution, where is the scope for different interpretations? Or do people read in the constitution what they want to be there?



understood only in the context of the politics of that period. You will know more about these issues in the next year when you study the political history of independent India.

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So, politicians do agree on some matters! And yet they fight over the meaning of what they agreed on!

Amendments through Political Consensus

Thirdly, there is another large group of amendments that have been made as a result of the consensus among the political parties. We may say that this consensus made it necessary that some changes had to be made in order to reflect the prevailing political philosophy and aspirations of the society. In fact, many of the amendments of the post-1984 period are instances of this trend. Remember our question above about the peculiarity that even when there were coalition governments, this period saw so many amendments? The reason is because many of these amendments were based on an evolving consensus on certain issues. Starting with the anti-defection amendment (52nd amendment), this period saw a series of amendments in spite of the political turbulence.

Apart from the anti-defection amendments (52nd and 91st), these amendments include the 61st amendment bringing down the minimum age for voting from 21 to 18 years, the 73rd and the 74th amendments, etc. In this same period, there were some amendments clarifying and expanding the scope of reservations in jobs and admissions. After 1992-93, an overall consensus emerged in the country about these measures and therefore, amendments regarding these measures were passed without much difficulty (77th, 81st, and 82nd amendments).

Controversial Amendments

Our discussion so far, should not create an impression that there has never been any controversy over amending the Constitution. In fact, amendments during the period 1970 to 1980 generated a lot of legal and political controversy. The parties that were in opposition during the period 1971-1976, saw many of these amendments

as attempts by the ruling party to subvert the Constitution. In particular, the 38th, 39th and 42nd amendments have been the most controversial amendments so far. These three amendments were made in the background of internal emergency declared in the country from June 1975. They sought to make basic changes in many crucial parts of the Constitution.

The 42nd amendment was particularly seen as a wide-ranging amendment affecting large parts of the Constitution. It was also an attempt to override the ruling of the Supreme Court given in the Kesavananda case. Even the duration of the Lok Sabha was extended from five to six years. In the chapter on Rights, you have read about Fundamental Duties. They were included in the Constitution by this amendment act. The 42nd amendment also put restrictions on the review powers of the Judiciary. It was said at that time that this amendment was practically a rewriting of many parts of the original Constitution. Do you know that this amendment made changes to the Preamble, to the seventh schedule of the Constitution and to 53 articles of the Constitution? Many MPs belonging to the opposition parties were in jail when this amendment was passed in Parliament. In this backdrop, elections were held in 1977 and the ruling party (Congress) was defeated. The new government thought it necessary to reconsider these controversial amendments and through the 43rd and 44th amendments, cancelled most of the changes that were effected by the 38th, 39th and the 42nd amendments. The constitutional balance was restored by these amendments.



*So, it is all about politics!
Didn't I say that this entire
thing about constitutions and
amendments is linked to
politics rather than law?*

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Activity

Find out the amendments about the right to education (RTE) and the Goods and Services Tax (GST). What do you think is the importance of these amendments?

BASIC STRUCTURE AND EVOLUTION OF THE CONSTITUTION

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One thing that has had a long lasting effect on the evolution of the Indian Constitution is the theory of the basic structure of the Constitution. You know already that the Judiciary advanced this theory in the famous case of Kesavananda Bharati. This ruling has contributed to the evolution of the Constitution in the following ways:

- ❖ It has set specific limits to Parliament's power to amend the Constitution. It says that no amendment can violate the basic structure of the Constitution;
- ❖ It allows Parliament to amend any and all parts of the Constitution (within this limitation); and
- ❖ It places the Judiciary as the final authority in deciding if an amendment violates basic structure and what constitutes the basic structure.

The Supreme Court gave the Kesavananda ruling in 1973. In the past four decades, this decision has governed all interpretations of the Constitution and all institutions in the country have accepted the theory of basic structure. In fact, the theory of basic structure is itself an example of a living constitution. There is no mention of this theory in the Constitution. It has emerged from judicial interpretation. Thus, the Judiciary and its interpretation have practically amended the Constitution without a formal amendment.

All living documents evolve in this manner through debates, arguments, competition and practical politics. Since 1973, the Court has, in many cases, elaborated upon this theory of basic structure and given instances of what constitutes the basic structure of the Constitution of India. In a sense, the basic structure doctrine has further consolidated the balance between rigidity and flexibility: by saying that certain parts cannot be amended, it has underlined the rigid nature while by allowing amendments to all others it has underlined the flexible nature of the amending process.



Ah! So it is the judiciary that has the final word! Is this also judicial activism?

Review of the Constitution

In the late nineties, efforts were made to review the entire Constitution. In the year 2000 a commission to review the working of the Constitution was appointed by the Government of India under the chairmanship of a retired Chief Justice of the Supreme Court, Justice Venkatachaliah. Opposition parties and many other organisations boycotted the commission. While a lot of political controversy surrounded this commission, the commission stuck to the theory of basic structure and did not suggest any measures that would endanger the basic structure of the Constitution. This shows the significance of the basic structure doctrine in our constitutional practice.



It's all wrong. First they say that an amendment requires consensus and now we see that Judges change the whole meaning of the Constitution.



There are many other examples of how judicial interpretation changed our understanding of the Constitution. In many decisions the Supreme Court had held that reservations in jobs and educational institutions cannot exceed fifty per cent of the total seats. This has now become an accepted principle. Similarly, in the case involving reservations for other backward classes, the Supreme Court introduced the idea of creamy layer and ruled that persons belonging to this category were not entitled to benefits under reservations. In the same manner, the Judiciary has contributed to an informal amendment by interpreting various provisions concerning right to education, right to life and liberty and the right to form and manage minority educational institutions. These are instances of how rulings by the Court contribute to the evolution of the Constitution.

Check your progress

State whether the following statements are correct or not:

- ❖ After the Basic Structure ruling, Parliament does not have power to amend the Constitution.
- ❖ The Supreme Court has given a clear list of the basic features of our Constitution, which cannot be amended.
- ❖ Judiciary has the power to decide whether an amendment violates basic structure or not.
- ❖ The Kesavananda Bharati ruling has set clear limits on Parliament's power to amend the Constitution.

CONSTITUTION AS A LIVING DOCUMENT

We have described our Constitution as a living document. What does that mean?

Almost like a living being, this document keeps responding to the situations and circumstances arising from time to time. Like a living being, the Constitution responds to experience. In fact that is the answer to the riddle we mentioned at the beginning about the durability of the Constitution. Even after so many changes in the society, the Constitution continues to work effectively because of this ability to be dynamic, to be open to interpretations and the ability to respond to the changing situation. This is a hallmark of a democratic constitution. In a democracy, practices and ideas keep evolving over time and the society engages in experiments according to these. A constitution, which protects democracy and yet allows for evolution of new practices becomes not only durable but also the object of respect from the citizens. The important point is: has the Constitution been able to protect itself and protect democracy?

In the past six decades, some very critical situations arose in the politics and constitutional development of the country. We have made a brief reference to some of these in this chapter already. In terms of constitutional-legal issues, the most serious question that came up



I get it! It's like a see-saw. Or is it a game of tug of war?

again and again from 1950 was about the supremacy of the Parliament. In a parliamentary democracy, the Parliament represents the people and therefore, it is expected to have an upper hand over both Executive and Judiciary. At the same time, there is the text of the Constitution and it has given powers to other organs of the government. Therefore, the supremacy of the Parliament has to operate within this framework. Democracy is not only about votes and people's representation. It is also about the principle of rule of law. Democracy is also about developing institutions and working through these institutions. All the political institutions must be responsible to the people and maintain a balance with each other.

Contribution of the Judiciary

During the controversy between the Judiciary and the Parliament, the Parliament thought that it had the power and responsibility to make laws (and amendments) for furthering the interests of the poor, backward and the needy. The Judiciary insisted that all this has to take place within the framework provided by the Constitution and pro-people measures should not bypass legal procedures, because, once you bypass laws even with good intentions, that can give an excuse to the power holders to use their power arbitrarily. And democracy is as much about checks on arbitrary use of power as it is about the well-being of the people.

The success of the working of the Indian Constitution lies in resolving these tensions. The Judiciary, in its famous Kesavananda ruling found a way out of the existing complications by turning to the spirit of the Constitution rather than its letter. If you read the Constitution, you will not find any mention of the 'basic structure' of the Constitution. Nowhere does the Constitution say that such and such are part of the basic structure. In this sense, the 'basic structure' theory is the



Of course, if there are no rights and no elections, the Constitution won't make much sense. And if there is no well being, elections and rights won't make sense. Is this how we understand the 'spirit' of our Constitution?



Let us not ignore that there are many instances of political immaturity as well. Does one have to list these?

invention of the Judiciary. How did it invent such a non-existent thing? And how is it that all other institutions have accepted this during the past four decades?

Therein lies the distinction between letter and spirit. The Court came to the conclusion that in reading a text or document, we must respect the intent behind that document. A mere text of the law is less important than the social circumstances and aspirations that have produced that law or document. The Court was looking at the basic structure as something without which the Constitution cannot be imagined at all. This is an instance of trying to balance the letter and the spirit of the Constitution.

Maturity of the Political Leadership

Our discussion of the role of Judiciary, in the paragraph above, brings out one more fact. In the background of the fierce controversy that raged between 1967 and 1973, Parliament and the Executive also realised that a balanced and long term view was necessary. After the Supreme Court gave the ruling in the Kesavananda case some attempts were made to ask the Court to reconsider its ruling. When these failed, the 42nd amendment was made and parliamentary supremacy was asserted. But the Court again repeated its earlier stand in the Minerva Mills case (1980). Therefore, even four decades after the ruling in the Kesavananda case, this ruling has dominated our interpretation of the Constitution. Political parties, political leaders, the government, and Parliament, accepted the idea of inviolable basic structure. Even when there was talk about 'review' of the Constitution, that exercise could not cross the limits set by the theory of the basic structure.

When the Constitution was made, leaders and people of our country shared a common vision of India. In Nehru's famous speech at the time of independence, this vision was described as a tryst with destiny. In the Constituent Assembly also, all the leaders mentioned this vision: dignity and freedom of the individual, social and

Even within the Constituent Assembly, there were some members who felt that this Constitution was not suited to the Indian situation:

“The ideals on which this draft constitution is framed have no manifest relation to the fundamental spirit of India. ...this Constitution ...would not prove suitable and would break down soon after being brought into operation.”

Lakshminarayan Sahu, CAD, Vol. XI, p. 613, 17 November 1949

economic equality, well-being of all people, unity based on national integrity. This vision has not disappeared. People and leaders alike hold to the vision and hope to realize it. Therefore, the Constitution, based on this vision, has remained an object of respect and authority even after half a century. The basic values governing our public imagination remain intact.

Conclusion

There can still be debates about what constitutes basic structure. There is nothing wrong in such debates. We must remember that politics in a democracy is necessarily full of debates and differences. That is a sign of diversity, liveliness and openness. Democracy welcomes debates. At the same time, our political parties and leadership have shown maturity in setting limits to these debates. Because, politics is also about compromises and give-and-take. Extreme positions may be theoretically very correct and ideologically very attractive, but politics demands that everyone is prepared to moderate their extreme views, sharp positions and reach a common minimum ground. Only then democratic politics becomes possible. Politicians and the people of India have understood and practised these skills. That has made the experience of working of the democratic Constitution quite successful. Among the different organs of the government, there will always be competition over which one is more important than the others. They will also always fight over what constitutes

the welfare of the people. But in the last instance, the final authority lies with the people. People, their freedoms and their well-being constitute the purpose of democracy and also the outcome of democratic politics.

Exercises

1. Choose the correct statement from the following.
A constitution needs to be amended from time to time because,
 - ✓ Circumstances change and require suitable changes in the constitution.
 - ✓ A document written at one point of time becomes outdated after some time.
 - ✓ Every generation should have a constitution of its own liking.
 - ✓ It must reflect the philosophy of the existing government.
2. Write True / False against the following statements.
 - a. The President cannot send back an amendment bill for reconsideration of Parliament.
 - b. Elected representatives alone have the power to amend the Constitution.
 - c. The Judiciary cannot initiate the process of constitutional amendment but can effectively change the Constitution by interpreting it differently.
 - d. Parliament can amend any section of the Constitution.
3. Which of the following are involved in the amendment of the Indian Constitution? In what way are they involved?
 - a. Voters
 - b. President of India
 - c. State Legislatures
 - d. Parliament
 - e. Governors
 - f. Judiciary

4. You have read in this chapter that the 42nd amendment was one of the most controversial amendments so far. Which of the following were the reasons for this controversy?
 - a. It was made during national emergency, and the declaration of that emergency was itself controversial.
 - b. It was made without the support of special majority.
 - c. It was made without ratification by State legislatures.
 - d. It contained provisions, which were controversial.
5. Which of the following is not a reasonable explanation of the conflict between the legislature and the judiciary over different amendments?
 - a. Different interpretations of the Constitution are possible.
 - b. In a democracy, debates and differences are natural.
 - c. Constitution has given higher importance to certain rules and principles and also allowed for amendment by special majority.
 - d. Legislature cannot be entrusted to protect the rights of the citizens.
 - e. Judiciary can only decide the constitutionality of a particular law; cannot resolve political debates about its need.
6. Identify the correct statements about the theory of basic structure. Correct the incorrect statements.
 - a. Constitution specifies the basic tenets.
 - b. Legislature can amend all parts of the Constitution except the basic structure.
 - c. Judiciary has defined which aspects of the Constitution can be termed as the basic structure and which cannot.
 - d. This theory found its first expression in the Kesavananda Bharati case and has been discussed in subsequent judgments.
 - e. This theory has increased the powers of the judiciary and has come to be accepted by different political parties and the government.
7. From the information that many amendments were made during 2000-2003, which of the following conclusions would you draw?
 - a. Judiciary did not interfere in the amendments made during this period.
 - b. One political party had a strong majority during this period.
 - c. There was strong pressure from the public in favour of certain amendments.

- d. There were no real differences among the parties during this time.
- e. The amendments were of a non-controversial nature and parties had an agreement on the subject of amendments.
8. Explain the reason for requiring special majority for amending the Constitution.
9. Many amendments to the Constitution of India have been made due to different interpretations upheld by the Judiciary and Parliament. Explain with examples.
10. If amending power is with the elected representatives, judiciary should NOT have the power to decide the validity of amendments. Do you agree? Give your reasons in 100 words.



Chapter Ten

THE PHILOSOPHY OF THE CONSTITUTION

INTRODUCTION

In this book, so far we have studied some important provisions of our Constitution and the way in which these have worked in the last sixty-eight years. We also studied the way in which the Constitution was made. But have you ever asked yourself why leaders of the national movement felt the need to adopt a constitution after achieving independence from British rule? Why did they choose to bind themselves and the future generations to a constitution? In this book, you have repeatedly visited the debates in the Constituent Assembly. But it should be asked why the study of the constitution must be accompanied by a deep examination of the debates in the Constituent Assembly? This question will be addressed in this chapter. Secondly, it is important to ask what kind of a constitution we have given ourselves. What objectives did we hope to achieve by it? Do these objectives have a moral content? If so, what precisely is it? What are the strengths and limitations of this vision and, by implication, the achievements and weaknesses of the Constitution? In doing so, we try to understand what can be called the philosophy of the Constitution.

After reading this chapter, you should be able to understand:

- ❖ *why it is important to study the philosophy of the Constitution;*
- ❖ *what are the core features of the Indian Constitution;*
- ❖ *what are the criticisms of this Constitution; and*
- ❖ *what are the limitations of the Constitution?*

WHAT IS MEANT BY PHILOSOPHY OF THE CONSTITUTION?

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Some people believe that a constitution merely consists of laws and that laws are one thing, values and morality, quite another. Therefore, we can have only a legalistic, not a political philosophy approach to the Constitution. It is true that all laws do not have a moral content, but many laws are closely connected to our deeply held values. For example, a law might prohibit discrimination of persons on grounds of language or religion. Such a law is connected to the idea of equality. Such a law exists because we value equality. Therefore, there is a connection between laws and moral values.

We must therefore, look upon the constitution as a document that is based on a certain moral vision. We need to adopt a political philosophy approach to the constitution. What do we mean by a political philosophy approach to the constitution? We have three things in mind.

- ❖ First, we need to understand the conceptual structure of the constitution. What does this mean? It means that we must ask questions like what are the possible meanings of terms used in the constitution such as 'rights', 'citizenship', 'minority' or 'democracy'?
- ❖ Furthermore, we must attempt to work out a coherent vision of society and polity conditional upon an interpretation of the key concepts of the constitution. We must have a better grasp of the *set of ideals* embedded in the constitution.
- ❖ Our final point is that the Indian Constitution must be read in conjunction with the Constituent Assembly Debates in order to refine and raise to a higher theoretical plane, the *justification* of values embedded in the Constitution. A philosophical treatment of a value is incomplete if a detailed justification for it is not provided. When the framers of the Constitution



Does it mean that all constitutions have a philosophy? Or is it that only some constitutions have a philosophy?

chose to guide Indian society and polity by a set of values, there must have been a corresponding set of reasons. Many of them, though, may not have been fully explained.

A political philosophy approach to the constitution is needed not only to find out the moral content expressed in it and to evaluate its claims but possibly to use it to arbitrate between varying interpretations of the many core values in our polity. It is obvious that many of its ideals are challenged, discussed, debated and contested in different political arenas, in the legislatures, in party forums, in the press, in schools and universities. These ideals are variously interpreted and sometimes wilfully manipulated to suit partisan short term interests. We must, therefore, examine whether or not a serious disjunction exists between the constitutional ideal and its expression in other arenas. Sometimes, the same

Yes, of course, I do remember this issue of different interpretations of the Constitution. We discussed it in the last chapter, didn't we?

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ideal is interpreted differently by different institutions. We need to compare these differing interpretations. Since the expression

The Japanese Constitution of 1947 is popularly known as the 'peace constitution'. The preamble states that "*We, the Japanese people desire peace for all time and are deeply conscious of the high ideals controlling human relationship*". The philosophy of the Japanese constitution is thus based on the ideal of peace.

Article 9 of the Japanese constitution states —

1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained...

This shows how the context of making the constitution dominates the thinking of the constitution makers.

of the ideal in the constitution has considerable authority it must be used to arbitrate in conflict of interpretation over values or ideals. Our Constitution can perform this job of arbitration.

Constitution as Means of Democratic Transformation

In the first chapter we have studied the meaning of the term constitution and the need to have a constitution. It is widely agreed that one reason for having constitutions is the need to restrict the exercise of power. Modern states are excessively powerful. They are believed to have a monopoly over force and coercion. What if institutions of such states fall into wrong hands who abuse this power? Even if these institutions were created for our safety and well-being, they can easily turn against us. Experience of state power the world over shows that most states are prone to harming the interests of at least some individuals and groups. If so, we need to draw the rules of the game in such a way that this tendency of states is continuously checked. Constitutions provide these basic rules and therefore, prevent states from turning tyrannical.

Constitutions also provide peaceful, democratic means to bring about social transformation. Moreover, for a hitherto colonised people, constitutions announce and embody the first real exercise of political self-determination.

Nehru understood both these points well. The demand for a Constituent Assembly, he claimed, represented a collective demand for full self-determination because; only a Constituent Assembly of elected representatives of the Indian people had the right to frame India's constitution without external interference. Second, he argued, the Constituent Assembly is not just a body of people or a gathering of able lawyers. Rather, it is a 'nation on the move, throwing away the shell of its past political and possibly social structure, and fashioning for itself a new garment of its own making.' The Indian Constitution was designed to break the shackles of traditional social hierarchies and to usher in a new era of freedom, equality and justice.



So, can we say that members of the Constituent Assembly were all eager to bring social transformation? But we also keep saying that all viewpoints were represented in the Assembly!

This approach had the potential of changing the theory of constitutional democracy altogether: according to this approach, constitutions exist not only to limit people in power but to empower those who traditionally have been deprived of it. Constitutions can give vulnerable people the power to achieve collective good.

Why do we need to go back to the Constituent Assembly?

Why look backwards and bind ourselves to the past? That may be the job of a legal historian — to go into the past and search for the basis of legal and political ideas. But why should students of politics be interested in studying the intentions and concerns of those who framed the Constitution? Why not take account of changed circumstances and define anew the normative function of the constitution?

In the context of America — where the constitution was written in the late 18th century— it is absurd to apply the values and standards of that era to the 21st century. However, in India, the world of the original framers and our present day world may not have changed so drastically. In terms of our values, ideals and conception, we have not separated ourselves from the world of the Constituent Assembly. A history of our Constitution is still very much a history of the present.



Activity

Read again the quotes from the Debates of the Constituent Assembly (CAD) given in the following chapters. Do you think that the arguments in those quotations have relevance for our present times? Why?

- i. Quotes in Chapter two
- ii. Quote in Chapter seven

Furthermore, we may have forgotten the real point underlying several of our legal and political practices, simply because somewhere down the road we began to take them for granted. These reasons have now slipped into the background, screened off from our consciousness even though they still provide the organizational principle to current practices. When the going is good, this forgetting



is harmless. But when these practices are challenged or threatened, neglect of the underlying principles can be harmful. In short, to get a handle on current constitutional practice, to grasp their value and meaning, we may have no option but to go back in time to the Constituent Assembly debates and perhaps even further back in time to the colonial era. Therefore, we need to remember and keep revisiting the political philosophy underlying our Constitution.

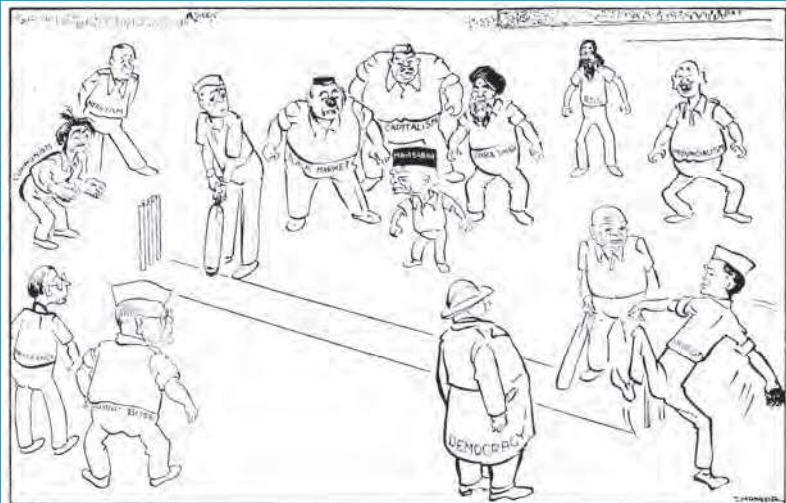
WHAT IS THE POLITICAL PHILOSOPHY OF OUR CONSTITUTION?

It is hard to describe this philosophy in one word. It resists any single label because it is liberal, democratic, egalitarian, secular, and federal, open to community values, sensitive to the needs of religious and linguistic minorities as well as historically disadvantaged groups, and committed to building a common national identity.

This is tough. Why couldn't they plainly tell us what the philosophy of this Constitution is? How can ordinary citizens understand the philosophy if it is hidden like this?

Shankar. Copyright: Children's Book Trust.

READ A CARTOON



While all ideas unfold on this playfield, democracy is the 'Umpire'.

In short, it is committed to freedom, equality, social justice, and some form of national unity. But underneath all this, there is a clear emphasis on peaceful and democratic measures for putting this philosophy into practice.

Individual freedom

The first point to note about the Constitution is its commitment to individual freedom. This commitment did not emerge miraculously out of calm deliberations around a table. Rather, it was the product of continuous intellectual and political activity of well over a century. As early as the beginning of the nineteenth century, Rammohan Roy protested against curtailment of the freedom of the press by the British colonial state. Roy argued that a state responsive to the needs of individuals must provide them the means by which their needs are communicated. Therefore, the state must permit unlimited liberty of publication. Likewise, Indians continued to demand a free press throughout the British rule.

It is not surprising therefore that freedom of expression is an integral part of the Indian Constitution. So is the freedom from arbitrary arrest. After all, the infamous Rowlatt Act, which the national movement opposed so vehemently, sought to deny this basic freedom. These and other individual freedoms such as freedom of conscience are part of the liberal ideology. On this basis, we can say that the Indian Constitution has a pretty strong liberal character. In the chapter on fundamental rights we have already seen how the Constitution values individual freedom. It might be recalled that for over forty years before the adoption of the Constitution, every single resolution, scheme, bill and report of the Indian National Congress mentioned individual rights, not just in passing but as a non-negotiable value.

Social Justice

When we say that the Indian Constitution is liberal, we do not mean that it is liberal only in the classical western sense. In the book on Political Theory, you will learn more about the idea of liberalism. Classical liberalism always privileges rights of the individuals over demands of social justice and community values.

Check your progress

State which of the following rights are part of individual freedom:

- ❖ Freedom of expression
- ❖ Freedom of religion
- ❖ Cultural and educational rights of minorities
- ❖ Equal access to public places

The liberalism of the Indian Constitution differs from this version in two ways. First, it was always linked to social justice. The best example of this is the provision for reservations for Scheduled Castes and Scheduled Tribes in the Constitution. The makers of the Constitution believed that the mere granting of the right to equality was not enough to overcome age-old injustices suffered by these groups or to give real meaning to their right to vote. Special constitutional measures were required to advance their interests. Therefore the constitution makers provided a number of special measures to protect the interests of Scheduled Castes and Scheduled Tribes such as the reservation of seats in legislatures. The Constitution also made it possible for the government to reserve public sector jobs for these groups.

Indian liberalism has two streams. The first stream began with Rammohan Roy. He emphasised individual rights, particularly the rights of women. The second stream included thinkers like K.C. Sen, Justice Ranade and Swami Vivekananda. They introduced the spirit of social justice within orthodox Hinduism. For Vivekananda, such a reordering of Hindu society could not have been possible without liberal principles. — **K.M. Panikkar**, *In Defence of Liberalism*, Bombay, Asia Publishing House, 1962.



And while talking of social justice, let us not forget the directive principles.

Respect for diversity and minority rights

The Indian Constitution encourages equal respect between communities. This was not easy in our country, first because communities do not always have a relationship of equality; they tend to have hierarchical relationships with one another (as in the case of caste). Second, when these communities do see each other as equals, they also tend to become rivals (as in the case of religious communities). This was a huge challenge for the makers of the Constitution: how to make communities liberal in their approach and foster a sense of equal respect among them under existing conditions of hierarchy or intense rivalry?

It would have been very easy to resolve this problem by not recognising communities at all, as most western liberal constitutions do. But this would have been unworkable and undesirable in our country. This is not because Indians are attached to communities more than others. Individuals everywhere also belong to cultural communities and every such community has its own values, traditions, customs and language shared by its members. For example, individuals in France or Germany belong to a linguistic community and are deeply attached to it. What makes us different is that we have more openly acknowledged the value of communities. More importantly, India is a land of multiple cultural communities. Unlike Germany or France we have several linguistic and religious communities. It was important to ensure that no one community systematically dominates others. This made it mandatory for our Constitution to recognise community based rights.

One such right is the right of religious communities to establish and run their own educational institutions. Such institutions may receive money from the government. This provision shows that the Indian Constitution does not see religion merely as a 'private' matter concerning the individual.



I have always wondered who I am. I have so many 'identities' in my bag: I have my religious identity, I have my linguistic identity, I have ties with my parental town, and of course, I am a student also.

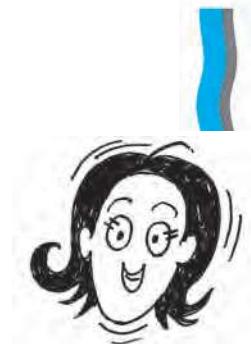


Secularism

Secular states are widely seen as treating religion as only a private matter. That is to say, they refuse to give religion public or official recognition. Does this mean that the Indian Constitution is not secular? This does not follow. Though the term 'secular' was not initially mentioned, the Indian Constitution has always been secular. The mainstream, western conception, of secularism means mutual exclusion of state and religion in order to protect values such as individual freedom and citizenship rights of individuals.

Again, this is something that you will learn more about in Political Theory. The term 'mutual exclusion' means this: both religion and state must stay away from the internal affairs of one another. The state must not intervene in the domain of religion; religion likewise should not dictate state policy or influence the conduct of the state. In other words, mutual exclusion means that religion and state must be *strictly separated*.

What is the purpose behind *strict separation*? It is to safeguard the freedom of individuals. States which lend support to organised religions make them more powerful than they already are. When religious organisations begin to control the religious lives of individuals, when they start dictating how they should relate to God or how they should pray, individuals may have the option of turning to the modern state for protecting their religious freedom, but what help would a state offer them if it has already joined hands with these organisations? To protect religious freedom of individuals, therefore, state must not help religious organisations. But at the same time, state should not tell religious organisations how to manage their affairs. That too can thwart religious freedom. The state must, therefore, not hinder religious organisations either. In short, states should neither help nor hinder religions. Instead, they should keep themselves at an arm's length from them. This has been the prevalent western conception of secularism.



Have they started teaching us the Political Theory course?

Conditions in India were different and to respond to the challenge they posed, the makers of the Constitution had to work out an alternative conception of secularism. They departed from the western model in two ways and for two different reasons.

❖ *Rights of Religious Groups*

First, as mentioned already, they recognised that inter-community equality was as necessary as equality between individuals. This was because a person's freedom and sense of self-respect was directly dependent upon the status of her community. If one community was dominated by another, then its members would also be significantly less free. If, on the other hand, their relations were equal, marked by an absence of domination, then its members would also walk about with dignity, self-respect and freedom. Thus, the Indian Constitution grants rights to all religious communities such as the right to establish and maintain their educational institutions. Freedom of religion in India means the freedom of religion of both individuals and communities.



I would like to know whether finally, the state can regulate matters related to religion or not. Otherwise, there can be no religious reform.

❖ *State's Power of Intervention*

Second, separation in India could not mean mutual exclusion. Why is it so? Because, religiously sanctioned customs such as untouchability deprived individuals of the most basic dignity and self-respect. Such customs were so deeply rooted and pervasive that without active state intervention, there was no hope of their dissolution. The state simply had to interfere in the affairs of religion. Such intervention was not always negative. The state could also help religious communities by giving aid to educational institutions run by them. Thus, the state may help or hinder religious communities depending on which mode of action promotes values such as freedom and equality. In India separation between religion and state did not mean their mutual exclusion but rather

principled distance, a rather complex idea that allows the state to be distant from all religions so that it can intervene or abstain from interference, depending upon which of these two would better promote liberty, equality and social justice.

We have hitherto mentioned three core features — these can also be seen as the achievements — of our Constitution.

- ❖ First, our Constitution reinforces and reinvents forms of liberal individualism. This is an important achievement because this is done in the backdrop of a society where community values are often indifferent or hostile to individual autonomy.
- ❖ Second, our Constitution upholds the principle of social justice without compromising on individual liberties. The constitutional commitment to caste-based affirmative action programme shows how much ahead India was compared to other nations. Can one forget that affirmative action programmes in the U.S. were begun after the 1964 Civil Rights Act, almost two decades after they were constitutionally entrenched in India?
- ❖ Third, against the background of inter-communal strife, the Constitution upholds its commitment to group rights (the right to the expression of cultural particularity). This indicates that the framers of the Constitution were more than willing to face the challenges of what more than four decades later has come to be known as multiculturalism.

Universal franchise

Two other core features may also be regarded as achievements. First, it is no mean achievement to commit oneself to universal franchise, specially when there is widespread belief that traditional hierarchies in India are congealed and more or less impossible to eliminate, and when the right to vote has only recently been extended to women and to the working class in stable, Western democracies.

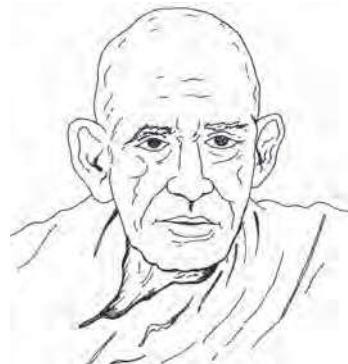
Once the idea of a nation took root among the elite, the idea of democratic self-government followed. Thus, Indian nationalism always conceived of a political order based on the will of every single member of society. The idea of universal franchise lay securely within the heart of nationalism. As early as the Constitution of India Bill (1895), the first non-official attempt at drafting a constitution for India, the author declared that every citizen, i.e., anyone born in



It's certainly a matter of pride that the principle of 'one man one vote' was accepted almost uncontested. Isn't it true that women had to struggle for their right to vote in many other countries?

"The Assembly has adopted the principle of adult franchise with an abundant faith in the common man and the ultimate success of democratic rule and in the full belief that the introduction of democratic government on the basis of adult suffrage will... promote the well-being..."

Alladi Krishnaswami Ayyar, CAD, Vol. XI, p. 835, 23 November 1949



India, had a right to take part in the affairs of the country and be admitted to public office. The Motilal Nehru Report (1928) reaffirms this conception of citizenship, reiterating that every person of either sex who has attained the age of twenty-one is entitled to vote for the House of Representatives or Parliament. Thus from very early on, universal franchise was considered as the most important and legitimate instrument by which the will of the nation was to be properly expressed.

Federalism

Second, by introducing the articles concerning Jammu and Kashmir (Art. 370) and the North-East (Art. 371), the Indian Constitution anticipates the very important concept of asymmetric federalism. We have seen in the chapter on federalism that the Constitution has created a strong central government. But despite this unitary bias of the Indian Constitution, there are important constitutionally embedded differences between the legal status and prerogatives of different sub-units within the same federation. Unlike the constitutional symmetry of American federalism, Indian federalism has been constitutionally asymmetric. To meet the specific needs and requirements of some sub-units, it was always part

of the original design to have a unique relationship with them or to give them special status.

For example, the accession of Jammu and Kashmir to the Indian union was based on a commitment to safeguard its autonomy under Article 370 of the Constitution. This is the only State that is governed by its own constitution. Similarly, under Article 371A, the privilege of special status was also accorded to the North-Eastern State of Nagaland. This Article not only confers validity on pre-existing laws within Nagaland, but also protects local identity through restrictions on immigration. Many other States too, are beneficiaries of such special provisions. According to the Indian Constitution, then, there is nothing bad about this differential treatment.

Although the Constitution did not originally envisage this, India is now a multi-lingual federation. Each major linguistic group is politically recognised and all are treated as equals. Thus, the democratic and linguistic federalism of India has managed to combine claims to unity with claims to cultural recognition. A fairly robust political arena exists that allows for the play of multiple identities that complement one another.

National identity

Thus, the Constitution constantly reinforces a common national identity. In the chapter on federalism, you have studied how India strives to retain regional identities along with the national identity. It is clear from what is mentioned above that this common national identity was not incompatible with distinct religious or linguistic identities. The Indian Constitution tried to balance these various identities. Yet, preference was given to common identity under certain conditions. This is clarified in the debate over separate electorates based on religious identity which the Constitution rejects. Separate electorates were rejected not because they fostered difference between religious communities as such or because they endangered a simple notion of national unity but because



I am really impressed! Who says our Constitution is based on imitation? In every 'borrowed' aspect, we have put our own distinct imprint.

they endangered a healthy national life. Rather than forced unity, our Constitution sought to evolve true fraternity, a goal dear to the heart of Dr. Ambedkar. As Sardar Patel put it, the main objective was to evolve 'one community'.

"But in the long run, it would be in the interest of all to forget that there is anything like majority or minority in this country and that in India there is only one community..."

Sardar Patel, CAD, Vol. VIII, p. 272, 25 May 1949



PROCEDURAL ACHIEVEMENTS

All these five core features are what might be called the substantive achievements of the Constitution. However, there were also some procedural achievements.

- ❖ First, the Indian Constitution reflects a faith in political deliberation. We know that many groups and interests were not adequately represented in the Constituent Assembly. But the debates in the Assembly amply show that the makers of the Constitution wanted to be as inclusive in their approach as possible. This open-ended approach indicates the willingness of people to modify their existing preferences, in short, to justify outcomes by reference not to self-interest but to reasons. It also shows a willingness to recognise creative value in difference and disagreement.
- ❖ Second, it reflects a spirit of compromise and accommodation. These words, compromise and accommodation, should not always be seen with disapproval. Not all compromises are bad.



I understand compromises in the design of institutions, but how can conflicting principles be accommodated?

CRITICISMS

The Indian Constitution can be subjected to many criticisms of which three may be briefly mentioned: first, that it is unwieldy; second, that it is unrepresentative and third, that it is alien to our conditions.

The criticism that it is unwieldy is based on the assumption that the entire constitution of a country must be found in one compact document. But this is not true even of countries such as the US which do have a compact constitution. The fact is that a country's constitution is to be identified with a compact document and with other written documents with constitutional status. Thus, it is possible to find important constitutional statements and practices outside one compact document. In the case of India, many such details, practices and statements are included in one single document and this has made that document somewhat large in size. Many countries for instance, do not have provisions for election commission or the civil service commission in the document known as constitution. But in India, many such matters are attended to by the Constitutional document itself.

A second criticism of the Constitution is that it is unrepresentative. Do you remember how the Constituent Assembly was formed? At that time, adult franchise was

not yet granted and most members came from the advanced sections of the society. Does this make our Constitution unrepresentative?

Here we must distinguish two components of representation, one that might be called voice and the other opinion. The voice component of representation is important. People must be recognised in their own language or voice, not in the language of the masters. If we look at the Indian Constitution from this dimension, it is indeed unrepresentative because members of the Constituent Assembly were chosen by a restricted franchise, not by universal suffrage. However, if we examine the other dimension, we may not find it altogether lacking in representativeness. The claim that almost every shade of opinion was represented in the Constituent Assembly may be a trifle exaggerated but may have something to it. If we read the debates that took place in the Constituent Assembly, we find that a vast range of issues and opinions were mentioned, members raised matters not only based on their individual social concerns but based on the perceived interests and concerns of various social sections as well.

Is it a coincidence that the central square of every other small town has a statue of Dr. Ambedkar with a copy of the Indian Constitution? Far from being a mere symbolic tribute to him, this expresses the feeling among Dalits that the Constitution reflects many of their aspirations.

A final criticism alleges that the Indian Constitution is entirely an alien document, borrowed article by article from western constitutions and sits uneasily with the cultural ethos of the Indian people. This criticism is often voiced by many. Even in the Constituent Assembly itself, there were some voices that echo this concern.

How far is this charge true?

It is true that the Indian Constitution is modern and partly western. Do you remember that in the first chapter we have listed the various sources from which our Constitution ‘borrowed’? But in this chapter you have also



Of course! Isn't it what we learnt in the first chapter? That there should be a valid reason for every section of society to go along with the Constitution?

“...we wanted the music of Veena or Sitar, but here we have the music of an English band. That was because our constitution makers were educated that way. ...That is exactly the kind of Constitution Mahatma Gandhi did not want and did not envisage.”

K. Hanumanthaiya
CAD, Vol. XI, pp.616-617, 17 November 1949

seen that it was never a blind borrowing. It was innovative borrowing. Besides, as we shall see, this does not make it entirely alien.

First, many Indians have not only adopted modern ways of thinking, but have made these their own. For them westernisation became a form of protest against the filth in their own tradition. Rammohan Roy started this trend and it is continued to this day by Dalits. Indeed, as early as 1841, it was noticed that the Dalit people of northern India were not afraid to use the newly introduced legal system and bring suits against their landlords. So, this new instrument of modern law was effectively adopted by the people to address questions of dignity and justice.

Second, when western modernity began to interact with local cultural systems, something like a hybrid culture began to emerge, possibly by creative adaptation, for which a parallel can be found neither in western modernity nor in indigenous tradition. This cluster of newly developed phenomenon forged out of western modern and indigenous traditional cultural systems have the character of a different, alternative modernity. In non-western societies, different modernities emerged as non-western societies tried to break loose not only from their own past practices but also from the shackles of a particular version of western modernity imposed on them. Thus, when we were drafting our Constitution, efforts were made to amalgamate western and traditional Indian values. It was a process of selective adaptation and not borrowing.

Limitations

All this is not to say that the Constitution of India is a perfect and flawless document. Given the social conditions within which the

Constitution was made, it was only natural that there may be many controversial matters, that there would be many areas that needed careful revision. There are many features of this Constitution that have emerged mainly due to the exigencies of the time. Nonetheless, we must admit that there are many limitations to this Constitution. Let us briefly mention the limitations of the Constitution.

- ❖ First, the Indian Constitution has a centralised idea of national unity.
- ❖ Second, it appears to have glossed over some important issues of gender justice, particularly within the family.
- ❖ Third, it is not clear why in a poor developing country, certain basic socio-economic rights were relegated to the section on Directive Principles rather than made an integral feature of our fundamental rights.

It is possible to give answers to these limitations, to explain why this happened, or even to overcome them. But that is not our point. We are arguing that these limitations are not serious enough to jeopardise the philosophy of the Constitution.



No document can be perfect and no ideals can be fully achieved. But does that mean we should have no ideals? No vision? Am I right?

Conclusion

In the previous chapter we described the Constitution as a living document. It is these core features of the Constitution that give it this stature of a living document. Legal provisions and institutional arrangements depend upon the needs of the society and the philosophy adopted by the society. The Constitution gives expression to this philosophy. The institutional arrangements that we studied throughout this book are based on a core and commonly agreed vision. That vision has historically emerged through our struggle for independence. The Constituent Assembly was the platform on which this vision was stated, refined and articulated in legal-institutional form. Thus, the

Constitution becomes the embodiment of this vision. Many people have said that the best summary of this vision or the philosophy of the Constitution is to be found in the preamble to our Constitution.

Have you carefully read the preamble? Apart from the various objectives mentioned in it, the preamble makes a very humble claim: the Constitution is not 'given' by a body of great men, it is prepared and adopted by 'We, the people of India...'. Thus, the people are themselves the makers of their own destinies, and democracy is the instrument that people have used for shaping their present and their future. More than five decades since the Constitution was drafted, we have fought over many matters, we have seen that the courts and the governments have disagreed on many interpretations, the centre and the States have many differences of opinion, and political parties have fought bitterly. As you will study next year, our politics has been full of problems and shortcomings. And yet, if you asked the politician or the common citizen, you will find that every one continues to share in that famous vision embodied in the Constitution: we want to live together and prosper together on the basis of the principles of equality, liberty and fraternity. This sharing in the vision or the philosophy of the Constitution is the valuable outcome of the working of the Constitution. In 1950, making of this Constitution was a great achievement. Today, keeping alive the philosophical vision of that Constitution may be our important achievement.

Exercises

1. The following are certain laws. Are they connected with any value? If yes, then what is the underlying value? Give reasons.
 - a. Both daughters and sons will have share in the family property.
 - b. There will be different slabs of sales tax on different consumer items.
 - c. Religious instructions will not be given in any government school.
 - d. There shall be no *begar* or forced labour.

2. Which of the options given below cannot be used to complete the following statement?
Democratic countries need a constitution to
 - i. Check the power of the government.
 - ii. Protect minorities from majority.
 - iii. Bring independence from colonial rule.
 - iv. Ensure that a long-term vision is not lost by momentary passions.
 - v. Bring social change in peaceful manner.
3. The following are different positions about reading and understanding Constituent Assembly debates.
 - i. Which of these statements argues that Constituent Assembly debates are relevant even today? Which statement says that they are not relevant?
 - ii. With which of these positions do you agree and why?
 - a. Common people are too busy in earning livelihood and meeting different pressures of life. They can't understand the legal language of these debates.
 - b. The conditions and challenges today are different from the time when the Constitution was made. To read the ideas of Constitution makers and use them for our new times is trying to bring past in the present
 - c. Our ways of understanding the world and the present challenges have not changed totally. Constituent Assembly debates can provide us reasons why certain practises are important. In a period when constitutional practises are being challenged, not knowing the reasons can destroy them.
4. Explain the difference between the Indian Constitution and western ideas in the light of
 - a. Understanding of secularism.
 - b. Articles 370 and 371.
 - c. Affirmative action.
 - d. Universal adult franchise.
5. Which of the following principles of secularism are adopted in the Constitution of India?
 - a. that state will have nothing to do with religion
 - b. that state will have close relation with religion
 - c. that state can discriminate among religions

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- d. that state will recognise rights of religious groups
 - e. that state will have limited powers to intervene in affairs of religions
6. Match the following.

a. Freedom to criticise treatment of widows	i. Substantive achievement
b. Taking decisions in the constituent assembly on the basis of reason, not self interest	ii. Procedural achievement
c. Accepting importance of community in an individual's life	iii. Neglect of gender justice
d. Article 370 and 371	iv. Liberal individualism
e. Unequal rights to women regarding family property and children	v. Attention to requirements of a particular region

7. This discussion was taking place in a class. Read the various arguments and state which of these do you agree with and why.

Jayesh: I still think that our Constitution is only a borrowed document.

Saba: Do you mean to say that there is nothing Indian in it? But is there such a thing as Indian and western in the case of values and ideas? Take equality between men and women. What is western about it? And even if it is, should we reject it only because it is western?

Jayesh: What I mean is that after fighting for independence from the British, did we not adopt their system of parliamentary government?

Neha: You forget that when we fought the British, we were not against the British as such, we were against the principle of colonialism. That has nothing to do with adopting a system of government that we wanted, wherever it came from.

8. Why is it said that the making of the Indian Constitution was unrepresentative? Does that make the Constitution unrepresentative? Give reasons for your answer.
9. One of the limitations of the Constitution of India is that it does not adequately attend to gender justice. What evidence can you give to substantiate this charge? If you were writing the Constitution today, what provisions would you recommend for remedying this limitation?
10. Do you agree with the statement that “it is not clear why in a poor developing country, certain basic socio-economic rights were relegated to the section on Directive Principles rather than made an integral feature of our Fundamental Rights”? Give reasons for your answer. What do you think are the possible reasons for putting socio-economic rights in the section on Directive Principles?
11. How did your school celebrate the Constitution Day on November 26th?

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