
UNIT 15 STATE BUILDING AND CONSTITUTIONALISM

Structure

- 15.1 Introduction
- 15.2 State Building
 - 15.2.1 The Instrumental Requirements
 - 15.2.2 States in History
 - 15.2.3 The Value of the Almond-Powell Schema
- 15.3 Constitutionalism
 - 15.3.1 Origins
 - 15.3.2 Meaning of Constitutionalism
- 15.4 Models of Constitutions
 - 15.4.1 The British Model of Constitutionalism
 - 15.4.2 The US Model
 - 15.4.3 The Continental Systems
 - 15.4.4 The Evolutionary Mode of Constitution Making
 - 15.4.5 The Revolutionary Mode of Constitution Making
- 15.5 Constitutionalism and State Building
 - 15.5.1 Constitution as a Framework
 - 15.5.2 The State and the Civil Society
 - 15.5.3 Rule of Law
 - 15.5.4 Army and Bureaucracy
- 15.6 Constitution of Rights
 - 15.6.1 The Origins
 - 15.6.2 Nature of Rights
- 15.7 Summary
- 15.8 Exercises

15.1 INTRODUCTION

The concepts of 'the nation' and 'the state' grew as parallels in history. 'Nation' indicated a collectivity of persons who have a certain bond with each other (See Unit 14). 'State' indicated a structured authority to rule over a people in a certain territory. The two are not necessarily co-extensive. In 1646, for instance, the Treaty of Westphalia recognised 300 German states. Today we find only two German-speaking states: Germany and Austria. One of the main reasons of the division of Austria and Germany is religious. Austria is **Catholic**, Germany Protestant.

Primarily, the state is a territorial concept, but **the** nation is a human phenomenon. Ever since the formation of the United Nations Organisation, the composite word 'nation-state' has entered

the political vocabulary of the world. The United Nations' Charter virtually identified the state with the **nation**. The national affairs are, however, more complex than the affairs of the state even though they are interlinked. The role of psychology is more important in the affairs of the nation than in the affairs of the state. Political science can deal with 'state building' better than 'nation building' even though, in the Third World countries the term 'nation building' is more popular. *'Nation building' involves not only government, which is the primary focus of state building, but also economic development and psychological integration of a population.* As Gabriel A. Almond and G. Bingham Powell, Jr. put it:

"While it is an oversimplification to put it in this way, we might view the problem of state building and its successful confrontation by a political system as essentially a structural problem. That is to say, what is involved is primarily a matter of the structural differentiation of new roles, structures and subsystems which penetrate the countryside. **Nation** building, on the other hand, emphasises the cultural aspects of political development. It refers to the process whereby people transfer their commitment and loyalty **from** the smaller tribes, villages, or petty principalities to a larger central political system. While these two processes of state and nation building are related, it is important to view them separately. There are many cases in which centralised and penetrative bureaucracies have been created, while a homogeneous pattern of loyalty and commitment to the central political institutions has never emerged".

Almond and Powell discussed the concept of state building in the context of the theory of political development the three other components of which are nation building, participation and distribution (of welfare). He spelt out the major questions of state building as 'what kind of bureaucracy one has to create, what kind of rule-making and adjudicative structures, and what kinds of loads these structures may be made to bear. The shortcoming of this theoretical schema consisted in its **assumption** of a continuity between 'a pre-existing, less differentiated political system' to a 'differentiated,' modern, political system. It does not take into account the states or 'political systems,' as the 'systems theorists' call them, which come into existence through revolutionary transformations. Or, perhaps, they consciously keep their eyes closed to revolutions and choose to start off from a post-revolutionary situation. They still ignore the fact that a revolution, as well as the pre-revolutionary experiences, may make their own contribution to the process of state building as is the case with several post-colonised countries like India.

15.2 STATE BUILDING

15.2.1 The Instrumental Requirements

But the task of state building is not a simple one either. 'State building occurs', say Almond and Powell, 'when the political elite create new structures and organisations designed to "penetrate" the society in order to regulate behaviour in it and draw a larger volume of resources from it. State building is commonly associated with significant increases in the regulative and extractive capabilities of the political system'. It involves the determination of the structure of authority, the territorial extent of its spread, the extent of popular conformity with the authority and the means of securing such authority. A crucial test of the authority is the legitimacy that the people accord it and the feeling of satisfaction among the people with the rule. **If the Government's primary**

interest is in securing the obedience of the people to law and order, the interest of the people lies in the preservation of their rights and promotion of their interest.

15.2.2 States in History

Ancient Greece and Rome began as **city-** states. Though the more ancient states of Egypt and Mesopotamia have been described as empires it is doubtful if their authority was as extensive as that of the modern empires. However, both Greece and Rome grew into empires and dissolved in course of time. Almond and Powell comment that 'there are examples, particularly among the great empires such as Imperial Rome, in which the elite never sought to create a common national culture of loyalty and commitment, but were content to develop a centralised and penetrative bureaucracy, while at the same time permitting culturally distinct component units to survive and retain some autonomy' .

The above comment of Almond and Powell **smacks** of a cultural totalitarianism that is characteristic of the US polity where knowledge of the English language is the primary condition of citizenship. It ignores the empirical reality that any large political unit is bound to allow considerable local and cultural autonomy in order to obtain an overall territorial loyalty of the people to the state. After the dissolution of the Roman Empire a number of feudal states grew up in Europe even though some of them called themselves 'empires.' They were ruled by dynasties wielding absolute power over their subjects with claim to divine right to rule. The Reformation in **the** late fifteenth century undermined this divine right theory and the Renaissance brought in a new self-confidence among people. Thus the concept of a 'national state,' as opposed to that of a 'dynastic state' was born. The monarch became the symbol of the nation's unity.

15.2.3 The value of the Almond-Powell Schema

The analytical value of the Almond-Powell schema is, however, considerable. According to these authors the primitive political systems handled their problems largely in **diffuse** and intermittent ways, by means of ad **hoc** or minimal structural differentiation and specialisation. The traditional political systems were characterised by specialised regulative and extractive structures and by a symbolic capability intended to create loyalty among its members and identity with the larger political system. But the problems of participation in the political system and of distribution of its products were still handled diffusely and intermittently. In the modern stable democracies all these functions are sufficiently distinct.

Yet they have worked in different ways in different countries. Thus, in Britain in the Tudor period, state building proper, in the sense of penetration of the state in the civil life and integration between the two, was achieved. But the process of nation building in the sense of growth of cultural homogenisation and subsystem autonomy went on till the nineteenth and the twentieth centuries. It was in the nineteenth and then twentieth centuries that the problem of participation and distribution of welfare was addressed. This prolonged step-by-step process helped Britain to follow a rather smooth path of transition.

In Germany these four processes were almost simultaneous and spread over a short period. While in Tudor Britain the feudal lords lost their estates they were accommodated with power and influence in the Parliament and the bureaucracy. On the other hand, in Germany, feudalism

was absorbed in the state's bureaucratic and military structure. France lay somewhere in between these two models. There the feudal **aristocracy** ~~was~~ absorbed in the royal court and divested of power as well as their communal roots. A newer aristocracy based on office controlled state power and closed high offices to the middle class creating a crisis of state authority, identity, loyalty and participation. The French peasantry was alienated by the burden of taxation, military services and feudal privileges. Hence the instability in revolutionary France.

The contrast posed between the smooth British model on the one hand and **the Franco-German** model of instability posed by the above analysis on the other rests on the assumption that Britain had time and the genius to hand the process of political development while the others had neither. This is a historical analysis, too abstract to give a clear picture of the French and German political experience. How does post-Nazi Germany or the Fifth Republican France conduct their politics? Did they start the state-building process anew? How did the United States of America, for that matter, cope with the problem of state building after **1776**?

15.3 CONSTITUTIONALISM

15.3.1 Origins

The beginning of the Enlightenment in the seventeenth century that stressed the value of the individual freedom and set in the process of curtailment of the authority of the monarch. The political ideology of this trend was reflected in the Social contract Theory that denied the monarch any divine right to rule. Instead, the monarch's power was said to have been voluntarily surrendered by the people on certain conditions. In other words, the ruler's power was not unconditional. Even though John Hobbes was reputed to be an absolutist, he laid stress on the sovereign's obligation to protect the life of the people. **Locke** went **further** by adding 'property' to this obligation stressing further that 'property' included liberty. More basic, however, was Locke's assertion of the autonomy of the civil society that had been created by a social contract prior to the contract between the civil society and the ruler establishing the state. Locke's sovereign was, therefore, a sovereign with a limited authority. Therefore, he endorsed the **limited/constitutional** monarchy that had been created by the Glorious Revolution of 1688.

This is the basis of the concept of 'constitutionalism'. It was subsequently developed by the French political philosopher, Montesquieu, who, expanding the British model of government established in 1689, gave the scheme of a separation of power that, in turn, influenced the framing of the world's first written Constitution: the Constitution of the United States of America and was followed, to different extents, by many other democracies with written Constitutions.

15.3.2 Meaning of Constitutionalism

The literal meaning of 'constitution' is the way a body is constituted and structured. In Political Science this would mean the way a state and its authority is constituted. When Aristotle wrote his Politics **after** studying about 150 city states in the Hellenic world, and classified constitutions, he was using this literal meaning of 'constitution'. Later, a value was added to it. A Constitution is believed to have the quality of stability and respectability to the extent that the people expect it to be followed by the members and organs of the Government. This practice of the Government

following the Constitution is called 'constitutionalism'. This means that the Government cannot be run by any person's whims.

Constitutionalism, however, is not republicanism, as the name 'constitutional monarchy' would indicate. Even now in Europe there are dynastic monarchs who have given up their absolute authority to elected **legislature**. On the other hand, republicanism, that means the system headed by an elected President, does not necessarily indicate constitutional rule. Military leaders in several countries have proclaimed themselves Presidents and even obtained popular 'support' by devious means including referenda. They have tampered with the constitutions of their countries and, **often**, thrown them out of the window.

There is also a difference between constitutionalism and democracy at the theoretical level, best illustrated by the social contract theory of the philosopher of the French Revolution, Rousseau. Rousseau advocated direct democracy, denied any special status to Government and any limit to the popular will that he regarded as sovereign. Direct democracy, however, is just impossible in the mass States of today. A principle of representative government has, therefore, been universally accepted. Because the representatives have handed over power to rule in future a Constitution becomes necessary to lay down the limits of their power – 'the rules of the game,' as they may be called. It is assumed that the makers of a constitution start with a **clean** slate and have no axe to grind. They are unbiased. The Subsequent politicians have to follow the rules. That is why most Constitutions of the world make the Constitutions 'rigid,' that is to say, not alterable by **ordinary** legislative procedure. Where such written and rigid Constitutions do not exist certain conventions and customs are, by national consensus, considered inviolable. The classic example of the first type is the US Constitution, that of the second type is the British Constitution.

15.4 MODELS OF CONSTITUTIONS

15.4.1 The British Model of Constitutionalism

An extension of the contradiction between populism and constitutionalism is the rival claims to legitimacy by an elected legislature and a non-political judiciary. In Britain, the Constitution being unwritten, sovereignty of the **Crown** in Parliament is the prevailing principle of government. That means that the Crown is a part of the Parliament but not a member of any House. The Crown can address the Houses. No court can review or invalidate an Act of Parliament even though the British courts interpret Parliamentary enactments quite liberally. There is no concept of strict separation of power in the British constitutional system.

In the British Constitutional system there is a bicameral legislature the upper chamber – the House of Lords – is made up of hereditary and nominated Peers and the lower chamber – of elected representatives of the people. The executive power is vested, nominally, in the monarch but actually in the Council of Ministers that contains members of both the Houses but is responsible to the House of Commons. This responsibility – meaning the liability of the Council, of Ministers to be removed from office if it loses confidence of the House of Commons – is an insurance against the **tyranny** of the executive. On the other hand, the power of the Council of Ministers to obtain dissolution of **the House of Commons** and seek a fresh election is an insurance against the tyranny of the House. An election means a reference to the voters who are the political sovereign.

A possible conflict between the **legislature** and the judiciary is sought to be resolved by the arrangement that the highest court of the country is the House of Lords and the House of Lords is generally aloof from the humdrum of the country's politics. This, however, is not strict separation of power. The power of judicial review that is exercised by the United States of America's Federal Supreme Court does not belong to the judicial committee of the British House of Lords. The House of Lords as a whole has the power to delay the passage of a law at the most.

15.4.2 The US Model

The basic difference between the constitutional systems of Britain and the USA is that, the US Constitution being written, the constitutional law there has been placed above the ordinary laws, while in Britain there is no written Constitution and all laws made by the Parliament are of equal strength. While interpreting the laws in the USA, the Supreme Court places the Constitutional Law above the ordinary law and overrules any legislation that, in its opinion, conflicts with the Constitution. This is the basis of judicial review. This has given rise to allegations of judicial indifference to public policy, especially in the 1930s. Lately, however, the US judiciary has been found to be quite sensitive to public policy.

The nominal and the real executive in the USA is the President, elected indirectly by the people. The legislative power in the USA is vested in the elected, bi-cameral, Congress. There is no responsibility of the executive to the legislature. But the system works on the basis of control – the concept of 'checks and balances,' as it is called. The President has a team of Secretaries to work for him at the head of each administrative department. His choices are of course subject to ratification of the second chamber of the US Congress – the Senate or the Council of States. All laws are enacted by the Congress, but the assent of the President is necessary. The Congress is also the sole controller of the funds of the Government. The President cannot address the Congress but he, or his Secretaries, may meet the Congressional committees. Legislations and Finance Bills are **drafted** by the Congressional Committees.

The US Constitution is not only written but also **rigid**. An Amendment of the Constitution requires to be proposed by two-thirds of both the Houses or by a convention called on application of two-thirds of the State legislatures and ratified by three-fourths of the State legislatures or State conventions. A Constitutional Amendment does not need the President's assent. The original US Constitution, however, is skeletal. Over more than two hundred years since its inception, only 26 Amendments have taken place. Growth of conventions and numerous judicial decisions have led to its elaboration.

A salient feature of the US Constitution that marks it apart from the British Constitutional system is its federal character. Britain – **officially**, the United Kingdom – is a unitary state, governed as one unit. Sovereignty, or the governing power, in the United Kingdom is exclusively vested in the **King/Queen** in Parliament. In the United States of America sovereignty is divided between the Union and the States. The powers of the Union are limited by the Constitution. The residual powers belong to the States. Being the guardian of the Constitution the Federal Supreme Court is also the guardian of the federal relations. The **States** have their own courts. Over the **past two centuries the powers of the Union have increased greatly through judicial decisions, conventions and sheer acquiescence of the States.**

In the British Dominion of Canada a combination of the British model of parliamentary government with a federal territorial structure emerged in 1867. Its key concept was provincial autonomy. This model, in a republican form, was adopted by India in 1950 at the same time borrowing elements from the Constitution of the former Union of Soviet Socialist Republics.

15.4.3 The Continental Systems

In continental Europe three other main forms of government emerged from the mid-19th century onward. A collegial executive came into existence in the tiny republic of Switzerland where the Ministers are elected by means of proportional representation by the legislature but are not responsible to it. They hold office during the entire period of life of the legislature. There are even elements of direct democracy in the forms of initiative, referendum and recall.

Switzerland is also a federation of a special kind. It calls itself a 'confederation' – a designation that was owned by the USA between 1777 and 1789 when the Federal Constitution came into existence. The Swiss people consider themselves a multi-religious, multi-lingual nation. Three major languages - German; French and Italian – and two major religious sects – Catholic and Protestant – divide the Swiss people into 22 cantons and six half-cantons which themselves are culturally homogeneous. The Swiss cantons enjoy more autonomy than the states of the USA. Switzerland is the first experiment in multi-cultural nationhood to a greater extent than Canada. It may be noted that when the first workers' and peasants' state – the Union of Soviet Socialist Republics - was set up, it adopted the Swiss model and called itself a 'multi-national state'.

After World War II Germany developed what is called 'the Chancellor system' of Government where the Chancellor – the equivalent of a Prime Minister, is appointed by the Federal President with the approval of the Bundestag, the first chamber of the federal legislature. If the Bundestag does not agree to the President's recommendation, it has to elect a Chancellor. The Bundestag also cannot move a vote of no confidence against the Chancellor before electing an alternative Chancellor.

Since the 1960s, new kind of Constitutions have developed in which the head of the state is above the Government and is a kind of ultimate guardian of the Constitution. This type first developed in France when Charles de Gaulle set up the Fifth Republic. It was later taken up by Sri Lanka (Ceylon). Some military dictators elsewhere have attempted to set up such Constitutional structures.

15.4.4 The Evolutionary Mode of Constitution Making

The distinction between an unwritten and flexible constitution on the one hand and a written and rigid constitution on the other can be traced to the history of the countries possessing them. The British Constitution is the product of an almost unbroken course of political development. Only once in the British history was monarchy violently overthrown – in the civil war of 1648. The leader of the revolution, Oliver Cromwell, assumed the role of the Lord Protector and issued an 'Instrument of Government' in 1649 that worked as a temporary Constitution for a few years. After Oliver Cromwell's death, Richard Cromwell, became the Lord Protector and the British people realised that they had got only a hereditary dictatorship. They overthrew it and restored monarchy. But the new monarch, Charles II had no intention to respect the legislature. Nor his son, James II, had it. The Glorious Revolution of 1688 replaced the monarch but did

not abolish monarchy. The new monarch, William of Orange, was happy enough to issue the Declaration of Rights of **1689** that is the basis of constitutional monarchy in Britain. In the succeeding years two major developments occurred. One was the establishment of the political leadership of the Council of Ministers and its Cabinet committee and the other was the gradual expansion of franchise. In **1928** universal adult franchise was established in Britain.

The **growth** and completion of the cabinet leadership in Britain, paradoxically, grew in a negative form – that of ministerial responsibility. Technically it means that the Council of Ministers is collectively responsible to the legislature to which the monarch has surrendered all powers of government. This has an extremely practical significance because **all** powers of the Government are exercised by the monarch on the advice of the Council of Ministers. Hence the **cliché**: 'The King can do no wrong.' The Council of Ministers, in turn, claims to command the confidence of the legislature. Indeed the legislature can get the Council of Ministers removed by passing a vote of censure against it. But, so long as the Council of Ministers is in office, it is the leader and the spokesman of the legislature. No monarch can reject its advice.

The fact that the monarch always abides by the advice of the Council of Ministers and that the Council of Ministers is responsible to the legislature are the two legs that the constitutional government in Britain stands on. But these facts do not automatically make Britain a democracy. Britain's democracy ultimately rests on the people's right to vote. It is this need of democracy that has made the House of Lords, a hereditary and nominated House of the British Parliament, virtually powerless.

The point to note here is that British constitutionalism developed and matured into democracy in course of about seven hundred years - from **1215** to **1929**. This was a continuous process – except for the temporary break between **1648** and **1659**. Britain, therefore, never had the occasion to frame a complete and formal constitution. Therefore, the British constitution is said to be 'unwritten.' But there are several **written** elements in the British Constitution. Several Acts of Parliament and judicial decisions have constitutional character. Although they may **be** amended or reviewed by Parliamentary Acts, **they** are nevertheless held sacrosanct. The British genius, **of course**, rests in the growth of constitutional conventions. The cabinet system is almost entirely based on conventions.

15.4.5 The Revolutionary Mode of Constitution Making

Constitutional government in other liberal democracies has **followed** the revolutionary course. Usually after a liberal, anti-authoritarian revolution, people's desire to 'start with a clean slate,' redesign their political structure by one stroke and sit together in an assembly or a convention to achieve this objective.

The world's first such gathering was the Philadelphia Constitutional Convention of **1787** that framed the Constitution of the United States of America. **52** representatives of the **13** North American states that had become **free in 1776** and set up a confederation in **1777** had originally met to revise the terms of the Confederation. Ultimately, however, they framed the seven Articles that came to be known as the Federal Constitution of the United States of America. It was enforced **after** all the **13** States ratified it. It went through **26** subsequent amendments and was enriched by conventions and judicial decisions.

The second such gathering was the French 'States General' of **1789** that first met at the royal summons in three 'estates' – the clergy, the feudal nobility and the commonality. The three estates having been unable to meet together, the Third Estate, with the participation of a major section of the clergy, constituted itself as the National Assembly and declared that in France sovereignty rested in the nation. The Declaration of Rights of Man, on **12 August 1789** proclaimed that 'all men being born equal should have equal rights' It went ahead to draft a constitution enshrining the principle of constitutional monarchy and yet incorporating the US pattern of separation of powers. The National Assembly laid down that the Constitution could not be changed for ten years. The King, Louis VI accepted the Constitution but would not abide by it. A war with Austria complicated the situation and the leadership of the **Constituent/National** Assembly was replaced by the Convention that abolished monarchy. France was thrown into chaos giving rise to the dictatorship of Napoleon Bonaparte.

Unlike the American Revolution that was purely political, the French Revolution was not only **political** but also socio-economic. It, however, lacked the leadership that could replace the *ancient regime* that it had overthrown. The revolution, therefore, failed.

But a Constitution had been framed. Both the Philadelphia Constitutional Convention and the French National Assembly had done it by going beyond the terms of reference on which they had been set up. Both of them were revolutionary. This did not happen in the **Frankfurt** Parliament of 1848 Prussia, that had been summoned by the monarch and that had framed a constitution for a constitutional monarchy. The monarch refused to accept the Constitution and the Frankfurt Assembly simply **accepted** defeat.

15.5 CONSTITUTIONALISM AND STATE BUILDING

15.5.1 Constitution as a Framework

Historically, therefore, the Constitution of a country has defined the contours of state building. Structurally, it is the framework within which the state and the entire political system operate by determining the limits of power of the sovereign and the rights of the people. Setting up a Constitution – not in the descriptive **sense** but in the normative one – simultaneously achieves two fundamental objectives: **(1)** It separates the state and the civil **society**. **(2)** It frees state authority from the whims of a ruler.

15.5.2 State and the Civil Society

When the state controls the affairs of the civil society the system is totalitarian. In the primitive societies there is no differentiation **between** political control and social authority. In the traditional societies too the dynastic ruler, often in league with the clerical **leadership** and the feudal subordinates, controls social affairs. Karl **Marx** observed that it was not before the eighteenth century that the civil society in Europe became really autonomous. That was the period of developing capitalism and political liberalism. On the other hand crisis of capitalism in the period between the two World Wars gave rise to totalitarian communism and fascism in Europe.

The other kind of problem concerning the relationship between the state and the civil society is one of autonomy of the state **from** the civil society. In societies driven by communal and ethnic extremism sometimes the state becomes subservient to sectional interests. Neutrality of the state power is an essential condition of its stability. Throughout the middle ages, Europe saw religious leaders vying with the secular ones for political hegemony. After the Reformation, European states became involved in bloody religious conflicts. It was in order to detach the state authority from such sectional conflicts that the doctrine of secularism was evolved. The very First Amendment to the United States Constitution, in 1791, laid down that the Congress would not muddle with religious affairs.

Religion, however, is not the only divisive force in a society. Race and language are the two other main causes of discord. The USA has experienced sharp racial conflicts. A number of constitutional amendments since 1868 have tried to reduce this evil and ordinary legislative and executive measures have been taken. In India religion and language have caused great strife. The Constitution of India has adopted secularism as a guiding force. Part XVII of the Constitution proclaimed Hindi and English as the official languages of the Union. States are free to adopt their own official languages for internal use. Members of Parliament are free to speak in any of the Indian languages mentioned in the Eighth Schedule. Religious and linguistic minorities are free to set up their own educational institutions. Freedom of religion is granted to all citizens.

15.5.3 Rule of Law

The concept of Rule of Law was first developed in the United Kingdom to fight arbitrary executive power. It encompassed a **whole** body of customs and traditions, constituting what are called 'the common law,' legislations and judicial decisions. Constitutionalism is actually a subset of the Rule of Law. Its special feature is treating the constitutional law as the highest law of the land.

Pursuit of the rule of law requires an independent judiciary the members of which are expected to be persons of legal knowledge and integrity. By way of applying law the judges interpret it and even expand its scope in the form of 'judge-made laws.' Judicial review, that is, the power to invalidate an ordinary law on the ground of its conflict with the Constitution, is an offshoot of the judiciary's power to **interpret** and apply law. To guarantee the rights of citizens from arbitrary executive action the judiciary applies various 'writs' like *habeas corpus* and *mandamus*,

15.5.4 Army and Bureaucracy

A non-political army and a non-partisan bureaucracy are among the highest requirements of constitutionalism. Members of the armed forces and the bureaucracy are placed under the nominal authority of the chief executive of the country. They are recruited through public examination systems of different kinds. They are expected to obey orders of the **Government** within the confines of law. **Broadly** the army looks after the defence of the country, the police forces look **after** the law and order and the bureaucracy administers the policies of the state. The bureaucracy is the chief link between the state and the people and the chief agent of the state's development activities. The bureaucracy and the army **are** accountable to the political executive that, in a democracy, represents the people.

15.6 CONSTITUTION OF RIGHTS

15.6.1 The Origins

The original meaning of the word 'right' is *appropriate /correct*. The *current meaning of right as entitlement* is derived from its association with *nature*. It is **necessary** to note that the father of the theory of constitutional government, John Locke, was also the father of the theory of natural right. He meant by it the natural **claim/entitlement** of people to certain conditions of existence. He mentioned the right to life and the right to property, defining property in a wide sense including liberty.

This posed a contradiction between the power of the Government and the rights of the people. Rights of the people were assumed to be safe so long as the power of the Government was limited. This theoretical position marked a radical discontinuity with all the previous notions of government. The ancient Greeks spoke of justice. It was the responsibility of the Government to do justice to its people. **Defining** 'justice' was, therefore, the central concern of Greek political theory. In the days of the dynastic monarchies this perception persisted but whatever was issued from the Government, was treated **as** a royal favour. Locke changed the view altogether.

Indeed every idea has its **historical** roots. As early **as 1215** the British aristocracy forced the King to sign a document, that later came to be known as the *Magna Carta*, conceding their demands that there would be no detention of subjects without trial and no collection of taxes without the consent of a Parliament. The King did not respect his commitment. In 1628 the Parliament submitted to the Crown a Petition of Rights that was not immediately granted. The Civil War of 1648 resulted in Charles I losing his head. The Glorious Revolution of 1688 was bloodless. But it resulted in the Declaration of Rights in 1689. Locke built his theory on this revolution.

But the Declaration of Rights itself was not a victory of the concept of natural rights. It issued from the Crown. While issuing the Declaration, however, the Crown set for itself certain limits to its powers. Thus the idea of a limited or 'constitutional' monarchy was born.

It was the American declaration of Independence that asserted the theory of natural rights first. It spoke of 'a people's' entitlement to the right to 'separate and equal status' by the 'Laws of Nature and Nature's God'. The declaration said:

"We hold these truths to **be** self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments is instituted among men, deriving their just powers from the consent **of the** governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying **its foundation** on such principles and organising its powers in such **form, as** to them shall seem most likely effect their safety and happiness".

The declaration of rights was an assertion of a natural collective right – that of a ruled people against what they consider to be an oppressive ruler. The original Constitution of the USA **drafted** in 1787 and enforced in 1789 did not contain any bill of rights. But there was widespread apprehension about the powerful federal Government that was set up by the Constitution. The

leaders of the Philadelphia Constitutional Convention that had **drafted** the Constitution, therefore, assured the people of their **fundamental** rights being incorporated in the Constitution shortly after it came into force. In 1791 the first ten amendments to the US Constitution **incorporated** those rights.

15.6.2 Nature of Rights

The rights that were guaranteed by the first ten amendments were 'natural rights' in the sense that they were drafted in a negative way. They bound the state to respect those rights. But they were individual, and not collective, rights. Subsequently, in the judgement in the **Marbury** versus Madison case of 1803, when the US Federal Supreme Court assumed the power of judicial review, it took upon itself the role of the guardian of the fundamental rights of the US people.

There is, thus, a fundamental assumption of contradiction between the rights of **people** and the power of the state in the liberal democratic theory. It was first removed in the Constitution of the 1936, Constitution of the **former Union** of Soviet Socialist Republics in which the rights were formulated in a positive language implying that it was the obligation of the state to provide for those rights. Constitutional guarantee of the fundamental rights of the citizens, therefore, is a necessity.

Liberal democratic Constitutions in the West have put a premium on political rights because these are concerned with the power of the state. The prevailing economic philosophy of liberal democracy has been *laissez faire* - meaning that, left to themselves the people can take care of their own interests. The state should confine itself to the maintenance of law and order without discriminating the citizens. The 1936 Constitution of the Union of Soviet Socialist Republics put a premium on economic rights, particularly, the right to guaranteed employment on the belief that, without a decent condition of livelihood, political rights are meaningless. The system, however, collapsed in 1990.

During the framing of India's Constitution, the Constituent Assembly of India debated the possibility and desirability of ensuring certain positive fundamental rights. It was, however, considered not feasible within the liberal democratic framework. Following the Irish model, therefore, certain Directive Principles of **State** Policy were laid down with a view to ameliorating the socio-economic conditions of the Indian citizens.

The **major** shortcoming for a system of positive rights is its essentially voluntaristic **nature**. There is no way the state can be sued for failure to implement them. No judicial guarantee can be given for any positive right for the defaulting state may simply plead inability. There can be only political judgement of a state's performance. On the other hand, when a negative right is violated, the state is seen to have transgressed its limit. The court will simply refuse to give effect to a law or an order of the state that it considers ultra vires and people would be free to violate such a law or order.

15.7 SUMMARY

In this unit, you have studied that the concepts of 'nation' and 'state' had witnessed a parallel growth in history, but the two are not necessarily co-extensive. While the state is a territorial concept, the concept of nation has a human dimension. The state is often identified with the concept of 'nation'; at the same time the two concepts **are** interlinked. Nation-building involves

both economic development and psychological integration of the population. In the state-building, the determination of the authority, territorial extent of the spread conformity with the authority are crucial requirements. In this context, constitutionalism is important. The constitutional models of various countries define the parameters of the state-building. Civil society, Rule of Law, Army and Bureaucracy act as accountable institutions in the state-building. Rights are also an inseparable part of state building, as this ensures justice to the people of the nation, and guarantees their **fundamental** rights. Rather, the preservation of rights and promotion of interests of the population constitutes the core of state-building.

15.8 EXERCISES

- 1) How do you distinguish between the concepts of 'state building' and 'nation building'? What are their respective components?
- 2) Discuss the meaning of 'constitutionalism.' Is there any contradiction between the concepts of 'constitutional government' and 'democracy'?
- 3) Discuss the constitutional models of the major Western democracies.
- 4) Discuss the evolutionary and the revolutionary modes of the growth of constitutionalism. What are the structural implications of their differences?
- 5) What is the relevance of constitutionalism to state building today?
- 6) What is the relevance of rights to constitutionalism? How do Constitutional systems protect rights?

SUGGESTED READINGS

Ahmed, N. and Norton, P., (eds) *Parliaments in Asia*, London: **Frank Cass**, 1999.

Alexis de **Tocqueville**., *Democracy in America*, New York: **Doubleday**, Garden City, 1969.

Almond, G. and Bingham Powell, **G.**, *Comparative Politics Today: A Worldview*, 7th edn, New York: HarperCollins, 20

Anderson, Benedict., *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London: Verso, 1991.

Andrews, William G., *Constitutions and Constitutionalism*, Delhi: Affiliated East-West Press Private Ltd, 1971.

Apter David E., *Introduction to Political Analysis*, New Delhi: **Prentice Hall** of India, 1970.

Balakrishnan, Gopal., (ed.) *Mapping the Nation*, London: Verso, 1996.

Ball, T. and Dagger, R., *Political Ideologies and the Democratic Ideal*, 2nd edn, New York.: **HarperCollins**, 1995.

Batra T.S., *International Institutions*, New Delhi: Bookhive, 1987.

Bayart, J.-F., *The State in Africa: the Politics of the Belly*, Harlow and New York: **Longman**, 1993

Blomstrom, Magnus. and **Hettne, Bjorn.**, *Development theory in transition: The dependency debate and beyond*, London: Zed Books, 1984.

Bratton, M. and van de **Walle, N.**, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, Cambridge and New York: Cambridge University Press, 1997.

Breuilly, J., *Nationalism and the State*, 2nd edn, New York: St. **Martin's Press**, 1993.

Brooker, P., *Twentieth-Century Dictatorships: The Ideological One-Party States*, Basingstoke: Macmillan, 1995.

Burgess, M., and Gagnon, A., *Comparative Federalism and Federation: Competing Traditions and Future Directions*, Hemel Hempstead: Harvester **Wheatsheaf**, 1993.

Calhoun, Craig., *Nationalism*, **Buckingham**: Open University Press, 1997.

Chandhoke, Neera., *State and Civil Society*, New Delhi: Sage **Publications**, 1995.

Chaube, **Shibani Kinkar.**, *Constituent Assembly of India: Springboard of Revolution*, First Edition, New Delhi: People's Publishing House, 1973.

Chazan, N, et al., *Politics and Society in Contemporary Africa*, 3rd edn, Boulder, Colorado: Lynne Rienner, 1999.

Chilcote Ronald H., *Theories of Comparative Politics*, Boulder, Colorado: **Westview** Press, 1981.

Cigler, C. and Loomis, B., (eds) *Interest Group Politics*, 5th edn, Washington, D.C.: **Congressional Quarterly Papers**, 1995.

Cohen, Jean L., and Andrew Arato. *Civil Society and Political Theory*, **Cambridge: MIT** Press, Mass., 1997.

Dahl, R., *Modern Political Analysis*, 5th edn, **Englewood Cliffs, N.J: Prentice** Hall, 1991.

Dalton, R. and **Wattenberg**, M., *Politics Without Partisans: Political Change in Advanced Industrial Democracies*, Oxford and **New** York: Oxford University Press, **2000**.

Diamond, **Larry**., *Developing Democracy: Toward Consolidation*, Baltimore: Johns Hopkins University Press, 1999.

Duchacek, I., 'Constitutions/Constitutionalism' in *The Blackwell Encyclopaedia of Political Science*, ed. V. Bogdanor, Oxford and Cambridge, Mass: **Blackwell**, 1991, pp.142-4.

Dunnleavy, Patrick and Brendan **O'Leary**., *Theories of the State*, London: Macmillan Education, 1987.

Easton, David., *The Political System*, New York: Alfred **A. Knopf**, 1981.

Elgie, R., *Political Leadership in Liberal Democracies*, **Basingstoke**: Macmillan, 1995.

Finer, S., **Comparative** Government, **Harmondsworth**: Penguin, 1974.

Frank McDonald, and Stephen Dearden., (eds.), *European Economic Integration*, Oxford: Oxford University **Press**, 1992.

Gellner E., *Nations and Nationalism*, Oxford: Blackwell, 1983.

Gibson, J. and Hanson, P., (eds) *Transformation from Below: Local Power and the Political Economy of Postcommunist Transitions*, Aldershot and Brookfield, Vt: Edward **Elgar**, 1996.

Gills, B., and Rocamora, J. and Wilson, R., (eds) *Low Intensity Democracy: Political Power in the New World Order*, Boulder, Colorado and London: Pluto, 1993.

Gough, Katherine & **H.P. Sharma**., (eds) *Imperialism and Revolution in South Asia*, New York: Monthly Review Press, 1973.

Greenfeld, Liah., 'Encyclopedia of Nationalism', Volume 1, London: Academic Press, **2001**. pp.883-898.

Guibernau Montserrat., *Nationalisms – The Nation State and Nationalism in the Twentieth Century*, London: Polity Press, 1996.

Hague, Rod. And **Martin Harrop**., *Comparative Government and Politics: An Introduction*, 5th edn, New York: Palgrave, 2001.

Harris, **Errol E.** and James A **Yunker.**, (eds) *Towards Genuine Global Governance: Critical Reactions*, in "Our Global Neighbourhood", Westport, **CT: Praeger**, 1999.

Hechter, M., *Containing Nationalism*, Oxford and New York: Oxford University Press, **2000**.

David Held., "Democracy, the Nation-state and the Global System" in his "Political Theory Today", London: Polity Press, 1991.

David Held, **et.al**, *Global Transformations Politics, Economics and Culture*, London: Polity press, 1999.

Held, D., *Democracy and the Global Order*, Cambridge: Polity, 1995.

Held, D., *Models of Democracy*, Cambridge: Cambridge University Press, 1996.

Hettne, **B.**, (ed) *Globalism and the New Regionalism*, Basingstoke: Macmillan, 1999.

Heywood, Andrew., *Political Ideologies*, 2nd edn, Basingstoke: Macmillan, 1998.

Heywood, Andrew., *Politics*, London: Macmillan, 1997.

Hobsbawm E.J., *Nations and Nationalism since 1780*, Cambridge: Cambridge University Press, **1990**.

Howard J. **Wiarda.**, (ed.) *New Directions in Comparative Politics*, Boulder, Colorado: **Westview** Press, 1985.

Hutchinson, John. and Anthony D Smith., *Nationalism*, Oxford Readers: Oxford University Press, 1994.

Kaviraj, Sudipta. and **Sunil Khilnani.**, *Civil Society*, Cambridge: Cambridge University Press, **2002**.

Ohmae, K., *The **Borderless** World*, London: Collins, 1995.

Parekh, B., *Gandhi's Political Philosophy: A Critical **Examination***, Houndmills: Macmillan, 1989.

Putnam, Robert., *Making Democracy Work: Civic Traditions in Modern Italy*, New Jersey: Princeton University Press, 1993.

Roy C. Macridis, (ed), *Comparative Politics, Notes and Readings*, 1986.

Sarangi, Prakash., *Liberal Theories of the State: Contemporary Perspective*, New Delhi: **Sterling**, 1996.

Sassen, S., *Losing Control? Sovereignty in an Age of Globalisation*, New York: Columbia University Press. 1996.

Smith, A.D., *Theories of **Nationalism***, London: Duckworth, 1971.

Strong, C.F. *Modern Political Constitutions*, London: **Sidgwick and Jackson**, 1963.

Tornquist, Olle., *Politics and Development: A critical introduction*, New Delhi: sage publications, 1999.

Wallerstein, Immanuel., *The Modern World System*, New York: Academic Press, 1974, 1979. Two Vols.

Walters, R. and Blake, D., *The Politics of Global Economic Relations*, 4th edn., Englewood Cliffs, NJ: Prentice Hall, 1992.

Willetts, Peter., 'Transnational actors and international organizations in global politics' in Baylis, John and Smith, Steve (eds.), *The Globalisation of World Politics: An Introduction to international relations*, 2nd edn., Oxford: Oxford University Press, 2001.

