Indian Government And Politics

DEPOL123

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LOVELY PROFESSIONAL UNIVERSITY

INDIAN GOVERNMENT AND POLITICS

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CONTENT

Unit 01: Making of the Indian Constitution

CONTENTS

Objectives

It is salient to mention that the Constitution on India is product of long drawn process and deliberations. This Unit deals with some issues relating to the making of the Indian Constitution during the colonial era. After going through this Unit, you will be able to learn about the:

1. explain the meaning and definitions of constitution.
2. analyse the functions of Constitution.
3. stages of constitution making prior to the formation of Constituent Assembly.
4. analyse some important acts passed by the British administration before the formation of Indian Constitution.
5. explain various features of the Constitution that have their roots in the British rule.
6. critically analyse Simon Commission.

Introduction

Indian constitutional law is of immense historical, practical, and theoretical significance. Almost all the issues that arise in the course of thinking about law in modern constitutional democracies find their most intense expression in the evolution of Indian constitutional law. India's Constitution was the framework through which the world's largest and one of its most contentious democracies was brought into being.If we will see, the general idea of a constitution and of constitutionalism originated with the ancient Greeks and especially in the systematic, theoretical, normative, and descriptive writings of Aristotle. He is regarded as the father of Political Science. In his famous works like Politics, Nicomachean Ethics, Constitution of Athens, and others, Aristotle used the Greek word for constitution (*politeia*) in several different senses. The simplest and most neutral of these was 'the arrangement of the offices in a polis' (state).

The word 'Constitution' is developed from the word 'Constitute', which means 'to frame or to establish or to compose'.It has derived from a Latin word "salus populi suprema lex" meaning 'welfare of the people is the supreme law'. Therefore, Constitution is the body of doctrines and practices that form the fundamental organizing principle of a political state. Itrepresents the legal fundamentals of a country. It outlines the rules and principles that are fundamental in the governance of the country. A constitution is a set of fundamental legal-political rules that:

1. are binding on everyone in the state, including ordinary lawmaking institutions;

2. concern the structure and operation of the institutions of government, political principles and the rights of citizens;
3. are based on widespread public legitimacy;
4. are harder to change than ordinary laws (e.g. a two-thirds majority vote or a referendum is needed);
5. as a minimum, meet the internationally recognized criteria for a democratic system in terms of representation and human rights (Bulmer, 2017).

In addition, the purpose of the Constitution is to maintain harmonious links between the individuals and the states, on the one hand, and between the different organs of the government on the other. The Constitution reflects the will and wish of the people. There are three pillars of the Constitution: Legislature, Executive and Judiciary. This is known as 'Doctrine of Separation of Power' as advocated and propagated by Lord Montesquieu. There are two types of Constitution: Rigid and Flexible Constitutions.

1.1 Definitions of Constitution

There is no consensus among the scholars, practitioner and theoreticians on an exact, precise or concise definition of a constitution. So, they have defined it in their respective frameworks. A few definitions are following:

Aristotle, ancient Greek philosopher and scientist, one of the greatest intellectual figures of Western history, defined the constitution as 'the way of life the state has chosen for itself'.

Maciver argues constitution is 'the rules which govern the State'.

Lord Byrce, who was British politician, diplomat, and historian, states that a constitution 'consists of those of its rules or laws which determine the form of the government and the respective rights and duties of the citizens towards the government'.

Gilchrist argues that 'It is that body of rules, or laws written or unwritten which determines the organization of government, the distribution of power to the various organs of the government and the general principles on which these powers are to be exercised'.

K.C. Wheare argued that the term constitution commonly has two connotations: first it describes the whole system of a government of a country; secondly it enumerates a bunch of rules that establish and regulate the government. One of the famous constitutional historians of America, C.H. McIlwain has also defined constitution in two ways: firstly, a constitution is a nation's actual institutions and their development; secondly "A constitution is a document, a code of fundamental law, struck off at a particular historic movement."

In short, a constitution is a rulebook of a nation, codifying rule of law. In the minimal sense, a constitution consists of rules or norms which enumerate the structure, powers and limitations on the governments.

1.2 The Functions of a Constitution

The very idea of the constitution entails that the government should be limited in its powers and its authority and legitimacy should depend on the observation of these limitations. There is no denying the fact, that modern states are very powerful and possess monopoly over means of force and coercion. A history of nations provides ample examples that the state can misuse its powers and can become tyrannical in exercise of its powers. A need therefore arises to put a limitation on the states' power. Constitution plays such a role.

1. Constitutions can declare and define the 'boundaries of the political community'. These boundaries can be territorial (the geographical borders of a state, as well as its claims to any other territory or extra-territorial rights) and personal (the definition of citizenship).
2. Constitutions can express the 'identity' and 'values' of a national community. Constitutiondefines the national flag, anthem and other symbols.
3. Constitutions are needed to control the destabilising swings generated by the popular passions. It saves the society from the ups and downs of every day politics.
4. Constitutions can declare and define the rights and duties of citizens.

5. Constitutions can divide or share power between different layers of government or sub-state communities.
6. As an instrument of social transformation, constitutions play a very important role. They provide means to change the society in a peaceful and democratic manner without resorting to violence.
7. Another important function of the constitution is that it can declare the official religious identity of the state and demarcate relationships between sacred and secular authorities (Bulmer 2017).

1.3 Evolution of the Indian Constitution 1858-1935

Like every other constitution, the Indian constitution also seeks to establish the fundamental organs of government and administration lay down their structure, composition, powers and functions. It embodies the provisions providing basic democratic rights of human beings including the persons who are not the citizens of the country. However, various constitutional features and polity have their roots in the British rule. It must be underlined that the features and values which were introduced during the colonial period were meant to serve the colonial interests in contrast the purpose of the provisions of the Constitution made by the Constituent Assembly of India. The measures by the colonial authorities to introduce the institutions of governance were indeed responses to the protests against the British. Following are the acts passed by the British government in a chronological order:

1.4 The Company Rule (1773-1858)

Regulating Act of 1773

The regulating Act of 1773 was passed by the British Parliament to control the territories of the East India Company majorly in Bengal. It was the 'first intervention by the British government in the company's territorial affairs and marked the beginning of a takeover process that was completed in 1858'.

The occasion for the Regulating Act was the company's misgovernment of its Bengal lands, brought to a crisis by the threat of bankruptcy and a demand for a government loan. Basically, the East India Company was in severe financial crisis and had asked a loan of 1 million pounds from the British government in 1772. Even allegations of corruption and nepotism were rampant against company officials.This act is of great constitutional importance as:

a) It was the first step taken by the 'British Government to control and regulate the affairs of the East India Company in India';
b) It recognised, for the first time, the 'political andadministrative functions' of the Company; and
c) It laid the foundations ofcentral administration in India.

Provisions of the Regulating Act

I. It designated the 'Governor of Bengal' as the 'Governor-General of Bengal' and created an 'Executive Council' of four members to assist him.
II. Warren Hastings was appointed as the Governor-General of the Presidency of Fort William.
III. This act permitted the company to retain its 'territorial possessions' in India but sought to regulate the activities and functioning of the company. It did not take over power completely, hence called 'regulating'.
IV. The Governors in Councils at Madras and Bombay were brought under the control of Bengal, especially in matters related to foreign policy. Now, they could not wage war against Indian states without Bengal's approval.

V. A Supreme Court of Judicature was established at Calcutta with Sir Elijah Impey as the first Chief Justice. Judges were to come from England. It had 'civil and criminal jurisdiction' over the British subjects and not Indian natives.

VI. It strengthened the control of the British Government over the Companyby requiring the Court of Directors (governing body of the Company) toreport on its revenue, civil, and military affairs in India.

Pitt's India Act of 1784

Pitt's India Act (1784), named for the British Prime Minister William Pitt the Younger, and established the dual system of control by the British government and the East India Company. This act continued in effect until 1858.

Features of the Act

a) This act established the British Crown's authority in the civil and military administration of its Indian territories. Commercial activities were still a monopoly of the Company.

b) It allowed the Court of Directors to manage the commercial affairs but created a new body called Board of Control to manage the political affairs. Thus, it established a system of double government.

c) It empowered the Board of Control to supervise and direct all operations of the civil and military government or revenues of the British possessions in India.

d) Hence, the act was so significant for two reasons: first, the Company's territories in India were for the first time called the 'British possessions in India'; and second, the British Government was given the supreme control over Company's affairs and its administration in India.

e) Charter Act of 1833

f) The Charter Act of 1833 was passed in the British Parliament which renewed the East India Company's charter for another 20 years. This was also called the 'Government of India Act 1833' or the 'Saint Helena Act 1833'. This Act was the final step towards centralisation in British India.

Features:

a) The 'Governor-General of Bengal' was re-designated as the 'Governor-General of India'. This made Lord William Bentinck the first Governor-General of India.

b) It deprived the governor of Bombay and Madras of their 'legislative powers'. The Governor-General of India was given 'exclusive legislative powers' for the entire British India. The laws made under the previous acts were called as Regulations while laws made under this act were called as Acts.

c) The company's commercial activities were closed down. It was made into an administrative body for British Indian possessions.

d) The Charter Act of 1833 attempted to introduce a system of 'open competition' for selection of civil servants, and stated that the Indians should not be debarred from holding any place, office and employment under the Company. However, this provision was negated after opposition from the Court of Directors.

Charter Act of 1853

This was the last of the series of Charter Acts passed by the BritishParliament between 1793 and 1853.This Act was passed in the British Parliament to renew the East India Company's charter. Unlike the previous charter acts of 1793, 1813 and 1833 which renewed the charter for 20 years; this act did not mention the time period for which the company charter was being renewed. It has constitutional significance as well.

Features:

a) For the first time, the legislative and executive functions of the Governor-General's council were separated.
b) This act served as the foundation of the modern parliamentary form of government. The legislative wing of the Governor-General's Council acted as a parliament on the model of the British Parliament.
c) It extended the company's rule for an indefinite period, unlike the previous charter acts. Thus, it could be taken over by the British government at any time.
d) It introduced an open competition system of selection and recruitment of civil servants. The covenanted civil service was thus thrown open to the Indians also. Accordingly, the Macaulay Committee (the Committee on the Indian Civil Service) was appointed in 1854.
e) For the first time, local representation was introduced into the legislative council in the form of four members from the local governments of Bengal, Bombay, Madras and North Western Provinces.

1.5 The Crown Rule (1858–1947)

If the transfer of rule from the East India Company was a reaction to revolt of 1857, subsequent Acts were the British response to the national movement against them. The main purpose of doing so was to continue colonial rule and to adapt it to the changing challenges. With the transfer of power from the East India Company to the British Crown, the British Parliament got involved in managing affairs of India. For this purpose it introduced different rules which laid the foundation of our constitution or provided a background to it.During this period the British Parliament introduced Acts, Let's us a look at them in a chronological way.

Government of India Act of 1858

This significant Act was enacted in the wake of the Revolt of 1857, alsoknown as the First War of Independence or the 'sepoy mutiny'. The Government of India Act 1858 was an Act of the British parliament that transferred the government and territories of the East India Company to the British Crown. The company's rule over British territories in India came to an end and it was passed directly to the British government.

Features of the Act

a) The Government of India Act 1858 was an Act of the British parliament that transferred the government and territories of the East India Company to the British Crown. The company's rule over British territories in India came to an end and it was passed directly to the British government.
b) It ended the system of 'double government' by abolishing the 'Board of Control and Court of Directors'.
c) It formed a new office, Secretary of State for India, vested with complete authority and control over Indian administration. The secretary of state was a member of the British cabinet and was responsible ultimately to the British Parliament.
d) It set-up a 15-member Council of India to assist the secretary of state for India. The council was an 'advisory body'. The secretary of state was made the chairman of the council.
e) It constituted the secretary of state-in-council as a body corporate, capable of suing and being sued in India and in England.

Indian Councils Act of 1861:

After the great revolt of 1857, the British Government felt the necessity ofseeking the cooperation of the Indians in the administration of their country.In pursuance of this policy of association, three acts were enacted by theBritish Parliament in 1861, 1892 and 1909The Indian Councils Act 1861 was an act of the British Parliament that made significant changes in the Governor-General's Council. The Act is an important landmark in the constitutional and political history of India.

Features of the Act:

a) It made a beginning of 'representative institutions' by associating Indians with the law-making process. It thus provided that the viceroy should nominate some Indians as 'non-official members' of his expanded council. In 1862, Lord Canning, the then viceroy, nominated three Indians to his legislative council, these were, the Raja of Benaras, the Maharaja of Patiala and Sir Dinkar Rao.

b) It also provided for the establishment of new legislative councils for Bengal, North-Western Frontier Province (NWFP) and Punjab, which were established in 1862, 1866 and 1897 respectively.

c) The Act empowered the Governor-General to delegate special task to individual members of the Executive council and hence all members have their own portfolio and death with their own initiative with all but the most important matters. This was the first beginning of 'Portfolio system' in India.

d) No distinction was made between the central and provincial subject. But measures concerning public debt, finances, currency, post-office, telegraph, religion, patents and copyrights were to be ordinarily considered by the Central Government.

e) The Governor-General also had the power to promulgate ordinances without the council's concurrence during emergencies.

Indian Councils Act 1892

The Indian Councils Act 1892 was an act of the British Parliament that increased the size of the legislative councils in India. The Indian Councils Act 1892 was an act of the British Parliament that increased the size of the legislative councils in India. One of their demands was the reform of the legislative councils. They also 'wanted the principle of the election instead of nomination'.

Features of the Act

a) The act increased the number of additional or non-official members in the legislative councils as follows:

Central Legislative Council: 10 – 16 members

Bengal: 20 members

Madras: 20 members

Bombay: 8 members

Oudh: 15 members

North Western Province: 15

b) In 1892, out of 24 members, only 5 were Indians.

c) It increased the functions of legislative councils and gave them the power of discussing the budget and addressing questions to the executive.

d) It also provided for the nomination of some non-official members of the:

   i. Central Legislative Council by the viceroy on the recommendation of the provincial legislative councils and the Bengal Chamber of Commerce, and,

   ii. That of the Provincial legislative councils by the Governors on the recommendation of the district boards, municipalities, universities, trade associations, zamindars and chambers.

e) Governor General was empowered to fill the seat in the case of Central legislative and by the Governor in the case of provincial legislature.
f) The legislative councils were empowered to make new laws and repeal old laws with the permission of the Governor-General.

Indian Councils Act 1909 (Morley-Minto Reforms)

Constitutional changes in British India, introduced to increase Indian participation in the legislature. They were embodied in the Indian Councils Act (1909) following discussions between John Morley, Secretary of State for India (1905–14), and Lord Minto, viceroy (1905–10). That is why it is commonly known the 'Morley-Minto Reforms' after the Secretary of State for India John Morley and the Viceroy of India, the 4th Earl of Minto.

Salient Features

a) The legislative councils at the Centre and the provinces increased in size.
   i. Central Legislative Council – from 16 to 60 members.
   ii. Legislative Councils of Bengal, Madras, Bombay and United Provinces – 50 members each.
   iii. Legislative Councils of Punjab, Burma and Assam – 30 members each.
b) The legislative councils at the Centre and the provinces were to have four categories of members as follows:
   i. Ex-officio members: Governor-General and members of the executive council.
   ii. Nominated official members: Government officials who were nominated by the Governor-General.
   iii. Nominated non-official members: nominated by the Governor-General but were not government officials.
   iv. Elected members: elected by different categories of Indians.
c) It introduced a system of 'communal representation' for Muslims byaccepting the concept of 'separate electorate'. Under this, the Muslimmembers were to be elected only by Muslim voters. Hence, the Act 'legalized communalism'. Lord Minto came to be known as 'theFather of Communal Electorate'.
d) The members given right to discuss matters of the public interest however, the house was not binding on the government.Rules were also framed under the act for the discussion of matters of general public interest in the legislative councils.
e) No discussion was permitted on any subject not within legislative competence of the particular legislature any matter affecting the relations of the Government of India with a foreign power or a native state, and any matter under adjudication by a court of law.

Government of India Act 1919

The Government of India Act was passed in British Parliament, which was mainly based on the recommendations of the combined report of the Secretary of the State, Edwin Montagu and the Governor General/Viceroy of India, Lord Frederic Thesiger (commonly known as Lord of Chelmsford). Therefore, the act was based on the recommendations of a report, which was prepared by Edwin Montagu, the then Secretary of State for India, and Lord Chelmsford, India's Viceroy between 1916 and 1921. The Act came into force in 1921.

Features of the Act:

a) It relaxed the central control over the provinces by demarcating and separating the central and provincial subjects. The central and provincial legislatures were authorised to make

laws on their respective list of subjects. However, the structure of government continued to be centralised and unitary.

b) It further divided the provincial subjects into two parts, i.e., transferred andreserved.

I. The transferred subjects were to be administered by the governor with the aid of ministers responsible to the legislative Council.

II. The reserved subjects, on the other hand, were to be administered by the governor and his executive council without being responsible to the legislative Council.This dual scheme of governance was known as 'dyarch' a term derived from the Greek word di-arche which means double rule. However, this experiment was largely unsuccessful.

c) A bicameral legislature was set up with two houses – Legislative Assembly (forerunner of the Lok Sabha) and the Council of State (forerunner of the Rajya Sabha).

d) This act provided for the first time, the establishment of a public service commission in India.

e) The act also provided that after 10 years, a statutory commission would be set up to study the working of the government. This resulted in the Simon Commission of 1927.

f) It also created an office of the High Commissioner for India in London.

g) It extended the principle of communal representation by providingseparate electorates for Sikhs, Indian Christians, Anglo-Indians andEuropeans.

Simon Commission

The then largest political party in the region Indian National Congress opposed the provisions of the Government of India Act, 1919 and launched non-cooperation movement. And, in response the British Conservative government under Stanley Baldwin appointed the Simon Commission in November 1927 to review the functioning of the Act of 1919.

The commission consisted of seven members – four from Conservative party, two from labour party, and one Liberal – under the joint chairmanship of the distinguished Liberal lawyer, Sir John Simon on his name this commission has been titled, and Clement Attlee, the future prime minister. It met a hostile reception in India, and was boycotted there because it had no Indian members. In 1927, the Congress Party decided to boycott the Commission at Madras session. The Muslim League led by M. A. Jinnah and Justice Party in South also boycotted it.

When the Commission landed in February 1928, there were mass protests, hartals and black flag demonstrations all over the country. The police resorted to lathi charges to suppress the movement. Even senior leaders like Pandit Nehru were not spared.In Lahore, LalaLajpatRai, who was leading the demonstration against the Simon Commission, was brutally lathi-charged. He died later that year due to injuries sustained then.

The Simon Commission submitted its report in 1930. The British government brought up the Simon Commission Report for discussion in the Round Table Conference in London.It recommended the 'abolition of dyarchy, extension of responsible government in the provinces, establishment of a federation of British India and princely states, continuation of communal electorate' and so on.

To consider the proposals ofthe commission, the British Government convened three round tableconferences of the representatives of the British Government, British Indiaand Indian princely states. On the basis of these discussions, a 'White Paperon Constitutional Reforms' was prepared and submitted for the considerationof the Joint Select Committee of the British Parliament. Therecommendations of this committee were incorporated (with certain changes) in the next Government of India Act of 1935.However, the British Prime Minister issued a "Communal Award" on August 4, 1932, which underlined that before discussion of the Simon Commission Report there Hindus and Muslims have to agree to some agreement for solution. It noted that the division between Hindus and Muslims had widened after the introduction of the Government of India Act, 1919. Following the discussion in the Round Table Conference, the British Government passed Government of India Act, 1935, which provided for separate representations to Muslims, Sikhs, the Europeans, Indian Christians and Anglo-Indians.

On the one side, Dalit leaders, especially Bhimrao Ramji Ambedkar, supported the proposal, believing it would allow Dalits to advance their interests. Mahatma Gandhi, on the other side, understood this move and knew that this was an attack on Indian nationalism. Therefore, Mahatma

Gandhi in prison announced a fast unto death, which he began on September 18. He objected to the provision of separate electorates for the Dalits. Gandhi opposed the British since he felt that their policies would divide the Hindu society.Though Ambedkar could hold onfor a few days in face of the growing public pressure to compromisewith Gandhi, he was persuaded as a 'true satyagrahi'to meet Gandhi in view of the willingness of the Mahatmato offer more reserved seats to the untouchables in return of theirrenunciation of the separate electorate system.

Thus, consequentupon the signing of the Poona Pact, Gandhi broke his fast on26 September 1932 with a seeming resolve for a more vigorous pursuitin the direction of the emancipation of the untouchables.A few days after the Poona Pact, Gandhi inspired his trusteddisciple G.D. Birla to set up the All India Anti-UntouchabilityLeague with a massive fund to work for the eradication of untouchability.Professing that untouchability is a crime againsthumanity and God; Gandhi initiated a series of programmes likeorganising Untouchability Abolition Week and so forth.

In addition, these developments took place in the backdrop of clamoring for formation of constitution for Indians by themselves. On May 27th 1927, Motilal Nehru at the Bombay session of the Congress moved a resolution calling upon the Congress Working Committee to frame a constitution for India in consultations with the members of central and provincial legislative assemblies. In pursuance of this proposal a committee was set up under the chairmanship of Motilal Nehru, which prepared a report in 1928 known as Nehru Report. This report was the first attempt by Indians to frame a constitution for themselves in the conference of the established All India parties (except the Justice Party in Madras and Unionist Party in Punjab). The Nehru Report demanded universal suffrage for adults and responsible government both in the centre and the provinces.

Government of India Act 1935

The Government of India Act was passed by the British Parliament in August 1935. It was the longest act enacted by the British Parliament at that time as it contained 321 sections and 10 schedules. So, it was divided into two separate acts namely, the Government of India Act 1935 and the Government of Burma Act 1935. The act gave new dimensions to the affairs of the country by the development of an All India Federation, Provisional autonomy and the removal of the dyarchy. It was also the last constitution of British India, before the Indian subcontinent was divided into two parts-India and Pakistan in August 1947. The act was implemented and formed from the sources like the Simon Commission Report, the three roundtable conferences etc. which were earlier declined by the government. The Act proposed various amendments in context to the act earlier framed in the year 1919. The Act was based on:

I. Simon Commission Report;
II. The recommendations of the Round Table Conference;
III. The White Paper published by the British government in 1933;
IV. Report of the Joint Select Committees.

Features of the Act

a) It provided for the establishment of an All-India Federation consisting of provinces and princely states as units. The Act divided the powers between the Centre and units in terms of three lists:

   I. Federal List (for Centre, with 59 items),
   II. Provincial List (for provinces, with 54 items), and
   III. The Concurrent List (for both, with 36 items). Residuary powers were given to the Viceroy. However, the federation never came into being asthe princely states did not join it.

b) This Act introduced a system of 'Provincial Autonomy' into the provinces in place of the dyarchy system. This time dyarchy was not introduced at the state level it only introduced at the central level.

c) It introduced bicameralism in six out of eleven provinces. Thus, thelegislatures of Bengal, Bombay, Madras, Bihar, Assam and the UnitedProvinces were made bicameral consisting of a legislative council (upperhouse) and a legislative assembly (lower house). However, manyrestrictions were placed on them.

d) It further extended the 'principle of communal representation' by providingseparate electorates for depressed classes (scheduled castes), women andlabour (workers).

e) A federal court was established after the recommendation of this Act. This court was introduced after two years of the passing of this Act, i.e., 1937.

f) This Act provides the recommendation for the establishment of the Reserve Bank of India to control the regulation of currencies and credits of this country.

g) This Act introduced the 'extension' of the franchise. Approximately 10% of the total population had the right to vote to appoint representatives to this legislature. The Act did not hold its hand over the communal electorates but it had extended it holds. For the first time, the direct election was introduced in India with the help of this Act.

h) It abolished the Council of India, established by the Government of IndiaAct of 1858. The secretary of state for India was provided with a team ofadvisors.

i) The Indian Council that was established by the Government of India Act, 1858 was abolished by this Act and in place of that council, it proposed the appointment of Secretary of State and his team which could not be more than six members and could not comprise of members less than three. The power of Secretary of State got diminished and the Governor-General became more powerful than him after the establishment of provincial autonomy through this Act.

Summary

The Indian Constitution is, in a significant sense, a cosmopolitan constitution.It was a cosmopolitan constitution in its fidelity to the universal principles of liberty, equality, and fraternity. But it is also cosmopolitan constitution in a second sense. Its text and principles, its values and its jurisprudence have been situated at the major cross-currents of global constitutional law.The making of Indian Constitution did not emerge overnight; it evolved gradually during the British rule. So, the colonial era consisted of two phases, i. e., 1973 to1958 and 1958 to1935.With the 'transfer of power' from the Company to the British Crown, the British government introduced diverse elements of polity and governance through different Acts. In the year 1909, the 'Morley-Minto Reforms'was introduced the provision of'communal representation'. When the Communal Award was announced in 1932; it wasstaunchly opposed by the leaders of the Indian National Movement, particularly in case of the Depressed Classes. Gandhi's fast unto death which resulted in the 'Poona Pact'. It did abolition of the separate electorate but in giving the reservation to the depressed classes in the provincial legislature.

Consequently, the Government of India Act of 1935 came into being after several parleys between the Indian national leaders and Britain. It contemplated a federation consisting of British Indian Provinces and native states. It introduced bicameral legislatures in six Provinces. It demarcated legislative power of the Centre and the Provinces through three lists: the Central List, the Provincial List and the Concurrent List.

Keywords

Autonomy: The condition of being autonomous; self-government or the right of self-government. A self-governing (to some certain extent) is community.

Bill: Draft law presented to the legislature for enactment

Constitution:A constitution is the fundamental law or the basic law of a country. It determines the fundamental political values and principles of the government, rules of procedure of that

government, rights and obligations of the citizenry and also sets forth methods to ensure accountability of governmental branches.

Constitution-making: The whole process of making a constitution.

Deliberation: The fair consideration of all positions, guided by the values of democracy and the general welfare, rather than by populism and crude bargaining on the part of narrow interest groups.

Enact (enactment): Pass a law (including a constitution).

Ratify(ratification): To approve an act done by someone else, and thus to have some legal effect, or to bind oneself. A country for which a representative has signed a treaty will often not be bound until it is ratified by some body - perhaps the legislature. In constitution-making a referendum might be required so that the people can ratify the constitution.

Ordinances: Provisional law made by the executive under the authority of the constitution and not of another statue.

Parliament:A legislature that formulates laws adopts the budget and forms the government in a parliamentary system of governance. It also plays the role of making the executive of the government (cabinet) accountable and scrutinizes government policies and programs.

Province/Provincial: A term to disrobe a territorial constituent unit within a federation.

Revenue sharing: Arrangements for sharing revenue between orders of government, usually from the federal government to its constituent units according to an established formula or practice.

Reservation:A process of positive discrimination to ensure adequate representation of marginalized groups in legislative and executive positions.

Self-government: The ability of peoples to govern themselves according to their values, cultures and traditions. In its wider sense, this also refers to institutions of local government in a federal or unitary system.

Self Assessment

1. Which one of the following Acts provided the setting up of a Board of Control in Britain, through which the British Government could fully control the British East India Company's civil, military and revenue affairs in India?

A. Regulating Act of 1773

B. Pitt's India Act of 1784

C. Charter Act of 1833

D. Government of India Act of 1858

2. Which of the following Act of British India designated the Governor-General of Bengal?

A. Regulating Act, 1773

B. Pitt's India Act of 1784

C. Charter Act of 1793

D. Charter Act of 1813

3. During the period of British rule in India, the rules made under which one of the following were known as the Devolution Rules?

A. Government of India Act, 1919

B. Indian Councils Act, 1909

C. Indian Councils Act, 1892

D. Government of India Act, 1935

4. Which of the following British Act introduces Indian Civil Service as an open competition?

A. Charter Act of 1793

B. Charter Act of 1813

C. Charter Act of 1833

D. Charter Act of 1853

5.Which one of the following pairs is correctly matched?

A. Indian Councils Act, 1892: Principle of Election

B. Indian Councils Act, 1909: Responsible Government

C. Government of India Act, 1919: Provincial Autonomy

D. Government of India Act, 1935: Dyarchy in Stat

6. Which of the following British Act established Public Service Commission?

A. Government of India Act, 1919

B. Government of India Act, 1935

C. Indian Council Act, 1909

D. Act of 1892

7.Partially responsible governments in the provinces were established under which one of the following Acts?

A. The Government of India Act, 1919

B. The Government of India Act, 1935

C. Indian Councils Act, 1909

D. Indian Councils Act, 1892

8.Which one of the following Acts laid the foundation of the British Administration in India?

A. Pitt's India Act, 1784

B. Indian Councils Act, 1861

C. Indian Councils Act, 1892

D. Regulating Act, 1773

9.With reference to the period of British Rule in India, Indian Statutory Commission is popularly known as:

A. Cabinet Mission

B. Simon Commission

C. Hunter Commission

D. Sadlar Commission

10.Who was the first Governor-General of Bengal?

A. Lord Warren Hastings

B. Lord William Bentinck

C. Lord Mayo

D. Robert Clive

11.Which of the following was the impact of 1857 revolt?

A. Doctrine of Lapse was withdrawn

B. End of Peshwaship and the Mughal rule

C. Control of Indian administration was passed on to the British Crown

D. All of the above

12.When was the White paper based on the recommendations of the Third Round Table Conference published?

A. 1919

B. 1931

C. 1933

D. 1935

13.Which of the following British Act established Public Service Commission?

A. Government of India Act, 1919

B. Government of India Act, 1935

C. Indian Council Act, 1909

D. Act of 1892

14.During the British Rule in India, who was the first Indian to be appointed as Law Member of the Governor General's Council?

A. Raja Kishori Lal Goswami

B. Motilal Nehru

C. Satyendra Sinha

D. Tej Bahadur Sapru

15.The Government of India Act, 1919, was based upon:

A. Morley-Minto Reforms

B. Montague-Chelmsford Report

C. Ramsay McDonald Award

D. Nehru Report

Answers for Self Assessment

1.	B	2.	A	3.	A	4.	D	5.	A
6.	A	7.	A	8.	D	9.	B	10.	A
11.	D	12.	C	13.	A	14.	C	15.	B

Review Questions

1) What s meant by a constitution? Describe some important definitions of the constitution?
2) Explain the important functions of the constitution?
3) Write a detailed note on the evolution of Indian Constitution during British colonial era?
4) Write a detailed note on the Crown Rule?
5) Critically discuss the constitutional importance of the Company's rule?
6) Discuss the role of the 1909 Act in making of the Indian Constitution?
7) What was the role of 1919 Act in making of the Indian Constitution?
8) What were the recommendations of the Simon Commission? What were its shortcomings?
9) Describe the crown rule and its influence on making of the Indian constitution and polity?
10) What was the Poona Pact? Identify its importance?
11) Discuss the significance and important features of the Government of India Act 1935?

Further Readings

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Unit 02: Making of the Indian Constitution

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

1. give a brief overview of a demand for Constituent Assembly (hereafter CA).
2. Explain or describe the composition of the CA.
3. analyse what is objective resolution and its salient features.
4. understand the status of the Preamble.
5. examine the significance and relevance of the Preamble.
6. explain salient features of the working process of the Constituent Assembly.

Introduction

We should remember this that the Constitution of India was not prepared in haste but the process of the evolution of the constitution began before India became independence in 1947. The enormous task of drafting free India's Constitution was taken up by the Constituent Assembly. The Assembly brought into being by the will of the Indian people, with the help of the British, drafted a Constitution for India in the years from December 1946 to December 1949. Before we will understand the making of Constituent Assembly in India, it is important to know the meaning of the Constituent Assembly.

2.1 Meaning of Constituent Assembly

Constituent Assembly has been defined by different thinkers in their respective frameworks. Dood has defined it as 'a representative body chosen for the purpose of considering and either adopting or proposing a new constitution or changes in the existing constitution'.

Abbe Siezes has defined it is 'an assembly of extraordinary representatives to which the nation shall have entrusted the authority to make a constitution or at any point to define it content'.

A constituent assembly is a democratic device for formulating or adopting a new constitution or for bringing about some fundamental changes in an existing constitution by a free people. The concept of a constitution assembly implies the right of a people to determine their own future and decide the nature and type of polity under which they would like to live. The right of people to give to themselves a constitution of their choice through a representative constituent assembly is an essential attribute of national freedom.

Sir lvor Jennings has noted three situations in which a Constituent Assembly comes into being: When there is 'a great social revolution' or 'when a nation throws off its foreign yoke' or when 'a nation is created by the fusion of smaller political units' Whatever the circumstances Jennings points out 'the need is felt and some person is felt and some person is set to draft a constitution'. According to this perspective, the Indian Constitution falls into the secondary category.

Evolution of the Concept of Constituent a Assembly in India

The origin and growth of the idea of a constituent assembly in the sense of a representative body called specifically for the purpose of formulating the fundamental law of a country has had a venerable history in the West and has always carried about itself the aroma of its revolutionary origin.

In India, the demand for a constituent assembly was, in a sense, implied in the demand for national freedom. As early as in December 1918, the 33rd session of the Indian National Congress held at Delhi unanimously adopted a resolution demanding that 'the principles of self-determination should be applied' to India. Writing in Young India on 1st January 1922, Mahatma Gandhi said that *Swaraj* (Self-rule) of his conception would not be free gift of the British Parliament but a declaration of India's self-expression, the will of the people of India expressed 'through her freely chosen representatives'. On February 8, 1924, Motilal Nehru, the leader of the Swaraj Party in the Central Legislative Assembly introduced a resolution embodying inter alia a demand for summoning 'at an early date of a representative Round Table Conference to recommend, with due regard to the protection of the rights and interests of important minorities the scheme of a constitution for India'.

On 17 May 1927, at the Bombay Session of the Congress, Motilal Nehru had moved a resolution calling upon the Congress Working Committee to frame a constitution for India in consultation with the elected members of the Central and Provincial Legislatures and leaders of political parties. The Congress Working Committee organised an All Parties Conference at Bombay on 19 May 1928 and appointed a committee, under the Chairmanship of Motilal Nehru 'to determine the principles of the Constitution of India'. The report of the Committee (submitted on 10 August 1928) which was later to become famous as the 'Nehru Report' was the first attempt by Indians to frame a constitution of their country. The constitution embodied in the Report, was based on the principle of Dominion Status with full responsible government on the parliamentary pattern.

In March 1933, the British government put forth before Indians the White Paper which contains proposals for the constitutional reforms for India. The nationalist opinion in India found this proposal highly objectionable and therefore unacceptable. Consequently, it was in 1934 that the idea of a Constituent Assembly for India was put forward for the first time by M. N. Roy, a radical humanist and a pioneer and staunch supporter of the communist movement in India.

In June 1934, the Congress adopted a resolution stated that the only satisfactory alternative to the white paper is a constitution drawn by the constituent assembly elected on the basis of adult suffrage. In 1935, the then major political party in the subcontinent, Indian National Congress (INC), for the first time, officially demanded a Constituent Assembly to frame the Constitution of India.

In 1938, Jawaharlal Nehru, on behalf of the INC declared that 'the Constitution of free India must be framed, without outside interference, by a Constituent Assembly elected on the basis of adult franchise'.

Congress kept on repeating the demand for a constituent assembly in subsequent sessions also. However, this demand was resisted by the British government until the outbreak of World War II, when external circumstances forced them to realise the urgency of solving the Indian constitutional problem. In 1940, the British government gave recognition to the principle that Indians themselves should frame the constitution for free India. In March 1942, the British government sent Sir Stanford Cripps with a draft declaration on the proposals. These proposals were to be adopted at the end of the war, provided the two major political parties Congress and Muslim League could come to an agreement to accept them. But the two parties failed to come to an agreement to accept the proposals. Thus an idea of the constitution making body failed to materialise (Basu, 2011).

In April 1942, the Cripps Mission failed and within months the mass struggle of the Indian people, 'the Quit India Movement' started. The growing popular upsurge against the British rule and the spread of discontent in the armed forces made it clear to British rulers that their days are numbered in India. In 1946, the British Government announced its intention to end its rule in India and as such it sent a Cabinet Mission in March 1946 to hold negotiations with Indian leaders on the transfer of power. The Mission proposed the formation of an interim government and the convening of a Constituent Assembly (Basu, 2011).

2.2 Cabinet Mission Plan and the Formation of the Constituent Assembly

After, the rejection of the Cripps Proposals, various attempts to reconcile the two parties were made including the Simla Conference held at the instance of the Governor-General, Lord Wavell. These having failed, the British Cabinet sent three of its own members including Cripps himself, to make another serious attempt for the solution of Indian problem. The Cabinet Mission, which arrived in New Delhi on March 24, 1946, had prolonged negotiations with Jawahar Lal Nehru and other leaders of the Congress and of the Muslim League. The Mission emphasized that their main object was not 'to lay out the details of a constitution' for India but to set in motion machinery whereby a constitution could be 'settled by Indians for Indians' (Fadia 2020).

The Cabinet Mission, too, failed in making the two major parties (Congress and Muslim League) come to an agreement and were accordingly, obliged to put forward their own proposals, which were announced simultaneously in India and England on 16th May 1946. The proposals are known as the Cabinet Mission Plan.

The Plan, while rejecting the demand of the All India Muslim League for partition of the country and establishment of a fully sovereign Pakistan, envisaged a confederation consisting of three groups of autonomous states vesting the powers of three departments - Defence, External Affairs and Communications - in a Central Government and all the remaining powers with the groups themselves. Each of the groups was free to have a separate constitution of its own choice, thus giving ample scope for both the leading religious groups, Hindus and Muslims, to live united but, at the same time, to enjoy complete autonomy in areas where they were in majority. The Plan had two parts, namely, a long-term programme and a short-term one. While the former was concerned with the future political setup on a permanent basis, the latter was intended to establish an immediate Indian Interim Government (Fadia, 2020).

The Cabinet Mission Plan also laid down in some detail the procedure to be followed by the constitution-making body. It was proposed in the Plan that for this Assembly each province was to be assigned specific number of seats. This number will be proportionate to the population of the province. Seats in each province will be allotted to different communities which will again be linked with population of the community in that province.

Composition of the Constituent Assembly

In November 1946, the Constituent Assembly was constituted in under the scheme formulated by the Cabinet Mission Plan. The features of the scheme were:

1. The total strength of the Constituent Assembly was to be 389. Of these, 296 seats were to be allotted to British India and 93 seats to the Princely States.
2. Each province and princely state were to be allotted seats in proportion to their respective population. Roughly, one seat was to be allotted for every million population.
3. Seats allocated to each British province were to be divided among the three principal communities—Muslims, Sikhs and general.
4. The representatives of each community were to be elected by members of that community in the provincial legislative assembly and voting was to be by the method of proportional representation by means of single transferable vote.
5. The representatives of princely states were to be nominated by the heads of the princely states (Fadia, 2020; Basu, 2011).

It is thus clear that the Constituent Assembly was to be a partly elected and partly nominated body.The elections to the Constituent Assembly (for 296 seats allotted to the British Indian Provinces) were held in July–August 1946. The Indian National Congress won 208 seats, the Muslim League 73 seats, and the small groups and independents got the remaining 15 seats. However, the 93 seats allotted to the princely states were not filled as they decided to stay away from the Constituent Assembly.

2.3 Working of the Constituent Assembly

Austin characterised the motivation and the task of the Constituent Assembly in these evocative words: 'In the Assembly, Indians, for the first time in a century and a half, were responsible for their own governance. They were at last free to shape their own destiny and to pursue their long proclaimed aims and aspiration by creating the national institutions that would facilitate the fulfilment of these aims. The members approached this task with remarkable idealism and strength of purpose, born out of the struggle for independence' (Austin, 1976).

The Constituent Assembly held its first meeting on December 9, 1946. The Muslim League boycotted the meeting and insisted on a separate state of Pakistan. The meeting was thus attended by only 211 members. Dr Sachchidanand Sinha, the oldest member, was elected as the temporary President of the Assembly, following the French practice. Later, Dr. Rajendra Prasad was elected as the President of the Assembly. Similarly, both H.C. Mukherjee and V.T. Krishnamachari were elected as the Vice-Presidents of the Assembly. In other words, the Assembly had two Vice-Presidents.

2.4 Objective Resolution

On 13 December 1946, the fifth day of the first session, Nehru moved the historic Objectives Resolution. The Resolution said:

1. India is an independent sovereign republic and to draw up for her future governance a Constitution.
2. India shall be a union of erstwhile states, British Indian territories, Indian states and other parts outside British India and Indian states as are willing to be a part of Union.
3. Territories forming the union shall be autonomous units. These states exercise all powers and functions of the government and administration, except those are assigned or vested in the Union.
4. All powers and authority of the sovereign India and its constitution shall flow from the people.
5. All people of India shall be guaranteed and secured social, economic and political justice; equality of status and opportunity; and fundamental freedoms of speech, expression, faith, worship, vocation, association and action.
6. The minorities, backward and tribal areas, depressed and other backward classes shall be provided adequate safeguards.
7. The territorial integrity of the Republic and its sovereign rights on land, air, sea shall be maintained according to justice and law of civilized nation.

The land would make full and willing contribution to the promotion of world peace and welfare to human kind.

Changes by the Independence Act

After the acceptance of the Mountbatten Plan of June 3, 1947 for a partition of the country, the representatives of most of the other princely states took their seats in the Assembly. The members of the Muslim League from the Indian Dominion also entered the Assembly.

The Indian Independence Act of 1947 made the following three changes in the position of the Assembly:

1. The Assembly was made a fully sovereign body, which could frame any Constitution it pleased. The act empowered the Assembly to abrogate or alter any law made by the British Parliament in relation to India.

2. The Assembly also became a legislative body. In other words, two separate functions were assigned to the Assembly that is, making of a constitution for free India and enacting of ordinary laws for the country. Thus, the Assembly became the first Parliament of free India. Whenever the Assembly met as the Constituent body it was chaired by Dr. Rajendra Prasad and when it met as the legislative body it was chaired by G V Mavlankar. These two functions continued till November 26, 1949, when the task of making the Constitution was over.

3. The Muslim League members (hailing from the areas included in the Pakistan) withdrew from the Constituent Assembly for India. Consequently, the total strength of the Assembly came down to 299 as against 389 originally fixed in 1946 under the Cabinet Mission Plan. The

strength of the Indian provinces (formerly British Provinces) was reduced from 296 to 229 and those of the princely states from 93 to 70.

Other Functions Performed

In addition to the making of the Constitution and enacting of ordinary laws, the Constituent Assembly also performed the following functions:

1. It ratified the India's membership of the Commonwealth in May 1949.

2. It adopted the national flag on July 22, 1947.

3. It adopted the national anthem on January 24, 1950.

4. It adopted the national song on January 24, 1950.

5. It elected Dr Rajendra Prasad as the first President of India on January 24, 1950.

In all, the Constituent Assembly had 11 sessions over two years, 11 months and 18 days. The Constitution-makers had gone through the constitutions of about 60 countries, and the Draft Constitution was considered for 114 days. The total expenditure incurred on making the Constitution amounted to ` 64 lakh.

> On January 24, 1950, the Constituent Assembly held its final session. It, however, did not end, and continued as the provisional parliament of India from January 26, 1950 till the formation of new Parliament after the first general elections in 1951–52.

2.5 Committees of the Constituent Assembly

The Constituent Assembly had a total of more than fifteen committees. Seven of them, such as House and Staff Committee performed minor functions. The brick and the mortar of the structure was provided by the reports of the Union Power Committee, the Union Constitution Committee, the Advisory Committee on Minorities and Fundamental Rights, the Committee on Chief Commissioner Provinces, the Committee on the Financial provisions of the Union Constitution and the Advisory Committee on Tribal Areas. The Assembly appointed a Drafting Committee on 29 August 1947 to consider the Draft Constitution with Dr B.R. Ambedkar as its Chairman along with six other members.

Drafting Committee

Among all the committees of the Constituent Assembly, the most important committee was the Drafting Committee set up on August 29, 1947. It was this committee that was entrusted with the task of preparing a draft of the new Constitution. It consisted of seven members. They were:

1. Alladi Krishnaswamy Aiyar, an astute lawyer of liberal views from Madras who came with a Congress ticket and later made outstanding contribution to constitution-making.
2. N. GopalaswamiAyyangar, another brilliant legal brain from Madras, with a liberal outlook, a congress ticket and a civilian background.
3. B.R. Ambedkar, the leader of the Scheduled Castes Federation, also an outstanding lawyer, who shed several ideological differences with the Congress. On the eve of independence, he joined the government as the law minister, without leaving his party.
4. K.M. Munshi, a Congress leader, occasionally working in the states' people's movement.
5. Saiyad Mohammad Saadullah, a League supporter from Assam of rather liberal outlook and a profound legalist
6. B.L. Mitter, an ex-law member of the Government of India and the Dewan of Baroda, who made remarkable contribution to the integration of the states with India.
7. D.P. Khaitan, an industrialist from West Bengal who had come with a Congress ticket (Chaube 2000).

The Drafting Committee, after taking into consideration the proposals of the various committees, prepared the first draft of the Constitution of India, which was published in February 1948. The people of India were given eight months to discuss the draft and propose amendments. In the light of the public comments, criticisms and suggestions, the Drafting Committee prepared a second

draft, which was published in October 1948.The Drafting Committee took less than six months to prepare its draft. In all it sat only for 141 days.

2.6 Constitution Assembly Debates

Constituent Assembly Debates (CADs) refer to the discussions and debates that the members of the CA had rigorously in the process of drafting a constitution for free India. These debates provide a good insight into the thinking behind the making of the Constitution. Following are some factual points. To frame the Constitution of India, the Assembly sat for about 165 days. Members had useful and productive discussions.

- Forty-six (46) days were spent on preliminary discussion in the Assembly.
- And, 101 days were spent on the clause by clause discussion of the draft Constitution.
- Approximately 36 lakh words were spoken during Assembly debates. Two-thirds of all deliberations were during the clause by clause discussion and deliberations in the second reading.
- Fundamental Rights were included in Part III of the draft Constitution. These were discussed for 16 days. That means, 14% of the total clause by clause discussion was dedicated to Fundamental Rights.
- Directive Principles of State Policy were included in Part IV were discussed six days. That means, 4% of the clause by clause discussion was dedicated to these principles.
- Provisions related to concept of Citizenship were included in Part II. It was discussed for three days. Thus, 2% of the discussion was dedicated to this part.
- In the Constituent Assembly 210 members were elected from provinces, and 64 members nominated by the princely states participated in debates.
- Members elected from provinces contributed to 85% of discussions in the Assembly, while the representatives from princely states contributed to 6% of the discussions.
- On average, each member from provinces spoke 14,817 words and a member from princely states spoke 3,367 words.

Decision Making in the Constituent Assembly

The process of decision making was democratic and pragmatic. The members were very persuasive in expressing their sometimes very divergent viewpoints. The debate comprised of many conflicting ideas such as: of what language Indians should speak; of political and economic system the nation should follow; of what moral values its citizens should uphold; how to protect the minorities etc. the members expressed many diverse viewpoints that made the sessions lively and interesting. The leadership of the Constituent Assembly followed the process of decision making by the consensus, by the policy of accommodation and by the art of selection and modification (Austin, 1976: 4). Shibani Kinkar Chaube pointed out that 'on fundamentals there was little concession'. G. Austin has highlighted that the leadership of the Constituent Assembly followed the process of decision making by the consensus, by the policy of accommodation and by the art of selection and modification. The framers successfully selected and modified the provisions which they had borrowed from other constitutions.

Consensus and accommodation were two principles which the Assembly applied which the Assembly applied to its task of drafting with great effectiveness. Principle of Consensus was used while arriving at decisions in the Assembly, while principle of accommodation was used while incorporating other provisions in the Constitution.

Decision Making by Consensus

Consensus simply means making decisions with near unanimity. It is a recognition of the fact that decision by majority is not the best way of deciding political conflicts. The framers of the Constitution knew fully well that constitutional provisions which would be agreed upon by consensus of the members will prove effective and long lasting. Consensus, opined Austin, thus 'had a general appeal in the Assembly as an ethical means of reaching lasting agreements and to the

rank and file as an indigenous institution that suited the framing of an Indian Constitution' (Austin, 1976: 316).

The method of consensus found its way in the Assembly in a number of ways. Firstly, the Congress party used the principle in its meeting. From party leaders to non-Congressmen like Aiyar, Ambedkar and Ayengar all were free to attend the Congress meetings. In addition to the Congress, this process of consensus was followed in the Committee system of the Assembly as well. The dialogue was carried with both the Provincial and the Union government leaders in the Assembly. Provisions regarding federal structure and the issue of language perhaps proved as the best testing ground of this principle. The issue of language strained the Assembly decision making machinery to the utmost. A generally acceptable solution to the problem of language eluded the Assembly members for three years. The Munshi-Ayengar formula was drafted almost in desperation. At the time of final debate on language, Prasad, the Chairman of the Assembly, refused to put the issue to vote. He argued, that in the absence of agreement, it would be difficult to implement it.

Policy of Accommodation

The policy of accommodation was the other salient element which was followed during the debates. According to Austin, it was India's second original contribution to the process of constitution making. In the Assembly, the members had divergent views on a number of crucial issues and there was an immediate and urgent need to reconcile the incompatible and conflicting views. A good deal of behind the scenes discussions and negotiations were required to accommodate these divergent views. The constitutional structure is a good example of the principle of accommodation on the matters of substance. The Constitution has combined federal with the unitary provisions, republican status of India with the membership of the Commonwealth and a strong Central government with decentralisation in the form of Panchayati Raj (Austin, 1976: 16).

The Art of Selection and Modification

The Constituent Assembly discovered a new principle 'the art of selection and modification'. It means, whatever has been borrowed from the other constitutions was not blindly followed. The Assembly seriously chose and modified the provisions so as to make them appropriate for Indian needs and circumstances. One such example of selection and modification is the method of Constitutional amendment. The three procedures of amendment made the Constitution flexible and also helped in protecting the rights of the states. The federal system was another proof of the system of modification. The Assembly, unlike the American and the Canadian Assembly, adopted the policy of publicity rather than secrecy. Following the democratic methods of debates and discussion, the Assembly published its high level debates which had an educative and enabling effect on the people.

2.7 Preamble and its Relevance

The preface or introduction to a Constitution is known as the Preamble.The Preamble to a const. is expected to embody the fundamental values and the philosophy on which the Const. is based.Also aims, plus major objectives which the founding fathers enjoined the polity to strive to achieve. Dyer, C. J., argues the Preamble is a "key to open the minds of the makers of the Act, and the mischiefs which they intended to redress". A preamble is the part of the constitution that best reflects the constitutional understandings of the framers, what Carl Schmitt calls the "fundamental political decisions." It presents the history behind the constitution's enactment, as well as the nation's core principles and values. A preamble is, thus, a common constitutional feature.It contains the summary or essence of the Constitution. An eminent jurist and constitutional expert N APalkhivala called the Preamble as the "identity card of the Constitution". The Preamble to the Indian Constitution is based on the 'Objectives Resolution',, drafted and moved by Pandit Nehru, and adopted by the Constituent Assembly. It has been amended by the 42nd Constitutional Amendment Act (1976), which added three new words - socialist, secular and integrity.This indicates that the Preamble being a part of the Const. is open to amendment in the exercise of Parliament's constituent power under Article 368 subject to the limitation that to the extent it reflects the basic structure or framework of the Constitution it can't be amended.

Ingredients of the Preamble

The Preamble reveals four ingredients or components:

1. Source of authority of the Constitution: The Preamble states that the Constitution derives its authority from the people of India.

2. Nature of Indian State: It declares India to be of a sovereign, socialist, secular democratic and republican polity.

3. Objectives of the Constitution: It specifies justice, liberty, equality and fraternity as the objectives.

4. Date of adoption of the Constitution: It stipulates November 26, 1949 asthe date.

Key Words in the Preamble

There are certain key words–Sovereign, Socialist, Secular, Democratic, Republic, Justice, Liberty, Equality and Fraternity–are explained as follows:

1. **Sovereign:** The word 'sovereign' implies that India is neither a dependency nor a dominion of any other nation, but an independent state. There is no authority above it, and it is free to conduct its own affairs (both internal and external).The expression 'sovereign' signifies that the Republic is externally sovereign. It had already ceased to be a dependency of the British Empire in August 1957.However, the fact that India is a Sovereign state doesn't mean that it can't cede a part of its territory in favour of a foreign state. Being a sovereign state, India can either acquire a foreign territory or cede a part of its territory in favour of a foreign state.The Constitution as already seen derives its authority from the people. Legal Sovereignty, therefore, is vested in the people of India. The Political Sovereignty is distributed between the Union and the States with greater weightage in favour of the Union. The states don't posses any absolute sovereignty. There is no dual citizenship in India.

2. **Socialist:** Even before the term was added by the 42nd Amendment in 1976, the Constitution had a socialist content in the form of certain Directive Principles of State Policy. In other words, what was hitherto implicit in the Constitution has now been made explicit. Moreover, the Congress party itself adopted a resolution to establish a 'socialistic pattern of society' in its Avadi session as early as in 1955 and took measures accordingly. The word 'Socialism' had been used in the context of 'economic planning'. It signifies major role in the economy. It also means commitment to attain ideals like removal of inequalities, provision of minimum basic necessities to all, equal pay for equal work. When you read about the Directive Principles of the State Policy, you will see how these ideals have been incorporated as well as partly, implemented in the Constitution. However, the new economic policy (1991) of liberalisation, privatisation and globalisation has, however, diluted the socialist credentials of the Indian State.

3. **Secular:** The term 'secular' too was added by the 42nd Constitutional Amendment Act of 1976. However, as the Supreme Court said in 1974, although the words 'secular state' were not expressedly mentioned in the Constitution, there can be no doubt that Constitution-makers wanted to establish such a state and accordingly Articles 25 to 28 (guaranteeing the fundamental right to freedom of religion) have been included in the constitution. The Indian Constitution embodies the positive concept of secularism i.e., all religions in our country (irrespective of their strength) have the same status and support from the state.

4. **Democratic:** A democratic polity, as stipulated in the Preamble, is based on the doctrine of popular sovereignty, that is, possession of supreme power by the people.Democracy is of two types–direct and indirect. In direct democracy, the people exercise their supreme power directly as is the case in Switzerland. In indirect democracy, on the other hand, the representatives elected by the people exercise the supreme power and thus carry on the government and make the laws. This type of democracy, also known as representative democracy, is of two kinds–parliamentary and presidential.The Indian Constitution provides for representative parliamentary democracy under which the executive is responsible to the legislature for all its policies and actions. Universal adult franchise, periodic elections, rule of law, independence of judiciary, and absence of discrimination on certain grounds are the manifestations of the democratic character of the Indian polity. The term 'democratic' is used in the Preamble in the broader sense embracing not only political democracy but also social and economic democracy.

5. **Republic:** A democratic polity can be classified into two categories−monarchy and republic. In a monarchy, the head of the state (usually king or queen) enjoys a hereditary position, that is, he comes into office through succession, eg, Britain. In a republic, on the other hand, the head of the state is always elected directly or indirectly for a fixed period, eg, USA.Therefore, the term 'republic' in our Preamble indicates that India has an elected head called the president. He is elected indirectly for a fixed period of five years. A republic also means two more things: one, vesting of political sovereignty in the people and not in a single individual like a king; second, the absence of any privileged class and hence all public offices being opened to every citizen without any discrimination.
6. **Justice:** Justice promises to give people what they are entitled to in terms of basic rights to food, clothing, housing, participation in the decision-making and living with dignity as human beings. The Preamble covers all these dimensions of justice – social, economic and political. In addition, the granting of political justice in the form of universal adult franchise or the representative form of democracy. You will read socio-economic justice in next lessons.
7. **Liberty:** The Preamble also mentions about liberty of thought and expression. These freedomshave been guaranteed in the Constitution through the Fundamental Rights. Though freedomfrom want has not been guaranteed in the Fundamental Rights, certain directives to theState have been mentioned in the Directive Principles.
8. **Equality:**Equality is considered to be the essence of modern democratic ideology. The Constitutionmakers placed the ideals of equality in a place of pride in the Preamble. All kinds ofinequality based on the concept of rulers and the ruled or on the basis of caste and gender,were to be eliminated. All citizens of India should be treated equally and extended equalprotection of law without any discrimination based on caste, creed, birth, religion, sex etc.Similarly equality of opportunities implies that regardless of the socio-economic situationsinto which one is born, he/she will have the same chance as everybody else to develop his/her talents and choose means of livelihood.
9. **Fraternity:** Fraternity means a sense of brotherhood. The Constitution promotes this feeling of fraternity by the system of single citizenship. Also, the Fundamental Duties (Article 51-A) say that it shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, regional or sectional diversities. The Preamble declares that fraternity has to assure two things—the dignity of the individual and the unity and integrity of the nation. The word'integrity' has been added to the preamble by the 42nd Constitutional Amendment (1976).

Status of the Preamble

The preamble being part of the Constitution is discussed several times in the Supreme Court. It can be understood by reading the following two cases.

- ***Berubari Case*:** It was used as a reference under Article 143(1) of the Constitution which was on the implementation of the Indo-Pakistan Agreement related to the Berubari Union and in exchanging the enclaves which were decided for consideration by the bench consisting of eight judges.Through the Berubari case, the Court stated that 'Preamble is the key to open the mind of the makers' but it cannot be considered as part of the Constitution. Therefore it is not enforceable in a court of law.
- ***Kesavananda Bharati Case:*** In this case, for the first time, a bench of 13 judges was assembled to hear a writ petition. The Court held that: The Preamble of the Constitution will now be considered as part of the Constitution**.**

The Preamble is not the supreme power or source of any restriction or prohibition but it plays an important role in the interpretation of statutes and provisions of the Constitution.So, it can be concluded that preamble is part of the introductory part of the Constitution. In the 1995 case of Union Government Vs LIC of India also, the Supreme Court has once again held that Preamble is the integral part of the Constitution but is not directly enforceable in a court of justice in India.

Significance and Relevance of the Preamble

The Preamble embodies the basic philosophy and fundamental values - political, moral and religious - on which the Constitution is based. It contains the grand and noble vision of the Constituent Assembly, and reflects the dreams and aspirations of the founding fathers of the Constitution. In the words of Sir Alladi Krishnaswami Iyer, a member of the Constituent Assembly who played a significant role in making the Constitution, "The Preamble to our Constitution expresses what we had thought or dreamt so long".

According to K M Munshi, a member of the Drafting Committee of theConstituent Assembly, the Preamble is the "horoscope of our sovereign democratic republic".Pandit Thakur Das Bhargava, another member of the Constituent Assembly, summed up the importance of the Preamble in the followingwords: "The Preamble is the most precious part of the Constitution. It is thesoul of the Constitution. It is a key to the Constitution. It is a jewel set in the Constitution. It is a proper yardstick with which one can measure the worth of the Constitution".

Sir Ernest Barker, a distinguished English political scientist, in his work *Principles of Social and Political Theory*(1951) paid aglowing tribute to the political wisdom of the authors of the Preamble. He described the Preamble as the "key-note" to the Constitution. M Hidayatullah, a former Chief Justice of India, observed, 'Preamble resembles the Declaration of Independence of the United States of America, but is more than a declaration. It is the soul of our Constitution, which lays down the pattern of our political society. It contains a solemn resolve, which nothing but a revolution can alter'.

Therefore, it is the soul of the Constitution, which lays down the pattern of the political society.The Preamble is the quite essence of the Indian polity as it embodies the basic philosophy and throws light on its structure. It is the combination of the philosophy of two revolutions, the Russian and the French revolution. If we see, the concepts of social, economic and political justice has been taken from the Russian Revolution and the concepts of liberty, equality and fraternity have been taken from the French revolution. The Preamble makes it clear that the unity and integrity is a precondition for the other cherished ideals to become reality in the scheme of things in an independent India.

2.8 Salient Features of the Constitution:

So far we have discussed about the Preamble to the Indian Constitution. In the following sections we are going to discus about the salient features of the Indian Constitution which directly and indirectly flow from the Preamble, indicating the faith of framers in the ideals, objectives and goals as mentioned in our Constitution.

Lengthiest Written Constitution

The Indian Constitution is mainly a written constitution. It is a verycomprehensive, elaborate and detailed document. A written constitution is framed at a given time and comes into force or is adopted on a fixed date as a document. The Indian constitution was framed over a period of 2 years, 11 months and 18 days; it was adopted on 26th November, 1949 and enforced on January 26, 1950.Certain conventions have gradually evolved over a period of time which has proveduseful in the working of the constitution.
Originally (1949), the Constitution contained a Preamble, 395 Articles(divided into 22 Parts) and 8 Schedules. Presently (2016), it consists of aPreamble, about 465 Articles (divided into 25 Parts) and 12 Schedules2. Thevarious amendments carried out since 1951 have deleted about 20 Articlesand one Part (VII) and added about 90 Articles, four Parts (IVA, IXA, IXB and XIVA) and four Schedules (9, 10, 11 and 12). No other Constitution inthe world has so many Articles and Schedules. Four factors have contributed to the elephantine size of our Constitution.They are:

a. Geographical factors, that is, the vastness of the country and its diversity.
b. Historical factors, e.g., the influence of the Government of India Act of1935, which was bulky.
c. Single Constitution for both the Centre.
d. Dominance of legal luminaries in the Constituent Assembly.

A Combination of Rigidity and Flexibility

The Indian Constitution is a unique example of combination of rigidity and flexibility. A constitution may be called rigid or flexible on the basis of its amending procedure. In a rigid constitution, amendment of the constitution is not easy. The Constitutions of USA, Switzerland and Australia are considered rigid constitutions. However, the British Constitutionis considered flexible because amendment procedure is easy and simple.

The Constitution of India provides for three categories of amendments. In the first category,amendment can be done by the two houses of Parliament simple majority of the memberspresent and voting of before sending it for the President's assent. In the second categoryamendments require a special majority. Such an amendment can be passed by each Houseof Parliament by a majority of the total members of that House as well as by the 2/3rdmajority of the members present and voting in each house of Parliament and send to thePresident for his assent which cannot be denied. In the third category besides the specialmajority mentioned in the second category, the same has to be approved also by at least50% of the State legislatures. Thus, you see that the Indian Constitution provides for thetype of amendments ranging from simple to most difficult procedure depending on thenature of the amendment.

Drawn From Various Sources

The Constitution of India has borrowed most of its provisions from theconstitutions of various other countries as well as from the Government ofIndia Act of 1935. Dr B R Ambedkar proudly acclaimed that theConstitution of India has been framed after 'ransacking all the knownConstitutions of the World'.

The structural part of the Constitution is, to a large extent, derived from theGovernment of India Act of 1935. The philosophical part of the Constitution(the Fundamental Rights and the Directive Principles of State Policy) derivestheir inspiration from the American and Irish Constitutions respectively. Thepolitical part of the Constitution (the principle of Cabinet Government andthe relations between the executive and the legislature) has been largelydrawn from the British Constitution.

The other provisions of the Constitution have been drawn from theconstitutions of Canada, Australia, Germany, USSR (now Russia), France,South Africa, Japan, and so on.The most profound influence and material source of the Constitution is theGovernment of India Act, 1935. The Federal Scheme, Judiciary, Governors,emergency powers, the Public Service Commissions and most of theadministrative details are drawn from this Act. More than half of theprovisions of Constitution are identical to or bear a close resemblance to theAct of 1935.

Federal Polity

India has adopted a federal structure. In a federation there are two distinct levels ofgovernments. There is one government for the whole country which is called the Union orCentral Government. Also there is government for each Unit/State. The United States ofAmerica is a federation whereas the United Kingdom (Britain) has a unitary form ofgovernment. In a unitary structure there is only one government for the whole country andthe power is centralised.The Constitution of India does not use the term 'federal state'. Article 1 says that India is a'Union of States'. There is a distribution of powers between the Union/Central Governmentand the State Governments. Since India is a federation, such distribution of functionsbecomes necessary. There are three lists of powers such as Union List, State List and theConcurrent List. These lists have been explained in Lesson 8 in detail. On the basic of thisdistribution, India may be called a federal system.The supremacy of the judiciary is an essential feature of a federation so that the constitutioncould be interpreted impartially. In India, the Supreme Court has been established to guardthe constitution.

However, in case of Indian federalism, more powers have been given tothe Union Government in administrative, legislative, financial and judicial matters. In fact,The Indian federal set up stands out with certain distinctive unitary features. The makersof our constitution while providing for two sets of government at the centre and in thestates provided for division of powers favouring the Central Government, appointment ofthe Head of the State government by the Central Government, single unified judiciary,single citizenship indicate the unitary nature of our federalism. Therefore, it is said thatIndia has a quasi-federal set up.

Independent and Impartial Judiciary

Under the democratic system, all citizens are equal before the law. There cannot be different sets of laws for the different groups of people. The judiciary is expected to provide justice to all the sections of the society. Therefore, the Judiciary is given adequate powers. The Supreme Court acts as a guardian of the Constitution in place of the Privy Council.

A Welfare State

A State which aims at providing social and economic security to all its citizens is known as a Welfare State. Social Security must be provided to the citizens so that they would live a peaceful life. They should have employment and adequate income, food, clothes, shelter and health care. The aged and destitute must get proper protection. It protects the weaker sections from exploitation, and provides equal social, economic and political opportunities to all citizens.

Parliamentary Democracy

India has a parliamentary form of democracy. This has been adopted from the British system. In a parliamentary democracy there is a close relationship between the legislature and the executive. The Cabinet is selected from among the members of legislature. The cabinet is responsible to the latter. In fact the Cabinet holds office so long as it enjoys the confidence of the legislature. In this form of democracy, the Head of the State is nominal. In India, the President is the Head of the State. Constitutionally the President enjoys numerous powers but in practice the Council of Ministers headed by the Prime Minister, which really exercises these powers. The President acts on the advice of the Prime Minister and the Council of Ministers.

Universal Adult Franchise

The system of election of representatives by all the adults of a country is called as Universal Adult Franchise. In India, an adult means one who is above the age of eighteen.

Fundamental Rights and Fundamental Duties

Every human being is entitled to enjoy certain rights which ensure good living. In ademocracy all citizens enjoy equal rights. The Constitution of India guarantees those rights in the form of Fundamental Rights.

Fundamental Rights are one of the important features of the Indian Constitution. The Constitution provides for six Fundamental Rights about which you will read in the following lesson. Fundamental Rights are justiciable and are protected by the judiciary. In case of violation of any of these rights one can move to the court of law for their protection.

Fundamental Duties were added to our Constitution by the 42nd Amendment. It lays down a list of ten Fundamental Duties for all citizens of India. While the rights are given asguarantees to the people, the duties are obligations which every citizen is expected to perform.

Secularism

As per the principle of secularism, the government must be impartialtowards all the religions followed by its citizens. There shall be no 'State Religion'. At the same time, the government guarantees freedom of faith and worship to all citizens. However, the government has the right to restrict religious freedom when it disturbs public peace, as well as law and order.

Directive Principles of State Policy

The Directive Principles of State Policy which have been adopted from the Irish Constitution is another unique feature of the Constitution of India. The Directive Principles were included in our Constitution in order to provide social and economic justice to our people. Directive Principles aim at establishing a welfare state in India where there will be no concentration of wealth in the hands of a few.

Single Citizenship

In a federal state usually the citizens enjoys double citizenship as is the case in the USA. In India there is only single citizenship. It means that every Indian is a citizen of India, irrespective of the place of his/her residence or place of birth. He/she is not a citizen of the Constituent State like Jharkhand, Uttaranchal or Chattisgarh to which he/she may belong to but remains a citizen of India. All the citizens of India can secure employment anywhere in the country and enjoy all the rights equally in all the parts of India.

Emergency Provisions

The Indian Constitution contains elaborate emergency provisions to enable the President to meet any extraordinary situation effectively. The rationality behind the incorporation of these provisions is to safeguard the sovereignty, unity, integrity and security of the country, the democratic political systemand the Constitution.The Constitution envisages three types of emergencies, namely:

(a) National emergency on the ground of war or external aggression or armed rebellion16 (Article 352);

(b) State emergency (President's Rule) on the ground of failure ofConstitutional machinery in the states (Article 356) or failure to comply with the directions of the Centre (Article 365); and

(c) Financial emergency on the ground of threat to the financial stability or credit of India (Article 360).

During an emergency, the Central Government becomes all-powerful andthe states go into the total control of the centre. It converts the federal structure into a unitary one without a formal amendment of the Constitution. This kind of transformation of the political system from federal (during normal times) to unitary (during emergency) is a unique feature of the Indian Constitution.

Summary

A Constituent Assembly is a body of people that frames the fundamental laws of a country. The Constitution of India was prepared by an elected body of people known as the Constituent Assembly of India. The making of India was a long process in which members of the Constituent Assembly debated as to what the Constitution was expected to include. The notion of a Constituent Assembly for India was in gestation for a long time both in the national quarters and the British ruling circles. The formation of the constituent assembly was the final culmination of aspirations of the people and the demand of the national movement that the constitution of India should be framed not by British Parliament but by the chosen representative of Indian people. Under the Cabinet Mission plan, the Constituent Assembly was to be indirectly elected by the system of proportional representation from the provincial legislature which themselves had been elected on a restricted franchise consisting of about 20 to 24 percent of the adult population. Initially, the number of members was 389. After partition, some of the members went to Pakistan and the number came down to 299. Out of this, 229 were from the British provinces and 70 were nominated from the princely states.

The work started with the presentation of the 'Objective Resolution' moved on 13th December, 1946 by Pandit Jawaharlal Nehru and was adopted on 22nd January, 1947. The Committee for scrutinizing the Draft Constitution and suggesting Amendments was formed on 29th August, 1947. The Draft was readied by February, 1948. The Constituent Assembly met thrice to read the Draft clause-by-clause in November, 1948, October, 1949 and November, 1949. After the third reading, it was signed by the President and adopted on 26th November, 1949. In fact, a Committee on Rules of Procedure was in place as early as December, 1946 under the Chairmanship of Dr. Bhimrao Ramji Ambedkar and other members.

The Drafting Committee studied the Constitutions of number of countries like France, Canada, USA, Switzerland, etc. and gathered the best features and adopted them for the realization of the aspirations of the people of India in our Constitution. The result of it was that we have one of the best Constitutions of the world today. The Indian Constitution closely follows the British Parliamentary Model but differs from it; the Constitution is Supreme, not Parliament. So the Indian Courts are vested with the authority to adjudicate on the constitutionality of any law passed by the Parliament

The framers of the constitution agreed that consensus of the members was required to make the provisions of the constitution effective and long lasting. Consensus means, to make decisions with near unanimity. The principle of consensus was followed to decide the fundamental issues such as federal structure, language etc. The policy of accommodation helped reconcile the conflicting views, behind the scene discussions and negotiations and to accommodate these divergent views. Through the principle of selection and modification the constitution makers made sure that it did not blindly followed the other constitutions but chose and modified the provisions to suit the Indian circumstances and the aspirations of the Indian people.

The Constituent Assembly discussed all concerns and issues very comprehensively before reaching decision on them. The decision and suggestions of different sub-Committees of the Constituent Assembly were finally incorporated in the Constitution of India. The Constitution of India is a document which provides a vision for social change. The Constitution is an embodiment of principles of liberal democracy and secularism, with some elements of social democracy. It ensures protection of cultural, linguistic and religious rights of individuals and communities.

Keywords/Glossary

Amend (amendment): Change a law, including a constitution. How to make a change to a constitution will be laid down in the previous constitution. It is possible that "amendment" does not include replacing the entire constitution.

Constituent Assembly: A group of people elected, or chosen on the basis of some other representative principle. This group is entrusted with the task of drawing/writing a constitution.

Consensus: General agreement on an issue—but it need not mean unanimity. However, a mere 51 percent majority would not be a consensus. Though it is a phrase often used in constitution-making, it often causes difficulties. It is rather vague for legal purposes. And there is always a risk that the consensus can be that of the majority, excluding minorities.

Drafting: The expert task of putting constitutional ideas into precise legal language that those who will employ the constitution, including the courts, are able to interpret. The word is often used to refer to a logically prior phase when ideas are put into a structured document, often called the draft constitution.

Preamble (to the constitution): An introduction setting out the aims and objectives of a Constitution.

Sovereign: Supreme; who does not derive power from anyone else and is herself/himself the source of power.

Swaraj: The term literally means self-rule, freedom or self-determination.

Self Assessment

1. What was the procedure followed for adoption of the Constitution of India?

A. It was submitted to the people of India for ratification.
B. It was submitted to the Governor-General for his assent.
C. It was adopted when the interim government approved it.
D. It was adopted when it received the signature of the President and Members of the Constituent Assembly.

2. Who among the following was the Chairman of the States Committee of the Constituent Assembly?

A. Dr. B.R. Ambedkar
B. Jawaharlal Nehru

C. Dr. Rajendra Prasad
D. Sardar Patel

3. **T**he Constituent Assembly of India was step up under the framework of?
A. Cripps mission (1942)
B. Cabinet mission (1946)
C. Simon commission (1927)
D. None of these.

4. The Constituent Assembly of India was passed and adopted on which of the following days?
A. 24 January, 1950
B. 26 January, 1950
C. 26 November, 1949
D. 29 August, 1947

5. The members of the Constituent Assembly were:
A. Directly elected by the people.
B. Nominated by the Governor General
C. Elected by the Legislatures of various provinces and nominated by the rulers of the princely states.
D. Nominated by the Congress and the Muslim League.

6. Who among the following was the Constitutional Advisor to the Constituent Assembly?
A. Dr. B.R. Ambedkar
B. K.M. Munshi
C. Sir B.N. Rau
D. T.T. Krishnamachari

7.Who among the following moved the "Objectives Resolution" in the Constituent Assembly?

A. B.N. Rao
B. B.R. Ambedkar
C. Jawaharlal Nehru
D. Rajendra Prasad

8. Who was the Chairman of the Union Power Committee of Constituent Assembly of India?
A. Sardar Vallabhbhai Patel
B. Dr. B.R. Ambedkar
C. Sir Alladi Krishnaswami Ayer
D. Pt. Jawaharlal Nehru

9. Who presided over the first meeting of the Indian Constituent Assembly?
A. Dr. Rajendra Prasad
B. Sachchidananda Sinha
C. B.R. Ambedkar
D. H.V. Kamath

10. Which of the following place where the Constituent Assembly met for the first time on 9th December 1946?

A. In the library of the Council Chamber, Delhi
B. In the library of the Council Chamber, Calcutta
C. In the library of the Council Chamber, Madras
D. None of the above

11. Who proposed the Preamble before the Drafting Committee of the Constitution?

A. Jawaharlal Nehru
B. B.R. Ambedkar
C. B.N. Rau
D. Mahatma Gandhi

12. How much time the Constituent Assembly took to frame the Constitution of India?

A. 2 year and 7 months 23 days
B. 3 years 4 months 14 days
C. 3 year 11 months 5 days
D. 2 year and 11 months 18 days

13. The philosophical postulates of the Constitution of India are based on:

A. Nehru Report, 1928.
B. Objectives Resolution of Pandit Nehru, 1947.
C. Mahatma Gandhi's article 'Independence in Young India',1922.
D. Indian National Congress's Resolution for Complete Independence, 1929.

14.The Preamble to the Indian Constitution is:

A. Not a part of the Constitution.
B. A part of the Constitution but it neither confers any powers nor imposes any duties nor can it be of any use in interpreting other provisions of the Constitution.
C. A part of the Constitution and can be of use in interpreting other provisions of the Constitution in cases of ambiguity.
D. A part of the Constitution and it confers powers and imposes duties as any other provisions of the Constitution.

15. The term "economic justice" in the Preamble to the Constitution of India, is a resolution for:

A. Equal distribution of wealth.
B. Economy in the administration of justice.
C. Socio-economic revolution.
D. Cheap justice to the poor.

16. The text of the Preamble to the Constitution of India aims to secure:

A. Fundamental rights to all individuals.
B. Fundamental duties to citizens of India.
C. Dignity of the individual and unity and integrity of the nation.
D. Security of service to Government servants.

17. Which one of the following is not a salient feature of the Constitution of India?

A. Written Constitution and supremacy of the Constitution
B. Quasi-federal structure
C. Committed Judiciary
D. Distribution of Powers

18. Which one of the following statements correctly describes the Seventh Schedule of the Constitution of India?

A. It contains the languages recognised in the Constitution.
B. It lists distribution of powers between the Union and the States.
C. It deals with the salaries and emoluments of the constitutional functionaries.
D. It contains the provisions regarding the administration of tribal areas.

19. Which one of the following pairs is not correctly matched?

A. Languages: Eighth Schedule
B. The forms of oaths or affirmations: Second Schedule
C. Allocation of seats in the Council of States: Fourth Schedule
D. Provisions as to disqualification on the ground of defection: Tenth Schedule

Answers for Self Assessment

1.	D	2.	B	3.	B	4.	B	5.	C
6.	C	7.	C	8.	B	9.	B	10.	A
11.	A	12.	D	13.	B	14.	C	15.	A
16.	C	17.	C	18.	B	19.	B		

Review Questions

1) What is meant by Constituent Assembly? Why do we need a Constituent Assembly?
2) How was the social diversity reflected in the composition of the Constituent Assembly?
3) How was a balance struck in the Constitution among the rights and aspirations of the various sections of the population?
4) Write a note on the policy of accommodation?
5) What is meant by preamble?What is the importance and relevance of the Preamble to the Constitution?
6) What role does preamble play in constitutional adjudication and constitutional design?
7) Write a critical not on why do states add a preamble to the constitution?
8) Identify salient features of the Indian Constitution.
9) Explain the significance of a written Constitution?
10) Distinguish between a rigid and flexible constitution.
11) Explain briefly India as a federal state.

Further Readings

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Unit 03: Fundamental Rights and Directive principles of State Policy

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- explain the meaning of a 'right'.
- analyse the Indian demand for Fundamental Rights.
- describe the meaning of the Fundamental Rights.
- explain the genesis of the Directive Principles of Sate Policy.
- describe the philosophical base of the Directive Principles of Sate Policy.
- understand the meaning and nature of the Directive Principles of Sate Policy.

Introduction

In fact, the experimentation of the constitutional democratic government in most of the post-colonial societies was taken to be a litmus test by the rest of the world to see whether these newly independent Afro-Asian nations would be able to secure and preserve those values of humanity and governance for which they had waged such long and stupendous national movements. Though majority of the countries in these continents appear to have failed on the core issue of sustaining a constitutional democratic government, India stands out to be one of the few fortunate nations to rival the classical democratic societies in the world and be branded as the biggest democracy on the globe. The deep-rooting of the ethos and functional vibrancy of democratic life in India may arguably be taken to be the fruition of thelong cherished endeavour of the fathers of the Constitution who notonly envisioned India to be a modern nation based on the norms ofrule of law, secular character of the society, democratic nature of thepolity and, ordinarily, primacy of the people's fundamental rightsover other imperatives of the state; but also made comprehensiveand mostly, precise provisions in the Constitution to facilitate themarch of the nation in the desired direction. The chapter attempts to figure out the Fundamental Rights, and the Directive Principlesof State Policy. Undoubtedly, the Indian Constitution appears to be a seamless web characterized by the three strands of the unity and integrity of the country, institutions and spirit of democracy, and social revolutionary fervor, yet, the shape of the web does not appear to be circular where it is not possible to figure out the sequence and placing of the particular value.The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence. And they were included in the constitution in the hope and expectation that one day the tree of true liberty would bloom in

India. The Rights and Principles, thus, connect India's future, present and past, adding greatly to the significance of their inclusion in the constitution, and giving strength to the pursuit of the social revolution in India.

3.1 Fundamental Rights

Before we discuss about what is meant by fundamental rights, we must know what is a right?Political debate is littered with references to rights – the right to work, theright to education, the right to abortion, the right to life, the right to freespeech, the right to own property and so forth. The idea is no lessimportant in everyday language: children may claim the 'right' to stay uplate or choose their own clothes; parents, for their part, may insist upontheir 'right' to control what their children eat or watch on television. In itsoriginal meaning, the term 'right' stood for a power or privilege as in theright of the nobility, the right of the clergy, and, of course, the divine right of kings. However, in its modern sense, it refers to an entitlement to act or be treated in a particular way. Although it would be wrong to suggest that the doctrine of rights is universally accepted, most modern political thinkers have nevertheless been prepared to express their ideas in terms of rights or entitlements. The concept of rights is, in that sense, politically less contentious than, say, equality or social justice. However, there is far less agreement about the grounds upon which these rights are based, who should possess them, and which ones they should have.That individuals have rights and the fact that rights mark important limits on what may bedone to them by the state, or in the name of other conceptions, is now a familiar positionin modern political philosophy.

The interest in rights was not restricted to the 17th and 18th centuries only; the secondhalf of the 19th century also witnessed a major resurgence of interest in the notion of humanrights. Issues of rights play a central role in our political life. The civil rights movementfrom the 1960s onwards took rights as the cornerstone upon which the rebuilding of oursociety was to be based. More recently, issues about rights of women and disadvantagedminorities have been a matter of debate. With the increasing medical advancements, weare now discussing whether persons have a right to die, i.e. euthanasia.Discussions aboutusing animals in research and testing are often phrased in terms of animal rights. Sexualchoice is discussed in terms of gay and lesbian rights. Human rights have become a majorconcern in recent times. Thus, discourse about rights has become persuasive in our society.The language of rights has proved to be the most powerful language for moral change inthe 20th and early 21st centuries.

Simply speaking, a right is to get 'one's due', i.e. to get what is due to someone as a human, citizen, individual or as a member of a group,etc. To have a right, then, is to be entitled to do something or to have something done;for example, to vote, to speak, to avail of healthcare, etc. It is different from obligation, asHobbes points out—on any occasion you have a choice whether or not to exercise yourright. You are not obliged to do what you are entitled to do. For example, it is your rightto vote, but you are not obliged to vote; you are free to exercise your choice, to vote or notto vote. While rights and obligations are not the same, they are still connected. Wheneveryou decide to do what you have a right to do, others have an obligation to let you do it.

Rights express a certain kind of relationship between two parties: the right-holder andthe right-observers. Rights thus have two faces, depending on whether they are viewed fromthe perspective of the holder of the right or from those with whom the right-holder is interacting.From the standpoint of the right-holder, a right is permission to act, an entitlement 'toact, to exist. To enjoy, to demand'. But from the standpoint of the right-observers, the rightusually imposes a correlative duty or obligation, as I mentioned earlier. This duty can be eithernegative (to refrain from interfering with the right-holder's exercise of the right) or positive(to assist in the successful exercise of the right). Finally, to have a right entails certain responsibilities.This brings us to the distinction between negative and positive rights.

The idea of rights provides for an essential tool of analysis of the relations betweenindividual and the state. The state claims authority over individual, but when thestate is viewed as an instrument of society, it is essential that authority of the stateis made to depend on the function it performs. In other words, when the state isregarded as a means, and the individual as the end, the state cannot be armed withabsolute authority over individual. If the state claims authority, individual must claimrights. Individual owes allegiance to the state and obeys its commands because thestate serves his interests. What does individual claim from the state? An answer tothis question will elucidate the concept of rights.

Rights essentially belong to the sphere of conflicting claims between individualand the state. Any political theory which holds that an individual cannot have rights'against the state' is no theory of rights. It is important to note that the benefitswhich flow automatically from the existence of the

state do not constitute rights.Rights come into the picture only when authority of the state is sought to be limited,or when individuals and their groups demand a positive role of the state. Thus,Thomas Hobbes (1588-1679), J.J. Rousseau (1712-78) and G.W.F. Hegel (1770-1831) may have paid rich tributes to the state, in their own ways, for creatingcongenial conditions for the happiness of men, but they have failed to evolve anyconcept of rights. Absence of rights makes the happiness of individuals depend onthe chance benevolence of the powers-that-be. If there are no rights to curb theauthority of the government and to prescribe functions of the government, the stateassumes unbridled power. It may soon degenerate into absolutism, authoritarianism,despotism and tyranny. Glorification of the state, without an in-built mechanism tocurb authority of the state means complete subordination of individual to the ruleror the ruling groups, thereby opening the floodgates of corruption, oppression,exploitation and injustice.

In a nutshell, rights consist in claims of individuals which seek to restrictarbitrary power of the state and which are required to be secured through legaland constitutional mechanisms. In addition, these may include some benefitswhich the state may extend to its citizens to improve the quality of their life.

Negative and Positive Rights

The concept of rights is a dynamic concept. With the development of socialconsciousness, rights are subjected to continual review and redefinition. It isinteresting to note that rights are always demanded and even granted as the 'rights of man'. But their beneficiaries are usually those classes which articulatethis demand because they formulate the demands of rights in a manner bestsuited and calculated to serve their own interests. However, with the spread ofmodem consciousness, the concept of rights has been modified in two importantdirections: it is now admitted that: (a) the advantages of rights should not beconfined to a tiny class which is placed in a privileged position by virtue of itsmoney and manipulative power; and that (b) rights should not be confined todelimiting the sphere of state activity and authority, but should also prescribe thefunctions and responsibility of the state so as to make them beneficial to the bulkof society. This trend indicates a shift of focus from negative to positive rights.

Negative rights are rights that entail non-interference from the society at large. For example,the right to liberty, life, property, etc. The right to life prevents others from killing me butit does not obligate them to do anything positive to assist me in living my life to the full orto live happily.Positive rights are rights that impose obligations on other people or the state to do somethingfor a fuller enjoyment of our rights. For example, the right to health, basic subsistence,etc. requires positive interference to do something. But negative rights restrict us from doingsomething. Negative rights entail only negative obligations of non interference; positiverights entail positive obligations on the part of the right-observer to do something to assistin the right-holder's exercise of the right. Rights can be classified in various ways—moral,legal, human rights, etc. or civil, political, social rights.A welfare state aims at combining negative rights with positive rightsas far as feasible.

There is, in the first place, a distinction between legal and moral rights.Some rights are laid down in law or in a system of formal rules and so areenforceable; others, however, exist only as moral or philosophical claims. Furthermore, particular problems surround the notion of human rights.Who, for instance, is to be regarded as 'human'? Does this extend tochildren and embryos as well as to adults? Are particular groups of people,perhaps women and ethnic minorities, entitled to special rights by virtueeither of their biological needs or social position? Finally, the conventionalunderstanding of rights has been challenged by the emergence of theenvironmental and animal liberation movements, which have raisedquestions about the rights of non-humans, the rights of animals and otherspecies. Are there rational grounds for refusing to extend rights to allspecies, or is this merely an irrational prejudice akin to sexism or racism?

Legal and Moral Rights

Legal rights are rights which are enshrined in law and are thereforeenforceable through the courts. They have been described as 'positive'rights in that they are enjoyed or upheld regardless of their moral content,in keeping with the idea of 'positive law' discussed in the last chapter.Indeed, some legal rights remain in force for many years even though theyare widely regarded as immoral. This can be said, for instance, about thelegal right enjoyed by husbands in the UK until 1992 to rape their wives.Legal rights extend over a broad range of legal relationships. A classicattempt to categorize such rights was undertaken by Wesley Hohfeld inRights, Obligations and Citizenship Fundamental

Legal Conceptions (1923). Hohfeld identified four types oflegal right. First, there are privileges or liberty-rights. These allow a personto do something in the simple sense that they have no obligation not to doit; they are 'at liberty' to do it – for instance, to use the public highway.Second, there are claim-rights, on the basis of which another person owesanother a corresponding duty – for example, the right of one person not tobe assaulted by another. Third, there are legal powers. These are bestthought of as legal abilities, empowering someone to do something – forexample, the right to get married or the right to vote. Fourth, there areimmunities, according to which one person can avoid being subject to thepower of another – for instance, the right of young, elderly and disabledpeople not to be drafted into the army.

Until the middle of the 20th century, civil rights were usually distinguished from 'politicalrights'. The former included the rights to own property, the rights to make and enforce contracts,the right to legal recourse and the right to one's religion. Civil rights also coveredfreedom of speech and of the press; but they did not include the right to hold public office,vote, or to testify in court. The latter were political rights, reserved for adult males.The civil–political distinction was conceptually and morally unstable insofar as it wasused to sort citizens into different categories. It was part of an ideology that classifi ed womenas citizens who were entitled to certain rights but not to the full panoply to which menwere entitled. As that ideology broke down, the civil–political distinction began to unravel.The idea that a certain segment of the adult citizenry could legitimately possess one bundleof rights, while another segment would have to make do with an inferior bundle, becameincreasingly implausible. In the end, the civil–political distinction could not survive the cogencyof the principle that all citizens of a liberal democracy were entitled, in Rawls' words,to 'a fully adequate scheme of equal basic liberties'.

Moral Rights

In ordinary language, we use the term 'right' in at least two ways; we say that someone hasthe right to something, and we also say that someone has a right to do certain things. In thefi rst instance, the existence of the right concerns the behaviour of someone other thanthe right-holder, since to say that I have a right to something is to say that someone has theduty to act in a certain manner towards me. In the second instance, it is the right-holder'sbehaviour that is in question, and to say that he has a right to act in a particular way is tosay that he is morally free to do so—that it is not wrong for him to do so. These two usesof the term 'right' correspond in part to Dworkin's (1977: 188) 'strong' and 'weak' sensesof right, respectively.The standard interpretation of a claim-right is that another person has the duty to act in acertain way with respect to the 'thing' to which the first person has a right. But does a rightto-something merely imply a duty in others or is it a package of normative advantages?Either way, the core idea of right appears to be that an object or interest protected by a dutyhas some things that are considered to be good, and to say that one has a right to such athing means that one's interests in that thing deserves protection.Not all goods or interests generate rights; it is only when there is a particularly importantmoral reason for protecting the good or interest in question that we speak of there being aright attached to it. This idea is expressed in Dworkin's (1977: 189–90) well-known claimthat individual rights are political trumps held by individuals. He goes an to add that individualshave rights when, for some reason, a collective goal is not a sufficient justificationfor denying them what they wish, as individuals, to have or to do, or is not a sufficient justification for imposing some loss or injury upon them. The idea is also expressed in Raz's(1995: 166) claim that a right exists if an aspect of a single person's well-being is a sufficientreason for holding some other person or persons to be under a duty. Political theories willdiffer in their estimate of the importance of certain goods or interests for human beings,and therefore in their ascription of particular rights, but the central idea remains that ofimportant interests of individuals protected against wider moral considerations. That is why,according to Hartney (1991), giving rights to the society would simply annihilate any competingindividual rights. But he ignores the very important issue of individuals not as atomizedentities but as culturally embedded, and the idea of 'good' as rooted in one's culture.

Theory of Natural Rights

The theory of natural rights was very popular in seventeenth and eighteenth centurypolitical thought. It treats the rights of man as a 'self-evident truth'. In other words,these rights are not granted by the state, but they come from the very nature of man,his own intrinsic being. This theory was broadly developed on two important bases:the contractual basis and the teleological basis.

The most influential statement on natural rights was given by John Locke in his SecondTreatise on Civil Government published in 1690 (repr. 1946). But before Locke, ThomasHobbes had also propounded a theory of natural rights. Hobbes' idea of natural rights canbe traced to his conception of the 'state of nature'. This state is the condition of human lifein the absence of organized political authority and government, the natural condition ofman in contrast to his artificial condition under a government. According to Hobbes (1946:80–81), the right of nature or what he calls 'Jus Naturale',is the liberty each man hath to use his power as he will himself for the preservation ofhis own nature, i.e. to say his own life, and consequently of doing anything which in hisown judgment and reason he shall conceive to be the aptest means.This liberty is a right to nature because each man has it in the state of nature. It is theonly right anyone can have in the absence of a government. But this is not a worthy rightbecause, as Hobbes (1946: 82) later points out, the state of nature is a condition of warwhere everyone is against everyone, and in which everyone is governed by his or her ownreason. Thus, Hobbes concludes that the natural right of every man to everything must begiven up as a necessary condition for the establishment of a government and to end theanarchy of the state of nature. All must agree to obey unconditionally one supreme authority.Hobbes, however, retains one natural right and that is the right to life. If the governmentorders a man to kill himself, he may resist.

John Locke (1946) also thinks of the state of nature as being the condition of humanbeings in the absence of government. But unlike Hobbes, he does not think that it is inherentlya state of war. 'Men live together according to reason, without a common superior onearth with authority to judge between them are properly in a state of nature.'According to Locke, in the state of nature men are in perfect freedom to order theiractions and dispose of their possessions and persons as they think fit within the bounds ofthe law of nature, without asking leave or depending upon the will of any other man. Healso adds that it is 'a state of equality, wherein all the power and jurisdiction is reciprocal,no one having more than the other'. But this natural freedom is not freedom to do as youlike. It is freedom 'within the bounds of the law of nature'. The state of nature has a law ofnature to govern it. This law teaches all mankind, who will consult it, that being all equaland independent, no one ought to harm another in his life, health, liberty or possessions.Locke speaks of man as being born with a title to perfect freedom and an uncontrolledenjoyment of all the rights and privileges of the law of nature. But what are these rightsand privileges? To this, Locke's answer is that every man has a natural right to his life andfreedom of action to use his property as he thinks fit, provided that he does not interferewith any other man's enjoyment of the same conditions.The theory of natural rights has been criticized by many thinkers, but the most vehement critics of this theory are the utilitarian's.

T.H. Green (1836-82) also sought to build his theory of moral rights on theteleological basis. Green argues that the rights of man do not emanate from atranscendental law as Locke had maintained, but they come from the moralcharacter of man himself. Each individual, impelled by his moral consciousness,tends to seek ideal objects. Since all individuals share the same moral consciousness,their ideal objects are common objects. Thus when they form the state, allindividuals agree to recognize each other's claim to pursue their ideal objects.Green undoubtedly holds that rights depend on recognition, but their recognitionis granted by the moral consciousness of the community—which is shared by allindividuals—not by the state. In fact, Green is concerned with ideal rights, notwith legal rights. Ideal rights derive their sanction from the inherent moral propensityof man, not from the 'force' of the state.

Jeremy Bentham (1748-1832) is the greatest champion of the theory of legalrights. He rejects the doctrine of natural rights as unreal and ill-founded. In hisPrinciples of Legislation (1789) Bentham observed:Rights, properly so called, are the creatures of law properly so called; reallaws give birth to real rights. Natural rights are the creatures of naturallaw; they are a metaphor which derives its origin from another metaphor...What there is natural in man is means—faculties. But to call these means,these faculties, natural rights is again to put language in opposition toitself. For rights are established to insure the exercise of means and faculties.The right is the guarantee; the faculty is the thing guaranteed. How canwe understand each other with a language which confounds under thesame term things so different?Bentham condemns natural rights as an invention of fanatics, which aredogmatic and unintelligible, devoid of reasoning. About their upholders, Benthamremarks: "Instead of examining laws by their effects, instead of judging them asgood or as bad, they consider them in relation to these pretended natural rights;that is to say, they substitute for reasoning of experience the chimeras of theirown imaginations".It is thus evident that the theory of legal rights was advanced with a focus onpolitical reality and to repudiate the imaginative character of natural rights theory.

3.2 Fundamental Rights

In the nineteenth and twentieth centuries the recognition of the Fundamental Rights of man, in the constitutions of states, became a general principle of constitutional law of the civilized states. The constitution of Egypt of 19th April and of Abyssinia of 6th July 1931 contained declarations of rights of individuals. The declaration of Fundamental Rights was also found in the Latin American constitutions. The enunciation of social and economic policies became a regular feature in the constitutions framed in the post-war years recognizing thereby that justice was to be secured not only in the political field for the individuals alone, but also in the social and economic spheres, for the society as a whole. The state was, therefore, called upon to play a more positive role to achieve the common good without sacrificingthe good of the individual.

Granville Austin argues that the Indian Constitution is "first and foremost a social document". The core of its commitment to a fundamental change in the social order lies in the section of fundamental rights and DPSP. They are "The conscience of the Constitution". The fundamental Rights reflect both India's assimilation of Western liberal tradition and its desire for the political freedom it was denied under colonial rule.

The Indian Demand for Fundamental Rights

The idea that human beings have fundamental rights and that the social/political arrangements of the society must recognize the worth of every human, along with facilitating the exercise of those rights has been an accepted norm of every democratic society. The scholars of political theory have been occupied in a major way to delineate the tradition of rights. S.K.Chaube opines that the sense of rights in terms of entitlement cannot be seen in ancient political theory. In this context, rights primarily meant what was appropriate or logical. The seeds of rights in terms of entitlement could be traced back to Magna Carta of thirteenth century, where King John enunciated that no person could be detained withouttrial. This was followed by an era of liberal political theory, with scholars like Hobbes and John Locke who came up with the concept of natural rights of life, liberty and later property. Subsequently, a petition of rights was given by the British Parliament in 1628, which paved the way for Declaration of Rights in 1689. However, it should be noted that the Constitution of England was unwritten. Incorporation of rights in a written form came up with the American Bill of Rights (enclosed in the first Ten Amendments of the Constitution of the USA) in 1791. These rights were termed as fundamental rights, as they could not be violated by the state. The US rights further progressed through amendments in 1865, 1866, 1870, 1919 and in 1962. In the present times, the ambit of protection of rights under the name of human rights has been strengthened with United Declaration of Human Rights along with other international conventions and treaties. Thus, the issue of preservation of rights has assumed a universal dimension. The fundamental rights are meant to be sheltered from the abuses of both the legislative and executive bodies of the government. In the United States, the declarations of the American Bill of Rights are absolute, to the extent that they have the concept of 'judicial supremacy' which can declare any Congressional Act as unconstitutional for breaching any provision of Bill of Rights and also it the Judiciary in the United States which can alter any fundamental right in the instance of national emergency or any kind of threat to the State. The Indian Constitution can be seen as a balance between parliamentary sovereignty of England and judicial supremacy of the United States. Our Parliament is constrained by a written constitution, unlike England. Hence, if any provisions of the Constitution like Fundamental Rights are transgressed by any act of the Legislature or the Executive, then in that case the Supreme Court or the High Courts are competent to declare that law as void. Also it should be noted that the degree of judicial supremacy in India in declaring these laws as void are less intense as compared to the American model. We are saying this because in the United States the power of the State to impose restrictions on fundamental rights had to be evolved by the Judiciary, while in India this power has been bestowed upon the Legislatures by the Constitution itself, along with a window for judicial review, where the Judiciary can determine whether the restrictions imposed by the Legislature are reasonable enough to impose restrictions on Fundamental Rights.

In the context of our country, we can say that the importance of rights was realized when we were fighting against the colonial forces. The formation of Indian National Congress in 1885 implicitly held that Indians wanted the same rights as the British. The first major document openly demanding for Fundamental Rights was The Constitution of India Bill, 1895. Even though the Simon Commission and the Joint Parliamentary Committee rejected the proposal of the affirmation of fundamental rights on the grounds that there are no means to make them effective. In spite of this, Motilal Nehru Committee claimed a bill of rights in 1928. The resolution on fundamental rights was adopted by the Indian National Congress in 1931, along with this towards the end of

1930s Nehru started Civil Liberties Union in order to provide legal aid to the freedom fighters. And the last major document in the pre-Assembly period was in the Sapru Report which came out with a constitutional outline dealing with portions of Fundamental Rights. The discussion on Constituent Assembly debates has been done in the next section. At this juncture, the distinction between Fundamental Rights and ordinary legal rights needs to be taken into account. The former are entailed and guaranteed by the Constitution, accordingly they may be altered by amending the Constitution itself, while the latter are put into effect by ordinary law and could be modified by the legislature or by regular procedure of law making. The protection of Fundamental Rights by the Constitution also entails that the judiciary can declare executive plus legislative acts illegal, if by any means they violate fundamental rights. Further, violation of Fundamental Rights is remedied by resorting to Article 32 which is direct recourse to the Supreme Court and which also includes the issue of judicial summons against a public authority contravening Fundamental Rights. However infringement of legal rights could be remedied by resort to Article 226 i.e. by approaching the High Court or by a regular suit.

Meaning of Fundamental Rights

The word fundamental suggests that these rights are so important that the Constitution has separately listed them and made special provisions for their protection. The Fundamental Rights are so important that the Constitution itself ensures that they are not violated by the government. Fundamental Rights are different from other rights available to us. While ordinary legal rights are protected and enforced by ordinary law, Fundamental Rights are protected and guaranteed by the constitution of the country. They are binding on public authorities. N.A. Palkhiwala argued they constitute the anchor of the Constitution and provide it with the dimension of permanence.The Constitution envisages the fundamental rights as the common platform on which divergent political ideologies and practices may meet. They provide the iron framework within which experiments in social and economic changes may be tried out. These rights, therefore, have been given a very esteemed position in the constitutional law of the country, for, all laws in force in the territory of India immediately before 26 January 1950, and all legislations enacted thereafter, have to conform to the provisions of Part III of the Constitution. Originally, the Constitution contained seven fundamental rights. But the right to property was repealed in 1978 by the Forty fourth Constitutional Amendment during the rule of the Janata government, reducing these rights to six only, which are Right to Equality (Articles 14–18), Right to Freedom (Articles 19–22), Right against Exploitation (Articles 23 and 24), Right to Freedom of Religion (Articles 25–28), Cultural and Educational Rights (Articles 29 and 30), and the Right to Constitutional Remedies (Article 32).However, fundamental rights are not absolute or unlimited rights. Government can put reasonable restrictions on the exercise of our fundamental rights.

3.3 Directive Principles of State Policy

The practice with regard to the enumeration ofsocial and economic policies within the framework of the constitution hasnot been uniform. It has varied from country to country depending upon it social and economic progress.The constitution of the Principality of Liechtenstein14 of 5th October 1921,and the constitution of the Spanish Republic of 9th December 1931, bothprofessing the Roman Catholic religion are out of those constitutions whichhad provided for social and economic matters, and require special mention.In the constitution of Liechtenstein, the chapter commencing with the'Directive' provides that the supreme duty of the State was to advance thepublic welfare, goes on to include in its fourteen articles, matters relating toeducation, public health, industrial and agricultural labour, public utilities,natural resources, currency, credit and taxation, poor relief, social insurance,and reform of the legal system. The Spanish 'directives' was an improvementon the Liechtenstein 'directives' in the sense that it broadened the'directives' by including in matters relating to the family and culture apartfrom social and economic matters. The enunciation of social and economicpolicies, however, found a distinctive place in the constitution of Irelandwhich came into force on 29th December 1937.

It is worthy to note here as to what principles should be kept in view whilelaying down the 'Directives' in the constitutional framework; what shouldbe the basic contents; and in what manner should they be stated. First and foremost consideration is to avoid any sort of partisan zeal. Secondly, that 'Directives' should appeal to popular imagination. Thirdly, the 'Directives'should not occasion violent and lasting controversy. The function of theprovision contained in the 'Directives' is to give a particularly solemn sanctionand status to principles which are regarded of

great importance. Inregard to the content, it should be said that no model 'Directives' could beset for adoption by all countries. The most that could be done is to lay downcertain generally acceptable objectives. Writing about Indian 'Directives' Where says: "Difficult to justify to the practical minded British observer, perhaps, is the large section embodying the 'Directive Principles of State Policy'. As these principles cannot be enforced in any court, they amount to a little more than a manifesto of aims and aspirations. In this matter of declarations of rights and of Directives of State Policy, the Indian Constituent Assembly has followed the Irish constitution and European practice rather than the less colorful and more legalistic documents which serve as constitution for other members of the Commonwealth. One thing is certain. If these declarations of liberal principles, strange as they may seem in a legal document to British eyes, help the Indian constitution on its way and assist its people in working their government, they are more than justified. This is the biggest liberal experiment in the government of men by themselves that has ever been tried."

Apart from the Irish constitution wherein the distinction between rightsjusticiable and non-justiciable were made, Sir. B.N. Rau also found a similardistinction recognized by Dr. Lauterpacht in his 'International Bill of theRights of Man'. The substantial provisions of the Bill were in two parts; PartI dealt with rights meant to be enforced by the ordinary courts, and Part IIdealt with rights incapable of or unsuitable for such enforcement. Impressedwith that distinction in Fundamental Rights as justiciable and non-justiciablein the Irish constitution and reinforced by Dr. Lauterpacht's recognition ofthe same, Sir B.N. Rau suggested for adopting in the Indian constitution theIrish plan and separating the two classes of rights: Part A dealing with FundamentalPrinciples of State Policy, and Part B with Fundamental Rights.

On the other hand, K.M. Munshi was not veryparticular in making any distinction between justiciable and non-justiciablerights and including the latter in the constitution. Ultimately, the FundamentalRights Sub-committee resolved that a distinction should be made inthe list of Fundamental Rights as justiciable and non-justiciable. The Subcommitteeexamined the Directive Principles of Social Policy on 30th March1947. According to the first set of 'Directive Principles of Social Policy asframed on 30th March 1947 by the Sub-committee was: "The principle ofSocial Policy set forth, in this part, are intended for the general guidance ofthe appropriate legislatures and governments in India (hereinafter collectivelycalled as the State). The application of these principles, in legislationand administration, shall be the care of the State and shall not be cognizableby any court". On the next day, 31st March 1947, the Sub-committee decidedto insert the following Preamble to the Directive Principles of Social Policy:"The principles of social policy set forth in this part are intended for thegeneral guidance of the State. The application of these principles in legislationand administration shall be the care of the State and shall not becognizable by any court".

Nature of the DPSP

Chapter IV of the Indian constitution relating to the Directive Principles of State Policy was the subject of animated discussion in the Constituent Assembly. On the one hand, one member preferred to label it as "pious expressions" and "pious superfluities", another member characterized it as 'vague' and 'adrift'. A third linked it to 'a cheque on a bank payable when able' because of its non-justiciable and non-binding character, a fourth took it to be analogous to an 'election manifesto' and as such there was no place for it in the constitution, and a fifth member called its inclusion in the constitution as 'undemocratic' and 'opposed to parliamentary democracy' and went to the extent of suggesting its deletion from the constitution. On the other hand, Professor Shibban Lal Saksena considered it to be 'an important chapter laying down the principles which would govern the policy of the State;' Pandit Thakur Das Bhargava regarded it to be the 'essence of the constitution and justified the way the Directives were worded, and S.V. Krishnamurthy Rao30 deemed it as containing 'the germs of a socialist government' and he said that the part relating to the Directives in the constitution should come in immediately after the Preamble. One member went to the extent of pointing out that the chapter on Directives was "one of the most cardinal, important, and creative chapters of the constitution." Pandit Hirday Nath Kunzru31 did not attach any 'value' to any of the Principles included in the Chapter on Directive Principles, and T.T. Krishnanamachari, a member of the drafting committee, preferred to label it as 'a veritable dustbin of sentiment.' V.S. Sarwate (United States of Gwalior-Indore-Malva-Madhya Bharat) was, however, inclined to believe that 'all the principles given in this chapter are of such a nature that they are fundamental, that they are basic, and that efforts to implement them to the fullest extent would have to the taken as long as society goes on. Members also criticized the distinction made between justiciable and non-justiciable rights. For instance, Somnath Lahiri (Bengal, General) observed: "It is

rather difficult to make a distinction between what are justiciable rights and what are not. For instance, when we make a provision thatpeople should have the right to work, that is, unemployment should notbe allowed to exist on our country, it would be social rights. If you makeit an inalienable provision of our Fundamental Rights, naturally it will haveto be justiciable. Similarly, take the question of nationalization of land. Ifone wants to say that the land belongs to the people and to nobody else,that would be a social and fundamental right no doubt...it will also be ajusticiable right. Therefore, it is rather arbitrary to make any distinction between what are justiciable and what are social and economic rights".Promath Ranjan Thakur (Bengal, General) said:"I do not know why economic Fundamental Rights should not be includedin these justiciable right., Economic rights are essential while framing acountry's constitution and they must also be made justiciable".Renuka Ray (West Bengal, General) said:The provision that no person shall be deprived of his property save byauthority of law with the details about compensation when property wastaken by the State for public purpose in accordance with law, should beput under directives and not under rights which are justiciable and enforceablein courts of law.VishwambharDayal Tripathi also thought:"There is no ground for thinking that the Directive Principles of State Policyas embodied in the Draft constitution would at all affect the future structureof society in India.'From the discussion in the Constituent Assembly, the following pointsemerge in respect of the Directive Principles of State Policy:

1. That the Directives are like Instruments of Instructions to the legislatureand the executive and as such could be justified for inclusion in theconstitution;
2. That the Directives cannot or will not be ignored by any responsiblegovernment or any legislature elected on the basis of universal suffragefor the sanction behind them is not the courts but the electorate;
3. That the Directives lay down the ideal of economic democracy.Article 37 brings forth a three-fold characteristic of the Directives, namely;

a. That the Directives shall not be enforceable by any court;

b. That the Directives are fundamental in the governance of the countrydespite the fact that the judiciary cannot see to their effectivecompliance;

c. That it shall be the duty of the State to apply these principles in making laws.

Directives came to be incorporated into the constitution, for assessingthe nature and significance of the Directives. It has already been notedthat the Directives came to be incorporated in constitutions to ensure socialand economic democracy in addition to political democracy. Directives partakesthe nature of the rights, but are different from the rights contained inthe chapter on Fundamental Rights. Part IV confers on the people PositiveRights while Part III grants to the people Negative Rights, rights not to beharmed and it is easier for the law to prevent the infliction of harm thanto enforce positive benefits. It is because of practical difficulty of enforcementof positive rights that Article 37 states that these rights 'shall not beenforceable by the courts'. It is undesirable for the court to order the stateto do any particular work and the exchequer may not have enough moneyto implement them or pay damages for failure to do so. It is for this reasonthat Part IV has not set, save in one instance, namely, Article 45, a time limitfor their fulfillment.It is also worthy to recall that Part III and Part IV were originally designatedas Fundamental Rights. The Fundamental Rights Sub-committee recommended'the list of Fundamental Rights should be prepared in two parts,the first part consisting of Directive Principles of Social Policy.' SardarVallabhbhai Patel also came to the conclusion that Fundamental Rightsshould be divided into two parts, the first part justiciable and the othernon-justiciable.

The significant expression contained in Article 38 "Justice, social, economic,and political" gives the proper key to the understanding of thenature and significance, on the base of which the entire structure of theDirectives has been built. The Directives in the Indian constitution lend flexibilityto the written constitution, by enabling it to adjust according to thecircumstances. It was for this reason that the Prime Minister characterizedthe Directives as representing something "dynamic" as against FundamentalRights which he said represented something "static". Directive Principles arethe deliberate formulation of national policy. They were not formulated byany particular political party or any particular organ of the government, butby the representatives of a nation who assembled to lay down the constitutionfor the government of the country. They indicate to the people of thecountry as to what the State might do for them and what it seeks to achieve.Directive Principles also constitute a pledge by the framers of the constitutionto the people of India and failure would bring not only breach of faith,but would also render a vital part of the constitution a

dead letter. Trulyspeaking, the Directive Principles are more fundamental than FundamentalRights from the point of view of the constitution since it contained the ideals,'Justice, social, economic, and political'. It is for this reason that both inthe Objectives Resolutions and in the Preamble to the constitution the idealof "Justice, social, economic, and political" is mentioned prior to the securingof guarantees under Fundamental Rights.Another important thing to be noted is with regard to the nature ofDirectives and that is their enunciation in a general and non-detailed way,unlike the other constitutions in which provisions of economic and socialmatters are laid in a detailed manner. It also lends flexibility to the constitutionand enables different governments to achieve the ideas contained in the constitution with varying methods of approach without resorting toalterations and amendments in the constitution.

Summary

The Constitution has been given the adjective of 'living', which connotes that it is a document which responds to the changing circumstances. It signifies that our Constitution is dynamic in nature and not constant, this also conveys its democratic aspect. Thus, with the new challenges, ideas and practices of the contemporary times, scope has been made to amend the Constitution. It should be noted that the constitutional provisions have scope to expand its meaning in order to make the exercise of Fundamental Rights more substantial. Therefore, two processes must go simultaneously. First, the existing provisions must be implemented i.e. the gap between theory (as given in the Constitution) and its actual practice needs to be lessened. And second, the interpretation of each constitutional provision must be widened with the changing circumstances.

The 'Directive Principles of State Policy' constitute an important part of the Indian Constitution. The implementation of the provisions of the Directive Principles has widened the scope for realization or freedom. Additionally, with these Principles it has become possible to argue with the Indian State for the realization of social and economic freedom for Indian citizens. The provisions in the 'Fundamental Rights' and the 'Directive Principles of State Policy' need to be read together for the realization of the ideals inscribed in the Indian Constitution. The role they will continue to play in the Indian democracy will depend on the manner in which the legislature and judiciary continue to interpret and implement these directives.

Keywords

Bill of Rights: Fundamental rights and privileges guaranteed to a people against violation by the government incorporated in the constitution. Whether or not a country should include a bill of rights in its constitution must be decided upon by the people, or representatives of the people, of that country. However, most nations today do in fact have a bill of rights incorporated in their constitutions.

Civil Rights: Rights ofparticipation and access topower, typically voting andpolitical rights and the right tonon-discrimination.

Locus Stand: The right or capacity to bring an action or to appear in the court.

Magna Carta: It is also known as the Great Charter of the Liberties of England. This was the first document to limit the powers of the King of England in the thirteenth century.

Natural Rights: God-givenrights that are fundamental tohuman beings and are thereforeinalienable (they cannot betaken away).

Negative Rights: Rights thatare enjoyed by virtue of theinactivity of others, particularlygovernment; often seen(somewhat misleadingly) as'freedoms from'.

Positive Rights: Rights thatcan only be enjoyed throughpositive intervention on thepart of government, oftenlinked to the idea of 'freedomto'.

Procedure established by law: It means that a law that is duly enacted by legislature or the concerned body is valid if it has followed the correct procedure.

Writ: a form of written command in the name of a court or legal authority.

Self Assessment

1. What do you mean by a right?

A. To gets one's due'.
B. To emulate orders.
C. To have everything.
D. None of the Above

2. What is meant by negative rights?
A. It suggests the sphere where the state is not permitted to enter.
B. It prescribes the responsibility of the state in securing rights of individuals.
C. Both A and B
D. None of the Above

3. What is meant by positive rights?
A. It suggests the sphere where the state is not permitted to enter.
B. It prescribes the responsibility of the state in securing rights of individuals.
C. Both A and B
D. None of the Above

4. In which part of the Indian Constitution, the Fundamental Rights are provided?
A. Part II
B. Part III
C. Part I
D. Part IV

5. Who among the following is not a contractualist?
A. Thomas Hobbes
B. Karl Marx
C. John Locke
D. J. Rousseau

6. Who among the following argued that the Indian Constitution is "first and foremost a social document"?
A. Karl Marx
B. K. Bodin
C. Granville Austin
D. Sardar Patel

7. Which among the following is true regarding the Fundamental Rights?
A. They are justiciable rights.
B. They are binding on public authorities.
C. They are not absolute or unlimited rights.
D. All of the Above

8. Who said Fundamental Rights constitute the anchor of the Constitution and provide it with the dimension of permanence?
A. Jawaharlal Nehru
B. N.A. Palkhiwala
C. M. Gandhi

D. T. Shankar Lal

9. Which part of the Indian Constitution deals with the Directive Principles of State Policy?
A. Part III
B. Part II
C. Part IV
D. Part XX

10. Directive Principles of State Policy may be classified under which group/s?
A. Certain ideals.
B. Certain directions.
C. Certain rights.
D. All of the Above
11. Directive Principles of State Policies aim at the establishment of the economic and social democracy.
A. True
B. False
C. Neither True nor False

12. Who among the following considered Directive Principles of State Policies chapter 'an important chapter laying down the principles which would govern the policy of the State'?
A. Professor Talat Ahmad
B. Professor Shibban Lal Saksena
C. Pandit Thakur Das Bhargava
D. Sarder Patel

13. Who regarded Directive Principles of State Policies to be the 'essence of the constitution'?
A. Professor Shibban Lal Saksena
B. Pandit Thakur Das Bhargava
C. Sarder Patel
D. Madan Mohan

14. Who deemed DPSP as containing 'the germs of a socialist government'?
A. S.V. Krishnamurthy Rao
B. Pandit Thakur Das Bhargava
C. Sarder Patel
D. Dr. Ambedkar

15. Who among the following described DPSP as a 'novel feature'?
A. Prof. Samir Amin
B. Pandit Thakur Das Bhargava
C. Sarder Patel
D. Dr. B. R. Ambedkar

16. Who stated DPSP as "The Directive Principles are the life giving provisions of the Constitution. They constitute the stuff of the Constitution and its philosophy of social justice"?

A. L. M. Singhvi
B. Pandit Thakur Das Bhargava
C. Rajander Prasad
D. K. T. Shah

Answers for Self Assessment

1.	A	2.	A	3.	B	4.	B	5.	B
6.	C	7.	D	8.	B	9.	C	10.	D
11.	A	12.	B	13.	B	14.	A	15.	D
16.	A								

Review Questions

1. Explain the meaning and concepts of 'right'?
2. What is the major difference between natural and positive rights?
3. Write a note on the concept of civil rights? Identify its features.
4. Critically examine the notion of legal rights?
5. What is meant by natural rights? Describe some features of natural rights?
6. Discuss in detail John Locke's contribution of natural rights?
7. What do you mean by fundamental rights?
8. Evaluate the genesis of fundamental rights in India?
9. Discuss the ambit of Fundamental Rights. Are they absolute in nature?
10. Describe the evolution of the Directive Principles of State Policy?
11. Write an essay on the debates surrounding 'Directive Principles of State Policy' held during the drafting of the Indian Constitution?
12. What are the major provisions of the 'Directive Principles of State Policy'? Why did members of the Constituent Assembly make a distinction between 'Directive Principles of State Policy' and 'Fundamental Rights'?

Further Readings

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Unit 04: Fundamental Rights and Directive Principles OfState Policy

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- describe some of the important characteristics of fundamental rights.
- analyse how fundamental rights are restrictive in nature.
- describe the importance of Right to Equality.
- analyse the significance of Right to Freedom.
- Understand the articles related to against exploitation.
- analyse different fundamental rights embedded in the Indian Constitution.
- explain the writs issue by the Supreme Court (under Article 32) and high courts (under Article 226).
- analyse different criticisms of Fundamental Rights.

Introduction

The vision of liberty, equality, justice, fraternity, peace, prosperity and so on envisaged in the speech of Jawaharlal Nehru, 'Tryst with Destiny' for independent India was given shape in the form of a Constitution. Various norms and principles were laid down in the Constitution for both the citizens and the government of India to achieve the abovementioned vision into a reality. These include limits on the powers of the government, along with space for rights and duties of individuals as well as groups/collectives.

4.1 History of Fundamental Rights

The idea that human beings have fundamental rights and that the social/political arrangements of the society must recognize the worth of every human, along with facilitating the exercise of those rights has been an accepted norm of every democratic society. The scholars of political theory have been occupied in a major way to delineate the tradition of rights. S.K.Chaube argues that the sense of rights in terms of entitlement cannot be seen in ancient political theory. In this context, rights primarily meant what was appropriate or logical.

The seeds of rights in terms of entitlement could be traced back to *Magna Carta* of thirteenth century, where King John enunciated that no person could be detained without trial. This was followed by an era of liberal political theory, with scholars like Hobbes and John Locke who came up with the concept of natural rights of life, liberty and later property. Subsequently, a petition of rights was given by the British Parliament in 1628, which paved the way for Declaration of Rights in 1689. However, it should be noted that the Constitution of England was unwritten. Incorporation of rights in a written form came up with the American Bill of Rights (enclosed in the first Ten Amendments of the Constitution of the USA) in 1791. These rights were termed as fundamental rights, as they could not be violated by the state. The US rights further progressed through amendments in 1865, 1866, 1870, 1919 and in 1962. In the present times, the ambit of protection of rights under the name of human rights has been strengthened with United Declaration of Human Rights along with other international conventions and treaties. Thus, the issue of preservation of rights has assumed a universal dimension. The fundamental rights are meant to be sheltered from the abuses of both the legislative and executive bodies of the government. In the United States, the declarations of the American Bill of Rights are absolute, to the extent that they have the concept of 'judicial supremacy' which can declare any Congressional Act as unconstitutional for breaching any provision of Bill of Rights and also it the Judiciary in the United States which can alter any fundamental right in the instance of national emergency or any kind of threat to the State.

The Indian Constitution can be seen as a balance between parliamentary sovereignty of England and judicial supremacy of the United States. Our Parliament is constrained by a written constitution, unlike England. Hence, if any provisions of the Constitution like Fundamental Rights are transgressed by any act of the Legislature or the Executive, then in that case the Supreme Court or the High Courts are competent to declare that law as void. Also it should be noted that the degree of judicial supremacy in India in declaring these laws as void are less intense as compared to the American model. We are saying this because in the United States the power of the State to impose restrictions on fundamental rights had to be evolved by the Judiciary, while in India this power has been bestowed upon the Legislatures by the Constitution itself, along with a window for judicial review, where the Judiciary can determine whether the restrictions imposed by the Legislature are reasonable enough to impose restrictions on Fundamental Rights.

Thus, The inclusion of a detailed scheme of fundamental rights in the Constitution marks the culmination of a long and sustained desire of the Indians to be bestowed with the basic liberties of free and happy life. Indeed, the formation of the Indian National Congress in 1885 was, among other things, aimed at ensuring the same rights and privileges for Indians that the British enjoyed in their own country. But the first systematic demand for fundamental rights came in the form of the Constitution of India Bill, 1895.

Thereafter, numerous resolutions were passed and committees were appointed to put forth the perspectives of Indians on the nature and scope of the fundamental rights, aspired by the people of India. The final shape to the fundamental rights was given by the Advisory Committee for reporting on minorities, fundamental rights, and on the tribal and excluded areas, under the chairmanship of Sardar Patel, which the Constituent Assembly accepted and adopted to make it Part III of the Constitution. In this regard, the framers of the Constitution derived inspiration from the Constitution of USA (i.e., Bill of Rights). Part III of the Constitution is rightly described as the Magna Carta of India. It contains a very lengthy and comprehensive list of 'justiciable' Fundamental Rights.

The Fundamental Rights are guaranteed by the Constitution to all persons without any discrimination. They uphold the equality of all individuals, the dignity of the individual, the larger public interest and unity of the nation. The Fundamental Rights are meant for promoting the ideal of political democracy. They prevent the establishment of an authoritarian and despotic rule in the country, and protect the liberties and freedoms of the people against the invasion by the State. They operate as limitations on the tyranny of the executive and arbitrary laws of the legislature. In short, they aim at establishing 'a government of laws and not of men'.

The Fundamental Rights are named so because they are guaranteed and protected by the Constitution, which is the fundamental law of the land. They are 'fundamental' also in the sense that they are most essential for the all round development (material, intellectual, moral and spiritual) of the individuals.

Originally, the Constitution contained seven fundamental rights. But the right to property was repealed in 1978 by the Forty-fourth Constitutional Amendment during the rule of the Janata government, reducing these rights to six only, which are:

i. Right to Equality (Articles 14–18),
ii. Right to Freedom (Articles 19–22),
iii. Right against Exploitation (Articles 23 and 24),
iv. Right to Freedom of Religion (Articles 25–28),
v. Cultural and Educational Rights (Articles 29 and 30),
vi. Right to Constitutional Remedies (Article 32).

Definition of state

The term 'State' has been used in different provisions concerning thefundamental rights.

Hence, Article 12 has defined the term for the purposesof Part III.

Laws inconsistent with fundamental rights

Article 13 declares that all laws that are inconsistent with or in derogation ofany of the fundamental rights shall be void. In other words, it expressivelyprovides for the doctrine of judicial review. This power has been conferredon the Supreme Court (Article 32) and the high courts (Article 226) that candeclare a law unconstitutional and invalid on the ground of contravention ofany of the Fundamental Rights.

Right to equality: these are discussed from Article 14 to Article 18 of the Constitution.

Article 14, states that the state has to follow equality before the law along with equal protection of law within the domain of Indian territory. Equality before law implies that every person irrespective of his rank/status is equal before the law of the land, and can't claim for any kind of special status. In this way, the concept carries a negative connotation in the sense that it implies absence of any special concessions on grounds of birth, caste, creed and so on. Nevertheless, exception to this are allowed for the President or the Governor of a state where no civil or criminal proceedings are allowed when they are in office.

The concept of 'equality before law' is of British origin while the concept of 'equal protection of laws' has been taken from the American Constitution. The first concept connotes: (a) the absence of any special privileges in favour of any person, (b) the equal subjection of all persons to the ordinary law of the land administered by ordinary law courts, and (c) no person (whether rich or poor, high or low, official or non-official) is above the law.

The second concept, on the other hand, connotes: (a) the equality of treatment under equal circumstances, both in the privileges conferred and liabilities imposed by the laws, (b) the similar application of the same laws to all persons who are similarly situated, and (c) the like should be treated alike without any discrimination. Thus, the former is a negative concept while the latter is a positive concept. However, both of them aim at establishing equality of legal status, opportunity and justice.

In the words of Justice P.N. Bhagwati, Article 14 'shines like a beacon light towards the goal of classless egalitarian socio-economic order'.

Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. The two crucial words in this provision are 'discrimination' and 'only'. The word 'discrimination' means 'to make an adverse distinction with regard to' or 'to distinguish unfavourably from others'. The use of the word 'only' connotes that discrimination on other grounds is not prohibited.

The second provision of Article 15 says that no citizen shall be subjected to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex, or place of birth with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, road and places of public resort maintained wholly or partly by State funds or dedicated to the use of general public. This provision prohibits discrimination both by the State and private individuals, while the former provision prohibits discrimination only by the State.

Article 16 provides for equality of opportunity for all citizens in matters of employment or appointment to any office under the State. No citizen can be discriminated against or be ineligible for any employment or office under the State on grounds of only religion, race, caste, sex, descent, place of birth or residence.

Further, as a state of exception, Article 16 (4) held that reservation for any post could be carried out by the state in favour of any backward class, if they are numerically or even qualitatively underrepresented in any particular service. Finally, in the last exception, Article 16 (5) declares that the offices of a particular religious or denominated institution may be reserved for members of that particular religious community.

Article 17 under Right to Freedom which formed the base for the enactment of Untochability (Offences) Act, 1955 and which was further modified in 1976 and was read as Protection of Civil Rights, 1955. Under this Article it has been declared that 'untochability' is abolished and its practice in any form like insulting a member of Scheduled Caste, preaching or justifying untochability in the name of tradition of the caste system is forbidden, as its practice is a punishable offence according to law under Article 35. Thus, no individual could be refused admission to any public institution or worshipping in any place of public worship or with regard to access to any place where public services are rendered.

This is followed by Article 18, Clause (1) which disallows the state to confer titles on individuals, therefore the abolition of titles. However military or academic distinctions may be awarded, and they may be used as titles but not as an 'appendage to one's name'. Further, Clause (2) of the Article prohibits an Indian citizen from accepting any foreign state title and also under Clause (3) any foreigner holding office of profit under the Indian State cannot accept any foreign state title without the permission of the President.

Right to Freedom: *These are discussed from Article 19 to Article 22 of the Constitution.*

Article 19 guarantees to all citizens the six rights. These are:

(i) Right to freedom of speech and expression.

(ii) Right to assemble peaceably and without arms.

(iii) Right to form associations or unions or co-operative societies.

(iv) Right to move freely throughout the territory of India.

(v) Right to reside and settle in any part of the territory of India.

(vi) Right to practice any profession or to carry on any occupation, trade or business.

Originally, Article 19 contained seven rights. But, the right to acquire, hold and dispose of property was deleted by the 44th Amendment Act of 1978.

These six rights are protected against only state action and not private individuals. Moreover, these rights are available only to the citizens and to shareholders of a company but not to foreigners or legal persons like companies or corporations, etc. The State can impose 'reasonable' restrictions on the enjoyment of these six rights only on the grounds mentioned in the Article 19 itself and not on any other grounds.

Article 20 grants protection against arbitrary and excessive punishment to an accused person, whether citizen or foreigner or legal person like a company or a corporation. It contains three provisions in that direction:

(a) No ex-post-facto law: No person shall be (i) convicted of any offence except for violation of a law in force at the time of the commission of the act, nor (ii) subjected to a penalty greater than that prescribed by the law in force at the time of the commission of the act.

(b) No double jeopardy: No person shall be prosecuted and punished for the same offence more than once.

(c) No self-incrimination: No person accused of any offence shall be compelled to be a witness against himself.

Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except 'according to the procedure established by law'. The concept of 'procedure established by law' is the adoption of the English concept of personal liberty, where the legislature is supreme. This is to be differentiated from the 'due process' entailed in the American Constitution, where any law depriving a person of his liberty could be declared unconstitutional by the Court on reasonable grounds.

In Gopalan v. State of Madras, 1950 case , liberty implied only physical body of the individual, however in 1978 decision in Maneka Gandhi v. union of India case, it was upheld that right to live,

is not only about physical existence, rather it also carries the connotation of right to live with human dignity. Also it should be noted that until this decision in 1978 the validity of legislative law depriving personal liberty could not be challenged in a court of law. But after this judgment it was held that the Court should attempt to expand the ambit of Fundamental Rights. Further, in 1982 Pavement Dwellers' case, right to life was made to be inclusive of right to livelihood. In 1993 the right to livelihood within the scope of Article 21 was reiterated in D.K.Yadav v. JMA Industries Ltd.

In increasing the ambit of Article 21, the Supreme Court in Mohini Jain v. State of Karnataka held that Right to Education was a fundamental right and that the state should provide opportunities for education. Right to Education Act was passed in 2009, where the state has the obligation to provide free and compulsory education to children between six to fourteen years.

Article 21 A declares that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may determine. Thus, this provision makes only elementary education a Fundamental Right and not higher or professional education. This provision was added by the 86th Constitutional Amendment Act of 2002. This amendment is a major milestone in the country's aim to achieve 'Education for All'. The government described this step as 'the dawn of the second revolution in the chapter of citizens' rights' .

Even before this amendment, the Constitution contained a provision for free and compulsory education for children under Article 45 in Part IV. However, being a directive principle, it was not enforceable by the courts. Now, there is scope for judicial intervention in this regard. This amendment changed the subject matter of Article 45 in directive principles. It now reads: 'The state shall endeavour to provide early childhood care and education for all children until they complete the age of six years. It also added a new fundamental duty under Article 51A that reads, 'It shall be the duty of every citizen of India to provide opportunities for education to his child or ward between the age of six and fourteen years'.

Article 22 grants protection to persons who are arrested or detained. Detention is of two types, namely, punitive and preventive. Punitivedetention is to punish a person for an offence committed by him after trial and conviction in a court. Preventive detention, on the other hand, means detention of a person without trial and conviction by a court. Its purpose is not to punish a person for a past offence but to prevent him from committing an offence in the near future. Thus, preventive detention is only a precautionary measure and based on suspicion.

Nevertheless, Clauses 4-7 of Article 22 contain protective provisions to prevent the misuse of the power of preventive detention by the state. Thus, a person detained under preventive detention cannot remain in custody for more than three months and if the period exceeds then it has to be justified. The person detained may be informed of the grounds of his detention, if those facts do not disrupt the public interest and also the opportunity of representation against the order of detention is to be given at the earliest.

Right Against Exploitation:These are discussed from Article 23 to Article 24 of the Constitution.

Article 23 prohibits traffic in human beings, begar (forced labour) and other similar forms of forced labour. Any contravention of this provision shall be an offence punishable in accordance with law. This right is available to both citizens and non-citizens. It protects the individual not only against the State but also against private persons.

The expression 'traffic in human beings' include (a) selling and buying of men, women and children like goods; (b) immoral traffic in women and children, including prostitution; (c) devadasis; and (d) slavery. To punish these acts, the Parliament has made the Immoral Traffic (Prevention) Act13, 1956.

The term 'begar' means compulsory work without remuneration. It was a peculiar Indian system under which the local zamindars sometimes used to force their tenants to render services without any payment. In addition to begar, the Article 23 prohibits other 'similar forms of forced labour' like 'bonded labour'. The term 'forced labour' means compelling a person to work against his will. The word 'force' includes not only physical or legal force but also force arising from the compulsion of economic circumstances, that is, working for less than the minimum wage. In this regard, the Bonded Labour System (Abolition) Act, 1976; the Minimum Wages Act, 1948; the Contract Labour Act, 1970 and the Equal Remuneration Act, 1976 were made.

Article 23 also provides for an exception to this provision. It permits the State to impose compulsory service for public purposes, as for example, military service or social service, for which

it is not bound to pay. However, in imposing such service, the State is not permitted to make any discrimination on grounds only of religion, race, caste or class.

In the same real, we have Article 24 which contains provisions prohibiting employment of children below the age of fourteen in factories, mines or any hazardous jobs. Unlike Article 23, where the state can exercise exception for public purposes, Article 24 is absolute in its nature which implies that there is no clause under which children could be employed in hazardous jobs. Further, in M.C.Mehta v. State of Tamil Nadu, 1991, the Supreme Court directed that positive measures should be taken for the welfare of such children by meeting the terms of Child Labour (Prohibition and Protection) Act.

Right to Freedom of Religion:These are discussed from Article 25 to Article 28 of the Constitution.

Article 25 upholds that all persons (citizens and non-citizens) have the right to freedom of conscience along with free profession, practice and propagation of religion which includes both faith or belief and observance of rituals.

The freedom of religion is not only meant for individuals but also for religious groups or denominations under Article 26. They have the right to establish institutions for religious and charitable purposes; manage their own affairs in matters of religion as well as the right to own and acquire movable/ immovable property in accordance with law. However, these freedoms are not absolute in nature and are subject to interests of the public order, morality, health and for social reform measures of the state.

Article 27 working within the ambit of equal respect for all religions says that no person shall be compelled to pay any taxes for the promotion and maintenance of any particular religion.

Article 28 completely prohibits religious instructions in state-owned educational institutions. Nevertheless, in other denominational institutions or educational institutions recognized or receiving aid from the state , religious instructions could be imparted but it cannot be imposed upon people attending that institution without their consent (consent from the guardian in case of a minor).

Right to Cultural and Educational Rights: these rights are from 29 and 30 in the Indian Constitution.

Article 29 guarantees every section of the citizens having a distinct language, script or culture to conserve the same. The state shall not inflict any culture upon the community. Article 30 holds that such communities have right to establish and administer educational institutions of its choice which also implies freedom to choose medium of instruction in such institutions (D.V.College Bhatinda v. State of Punjab, 1971) and the state shall not discriminate on the ground that the institution is maintained by a minority community while granting aid to educational institutions. 44th Amendment added Clause 1(A) to Article 30 which says full compensation to be paid if the State acquires the property of any such institution.

Right to Constitutional Remedies: Article 32 deals with it.

A mere declaration of fundamental rights in the Constitution is meaningless, useless and worthless without providing an effective machinery for their enforcement, if and when they are violated. Hence, Article 32 confers the right to remedies for the enforcement of the fundamental rights of an aggrieved citizen. In other words, the right to get the Fundamental Rights protected is in itself a fundamental right. This makes the fundamental rights real. That is why Dr Ambedkar called Article 32 as the most important article of the Constitution - 'an Article without which this constitution would be a nullity. It is the very soul of the Constitution and the very heart of it.'. The Supreme Court has ruled that Article 32 is a basic feature of the Constitution.

There are five kinds of writs which the Supreme Court or the High Courts may issue namely habeas corpus, mandamus, prohibition, certiorari and quo warranto. These writs are borrowed from English law where they are known as 'prerogative writs'. They are so called in England as they were issued in theexercise of the prerogative of the King who was, and is still, described as the 'fountain of justice'. Later, the high court started issuing these writs asextraordinary remedies to uphold the rights and liberties of the British people.

The literal meaning of the term *habeas corpus* is 'to have a body' which has a Latin origin. This writ could be issued to check the arbitrary acts not only of private individuals/officials but also against the executive. The writ attempts to secure the body of the person detained by bringing the person

before the court, to know the reason of detention and to set free if there is no justification for detention. However, it cannot issued for persons charged with criminal offence.

Mandamus means command, thus the Supreme Court or the High Courts commands the officers, government and other persons who are bound to do a public duty and which have been refused to be performed by them. It could also be issued against inferior or other judicial bodies who have refused to exercise their jurisdiction. Nonetheless, it could not be issued against the President or the Governor of a state and also not against private individual or body which is not in collusion with the state.

While mandamus commands activity, we have the writ of *prohibition* where the Supreme Court or the High Courts command inactivity on the part of inferior court by usurping the latter's excessive jurisdiction i.e. which is not legally vested in them. Thus, this writ is issued before the order is made, in the sense of prohibiting judicial tribunal or inferior courts from making unconstitutional orders.

The writ of *certiorari* is issued against Courts and tribunals exercising judicial powers to quash their orders which contravene the rules of justice.

Article 33 empowers the Parliament to restrict or abrogate the fundamental rights of the members of armed forces, para-military forces, police forces, intelligence agencies and analogous forces. The objective of this provision is to ensure the proper discharge of their duties and the maintenance of discipline among them.

The power to make laws under Article 33 is conferred only on Parliamentand not on state legislatures. Any such law made by Parliament cannot be challenged in any court on the ground of contravention of any of thefundamental rights.

Article 34 provides for the restrictions on fundamental rights while martial law is in force in any area within the territory of India. It empowers the Parliament to indemnify any government servant or any other person for any act done by him in connection with the maintenance or restoration of order in any area where martial law was in force. The Parliament can also validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area. The Act of Indemnity made by the Parliament cannot be challenged in any court on the ground of contravention of any of the fundamental rights.

Article 35 lays down that the power to make laws, to give effect to certain specified fundamental rights shall vest only in the Parliament and not in the state legislatures. This provision ensures that there is uniformity throughout India with regard to the nature of those fundamental rights and punishment for their infringement.

4.2 Features of Fundamental Rights

The Fundamental Rights guaranteed by the Constitution are characterisedby the following:

1. Some of them are available only to the citizens while others are available to all persons whether citizens, foreigners or legal persons like corporations or companies.

2. They are not absolute but qualified. The state can impose reasonablerestrictions on them. However, whether such restrictions are rea-sonable or not is to be decided by the courts. Thus, they strike a balance between the rights of the individual and those of the society as a whole, betweenindividual liberty and social control.

3. Some of them are negative in character, that is, place limitations on theauthority of the State, while others are positive in nature, conferring certain privileges on the persons.

5. They are justiciable, allowing persons to move the courts for their enforcement, if and when they are violated.

4. They are defended and guaranteed by the Supreme Court. Hence, the aggrieved person can directly go to the Supreme Court, not necessarily by way of appeal against the judgement of the high courts.

5. They are not sacrosanct or permanent. The Parliament can curtail or repeal them but only by a constitutional amendment act and not by an ordinary act. Moreover, this can be done without affecting the 'basic structure' of the Constitution.

6. They can be suspended during the operation of a National Emergency except the rights guaranteed by Articles 20 and 21. Further, the six rightsguaranteed by Article 19 can be suspended only when emergency isdeclared on the grounds of war or external aggression (i.e., externalemergency) and not on the ground of armed rebellion (i.e., internal emergency).

7. Their scope of operation is limited by Article 31A (saving of lawsproviding for acquisition of estates, etc.), Article 31B (validation ofcertain acts and regulations included in the 9th Schedule) and Article 31C(saving of laws giving effect to certain directive principles).

10. Their application to the members of armed forces, para-military forces,police forces, intelligence agencies and analogous services can berestricted or abrogated by the Parliament (Article 33).

11. Their application can be restricted while martial law is in force in any area. Martial law means 'military rule' imposed under abnormalcircumstances to restore order (Article 34). It is different from theimposition of national emergency.

12. Most of them are directly enforceable (self-executory) while a few ofthem can be enforced on the basis of a law made for giving effect to them.Such a law can be made only by the Parliament and not by statelegislatures so that uniformity throughout the country is maintained(Article 35).

4.3 Criticism of Fundamental Rights

The Fundamental Rights enshrined in Part III of the Constitution have metwith a wide and varied criticism. The arguments of the critics are:

1. ***Excessive Limitations***

They are subjected to innumerable exceptions, restrictions, qualifications and explanations. Hence, the critics remarked that the Constitution grants Fundamental Rights with one hand and takes them away with the other. Jaspat Roy Kapoor went to the extent of saying that the chapter dealing with the fundamental rights should be renamed as 'Limitaions on Fundamental Rights' or 'Fundamental Rights and Limitations Thereon'.

2. ***No Social and Economic Rights***

The list is not comprehensive as it mainly consists of political rights. It makes no provision for important social and economic rights like right to social security, right to work, right to employment, right to rest and leisure and so on. These rights are made available to the citizens of advanced democratic countries. Also, the socialistic constitutions of erstwhile USSR or China provided for such rights.

3. No Clarity

They are stated in a vague, indefinite and ambiguous manner. The various phrases and words used in the chapter like 'public order', 'minorities', 'reasonable restriction', 'public interest' and so on are not clearly defined.The language used to describe them is very complicated and beyond the comprehension of the common man. It is alleged that the Constitution was made by the lawyers for the lawyers. Sir Ivor Jennings called the Constitution of India a 'paradise for lawyers'.

4. No Permanency

They are not sacrosanct or immutable as the Parliament can curtail or abolish them, as for example, the abolition of the fundamental right to property in 1978. Hence, they can become a play tool in the hands of politicians having majority support in the Parliament. The judicially innovated 'doctrine of basic structure' is the only limitation on the authority of Parliament to curtail or abolish the fundamental right.

5. Suspension During Emergency

The suspension of their enforcement during the operation of National Emergency (except Articles 20 and 21) is another blot on the efficacy of these rights. This provision cuts at the roots of democratic system in the country by placing the rights of the millions of innocent people in continuous jeopardy. According to the critics, the Fundamental Rights should be enjoyable in all situations−Emergency or no Emergency.

6. Expensive Remedy

The judiciary has been made responsible for defending and protecting these rights against the interference of the legislatures and executives. However, the judicial process is too expensive and

hinders the common man from getting his rights enforced through the courts. Hence, the critics say that the rights benefit mainly the rich section of the Indian Society.

7. Preventive Detention

The critics assert that the provision for preventive detention (Article 22) takes away the spirit and substance of the chapter on fundamental rights. It confers arbitrary powers on the State and negates individual liberty. It justifies the criticism that the Constitution of India deals more with the rights of the State against the individual than with the rights of the individual against the State. Notably, no democratic country in the world has made preventive detention as an integral part of their Constitutions as has been made in India.

8. No Consistent Philosophy

According to some critics, the chapter on fundamental rights is not the product of any philosophical principle. Sir Ivor Jennings expressed this view when he said that the Fundamental Rights proclaimed by the Indian Constitution are based on no consistent philosophy. The critics say that this creates difficulty for the Supreme Court and the high courts in interpreting the fundamental rights.

Summary

The framing of the Constitution was completed on November 26, 1949 when the Constituent Assembly formally adopted the new Constitution. The Constitution came into force with effect from January 26, 1950. The Constitution begins with a Preamble which declares India to be a Sovereign, Socialist, Secular, Democratic, Republic. The Preamble also mentions the goals of securing justice, liberty and equality for all its citizens and promotion of national unity and integrity on the basis of fraternity among the people assuring dignity of the individual.

The Constitution has been given the adjective of 'living', which connotes that it is a document which responds to the changing circumstances. It signifies that our Constitution is dynamic in nature and not constant, this also conveys its democratic aspect. Thus, with the new challenges, ideas and practices of the contemporary times, scope has been made to amend the Constitution. The Indian Constitution provides for Fundamental Rights which are justiciable. Ten Fundamental Duties have also been added to the Constitution. The Directive Principles of State Policy give a concrete shape to the welfare concept.

It should be noted that the constitutional provisions have scope to expand its meaning in order to make the exercise of Fundamental Rights more substantial. Therefore, two processes must go simultaneously. First, the existing provisions must be implemented i.e. the gap between theory (as given in the Constitution) and its actual practice needs to be lessened. And second, the interpretation of each constitutional provision must be widened with the changing circumstances.

Keywords

Agency: An entity or organization providing specified service or having certain responsibilities: 'governing agency'.

Amend: To alter, modify, rephrase, or add to or subtract from (a motion, bill, constitution, etc.) by formal procedure.

Article: The main element of a constitution. A separate clause or provision of a statue (separate clauses in the constitution).

Authorities: Officials or bodies with official powers. A person or body of persons in whom authority is vested, for example a governmental agency.

Bill: Draft law presented to the legislature for enactment.

Breach: Breaking an understanding, agreement or law.

Constitutional order: Constitutional orders are political orders organized around agreed-upon legal and political institutions that operate to allocate rights and limit the exercise of power. In a constitutional order, power is "tamed" by making it less consequential. The stakes in political struggles are reduced by the creation of institutionalized processes of participation and decision making that specifies rules, rights, and limits power holders.

Ethno-religious conflict: A clash of cultures rooted in both objective and psychological factors that fuse lineage with religious belief-system.

Fundamental: A basic rule or principle; an essential part.

Individual Autonomy: Refers to the idea to live one's life according to reasons and motives that are taken as one's own and are not the product of manipulative or distorting external forces.

Inviolable: Secure from violation; something that cannot be violated.

Judiciary: The branch of government that is endowed with the authority to interpret the law, adjudicates legal disputes, and otherwise administers justice. "Judiciary" is also used to refer to judges of a court considered as a group.

Non-discrimination: Treating persons equally without taking account of irrelevant differences.

Process: A particular course of action intended to achieve a result (may be a prosecution process, legislative process, budgetary process, etc.

Protection of minorities: Involves constitutional and statutory principles for guaranteeing fundamental freedoms of minority groups. It also involves the representation of linguistic, cultural or other minorities in the various levels of governance, the meaning of protection of minorities also extends to ensuring constitutional measures of self-governance to minority groups.

Ratify (ratification):To approve an act done by someone else—and thus to have some legal effect, or to bind oneself. A country for which a representative has signed a treaty will often not be bound until it is ratified by some body—perhaps the legislature. In constitution-making a referendum might be required so that the people can ratify the constitution.

Religion: Belief in and reverence for a supernatural power or powers regarded as creator and governor of the universe; a particular system of faith and worship based in religious belief.

Rule of law: It is a doctrine that holds that no individual is above the law and everyone regardless of their social status is equal before law. It is a condition in which every member of society including its ruler accepts the authority of the law. This carries the implication that this applies equally to all levels of government.

Secular state: A secular state is a state or a country that is officially neutral in matters of religion, neither supporting nor opposing any particular religious system. This belief of keeping state affairs free from religion arises out of ideology of secularism.

Secularism: The belief that religion should not intrude into secular (worldly) affairs, usually reflected in the desire to separate church from state.

Writ: a form of written command in the name of a court or legal authority.

Self Assessment

1. Which one of the following pairs is not correctly matched?

A. Freedom of speech and expression: Include the freedom of Press

B. Freedom of conscience: Include the right to wear and carry kirpans by Sikhs

C. Right to personal liberty: Include the right to carry on any trade or business

D. Right to equality: Include the principle of natural justice

2. As far as the Armed Forces are concerned, the Fundamental Rights granted under Articles 14 and 19 of Constitution are:

A. Not available at all

B. Available to the Armed Forces but not to other forces

C. Available only at the discretion of the Chief of the Army staff

D. Available only according to law made by Parliament

3. In Indian Constitution, the power to issue a writ of 'Habeas Corpus' is vested only in:

A. The Supreme Court
B. The High Courts
C. The Subordinate Courts
D. The Supreme Court and the High Courts

4. Which of the following rights is not explicitly mentioned in the Fundamental Rights but has been upheld to be so by several pronouncements of the Supreme Court?
A. Equity before law
B. Right to form associations or unions
C. Right to freedom of Press
D. Right to non-discrimination in public employment

5. Which one of the following pairs is not correctly matched?
A. Article 15: Special provisions for socially and educationally backward classes.
B. Article 22:Safeguards under Preventive Detention
C. Article 20: Immunity from double punishment
D. Article 16: Discrimination in favour of women in service under the State

6. Under the Indian Constitution, which one of the following is not a specific ground on which theState can place restrictions on freedom of religion?
A. Public order
B. Morality
C. Social Justice
D. Health

7. The scope of 'life and personal liberty', as envisaged in Article 21 of the Constitution of India,has expanded considerably over the years. Which one of the following can still not be subject ofthis protection?
A. The Right of a bonded labour to rehabilitation after release
B. The Right, under a settlement, to claim bonus or dearness allowance
C. The Right to livelihood by means which are not illegal, immoral or opposed to public policy.
D. The Right to good health.

8. Which one of the following rights of Indian Constitution guarantees all the fundamental rights to every resident of a country?
A. Right against exploitation
B. Right to freedom
C. Right to equality
D. Right to constitutional remedies

9. Which one of the following is true with respect to the Fundamental Rights of Indian Constitution?
A. The sovereignty of the people
B. Equality of opportunity for all resident

C. Limited government
D. Democracy

10. Which Article of the Indian Constitution abolishes Untouchability?
A. 13
B. 14
C. 16
D. 17

11. B. R. Ambedkar termed Article 32 of the Indian Constitution as the "Heart and Soul of the Indian Constitution". Which one of the following fundamental right it contains?
A. Right to freedom
B. Right to constitutional remedies
C. Right to elementary education
D. Right to freedom of religion

12. Which one of the following freedoms is not guaranteed by the Constitution of India?
A. Freedom to own, acquire and dispose of property
B. Freedom to move freely throughout the country
C. Freedom to assemble peaceably and without arms
D. Freedom to practice any trade or profession

13. Fundamental rights guaranteed in the Indian Constitution can be suspended only by:
A. A proclamation of national emergency
B. An Act passed by the Parliament
C. An amendment of the Constitution
D. The judicial decisions of the Supreme Court

14. Which of the following can a court issue for enforcement of Fundamental Rights?
A. Decree
B. A writ
C. An Ordinance
D. A notification

15. Which of the following Fundamental Rights cannot be suspended during emergency?
A. Freedoms under Article 19
B. Right to constitutional remedies under Articles 32 and 226
C. Rights under Articles 21 and 22
D. Rights under Articles 20 and 21

16. Which one of the following pairs is correctly matched?
A. Writ of Habeas Corpus: Available against private individuals as well
B. Writ of Quo-Warranto: Available against subordinate courts only
C. Writ of Certiorari: Available against autonomous bodies only
D. Writ of Prohibitio: Available against public servants only

17. Which one of the following writs is issued by an appropriate judicial authority/body to free aperson who has been illegally detained?

A. Quo-warranto
B. Mandamus
C. Certiorari
D. Habeas Corpus

Answers for Self Assessment

1.	C	2.	D	3.	D	4.	C	5.	D
6.	C	7.	B	8.	D	9.	B	10.	D
11.	B	12.	A	13.	A	14.	B	15.	D
16.	A	17.	D						

Review Questions

1. Discuss the scope of Fundamental Rights. Are they absolute in nature?
2. Identify important features of the Fundamental Rights?
3. Write a detailed note on Right to Equality? Why is it so important in the Indian Constitution?
4. What are the provisions within Article 19? Do you think they have been violated in the present context? Evaluate right to personal liberty?
5. What are the constitutional provisions to ensure Right to Cultural and Educational Rights under the Constitution of India?
6. What is meant by secularism? How Indian secularism is different from the Western notion of secularism?
7. Why Right to Property has been deleted from the list of Fundamental Rights?
8. What are the writs existing under Right to Constitutional Remedies?
9. What is meant by Habeas Corpus? Identify its key features.
10. What are the provisions within Articles 33 and 34?
11. What are the limitations on the exercise of Fundamental Rights?

Further Readings

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Unit 05: Fundamental Rights and Directive principles of State Policy

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- understand how and for what purpose, the directives came to be incorporated into the constitution.
- analyse the nature and significance of these directives.
- analyse socialists, Gandhian and liberal-intellectual principles of Directive Principles of State Policy.
- explain the utility and role of Directive Principles of State Policy.
- examine the historical process of fundamental duties in the Indian Constitution.
- outline the list of Fundamental Duties.
- describe the features and criticisms of Fundamental Duties.

Introduction

Framers of Constitutions draw upon certain notions of the past as legitimizing the normative foundations they strive to build for an indefinite future.The constituent moment is understood not just as an aid tointerpretation of constitutional provisions but also as a politically chargedevent that legitimizes several other actions: "We want to build the countryenvisaged by our founding fathers", one often hears in political speechesdefending various kinds of policies. Foundation myths glorify certain normativeprojects like the "pursuit of liberty", or the "quest for equality"as the intention of the framers, hiding the more turbulent politics withinwhich constitutions emerged.

It has been well documented that the original intention of the framers of the Indian Constitution was to create only one set of 'Fundamental Rights' in the Constitution which were to cover civil, political, social and economic rights. In the first draft of Constitution, the Part III consisted of three chapters. The first chapter dealt with certain general principles emphasizing the importance of

Directive Principles, the second chapter consisted of the 'Fundamental Rights' and the third chapter comprised of the Directive Principles (Diwan, 1982).

On the other hand, the rights which were aimed at promoting social and economic progress and required action on the part of the state (in terms of legislation etc) were framed in Part IV of the Indian Constitution as goals for the Indian State and termed as the 'Directive Principles of State Policy' (Deshpande, 1982).It was argued during the Constituent Assembly that the newly independent Indian State could only guarantee social and economic rights over a period of time. Thus, the civil and political rights were enshrined in the Indian Constitution as the 'Fundamental Rights' where as the social and economic rights were made a part of the 'Directive Principles of State Policy.

The Directive Principles of State Policy occupy an ambiguous place in our constitutional scheme. They are framed as a set of obligations upon the State. Nonetheless, the constitutional text expressly renders them unenforceable. At the time of drafting, the only other Constitution that contained anything analogous was the Irish. The members of the Constituent Assembly themselves were deeply divided over the DPSPs. Many could not see the utility of an unenforceable set of exhortations. Some recommended scrapping the chapter altogether, while others argued for placing it within the domain of Part III and the fundamental rights. Still others argued over the level of detail that the DPSPs set out. And some of them pointed out the contradictions inherent in placing abstract principles of economic justice alongside concrete policies like prohibition and controlling cow slaughter.

5.1 Nature of the Directive Principles of State Policy

The Directive Principles of State Policy are enumerated in Part IV of the Constitution from Articles 36 to 51. The framers of the Constitutionborrowed this idea from the Irish Constitution of 1937, which had copied it from the Spanish Constitution. Dr B R Ambedkar described these principles as 'novel features' of the Indian Constitution. The Directive Principles along with the Fundamental Rights contain the philosophy of the Constitution and is the soul of the Constitution. Granville Austin has described the Directive Principles and the Fundamental Rights as the 'Conscience of the Constitutio'. As K.C. Markandan argues, 'Far from being a proclamation or promulgation of principles, the directive principles constitute a pledge by the framers of the Constitution to the people of India and a failure to implement them would constitute not only a breach of faith with the people but would also render a vital [feature] of the Constitution practically a dead letter'.

Chapter IV of the Indian constitution relating to the Directive Principlesof State Policy was the subject of animated discussion in the ConstituentAssembly. On the one hand, one member preferred to label it as "piousexpressions" and "pious superfluities", another member characterized it as'vague' and 'adrift'. A third linked it to 'a cheque on a bank payable whenable'because of its non-justiciable and non-binding character, a fourth tookit to be analogous to an 'election manifesto' and as such there was no placefor it in the constitution, and a fifth member called its inclusion in the constitutionas 'undemocratic' and 'opposed to parliamentary democracy' andwent to the extent of suggesting its deletion from the constitution.It is important to take into consideration, how and for what purpose; the Directives came to be incorporated into the constitution, for assessing the nature and significance of the Directives. It has already been noted that the Directives came to be incorporated in constitutions to ensure social and economic democracy in addition to political democracy. Directives partake the nature of the rights, but are different from the rights contained inthe chapter on Fundamental Rights.

Directive Principles arethe deliberate formulation of national policy. They were not formulated byany particular political party or any particular organ of the government, butby the representatives of a nation who assembled to lay down the constitutionfor the government of the country. They indicate to the people of thecountry as to what the State might do for them and what it seeks to achieve.Directive Principles also constitute a pledge by the framers of the constitutionto the people of India and failure would bring not only breach of faith,but would also render a vital part of the constitution a dead letter.

The DPSPs' abstract and wide-ranging scope has rendered them particularly suitable forproviding the rhetorical window-dressing to a rapidly proliferating set of judicial opinions-especially over the past twenty years. This chapter does not-indeed; it cannot-catalogue all thoseinstances. Rather, its aim is to provide a conceptual understanding of their role in constitutionalreasoning, and its examination of the cases is limited to that end.

5.2 Significance and Utility of 'Directive Principles of State Policy'

Some significant changes took place in the manner in which the functioning of States and governments was envisaged after the First and Second World War. In this context it was thought that the goal of a government was not just to guarantee political freedom but to also ensure social and economic justice. This broad way of thinking impacted the debates on constitution making in the newly independent countries, including India (Laskar, 1988).

Additionally, the knowledge of the members of the Indian National Movement pertaining to constitutions made by European countries (such as Germany, and Eastern European countries) and their socialist commitments; reflected on the manner in which rights were formulated in the Indian Constitution. The members of the Constituent Assembly were inspired by different constitutions of the world. With regard to the provisions on the 'Directive Principles of State Policy' it needs to be stressed that these were modeled on similar provisions existing in the Irish Constitution of 1937.

The 'Directive Principles of State Policy' have been written in the form of instructions or recommendations to the government and government agencies to formulate policies accordingly. It has been argued that the importance of the 'Directive Principles of State Policy' has not been reduced just because they are not justiciable. Even though the Directive Principles were not to be justiciable, the makers of the Indian Constitution envisioned that they would play a central role in the governance of the country. These Principles were to ensure that the Indian State would work towards the welfare of its citizens. The common men/women's welfare was of preeminence to the members of the Constituent Assembly and in order to ensure this welfare the 'Directive Principles of State Policy' were created.

If there is a strong public opinion in favour of these Directive Principles then it would be difficult for the government to ignore them (Mohanty, 2009). People have judged subsequent governments for the manner in which they have/have not legislated on these Directive Principles. The presence of the Directive Principles has ensured that the government in India has been answerable to the citizens. Another significant aspect of the Directive Principles is that they present guidelines to the Indian State to act as a Welfare State. They aim at ensuring the realization of social justice and economic democracy. These provisions are framed in the form of positive obligations placed on the State. For instance, they direct the State government to secure adequate means of livelihood for citizens, to ensure proper standards of nutrition, ensure equal pay for equal work etc.

It can be argued that the extent to which these principles are applied whilst governing the Indian State, to the same extent social and economic justice have become relizable and vice versa. Some scholars have opined that the extent to which the government has/has not been able to realize the ideals present in the 'Directive Principles of State Policy', the 'Fundamental Rights' have become realizable (Mohanty, 2009). Individual liberty can only be realized in the presence of social and economic freedom. However, it is also important to point out criticisms of the 'Directive Principles of State Policy'. It has been a severe limitation that these Principles have not been made legally binding on the State and government. The fact that they have not been made justiciable has restricted their implementation. Several governments have not been able to implement them.

In the Directive Principles, however, one finds an even clearer statementof the social revolution. They aim at making the Indian masses free inthe positive sense, free from the passivity engendered by centuries of coercionby society and by nature, free from the object, physical conditions thathave prevented them from fulfilling their best selves. To do this, the Stateis to apply the precepts, contained in the Directive Principles when makinglaws. These principles are not justiciable, a court cannot enforce them,but they are to be, nevertheless, 'fundamental in the governance of thecountry'. The essence of the Directive Principles lies in Article 38, whichechoing the Preamble, reads: "The State shall strive to promote the welfare of the people by securing andprotecting as effectively as it may a social order in which justice, social,economic, and political, shall inform all the institutions of a national life".The Directive Principles represented the humanitarian socialist precepts (Austin, 1966). They also contained provisions taken from Gandhiji's ideals. For instance, provisions pertaining to the Indian State's responsibility of strengthening village panchayats.

5.3 Categorization of Directive Principles State Policy

The Constitution does not contain any classification of Directive Principles. However, on the basis of their content and direction, they can be classified into three broad categories, viz, socialistic, Gandhian and liberal-intellectual.

Socialistic Principles

These principles reflect the ideology of socialism. They lay down the framework of a democratic socialist state, aim at providing social and economic justice, and set the path towards welfare state. They direct the state:

Article 37 confers non-enforceable rights on any person and imposes non-enforceable obligation on the State. The principal object in enacting the Directive Principle appears to have been to set standards of achievements before the legislature and the executive, the local and other authorities, by which their success or failure could be judged. The key to the Directive Principles is found in Article 37 which states, "The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

Article 38: To promote the welfare of the people by securing a social order permeated by justice−social, economic and political−and to minimise inequalities in income, status, facilities and opportunities.

Article 39: To secure (a) the right to adequate means of livelihood for all citizens; (b) the equitable distribution of material resources of the community for the common good; (c) prevention of concentration of wealth and means of production; (d) equal pay for equal work for men and women; (e) preservation of the health and strength of workers and children against forcible abuse; and (f) opportunities for healthy development of children.

Article 39 (A):*Equal Justice and Free Legal Aid:* The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 41: To secure the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.

Article 42: To make provision for just and humane conditions of work and maternity relief.

Article 43: To secure a living wage, a decent standard of life and social and cultural opportunities for all workers.

Article 43 (A):*Participation of Workers in Management to Industries:* The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry.

Article 47: Article 47 directs the State to regard the raising of the level of nutrition and the standard of living of its people as among its primary duties. It deals not only with raising the standard of living of the people, but also directs that the improvement of public health should be a primary duty of the State and in particular, "the State shall endeavour to bring about prohibition of the consumption except for medical purposes, of intoxicating drinks and of drugs which are injurious to health."

Gandhian Principles

These principles are based on Gandhian ideology. They represent the programme of reconstruction enunciated by Gandhi during the national movement. In order to fulfil the dreams of Gandhi, some of his ideas were included as Directive Principles. They require the State:

Article 40: To organise village panchayats and endow them with necessary powers and authority to enable them to function as units of self-government.

Article 43: It say 'the State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas'.

Article 43 (B): To promote voluntary formation, autonomous functioning, democratic control and professional management of co-operative societies.

Article 46: It states that, 'the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation'.

Article 47: To prohibit the consumption of intoxicating drinks and drugs which are injurious to health.

Article 48: To prohibit the slaughter of cows, calves and other milch and draught cattle and to improve their breeds.

Liberal–Intellectual Principles

The principles included in this category represent the ideology of liberalism.

They direct the state:

Article 44: To secure for all citizens a uniform civil code throughout the country.

Article 45: To provide early childhood care and education for all children until they complete the age of six years.

Article 48: To organise agriculture and animal husbandry on modern and scientific lines.

Article 48 (A): To protect and improve the environment and to safeguard forests and wild life.

Article 49: To protect monuments, places and objects of artistic or historic interest which are declared to be of national importance.

Article 49(A): *Protection and Improvement of Environment and Safeguarding of Forests and Wildlife:* The State shall endeavour to protect and to improve the environment and safeguard the forests and wildlife in the country.

Article 50: To separate the judiciary from the executive in the public services of the State.

Article 51: It reads, 'the State shall endeavour to:

a) promote international peace and security;
b) maintain just and honourable relations between nations;
c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
d) encourage settlement of international disputes by arbitration.

5.4 Fundamental Duties

Though the rights and duties of the citizens are correlative andinseparable, the original constitution contained only the fundamentalrights and not the fundamental duties. In other words, the framers of theConstitution did not feel it necessary to incorporate the fundamental duties ofthe citizens in the Constitution. However, they incorporated the duties of theState in the Constitution in the form of Directive Principles of State Polity.Later in 1976, the fundamental duties of citizens were added in theConstitution. In 2002, one more Fundamental Duty was added.The Fundamental Duties in the Indian Constitution are inspired by theConstitution of erstwhile USSR. Notably, none of the Constitutions of majordemocratic countries like USA, Canada, France, Germany, Australia and soon specifically contain a list of duties of citizens. Japanese Constitution is,perhaps, the only democratic Constitution in world which contains a list ofduties of citizens. The socialist countries, on the contrary, gave equalimportance to the fundamental rights and duties of their citizens. Hence, theConstitution of erstwhile USSR declared that the citizen's exercise of theirrights and freedoms was inseparable from the performance of their duties andobligations.

Swaran Singh Committee Recommendations

In 1976, the Congress Party set up the Sardar Swaran Singh Committee tomake recommendations about fundamental duties, the need and necessity ofwhich was felt during the operation of the internal emergency (1975-1977).The committee recommended the inclusion of a separate chapter onfundamental duties in the Constitution. It stressed that the citizens shouldbecome conscious that in addition to the enjoyment of rights, they also havecertain duties to perform as well. The Congress Government at Centreaccepted these recommendations and enacted the 42nd ConstitutionalAmendment Act in 1976. This amendment added a new part, namely, PartIVA to the Constitution. This new part consists of only one Article, that is,Article 51A which for the first time specified a code of ten fundamentalduties of the citizens. The ruling Congress party declared the non-inclusion offundamental duties in the Constitution as a historical mistake and claimedthat what the framers of the Constitution failed to do was being done now.Though the Swaran Singh

Committee suggested the incorporation of eightFundamental Duties in the Constitution, the 42nd Constitutional AmendmentAct (1976) included ten Fundamental Duties.

Interestingly, certain recommendations of the Committee were notaccepted by the Congress Party and hence, not incorporated in theConstitution. These include:

1. The Parliament may provide for the imposition of such penalty orpunishment as may be considered appropriate for any non-compliancewith or refusal to observe any of the duties.

2. No law imposing such penalty or punishment shall be called in questionin any court on the ground of infringement of any of Fundamental Rightsor on the ground of repugnancy to any other provision of the Constitution.

3. Duty to pay taxes should also be a Fundamental Duty of the citizens.

Impregnating the high sounding and zealously guarded domain of fundamental rights with a moderate dose of ethical citizenship responsibilities, the fundamental duties were inserted inthe Constitution in 1976 through the Constitution's Forty-second Amendment. Drawn from the Constitution of former Soviet Union and placed in Part IV-A of the Constitution under Article 51-A, the set of ten fundamental duties is supposed to be only moral exhortation to the citizens of the country to inculcate a sense of patriotic and sensible citizenship, without any legal justiciability.

Though not justiciable and therefore, with little consequence in practical terms, the provision of fundamental duties was opposed by many people who also brought out several inconsistencies in these duties. For instance, one of the fundamental duties asks every citizen of the country to develop a scientific c temper and spirit of enquiry. But with bulk of the people still illiterate, how is it possible to imbibe the habit of thinking with clarity and precision if they are unable to get the basic inputs of such thinking. Nevertheless, the fundamental duties have become a part of the Constitution and despite their non-justiciability, they continue to exercise some sort of social and collective restriction on those who are fond of enjoying unfettered rights without discharging even an iota of duty to the society and the nation.

List of Fundamental Duties

According to Article 51 A, it shall be the duty of every citizen of India:

a. To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
b. To cherish and follow the noble ideals that inspired the national struggle for freedom;
c. To uphold and protect the sovereignty, unity and integrity of India;
d. To defend the country and render national service when called upon to do so;
e. To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women;
f. To value and preserve the rich heritage of the country's composite culture;
g. To protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures;
h. To develop scientific temper, humanism and the spirit of inquiry and reform;
i. To safeguard public property and to abjure violence;
j. To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement; and
k. To provide opportunities for education to his child or ward between the age of six and fourteen years. This duty was added by the 86th Constitutional Amendment Act, 2002.

Features of the Fundamental Duties

Following points can be noted with regard to the characteristics of theFundamental Duties:

a) Some of them are moral duties while others are civic duties. For instance, cherishing noble ideals of freedom struggle is a moral precept and respecting the Constitution, National Flag and National Anthem is a civic duty.
b) They refer to such values which have been a part of the Indian tradition, mythology, religions and practices. In other words, they essentially contain just a codification of tasks integral to the Indian way of life.
c) Unlike some of the Fundamental Rights which extend to all persons whether citizens or foreigners1, the Fundamental Duties are confined to citizens only and do not extend to foreigners.
d) Like the Directive Principles, the fundamental duties are also nonjusticiable. The Constitution does not provide for their direct enforcement by the courts. Moreover, there is not legal sanction against their violation. However, the Parliament is free to enforce them by suitable legislation.

5.5 Criticism of Fundamental Duties

The Fundamental Duties mentioned in Part IVA of the Constitution havebeen criticised on the following grounds:

1. The list of duties is not exhaustive as it does not cover other importantduties like casting vote, paying taxes, family planning and so on. In fact,duty to pay taxes was recommended by the Swaran Singh Committee.
2. Some of the duties are vague, ambiguous and difficult to be understood bythe common man. For example, different interpretations can be given tothe phrases like 'noble ideals', 'composite culture','scientific temper'and so on.
3. They have been described by the critics as a code of moral precepts due totheir non-justiciable character. Interestingly, the Swaran SinghCommittee had suggested for penalty or punishment for the nonperformanceof Fundamental Duties.
4. Their inclusion in the Constitution was described by the critics assuperfluous. This is because the duties included in the Constitution asfundamental would be performed by the people even though they werenot incorporated in the Constitution.
5. The critics said that the inclusion of fundamental duties as an appendageto Part IV of the Constitution has reduced their value and significance.They should have been added after Part III so as to keep them on par withFundamental Rights.

5.6 Verma Committee Observations

The Verma Committee on Fundamental Duties of the Citizens (1999)identified the existence of legal provisions for the implementation of some ofthe Fundamental Duties. They are mentioned below:

1. The Prevention of Insults to National Honour Act (1971) preventsdisrespect to the Constitution of India, the National Flag and the NationalAnthem.
2. The various criminal laws in force provide for punishments forencouraging enmity between different sections of people on grounds of language, race, place of birth, religion and so on.
3. The Protection of Civil Rights Act4 (1955) provides for punishments foroffences related to caste and religion.
4. The Indian Penal Code (IPC) declares the imputations and assertionsprejudicial to national integration as punishable offences.

5. The Unlawful Activities (Prevention) Act of 1967 provides for thedeclaration of a communal organisation as an unlawful association.
6. The Representation of People Act (1951) provides for the disqualificationof members of the Parliament or a state legislature for indulging incorrupt practice that is, soliciting votes on the ground of religion orpromoting enmity between different sections of people on grounds ofcaste, race, language, religion and so on.
7. The Wildlife (Protection) Act of 1972 prohibits trade in rare andendangered species.
8. The Forest (Conservation) Act of 1980 checks indiscriminatedeforestation and diversion of forest land for non-forest purposes.

Summary

A novel feature of our polity is the inclusion of a chapter on Directive Principlesof State or Social Policy as an integral part of the constitution. Theyare deliberately included by the framers of the constitution to bring about,primarily, a desired socio-economic pattern of society into existence. The 'Directive Principles of State Policy' constitute an important part of the Indian Constitution. Directives aim atachieving social and economic democracy. They are directives from theconstitution to the State, asking it to perform certain duties fundamental incharacter with the assurance that in the performance of these duties thereshall be no compulsion by individuals acting through the judiciary. The implementation of the provisions of the Directive Principles has widened the scope for realization or freedom. Additionally, with these Principles it has become possible to argue with the Indian State for the realization of social and economic freedom for Indian citizens.

The provisions in the 'Fundamental Rights' and the 'Directive Principles of State Policy' need to be read together for the realization of the ideals inscribed in the Indian Constitution. The role they will continue to play in the Indian democracy will depend on the manner in which the legislature and judiciary continue to interpret and implement these directives. Truly speaking, the Directive Principles are more fundamental than Fundamental Rights from the point of view of the constitution since it contained the ideals, 'Justice, social, economic, and political'. It is for this reason that both in the Objectives Resolutions and in the Preamble to the constitution the ideal of "Justice, social, economic, and political" is mentioned prior to the securing of guarantees under Fundamental Rights.

Keywords

Arbitrary: Subject to individual will or judgment without restriction; contingent solely upon one's discretion.

By-law: Rule made by a local body or council under authority of a statue.

Democracy: A system of government by and for the people. Literally means 'rule by the people'. "Democracy" is inherently difficult to define and many scholars have attempted to provide a useful and broadly accepted definition. However, at a minimum democracy requires: 1) universal, adult suffrage; 2) recurring, free, competitive, and fair elections; 3) more than one serious political party; and 4) alternative sources of information.

Equality: The state of being equal in status and rights.

Fundamental: A basic rule or principle; an essential part.

Justice: A public official authorized to decide questions brought before a court of justice; the quality of being just or fair; what courts, etc. dispense: 'the administration of justice'.

Principles: Guiding rules or a system of moral behaviour.

Procedure: The rules and methods of a legal process or those of parliament or other body.

Self Assessment

1. Which one of the following is the real guiding factor for the State to meet social needs and for the establishment of new social order?

A. Fundamental Rights
B. Preamble of the Constitution
C. Directive Principles of State Policy
D. Distribution of Powers

2. Which one of the following is not stated as a Directive Principle of State Policy in the Constitution of India?

A. Organisation of village panchayats
B. Uniform civil code for the citizens
C. Separation of Judiciary from Executive
D. Right of minorities to establish and administer educational institutions

3. Though the Directive Principles of State Policy contained in the Constitution are not enforceable by any court, yet they are:

A. Fundamental in the governance of the country
B. Binding on the State
C. Enforceable at the instance of the President
D. Superior to Fundamental Rights of India

4. Which one of the following is not a Directive Principle of State Policy?

A. The State shall endeavour to secure for the citizens a uniform civil code.
B. The State shall promote with special care the educational and economic interest of the weaker sections.
C. The State shall endeavour to promote adult education to eliminate illiteracy.
D. The State shall endeavour to protect every monument, place or object of artistic or historic interest.

5. Which one of the following is not the objective of the Directive Principles of State Policy?

A. To establish a welfare state
B. To ensure socio-economic justice
C. To establish a religious state
D. To establish a secular state

6. Which one of the following is a correct statement?

A. Primacy is given to all the directive principles contained in Part IV of the Constitution over fundamental rights.
B. Primacy is given to all the fundamental rights conferred by Article 14-32 of the Constitution over directive principles.
C. Primacy is given to all the fundamental rights conferred by Part III of the Constitution over directive principles.
D. Primacy is given only to directive principles in clauses (b) and (c) of Article 39 over fundamental rights conferred by Articles 14 and 19 of the Constitution.

7. Which one of the following Directive Principles was not originally provided for in the Constitutionof India?
A. Citizen's right to an adequate means of livelihood
B. Free legal aid
C. Uniform civil code for the citizens
D. Prohibition of the slaughter of cows and calves

8. The term 'equal pay for equal work' is a:
A. Directive Principle of State Policy
B. Fundamental Right
C. Fundamental Duty
D. Constitutional Right

9. Which one of the following is not a Directive Principle of State Policy?
A. Organisation of Village Panchayats
B. Uniform Civil Code for citizens as well as non-citizens
C. Right to work, to education and to public assistance in certain cases
D. Participation of workers in management of industries

10. Who among the following has described "Directive Principles of State Policy are the conscience of the Constitution which embody the social philosophy of the Constitution"?
A. Granville Austin
B. A.V. Dicey
C. Dr. B.R. Ambedkar
D. K.C. Wheare

11. The Directive Principles of State Policy are fundamental for the:
A. Upliftment of backward classes
B. Protection of individual rights
C. Administration of justice
D. Governance of state

12. Which of the following committee suggested incorporating Fundamental Duties in the Indian Constitution?
A. Malhotra Committee
B. Raghavan Committee
C. Swaran Singh Committee
D. Narasimhan Committee

13. The Fundamental Duties are mentioned in:
A. Part-IV A
B. Part-IV
C. Part-III
D. Part-II

14. Which of the following are Fundamental Duties?

A. Safeguarding public property.
B. Protecting the sovereignty, integrity and unity of India.
C. Developing scientific temper and humanism.
D. All the above

15. Which of the following is a fundamental duty of every citizen of India?
A. To renounce practices derogatory to the dignity of children
B. To renounce practices derogatory to the dignity of human beings
C. To renounce practices derogatory to the dignity of women
D. To be truthful to one's duties

16. The 'Fundamental Duties' are intended to serve as a reminder to:
A. The State to perform duties conferred by the Constitution
B. The judiciary to administer justice properly
C. Every citizen to observe basic norms of democratic conduct
D. The legislature to make laws for the welfare of the people

17. Respect for the National Flag and the National Anthem is:
A. A fundamental right of every citizen
B. A fundamental duty of every citizen
C. A directive principle of state policy
D. An ordinary duty of every citizen

Answers for Self Assessment

1.	C	2.	D	3.	A	4.	C	5.	C
6.	D	7.	B	8.	A	9.	B	10.	A
11.	D	12.	C	13.	A	14.	D	15.	C
16.	C	17.	B						

Review Questions

1. What do you mean by Directive Principles of State Policy?
2. Critically examine the nature of the Directive Principles of State Policy?
3. Write a detailed essay on the debates surrounding 'Directive Principles of State Policy' held during the drafting of the Indian Constitution?
4. What is the significance and utility of the 'Directive Principles of State Policy'? Discuss with reference to the Constituent Assembly debates.
5. What are the major provisions of the 'Directive Principles of State Policy'?
6. Why did members of the Constituent Assembly make a distinction between 'Directive Principles of State Policy' and 'Fundamental Rights'?
7. Explains socialist principles in Directive Principles of State Policy?
8. What is the difference between Gandhian principles and liberal-intellectual principles?

9. Write a note on the Article 51 embedded in the Directive Principles of State Policy?
10. Explain the importance of Articles 40 and 45 embedded in the Indian Constitution?
11. Examine the role of Directive Principles of State Policy in interpreting the Constitution.
12. Examine the differences between socialist principles and Gandhian Principles?

Further Readings

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Unit 06: Fundamental Rights and Directive Principles of State Policy

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- explain possibility of conflict and issue of superiority between Fundamental Rights and Directive Principles of State Policy.
- describe the distinctions between Fundamental Rights and Directive Principles of State Policy.
- examine the relationship between Fundamental Rights and Directive Principles of State Policy.
- describe why Fundamental Rights and Directive Principles of State Policy are so salient.

Introduction

The Preamble, FRs and DPSP constitute the more important features of Indian Constitution. The FRs goals and objectives of the Indian Const. outlined in the Preamble, the DPSP enshrined in Part IV and the FRs guaranteed in part III of the const. are all parts of thesame constitutional scheme without any of them varying with another, so to say, in superiority, importance or respectability.The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence. And they were included in the constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The Rights and Principles, thus, connect India's future, present and past, adding greatly to the significance of their inclusion in the constitution, and giving strength to the pursuit of the social revolution in India.

In the Directive Principles, however, one finds an even clearer statement of the social revolution. They aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the object, physical conditions that have prevented them from fulfilling their best selves.To do this, the State is to apply the precepts, contained in the Directive Principles when making laws. These principles are not justiciable, a court cannot enforce them, but they are to be, nevertheless, 'fundamental in the governance of the country'.The essence of the Directive Principles lies in Article 38, which echoing the Preamble, reads: The State shall strive to promote the welfare of the people by securing andprotecting as effectively as it may a social order in which justice, social,economic, and political, shall inform all

the institutions of a national life. Although the Fundamental Rights and Directive Principles appear in the constitution as distinct entities, it was the Assembly that separated them; the leaders of the independence movement had drawn no distinction betweenthe positive and negative obligations of the State. Assuming that the constitutional conflict between the Fundamental Rights and Directive Principles of State Policy is real, one way to resolve it would be to study the background in which these rights and principles were incorporated in the original constitution with the actual intention of founding fathers in regard to them. GolakNath case (1967) chose to interpret the constitution according to their varying lights and in the process destroyed its intrinsic harmony.The executive and the legislature have, on their part, disfigured the document through a series of amendments calculated not so much to resolve the apparent conflict between the constitutional provisions, as to assert their own supremacy over the judicial arm of the government. The constitution has become a plaything in the hands of its own creatures, namely, the organs, institutions and functionaries provided by it.

6.1 Conflict Between Fundamental Rights and Directive Principles of State Policy

The framers of the Indian Constitution intended that the sections on the 'Fundamental Rights' and the 'Directive Principles of State Policy' be read by different organs of the government, in conjunction to each other. However, over a period of time the manner in which these two sections of the Constitution have been read and interpreted has varied significantly. In this section the changing relationship between these two sections of the Indian Constitution will be examined.

Fundamental rights are known as "basic rights" as without which a human being cannot survive in dignified manner in a civilized society.Directive Principles of State Policy are in the form of instructions/guidelines to the governments at the center as well as states. Justice Deshpande succinctly put it: "Democratic socialism spelt out in the Preamble and the Directive Principles of our Constitution is meant to provide the context in which the fulfillment of the FRs has to be achieved".

Scholars have argued that there can be three possible perspectives on the manner in which the Supreme Court has dealt with the relationship between the 'Fundamental Rights' and the Directive Principles (Jaswal, P. S. 1996). According to the first perspective the 'Fundamental Rights' have been considered to be superior to the Directive Principles, as the former have been read to be justiciable whilst the latter have not been justiciable. In accordance with this view for many years the Supreme Court held that the 'Fundamental Rights' were a sacrosanct part of the Indian Constitution and could not be overwritten by any interpretation of the Directive Principles. Over a period of time, the Supreme Court has held the view that the 'Fundamental Rights' and 'Directive Principles of State Policy' are equally important constituents of the Indian Constitution. Thus, the Supreme Court has tried to read the provisions present in these two sections in correlation with each other. The judiciary realized that even though the Directive Principles were non-justiciable still they formed a vital part of the Indian Constitution. Hence it was deemed important to interpret them alongside the 'Fundamental Rights'. According to the third perspective Jaswal (1996) argues that the Supreme Court held that the Directive Principles are more important than the 'Fundamental Rights'. It was opined by the Supreme Court that the Constitution held that the Directive Principles were to be fundamental in the process of governing the country, and it was to be the duty of the State to implement the provisions present in the Directive Principles.

After independence, over the first two decades the relationship between the 'Fundamental Rights' and the Directive Principles was marked by a conflict in interpretation between the Indian executive and judiciary. The artificial nature of the present-day conflict between the FundamentalRights and the Directive Principles would be clear if one looksinto the historical circumstances in which they came to be incorporated in the constitution. The Fundamental Rights Sub-committee was entrusted with the task of framing the Fundamental Rights as well as the Directive Principles. It would be worthwhile to recall in this respect that both part III and IV were originally designated and drafted as Fundamental Rights.The Committee had a long list of rights including political, social, economic,and so on. A scrutiny of this list reflects that the rights fell intotwo categories:

(1) Those that could be assured to the citizens without anyserious difficulty, and, hence enforceable in a court of law, and

(2) Thosethat were for some reason or other, difficult to be ensured and, therefore,impracticable to be legally enforced.

It was clear that a special effort wouldhave to be made by the government to secure the second type of rightsfor the citizens; as such, till these were capable of realization, there wasno point in making them enforceable in a court of law. So, it was obviousthat as and when the State was in a position to ensure to the citizens theserights (which were termed as the Directive Principles of State Policy) andlaws were enacted for this purpose, they should become rights in the samemanner as the Fundamental Rights. In other words, when the DirectivePrinciples become realisable, they should also become enforceable. Thus,the intention clearly was to enlarge the chapter on Fundamental Rights bya progressive transfer to it from that part of the constitution dealing withthe Directive Principles. The framers of the constitution were clear that though the Fundamental Rights could not be abridged or taken away by a law made by the State, they could be by an amendment of the constitution. Accordingly, the term "law" in Article 13(2) was not to take in, in its inclusive definition, an amendment to the constitution. The doubt over this kicked up in Golak Nath's case was not all that new. It needs to be recalled that to clarify this position, the Constituent Assembly unanimously decided on an amendment on 29th April 1947, to the effect that although the Fundamental Rights could not be abridged or taken away by law, they could nevertheless be curtailed by an amendment of the constitution.[8] It might then be asked why the constitution, as finally adopted, did not make this provision explicitly. The answer lies in the fact that the Drafting Committee which examined this matter found that such a provision was unnecessary in as much as no Article or part of the constitution was exempted from the purview of the amending clause of the constitution.While the Fundamental Rights as incorporated in the constitution were not to be abridged or taken away, they were to be subject to the constitutional law. That was the reason why the term "law" was defined in Article 13, clause 3(a), rather elaborately. If this basic scheme of the constitution had been appreciated by the judiciary, they would not have gone the way they did in the Golak Nath case, nor would it have been necessary for the Parliament to bring forth a series of amendments to the constitution.The justiciability of Fundamental Rights and non-justiciability of DirectivePrinciples on the one hand and the moral obligation of State to implementDirective Principles (Article 37) on the other hand have led to a conflictbetween the two since the commencement of the Constitution. In theChampakamDorairajan case (1951), the Supreme Court ruled that in caseof any conflict between the Fundamental Rights and the Directive Principles,the former would prevail. It declared that the Directive Principles have toconform to and run as subsidiary to the Fundamental Rights. But, it also heldthat the Fundamental Rights could be amended by the Parliament by enactingconstitutional amendment acts.In this context the legislature passed the First Amendment to the Indian Constitution in 1951. Under this Amendment, Article 15 was changed, and a provision was added to it which held that Articles 15 or 29 (B) could no longer prevent the Indian State from making special provisions for the advancement of socially and educationally backward classes. In the context of economic rights, the difference of viewpoint between the legislature and the judiciary was even more pronounced during this period. In the 1950's and 1960's the judiciary held several provisions enacted by the legislature pertaining to compulsory land acquisition and nationalization of business as being void. The Courts argued that under Article 19 (pertaining to the Fundamental Right to different freedoms) and Article 31 (the Fundamental Right to Property, later repealed in 1978) the above-mentioned economic enactments were void.

In response to this the legislature introduced amendments to the Constitution. For instance, when the Allahabad High Court ruled that the state government should cease the nationalization of private transport business, the First Amendment added a clause to Article 19 (F) in order to subvert this order. Similarly, the Courts held that the abolition of Zamindari was invalid on grounds of violating Article 31, the legislature argued under the ambit of the First Amendment (by adding Article 31 A and Article 31 B) that such enactments were not invalid.Sibal (2010) has argued that the Fourth and Seventeenth Amendments to the Indian Constitution were brought about to intensify land reform legislations. Under the ambit of the Fourth Amendment a legal debate by the landholder on the compensation accorded to her/him by the government for acquired land was made non-justiciable. The Seventeenth Amendment brought ryotwari lands under this ambit where in land could be acquired by the government and the compensation provided could not be questioned.The Parliament reacted to the Supreme Court's judgment in theGolaknath Case (1967) by enacting the 24th Amendment Act (1971) and the25th Amendment Act (1971). The 24th Amendment Act declared that theParliament has the power to abridge or take away any of the FundamentalRights by enacting Constitutional Amendment Acts. The 25th AmendmentAct inserted a new Article 31C which contained the following twoprovisions:

1. No law which seeks to implement the socialistic Directive Principlesspecified in Article 39 (b)22 and (c)23 shall be void on the ground ofcontravention of the Fundamental Rights conferred by Article 14(equality before law and equal protection of laws), Article 19 (protectionof six rights in respect of speech, assembly, movement, etc) or Article 31(right to property).
2. No law containing a declaration for giving effect to such policy shall bequestioned in any court on the ground that it does not give effect to such apolicy.

In the Kesavananda Bharati case24 (1973), the Supreme Court declared theabove second provision of Article 31C as unconstitutional and invalid on theground that judicial review is a basic feature of the Constitution and hence,cannot be taken away. However, the above first provision of Article 31C washeld to be constitutional and valid.

Later, the 42nd Amendment Act (1976) extended the scope of the abovefirst provision of Article 31C by including within its protection any law toimplement any of the Directive Principles and not merely those specified inArticle 39 (b) and (c). In other words, the 42nd Amendment Act accorded theposition of legal primacy and supremacy to the Directive Principles over theFundamental Rights conferred by Articles 14, 19 and 31. However, thisextension was declared as unconstitutional and invalid by the Supreme Courtin the Minerva Mills case25 (1980). It means that the Directive Principleswere once again made subordinate to the Fundamental Rights. But theFundamental Rights conferred by Article 14 and Article 19 were accepted assubordinate to the Directive Principles specified in Article 39 (b) and (c).Further, Article 31 (right to property) was abolished by the 44th AmendmentAct (1978).In the Minerva Mills case (1980), the Supreme Court also held that 'theIndian Constitution is founded on the bedrock of the balance between theFundamental Rights and the Directive Principles. They together constitute thecore of commitment to social revolution. They are like two wheels of achariot, one no less than the other. To give absolute primacy to one over theother is to disturb the harmony of the Constitution. This harmony and balancebetween the two is an essential feature of the basic structure of theConstitution. The goals set out by the Directive Principles have to beachieved without the abrogation of the means provided by the FundamentalRights'.

Therefore, the present position is that the Fundamental Rights enjoysupremacy over the Directive Principles. Yet, this does not mean that theDirective Principles cannot be implemented. The Parliament can amend theFundamental Rights for implementing the Directive Principles, so long as theamendment does not damage or destroy the basic structure of theConstitution.

6.2 Fundamental Rights Compared With Directive Principles: Distinctions

It is now universally recognised that the difference between the fundamental rights and the directive principles lies in this that the fundamental rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the directive principles are aimed at securing social and economic freedoms by appropriate action. The fundamental rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be forced by resort to courts, so they are made justiciable. However, notwithstanding their great importance the directive principles cannot in their nature of things be enforced in a court of law. It is unimaginable that any court can compel legislature to make a laws then parliamentary democracy would soon be reduced to a oligarchy of judges. It is for this reason that the Constitution says that the directive principles shall not be enforceable by courts. The difference between fundamental rights and directive principles are discussed in the points given below:

1. Fundamental Rights are negative in character as they prohibit the State from doing certain things or impose certain restrictions on the government, while the Directive Principles of State Policy are positive in character as they require the State to do certain things or they ask the state to endeavour to achieve certain goals.
2. Fundamental Rightsare justiciable, that is, they are legally enforceable by the courts in case of their violation. Directive Principles of State Policy are non-justiciable, that is, they are not legally enforceable by the courts for their violation. Yet they are important to provide guidelines to Legislature to formulate a policy.Directive Principles of State Policy helps the State to attain its Socio-economical goals.

3. Fundamental Rights aim at establishing political democracy country by guaranteeing equality, liberty, religious freedom and cultural rights. While Directive Principles of State Policy aim at establishing social and economic democracy in the country.
4. Fundamental Rights have legal sanctions, while as Directive Principles of State Policy have moral and political sanctions.
5. Fundamental Rights promote the welfare of the individual. Hence, they are personal and individualistic, while Directive Principles of State Policy promote the welfare of the community. Hence, they are societarian and socialistic.
6. Fundamental Rights do not require any legislation for their implementation. They are automatically enforced. WhileDirective Principles of State Policy require legislation for their implementation. They are not automatically enforced.
7. The courts are bound to declare a law violative of any of the Fundamental Rights as unconstitutional and invalid. The courts cannot declare a law violative of any of the Directive Principles as unconstitutional and invalid. However, they can uphold the validity of a law on the ground that it was enacted to give effect to a directive.

The analysis about the character and legal effect of Fundamental Rights and Directive Principles of State Policy has clearly shown that the current fashionable view of their interrelation is untenable. It is not necessary to repeat what had been stated earlier, but a brief summary of preposition may be enumerated. The following propositions emerge from the discussion:

a) Indian Constitution is the supreme or fundamental law because all laws and executive action contravening the Constitution are void. Consequently, fundamental rights are part of fundamental laws. Directive Principles, although provided in the text of the Constitutions are not a part of the fundamental law, for they are not laws at all. No law executive action violating directive principle is void.

b) Directive Principles are moral precepts which have an educative value, depending on their efficacy, the moral character and sense of duty of persons to whom the directives are addressed.

c) If fundamental rights had not been enacted, the result would have been disastrous; our liberal democracy could have been converted into a police state as happened during the operation of Emergency from 25 June 1975 to 21 March, 1977.

d) If Directive Principle had not been enacted, nothing would have happened. For, government exists to work for the social, political and economic welfare of the governed, and legislative executive power enable them to do so. The welfare state has been created in many states whose constitution does not include directive principles, as experience from the example of England, U.S.A. and Canada.

e) Proposition in (c) and (d) above show that the similarity of fundamental rights and directive principles being two wheels of chariot so that if one is snapped the other would lose its efficacy is misleading and has in fact misled the judges.

f) Fundamental Rights are not selfish individual rights but have a large social, political and economic content. Fundamental rights carry with the duty not to use them to injure others or the states, or, to put it in move technical terms, fundamental impose the duty not to transgress the permissible limit, of the restriction put on those rights by law.

g) Fundamental Rights have brought about a social, political and economic revolution by subjecting legislative and executive despotism to the discipline of fundamental rights in order to protect basic human rights and values. Secondly, the equality provisions of our constitution relating to 'untouchability' have brought about a social revolutions, for, untouchable were restored to human dignity and were put on the same level as “High

Caste Hindus", to use a familiar expression for lack of better words. Further, discrimination in their favour was expressively permitted. Since Fundamental Rights and Directive Principles are the part of the same constitutions, although their legal status is different, and attempt must be made to harmonize laws made to implement directive principle with fundamental rights. In the case of an irreconcilable conflict, fundamental right must prevail over the law implementing directive principles because such a law would be covered by Article 13 (2) and would be void.

6.3 Directive Principles and Fundamental Rights: Salient Relationship

From the foregoing pages, it is reasonable to come to the conclusion that there cannot be a conflict between the Directive Principles of State Policy and the Fundamental Rights in the Indian constitution. The framers of the constitution had intended to provide these two chapters so that they may supplement and complement each other. This is evident not only from the records of the Constituent Assembly, but also from the written words and phraseology of the constitution. As already pointed out, the framers of the constitution had a long list of rights from which they have picked up some to be put in the chapter on Fundamental Rights and some others to be put in the chapter on Directive Principles of the State Policy. Since some of the rights could be ensured to the citizens without much difficulty to the individuals they have put them as Fundamental Rights and made them enforceable by the courts of law. As for the other set of rights, since they anticipated difficulty in ensuring them for the people of India straightway, the difficulties, such as finance, difficulties consequent on social customs and traditions, the founding fathers had thought of putting them in another chapter.

Because of these difficulties, they further thought that it may be prudent to make them non-enforceable in the courts of law. Lest they should be looked upon by the judiciary as less important than Fundamental Rights, the framers of the constitution took a realistic view and made to Directive Principles non-enforceable in the courts of law. If the Fundamental Rights are important because they are so entailed, the Directive Principles are equally important because the framers have said that the Directive Principles are "fundamental in the governance of the country" and "it shall be the duty of the State to apply these principles in making laws."

As a matter of fact, one could think of the Directive Principles as more important than Fundamental Rights, because the former are concerned with conferring certain rights for the society as a whole as against the latter which are concerned with theconferment of the rights for the individuals. Certainly, society is more important than the individual. As the arguments presented above state, that truly speaking, the Directive Principles are more fundamental than Fundamental Rights from the point of view of the constitution since the ideas enshrined in it, 'Justice, Social, Economic, and Political', are loftier in conception and seek to secure to the individual tangible benefit of great significance than Fundamental Rights. The position of the Fundamental Rights vis-à-vis the Directive Principles of State Policy, therefore, appear to be that the Fundamental Rights should be enforced by the judiciary so long as they do not conflict with the Directive Principles of State Policy. But, once such a conflict arises, the judiciary ought to withdraw to allow the Directive Principles to prevail. Secondly, the Fundamental Rights should be enlarged by translating the Directive Principles into laws. Also, The Fundamental Rights could be whittled down or even totally effaced by an amendment of the constitution. It follows that the Fundamental Rights were not meant to be sacrosanct or transcendental. These were incorporated in the constitution of free India to signify, first, the emancipation of the country from the British rule and, secondly, the right of the minority communities to be protected against any possible tyranny of majority rule. Those who framed the constitution did not intend to pit these rights against the Directive Principles of State Policy. Rather, they expected that the organs of government would interpret and use these rights in a manner that would help implement the Directive Principles. The framers of the constitutions saw no incongruity, nor any possibility of a conflict, between Parts III and IV of the constitution. The Fundamental Rights embodied in Part III are intended to secure the main objectives of the constitution enumerated in its Preamble, that is, "social, economic, and political justice". These very words occur in Article 38 which is the main plank of Part IV thereby implying that there is no conflictbetween Parts III and IV.

It should be pointed out that there is no inherent conflict between the rights contained in Parts II and IV and the attitude of the courts towards the directives would not have been so hostile if the real meaning of the words 'shall not be enforceable' used in Article 37 had been comprehended.

When Sir B.N. Rau suggested the inclusion of these directives, he did not anticipate any conflict between the provisions of the two chapters, but with the elevation of the status of the 'directives' as 'fundamental in the governance of the country' and the substitution of the word 'duty' for the word 'care'left the possibility of a conflict between Fundamental Rights and Directive Principles. He, therefore, suggested that in case of conflict the 'directives'should prevail. The words 'shall not be enforceable' used in the chapter on Directives were not really meant to offend the judiciary or to restrict its ambit as the guarantor of the Fundamental Rights of the individuals. It is not correct to say that the judiciary being charged with the function of safeguarding the rights of individual would be oblivious to the rights of the society as a whole.

In the 1990's India has witnessed a weakening of the welfare functions of the State and an expanded role of the market in this new era of globalization. Yet even in this period the Supreme Court interpreted the 'Fundamental Rights' by reading the 'Directive Principles of State Policy' into them. For instance, the Court has read Article 21 with Articles 47 and 48 (A) recognizing the right to pollution free environment; similarly the right to education has been accepted as being paramount by reading Article 45 with Article 21 (Sibal, 2010). Even in the context of a conflict between privat4e individuals the Court has read the 'Fundamental Rights' and Directive Principles together. In the Vishakha case in 1997, the Supreme Court held that norms must be put in place in all forms of workplaces to prevent sexual harassment. In this decision too the Court read the 'Fundamental Rights' under Articles 14, 15, 19, 21 and the Directive Principles under Article 45; in consonance with each other. Lately, the Supreme Court has begun to take a conservative stance towards the expansion of positive rights. For instance, in the T.K. Rangarajan case in 2003 the Court held that the Tamil Nadu government workers did not have a legal or moral right to strike. Similarly, in the Narmada BachaoAndolan case in 2000 the Court ruled in favour of forces eviction of many people from the sites proposed for the construction of the dam on the river Narmada. Thus, the relationship between the 'Fundamental Rights' and the 'Directive Principles of State Policy' has varied significantly over the last sixty years.

6.4 Directives Outside Part IV

Apart from the Directives included in Part IV, there are some other Directives contained in other Parts of the Constitution. They are:

1. Claims of SCs and STs to Services: The claims of the members of theScheduled Castes and the Scheduled Tribes shall be taken intoconsideration, consistently with the maintenance of efficiency ofadministration, in the making of appointments to services and posts inconnection with the affairs of the Union or a State (Article 335 in PartXVI).
2. Instruction in mother tongue: It shall be the endeavour of every state andevery local authority within the state to provide adequate facilities forinstruction in the mother-tongue at the primary stage of education tochildren belonging to linguistic minority groups (Article 350-A in PartXVII).
3. Development of the Hindi Language: It shall be the duty of the Union topromote the spread of the Hindi language and to develop it so that it mayserve as a medium of expression for all the elements of the compositeculture of India (Article 351 in Part XVII).

The above Directives are also non-justiciable in nature. However, they are also given equal importance and attention by the judiciary on the ground that all parts of the constitution must be read together.

Summary

The Directive Principles of State Policy of Indian Constitution have incorporated points from the Constitution of Ireland which is itself an end result of copying Spanish Constitution. Directive Principles are in the Constitution to guide the State in the governance of our nation as a "welfare State". Article 37 clearly tells that, "The provisions shall not be enforceable by any court but the principles should be the guiding force in making the laws". The critical analysis clearly shows that attempts of propagating the views that Fundamental Rights and Directive Principles are inter-related are untenable. Directive Principles are moral guidance to State for enacting the laws. It is also proved that the soul of the Constitution is that Fundamental Rights are above Directive Principles and in case of any conflict between the two former should be accorded priority or the

later.The provisions in the 'Fundamental Rights' and the 'Directive Principles of State Policy' need to be read together for the realization of the ideals inscribed in the Indian Constitution. The role they will continue to play in the Indian democracy will depend on the manner in which the legislature and judiciary continue to interpret and implement these directives. In short, fundamental rights are essential rights awarded to the citizens by the government, to live life with equality, liberty and justice. Conversely, Directive Principles are nothing but the directions which are kept in mind by the government agencies while framing laws; even the judiciary has to consider them at the time of giving their verdict on the cases.

Keywords

Amendment: Change or addition to a document or legal provisions: 'constitutional amendment'.

Authenticated: Officially validated (of document).

Authorities: Officials or bodies with official powers. A person or body of persons in whom authority is vested, for example a governmental agency.

Committee: A body of persons appointed or elected for performing specified tasks; may be small group within a larger body.

Conflict: From the Latin for 'to clash or engage in a fight', a confrontation between one or moreparties aspiring towards incompatible or competitive means or ends. Conflict may be either manifest, recognisable through actions or behaviours, or latent, in which case it remains dormant for some time, as incompatibilities are unarticulated or are built into systems or such institutional arrangements as governments, corporations, or even civil society.

Democracy: Government by the people. In ancient Greece this entailed direct participation in government of every adult male citizen. Plato's political thought led himto reject democracy in favour of elitism.

Justice: A public official authorized to decide questions brought before a court of justice; the quality of being just or fair; what courts, etc. dispense: 'the administration of justice'.

Political Power: The summation of means, influences, and pressures available to a government,institution, group, or individual that are exploited to achieve respective objectives or to change targeted conditions. Political power may be exerted positively, in the form of incentives, or negatively, as in various types of sanctions. Domestic and international relations are influenced and at times dictated by the relative political power among parties. The attainment of political power is often a source of conflict in itself. Differentials in political power can be a crucial factor in determining the outcomes of disputes, but in such situations the underlying causes of the conflict in question are often purposefully ignored. Groups are often unaware of their full power capacity, creating distorted assumptions of the balance of power among contending parties. Shifts in power relationships can occur through a full realisation of political power or structural changes within or among societies.

Non-discrimination: Treating persons equally without taking account of irrelevant differences.

Self Assessment

1. Which one of the following is not a correct description of the Directive Principles of State Policy?

A. Directive Principles are not enforceable by the courts.

B. Directive Principles have a political sanction.

C. Directive Principles are declaration of objectives for State Legislation.

D. All of Above

2. Which one of the following statements regarding the current status of the relationship between Fundamental Rights and Directive Principles is correct?

A. Directive Principles cannot get priority over Fundamental Rights in any case.

B. Directive Principles always get priority over Fundamental Rights.
C. Fundamental Rights always get priority over Directives Principles.
D. In some cases Directive Principles may get priority over Fundamental Rights.

3. Directive Principles promise equal income and free health care for all Indians.The 'Instrument of Instructions' contained in the Government of India Act, 1935, has been incorporatedin the Constitution of India in the year 1950 as:
A. Fundamental Rights
B. Directive Principles of State Policy
C. Fundamental Duties
D. Emergency provisions

4. Right to work in India is a:
A. Fundamental right
B. Directive principle
C. Constitutional right
D. Constitutional duty

5. The Directive Principles of State Policy are fundamental for the:
A. Upliftment of backward classes
B. Protection of individual rights
C. Administration of justice
D. Governance of state

6. Which one of the following is not covered under Article 20 of the Constitution of India?
A. Ex post facto laws
B. Preventive detention
C. Double jeopardy
D. Self-incrimination

7. When emergency under Article 352 of the Constitution is proclaimed, the President of India hasno power to suspend the Fundamental Rights contained in which of the following Articles?
A. 20 and 21
B. 19 and 20
C. 21 and 22
D. 19 and 21

8. The Supreme Court of India declared by issuing a writ that "the respondent was not entitled to an office he was holding or a privilege he was exercising". Which writ is that?
A. Habeas Corpus
B. Prohibition
C. Quo-Warranto
D. Certiorari

9. Under Article 22 of the Constitution of India, with the exception of certain provisions statedtherein, what is the maximum period for detention of a person under preventive detention?

A. 2 months
B. 3 months
C. 4 months
D. 6 months

10. The 86th Constitutional Amendment deals with which of the following?

A. Allocation of more number of parliamentary seats for recently created states.
B. Reservation of 30% posts for women in Panchayati Raj Institutions.
C. Insertion of Article 21A related with free and compulsory education for all children between the age of 6 and 14 years.
D. Continuation of reservation for backward classes in government employment.

11. The writ of certiorari is issued by a superior court to:

A. An inferior court to stop further proceedings in a particular case.
B. An inferior court to transfer the record of proceedings in a case for review.
C. An officer to show his right to hold a particular office.
D. A public authority to produce a person detained by it before the court within 24 hours.

12. The 'Instrument of Instructions' contained in the Government of India Act, 1935, has been incorporated in the Constitution of India in the year 1950 as:

A. Fundamental Rights
B. Directive Principles of State Policy
C. Fundamental Duties
D. Emergency provisions

13. Which one of the following is not a correct description of the Directive Principles of State Policy?

A. Directive Principles are not enforceable by the courts.
B. Directive Principles have a political sanction.
C. Directive Principles are declaration of objectives for State Legislation.
D. Directive Principles promise equal income and free health care for all Indians.

14. Who among the following stated "Democratic socialism spelt out in the Preamble and the Directive Principles of our Constitution is meant to provide the context in which the fulfillment of the FRs has to be achieved"?

A. Justice Deshpande
B. J. L. Nehru
C. Dr. B. R. Ambedkar
D. Sardar Patel

15. Which is the following statement/s are correct?

A. Fundamental Rights are negative rights, while DPSP are positive rights.
B. FRs are justiciable, while as DPSP are non-justiciable.

C. FRs aim at establishing political democracy, while DPSP aim at establishing social and economic democracy.

D. All of the Above

Answers for Self Assessment

1.	B	2.	D	3.	B	4.	B	5.	D
6.	B	7.	A	8.	C	9.	B	10.	C
11.	B	12.	B	13.	D	14.	A	15.	D

Review Questions

1. What is the fundamental difference between Fundamental Rights and Directive Principles of State Policy?
2. Write a detailed note on the conflict between Fundamental Rights and Directive Principles of State Policy?
3. Why Fundamental Rights and Directive Principles of State Policy are so salient?
4. How Fundamental Rights and Directive Principles of State Policy are complimentary to each other? Discuss?
5. Write a note on Golak Nath case (1967)? Why is it important in the Indian Constitution?
6. Explain the First Amendment Act, 1951?
7. Why did members of the Constituent Assembly make a distinction between 'Directive Principles of State Policy' and 'Fundamental Rights'?
8. Examine character and legal effect of Fundamental Rights and Directive Principles of State Policy?
9. Discuss in detail the ChampakamDorairajan case?
10. What do you mean by economic rights?
11. Explain the notion of political democracy? Identify its important features.
12. Write a conceptual understanding of social and economic democracy? Describe some of the salient characteristics?

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Unit 07: Union Government

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- understand the background of the Union executive.
- explain the procedure for the election of the President of India.
- analyse the process of impeachment of the President in India.
- describe the powers and functions of the President of India.
- analyse constitutional position of the President of India.

Introduction

Historically, one can delineate at least two divergent lines associated with the evolution of the executive system in India: (1) the monarchical, and (2) federal republican. The federal republican gana-sanghasappeared in the ancient India but were soon supplanted by monarchies. Republican parliamentary-federal executive finally came to be established only in independent.

Independent India adopted a modified version of the Westminster model of government. The most fundamental modification was, of course, the combination of the parliamentary system with federalism and Fundamental Rights of the citizens and Directive Principles of State Policy. This created the federal imperative that the Westminster model does not know.India under the constitution framed in 1950.The organ of a government that primarily looks after the function of implementation and administration is known the Executive. The Executive is the branch of Government accountable for the implementation of laws and policies legislated by the legislature. In the Parliamentary form of executive, the Prime Minister is the head of the government, and the head of the State may be Monarch (Constitutional Monarchy, e.g., UK) or President (Parliamentary Republic, e.g., India). In a Semi-Presidential System, the President is the head of the State, and the Prime Minister is the head of the government, e.g., France. In a Presidential System, the President is the head of the State as well as the head of government, e.g., the US.

India is a democratic republic with a parliamentary form of government. The government at the Central level is called 'Union Government' and at the State level it is known as 'State Government'. The Union Government has three organs – the Executive, the Legislature and the Judiciary. The President, the Prime Minister and his Council of Ministers collectively constitute the Union Executive. The Constitution of India, however, bestows authority and dignity on the office of the President without providing adequate powers to rule. The President performs essentially a

ceremonial role. The Prime Minister exercises real executive power. While the President is the head of the state, the Prime Minister is the head of the government. The President carries out the actual functions of the government only with the aid and advice of the Prime Minister. Let's have a discussion on President, Prime Minister and Council of Ministers one by one.

7.1 President

The constitution has made detailed provisions to see that the President, the head of the state, is a ceremonial head and that he does not arrogate to himself any real power. Article 52 reads that there shall be a President of India. The Constitution vests executive powers of the Union in the hands of the President. The President is the head of the Indian State. He is the first citizen of Indiaand acts as the symbol of unity, integrity and solidarity of the nation. Article 53 reads that he is also the supreme commander of the armed forces. He alone has the powers to declare war and peace. He always comes first on the table of precedence. Therefore, he is the highest constitutional dignitaries in the country.

Election of the President

Article 54 of the Constitution reads that the President is elected not directly by the people but by members of Electoral College consisting of:

1. the elected members of both the Houses of Parliament.

2. the elected members of the legislative assemblies of the states; and

3. the elected members of the legislative assemblies of the Union Territories of Delhi and Puducherry.

The President's election is held in accordance with the system of proportional representation by means of the single transferable vote and the voting is by secret ballot. This system ensures that the successful candidate is returned by the absolute majority of votes.

The framers of the Constitution were keen to obtain parity between the votes of the elected members of Parliament on one side and elected members of Legislative Assemblies of all the States on the other. They devised a system to determine the value of vote of each member of Parliament and Legislative Assembly, so as to ensure equality. The value of vote of each member of Legislative Assembly of a state is determined by the formula as given below: -

Total population of the State ÷100

= Number of elected members of State Legislative Assembly

In simple words the total population of the State is divided by the number of elected members of the State Legislative Assembly, and the quotient is divided by 1000.

The value of each vote of a Member of Parliament is determined by adding all the votes of members of the State Legislative Assemblies including the Legislative Assemblies of Union Territory of Delhi and Puducherry divided by total member of elected members of Lok Sabha and Rajya Sabha.

= Total number of votes of Member of all the State Legislative Assemblies

Total number of elected Members of both Houses of Parliament

Single Transferable Vote System: The election of the President is held through single transferable vote system of proportional representation. Under this system, names of all the candidates are listed on the ballot paper and the elector gives them numbers according to his/her preference. Every voter may mark on the ballot paper as many preferences as there are candidates. Thus, the elector shall place the figure 1 opposite the name of the candidate whom he/she chooses for first preference and may mark as many preferences as he/she wishes by putting the figures 2, 3, 4 and so on against the names of other candidates. The ballot becomes invalid if first preference is marked against more than one candidate or if the first preference is not marked at all.

Counting of Votes and Declaration of Result: Members of State Legislative Assemblies cast their votes in States Capitals, while Members of Parliament cast their votes in Delhi in the States Capitals. Counting of votes is done at New Delhi. First preference votes of all the candidates are sorted out and counted. To be declared elected a candidate must get more than 50% of the total valid votes polled. This is known as Quota. The Quota is determined by totaling the total number of votes polled divided by the number of candidates to be elected plus one. In this case, since only the

President is to be elected, so division is done by 1+1. One (01) is added to the quotient to make it more than 50%.

This method of election was intended to make the Presidential election broad based to achieve political balance between the Centre and the states. Consequently, the President represents not only the Union but also the States. This is in keeping with the federal character of the Indian polity.

Qualifications for Election as President

Articles 58 and 59 of the Constitution of India lay down the qualifications for the office of the President of India. Article 58 reads that a person to be eligible for election as President should fulfil the followingqualifications:

1. He should be a citizen of India.
2. He should have completed 35 years of age.
3. He should be qualified for election as a member of the Lok Sabha.
4. He should not hold any office of profit under the Union government orany state government or any local authority or any other public authority.

Oath or Affirmation by the President

Article 60 deals with the oath or affirmation of the President. Before entering upon his office, the President has to make and subscribe to an oath or affirmation. In his oath, the President swears:

1. to faithfully execute the office.
2. to preserve, protect and defend the Constitution and the law; and
3. to devote himself to the service and well-being of the people of India.

The oath of office to the President is administered by the Chief Justice of India and in his absence, the seniormost judge of the Supreme Court available.

Term of Office and Removal of the President

The tenure of the office of the President of India is five years. His/her term commences from the date on which he/she assumes office after taking an oath administered by the Chief Justice of India. However, the President can seek a second term. For instance, Rajendra Prasad was elected as the President twice despite not being favoured by the then Prime Minister Jawaharlal Nehru but strongly supported by a large number of Congress leaders. The President remains in office until his/her successor enters the office. However, if the President wishes to resign, he can send his resignation letter to the Vice-President. If the post of the President falls vacant, the Vice-President takes over the charge. But the election for the post of President must be conducted within six months from the date of occurrence of the vacancy.

Articles 56 and 61 deal with the procedure for impeaching the President of India. In this regard, the constitution lays down 'violation of the Constitution' as the ground for removal. The process of impeachment can be initiated in either house of parliament and must be passed by not less than two-thirds of the total membership of the House in which it has been moved. If the other House investigates the charge and two-thirds majority of that house find him guilty, the President stands impeached from the office from the date of passing of the resolution. Thus, the procedure of removal of the President is difficult and has been made so to prevent misuse of this power by the Parliament. Till date, no President of India has been impeached.

Vacancy in the Office of the President

Whenever the office of the President falls vacant either due to death or resignation or impeachment, the Vice-President officiates for a period not more than six months. The Constitution has made it obligatory that in such cases (of vacancy in the office of President) election for a new President must be held within six months. The newly elected President then holds office for his full term of five years. Thus, when President Fakhruddin Ali Ahmad died in 1977, Vice-President B. D. Jattiofficiated, and the new President (Sanjeeva Reddy) was elected within six months. In case the President's office falls vacant and the Vice-President is not available (or VicePresident acting as President dies or resigns in less than six months), the Chief Justice of India is required to officiate till the new President is elected. This provision was made in 1969 by the Parliament to enable Chief Justice Hidayatullah to officiate when President Zakir Hussain had died, and Vice-President V. V. Giri resigned. If a President is temporarily unable to discharge his duties, due to illness or

otherwise, the Vice-President may discharge the functions of the President without officiating as the President

7.2 Powers and Functions of the President

Alan Gledhill, for example, presents an alarmist view of the President's power toassume dictatorial control of the government. Granville Austin paraphrase Gledhill's apprehensions of the murky prospects thus, only to subsequently dismiss it: "A President who has been aggrandizing his powers learns that Parliament intends to impeach him. During the stipulated lapse of two weeks between the notice of, and the movement of, the impeachment motion,the President dissolves Parliament. If a new Parliament is elected, writes Professor Gledhill, the President need not to summon it for six months. In the meantime, the President may dismiss his ministers and appoint others of this choice, himself governing the country by Ordinance during this period. This situation could easily justify a proclamation of emergency, and in this manner the President could step by step take over control of the nation".

The Constitution has vested the President with vast powers. The powers enjoyed and the functions performed by the President can bestudied under the following heads.

1. Executive powers
2. Legislative powers
3. Financial powers
4. Judicial powers
5. Diplomatic powers
6. Military powers
7. Emergency powers

Executive Powers

The President is head of State and executive powers of the Union have been vested in him. The President is empowered to exercise these powers either directly or through officers subordinate to him which means through the Prime Minister and Council of Ministers also. His executive powers are given below:

The executive powers and functions of the President are:

All executive actions of the Government of India are formally taken in his name.

i. He can make rules specifying the manner in which the orders and otherinstruments made and executed in his name shall be authenticated.
ii. He appoints the prime minister and the other ministers. They hold officeduring his pleasure.
iii. He appoints the attorney general of India and determines hisremuneration. The attorney general holds office during the pleasure of thePresident.
iv. He appoints the comptroller and auditor general of India, the chief electioncommissioner and other election commissioners, the chairman andmembers of the Union Public Service Commission, the governors ofstates, the chairman and members of finance commission, and so on.
v. He can seek any information relating to the administration of affairs of theUnion, and proposals for legislation from the prime minister.

All laws enacted by the Union Parliament are enforced by him/her. All officials appointed by him/her (such as Governors and Ambassadors) may be removed or recalled by him/ her, on the advice of the Union Council of Ministers. All the functions are performed by the President on the advice of the Prime Minister. All decisions of the Union Government are communicated to him/her by the Prime Minister. The President can ask the Prime Minister only once to have a recommendation of the executive reconsidered by the Cabinet. The President can also refer a

minister's decision to the Cabinet for its consideration. The President cannot seek a second reconsideration

Legislative Powers

The President being an integral part of Parliament enjoys many legislative powers. These powers are given below:

I. He can summon or prorogue the Parliament and dissolve the Lok Sabha.He can also summon a joint sitting of both the Houses of Parliament, which is presided over by the Speaker of the Lok Sabha.

II. He can address the Parliament at the commencement of the first session after each general election and the first session of each year.

III. He can send messages to the Houses of Parliament, whether with respect to a bill pending in the Parliament or otherwise.

IV. He can appoint any member of the Lok Sabha to preside over its proceedings when the offices of both the Speaker and the Deputy Speaker fall vacant. Similarly, he can also appoint any member of the Rajya Sabha to preside over its proceedings when the offices of both the Chairman and the Deputy Chairman fall vacant.

V. He nominates 12 members of the Rajya Sabha from amongst persons having special knowledge or practical experience in literature, science, art and social service.

VI. He can nominate two members to the Lok Sabha from the Anglo-Indian Community.

VII. He decides on questions as to disqualifications of members of the Parliament, in consultation with the Election Commission.

VIII. When a bill is sent to the President after it has been passed by theParliament, he can:

(i) give his assent to the bill, or

(ii) withhold his assent to the bill, or

(iii) return the bill (if it is not a money bill) for reconsideration of theParliament.

IX. However, if the bill is passed again by the Parliament, with or withoutamendments, the President has to give his assent to the bill.

Financial Powers

All money bills are introduced in the Lok Sabha only with the prior approval of the President. The President has the control over Contingency Fund of India. It enables her to advance money for the purpose of meeting unforeseen expenses. Annual budget and railway budget are introduced in the Lok Sabha on the recommendation of the President. If the Government in the middle of the financial year feels that more money is required than estimated in the annual budget, it can present supplementary demands. Money bills are never returned for reconsiderations. The President appoints the Finance Commission after every five years. It makes recommendations to the President on some specific financial matters, especially the distribution of Central taxes between the Union and the States. The President also receives the reports of the Comptroller and Auditor-General of India, and has it laid in the Parliament.

Judicial Powers

The judicial powers and functions of the President are:

I. You have seen the above that the President appoints the Chief Justice and the judges of Supreme Court and highcourts. The President also appoints Chief Justices and other judges of the High Courts.

II. (b) He can seek advice from the Supreme Court on any question of law orfact. However, the advice tender by the Supreme Court is not binding onthe President.

III. (c) He can grant pardon, reprieve, respite and remission of punishment, orsuspend, remit or commute the sentence of any person convicted of anyoffence:

a) In all cases where the punishment or sentence is by a court martial;

b) In all cases where the punishment or sentence is for an offenceagainst a Union law; and

c) In all cases where the sentence is a sentence of death.

Diplomatic Powers

The international treaty and agreements are negotiated and concluded onbehalf of the President. However, they are subject to the approval of theParliament. He represents India in international forums and affairs and sendsand receives diplomats like ambassadors, high commissioners, and so on.

Military Powers

He is the supreme commander of the defence forces of India. In that capacity,he appoints the chiefs of the Army, the Navy and the Air Force. He candeclare war or conclude peace, subject to the approval of the Parliament.

Emergency Power

With the intention of safeguarding the sovereignty, independence and integrity of Union of India, the constitution bestows emergency powers on the President of India. The President is empowered to declare three types of emergencies, namely, national emergency (Article 352) arising out of the war, external aggression or armed rebellion, b) emergency arising (Article 356 and 3665) due to the breakdown of the constitutional machinery in the States, and c) financial emergency (Article 360).

The President can make a proclamation of national emergency at any time if he is satisfied that the security of Indian any part of the country is threatened by war, external aggression or armed rebellion. This proclamation must be submitted to the Parliament for its consideration and approval. It must be accepted within one month by both the houses of Parliament by two-third of the members present and voting. If the Parliament fails to approve the proclamation bill, it ceases to operate. If approved, it can continue for a period of six months. However, it can continue for any length of time if the President approves the proclamation for every six months. The Parliament however, has the power to revoke the emergency at any time by a resolution proposed by at least one tenth of the total members of the Lok Sabha and accepted by a simple majority of the members present and voting.

National emergency under Article 352 was proclaimed for the first time in 1962 when the Chinese aggression took place. The second proclamation was made in 1971 during the Bangladesh war. On 26th June 1975, for the first time, the President proclaimed, on the advice of the Prime Minister, emergency in the name of grave danger to internal security.

When there is a breakdown of the constitutional machinery in the state, the President can impose emergency in that state. Article356 provides that if the President, on receipt of a report from the Governor of a state or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the constitutional provisions, he may proclaim constitutional emergency in the state. He can also declare state emergency if the state government refuses or fails to carry out certain directives given by the central government. The proclamation of this type of emergency, popularly called as President Rule, can remain in force for a period of six months. By the 44th Amendment, the Parliament can extend the duration of the state emergency for a period of six months at one instance. Ordinarily, the total period of such emergency cannot exceed one year unless there is a national emergency in force. However, the total period of state emergency cannot go beyond three years.

The President can impose financial emergency. Article 360 states that if the President is satisfied that a situation has arisen where the financial stability or credit of India or any part of the country is threatened, he may declare financial emergency. Like the National emergency, such a proclamation has to be laid before the Parliament for its approval. On its face value one can say that the President enjoys formidable powers. In reality however, he can exercise his powers only on the aid and advice of the Council of Ministers, headed by the Prime Minister. In this respect, the Presidents position is more like that of the British Monarch rather than that of the President of the United States of America. While the President of India may be the head of the state, the head of the government is the Prime Minister.

Veto Power of the President

President has the power to withhold his assent to a bill passed by the Parliament. This is also known as Veto Power of the President. India President has three types of Veto Power.

Absolute Veto:When President declares that he withholds his assent to a bill then it is called as Absolute veto. However, he can reject any bill only the recommendation of the council of ministers.

Suspensive Veto: When President returns a bill (except money and constitutional amendment bills) for the reconsideration of the Parliament. Then it is called suspensive veto. However, if Parliament passes the bill for the second time president is bound to give assent to bill.

Pocket Veto: Constitution doesn't provide any time limit, within which president is to declare his assent or refusal, or to return the bill. Thus, after a bill is presented to the President, he can keep the bill on his table for an indefinite time. This is known as pocket veto.

7.3 Constitutional Position

The Constitution of India has provided fora parliamentary form ofgovernment. Consequently, the President has been made only a nominalexecutive; the real executive being the council of ministers headed by theprime minister. In other words, the President has to exercise his powers and functions with the aid and advise of the council of ministers headed by theprime minister. B. R. Ambedkar succinctly pointed in the Constitution Assembly: "President occupies the same position as the king under the English constitution. He is the head of the state but not of the executive. He represents the nation but doesn't rule the nation. He is the symbol of the nation". But in reality the President of India is not a mere rubber stamp. The Constitution lays down that the President has to preserve, protect and defend the Constitution. The President can ask a newly appointed Prime Minister to seek a vote of confidence in the Lok Sabha within a stipulated period of time. All the administration of the country is carried on in her name. The President can ask for any information from any minister. All the decisions of the Cabinet are communicated to the President. The President is furnished with all the information relating to administration. It is in this context that the utility of the office of the President comes to be fully realised when the President gives suggestions, encourages and even warns the government. It is in this context, the President emerges as an advisor, a friend and even a critic.

The 42nd Constitutional Amendment Act of 1976 (enacted by the IndiraGandhi Government) made the President bound by the advice of the councilof ministers headed by the prime minister. The 44th Constitutional

Amendment Act of 1978 (enacted by the Janata Party Government headed byMorarji Desai) authorised the President to require the council of ministers toreconsider such advice either generally or otherwise. However, he 'shall' actin accordance with the advice tender after such reconsideration. In otherwords, the President may return a matter once for reconsideration of hisministers, but the reconsidered advice shall be binding.

In October 1997, the cabinet recommended President K R Narayanan toimpose President's Rule (under Article 356) in Uttar Pradesh. The Presidentreturned the matter for the reconsideration of the cabinet, which then decidednot to move ahead in the matter. Hence, the BJP-led government underKalyan Singh was saved. Again in September 1998, the President KRNarayanan returned a recommendation of the cabinet that sought theimposition of the President's Rule in Bihar. After a couple of months, thecabinet re-advised the same. It was only then that the President's Rule wasimposed in Bihar, in February 1999.

Though the President has no constitutional discretion (the freedom or power to decide what should be done in a particular situation), he has somesituational discretion. In other words, the President can act on his discretion(that is, without the advice of the ministers) under the following situations:

a) Appointment of Prime Minister when no party has a clear majority in theLok Sabha or when the Prime Minister in office dies suddenly and there isno obvious successor.
b) Dismissal of the council of ministers when it cannot prove the confidenceof the Lok Sabha.
c) Dissolution of the Lok Sabha if the council of ministers has lost itsmajority.

By way of conclusion, we may describe the position of the President in the words of Dr. B.R. Ambedkar. According to him/her, the President is the Head of State but not the executive. The President represents the nation but does not rule over the nation. The President is the symbol of nation. His/her place in the administration is that of a ceremonial head.

Summary

Following the pattern of British Westminster model, India evolved its system of the parliamentary form of government in which the executive is responsible to the legislature. The executive power of the government of India is vested in the President of India, who is both the formal head of the state and the symbol of the nation. The President is endowed with authority and dignity without adequate powers. The President is elected for a term of five years. The President is eligible for reelection. The President may resign before the expiry of his/her term or can be removed from office by impeachment. The President can exercise his/her authority only with the aid and advice of the Council of Ministers headed by the Prime Minster. It is the Prime Minister who exercises real executive power in the Indian political system. As the head of the Council of Ministers, the leader of the majority party in the Lok Sabha and often the leader of the Parliament, the Prime Minister enjoys considerable power and authority. Though the Prime Minister is appointed by the President and holds office during the pleasure of the President, the Prime Minister is in reality responsible to the Parliament. The Council of Ministers and the informal cabinet headed by the Prime Minister work on the principle of collective responsibility . Sometimes here have been differences between the President and the Prime Minister. But these did not assume serious proportions culminating in any constitutional crisis.

Besides, over the years, the salience of the politics of mass rallies, and occasionally of mass movements, has become more evident in the party system and lent a plebiscitary favourto the electoral politics. This strand of mass politics is more typical of the unorganized sectors of the economy and polity according to Lloyd and Susanne Rudolph, andis marked by what they call 'demand groups', distinct from pressuregroups inasmuch as the former are more likely to use anomic and non-institutional channels. The test of statesmanship lies in institutionalizing the party system and restoring the efficacy and esteem of the organs of the government within a more federalized parliamentary system. With much greater salience of regional parties in the 2014 general elections, the statesmanship of the Indian political leadership would be much in demand in the times ahead.

Keywords

Ballot: The method of secret voting by means of printed or written ballots or by means of voting machines.

Bill: Draft law presented to the legislature for enactment.

Cabinet: usually a synonym for "Council of Ministers".

Election: The process of selecting a person of choice through voting.

Executive/Executive Power: Having power to put decisions, laws, etc. into effect (power conferred on the executive). In some federations, the federal executive has extensive independent authority to make laws by decree or in circumstances of a national emergency.

Impeachment: Process under which charges are brought in Parliament against a high constitutional authority, public official or judge.

Secret ballot: A system of voting in which one's choice of candidate is kept secret.

Veto: Valid power that one can exercise to block a decision (e.g. the power that a head of state has to reject a bill passed by the legislature).

Self Assessment

1. The Constitution of India establishes parliamentary form of Government, and the essence of this form of government is its responsibility to the:

A. People of India
B. President
C. Prime Minister
D. Legislature

2. In a parliamentary form of Government, ministers are appointed by:
A. The head of the state at his discretion.
B. The head of the government.
C. The head of the state on the recommendations of the head of the government.
D. The legislature

3. Which Article of the Indian Constitution says that there shall be a President of India?
A. Article 61
B. Article 60
C. Article 51
D. Article 52

4. Who participates in the Presidential election?
A. Elected members of both Houses of Parliament
B. Elected and nominated members of the State Legislative Assembly
C. Members of all Union Territories
D. All of the above

5. What is the minimum age for a candidate to be elected as President of India?
A. 20 Years
B. 35 Years
C. 32 Years
D. 25 Years

6. Which of the following statements is wrong?
A. Elected and nominated members of the State Legislative Assembly participate in the presidential election.
B. The Union Executive includes the President, Vice President, Prime Minister, Attorney General of India
C. Impeachment may be initiated against the President for 'breach of constitution'.
D. Article 56 envisages the tenure of the President.

7. The President of India:
A. Can be a member of Parliament.
B. Is part of Parliament.
C. Cannot stand for election for more than two terms.
D. Presides over joint sittings of both the Houses of Parliament

8. A bill cannot become an act of parliament, unless and until_____?
A. It is passed by Lok Sabha
B. It is passed by Rajya Sabha
C. It gets assent from President
D. It is passed by both Lok Sabha and Rajya Sabha

9. A bill cannot become an act of parliament, unless and until_____?
A. It is passed by Lok Sabha

B. It is passed by Rajya Sabha
C. It gets assent from President
D. It is passed by both Lok Sabha and Rajya Sabha

10. The Executive power of the Union Government is vested in the President of India. The Presidentshall exercise these powers:
A. Himself.
B. Directly or through officers subordinate to him if he so desires.
C. Either directly or through officers subordinate to him in accordance with the provisions of the Constitution.
D. Only on the advice of Prime Minister

11. Which one of the following statements is correct?
A. The Chief Election Commissioner of India holds his office during the pleasure of President.
B. The Governor of a State holds his office during the pleasure of the President.
C. The Prime Minister can only be removed by a resolution passed by both Houses of Parliament.
D. The speaker of the Lok Sabha can be removed at the pleasure of the President.

12. Which of the following statements is not correct?
A. There shall be a Council of Ministers headed by the Prime Minister to aid and advise the President who shall act in accordance with such advice.
B. The President may require the Council of Ministers to reconsider such advice.
C. The President need not act in accordance with the advice tendered after such reconsideration.
D. The President shall act in accordance with the advice tendered after such reconsideration.

13. In which one of the following cases, is the President of India not bound by the aid and advice of the Union Council of Ministers?
A. In deciding the question of removal of a Governor.
B. In deciding the question whether a member of Lok Sabha has become disqualified to continue as a member.
C. While exercising power to grant pardon.
D. In dismissing a civil servant without any enquiry and hearing on the ground of security of state.

14. Money can be advanced out of the Contingency Fund of India to meet unforeseen expenditure by the:
A. Parliament
B. President
C. Finance Minister
D. Prime Minister

15. Which of the following is a correct statement about the President of India?
A. He can address both Houses of Parliament, can summon the Houses of Parliament and can send messages to either House of Parliament.

B. He can summon the Houses of Parliament but cannot send messages to either House ofParliament.
C. He can send messages to either House of Parliament, but cannot summon the Houses ofParliament.
D. He cannot send messages to either House of Parliament or summon the Houses of Parliament

Answers for Self Assessment

1.	D	2.	C	3.	D	4.	A	5.	B
6.	A	7.	B	8.	C	9.	C	10.	C
11.	B	12.	C	13.	B	14.	B	15.	A

Review Questions

1. What do you mean by parliamentary form of government? Identify some of the key elements.
2. Describe the notion of union executive?
3. Define Westminster model of government?
4. What is the difference between parliamentary and presidential forms of government?
5. Explain the method of election of the President?
6. Illustrate judicial powers of the President?
7. What is the procedure of removal of the President known as?
8. Discuss the veto powers of the President?
9. Critically examine the various legislative powers of the President?
10. Write an essay on financial powers of the President?
11. Evaluate the role of the President in the Indian Constitution?
12. Discuss the link between President and Prime Minister in the Indian Constitution?

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Unit 08: Union Government

CONTENTS

Objectives

Articles 52 to 78 in Part V of the Indian Constitution deal with the Unionexecutive.The Union executive consists of the President, the Vice-President, thePrime Minister, the council of ministers and the attorney general of India.After going through this Unit, you will be able to learn about the:

- describe the nature of Prime Minister in India.
- identify the sources of power and influence of the Prime Minister.
- understand the Models of Prime Ministerial leadership in India.
- describe the composition and functions of the Council of Ministers.
- illustrate the responsibility of the council of ministers.

Introduction

The organ of a government that primarily looks after the function of implementation and administration is known the Executive. The Executive is the branch of Government accountable for the implementation of laws and policies legislated by the legislature. In the Parliamentary form of executive, the Prime Minister is the head of the government and the head of the State may be Monarch (Constitutional Monarchy, e.g. UK) or President (Parliamentary Republic, e.g. India). In a Semi-Presidential System, the President is the head of the State and the Prime Minister is the head of the government, e.g. France. In a Presidential System, the President is the head of the State as well as the head of government, e.g. the US.

Independent India adopted a modified version of the Westminster model of government. The most fundamental modification was, of course, the combination of the parliamentary system with federalism and FundamentalRights of the citizens and Directive Principles of State Policy. This created the federal imperative that the Westminster model does not know. Another equally important departure is the replacement of monarchy by a republican presidency, although the two are functionally comparable in their limited and strictly nominal role for all practical purposes and their pomp and pageantry. This feature is best described by Walter Bagehot by his celebrated distinction between the 'dignified' and 'efficient' parts of the executive played by the monarch and

the Prime Minister and his cabinet. This is similar though not identical with the roles of the President and the Prime Minister/Cabinet in the Indian system. A second feature of the Westminster model adopted in the Indian constitution and convention without any modification is the fusion of powers between the executive and the Parliament which technically means the President in-Parliament, and the Prime Minister and his council of ministers spring from the Parliament itself. The Prime Minister is the fulcrum of the cabinet, which is collectively and individually responsible to the Parliament, specifically to the Lok Sabha. This feature of the cabinet system is buttressed by the party system. The party or coalition of parties enjoying majority in the Lok Sabha forms the government. This lends ideological and programmatic homogeneity to the cabinet. This is further reinforced by Prime Ministerial and Presidential prerogatives with regard to the formation of the government, dismissal of ministers, and the dissolution the Lok Sabha. A third feature of this model is the independence of the judiciary from legislative and executive control. Even though the judges are appointed by the executive and are impeachable by the Parliament, the constitution takes great pains to ensure that they function without fear or favour. Parliament's power of impeachment of the President and judges and President's powers of pardon and reprieve in criminal cases are essentially, or at least partly, judicial functions. But the judicial power ismainly the preserve of the judicial organ of the state, which forms a unified hierarchy of federal, state, and local courts of India. A fourth feature of the Union executive in India is that the ultimate responsibility of the cabinet goes beyond the Parliament to the electorate at large.

India is a democratic republic with a parliamentary form of government. The government at the Central level is called 'Union Government' and at the State level it is known as 'State Government'. The Union Government has three organs – the Executive, the Legislature and the Judiciary. The President, the Prime Minister and his Council of Ministers collectively constitute the Union Executive. The Constitution of India, however, bestows authority and dignity on the office of the President without providing adequate powers to rule. The President performs essentially a ceremonial role. The Prime Minister exercises real executive power. While the President is the head of the state, the Prime Minister is the head of the government. The President carries out the actual functions of the government only with the aid and advice of the Prime Minister. Let's have a discussion on President, Prime Minister and Council of Ministers one by one.

8.1 Prime Minister

An important thing about the cabinet system in India is that, except for the procedure of its formation, almost everything else about it has been left to conventions. This is essentially in conformity with the Westminster model of cabinet government. This constitutional vacuum in India, as in Britain, has been left to be plugged by the party system. There has, of course, grown an intricate web of conventional and legal administrative procedures and organizations centering on the cabinet (e.g., cabinet committees, Prime Minister's Office, cabinet secretariat, etc.) within the government itself. However, the role of the Prime Minister and the way Council of Ministers works are basically determined by the balance of forces in the ruling party, or parties in case of a coalition government, and in the party system at large. Besides the factional balance of forces in the party and configuration of parties in the system, a Prime Minister is also constrained in government formation to take into account, at least to an extent, ethnic and regional factors. But, these considerations are always mediated by political factors. If the Prime Minister happens to be in a commanding position in the party, there are few fetters on his powers of appointing and dismissing ministers and conducting the working of the Council of Ministers.In the scheme of parliamentary system of government provided by theconstitution, the President is the nominal executive authority (de jureexecutive) and Prime Minister is the real executive authority (de factoexecutive). In other words, president is the head of the State while PrimeMinister is the head of the government.

Appointment of the Prime Minister

The Constitution does not contain any specific procedure for the selectionand appointment of the Prime Minister. Article 75 says only that the Prime Minister shall be appointed by the president. However, this does not imply that the president is free to appoint any one as the Prime Minister. In accordance with the conventions of the parliamentary system of government the President has to appoint the leader of the majority party in the Lok Sabhaas the Prime Minister. But, when no party has a clear majority in the Lok Sabha, then the President may exercise his personal discretion in the selection and appointment of the Prime Minister. In such a situation, the President usually appoints the leader of the largest party or coalition in the Lok Sabha as the Prime Minister and asks him to

seek a vote of confidence in the House within a month. This discretion was exercised by the President, for the firsttime in 1979, when Neelam Sanjiva Reddy (the then President) appointed Charan Singh (the coalition leader) as the Prime Minister after the fall of theJanata Party government headed by Morarji Desai.

Oath, Term and Salary

Before the Prime Minister enters upon his office, the president administers tohim the oaths of office and secrecy.2 In his oath of office, the Prime Ministerswears:

i. to bear true faith and allegiance to the Constitution of India,
ii. to uphold the sovereignty and integrity of India,
iii. to faithfully and conscientiously discharge the duties of his office, and
iv. to do right to all manner of people in accordance with the Constitutionand the law, without fear or favour, affection or ill will.

The term of the Prime Minister is not fixed and he holds office during thepleasure of the president. However, this does not mean that the president candismiss the Prime Minister at any time. So long as the Prime Minister enjoysthe majority support in the Lok Sabha, he cannot be dismissed by thePresident. However, if he loses the confidence of the Lok Sabha, he mustresign or the President can dismiss him.

The salary and allowances of the Prime Minister are determined by theParliament from time to time. He gets the salary and allowances that arepayable to a member of Parliament. Additionally, he gets a sumptuaryallowance, free accommodation, travelling allowance, medical facilities, etc.

8.2 Powers and Functions of the Prime Minister

The Prime Minister is the most important and powerful functionary of the Union Government. The President is head of the government and leader of Lok Sabha. The powers and functions of Prime Minister can be studied under thefollowing heads:

In Relation to Council of Ministers

The Prime Minister enjoys the following powers as head of the Union councilof ministers:

1. He recommends persons who can be appointed as ministers by thepresident. The President can appoint only those persons as ministers whoare recommended by the Prime Minister.

2. He allocates and reshuffles various portfolios among the ministers.

3. He can ask a minister to resign or advise the President to dismiss him incase of difference of opinion.

4. He presides over the meeting of council of ministers and influences itsdecisions.

5. He guides, directs, controls, and coordinates the activities of all theministers.

6. He can bring about the collapse of the co-uncil of ministers by resigningfrom office.

In Relation to the President

The Prime Minister enjoys the following powers in relation to the President:

1. He is the principal channel of communication between the President andthe council of ministers.4 It is the duty of the prime minister:

(a) to communicate to the President all decisions of the council ofministers relating to the administration of the affairs of the Union andproposals for legislation;

(b) to furnish such information relating to the administration of theaffairs of the Union and proposals for legislation as the President maycall for; and

(c) if the President so requires, to submit for the consideration of thecouncil of ministers any matter on which a decision has been taken bya minister but which has not been considered by the council.

2. He advises the president with regard to the appointment of importantofficials like attorney general of India, Comptroller and Auditor Generalof India, chairman and members of the UPSC, election commissioners,chairman and members of the finance commission and so on.

In Relation to Parliament

The Prime Minister is the leader of the Lower House. In this capacity, heenjoys the following powers:

1. He advises the President with regard to summoning and proroguing of thesessions of the Parliament.

2. He can recommend dissolution of the Lok Sabha to President at any time.

3. He announces government policies on the floor of the House.

Other Powers & Functions

In addition to the above-mentioned three major roles, the Prime Minister hasvarious other roles. These are:

1. He is the chairman of the Planning Commission (now NITI Aayog),National Development Council, National Integration Council, Inter-StateCouncil and National Water Resources Council.

2. He plays a significant role in shaping the foreign policy of the country.

3. He is the chief spokesman of the Union government.

4. He is the crisis manager-in-chief at the political level during emergencies.

5. As a leader of the nation, he meets various sections of people in differentstates and receives memoranda from them regarding their problems, andso on.

6. He is leader of the party in power.

7. He is political head of the services.

Thus, the Prime Minister plays a very significant and highly crucial role inthe politico-administrative system of the country. Dr B R Ambedkar stated,'If any functionary under our constitution is to be compared with the USpresident, he is the Prime Minister and not the president of the Union'.

8.3 Models of Prime Ministerial Leadership in India

One can, indeed, delineate at least three models of Prime Ministerial leadership in India. The first,typical of the Nehru era, may be called for want of a better term, 'pluralist parliamentary premiership. It coincidedwith the single-party dominant 'phase under the aegis of the Congress both at the federal and state levels. For this reason, the Prime Minister of India operated within a political framework that, despite the federal division of powers, almost resembled the parliamentary system. The second model of Prime Ministerial power may be called 'neo-patrimonial parliamentary premiership'. This was exemplified by Indira Gandhi at the height of her power, mainly 1971 to the end of internal Emergencyin 1977. The Congress party enjoyed predominance during this phase in New Delhi and also in most of the states, but with a difference.

Unlike the pluralist power structure and internal democracy in the party in the Nehru era, Indira Gandhi's Congress dispensed with organizational elections following the great split of 1969; state Chief Ministers and Pradesh party presidents came to be nominated by the Prime Minister herself. With this centralization of power in the Prime Minister's hands, she also gave the call for 'committed' bureaucracy and judiciary. The Prime Minister's Secretariat (later renamed by Morarji Desai as PMO) was greatly expanded to buttress her enormous powers. The third model of Prime Ministerial style may be designated as the 'federal' parliamentary one. It was presaged by the Janata government (1977-79) and the Rajiv Gandhi government (1984-89), which, despite the persistence of oligarchical tendencies in the two respective parties, were more amenable to federal pressures than any other preceding governments. The four (later five) major parties that merged to form the Janata Party—Bharatiya Jana Sangh, BharatiyaLok Dal, Congress (Organization), Socialist Congress for Democracy-functioned as four oligarchical factions at the Centre, but state-level

groups had better chances of being heard and considered in New Delhi than, say, in the highly-centralized and oligarchic power structure of the Congress Party led by Indira Gandhi. The Congress (Indira) under Rajiv Gandhi continued to be oligarchical and undemocratic, but his relations with non-Hindi state units of the party and non-Congress state governments were generally more informed by the federal principle than those with Congress units and governments in the Hindi-speaking regions. The federal premiership style came to have a fuller denouement in the post-1989 period.

The Prime Minister mustact as to use a cliché, the keystone of the cabinet arch. Observers, who have worked in the Prime Minister's, Secretariat, tell us that his role as the executive head of the government mainly clusters around initiation, coordination, and monitoring of policies. An effective Prime Minister is the one who keeps himself as free and available as possible for consultation and policy initiation and coordination. In Chetakar Jha's opinion, 'a Prime Minister without any specific portfolio is more desirable than the present practice. The British Prime Minister does not hold any'. L.N. Sharma, too, regards coordination as his 'most important responsibility'. This is particularly true of governments and countries with greater departmental autonomy, such as Britain and the older Commonwealth than India, especially under powerful Prime Ministers, like Jawaharlal Nehru and Indira Gandhi, who like the grand Mughals tried to implement almost everything important by themselves.

8.4 Role of Prime Minister

Beyond the Presidency and the cabinet, Prime Minister's role may well be conceptualized as a series of concentric circles of power and influence spanning the parliament and the civil society.The institutional imperatives of India's parliamentary-federal systemsignificantly determine the Prime Minister's relations and role in the partyand the mass public. In the periods of transition from the anti-colonialnationalist movement to national governance (1947-50), from the 'Nehru-Patel duumvirate', to the former's supremacy in the dominant Congressparty (1950-52), and from one durable premiership to another (1964-1970,when Shastri and Indira Gandhi in quick succession, succeeded Nehru), theorganizational wing of the Congress tended to acquire some salience andeven tried to assert its supremacy vis-a-vis the parliamentary wing. However,forcing the issue into direct confrontations, both Nehru and IndiraGandhi in their respective periods of ascendancy were soon successful inestablishing the supremacy of the parliamentary wing over the organizationalwing and of the Prime Minister over the party as a whole. The organizationalwing again displayed a flurry of sponsored activity under thebenevolent authoritarian shadow of Prime Minister, Indira Gandhi, to facilitatethe political induction of her sons, Sanjay's and, after his death, Rajiv's,in the first half of the 1980s. After Rajiv's tragic assassination in 1991, whenthe veteran P.V. Narasimha Rao was called upon to abandon his plans ofpolitical retirement and head the party, he departed from the practice of ad hoc nomination of organizational units under Indira and Rajiv Gandhi and held organizational elections in the party in 1992 after a lapse of twenty years.

As effective head of the government, the Prime Minister, especially in an one-party government easily dominates the electoral process and the party's political process The various comments made by the eminent political scientists and constitutional experts on the role of Prime Minister in Britain holds good in the Indian context also. These are mentioned below:

Lord Morely has described Prime Minister as 'primus inter pares' (first among equals) and 'key stone of the cabinet arch'. He said, "The head of the cabinet is 'primus inter pares', and occupied a position which so long as it lasts, is one of exceptional and peculiar authority". Herbert Marrisonhas argued "As the head of the Government, he (prime minister) is 'primus inter pares'. But, it is today for too modest an appreciation of the Prime Minister's position".Sir William Vernor Harcourt stated that Prime Minister as 'interstellasluna minores' (a moon among lesser stars). Jennings argues that "He is, rather, a sun around which planets revolve. He is the keystone of the constitution. All roads in the constitution lead to the Prime Minister."

H.J. Laski points out n the relationship between the Prime Minister and the cabinet,he said that the Prime Minister "is central to its formation, central to its life, and central to its death". He described him as "the pivot around which the entire governmental machinery revolves."H.R.G. Greaves argues that "The Government is the master of the country and he (Prime Minister) is the master of the Government."Munro called Prime Minister as "the captain of the ship of the state". Ramsay Muir also described Prime Minister as "the steersman of steering wheel of the ship of the state."

The role of the Prime Minister in the British parliamentary government is so significant and crucial that observers like to call it a 'Prime Ministerial government'. Thus, R H Crossman says, "The post-

war epoch has been the final transformation of cabinet government into Prime Ministerial government". Similarly, Humphrey Berkely points out, "Parliament is not, in practice, sovereign. The parliamentary democracy has now collapsed at Westminster. The basic defect in the British system of governing is the super-ministerial powers of the Prime Minister".The same description holds good to the Indian context too.

8.5 Council of Ministers

The principles of parliamentary system of government are not detailed in the Constitution, but two Articles (74 and 75) deal with them in a broad, sketchy and general manner. Article 74 deals with the status of the council of ministers while Article 75 deals with the appointment, tenure, responsibility, qualification, oath and salaries and allowances of the ministers.

Appointment of Council of Ministers

Members of the Council of Ministers are appointed by the President on the advice of the Prime Minister. While selecting the ministers, the Prime Minister the PM keeps in mind that due representation to different regions of the country, to various religious and caste groups. In a coalition government, the members of coalition parties have to be given due representation in the Council of Ministers. The Prime Minister decides portfolios of the Ministers, and can alter these at his will. In order to be a Minister, a person has to be a member of either of the two Houses of Parliament. Even a person who is not a member of any of the two Houses can become a Minister for a period of six months. Within six months the Minister has to get himself/ herself elected to either House of Parliament, failing which he/she ceases to be a Minister. All the Ministers are collectively as well as individually responsible to the Lok Sabha.

The Council of Ministers consists of two category of ministers. These are: Cabinet Ministers and Ministers of State. The Cabinet Ministers are usually senior members of the party/ coalition of parties. The Ministers of State come next to Cabinet Ministers. Some of the Ministers of State have independent charge of a department while other Ministers of State only assist the Cabinet Ministers. Sometimes even deputy ministers are also appointed to assist the ministers. Ministers other than Cabinet Ministers normally do not attend the meetings of the Cabinet. The Prime Minister presides over the meetings of the Cabinet. All policy matters are decided by the Cabinet. The Prime Minister has the authority to reshuffle the portfolios of the Ministers or even ask for their resignation. In case of resignation or death of the Prime Minister the entire Council of Ministers also goes out of office. This is because the Council of Ministers is created by the Prime Minister, who also heads it. The entire Council of Ministers is responsibility to the Lok Sabha.

Responsibility of the Ministers

We have already read that there is a Council of Ministers, with the Prime Minister as its head to aid and advise the President. Constitutionally the Ministers hold office during the pleasure of the President. But, in fact, they are responsible to, and removable by the Lok Sabha. Actually the Constitution has itself declared that the Council of Ministers shall be responsible to the Lok Sabha (not to both the Houses). Ministerial responsibility is the essential feature of parliamentary form of government. The principle of ministerial responsibility has two dimensions: collective responsibility and individual responsibility.

Collective Responsibility

Our Constitution clearly says that "The Council of Ministers shall be collectively responsible to 'House of the People'." It actually means that the Ministers are responsible to the Lok Sabha not as individuals alone, but collectively also. Collective responsibility has two implications. Firstly, it means that every member of the Council of ministers accepts responsibility for each and every decision of the Cabinet. Members of the Council of Ministers swim and sink together. When a decision has been taken by the Cabinet, every Minister has to stand by it without any hesitation. If a Minister does not agree with the Cabinet decision, the only alternative left to him/her is to resign from the Council of Ministers. The essence of collective responsibility means that, 'the Minister must vote with the government, speak in defence of it if the Prime Minister insists, and he/she cannot afterwards reject criticism of his act, either in Parliament or in the constituencies, on the ground that he/she did not agree with the decision.' Secondly, vote of no-confidence against the Prime Minister is a vote against the whole Council of Ministers. Similarly, adverse vote in the Lok Sabha on any government bill or budget implies lack of confidence in the entire Council of Ministers, not only the mover of the bill.

Individual Responsibility

Though the Ministers are collectively responsible to the Lok Sabha, they are also individually responsible to the Lok Sabha. Individual responsibility is enforced when an action taken by a Minister without the concurrence of the Cabinet, or the Prime Minister, is criticised and not approved by the Parliament. Similarly if personal conduct of a Minister is questionable and unbecoming he may have to resign without affecting the fate of the Government. If a Minister becomes a liability or embarrassment to the Prime Minister, he may be asked to quit.

8.6 Composition of the Council of Ministers

The council of ministers consists of three categories of ministers, namely,cabinet ministers, ministers of state, and deputy ministers. The difference between them lies in their respective ranks, emoluments, and political importance. At the top of all these ministers stands the Prime Minister– the supreme governing authority of the country.

The cabinet ministers head the important ministries of the Centralgovernment like home, defence, finance, external affairs and so forth. They are members of the cabinet, attend its meetings and play an important role in deciding policies. Thus, their responsibilities extend over the entire gamut of Central government.

The ministers of state can either be given independent charge ofministries/departments or can be attached to cabinet ministers. In case ofattachment, they may either be given the charge of departments of the ministries headed by the cabinet ministers or allotted specific items of work related to the ministries headed by cabinet ministers. In both the cases, they work under the supervision and guidance as well as under the overall charge and responsibility of the cabinet ministers. In case of independent charge, they perform the same functions and exercise the same powers in relation to their ministries/departments as cabinet ministers do. However, they are not members of the cabinet and do not attend the cabinet meetings unless specially invited when something related to their ministries/departments are considered by the cabinet.

Next in rank are the deputy ministers. They are not given independentcharge of ministries/departments. They are attached to the cabinet ministers or ministers of state and assist them in their administrative, political, and parliamentary duties. They are not members of the cabinet and do not attend cabinet meetings.

It must also be mentioned here that there is one more category of ministers,called parliamentary secretaries. They are the members of the last category of the council of ministers (which is also known as the 'ministry'). They have no department under their control. They are attached to the senior ministers and assist them in the discharge of their parliamentary duties. However, since 1967, no parliamentary secretaries have been appointed except during the first phase of Rajiv Gandhi Government. At times, the council of ministers may also include a deputy prime minister. The deputy prime ministers are appointed mostly for political reasons.

Summary

Following the pattern of British Westminster model, India evolved its system of the parliamentary form of government in which the executive is responsible to the legislature. The executive power of the government of India is vested in the President of India, who is both the formal head of the state and the symbol of the nation. It is the Prime Minister who exercises real executive power in the Indian political system. As the head of the Council of Ministers, the leader of the majority party in the Lok Sabha and often the leader of the Parliament, the Prime Minister enjoys considerable power and authority. Though the Prime Minister is appointed by the President and holds office during the pleasure of the President, the Prime Minister is in reality responsible to the Parliament. The Council of Ministers and the informal cabinet headed by the Prime Minister work on the principle of collective responsibility. Sometimes here have been differences between the President and the Prime Minister. But these did not assume serious proportions culminating in any constitutional crisis.

The Council of Ministers consists of all category of Ministers, while the Cabinet is a smaller group consisting of senior Ministers. The Council of Ministers as a whole rarely meets. It is the Cabinet which determines the policies and programmes of the Government. All the Ministers are collectively as well as individually responsible to the Lok Sabha. The Council of Ministers can be

removed from office by Lok Sabha if a vote of no-confidence is adopted by it. The Cabinet formulates the external and internal policies of the government. It coordinates the working of various departments. It has full control over the national finance. A money bill can only be introduced in the Lok Sabha by a Minister.

Keywords

Ballot: The method of secret voting by means of printed or written ballots or by means of voting machines.

Bicameral: Having two branches, chambers, or houses, as a legislative body.

By-law: Rule made by a local body or council under authority of a statue.

Cabinet: usually a synonym for "Council of Ministers".

Election: The process of selecting a person of choice through voting.

Electoral system: The method of converting votes into seats in an elected body.

Executive/Executive Power: Having power to put decisions, laws, etc. into effect (power conferred on the executive). In some federations, the federal executive has extensive independent authority to make laws by decree or in circumstances of a national emergency.

Impeachment: Process under which charges are brought in Parliament against a high constitutional authority, public official or judge.

Legislation: The process of making enacted law; the body of enacted laws (note: an individual law is not 'a legislation' but a 'piece of legislation' or 'a statue').

Legitimacy: The state of quality of being accepted as legitimate, lawful or right. It can refer to a system being accepted as legitimate by the population, or have a narrow meaning of legal legitimacy as recognized by the courts.

Monarchy: A form of government in which a monarch, usually a single person, is the hereditary head of the state. In most monarchies, a monarch holds his/her position for life. The position may be largely symbolic or powerful.

Parliament: A legislature that formulates laws, adopts the budget and forms the government in a parliamentary system of governance. It also plays the role of making the executive of the government (cabinet) accountable and scrutinizes government policies and programs.

Secret ballot: A system of voting in which one's choice of candidate is kept secret.

Veto: Valid power that one can exercise to block a decision (e.g. the power that a head of state has to reject a bill passed by the legislature).

Self Assessment

1. Which one of the following is correct in terms of the Constitution of India?

A. The Prime Minister decides the allocation of portfolios among the ministers.

B. When the Prime Minister resigns, the Council of Ministers gets dissolved.

C. All the principal policy announcements of the government are made by the Prime Minister.

D. It shall be the duty of Prime Minister to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the union.

2. The Constitution of India lays down that proposals for legislation are to be communicated to the President by the:

A. Prime Minister

B. Speaker of the Lok Sabha and Chairman of the Rajya Sabha

C. Minister for Law

D. Minister for Parliamentary Affairs

3. Who among the following called Prime Minister as "the captain of the ship of the state"?
A. Ramsay Muir
B. Lord Morely
C. H.J. Laski
D. Munro

4. Which one of the following article deals with the appointment of the Prime Minister and other ministers?
A. Article 76
B. Article 74
C. Article 75
D. Article 72

5. According to Article 74 of the Constitution, which of the following statements relating to the advice tendered by Ministers to the President would be correct?
A. It shall not be inquired into in any court.
B. It can be inquired into in the Supreme Court.
C. It can be inquired into in all the courts.
D. It cannot be inquired into in the High Courts

6. Who among the following shall communicate to the president all the decisions of the council of ministers under article 78?
A. Home Minister
B. Prime Minister
C. Attorney General
D. Finance Minister

7. The Prime Minister is appointed by which one of the following?
A. Attorney General of India
B. President
C. Vice-President
D. Chief Justice of India

8. The accountability or responsibility of the Prime Minister and Cabinet to the Lok Sabha is:
A. Intermittent
B. Indirect
C. At the time of elections
D. Direct, continuous and collective

9. According to Article 74 of the Constitution, which of the following statements relating to the advice tendered by Ministers to the President would be correct?
A. It shall not be inquired into in any court.
B. It can be inquired into in the Supreme Court.
C. It can be inquired into in all the courts.
D. It cannot be inquired into in the High Courts.

10. How are the salaries and allowances of the Union Ministers determined?
A. By the Cabinet Secretariat
B. By the Parliament
C. By the Ministry of Finance
D. By the Ministry of Parliamentary Affairs

11. Which of the Articles of the Constitution of India are relevant to analyse the constitutional provisionsthat deal with the relationship of the President with the Council of Ministers?
A. Articles 71, 75 and 78
B. Articles 74, 75 and 78
C. Articles 73, 76 and 78
D. Articles 72, 73 and 76

12. In which of the following provisions of the Constitution of India is the principle of collectiveresponsibility of the Council of Ministers enshrined?
A. Article 75
B. Article 74
C. Article 77
D. Article 78

13. Article 74 of the Constitution provides that:
A. There shall be a Council of Ministers with the Prime Minister at the head, to aid and advisethe President in exercise of his functions.
B. There shall be a Council of Ministers with the Prime Minister at the head, to aid and advisethe President, who shall in exercise of his functions, act in accordance with such advice.
C. There shall be a Council of Ministers with the Prime Minister at the head, to aid and advise the President, who shall in exercise of his functions act in accordance with such advice provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise and the President shall act in accordance with the advice tendered after such reconsideration.
D. There shall be a Council of Ministers with the Prime Minister at the head, to aid and advisethe President, who shall in exercise of his functions, act in accordance with such advice or otherwise on his own.

14. According to the Constitution of India, if the President so requires, it shall be the duty of thePrime Minister to submit for the consideration of the Council of Ministers any matter on whicha decision has been taken by a Minister, but which has not been considered by the Council. Thisensures:
A. Collective responsibility.
B. The status of the Prime Minister as the first among the equals.
C. The power of the President to nullify the decision of the Minister.
D. The inherent power of the Minister to take a decision independent of the Council of Ministers.

15. Which of the following statements is not correct?
A. Article 74 deals with the Council of Ministers

B. The Prime Minister is the head of the Council of Ministers
C. The Central Council of Ministers is the head of India's political and administrative system.
D. Article 75 is related only to the appointment of ministers.

16. The salary and allowances of the Ministers of the Government of India are determined by whom?
A. Parliament
B. Prime Minister
C. President
D. Council of Ministers

17. The executive power of the Union is vested in the:
A. Union Cabinet
B. President of India
C. Prime Minister
D. Union Council of Ministers

Answers for Self Assessment

1.	D	2.	A	3.	D	4.	C	5.	A
6.	B	7.	B	8.	D	9.	A	10.	B
11.	B	12.	A	13.	C	14.	A	15.	D
16.	A	17.	B						

Review Questions

1. How is the Prime Minister of India appointed? Explain.
2. Explain the powers and functions of the Prime Minister of India?
3. What role does Prime Minister play in the Indian polity?
4. Discuss the models of Prime Ministerial leadership in India?
5. Write a note on the composition on the Council of Ministers?
6. How Council Of Ministers are appointed? Discuss?
7. Critically examine the collective and individual responsibility of the Ministers?
8. What kind of relationship is between the Prime Minister and Council of Ministers?
9. What is the role of Council of Ministers?
10. Describe the relationship between the President and Prime Minister?
11. Who are the Council of Ministers and Prime Minister responsible to?
12. Do you think the parliamentary system is the most suitable for India? Justify.
13. Why is the advice of Council of Ministers binding on the President?

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Unit 09: State Government

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- explain the appointment of a governor.
- understand the Conditions of Governor's Office.
- examine the powers and functions of a governor.
- analyse the constitutional position of a governor.

Introduction

Articles 153 to 167 in Part VI of the Constitution deal with the state executive.The creation of a whole set of institutions and processes of governance at the level of states fulfils an important prerequisite for India to become a federation, at least theoretically. The most distinct feature of the state-level governance in India may arguably be a relatively subservient position vis-à-vis the Centre in both constitutional arrangement and practical functioning of the executive. At the State level, generally following the central pattern, the Governor, like the President,acts as a nominal head and the real powers are exercised by the Council of Ministersheaded by the Chief Minister. The members of the Council of Ministers at the State levelare also collectively and individually responsible to the lower House of the State Legislaturefor their acts of omission as well as commission. Hence, the major segment which accounts for much of what is called as the state government is the executive branch of the government, though the Legislative Assembly also occupies a place of prestige and reckoning in the governmental system of the state. Above all, even the executive system of the state revolves around the key constitutional functionaries like the Governor and the Chief Minister, with the Council of Ministers and the bureaucracy playing a second fiddle to them. The broad theme of the chapter, therefore, concentrates on the office of the Governor and the Chief Minister, with special reference to both the constitutional provisions as well as the political trends in position and functioning of the two authorities.

9.1 Governor

The Governor plays the key role as a constitutional head of the state and a custodian of the constitution. This chapter examines the important constitutional provisions relating to the powers and functions of the Governor how these powers have been exercised since the commencement of

the constitution; how to safeguard and ensure the smooth working of parliamentary democracy in states even in the most difficult situations. Each state in India has a Governor in whom, as per Article 154 of the constitution, all the executive powers of the state are vested. This power is to be exercised by him in the same fashion as the President in case of the executive powers of the Union "either directly or through the officers subordinate to him in accordance with this constitution" (cited in Sethi, 2017)The pattern of governments in the states in the Indian Union is of the parliamentary type. The executive head designated as the Governor is a constitutional ruler and acts on the advice of the ministers who are responsible to the lower house of the state legislature. M.V. Pylee observes, "As in the union, the government in the states is also organized on the Parliamentary model. The head of the states is called the Governor; the head of the state government is called the Chief Minister who is counterpart in the State, of the Prime Minister of India" (cited in Sethi, 2017). His office is not subordinate or subservient to the government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. He holds an independent constitutional office which is not subject to the control of the government of India (Sethi, 2017).

According to the Constitution of India, there has to be a Governor for each State. If need be, one person may be appointed Governor for even two or more States. The executive authority of every State is vested in the Governor of the state. He/She may exercise the same, directly or through the officers subordinate to him.

Appointment of the Governor

The governor is neither directly elected by the people nor indirectly elected by a specially constituted electoral college as is the case with the president. He is appointed by the president by warrant under his hand and seal. In a way, he is a nominee of the Central government. But, as held by the Suprem Court in 1979 the office of governor of a state is not an employment underthe Central government. It is an independent constitutional office and is not under the control of or subordinate to the Central government.Article 155 provides the "Governor of a state shall be appointed by the President by warrant under his hand and seal."In order to become a Governor a person musthave following qualifications:

a. He/she must be a citizen of India;
b. He/she should be at least 35 years; and
c. He/she cannot hold any office of profit during his tenure.

Additionally, two conventions have also developed in this regard over theyears. First, he should be an outsider, that is, he should not belong to the statewhere he is appointed, so that he is free from the local politics. Second, whileappointing the governor, the president is required to consult the chief ministerof the state concerned, so that the smooth functioning of the constitutionalmachinery in the state is ensured. However, both the conventions have beenviolated in some of the cases.National Commission to Review the working of the Indian constitutionunder the Chairmanship of Justice N.M. Venkatachalaiha recommended, acommittee consisting of the Prime Minister, Home Minister, Speaker of theLok Sabha and the Chief Minister of the concerned State should select theGovernor. Instead of confidential and informal consultation, it is better thatthe process of selection is transparent and unambiguous.

9.2 Constituent Assembly Debates

When the Constituent Assembly discussed the question of the head of the State four alternative methods of selecting the Governor were suggested before the final decision was taken:
1. Election by adult suffrage.
2. Election by the members of the Legislative Assembly either by proportional representation, or otherwise.
3. Selection by the President out of a panel prepared by the Legislative Assembly.
4. Appointment by the President.

General discussion in the Constituent Assembly revealed that the election of the Governor on the basis of universal adult suffrage was incompatible with the parliamentary form of government as was adopted for states where head of the state has to be only a constitutional head. Several members of the Constituent Assembly criticized the direct election as inappropriate, an anomaly and absurd. B.R. Ambedker, on behalf of the Drafting Committee, made the position clear and stated, "We feel that the powers of the Governor were so limited, so nominal, his position so ornamental that probably very few would come forward for elections." Direct election of the Governor would have created constitutional crisis as it would have clashed with the directly

elected Chief Minister. His election would also create problem of leadership at the time of general election. Apart from a possibility of clash between the Governor and the Council of Ministers, the direct election of the Governor creates serious problem of leadership at the time of a general election. During election, a political party will have to rally round a leader. Who will be the leader, a candidate for the Governor or for the office of the Chief Minister? Discussions on the floor of the Assembly revealed that the co-existence of a directly-elected Governor and directly-elected Chief Minister might lead to friction. Election by the Legislative Assembly wouldmake the Governor a nominee of the ruling party, and he would alwaysbe trying to appease the Assembly, for his own election. Therefore, thiswas also not acceptable to many. H.V. Kamath opposed the panel systemon the ground that if the President somehow did not choose the very firstnominee and chose the third or fourth, the legislature of the state wouldcertainly have grouse against the man chosen by the President, because hehad been chosen in preference to the first man. After having discussed allthe proposals, framers accepted Brajeshwar Prasad's amendment for theappointment of the Governor by the President "by warrant under his handand seal," thinking it to be the "lesser most evil", an instrument of maintaining"common links" between the Centre and the states and a cogent factorestablishing "harmony, good working, and balanced relations between theprovincial cabinet and the Governor."

Speaking in the Constituent Assembly on the choice of the Governor,Nehru observed: "I think it would be infinitely better if the Governor wasnot so intimately connected with the local politics of the province; andwould it not be better to have a more detached figure, obviously—a figurethat must be acceptable to the government of the province and yet he mustnot be a part of the party machine of that province. But, on the whole, itprobably would be desirable to have people from outside, eminent people,sometimes people who have not taken too great a part in politics." Threedecades later Sarkaria Commission on the Centre-State relations recommendedthe following: (1) It is desirable that a politician from the rulingparty at the Union is not appointed as Governor of a State which is beingrun by some other party or a combination of other parties, (2) In order toensure effective consultation with the State Chief Minister in the selectionof a person to be appointed as Governor, the procedure of consultationshould be prescribed in the constitution itself by suitably amending Article155. In brief, we can safely say that to ensure efficient and impartial dischargeof the limited discretionary powers by the Governor, it is a must thatfair-minded men of high calibre and integrity are appointed.

Conditions of Governor's Office

The Constitution lays down the following conditions for the governor'soffice:

I. He should not be a member of either House of Parliament or a House ofthe state legislature. If any such person is appointed as governor, he isdeemed to have vacated his seat in that House on the date on which heenters upon his office as the governor.
II. He should not hold any other office of profit.
III. He is entitled without payment of rent to the use of his official residence(the Raj Bhavan).
IV. He is entitled to such emoluments, allowances and privileges as may bedetermined by Parliament.
V. When the same person is appointed as the governor of two or more states,the emoluments and allowances payable to him are shared by the states insuch proportion as determined by the president.
VI. His emoluments and allowances cannot be diminished during his term ofoffice.

Oath or Affirmation

Before entering upon his office, the governor has to make and subscribe toan oath or affirmation. In his oath, the governor swears:

a) to faithfully execute the office;
b) to preserve, protect and defend the Constitution and the law; and
c) to devote himself to the service and well-being of the people of the state.

The oath of office to the governor is administered by the chief justice ofthe concerned state high court and in his absence, the senior-most judge ofthat court available.Every person discharging the functions of the governor also undertakes thesimilar oath or affirmation.

Term of the Office

The Governor is appointed for a term of five years but normally holds office during the pleasure of the President. He/she may resign before the expiry of the term or may beremoved by the President earlier. As a matter of fact while appointing or removing theGovernor the President goes by the advise of the Prime Minister. He/she is entitled to arent-free residence which is called Raj Bhawan. His/her emoluments, allowances andprivileges are specified by the law. However, the emoluments and allowances of theGovernor cannot be reduced during his tenure.

9.3 Powers and Functions of Governor

The powers and functions of the Governor can broadly be categorized under two heads namely (a) as the head of the State, and (b) as the representative of the Union Government. Under the head of the State you will study his/her executive, legislative, financial as well as the power to grant pardon.

Executive Powers

All the executive functions in the State are carried on in the name of the Governor. He/shenot only appoints the Chief Minister but on his/her advice appoints the members of theCouncil of Ministers. According to a well established convention he/she calls the leader ofthe majority party or an alliance of parties (if no single party in the Legislative Assemblygets majority) to form the Government. On the advice of the Chief Minister he/she allocatesportfolios among the ministers.
He/she appoints the Advocate- General and Chairman and members of the State PublicService Commission.
He/she has the power to appoint judges of the courts, other than the High Court. He/she,however, is consulted when the judges of the State High Court are appointed by thePresident of India.
While discharging all his/her functions as Head of the Executive in the State, the Governorslike the President, is aided and advised by the Council of Ministers headed by the ChiefMinister.

Legislative Powers

A governor is an integral part of the state legislature. In that capacity, he hasthe following legislative powers and functions:

1. He can summon or prorogue the state legislature and dissolve the statelegislative assembly.
2. He can address the state legislature at the commencement of the firstsession after each general election and the first session of each year.
3. He can send messages to the house or houses of the state legislature, withrespect to a bill pending in the legislature or otherwise.
4. He can appoint any member of the State legislative assembly to presideover its proceedings when the offices of both the Speaker and the DeputySpeaker fall vacant. Similarly, he can appoint any member of the statelegislature council to preside over its proceedings when the offices ofboth Chairman and Deputy Chairman fall vacant.
5. He nominates one-sixth of the members of the state legislative councilfrom amongst persons having special knowledge or practical experiencein literature, science, art, cooperative movement and social service.
6. He can nominate one member to the state legislature assembly from theAnglo-Indian Community.
7. He decides on the question of disqualification of members of the statelegislature in consultation with the Election Commission.
8. When a bill is sent to the governor after it is passed by state legislature, hecan:

(a) He/she may give assent to the bill; in that case the bill becomes a law;
(b) He/she may withhold the assent; in which case the bill fails to become a law;
(c) He/she may return the bill with his message. If the State Legislature passes the bill inits original shape or in a modified form, the Governor has to give the assent to the bill;
(d) He/she may reserve the bill for the consideration of the President.

9. He can promulgate ordinances when the state legislature is not in session.These ordinances must be approved by the state legislature within sixweeks from its reassembly. He can also withdraw an ordinance anytime.This is the most important legislative power of the governor.
10. He lays the reports of the State Finance Commission, the State PublicService Commission and the Comptroller and Auditor-General relating tothe accounts of the state, before the state legislature.

Financial Powers

I. No money bill can be introduced in the State Legislative Assembly without the prior permission of the Governor.
II. The annual and supplementary budgets are introduced in the Assembly in the name of the Governor.
III. The Governor has the control over the State Contingency Fund.

Judicial Powers

Article 161 says that the Governor of a state shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend or remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the state extends. In case of A.M. Nanawati, the Governor of Maharashtra granted remission and ordered his release, four years after he was awarded life imprisonment. This order was issued by the Governor in consultation with the Chief Minister because of exceptionally good conduct of Nanawati in jail and a distinguished record of service in the Indian Navy. The Governor is entitled to be consulted by the President of India in matters related to appointment of the judges of the State High Court [Article 217].

The Governor has the power to sanction prosecution of a minister or an MLA under the Prevention of Corruption Act. There has been considerable debate whether this power is to be exercised by the Governor on the advice of the Council of Ministers or in his discretion. After A.R. Antulay's case where Governor P.C. Alexander had accorded his permission to prosecute the former, a new controversy surfaced in the Fodder Scam case involving Bihar's former Chief Minister Laloo Prasad Yadav. The then Bihar Governor A.R. Kidwai had accorded sanction to the CBI to prosecute the Chief Minister. In Tamil Nadu, Jayalalitha had challenged in the Supreme Court of India th power of the Governor M. Chenna Reddy to sanction her prosecution. The apex court said, "If the Governor cannot act in his own discretion, there would be a complete breakdown of the rule of law as much as it would be open for governments to refuse sanction in spite of overwhelming material showing that *prima facie* a case was made out."

Emergency Powers

Article 356 empowers the Governor to send a report to the President that the constitutional machinery in a state has broken down or that the state cannot function in accordance with the provisions of the constitution. On receipt of the report, President may assume to himself all or any of the functions of the government of the state [President's rule]. Article 356 has been used more than hundred times to impose President's rule in different states.

9.4 Position and Role of the Governor

The role of Governor has become one of the main issues in the Centre-State relations. While the office of the Governor remained free from publiccontroversy during 1950-67, it became highly controversial after the fourth general elections of 1967 which ushered in an era of coalition politics. The thinking that the Governor was a mere constitutional figure had proved true and served the country well during 1950-67. This was mainly due to three reasons.

First, after the promulgation of the new constitution when governments were formed in the states in the wake of first general election the top Congress leaders of the states took over as Chief Ministers and only second rank leaders were appointed as governors. For instance, G.B. Pant took over as the Chief Minister of Uttar Pradesh, B.C. Roy of West Bengal, and Srikrishna Sinha of Bihar. Governors appointed in these States though illustrious persons were not of comparable eminence.

Second, the Indian political scene was dominated by a single party, namely, the Congress for a long period, 1950-56. During this period, the Congress party held sways at the Centre and in most of the states, and if and when there was a constitutional crisis in any state, which was resolved in the intra-party forum according to the directions of the Congress high command, and the Governor, had very little chance of using his discretionary powers. The office of the Governor remained non-controversial. In cases where one ministry went out of power the installation of another did not prove tumultuous. Except in states, like Kerala where President's rule was introduced thrice, i.e., 1957, 1959, and 1964; it was promulgated once in each of the following: Punjab in 1951, PEPSU in 1953, Andhra Pradesh in 1954, Travancore-Cochin in 1956, and Orissa in 1961.

The third reason, why the Governor acted as figure head was that they took their cue from the President who acts according to the aid and advice of the Prime Minister and his cabinet. The governors were so powerless during this period that some of them lamented over their fate and wondered whether the office they held was of any consequence or significance at all. In his article, titled The Governors at Work, K.V. Rao has quoted Sarojini Naidu, one time Governor of UP, as "bird in a golden cage". Sarojini Naidu became the Governor of Uttar Pradesh immediately after independence. Patabhi Sitarammaya observed that he had no public function to perform except "making fortnightly reports to the President".

The Constitution of India provides for a parliamentary form of government in the states as in the Centre. Consequently, the governor has been made only a nominal executive, the real executive constitutes the council of ministers headed by the chief minister. In other words, the governor has to exercise his powers and functions with the aid and advise of the council of ministers headed by the chief minister, except in matters in which he is required to act in his discretion (i.e., without the advice of ministers).

In estimating the constitutional position of the governor, particular reference has to be made to the provisions of Articles 154, 163 and 164. These are:

a) The executive power of the state shall be vested in the governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution (Article 154).

b) There shall be a council of ministers with the chief minister as the head to aid and advise the governor in the exercise of his functions, except in so far as he is required to exercise his functions in his discretion (Article 163).

c) The council of ministers shall be collectively responsible to the legislative assembly of the state (Article 164). This provision is the foundation of the parliamentary system of government in the state.

From the above, it is clear that constitutional position of the governordiffers from that of the president in the following two respects:

1. While the Constitution envisages the possibility of the governor acting attimes in his discretion, no such possibility has been envisaged for thePresident.

2. After the 42nd Constitutional Amendment (1976), ministerial advice hasbeen made binding on the President, but no such provision has been madewith respect to the governor.

According to the constitutional experts, the Governor's role in three respects i.e. recommending to the President for the proclamation of emergency; appointing a Chief Minister in case no party gets a clear majority anddeciding the fate of the Chief Minister in case of intra-party defections, has become very controversial. The deterioration in the political standards and practices that has come about in the wake of multi-party ministries in many of the States, party rivalries, political defections and fragmentation of the political parties has been at the root of these controversies. Suggestions and recommendations of the Administrative Reforms Commission as well as of Sarkaria Commission have remained only on paper, in spite of the fact that these recommendations would help in minimising partiality on the part of the functioning of the Governors.

Summary

In the discussions on the Indian political system, the subject of the state-level system of governance is ordinarily taken to be a topic of insignificance and, therefore, left out in the cold without any elaborate discussion.Though the basic structural postulates of the state executive arepatterned on the system prevailing at the Union level, there appear to be marked distinctions at least in the powers and functionsof the head of the state executive, that is, the Governor of the state. In fact, the office of the Governor has been one of the most hotly debated subjects in the discourses on the Indian politics asits implications are not only grave for the proper functioning ofthe state executive but they also throw a spanner in the works ofCentre-state relations in the country.

The Head of the State is Governor who is approved and appointed by the President on the recommendation of the Union Cabinet. His/her tenure is of five years but can be removedfrom his office even prior to the expiry of the term.He/She also exercises legislative, financial, judicial and discretionary powers. He/Sheperforms his/her functions as the executive head but is guided and advised by the Councilof Minister's headed by the Chief Minister.

The discretionary powers which he/she exercises have made him/her a controversialperson. Efforts have been made by Administrative Reforms Commission and SarkariaCommission to make him/her impartial but nothing concrete has come out.The Chief Minister is the real head of the Government at the State level. The Governorappoints the Chief Minister. The person who commands the support of majority in theState Legislative Assembly is appointed as the Chief Minister by the Governor. OtherMinisters are appointed by the Governor on the advice of the Chief Minister. The ChiefMinister presides over the Cabinet meetings. He/she lays down the policies of the StateGovernment. He/she is the sole link between his ministers and the Governor. He/sheCoordinates the functioning of different ministries.During normal times, the Governor exercises his/her powers on the advice of the ChiefMinister but when there is a breakdown of constitutional machinery in the State, the Governoradvises the President to proclaim constitutional emergency in his discretion. He/sheadministers the State, during constitutional emergency, on behalf of the President.

The era of coalition politics in states expanded the scope of discretionarypowers of the governors with regard to several matters. In June 1997, the focus of the Conference of governors and political leaders convenedby the President was mainly on the theme: "The role of constitutional headwhen, following an election, no party or combination of parties appears tohave secured a majority." The issue has relevance both at the Centre and inthe States in the present era of coalition governments.The President of India while inaugurating the governors' conferencesaid that the outcome of the elections of the eleventh Lok Sabha and theUttar Pradesh State Assembly in 1996 have led to conjectures that hungAssemblies and even Lok Sabha could be a recurrent feature in India'spolitical life. This has a bearing on the image of our country. We have tobestir ourselves to prove that there are institutions and systems which canefficiently and confidently deal with the phenomenon of hung legislatures.This conference should signify the capability and determination of higherleadership to effectively manage any problem, however, intractable it mayseem. This will be in keeping with our country's prestige as an advancedparliamentary democracy.President Shankar Dayal Sharma said, "In my view it is of utmostimportance that in the given situation the constitutional head functionswith due impartiality, independence, constitutional propriety, transparency,and upholds national interest as paramount."

Keywords

Decentralization: A process of governance where constituent units exercise administrative, legislative and/or fiscal authority. The process is also defined in the transfer of authority from central government to lower levels of government in political, administrative and territorial hierarchy.

Election: The process of selecting a person of choice through voting.

Executive/Executive Power: Having power to put decisions, laws, etc. into effect (power conferred on the executive).

Parliamentary system: A system of government in which the executive is composed of a select group of members of Parliament, called the cabinet, which is accountable to Parliament. The executive is dependent on direct or indirect support of the legislative (often termed the parliament), frequently expressed through a vote of confidence. Also known as parliamentarism; examples include the United Kingdom and India

Party: A political organization whose members have the same aim and belief; side in an argument or court case.

Self Assessment

1. Which one of the following statements is not correct?

A. The Governor can issue ordinances when the Legislative Assembly is not in session or only when two Houses are not in session.

B. The Governor can at his discretion issue the ordinances whether the Assembly is in session or not.

C. The Governor must be satisfied that such circumstances exist which render it necessary for him to take immediate action.

D. The Governor's ordinance shall have the same force and effect as an Act of the Legislature.

2. When a Bill passed by the State Legislature attempts to take away the powers of the High Court and is presented before the Governor for his assent, he:

A. May give his assent
B. May withhold his assent
C. Is bound to return the Bill for reconsideration
D. Is bound to reserve the Bill for the consideration of the President

3. The de-jure head of a State Government is the:

A. Chief Minister of the State
B. Law Minister of the State
C. Home Minister of the State
D. Governor of the State

4. On receipt of the report from the Governor of a State that the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the President of India under Article 356:

A. Has to proclaim President's Rule in the State
B. Has to dismiss the State Government and dissolve the Legislative Assembly
C. Has to dismiss the Government but keep that Legislative Assembly in a state of suspended animation
D. May refuse to impose President's Rule in the State

5. When can the Governor of a State issue an ordinance?

A. When the Union Government asks him to do so
B. Whenever there is a law and order problem in the State
C. Whenever the State Legislature is not in session and the Governor is satisfied that immediateaction is needed
D. Whenever the Judiciary advises him to do so

6. The correct constitutional position regarding the Governor is that the:

A. Governor acts on the advice of the Prime Minister
B. Governor acts on the advice of the President of India
C. Governor acts on the advice of the Chief Minister of the State
D. Governor acts on the advice of the Council of Ministers of the State

7. In the performance of his duties and in the exercise of his powers, the Governor

A. Is answerable in a court of law
B. Is not answerable in a court of law
C. Can be impeached in the Vidhan Sabha
D. Is answerable to the Vidhan Sabha

8. Under Article 213, the Governor of a State is empowered to:

A. Exercise discretionary powers
B. Promulgate ordinances during the recess of the Legislature
C. Appoint a Judge of the State High Court
D. Exercise his emergency powers

9. Which one of the following statements is not correct?
A. The Council of Ministers is collectively responsible to the Governor.
B. Under Article 167 of the Constitution of India, the Chief Minister has to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation.
C. Once the Governor reserves a Bill for the consideration of the President, the subsequent enactment of the Bill is in the hands of the President and the Governor shall have no further part in its career.
D. The executive power of the State is vested in the Governor and all executive actions of the State have to be taken in the name of the Governor.

10. Who of the following is not appointed by the Governor?
A. State Council of Ministers
B. State Advocate General
C. State Director General of Police
D. Members of State Public Service Commission

11. The Governor of a State may be removed from the office by the President:
A. At the request of the Chief Minister
B. On the advice of the Lok Ayukta
C. On the advice of the Union Cabinet
D. On the advice of the Attorney-General of India

12. Which one of the following is not correct in respect of the Governor's Ordinance making power?
A. It is exercised only when the Legislature is not in session.
B. It is a discretionary power which need not be exercised with the aid and advice of Ministers.
C. The Governor himself is competent to withdraw the Ordinance at any time.
D. The scope of the Ordinance-making power is limited to subjects in List II and List III of Schedule VII.

13. Under which Article of the Constitution of India, the State Governor can reserve a Bill for theconsideration of the President?
A. Article 169
B. Article 200
C. Article 201
D. Article 257

14. Which one of the following Constitutional Amendments made it possible to appoint one person to hold the office of the Governor in two or more states simultaneously?
A. Constitution (Seventh Amendment) Act, 1956
B. Constitution (Forty-second Amendment) Act, 1976
C. Constitution (Forty-third Amendment) Act, 1977
D. Constitution (Forty-fourth Amendment) Act, 1978

15. Which one of the following statements is correct?

A. The same person can be appointed as Governor of three states.

B. A Governor can be appointed only in consultation with the Chief Minister of the State concerned.

C. A Governor has no power to entrust any of the functions of the state to Government of India even with the latter's consent.

D. Only a person who has completed 30 years of age can be appointed as Governor of a state.

Answers for Self Assessment

1.	B	2.	D	3.	D	4.	A	5.	C
6.	D	7.	B	8.	B	9.	A	10.	C
11.	C	12.	B	13.	B	14.	A	15.	A

Review Questions

1. How is Governor appointed? Discuss.
2. Examine critically the constitutional debate on the office of Governor?
3. What powers are exercised by the Governor?
4. Describe the executive powers of the Governor?
5. Illustrate briefly conditions of the Governor office?
6. Write an essay on emergency powers of the Governor?
7. Write an essay on the main functions of a Governor?
8. "A Governor should be discharging his/her duties according with the spirit of the Constitution, not just be an agent of the Centre". Discuss the statement in light of the role of Governor in the Indian polity.
9. Explain the role and position of Governor?
10. Can Governor be re-appointed? Discuss.
11. Explain the relationship between the governor and President?
12. Despite unique constitutional position, the Governor is sometimes not seen as willing or able to discharge his/her duties as impartiality, efficiently, judiciously as envisaged by the framers of the Indian Constitution. Discuss.

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Unit 10: Chief Minister: Powers and Functions

CONTENTS

Objectives:

After studying this chapter, you would be able to:

- explain the appointment of a Chief Minister.
- scrutinizethe oath, term and salary of a Chief Minister.
- examine powers and functions of Chief Minister.
- describe the relationship between Chief Minister and Governor.
- analyse the position of the Chief Minister.
- highlight the importance of Council of Ministers.

Introduction

Articles 153 to 167 in Part VI of the Constitution deal with the state executive.The most distinct feature of the state-level governance in India may arguably be a relatively subservient position vis-à-vis the Centre in both constitutional arrangement and practical functioning of the executive. Right from the constitutional provisions regarding the indestructibility of boundary, nomenclature, and even existence of a state, to the actual continuation of a Chief Minister as an individual in office in a state, despite his party continuing to enjoy the majority support in the Legislative Assembly, depend, more or less, on the powers-that-be at the Centre. Unlike the trends prevalent in the federations like the United States where the states of the Union have not only been given high degree of functional autonomy but also a number of sound ingredients of statutory separate identity like separate constitutions,separate citizenships, and so on, the states in India, excepting, to some extent, the state of Jammu and Kashmir, are totally bereft of any such statutory traits of separate existence.

The creation of a whole set of institutions and processes of governance at the level of states fulfils an important prerequisite for India to become a federation, at least theoretically. The most distinct feature of the state-level governance in India may arguably be a relatively subservient position vis-à-vis the Centre in both constitutional arrangement and practical functioning of the executive. At the State level, generally following the central pattern, the Governor, like the President,acts as a nominal head and the real powers are exercised by the Council of Ministersheaded by the Chief

Minister. The members of the Council of Ministers at the State levelare also collectively and individually responsible to the lower House of the State Legislaturefor their acts of omission as well as commission. Hence, the major segment which accounts for much of what is called as the state government is the executive branch of the government, though the Legislative Assembly also occupies a place of prestige and reckoning in the governmental system of the state. Above all, even the executive system of the state revolves around the key constitutional functionaries like the Governor and the Chief Minister, with the Council of Ministers and the bureaucracy playing a second fiddle to them. The broad theme of the chapter, therefore, concentrates on the office of the Governor and the Chief Minister, with special reference to both the constitutional provisions as well as the political trends in position and functioning of the two authorities.

10.1 Chief Minister

Taking the analogy of the parliamentary system of governance at the state level, the Constitution provides for the office of the Chief Minister to be the real executive of the state. As the head of the Council of Ministers of the state, the Chief Minister happens to be the chief advisor to the Governor in the discharge of his functions as head of the state. In the scheme of parliamentary system of government provided by the Constitution, the governor is the nominal executive authority (de jure executive) and the Chief Minister is the real executive authority (de facto executive). In other words, the governor is the head of the state while the Chief Minister is the head of the government. Thus the position of the Chief Minister at the state level is analogous to the position of prime minister at the Centre.

Appointment of Chief Minister

The Constitution does not contain any specific procedure for the selectionand appointment of the Chief Minister. Article 164 only says that the Chief Minister shall be appointed by the governor.According to the Constitution, the Chief Minister may be a member of anyof the two Houses of a state legislature. Usually Chief Ministers have beenselected from the Lower House (legislative assembly), but, on a number ofoccasions, a member of the Upper House (legislative council) has also beenappointed as Chief Minister.

Oath, Term and Salary

Before the Chief Minister enters his office, the governor administers to himthe oaths of office and secrecy. In his oath of office, the Chief Ministerswears:

1. to bear true faith and allegiance to the Constitution of India,
2. to uphold the sovereignty and integrity of India,
3. to faithfully and conscientiously discharge the duties of his office, and
4. to do right to all manner of people in accordance with the Constitutionand the law, without fear or favour, affection or ill-will.

In his oath of secrecy, the Chief Minister swears that he will not directly orindirectly communicate or reveal to any person(s) any matter that is broughtunder his consideration or becomes known to him as a state minister exceptas may be required for the due discharge of his duties as such minister.

The term of the Chief Minister is not fixed and he holds office during thepleasure of the governor. However, this does not mean that the governor candismiss him at any time. He cannot be dismissed by the governor as long ashe enjoys the majority support in the legislative assembly.6 But, if he losesthe confidence of the assembly, he must resign or the governor can dismisshim.

The salary and allowances of the Chief Minister are determined by thestate legislature. In addition to the salary and allowances, which are payableto a member of the state legislature, he gets a sumptuary allowance, freeaccommodation, travelling allowance, medical facilities, etc.

10.2 Powers and functions of Chief Minister

Chief Minister is the head of the Council of Ministers of his State. The constitutional position of the Chief Minister is more or less similar to that of the Prime Minister. The Chief Minister plays an important role in the administration of the State. The powers and functions of the Chief Minister can be studied under thefollowing heads:

In Relation to Council of Ministers

The Chief Minister enjoys the following powers as head of the state councilof ministers:
(a) The governor appoints only those persons as ministers who arerecommended by the Chief Minister.
(b) He allocates and reshuffles the portfolios among ministers.
(c) He can ask a minister to resign or advise the governor to dismiss him incase of difference of opinion.
(d) He presides over the meetings of the council of ministers and influencesits decisions.
(e) He guides, directs, controls and coordinates the activities of all theministers.
(f) He can bring about the collapse of the council of ministers by resigningfrom office. Since the Chief Minister is the head of the council ofministers, his resignation or death automatically dissolves the council ofministers. The resignation or death of any other minister, on the otherhand, merely creates a vacancy, which the Chief Minister may or may notlike to fill.

In Relation to the Governor

The Chief Minister enjoys the following powers in relation to the governor:
(a) He is the principal channel of communication between the governor andthe council of ministers.7 It is the duty of the Chief Minister:
(i) to communicate to the Governor of the state all decisions of thecouncil of ministers relating to the administration of the affairs of thestate and proposals for legislation;
(ii) to furnish such information relating to the administration of theaffairs of the state and proposals for legislation as the governor maycall for; and
(iii) if the governor so requires, to submit for the consideration of thecouncil of ministers any matter on which a decision has been taken bya minister but which has not been considered by the council.
(b) He advises the governor with regard to the appointment of importantofficials like advocate general, chairman and members of the state publicservice commission, state election commissioner, and so on.

In Relation to State Legislature

The Chief Minister enjoys the following powers as the leader of the house:
(a) He advises the governor with regard to the summoning and proroguing ofthe sessions of the state legislature.
(b) He can recommend the dissolution of the legislative assembly to thegovernor at any time.
(c) He announces the government policies on the floor of the house.

Other Powers and Functions

In addition, the Chief Minister also performs the following functions:
(a) He is the chairman of the State Planning Board.
(b) He acts as a vice-chairman of the concerned zonal council by rotation,holding office for a period of one year at a time.8
(c) He is a member of the Inter-State Council and the National DevelopmentCouncil, both headed by the prime minister.
(d) He is the chief spokesman of the state government.
(e) He is the crisis manager-in-chief at the political level during emergencies.
(f) As a leader of the state, he meets various sections of the people andreceives memoranda from them regarding their problems, and so on.
(g) He is the political head of the services.
Thus, he plays a very significant and highly crucial role in the stateadministration. However, the discretionary powers enjoyed by the governorreduce to some extent the power, authority, influence, prestige and role ofthe Chief Minister in the state administration.

10.3 Council of Ministers

Following the model of the parliamentary government, the real government of the state consists of the Council of Ministers headed by the Chief Minister. Significantly, over the years, in most of the parliamentary systems of governance, the place of pride ordained for the collective executive in the form of the Council of Ministers, has been usurped by the individual personality of the Prime Minister or the Chief Minister, as the case may be. Not remaining immune to this worldwide

phenomenon, the Council of Ministers in the states have also lost much of their sheen, if not vitality, in face of the growing personality-based clout of the Chief Minister.
The principles of parliamentary system of government are not detailed inthe Constitution; but two Articles (163 and 164) deal with them in a broad,sketchy and general manner. Article 163 deals with the status of the councilof ministers while Article 164 deals with the appointment, tenure,responsibility, qualifications, oath and salaries and allowances of theministers.

Constitutional Provisions

Article 163—Council of Ministers to aid and advise Governor

1. There shall be a Council of Ministers with the Chief Minister as the headto aid and advise the Governor in the exercise of his functions, except inso far as he is required to exercise his functions in his discretion.
2. If any question arises whether a matter falls within the Governor's discretion or not, decision of the Governor shall be final, and the validityof anything done by the Governor shall not be called in question on theground that he ought or ought not to have acted in his discretion.
3. The advice tendered by Ministers to the Governor shall not be inquiredinto in any court.

Article 164—Other Provisions as to Ministers

1. The Chief Minister shall be appointed by the Governor and the otherMinisters shall be appointed by the Governor on the advice of the ChiefMinister. However, in the states of Chhattisgarh, Jharkhand, MadhyaPradesh and Odisha, there shall be a Minister in charge of tribal welfarewho may in addition be in charge of the welfare of the scheduled castesand backward classes or any other work. The state of Bihar was excludedfrom this provision by the 94th Amendment Act of 2006.
2. The total number of ministers, including the chief minister, in the councilof ministers in a state shall not exceed 15 per cent of the total strength ofthe legislative assembly of that state. But, the number of ministers,including the chief minister, in a state shall not be less than 12. Thisprovision was added by the 91st Amendment Act of 2003.
3. A member of either House of state legislature belonging to any politicalparty who is disqualified on the ground of defection shall also bedisqualified to be appointed as a minister. This provision was also addedby the 91st Amendment Act of 2003.
4. The ministers shall hold office during the pleasure of the Governor.
5. The council of ministers shall be collectively responsible to the stateLegislative Assembly.
6. The Governor shall administer the oaths of office and secrecy to aminister.
7. A minister who is not a member of the state legislature for any period ofsix consecutive months shall cease to be a minister.
8. The salaries and allowances of ministers shall be determined by the statelegislature.

Article 166—Conduct of Business of the Government of a State

1. All executive action of the Government of a State shall be expressed to betaken in the name of the Governor.
2. Orders and other instruments made and executed in the name of theGovernor shall be authenticated in such manner as may be specified inrules to be made by the Governor. Further, the validity of an order orinstrument which is so authenticated shall not be called in question on theground that it is not an order or instrument made or executed by theGovernor.
3. The Governor shall make rules for the more convenient transaction of thebusiness of the government of the state, and for the allocation amongministers of the said business in so far as it is not business with respect towhich the Governor is required to act in his discretion.

Article 167—Duties of Chief Minister

It shall be the duty of the Chief Minister of each state
1. To communicate to the governor of the state all decisions of the council ofministers relating to the administration of the affairs of the state andproposals for legislation
2. To furnish such information relating to the administration of the affairs of the state and proposals for legislation as the governor may call for
3. If the governor so requires, to submit for the consideration of the councilof ministers any matter on which a decision has been taken by a ministerbut which has not been considered by the council

Article 177—Rights of Ministers as Respects the Houses

Every minister shall have the right to speak and take part in the proceedingsof the Assembly (and also the Council where it exists) and any Committee ofthe State Legislature of which he may be named a member. But he shall notbe entitled to vote.

Appointment of Ministers

The chief minister is appointed by the governor. The other ministers are appointed by the governor on the advice of the chief minister. This means that the governor can appoint only those persons as ministers who are recommended by the chief minister.

Oath and Salary of Ministers

Before a minister enters upon his office, the governor administers to him theoaths of office and secrecy. In his oath of office, the minister swears:
1. to bear true faith and allegiance to the Constitution of India,
2. to uphold the sovereignty and integrity of India,
3. to faithfully and conscientiously discharge the duties of his office, and
4. to do right to all manner of people in accordance with the Constitutionand the law, without fear or favour, affection or ill-will.

In his oath of secrecy, the minister swears that he will not directly orindirectly communicate or reveal to any person(s) any matter that is broughtunder his consideration or becomes known to him as a state minister exceptas may be required for the due discharge of his duties as such minister.
The salaries and allowances of ministers are determined by the statelegislature from time to time. A minister gets the salary and allowanceswhich are payable to a member of the state legislature. Additionally, he gets asumptuary allowance (according to his rank), free accommodation, travellingallowance, medical facilities, etc.

10.4 Responsibility of Ministers

Collective Responsibility

The fundamental principle underlying the working of parliamentary systemof government is the principle of collective responsibility. Article 164 clearlystates that the council of ministers is collectively responsible to the legislativeassembly of the state. This means that all the ministers own jointresponsibility to thelegislative assembly for all their acts of omission and commission. They work as a team and swim or sink together. When thelegislative assembly passes a no-confidence motion against the council ofministers, all the ministers have to resign including those ministers who arefrom the legislative council. Alternatively, the council of ministers canadvice the governor to dissolve the legislative assembly on the ground thatthe House does not represent the views of the electorate faithfully and call forfresh elections. The governor may not oblige the council of ministers whichhas lost the confidence of the legislative assembly.
The principle of collective responsibility also mean that the cabinet decisionsbind all cabinet ministers (and other ministers) even if they deferred in thecabinet meeting. It is the duty of every minister to stand by the cabinetdecisions and support them both within and outside the state legislature. Ifany minister disagrees with a cabinet decision and is not prepared to defendit, he must resign. Several ministers have resigned in the past owing to theirdifferences with the cabinet.

Individual Responsibility

Article 164 also contains the principle of individual responsibility. It statesthat the ministers hold office during the pleasure of the governor. This meansthat the governor can remove a minister at a time when the council ofministers enjoys the confidence of the legislative assembly. But, the governorcan remove a minister only on the advice of the chief minister. In case ofdifference of opinion or dissatisfaction with the performance of a minister,the chief minister can ask him to resign or advice the governor to dismisshim. By exercising this power, the chief minister can ensure the realisation ofthe rule of collective responsibility.

No Legal Responsibility

As at the Centre, there is no provision in the Constitution for the system oflegal responsibility of the minister in the states. It is not required that an orderof the governor for a public act should be

countersigned by a minister.Moreover, the courts are barred from enquiring into the nature of advicerendered by the ministers to the governor.

Composition of the Council of Ministers

The Constitution does not specify the size of the state council of ministers orthe ranking of ministers. They are determined by the chief minister accordingto the exigencies of the time and requirements of the situation.Like at the Centre, in the states too, the council of ministers consists ofthree categories of ministers, namely, cabinet ministers, ministers of state,and deputy ministers. The difference between them lies in their respectiveranks, emoluments, and political importance. At the top of all these ministersstands the chief minister−supreme governing authority in the state.The cabinet ministers head the important departments of the stategovernment like home, education, finance, agriculture and so forth. They aremembers of the cabinet, attend its meetings and play an important role indeciding policies. Thus, their responsibilities extend over the entire gamut ofstate government.The ministers of state can either be given independent charge ofdepartments or can be attached to cabinet ministers. However, they are notmembers of the cabinet and do not attend the cabinet meetings unless specially invited when something related to their departments are consideredby the cabinet.

Next in rank are the deputy ministers. They are not given independentcharge of departments. They are attached to the cabinet ministers and assistthem in their administrative, political and parliamentary duties. They are notmembers of the cabinet and do not attend cabinet meetings.At times, the council of ministers may also include a deputy chief minister.The deputy chief ministers are appointed mostly for local political reasons.

Summary

In the discussions on the Indian political system, the subject of the state-level system of governance is ordinarily taken to be a topic of insignificance and, therefore, left out in the cold without any elaborate discussion.Though the basic structural postulates of the state executive arepatterned on the system prevailing at the Union level, there appear to be marked distinctions at least in the powers and functionsof the head of the state executive, that is, the Governor of the state. In fact, the office of the Governor has been one of the most hotly debated subjects in the discourses on the Indian politics asits implications are not only grave for the proper functioning ofthe state executive but they also throw a spanner in the works ofCentre-state relations in the country.

The Chief Minister is the real head of the Government at the State level. The Governorappoints the Chief Minister. The person who commands the support of majority in theState Legislative Assembly is appointed as the Chief Minister by the Governor. OtherMinisters are appointed by the Governor on the advice of the Chief Minister. The ChiefMinister presides over the Cabinet meetings. He/she lays down the policies of the StateGovernment. He/she is the sole link between his ministers and the Governor. He/sheCo-ordinates the functioning of different ministries.During normal times, the Governor exercises his/her powers on the advice of the ChiefMinister but when there is a breakdown of constitutional machinery in the State, the Governoradvises the President to proclaim constitutional emergency in his discretion. He/sheadministers the State, during constitutional emergency, on behalf of the President.

Keywords

Accountability: A requirement to offer explanation for an action; responsibility for one's action (implies that there is someone to whom one is responsible).

Authorities: Officials or bodies with official powers. A person or body of persons in whom authority is vested, for example a governmental agency.

Cabinet: usually a synonym for "Council of Ministers".

Committee: A body of persons appointed or elected for performing specified tasks; may be small group within a larger body.

Diversity: The existence of distinct political, economical, social, cultural and demographic differences within a society.

Government: The governing body of a state; often same as the 'executive', but also used to cover the legislature and judiciary; 'three branches of government'.

Individual Autonomy: Refers to the idea to live one's life according to reasons and motives that are taken as one's own and are not the product of manipulative or distorting external forces.

Monarchy: A form of government in which a monarch, usually a single person, is the hereditary head of the state. In most monarchies, a monarch holds his/her position for life. The position may be largely symbolic or powerful.
Opposition: The state or act of opposing; (more likely in constitution), the members of the main house of the legislature who are not supporting the government.191
Orders of government: The vertical division within a system of federal government; typically one overarching central government, several broad regional governments that are the constituent units, and a multitude of local governments, notably municipalities.
Parliamentary system: A system of government in which the executive is composed of a select group of members of Parliament, called the cabinet, which is accountable to Parliament. The executive is dependent on direct or indirect support of the legislative (often termed the parliament), frequently expressed through a vote of confidence. Also known as parliamentarism; examples include the United Kingdom and India.
Presidential system: A system of governance in which the office of the head of state and head of government is combined and usually referred to as a president; and the president is directly elected by the people for a fixed term.
Prime Minister: The head of government chairing the council of ministers (used in the parliamentary system of government) – and in federal parliamentary systems refer to the head of government at the national level.
Representative government: A system of government where the legislative and executive bodies are filled, directly or indirectly, through a process of regular elections.
Transparency: The state or quality of being transparent; in constitutions usually used of government processes being open to public scrutiny.
Unconstitutional: Contrary to the provisions of the constitution.

Review Questions

1. Write a detailed note on the appointment of Chief Minister?
2. Critically examine the powers of Chief Minister?
3. Illustrate the functions of the Chief Minister?
4. What is the position and role of Chief Minister?
5. How is the Council of Ministers formed in a State?
6. Who comes under Council of Ministers? Discuss.
7. Evaluate the relationship between Governor and Chief Minister of a state?
8. Describe the relationship between Chief Minister and Council of Ministers?
9. Discuss in detail the composition of the Council of Ministers?
10. Explain different types of Council of Ministers?

Self Assessment

1. Which one of the following is constitutionally obligatory on the part of the Chief Minister of a State?

A. As the Governor is the head of the State, the Chief Minister has to take all major decisions regarding administration only after prior approval by the Governor.
B. The Chief Minister has to communicate to the Governor all decisions of the cabinet relating to administration and proposals for legislation.
C. As the ministers are appointed by the Governor, the Chief Minister has to go by Governor's discretion in the allocation of business among the ministers.
D. The Chief Minister, if he happens to be the leader of a party not having the required majority, should prove his majority strength in the State Legislative Assembly within the period stipulated by the Governor.

2. Which one of the following is correct in terms of the Constitution of India?

A. The Chief Minister decides the allocation of portfolios among the Ministers.
B. When the Chief Minister resigns, the Council of Ministers gets dissolved.
C. All the principal policy announcements of the Government are made by the Chief Minister.
D. It shall be the duty of Chief Minister to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State.

3. When there is no majority party in the State Legislative Assembly, the principal consideration governing the choice of the Chief Minister by the Governor of the State is the:
A. Ability of the person who is most likely to command a stable majority in the House
B. Largest political party in the Legislative Assembly
C. The combination of several parties as a unit
D. The loyalty and support of the party members to their respective party programmes and policies.

4. The Constitution of India lays down that proposals for legislation are to be communicated to the Governor by the:
A. Chief Minister
B. Speaker of the Legislative Assembly
C. Minister for Law
D. Minister for Home Affairs

5. Some state governments have, besides Cabinet Ministers and Ministers of State, Parliamentary Secretaries also. These Parliamentary Secretaries who are also members of the State Legislature are appointed by:
A. The Chief Minister
B. The Governor
C. The Chief Whip of the ruling party
D. The Speaker

6. The salaries and allowances of the Council of Ministers of the State Government are paid from the:
A. Reserve Bank of India
B. Treasury of the State Government
C. Contingency Fund of the State
D. Consolidated Fund of the state

7. Which of the Articles of the Constitution of India are relevant to analyse the constitutional provisions that deal with the relationship of the Governor with the State Council of Ministers?
A. Articles 161, 165 and 166
B. Articles 163, 164 and 167
C. Articles 162, 163 and 168
D. Articles 164, 165 and 169

8. In which of the following provisions of the Constitution of India is the principle of collective responsibility of the State Council of Ministers enshrined?

A. Article 164
B. Article 162
C. Article 163
D. Article 167

9. The ministers in the State could be prosecuted only with the approval of the Governor becausethey:

A. Are the heads of the ministries
B. Are representatives of the people
C. Enjoy certain immunities under the provisions of the Constitution
D. Exercise executive powers on behalf of the Governor

10. The ministers in the Council of Ministers at the state level are appointed by:

A. President of the party
B. Governor
C. Chief Minister
D. Prime Minister

11. According to the Constitution of India, if the Governor so requires, it shall be the duty of theChief Minister to submit for the consideration of the State Council of Ministers any matter onwhich a decision has been taken by a Minister, but which has not been considered by the Council.This ensures:

A. Collective responsibility
B. The status of the Chief Minister as the first among the equals
C. The power of the Governor to nullify the decision of the Minister
D. The inherent power of the Minister to take a decision independent of the State Council ofMinisters.

12. The accountability or responsibility of the Chief Minister and Cabinet to the State Legislative Assemblyis:

A. Intermittent
B. Indirect
C. At the time of elections
D. Direct, continuous and collective

13. According to Article 163 of the Constitution, which of the following statements relating to the question whether any, and if so what, advice was tendered by Ministers to the Governor would be correct?

A. It shall not be inquired into in any court.
B. It can be inquired into in the Supreme Court.
C. It can be inquired into in all the courts.
D. It cannot be inquired into in the High Court.

14. How are the salaries and allowances of the State Ministers determined?

A. By the Home Department

B. By the State Legislature
C. By the Finance Department
D. By the Law Department

15. What is the time-limit within which a non-money Bill has to be sent to the State Legislature by the Governor for reconsideration?
A. 14 days
B. One month
C. Three months
D. No time limit specified

Answers for Self Assessment

1.	B	2.	D	3.	A	4.	A	5.	B
6.	D	7.	B	8.	A	9.	C	10.	B
11.	A	12.	D	13.	A	14.	B	15.	D

Review Questions

1. Write a detailed note on the appointment of Chief Minister?
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Unit 11: Federalism and its Working

CONTENTS

Objectives

After studying this chapter, you would be able to:

- explain the federalism in India.
- distinguish between unitary and federal features of Indian Constitution.
- analyse the asymmetrical federal provisions in the Indian constitution.
- understand the Centre-State relations.
- analyse the legislative, administrative, and financial relations between Centre and States in India.

Introduction

Even if this argument is accepted that the parliamentary-federal system establishedunder the 1950 Indian constitution is in many ways not only aunique federal union in contemporary comparative politics, but also theone uniquely suited to the Indian conditions,1 we cannot wish away thefact that India in the 1980s and 1990s has been faced with an overwhelmingchallenge of federalizing its predominantly parliamentary system. Workinga pure parliamentary system (e.g., United Kingdom) is difficult enough.The constitution established an "amicable union" combining parliamentary federal features. In many ways, it is a unique federal constitution incomparative federalism. It ensures Union's legislative supremacy not on theUnion List, but also on the Concurrent List and residuary legislative jurisdiction;even on the State List the Union Parliament can legislate in specifiedand exceptional circumstances. The Union executive power overrides Stateexecutive power outside the area of exclusive legislative jurisdiction of theStates. The constitution ensures Union Parliament's supremacy and initiativein taxation, in constitutionally anticipated emergencies, in all-India civil andpolice services (which are recruited and trained by the Union government,and then allocated to the State governments), in judicial administration, andin constitutional amendments. Even the very existence of a State is contingenton the will of the Parliament which enjoys overriding powers withregard to redrawing the map of India and reorganization of State boundaries.However, it is evident from the reorganization of States over the years thatthe formal parliamentary power, in this regard, had been subject to the powerfulmass movements for the creation of unilingual States much against thewill of the Central government.

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. In a federal set up there is a two tier of Government with well assigned powers and functions. In this system the central government and the governments of the units act within a well

defined sphere, co-ordinate and at the same time act independently. The federal polity, in other words, provides a constitutional device for bringing unity in diversity and for the achievement of common national goals. While the parliamentary system is conceptually unitary, federalism is just otherwise. This is a puzzle that needs to be understood in a specific historical context. 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 British parliamentary model remained a major reference point for the Indian Constitution-makers. Federalism seemed to have provided an institutional arrangement to accommodate India's pluralist socio-political character. Despite being conceptually incompatible,the founding fathers were favourably inclined towardsparliamentary-federalism as perhaps the most appropriate institutionalset-up for governance in India. Parliamentary federalismis thus a creative institutional response to democratic governance suitable for India's peculiar socio-political milieu (Chakrabarty and Pandey, 2012).

11.1 Federalism in India: Nature and Scope

One way of classifying a constitution is whether it is unitary or federal. Broadly speaking, in a unitary constitution the totality of the powers of the State is vested in one government, while in a federal constitution it is divided between a government for the whole country and a number of governments for its different regions. After initial differences on whether the Constitution of India is unitary or federal, it has finally been decided that it is federal and that federalism is one of its basic features, which cannot be changed even by an amendment of the Constitution. The initial differences and the final conclusion indicate that finer issues are involved in the identification of a constitution. Every constitution responds to the background, surrounding conditions, and future projection of the country of its making. The Constitution of India is no exception to this rule.

The term 'federation' is derived from a Latin word 'foedus' which means'treaty' or 'agreement'. Thus, a federation is a new state (political system)which is formed through a treaty or an agreement between the various units.The units of a federation are known by various names like states (as in US) orcantons (as in Switzerland) or provinces (as in Canada) or republics (as inRussia). The Constitution of India provides for a federal system of government inthe country. The framers adopted the federal system due to two main reasons−the large size of the country and its socio-cultural diversity. They realisedthat the federal system not only ensures the efficient governance of thecountry but also reconciles national unity with regional autonomy.However, the term 'federation' has no where been used in the Constitution.Instead, Article 1 of the Constitution describes India as a 'Union of States'. According to Dr B R Ambedkar, the phrase 'Union of States' has beenpreferred to 'Federation of States' to indicate two things: (i) the Indianfederation is not the result of an agreement among the states like theAmerican federation; and (ii) the states have no right to secede from thefederation. The federation is union because it is indestructible.The Indian federal system is based on the 'Canadian model' and not on the 'American model'. The 'Canadian model' differs fundamentally from the 'American model' in so far as it establishes a very strong centre. The Indianfederation resembles the Canadian federation (i) in its formation (i.e., by wayof disintegration); (ii) in its preference to the term 'Union' (the Canadianfederation is also called a 'Union'); and (iii) in its centralizing tendency (i.e.,vesting more powers in the centre vis-a-vis the states).

India has a hybrid system of government. The hybrid system combinestwo classical models: the British traditions, drawn upon parliamentarysovereignty and conventions, and American principlesupholding the supremacy of a written constitution, the separation of powers and judicial review. The two models are contradictorysince parliamentary sovereignty and constitutional supremacy areincompatible. India has distinct imprints in her Constitution of boththe British and the American principles. In other words, followingthe adoption of the 1950 Constitution, India has evolved a completelydifferent politico-constitutional arrangement with characteristicsfrom both the British and the American constitutional practices. Thepeculiarity lies in the fact that despite being parliamentary, Indianpolitical arrangement does not wholly correspond with the Britishsystem simply because it has adopted the federal principles as well;it can never be completely American since Parliament in India continuesto remain sovereign. As a hybrid political system, India hascontributed to a completely different politico-constitutional arrangement,described as parliamentary-federalism, with noparallel in the history of the growth of constitutions. Based onboth parliamentary practices and federal principles, political systemin India is therefore a conceptual riddle underlining the hithertounexplored dimensions of socio-political history of

nation-statesimbibing the British traditions and American principles. At thetime of the framing of the Constitution, political institutions werechosen with utmost care. 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 meager revenue sources.

11.2 Federal Features of the Indian Constitution

The Constitution of India has adopted federal features; though it does not, in fact, claim that it establishes a federation. The question whether the Indian Constitution could be called a federal constitution troubled the minds of the members of the Constituent Assembly. This question cannot be answered without going into the meaning of federalism and the essential features that are evident in federal state. Let us examine them and try to find out whether India is a federation or not.

1. ***Dual Polity***: The Constitution establishes a dual polity consisting the Union at the Centre and the states at the periphery. Each is endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. The Union government deals with the matters of national importance like defence, foreign affairs, currency, communication and so on. The state governments, on the other hand, look after the matters of regional and local importance like public order, agriculture, health, local government and so on.

2. ***Written Constitution:*** The Constitution is not only a written document but also the lengthiest Constitution of the world. Originally, it contained a Preamble, 395 Articles (divided into 22 Parts) and 8 Schedules.2 At present (2016), it consists of a Preamble, about 465 Articles (divided into 25 Parts) and 12 Schedules. It specifies the structure, organisation, powers and functions of both the Central and state governments and prescribes the limits within which they must operate. Thus, it avoids the misunderstandings and disagreements between the two.

3. ***Division of Powers***: The totality of the powers of the State is divided into legislative, executive, judicial, and financial. Ina federal constitution, such powers are shared between the central and the regional governments. No universal rule or general principle for sharing these powers exists, and it is often hard to separate matters of common concern from those involving local needs. Quite often matters of local interest become matters of general interest or of interest to more than one region and, therefore, such matters may be placed in a third category over which both the central and the regional governments may exercise powers as the occasion demands. Another recommended general rule is that while the Union government should have enumerated powers the rest may be left to the regional governments. But it is easier said than practised, for some powers need to be within the jurisdiction of both. Moreover, over time, matters may emerge which are incapable of being handled by the regional governments. In that case they must be handled by the Union government. In view of such reasons no hard-and-fast rule of universal application can be prescribed for the distribution of powers between the central and the regional governments.

   The Constitution divided the powers between the Centre and the states in terms of the Union List, State List and Concurrent List in the Seventh Schedule. The Union List consists of 100 subjects (originally 97), the State List 61 subjects (originally 66) and the Concurrent List 52 subjects (originally 47). Both the Centre and the states can make laws on the subjects of the concurrent list, but in case of a conflict, the Central law prevails. The residuary subjects (i.e., which are not mentioned in any of the three lists) are given to the Centre.

4. ***Supremacy of the Constitution***: Unlike some other constitutions, the Constitution of India does not have a supremacy clause.However, neither its makers, nor the courts, nor

the governments at any level have entertained anydoubt at any stage that it is the highest law of the land binding on all organs of the State. Therefore,soon after the commencement of the Constitution, laws of different legislatures, including laws ofParliament and the executive actions of the State, were challenged in the High Courts and the SupremeCourt and these courts entertained such challenges without either of the parties raising any concernsover whether the Constitution must be complied with. In India, the supremacy of the originalConstitution has been established not only to the extent that all actions of different organs createdunder it must comply with it but also that the amending body must exercise its amending powersubject to the condition that the basic structure of the Constitution is not undermined

The Constitution is the supreme (or the highest) law of the land. The laws enacted by the Centre and the states must confirm to its provisions. Otherwise, they can be declared invalid by the Supreme Court or the high courts through their power of judicial review. Thus, the organs of the government (legislative, executive and judicial) at both the levels must operate within the jurisdiction prescribed by the Constitution.

5. ***Rigid Constitution:*** The division of powers established by the Constitution as well as the supremacy of the Constitution can be maintained only if the method of its amendment is rigid. Hence, the Constitution is rigid to the extent that those provisions which are concerned with the federal structure (i.e., Centre–state relations and judicial organisation) can be amended only by the joint action of the Central and state governments. Such provisions require for their amendment a special majority4 of the Parliament and also an approval of half of the state legislatures.

6. ***Independent Judiciary:*** The Constitution establishes an independent judiciary headed by the Supreme Court for two purposes: one, to protect the supremacy of the Constitution by exercising the power of judicial review; and two, to settle the disputes between the Centre and the states or between the states. The Constitution contains various measures like security of tenure to judges, fixed service conditions and so on to make the judiciary independent of the government.

7. ***Bicameralism:*** The Constitution provides for a bicameral legislature consisting of an Upper House (Rajya Sabha) and a Lower House (Lok Sabha). The Rajya Sabha represents the states of Indian Federation, while the Lok Sabha represents the people of India as a whole. The Rajya Sabha (even though a less powerful chamber) is required to maintain the federal equilibrium by protecting the interests of the states against the undue interference of the Centre.In the light of the above criteria, there was no doubt that the founding fathers preferred federalism in its true spirit and yet what emerged after the deliberations in the Constituent Assembly was a unique form, adapted to the Indian context. As Ambedkar argued, the draft constitution contained provisions that provide for both federal and unitary forms of government. In normal times, it is framed to work as a federal system,Ê stated Ambedkar. But intimes of war: "it is so designed as to make it work as though it was a unitarysystem. Once the President issues a Proclamation which he isauthorized to do under the Provisions of Article 275, the whole scenecan become transformed, and the State becomes a unitary state".

11.3 Centre-State Relations

We have seen that the Constitution of India provides for a federal system. Both the Union and the State are created by the Constitution and derive their respective authority from it. To understand this, it is desirable to study the relationship between the Union and the States. The relations between the Centre and the states which constitute the core of federalism have been enumerated in Parts XI and XII of the Constitution under the heads, legislative, administrative and financial relations. Let us examine them one by one.

Legislative Relations

Regarding legislative relations, there is a threefold division of powers in the Constitution. We have followed a system in which there are two lists of legislative powers, one for the Centre and the other for the State, known as the Union List and the State List, respectively. An additional list called the Concurrent List has also been added. The Union List which consists of 97 subjects of national interest is the largest of the three lists. Some of the important subjects included in this list are: Defence, Railways, Post and Telegraph, Income Tax, Custom Duties, etc. The Parliament has the

exclusive power to enact laws on the subjects included in the Union List for the entire country. The State List consists of 66 subjects of local interest. Some of the important subjects included in this List are Trade and Commerce within the State, Police, Fisheries, Forests, Industries, etc. The State Legislatures have been empowered to make laws on the subjects included in the State List.

The Concurrent List consists of 47 subjects of common interest to both the Union and the States. Some of the subjects included in this list are: Stamp Duties, Drugs and Poison, Electricity, Newspapers etc. Both the Parliament and the State Legislatures can make laws on the subjects included in this list. But in case of a conflict between the Union and the State law relating to the same subject, the Union law prevails over the State law. Power to legislate on all subjects not included in any of the three lists vests with the Parliament. Under certain circumstances, the Parliament can legislate on the subjects mentioned in the State List.

Administrative Relations

The framers of the Indian Constitution never intended to create administrative co-operation and co-ordination between the centre and states. The executive power of the State is to be exercised in such a way as to ensure compliance with the laws made by the Parliament. Further, the Union Executive is empowered to give directions to a State, if necessary, for the requisite purpose. The Union Government can issue directions to the States to ensure compliance with the laws of the Parliament for construction and maintenance of means of communications, declared to be of national and military importance, and also on the measures for the protection of Railways. In addition to all this, the Parliament can alone adjudicate on inter-state river disputes. Also, a provision has been made for constituting an Inter- State Council to advise the president on inter-state disputes. Even the State governments may delegate some of its administrative functions relating to the State subjects, to Union Government for a specified period. The Constitution of India has certain special provisions to ensure uniformity of the administrative system. These include the creation of All India Services such as IAS and IPS and placing members of these services in key administrative positions in the states. The presence of All India Service Officers further paves way for the Central Government to exercise its authority and control over the states. The members of these services are recruited by the Centre but are appointed in the States. No disciplinary action can be taken against them by the State Governments without the permission of the Centre. The Constitution also makes provision for the creation of new All India Service by the Parliament on the recommendation of the Rajya Sabha. The President also puts the entire control of the state administrative machinery under the control of the Union which you will study in details while going through the lesson on emergency provisions. You would also recall that the Union executive is empowered to give such directions to a state as it may appear necessary for the purpose to the Union Government. The Union Government has wide powers to issue directions based on the subjective view of the Union and may, therefore, interfere with the state autonomy in the field of administration. Ordinarily, the central police force and Army are posted to the states at the request of the State Government. However, there have been occasions when the CRPF of BSF have been deployed in states much against the state wishes of the State Government. Thus, the center plays a very important role in the administrative sphere of activity concerning the States.

Financial Relations

The distribution of financial resources is especially critical in determining the nature of the State's relationship with the Centre. Both the Union and the State have been provided with independent sources of revenue by the Constitution. The Parliament can levy taxes on the subjects included in the Union List. The States can levy taxes on the subjects in the State List. By and large taxes that have an inter-state base are levied by the Centre and those with a local base by the State. The Union List consists of items of taxation which fall under the following categories:

i. Taxes levied by the Union but collected and appropriated by the State such as stamp duties and duties of excise on medicinal and toilet preparations etc.
ii. Taxes levied and collected by the Union but assigned to the States viz. railways, sea or air etc.
iii. Taxes levied and collected by the Central and may be distributed between the Central and the states if the Parliament by law so provides, such as union excise duties, excise on toilet preparations etc.
iv. Taxes levied and collected and retained by the Centre such as customs, surcharge on income tax etc.
v. Taxes levied and collected by the Centre and distributed between the union and the states such as taxes other than agriculture etc. It is clear that in the financial sphere too the Centre is better equipped.

The Centre can exercise control over the state finances and grants-in-aid both general and special to meet the expenditure on developmental schemes. During financial emergency,

the President has the power to suspend the provisions regarding division of taxes between the Centre and the State. He can also impose other restrictions on the expenses of the State. State plans are framed within the priorities of the central plan and they are executed with the approval of the Planning Commission. Further, the States have to carry out the centre-sponsored schemes for which the Centre gives grants and the conditions under which these are to be made. The Planning Commission has created an over-centralized planning system. No initiative is left to the states and the centrally formulated schemes have been inappropriately and unimaginatively imposed upon them.

11.4 Federalism with a Strong Central Government

The British colonial rule introduced federalism in phases, partly in response to the nationalist demand for decentralization of power and partly to implement the liberal principle of self-rule in colonies. Despite its organic roots in colonialism, federalism was also an outcome of the growing democratization in India, which theGandhi-led nationalist movement facilitated. In short, the legacy ofcolonialism, partition, and the vision of nation building all contrivedto create a centralized federation that hardly corresponds withits classical form. Two major constitutional inputs from the colonialpast seem to be critical in the evolution of federalism in India. First,the 1918 Montague-Chelmsford Report on constitutional reformsand later the 1929 Simon Commission Report strongly argued fordecentralization of authorities among the constituent provinces asperhaps the best administrative device in politically-fragmented and strife-ridden India. For B.R. Ambedkar, the choice was categoricalsince: "the draft constitution is a Federal Constitution in as much as it establishes / Dual Polity [with] the Union at the centre and the States at the periphery, each being assigned with sovereign powers to be exercised in the field assigned to them respectively by the Constitution. The States in our Constitution are in no way dependentupon the Centre for their legislative and executive authority.[T]he Centre and the States are co-equal in this matter. [I]t is thereforewrong to say that the States have been placed under the Centre".

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. Moreover, the decisionof the Muslim majority provinces of British India to constitutethemselves into Pakistan aroused the apprehension in the mindsof the nationalist leadership in India that they might have to facefurther attempts at secession from a future Indian union. However,the very apprehensions that produced a desire for stronger centralauthority also led to a counter-tendency in the form of demandsfrom several states for greater autonomy.Thus, the Union of India in 1947 began with a major asymmetry between British India and the princely states and even among the latter, the terms of accession differed depending on the bargaining strength. In almost all cases, the princely states surrendered whatever notional sovereignty they had to the new country of India, in exchange for a guaranteed revenue stream: their "privy purses". The nature of this bargain was clear - security and money in exchange for giving up authority or residual control rights.

Article 3 of the Constitution vests the Parliament with powers to constitute new states by separating territories from the existing ones, alter their boundaries, and change their names. The only requirement for this is that the Bill for the purpose will have to be placed in the Parliament on the recommendation of the President and after it has been referred to the relevant State legislature for ascertaining their views (their approval is not necessary).

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: "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.

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".

The adoption of market economy heralded a new era in which states came to occupy a strategic position in India's market-led economy. The Centre has even gone to the extent of encouraging the states to negotiate loans/foreign direct investments (FDIs) with overseas banks/institutions directly since the 1990s.The introduction of New Economic Policy (NEP) in 1991 has, indeed, led to a paradigm shift in Centre–state relations. The dominance of the Centre in economic policy decision-making witnessed significant decline.Economic liberalisation dismantled the role of the central government as the gatekeeper of the license-permit raj. After liberalisation in 1991, states stepped into the breach, taking on a more central role in economic regulation and in competing with each other in the liberalised economy. Planning Commission, given its role as a centralising force and not considered as useful for the market economy, has been replaced by a new institution called National Institute of Transforming India (NITI) Aayog, with a reduced regular role in economic decisions of the governments.

With the states' engagement in para-diplomacy, foreign economic policy no longer remained a central preserve.Economic globalisation and regionalization have made it possible for states of India to interact with their respective investors in foreign countries in a de facto sense if not in a de jure sense. Regionalization of political parties and coalition rule at the Centre do not adequately explain sub-national para-diplomacy. Earlier in the pre-liberalisation period there existed two routes, that is, the partisan route and bureaucratic route to engage in par diplomatic activities. States so far have adopted a host of instruments which fall under para-diplomacy.Public relations exercises have become an important driving force for attracting foreign FDIs. Media has become an important tool to showcase the achievements of states. Chief Ministers use media to advertise their industrial policies and achievements and also compare themselves with their competitor states. Increasingly, there is a realisation among foreign investors that the states in India have come to occupy an independent role in the making of foreign economic policies suited to their own needs and that the old method of approaching the central government to pursue trade relations at the state level cannot be useful. Nevertheless, paradiplomacy presents challenges too. It is often argued that states lack the skills to exercise responsible foreign policy, especially in the political sphere, given the fact that states do not have trained diplomats.

One of the major advantages of federalism is that 'it offers to the constituents to operate in a large market'. The economic benefits from competition and a free flow of goods and factors of production over a large area are so enticing that many countries, in spite of their reluctance to surrender their sovereignty, have come. The Punchhi Commission on Centre–states relations recommended the creation of a common market.Our founding fathers of the constitution have recognised the great potential of a large common market and hence devoted one full part of the constitution (Part XIII). to trade and commerce within the country with a clear mandate in its opening article (Article 301): '....trade, commerce and intercourse throughout the territory of India shall be free'. The introduction of the GST in 2017 took India another step closer to a model of internal competition within a common market by dismantling inter-state taxes on goods and services. The GST introduced standard rates of tax on goods and services (within six bands) across India.The Centre has been successful in introduction of proposed Goods and Services Tax (GST) aimed at removing restrictions on trade and commerce across India. Kapur (2014) has stated that 'impact of GST can be social and political also'.He argues: Importantly over the long time its most beneficial impact will be to leverage the large common market that is India. GST that finally came

into effect in the states in 2017 can be considered as a major milestone in Centre–state relations and a step towards a gradual move to forge a common market.

Kelkar (2010) has discussed a host of new emerging issues and challenges in the realm of fiscal federalism. Given the spurt in discovery of offshore reserves of hydrocarbons and given the huge rents from such vast resources, which so far have remained under the preserve of the Centre, they now need to be shared. Apart from resource federalism, green federalism is another big challenge for our fiscal federalism.Our existing intergovernmental transfer system does not adequately recognise environmental externalities. For example, states with large forests are seeking compensation for the environmental services they provide to the entire federation.

Summary

To conclude, we examined India's political dynamics through the conceptualprisms of a combination of parliamentary and federal institutionalimperatives. What has emerged from our analysis is that, though the 1950constitution continues to be a predominantly parliamentary one with subsidiaryfederal features, the political system in its actual working has beenbecoming more federal than a mere reading of the constitutional text mayimply. There is also a growing pressure for a greater federalization of thesystem by constitutional amendments. In this concluding section, we intendto argue that we may indeed go further and see the ongoing politicalferment in terms of the conceptual polarities of majoritarianism versusconsensus models of democratic politics.

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. In a federal system of government there is a need for clear cut division of power between the Union and States. This also requires a written and rigid constitution and an independent judiciary to decide disputes between the Union and the States. Though the Indian Constitutionhas all such features of a federal state, it is indeed difficult to put the Indian Constitution inthe category of true federations.

The Constitution's federal scheme has been a matter of debate since its founding. KC Whearefamously characterised the scheme as 'quasi-federal' and others like CH Alexandrowicz raised thequestion of whether Indian should in fact be called a federation at all. Such notions of federalism,largely focused on autonomous units coming together, became outdated, however, after World War II.There emerged a far more diverse understanding of how regional units might be granted a degree ofautonomy. The Indian federal model emerged out of, and has been sustained by, an understanding thatonly a strong Union can keep the country together and is necessary in the conditions in which theConstitution is operating. There has also been a belief that the way in which regional autonomy isprovided under the Indian scheme affords certainflexibility, and is able to thereby avoid therigidness to which federal models are often vulnerable.

The framers of the Constitution have incorporated certain non federal features in it suchas single citizenship, single judiciary, a strong centre, appointment of the Governor by thePresident, unequal of representation in the Rajya Sabha and so on. All these indicate a tilttowards strong centre. The states have to work in close co-operation with the centre. Theconstitution is federal in form but unitary in spirit. The study of Center-State relationship inlegislative, administrative and financial spheres also clearly shows that the Centre is strongeras compared to the states. The Centre has been assigned a dominant role which becamenecessary keeping in view the dangers to the unity and integrity of the nation. Therefore,there are provisions for a co- operative federalism.The working of the Indian Constitution over the year indicates that relations between thecenter and the States have not remained very co-ordinal. The states have started demandingmore autonomy. Various commissions have been appointed by the Government of India toreview the centre- state relations. The Sarkaria Commission examined the problem andrecommended changes in the area of federal, legislative, administrative and financial relations.

Keywords

Assimilation: The process by which minority groups adopt characteristics of larger groups, including language, religion, beliefs and identity. It can be either voluntary or coerced.

Autonomous region: A region having certain independent governing powers.

Autonomy: The condition of being autonomous; self-government or the right of self-government. A self-governing (to a certain extent) community.

Bicameral: Having two branches, chambers, or houses, as a legislative body.
Confederation: A group of nations or states, or a government encompassing several states or political divisions, in which the component states retain considerable independence. The members of a confederation often delegate only a few powers to the central authority.

Devolution: A process by which administrative, executive, legislative and fiscal powers are given to constituent units. Devolution differs from federalism in that the devolved powers may be repealed, that is taken back to the centre by the central government by ordinary legislation.

Federal Government: The central government of a federal state. A federal government may be named in different ways such as national government in South Africa, Commonwealth government in Australia, Union government in India, and federal government in the United States of America.

Federalism: Federalism refers to a broad category of political systems in which, by contract with the single central source of political and legal authority in unitary systems, there are two or more constitutionally established orders of government, each directly elected, and each order having some autonomy from the other in terms of the powers assigned to it. The system combines elements of shared rule (collaborative partnership) through a common government and regional self-rule (constituent unit autonomy) for the governments of the constituent units.

Power-sharing: This term is used to describe a system of governance in which all or some groups of society, usually defined along territorial, ethnic, racial, linguistic or religious lines, are guaranteed a permanent share of power. Power-sharing arrangements include guaranteed political representation in public institutions, protection of minority rights or group rights, federalism or consociationalism. It also implies sharing of power by various political parties in a parliamentary system.

Union: The term is used to describe the association of nation states such as the European Union; it also refers to unitary governments, such as the United Kingdom, and to federations, such as the Union of India. Thus, the term can refer to a federation as a whole, or to the national order of governance; in the case of India, Union is the official term for the federation and its central government.

Self Assessment

1. How many levels of government does a federation usually have?

A. 2
B. 3
C. 4
D. 1

2. Different tiers of government govern the same citizens, but each tier has its own …….. in specific matters.

A. Administration
B. Jurisdiction
C. Execution
D. Policies

3. What is meant by residuary subjects?

A. Subjects under union list
B. Subjects under state list
C. Subject under both state and union list
D. Subjects which are not under any list

4. Federal power sharing in India needs another tier of government below that of the State governments, it is called……..
A. State offices
B. District government
C. Local government
D. Tehsils

5. If there is a clash between the laws made by the state and centre on a subject in the concurrent list:
A. The central law prevails
B. The state law prevails
C. The Supreme Court has to intervene to decide
D. Both the laws prevail in their respective jurisdiction

6. The Constitution of India has:
A. Divides power between centre and state into two lists
B. Divides power between centre and state into three lists
C. Listed the powers of the state and left the undefined powers to the state
D. Specified the powers of the state and left the residuary powers with the state

7. The Constitution of India is federal in character because:
A. The Head of the State (the President) is elected by an electoral college consisting of the elected members of both the Houses of Parliament and the elected members of the Legislative Assemblies of the States.
B. The Governors of States are appointed by the President and they hold office during the pleasure of the President.
C. There is distribution of powers between the Union and the States.
D. The amendment of the Constitution can be made only by following the procedure laid downin the Constitution and in some cases the amendment requires ratification by Legislatures ofthe States.

8. In the Constitution of India, the term 'Federal':
A. Figures in the Preamble
B. Figures in Part III of the Constitution
C. Figures in Article 368
D. Does not figure anywhere

9. When can the Parliament legislate on a subject in the state list?
A. If the Parliament passes a resolution to that effect in the national interest.
B. If the Supreme Court grants necessary authority to the Parliament.
C. If the Rajya Sabha passes a resolution by two-thirds majority declaring that the subject in thestate list under consideration is of national importance.
D. If the President issues an ordinance transferring the subject from the state list to the union orthe concurrent lists.

10. The best form of federalism suited for countries like India is:

A. Centralised federalism
B. Bargaining federalism
C. Cooperative federalism
D. Conflicting federalism

11. What is the implication of the Union Government giving 'Special Status' to a State?
A. Subsequently large percentage of the Central assistance will be grants-in-aid
B. Current account budgetary deficit will be bridged by the Union Government
C. The extent of loan as a percentage of total assistance will be high
D. The Union Government meets entire expenditure of the State during the period of 'Special Status'

12. Who, among the following, can establish additional courts for better administration of any existinglaw with respect to a matter contained in the Union List?
A. Parliament by law
B. Parliament with the consent of states
C. Union Government by resolution
D. Supreme Court of India

13. If any directions are issued by the Union Government to a State and they have not been complied with, then which one of the following statements is correct?
A. It shall be presumed that the constitutional machinery in the State had failed as per Article 365 of the Constitution
B. It shall be presumed that the State had law and order problem and action under Article 365 is required
C. The Union Government can appoint advisers to help the Governor for performing his functions
D. The Parliament may make laws for that State

14. Which one of the following statements is not correct?
A. Parliament has exclusive power to make law on any matter in the Union List.
B. Parliament and State Legislatures both have power to make law on any matter in the Concurrent List.
C. In certain exceptional circumstances, State Legislatures can make law on a subject given in the Union List.
D. Parliament can make law on State subjects in certain circumstances.

15. Who among the following said, "There can be no doubt that the standard of administration dependsupon the caliber of civil servants who are appointed to these strategic posts"?
A. Jawaharlal Nehru
B. Dr. B.R. Ambedkar
C. Sardar Vallabhbhai Patel
D. Warren Hastings

Answers for Self Assessment

1.	A	2.	B	3.	D	4.	C	5.	A
6.	B	7.	C	8.	D	9.	C	10.	C
11.	A	12.	A	13.	A	14.	C	15.	B

Review Question

1) Define Federalism? Definitions of federalism.
2) Illustrate some key elements of the Indian Constitution that give greater power to the central government than the State government.
3) Identify the salient federal features of the Indian Constitution?
4) Describe the unitary features of the Constitution of India?
5) Write a detailed note on the legislative relations between the center and the states?
6) Write an essay on the financial relations between the center and states?
7) Explain that the Indian Constitution is federal in form but unitary in spirit?
8) What are the demands raised by States in their quest for greater autonomy?
9) Should some States be governed by special provisions?
10) Does this create resentment among other States? Does this help in forging greater unity among the regions of the country?
11) What is the difference between autonomy and secession?
12) Do you think that there is a need formentioning residuary powersseparately? Why?

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Unit 12: Federalism and Its Working

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- analyse the demand for state autonomy.
- describe the demands for redefine the Centre-State relations.
- analyse the evolution of the reorganisation of states in India.
- explain what leads to the rise of demands for new states?

Introduction

The concept of the state occupies a central place in the study of politics. State is also associated with the most authoritative and dominant institutional concentration of power found within nation.It encompasses institutions whose purposes and actions have a prestigious character, embodying a national commitment to a substantive notion of the public interest.The commonly accepted features of a federal constitution are:
(i) Existence of two levels ofgovernment: a general government for the whole country and two or more regional governments fordifferent regions within that country;
(2) Distribution of competence or powers—legislative,executive, judicial, and financial—between the general and the regional governments;
(3) Supremacyof the constitution—that is, the foregoing arrangements are not only incorporated in the constitutionbut they are also beyond the reach of either government to the extent that neither of them canunilaterally change nor breach them;
(4) Dispute resolution mechanism for determining thecompetence of the two governments for exercising any power or for performing any function. We mayexamine the federal scheme in the Constitution of India on the above parameters (Sing, 2016).
There emerged a far more diverse understanding of how regional units might be granted a degree ofautonomy. The Indian federal model emerged out of, and has been sustained by, an understanding thatonly a strong Union can keep the country together and is necessary in the conditions in which theConstitution is operating. There has also been a belief that the way in which regional autonomy isprovided under the Indian scheme affords certain flexibility, and is able to thereby avoid therigidness to which federal models are often vulnerable.

12.1 State Autonomy

The autonomy of the state and its specific relationship to society was a central theme in the 19th and 20th century classical sociology. From the writing of Thomas Hobbes in 1 7th century to Max Weber in 1 9th century, it was observed that they devoted themselves to issues surrounding what Karl Polanyi later called the 'great transformation'. According to Weber, a modern state exists

where a political community possesses the following characteristics : (1) An administrative and legal order that is subject to change by legislation (2) An administrative apparatus that conducts official business in accordance with legislative regulation (3) Binding authority over all persons - who usually obtain their citizenship by birth and over most actions taking place in the area if coercion is either permitted or prescribed by legally constituted government.

In a federal constitutional context, state autonomy can be defined as freedom of the federating units to determine their actions on the constitutionally allotted spheres for which they are responsible to the electorate. Thus autonomy does not mean independence or sovereignty of the state. There was not much controversy over state autonomy during the Nehru era because the congress was in power not only at the centre but also at the states. During the Nehru period, state and central politics were largely autonomous, though the central leadership of the Congress known as the 'high command'. And even often played arbitrating and mediating roles between competing factions in the state congress parties. Moreover, under Nehru, a strong central government coexisted with strong states and powerful state leaders in a mutual bargaining situation in which ultimate authority existed in Delhi. Nehru and his cabinet also exercised firm control over both the civilian and military. Nehru articulated a clear set of ideological and policy goals, which included a commitment through state-directed planning and non-alignment in international affairs. The differences or conflicts between the centre and the states had always been resolved at the party level. Added to it was the fact that during the Nehru-Shastri period (1950-1966) the national and state governments were strong. The level of political mobilisation inIndian State during 1950s and 1960s were relatively low and elite politics tended to accommodateintra-elite struggles. It is also important to recognise however that political struggle in this early stage primarily involved a relatively small group of elite, especially nationalists and other wealthy urban and rural elites.

Till 1967, when the congress party was ruling both in the centre and almost all the states, the relation between the centre and states by and large was smooth and there were only a few tensions. If at all there were some differences between the centre and the states, they were resolved at the intra governmental level. In 1967 elections, theCongress party was defeated in nine states and its position at the Centrebecame weak. This changed political scenario heralded a new era in theCentre-state relations. The non-Congress Governments in the states opposedthe increasing centralisation and intervention of the Central government.They raised the issue of state autonomy and demanded more powers andfinancial resources to the states. This caused tensions and conflicts in Centre-state relations.They wanted greater independence of action. The states, which have been most vocal in criticizing the growing power of the centre, have put forward the demand for greater autonomy included West Bengal, Punjab, Andhra Pradesh, Kerala and Jammu and Kashmir also joined this category. These states demanded an overall review of the Centre-state relations. Ever since the independence many regional political parties have emerged in India and gained significant influence in some regions. The growth and dominance of regional and non congress parties is almost like a pincer movement. From the northwest, and the east, the northeast, the south and the southeast they seem to be advancing on a heartland, which is still the domain of the congress (I). These parties do not go against national integration. First of all, we have to consider why regional parties have emerged. The constitution provides for safeguarding small nationalities, it provides for the balanced social, cultural and economic development of different areas. But this has not been the policy of the central government so far and that is why we find a Telugu Desam in Andhra Pradesh, DMK, AIADMK in Tamil Nadu, National Conference in Jammu and Kashmir. They have come up because their problems have not been fulfilled. Regional parties take care of these problems and in the process help strengthen the country. Because of this reason more and more state based parties are coming up in various regions, notwithstanding the congress, claim that the so-called regional parties will harm national unity and integrity.

Consequently, the persistence of instability since the 1970s, has now shown that it is indeed a larger problem of political crisis and various ideas have been developed by different political scientists to explain its exact nature. The Neo-Liberal modernists like, Rajni Kothari(1988), Atul Kohli(1 990), Frankel(1990), Rudolph(1987), focus on the institutions and processes as the key to understanding the state and political power in India. The Neo-Marxist like SudiptaKaviraj(1997), AchaniVinaik(1990) , Pranab Bardhan(1984) and ParthaChattarjee interpreted the Indian state in the line of orthodox Marxist, Gramscian and cultural terms. They assert that it was the exploiting classes which dominated the independence movement. They also analyse the state as a site over which several dominant classes try to work out coalitional arrangements in order to preserve their dominance as a whole. That means, nature and autonomy thesis of the Indian state can be described in terms of changing balances in the ruling class coalition.

Demands for Redefine the Centre-State Relations

The issues in Centre-State relations have been under consideration sincethe mid-1960s. In this direction, the following developments have takenplace:

Rajamannar Committee

In 1969, the Tamil Nadu Government (DMK) appointed a three-membercommittee under the chairmanship of Dr P V Rajamannar to examine the entire question of Centre–state relations and to suggest amendments to the Constitution so as to secure utmost autonomy to the states.The committeesubmitted its report to the Tamil Nadu Government in 1971. The Committee identified the reasons for the prevailing unitary trends (tendencies of centralisation) in the country. They include: (i) certain provisions in the Constitution which confer special powers on the Centre; (ii) one-party rule both at the Centre and in the states; (iii) inadequacy of states' fiscal resources and consequent dependence on the Centre for financial assistance; and (iv) the institution of Central planning and the role of the Planning Commission.

The important recommendations of the committee are as follows: (i) An Inter-State Council should be set up immediately; (ii) Finance Commission should be made a permanent body; (iii) Planning Commission should be disbanded and its place should be taken by a statutory body; (iv) Articles 356,357 and 365 (dealing with President's Rule) should be totally omitted; (v)The provision that the state ministry holds office during the pleasure of thegovernor should be omitted; (vi) Certain subjects of the Union List and the Concurrent List should be transferred to the State List; (vii) the residuary powers should be allocated to the states; and (viii) All-India services (IAS, IPS and IFS) should be abolished. However, the Central government completely ignored the recommendations of the Rajamannar Committee.

Anandpur Sahib Resolution

In a convention held at Anandpur Sahib in Punjab in 1973, the Akali Dal adopted a resolution containing both political and religious objectives. The resolution, known as the Anandpur Sahib Resolution, urged that the Centre's jurisdiction be limited to defence, foreign affairs, communications, and money, and that the states retain all other powers. It declared that the Constitution should be made truly federal, with equal authority and representation for all states at the federal level.

West Bengal Memorandum

In 1977, the West Bengal government (headed by the Communists) issued and transmitted to the Central government a memorandum on Centre–state relations. The memorandum inter alia suggested the following:

(i) The word 'union' in the Constitution should be replaced by the word 'federal';

(ii) The Centre's jurisdiction should be limited to defence, foreign affairs, currency, communications, and economic coordination;

(iii) All other subjects, including the residuary, should be vested in the states;

(iv) Articles 356 and 357 (President's Rule) and 360 (financial emergency) should be repealed; and,

(v) State's consent should be made obligatory for formation of new states or reorganisation of existing states;

(vi) Of the total revenue raised by the Centre from all sources, 75 per cent should be allocated to the states;

(vii) Rajya Sabha should have equal powers with that of the Lok Sabha; and

(viii) There should be only Central and state services and the all-India services should be abolished.

The Central government did not accept the demands made in the memorandum.

Sarkaria Commission

The Central government established a three-member Commission on Centre–State Relations in 1983, which was chaired by former Supreme Court judge R S Sarkaria. The panel was given the task of examining and reviewing the functioning of existing agreements between the Centre and states in all domains and making recommendations for adjustments and measures. It was granted one year to finish its task at first, but the deadline was extended four times. The final report was turned

in October 1987, and the executive summary was made public in January 1988. The Commission was opposed to structural reforms and thought the present constitutional structures and institutional principles were mostly sound. It did, however, emphasise the need for functional and operational adjustments. Federalism is more of a functional arrangement for cooperative activity than a rigid institutional paradigm, according to the report. It flatly rejected the proposal for the Centre's powers to be curtailed, stating that a strong Centre is necessary to protect national unity and integrity, which are under threat from the body politic's fissiparous inclinations.

It did not, however, associate a strong centre with power concentration. Over-centralization causes high blood pressure in the centre and anemia in the periphery, according to the study. The Commission issued 247 proposals to enhance the relationship between the federal government and the states. The important recommendations are mentioned below:

1. Under Article 263, a permanent Inter-State Council named the Inter-Governmental Council shall be established.
2. Article 356 (President's Rule) should be used only in severe circumstances, as a last resort after all other options have failed.
3. The All-India Services institution should be strengthened, and more such services should be developed.
4. The residuary taxing powers should be retained by Parliament, while the other residuary powers should be transferred to the Concurrent List.
5. The grounds for the president's refusal to sign state bills should be reported to the state administration.
6. The National Development Council (NDC) should be called the National Economic and Development Council and reconstructed (NEDC).
7. The zonal councils should be reformed and revitalised in order to enhance the spirit of federalism.
8. Even without the approval of states, the Centre should be able to deploy its armed forces.It is, nonetheless, desirable that the states be consulted.
9. Before passing a law on a topic from the Concurrent List, the Centre should confer with the states.
10. The procedure for consulting the chief minister before appointing a state governor should be spelled out in the Constitution.
11. The net proceeds of the corporate tax may be made available to the states for sharing.
12. As long as the council of ministers has a majority in the assembly, the governor cannot remove it.
13. No commission of inquiry should be established against a state minister unless the Parliament requests it.
14. The Centre should not levy an income tax surcharge unless it is for a defined purpose and for a short length of time.
15. The current allocation of responsibilities between the Finance and Planning Commissions is acceptable and should be maintained.
16. Steps should be taken to ensure that the three language formula is implemented consistently and in its entirety.
17. Radio and television do not have autonomy, although their activities are decentralized.
18. The Rajya Sabha's role and the Centre's prerogative to reorganise the states remain unchanged.
19. The linguistic minorities commissioner should be activated.

The central government has implemented 180 of the Sarkaria Commission's recommendations (out of 247). The most significant is the Inter-State Council, which was established in 1990.

Punchhi Commission

The Government of India established the Second Commission on Centre-State Relations in April 2007 under the chairmanship of Madan Mohan Punchhi, former Chief Justice of India. It was necessary to investigate issues of Centre-State relations in light of the significant changes that have occurred in India's polity and economy since the Sarkaria Commission last looked into the subject over two decades ago. The terms of reference of the Commission were as follows:

1. The Commission was mandated to examine and review the functioning of existing arrangements between the Union and States under the Indian Constitution, as well as the healthy precedents that had been set, as well as various Court pronouncements on powers, functions, and responsibilities in all spheres, including legislative relations, administrative relations, governors' role, emergency provisions, financial relations, economic and social planning, and Panchayati Raj institutions.
2. In examining and reviewing the functioning of existing arrangements between the Union and States and making recommendations for changes and measures, the Commission was required to take into account social and economic developments over time, particularly in the last two decades, as well as the Constitution's scheme and framework. Such recommendations were also required to address the growing challenges of ensuring good governance in order to promote the welfare of the people while preserving the country's unity and integrity, as well as taking advantage of emerging opportunities for sustained and rapid economic growth in order to alleviate poverty.
3. The Commission was expected to pay special attention to, but not limit its mandate to, the following while analysing and providing recommendations on the above:
    a. The Centre's role, responsibility, and jurisdiction in relation to States during major and long-term outbreaks of communal violence, caste violence, or any other social conflict that results in sustained and escalated violence.
    b. The role, duty, and jurisdiction of the Centre in relation to States in the design and implementation of major projects such as river interconnections, which typically take 15–20 years to complete and rely heavily on State support.
    c. The Centre's duty, responsibility, and authority vis-à-vis States in supporting efficient devolution of powers and autonomy to Panchayati Raj Institutions and Local Bodies, including Autonomous Bodies, under the Constitution's sixth Schedule within a stipulated timeframe.
    d. The Centre's role, responsibility, and jurisdiction vis-à-vis States in supporting the concept and practise of district-level independent planning and budgeting.
    e. The Centre's role, accountability, and jurisdiction vis-à-vis States in tying various forms of Central support to the States' performance.
    f. The Centre's role, accountability, and jurisdiction in adopting positive discrimination measures and policies in favour of backward states. The impact of the Finance Commissions' recommendations on fiscal relations between the Centre and the States, particularly the States' increased reliance on devolution of money from the Centre.
    g. Following the implementation of the Value Added Tax regime, the necessity for and significance of different taxes on the production and sale of goods and services.
    h. The importance of liberalising inter-state commerce in order to create a unified and integrated domestic market, as well as State Governments' unwillingness to follow the relevant Sarkaria Commission's suggestion in Chapter XVIII of its report.

In April 2010, the Commission presented the government with its report. The Sarkaria Commission report, the National Commission to Review the Working of the Constitution (NCRWC) report, and the Second Administrative Reforms Commission report were all used extensively by the

Commission in completing the 1,456-page report in seven volumes. The Commission report, however, deviated from the Sarkaria Commission's recommendations in a number of areas.

The Commission came to the conclusion that 'cooperative federalism' will be the key to safeguarding India's unity, integrity, and social and economic progress in the future after thoroughly considering the issues highlighted in its Terms of Reference and associated factors in all their hues and tints. Cooperative federalism's ideals may thus have to serve as a practical guide for Indian polity and governance.

The Commission issued around 310 recommendations in all, covering a wide range of topics related to the functioning of Centre-state relations. The following are some of the most essential recommendations:

1. Before initiating legislation in Parliament on items in the Concurrent List, it is required to establish some broad agreement between the Union and states in order to ensure effective execution of the laws on List III subjects.
2. In subjects entrusted to the states, the Union should use utmost caution in establishing Parliamentary primacy.
3. The potential for increasing revenue from the taxes specified in article 268 should be reevaluated. This issue could be referred to the next Finance Commission, or an expert group could be formed to investigate the situation.
4. All fiscal laws should provide for an annual examination by an independent body, and the reports of these committees should be brought before both Houses of Parliament/state legislatures to increase accountability.Considerations outlined in the Finance Commission's Terms of Reference (ToR) should be equally distributed between the Centre and the states.
5. For stronger Centre-state relations, states need more freedom in terms of subjects on the State List and "transferred items" on the Concurrent List. The Union should only have concurrent or overlapping authority over those subjects that are absolutely necessary to establish policy uniformity in the national interest.
6. The Inter-state Council should continue to audit the management of matters involving concurrent or overlapping jurisdiction.
7. The six-month period prescribed in Article 201 for the State Legislature to act when a bill is returned by the President can be extended to the President's decision on whether to assent or withhold assent to a state bill reserved for his consideration.
8. To streamline the procedures, Parliament should pass a law on the subject of Entry 14 of List I (treaty making and implementation through Parliamentary legislation).
9. Given the federal system of legislative and executive authorities, the exercise of authority cannot be total or unchartered.
10. Financial obligations originating from treaties and agreements, as well as their implications for state finances, should be a permanent term of reference for Finance Commissions established from time to time.
11. 8. When selecting Governors, the Central Government should follow the Sarkaria Commission's rigorous guidelines, which were proposed in the report, to the letter and spirit:
    I. He should be a prominent figure in some field.
    II. He should be a person from outside the state.
    III. He should be a detached figure who is not too closely associated with the states' local politics.
    IV. He should not have played a significant role in politics in the recent past.
12. Governors should be appointed for a five-year term, and their removal should not be at the discretion of the federal government.

13. The procedure for impeachment of the President can be applied mutatis mutandis to the impeachment of Governors.
14. The Governor does not have broad discretionary authority to act against or without the advice of his Council of Ministers under Article 163.
15. In fact, the scope of his discretion is limited, and even within that scope, his actions should not be arbitrary or speculative. It must be a decision based on logic, fueled by good faith, and tempered by caution.
16. In respect of bills passed by the Legislative Assembly of a state, theGovernor should take the decision within six months whether to grantassent or to reserve it for consideration of the President.
17. On the question of Governor's role in appointment of Chief Minister inthe case of an hung assembly, it is necessary to lay down certain clearguidelines to be followed as Constitutional conventions. These guidelinesmay be as follows:
    I. The party or combination of parties which commands the widestsupport in the Legislative Assembly should be called upon to form theGovernment.
    II. If there is a pre-poll alliance or coalition, it should be treated as onepolitical party and if such coalition obtains a majority, the leader ofsuch coalition shall be called by the Governor to form theGovernment.
    III. In case no party or pre-poll coalition has a clear majority, theGovernor should select the Chief Minister in the order of preferenceindicated here.(a) The group of parties which had pre-poll alliance commandingthe largest number(b) The largest single party staking a claim to form the governmentwith the support of others(c) A post-electoral coalition with all partners joining thegovernment(d) A post-electoral alliance with some parties joining thegovernment and the remaining including independentssupporting the government from outside
18. The Zonal Councils should meet at least twice a year with an agendaproposed by states concerned to maximise co-ordination and promoteharmonisation of policies and action having inter-state ramification. TheSecretariat of a strengthened Inter-State Council can function as theSecretariat of the Zonal Councils as well.
19. New all-India services in sectors like health, education, engineering andjudiciary should be created.
20. Factors inhibiting the composition and functioning of the SecondChamber as a representative forum of states should be removed ormodified even if it requires amendment of the Constitutional provisions.In fact, Rajya Sabha offers immense potential to negotiate acceptablesolutions to the friction points which emerge between Centre and states infiscal, legislative and administrative relations.
21. A balance of power between states inter se is desirable and this is possibleby equality of representation in the Rajya Sabha. This requires amendmentof the relevant provisions to give equality of seats to states in the RajyaSabha, irrespective of their population size.
    The scope of devolution of powers to local bodies to act as institutions of
22. The current ceiling on profession tax should be completely done awaywith by a Constitutional amendment.
23. The Finance Commission and the Planning Commission should work together considerably more closely. The Finance Commission's and the Five-Year Plan's periods will be synchronised, which will greatly improve coordination.

24. 28. The Ministry of Finance's Finance Commission division should be transformed into a full-fledged department that serves as the permanent secretariat for the Finance Commissions.
25. In the current scenario, the Planning Commission plays a critical function. However, rather than micromanaging sectoral plans of the Central ministries and states, its role should be one of coordination.
26. When it comes to dismissing a Chief Minister, the Governor should always insist on the Chief Minister prove his majority on the House floor, and he should set a time limit for this.
27. If the Governor believes the Cabinet decision is driven by bias in the face of compelling evidence, the Governor should have the authority to sanction a state minister for prosecution against the advice of the Council of Ministers.
28. To make the Inter-State Council a credible, powerful, and fair vehicle for resolving interstate and Centre-state conflicts, appropriate revisions to Article 263 are required.
29. The Empowered Committee of State Finance Ministers proven to be a successful experiment in inter-state fiscal coordination. Similar models must be institutionalised in other sectors as well. A forum of Chief Ministers, chaired by one of the Chief Ministers on a rotating basis, may be considered in the same way, with the goal of coordinating policy in sectors such as energy, food, education, the environment, and health.

12.2 States Re-Organisation Act

India is a land rich in social and cultural diversity, but its linguistic diversity is even more perplexing. India is referred described as a "multitude of various countries" and "a entire universe in itself" due to its diversity. India's geographical location has made it a gathering ground for individuals of many racial and cultural backgrounds. As a result, there is a significant deal of diversity and variety in the country's spoken languages. Language is the key to inclusion. Recognizing the value that people have on their languages provides crucial insight into how to combat poverty and hunger. It's a significant step in moving away from failed "top-down" development paradigms and toward a participatory development model.

Dhar Commission and JVP Committee

The relationship between princely states and the rest of India is completely ad hoc. Various regions, particularly in South India, have called for state reorganisation based on linguistic criteria. As a result, the Government of India established the Linguistic Provinces Commission in June 1948, chaired by S K Dhar, to investigate the viability of this. In December 1948, the commission issued its findings, which proposed that states be reorganised based on administrative convenience rather than linguistic factors. This sparked widespread dissatisfaction, prompting the Congress to convene a new Linguistic Provinces Committee in December 1948 to re-examine the entire issue.

It was known as the JVP Committee because it included Jawaharlal Nehru, Vallahbhai Patel, and Pattabhi Sitaramayya. In April 1949, it issued a report in which it formally rejected language as a basis for governmental reorganisation.

However, the Indian government was obliged to create the first linguistic state, Andhra Pradesh, in October 1953, by detaching Telugu-speaking districts from the Madras state. This came after a lengthy period of popular unrest, culminating in the death of Potti Sriramulu, a prominent Congressman, following a 56-day hunger strike in support of the cause.

Fazl Ali Commission

The emergence of the state of Andhra Pradesh heightened the demand for linguistically-based states in other regions. This compelled the Indian government to form (in December 1953) a three-member States Reorganization Commission, chaired by Fazl Ali, to re-examine the entire issue. K M Panikkar and H N Kunzru were the other two members. It issued its report in September 1955, with widely approved language as the foundation for state re-organisation. It did, however, reject the premise of "one language, one state."

It was of the opinion that, in any redrawing of India's political subdivisions, the country's unity should be the first issue. It outlined four important criteria that can be considered in any state reorganisation design.:
(a) Preservation and strengthening of the unity and security of the country.
(b) Linguistic and cultural homogeneity.
(c) Financial, economic and administrative considerations.
(d) Planning and promotion of the welfare of the people in each state as wellas of the nation as a whole.
The commission suggested the abolition of the four-fold classification ofstates under the original Constitution and creation of 16 states and 3 centrallyadministered territories. The Government of India accepted theserecommendations with certain minor modifications. By the StatesReorganisation Act (1956) and the 7th Constitutional Amendment Act(1956), the distinction between Part-A and Part-B states was done away withand Part-C states were abolished. Some of them were merged with adjacentstates and some other were designated as union territories. As a result, 14states and 6 union territories were created on November 1, 1956.
The States Reorganisation Act of 1956 established the new state of Keralaby merging the Travancore - Cochin State with the Malabar District ofMadras state and Kasargode of South Canara (Dakshina Kannada). It mergedthe Telugu-speaking areas of Hyderabad state with the Andhra state to createthe Andhra Pradesh state. Further, it merged the Madya Bharat state, VindyaPradesh state and Bhopal state into the Madya Pradesh state. Similarly, itmerged the Saurashtra state and Kutch state into that of the Bombay state, theCoorg state into that of Mysore state; the Patiala and East Punjab StatesUnion (Pepsu) into that of Punjab state; and the Ajmer state into that ofRajastan state. Moreover, it created the new union territory of Laccadive,Minicoy and Amindivi Islands from the territory detached from the Madrasstate.

Summary

Reorganization gave states a political identity congruent with their culture and language. It brought state politics closer to the people and made it easier for traditional leaders and influential regional groups to capture control or at least exercise much influence over the use of power.It can be said that the demand of reorganisation of states has both pros and cons but the significant part of these movements is that they help in deepening the democratic system by emphasising on decentralization and minority representation. This also helps in narrowing down the gap between nationalism and regionalism. It is all because of its adaptation, acceptance and flexibility that Indian democracy became an extraordinary case study to understand the value of unity in diversity. In other words unequal development of regions, unequal access to political power and introduction of economic reforms became new premise for such demands.It can be argued that today the regions are not merely political, linguistic or cultural constructs but also possess economic connotation and denotation.

Keywords

Accession: The act of coming into the possession of a right, title, office, etc.
Accountability: A requirement to offer explanation for an action; responsibility for one's action (implies that there is someone to whom one is responsible).
Autonomy: The condition of being autonomous; self-government or the right of self-government. A self-governing (to a certain extent) community.
Authorities: Officials or bodies with official powers. A person or body of persons in whom authority is vested, for example a governmental agency.
Boundaries: Boundary, border, frontier share the sense of that which divides one entity or political unit from another. Boundary, in reference to a country, city, state, territory, or the like, most often designates a line on a map. Occasionally, it also refers to a physical feature that marks the agreed-upon line separating two political units.
Decentralization: A process of governance where constituent units exercise administrative, legislative and/or fiscal authority. The process is also defined in the transfer of authority from central government to lower levels of government in political, administrative and territorial hierarchy.
Governance: The act of governing; exercising power.
Judicial interpretation: The method by which courts establish the meaning of constitutional provisions or legislative acts.

Ratification: Making something valid by formally approving or confirming it: 'a referendum may ratify a constitution'; 'Parliament may ratify a treaty'.

Review Questions

1. What do you mean by autonomy?
2. Explain the characteristics and principles of autonomy?
3. What is the difference between autonomy and self-determination?
4. How is autonomy measured?
5. What is meant by state re-organisation?
6. Why and how state re-organisation commission was formed?
7. How a state is divided in India? Discuss.
8. Discuss the significance of Anandpur Sahab Resolution?
9. Explain Sarkaria Commission and its features?
10. Exploring the demands of new states in India?
11. How languages play an important role in demands of new states in India?
12. Write a note on separatism?

Self Assessment

1. ……..can be defined as freedom of the federating units to determine their actions on the constitutionally allotted spheres for which they are responsible to the electorate.

A. State Autonomy
B. Self-rule
C. Freedom
D. None of the Above

2. When can the Parliament legislate on a subject in the state list?

A. If the Parliament passes a resolution to that effect in the national interest.
B. If the Supreme Court grants necessary authority to the Parliament.
C. If the Rajya Sabha passes a resolution by two-thirds majority declaring that the subject in the state list under consideration is of national importance.
D. If the President issues an ordinance transferring the subject from the state list to the union orthe concurrent lists.

3. The quotation, "The Indian Constitution establishes, indeed, a system of government which is at the most quasi-federal, a unitary State with subsidiary federal features rather than the federal State with unitary features" is attributed to:

A. Jennings
B. G. Austin
C. K.C. Wheare
D. H.J. Laski

4. What is the implication of the Union Government giving 'Special Status' to a State?

A. Subsequently large percentage of the Central assistance will be grants-in-aid
B. Current account budgetary deficit will be bridged by the Union Government
C. The extent of loan as a percentage of total assistance will be high

D. The Union Government meets entire expenditure of the State during the period of 'SpecialStatus'

5. A law made by Parliament having extra-territorial operation shall:

A. Not be deemed invalid

B. Be deemed invalid

C. Be deemed ultravires

D. Be deemed unconstitutional

6. If any directions are issued by the Union Government to a State and they have not been compliedwith, then which one of the following statements is correct?

A. It shall be presumed that the constitutional machinery in the State had failed as per Article 365 of the Constitution.

B. It shall be presumed that the State had law and order problem and action under Article 365 is required

C. The Union Government can appoint advisers to help the Governor for performing his functions

D. The Parliament may make laws for that State

7. The idea of the Union giving directions to the States was adopted by the makers of the IndianConstitution from:

A. The Government of India Act, 1935

B. The US Constitution

C. The Soviet Constitution

D. The Australian Constitution

8. In case of inconsistency between laws made by Parliament and the laws made by the State Legislatures,which one of the following shall prevail?

A. The law made by Parliament before the law made by the legislature of the State

B. The law made by Parliament after the law made by the legislature of the State

C. The law made by Parliament before or after the law made by the legislature of the State

D. The law made by the legislature of the State

9. Consider the following statements:

A. Sarkaria Commission recommended that the Union Government may persuade the State Governments for constitution of an All-India Service for education.

B. All-India Services are included in the Concurrent List of the Constitution of India. Which of the statements given above is/are correct?

A. Only A

B. Only B

C. Both A and B

D. Neither A nor B

10. In which year, the Government of India had set up the Sarkaria Commission on Centre-State relations?

A. 1987

B. 1989

C. 1983
D. 2001

11. Which one of the following is not correct?
A. The executive power of every State shall be so exercised as to ensure compliance with the laws made by the Parliament
B. Full faith and credit shall be given throughout the territory of India to public acts, records andjudicial proceedings of the Union and of every State.
C. The Governor of a State may entrust to the Government of India any matter to which the executive power of the State extends.
D. The executive power of the Union extends to the giving of directions to a state to protect therailways within the State.

12. Which one of the following statements is not correct?
A. No law made by a State legislature shall be treated as unconstitutional if it incidentally touchesupon the jurisdiction provided for under List I or List III.
B. The legislature of a State cannot make a law to regulate "Water".
C. The law made by Parliament under Article 357 for a State continues its application after theexpiry of President's rule.
D. Parliament has full power to make law on a residuary matter.

13. In which year, Goa was declared as India's 25th state?
A. 1999
B. 1988
C. 1987
D. 2011

14. In case of declaration of financial emergency:
A. All the State Governments will be dissolved and management of economy will be taken overby the Union Government
B. All Money Bills of the states will be considered and passed only by the Parliament
C. All the State Assemblies will be put under suspended animation and laws on the State List will be enacted by the Parliament
D. The President may give such directions to the states as may be deemed necessary for economic recovery and salaries of officials may be temporarily reduced

15. When did Dhar Commission come into existence?
A. 1948
B. 2001
C. 1977
D. 2014

16. When did Fazal Ali Commission come into being?
A. December 1954
B. January 2001
C. September 1999
D. August 1953

Answers for Self Assessment

1.	A	2.	C	3.	C	4.	A	5.	A
6.	A	7.	A	8.	C	9.	A	10.	C
11.	C	12.	B	13.	C	14.	A	15.	A
16.	D								

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Unit 13: The Judiciary

CONTENTS

Objectives

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. After studying this chapter, you would be able to:

- understand the meaning of independence of judiciary.
- describe the functions of the Indian judiciary.
- analyse the importance of independent Judiciary in interpreting the Constitution.
- explain the composition and functioning of the Supreme Court.
- analyse the powers and jurisdiction of the Supreme Court.

Introduction

Justice is the basic human law for any civilized society to ideally function. Upholding the law is, in fact, the first essential, the first guidepost. Neither a nation nor a state can survive unless it provides an efficient justice delivery system capable of alleviating the concerns of the people within reasonable time frame. The judiciary has assumed only such roles as would enable it to fulfill the ideals of the constitution. The role of Courts is not just to interpret laws, but to safeguard the rights that legitimately belong to the people. It must be independent, efficient and active if democracy has to have a meaning for the people of India.

In a modern nation state, judiciary plays an important role of interpretingand applying the law. In a country with a written constitution, the judiciaryupholds the supremacy of constitutional provisions. In India, withinthe framework of supremacy of the constitution, parliamentary democracyand a quasi-federal set-up, the judicial system is unitary in nature with thehighest court being the Supreme Court of India.From the very beginning of national movement, in the late 19th century,there was a demand for independent Supreme Court with considerablejurisdiction, which was to be an important ingredient of the machinery ofstate of independent India. This demand continued with Hari Singh Gaur'sattempt to establish a Supreme Court in Governor's Councils in the 1920s.This demand found its expression in the Nehru Report of 1928, which proposedimportant additions to the existing judicial system.The White Paper of 1933 proposed a Supreme Court parallel to that ofthe Federal Court which was to hear appeals from provincial courts, providedthat appeal did not lie in the Federal Court. This proposal was rejectedby the Joint Committee and subsequently abandoned by the colonial rulers.

Under the Act of 1935, an All India Court, named, the Federal Court was setup. It consisted of one chief justice and a number of other judges as HerMajesty's government deem necessary. From 1937-50, constitutional questionswere dealt with by the Federal Court while ordinary civil and criminalappeals went to the Privy Council

When you read the Constitution of India, you will come to know 'that it is characterised as a federal Constitution. By federal Constitution we mean a written Constitution which provides the division of powers between Central and the State Governments'. It is the supreme law of the land. But the language of the Constitution is very complex as its meaning is likely to be interpreted by different authorities at different times in different manners. Like several other institutions under the Constitution, 'thejudicial system of independent India appears to be a compromisebetween the two distinct perspectives of judiciary under the parliamentaryand federal systems of government. under the classical notion of the federal systems like America, the Supreme Court should have been accorded some sort of supremacy amongst the three organs of the government owing to its position as the protector of the Constitution and the people's rights'. On the other hand, the imperatives of the parliamentary system as in Britain require the highest court to be in a subservient position to the Parliament since the latter is construed to be the sovereign authority in the political system of the country. Now, since the Indian political system was designed to be a halfway mark of both the federal as well as the parliamentary systems, the judicial system of India was bound to be an amalgam of certain features prevalent in both the countries.

Hence, it is natural that dispute might arise between the Centre and its constituent units (primarily the States) regarding their respective powers. '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. 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.

The Constitution of India has provided a 'single integrated and unified judicial system for the whole country'. It means that for the entire country, there is one unified judicial system, one hierarchy of courts with the Supreme Court as the highest or the apex court. It is also the highest and the final interpreter of the Constitution and the general law of the land. The Unitary Judicial System "seems to have been accepted with the least questioning". The Supreme Court was to have a special, countrywide responsibility for the protection of individual rights. Dr B. R. Ambedkar was perhaps the greatest apostle in the Assembly of what he described as 'one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the Civil, or the Criminal law, essential to maintain the unity of the country'. With the Indian independence in 1947, the judicial system had to be modified to suit the changed conditions. The jurisdiction of the Privy Council over the Indian appeals came to an end with the establishment of the Supreme Court of India on January 26, 1950. Presently, 'India has a fairly advanced judicial system having a well defined hierarchy of Courts with the Supreme Court at the apex and a number of subordinate Courts below it'. The laws are mostly codified having a uniform application throughout the country. Below the Supreme Court are the High Courts of different States and under each High Court there are 'subordinate courts', i.e., courts subordinate to and under the control of the High Courts.

13.1 Supreme Court

Within the framework of a unified integrated judicial system, the Constitution provides for the establishment of the courts at the Central, states, and the district levels, with the Supreme Court standing at the head of the system. A successor of the Federal Court of the pre-Independence times, the Supreme Court was inaugurated in 1950 with Chief Justice H.J. Kania and seven other judges. The Supreme Court of India was inaugurated on January 28, 1950. Itsucceeded the Federal Court of

India, established under the Government ofIndia Act of 1935. However, the jurisdiction of the Supreme Court is greaterthan that of its predecessor. This is because, the Supreme Court has replacedthe British Privy Council as the highest court of appeal.Articles 124 to 147 in Part V of the Constitution deal with the organisation,independence, jurisdiction, powers, procedures and so on of the SupremeCourt. The Parliament is also authorised to regulate them.

Organisation of Supreme Court

The Supreme Court is the apex Court at national level which was established on 28th January 1950, under Article 124(1) of the Constitution of India. In this context, Article 124 (1) reads as "there shall be a Supreme Court of India consisting of the Chief Justice of India and until Parliament, by law, prescribe a large number of not more than 7 judges". Though by 2009 Amendment, the number of judges in Supreme Court was raised to 31 including the Chief Justice. This followed the enactment of the Supreme Court(Number of Judges) Amendment Act, 2008. Originally, the strength of theSupreme Court was fixed at eight (one chief justice and seven other judges).The Parliament has increased this number of other judges progressively to tenin 1956, to thirteen in 1960, to seventeen in 1977 and to twenty-five in 1986.

All proceedings in the Supreme Court are conducted in English. The seat of Supreme Court is in Delhi and the proceedings are open to the public.

Appointment of Judges

Under article 124(2), Supreme Court judges are to be appointed by the President "after consultation with such judges of the Supreme Court and of the High Courts as the President may deem necessary". The provision in the Article says that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted. It is obligatory for the Government in which it has to consult the Chief Justice and other judges. The consultation with thechief justice is obligatory in the case of appointment of a judge other thanChief justice. Significantly, the appointment is not required to be made in consultation but only 'after consultation', and the opinion should be in written. In actual practice, after receiving the opinion of the Chief Justice, the Cabinet deliberates on the matter and advises the President in regard to the persons to be appointed. The President acts on the advice. The Chief Justice has to consult four senior most Judges of the Supreme Court and if two of the four disagree on some name, it can not be recommended. In fact, decisions are to be taken by consensus where the Chief Justice and at least three of the four Judges agree.

The 99th Constitutional Amendment Act of 2014 and the National JudicialAppointments Commission Act of 2014 have replaced the collegiums systemof appointing judges to the Supreme Court and High Courts with a new bodycalled the National Judicial Appointments Commission (NJAC). However, in2015, the Supreme Court has declared both the 99th ConstitutionalAmendment as well as the NJAC Act as unconstitutional and void.Consequently, the earlier collegiums system became operative again. Thisverdict was delivered by the Supreme Court in the Fourth Judges case(2015). The court opined that the new system (i.e., NJAC) would affect theindependence of the judiciary.

Appointment of Chief Justice

From 1950 to 1973, the practice has been to appoint the seniormost judge of the Supreme Court as the chief justice of India. This established convention was violated in 1973 when A N Ray was appointed as the Chief Justice of India by superseding three senior judges.Again in 1977, M U Beg was appointed as the chief justice of India by superseding the then senior-most judge.This discretion of the government was curtailed by the Supreme Court in the Second Judges Case (1993), in which the Supreme Court ruled that the seniormost judge of the Supreme Court should alone be appointed to the office of the chief justice of India.

Qualifications of Judges

A person to be appointed as a judge of theSupreme Court should have the following qualifications:

1. He should be a citizen of India.
2. (a) He should have been a judge of a High Court (or high courts insuccession) for five years; or

   (b) He should have been an advocate of aHigh Court (or High Courts in succession) for ten years; or

(c) He shouldbe a distinguished jurist in the opinion of the president.

From the above, it is clear that the Constitution has not prescribed a minimum age for appointment as a judge of the Supreme Court. Interestingly, a non-practising or an academic lawyer may also be appointed as Judge of the Supreme Court, if he/she is, in the opinion of the President, a distinguished Jurist. But in India so far, no non practising lawyer has been appointed as a Judge of the Supreme Court. Every person appointed as a judge of the Supreme Court, before he/she enters upon his office, takes an oath before the President or some other person appointed by him in the form prescribed in III Scheduled of the Constitution.

Oath or Affirmation

A person appointed as a judge of the SupremeCourt, beforeentering upon his Office, has to make and subscribe an oath or affirmation before the President, or some person appointed by him for this purpose. In his oath, a judge of the Supreme Court swears:

1. to bear true faith and allegiance to the Constitution of India;
2. to uphold the sovereignty and integrity of India;
3. to duly and faithfully and to the best of his ability, knowledge andjudgement perform the duties of the Office without fear or favour,affection or ill-will; and
4. to uphold the Constitution and the laws.

Tenure of Judges

The Constitution has not fixed the tenure of a judge ofthe Supreme Court. However, it makes the following three provisions in thisregard:

1. He holds office until he attains the age of 65 years. Any questionregarding his age is to be determined by such authority and in suchmanner as provided by Parliament.
2. He can resign his office by writing to the president.
3. He can be removed from his office by the President on the recommendation of the Parliament.

Removal of Judges

A judge may be removed from his/her office only by an order of the President passed after an address by each House of Parliament for his removal on the ground of 'proved misbehavior or incapacity', supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members present and voting in the same session. The procedure of the presentation of an address for investigation and proof of misbehavior or incapacity of a Judge will be determined by Parliament (Article 124 (5)).The Supreme Court has held that a Judge of the Supreme Court or High Court can be prosecuted and convicted for criminal misconduct. The expression 'misbehavior' in article 124 (5) includes criminal misconduct as defined in the Prevention of Corruption Act.

It is interesting to know that no judge of the Supreme Court has been impeached so far. The first and the only case of impeachment is that of Justice V Ramaswami of the Supreme Court (1991-1993). Though the enquiry Committee found him guilty of misbehaviour, he could not be removed as the impeachment motion was defeated in the Lok Sabha. The Congress Party abstained from voting.

Salaries and Allowances

Judges of the Supreme Court are to be paid such salaries as may be determined by Parliament by law and until so determined salaries are laid down in the Second Schedule (Article 125). In addition to this, they are also allowed sumptuary allowances, rent free furnished residences, telephone, water, electricity, medical and many other facilities.

Seat of the Supreme Court

The Constitution provides that Supreme Court shall sit in Delhi. However, the Chief Justice of India may with the previous approval of President be able to sit in such other place or places as he/she may decide (Article 130). At present, the Supreme Court is functioning from Delhi.

13.2 Jurisdiction and Powers of Supreme Court

The Constitution has conferred a very extensive jurisdiction and vast powerson the Supreme Court. It is not only a Federal Court like the American Supreme Court but also a final court of appeal like the British House of Lords (the Upper House of the British Parliament). It is also the final interpreter and guardian of the Constitution and guarantor of the fundamental rights of the citizens. Further, it has advisory and supervisory powers. Therefore, AlladiKrishnaswamy Ayyar, a member of the Drafting Committee of the Constitution, rightly remarked: "The Supreme Court of India has more powers than any other Supreme Court in any part of the world". Article 129 provides that the Supreme Court shall be a Court of record and shall have all powers of such a Court. He further remarked in the Constituent Assembly: "TheSupreme Court of India under the constitution has wide powers, morethan the highest court, in any other federation. The criticism, if at all, canonly be that the powers of the Supreme Court are not wide enough, butthat they are too wide."

Being the highest court of the land, its proceedings, acts and decisions are kept on record for perpetual memory and for presentation as evidence, in support of the law. Being a Court of record it implies that its records can be used as evidence and cannot be questioned for their authenticity in any court. Court of record also means that it can punish for its own contempt. But this is a summary power, used rarely and under pressing circumstances. It does not restrict genuine and well intentioned criticism of Court and its functioning. Fair and reasonable criticism of judicial acts in the interest of public good does not constitute the contempt. The jurisdiction and powers of the Supreme Court can be classified into the following:

1. Original Jurisdiction.

2. Writ Jurisdiction.

3. Appellate Jurisdiction.

4. Advisory Jurisdiction.

5. A Court of Record.

6. Power of Judicial Review.

7. Other Powers.

Original Jurisdiction

This refers to the cases that directly originate in the Supreme Court. The court, in its original jurisdiction, is not entitled to entertain any suit where both the parties are not units of the federation. If any suit is brought either against the state or the Government of India by a citizen, that will not lie within the original jurisdiction of the Supreme Court, but will be brought in the ordinary courts under the ordinary law.

Article 131 of the constitution explains the original jurisdiction of the Supreme Court. As a federal court, the Supreme Court decides the disputes between different units of the Indian Federation. More elaborately, any dispute between:

(a) the Centre and one or more states; or

(b) the Centre and any state or states on one side and one or more states on the other; or

(c) between two or more states.

In the above federal disputes, the Supreme Court has exclusive original jurisdiction. Exclusive means, no other court can decide such disputes and original means, the power to hear such disputes in the first instance, not by way of appeal. With regard to the exclusive original jurisdiction of the Supreme Court, two points should be noted. One, the dispute must involve a question (whether of law or fact) on which the existence or extent of a legal right depends. Thus, the questions of political nature are excluded from it. Two, any suit brought before the Supreme Court by a private citizen against the Centre or a state cannot be entertained under this.

The Supreme Court in its original jurisdiction cannot entertain any suits brought by individuals against the Government of India. The dispute relating to the original jurisdiction of the Court must involve a question of law or fact on which the existence of legal right depends. This means that the Court has no jurisdiction in matters of political nature. However, this jurisdiction shall not extend to a dispute arising out of a treaty, agreement etc. which is in operation and excludes such jurisdiction (Article 131).

The jurisdiction of Supreme Court also excludes in inter-State water disputes India-II (Article 262), matters referred to the Finance Commission (Article 280) and adjustment of certain expenses and pensions between the Union and States (Article 290). If any dispute is to be brought before the Supreme Court, it must involve a question of law on which the legal right depends. Under Article 139A, the Supreme Court may transfer to itself cases from one or more High Courts if these involve questions of law or of great importance. The Supreme Court may transfer cases from one High Court to another in the interest of justice. The Original Jurisdiction of the Supreme Court also extends to cases of violation of the Fundamental Rights of individuals and the Court can issue several Writs for the enforcement of these rights (Article 32). It is a unique feature of our Constitution that in principle, any individual can straightway approach the highest Court in case of violation of his/her Fundamental Rights.

Writ Jurisdiction

The Constitution has constituted the Supreme Court as the guarantor and defender of the fundamental rights of the citizens. The Supreme Court is empowered to issue writs including habeas corpus, mandamus, prohibition, quo-warrentoand certiorari for the enforcement of the fundamental rights of an aggrieved citizen. In this regard, the Supreme Court has original jurisdiction in the sense that an aggrieved citizen can directly go to the Supreme Court, not necessarily by way of appeal. However, the writ jurisdiction of the Supreme Court is not exclusive. The high courts are also empowered to issue writs for the enforcement of the Fundamental Rights. It means, when the Fundamental Rights of a citizen are violated, the aggrieved party has the option of moving either the high court or the Supreme Court directly.

Therefore, the original jurisdiction of the Supreme Court with regard to federal disputes is different from its original jurisdiction with regard to disputes relating to fundamental rights. In the first case, it is exclusive and in the second case, it is concurrent with high courts jurisdiction.

Appellate Jurisdiction

As a court of appeal, the Supreme Court is a final appellate tribunal of the land. The power of reviewing and revising the orders of lower courts and tribunals by the Supreme Court is called as the appellate jurisdiction.The Appellate Jurisdiction of the Supreme Court extends to civil, criminal and constitutional matters. In a civil matter, an appeal lies to the Supreme Court from any judgment, decree or final order of a High Court if the High Court certifies under Article 134A that a 'substantial question of law' of general importance is involved and the matter needs to be decided by the Supreme Court. The High Court grants certificate only where there have been exceptional circumstances where substantial and grave injustice has been done. Thus, a certificate cannot be granted by the High Court on mere question of fact, where no substantial question of law is involved. In criminal cases, an appeal to the Supreme Court shall if the High Court:

- has reversed an order of acquittal of an accused person and sentenced him to death.
- has withdrawn for trial before itself any case from any subordinate court to its authority and has in such trial convicted the accused person and sentenced him to death (Article 134).

It is to be noted that before the commencement of the Constitution, there was a Federal Court in India. It was created by the Government of India Act 1935 and has been abolished by the Constitution of independent India. Article 135 was included in the Constitution to enable the Supreme Court to exercise jurisdiction in respect of matters where the Federal Court had the jurisdiction. Under Article 136 the Supreme Court, by its own, may grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. These powers of the Supreme Court to grant 'special leave to appeal' are far wider than the High Court.

Article 137 provides for the Supreme Court having the power to review its own judgments and orders. The Supreme Court has held that a judgement of the apex Court of the land is final. A review of such a judgement is an exceptional phenomenon, permitted only where a grave error is made out.

The Supreme Court under Article 137 has the power to review any judgements pronounced by the court. It can be done on the ground that there is error or the court's attention has not been drawn as a particular statutory provision. The normal principle that judgements pronounced are binding unless substantial and compelling character make it necessary to review and revise its decisions. The court can also override its decisions for compelling reasons as fresh horizons may reveal as a

result of new ideas and developments. The court, while reviewing its decisions, should uphold the changing ideas of the society.

Advisory Jurisdiction

Article 143 of the constitution explains that the advisory jurisdiction and states: If the President at any time feels that a question of law or fact of public importance has arisen such that it is expedient to obtain the opinion of the Supreme Court. H.M. Seervai has said "although the advisory opinion given by the Supreme Court has high persuasive authority, it is not lawdeclared by it within the meaning of Article 141." The Constitution (Article 143) authorises the president to seek the opinion of the Supreme Court in the two categories of matters:

a) On any question of law or fact of public importance which has arisen orwhich is likely to arise.
b) On any dispute arising out of any pre-constitution treaty, agreement,covenant, engagement, sanador other similar instruments.

Article-139 lays down that Parliament may confer on the Supreme Court power to issue directions, orders or writs in matters not already covered under Article 32. Under Article-140, Parliament may supplement the powers of the Supreme Court to enable it to perform effectively the functions placed upon it under the Constitution. Law declared by the Supreme Court is binding on all courts in India under Article-141. Article-142 provides that the Supreme Court in exercise of its jurisdiction may pass such decrees or orders as necessary for doing complete justice. The decree or order made by the Court shall be enforceable throughout the territory of India in such a manner as prescribed by the Parliament. Until provision is made by the Parliament, the orders of the Court will be enforced in the manner prescribed by the President.

A Court of Record

As a Court of Record, the Supreme Court has two powers:

a) The judgements, proceedings and acts of the Supreme Court are recordedfor perpetual memory and testimony. These records are admitted to be ofevidentiary value and cannot be questioned when produced before anycourt. They are recognised as legal precedents and legal references.
b) It has power to punish for contempt of court, either with simpleimprisonment for a term up to six months or with fine up to 2,000 or withboth. In 1991, the Supreme Court has ruled that it has power to punish forcontempt not only of itself but also of high courts, subordinate courts andtribunals functioning in the entire country.

Summary

The legal and Judicial history of India is as old as 5000 years from now. From the point of view of chronology, the beginning of Indian Judicial System can be traced back to Anglo-India era when the Judicial System was at its primitive stage. The Regulating Act of 1773 enacted by the British Parliament is considered to be a landmark in the development of Indian Judicial System in India.

The Jurisdiction of Privy Council over the Indian appeals came to an end withthe establishment of Supreme Court on January 26, 1950. The crucial feature of Indian Judiciary is that 'it has a single integrated and unified Judicial System'.

The structure of courts in India is like a pyramid. The Supreme Court is theApex Court in India. The Highest Court in the State is High Court. Then thereare Subordinate Courts at District, Sub-Division and Tehsil level. The growth, evolution and development of modern Indian Judicial System is not the creation of one man or of one day. It is rather an outcome of the concerted efforts and experience of a number of able administrators who laboured patiently for generations.

The Supreme Court of India should inspire alternate dispute settlement machinery, where public can redress its grievances and not burden it with special leave petitions. The judges should write brief judgements and give early decisions. In a few cases, judgements are pronounced only when a judge is to retire; otherwise, they remain reserved for unlimited period. Quality of judges and ability to handle cases with speed and honesty should be the criterion in selection. Unfortunately,

politics has entered even in appointments. One finds that judges, like ministers, also come from different High Courts representing different castes, class, or religious backgrounds. It would be worthwhile to restrict the time for arguments. It need not be stressed that a lot of time is wasted by a few senior lawyers who keep arguing for days and many other cases suffer. There is a need to reform even the legal profession, which has made access to Supreme Court virtually impossible for millions in this country. Long and tardy procedure with further uncertainty, whether the matter would be taken up or not on a particular day, keeps the poor away from approaching the Supreme Court. Time has come when either we reduce the cases that can come up before the Supreme Court or have its benches in different regions. The sitting judges should not be appointed for commissions of inquiry.

Keywords

Bodies: Legal or constitutional entities created for a special purpose.

Boundaries: Boundary, border, frontier share the sense of that which divides one entity or political unit from another. Boundary, in reference to a country, city, state, territory, or the like, most often designates a line on a map.

Constitutional Court: A constitutional court is one that has the final say in interpreting the constitution and also in deciding whether or not other national laws are in harmony with the constitution or are unconstitutional.

High Court: It is generally the court of appeal. In India it is the highest court at the level of a constituent state. The high court may also be endowed with extraordinary jurisdiction to enforce fundamental rights and judicial review.

Judicial interpretation: The method by which courts establish the meaning of constitutional provisions or legislative acts.

Judiciary: The branch of government that is endowed with the authority to interpret the law, adjudicates legal disputes, and otherwise administers justice. "Judiciary" is also used to refer to judges of a court considered as a group.

Jurisdiction: The territorial or legislative fields over which an order of government, including the judiciary, has the authority to make laws.

Supreme Court: In most cases, the highest court within the legal system. It is the highest appellate court for all other courts in the state.

Self Assessment

1. From which source India got the concept of Single order of court?

A. Government of India Act, 1935

B. Government of India Act, 1919

C. Pitts India Act, 1773

D. None of the following

2. Which one of the following statements is correct?

A. The original jurisdiction of the Supreme Court is unlimited

B. A dispute between one State and another can only be dealt with by the Supreme Court

C. The Supreme Court must admit appeal from any judgement or order made by any court

D. All courts including the Supreme Court are bound by a Supreme Court decision

3. Which one of the following statements is correct?The power of judicial review means the power of the Supreme Court to:

A. Set aside any executive decision if it is against statutory law.

B. Set aside any provision of law if it is contrary to the Fundamental Rights.

C. Examine constitutional validity of any administrative action as well as legislative provision and strike it down if not found in accordance with the constitutional provisions.
D. Review its own decisions or decisions of any court or tribunal within the territory of India.

4. Judicial Review in the Indian Constitution is based on:
A. Procedure established by law
B. Due process of Law
C. Rule of Law
D. Precedents and conventions

5. The Judiciary is the ……. organ of the government.
A. Second
B. First
C. Fourth
D. Third

6. …….is the basic human law for any civilized society to ideally function.
A. Discrimination
B. Justice
C. Injustice
D. Repression

7. …… as the guardian-protector of the constitution and the fundamental rights of the people makes it more respectable than other two organs.
A. Executive
B. Legislature
C. Judiciary
D. None of the Above

8. Which of the following statement is not true about India's Supreme Court?
A. Article 124 to 147 and Part V of the Indian Constitution informs about the composition and powers of the Supreme Court?
B. The Supreme Court was inaugurated on January 28, 1950
C. At present, there are 39 judges in the Supreme Court
D. Judges of Supreme Court are appointed by the President of India

9. Which among the following is the final authority to interpret the Constitution of India?
A. President
B. Prime Minister
C. Council of Ministers
D. Supreme Court

10. Till now how many judges of Supreme Court of India have been removed from Office through impeachment?
A. 0
B. 1
C. 2

D. 3

11. Which qualification is wrong for being a judge in the Supreme Court?
A. It is compulsory to be a citizen of India.
B. He should be a respected jurist in the eyes of Parliament
C. Must be a judge in the High Court for at least 5 years
D. He should be a lawyer in the High Court for at least 10 years

12. Who can remove the Judge of the Supreme Court?
A. Chief Justice of the Supreme Court
B. Only President
C. Only Parliament
D. Both Parliament and President

13. At Present, how many judges in the Supreme Court?
A. 34
B. 40
C. 25
D. 27

14. The President can declare a judge an executive chief justice of the Supreme Court of India when ...
(A) The post of Chief Justice is vacant
(B) Chief Justice is temporarily absent
(C) Chief Justice is unable to discharge his obligations
(D) All of the above

15. Disputes between States come to the Supreme Court under:
A. Appellate jurisdiction
B. Original jurisdiction
C. Advisory jurisdiction
D. Writ jurisdiction

Answers for Self Assessment

1.	A	2.	B	3.	C	4.	A	5.	D
6.	A	7.	C	8.	C	9.	D	10.	A
11.	B	12.	D	13.	A	14.	D	15.	B

Review Questions

1. What do you mean by judiciary?
2. What is the Role of the Judiciary?
3. What is an Independent Judiciary?
4. What is the Structure of Courts in India?

5. How is the judicial system of India based on the hierarchy of courts?
6. Do you think that executive should have the power to appoint judges?
7. How does the President of India appoint the Judges of the Supreme Court, other than the Chief Justice?
8. What are the grounds on which the Judge of Supreme Court can be removed?
9. Which Court has the wider powers to issue 'Writs' in the context of Fundamental Rights?
10. How does the President of India appoint the Judges of the High Courts?
11. Critically evaluate the original and appellate jurisdictions of the Supreme Court?

Further Readings

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Unit 14: The Judiciary

CONTENTS

Objectives

After going through this Unit, you will be able to learn about the:

- explain organisation and composition of high court.
- analyse powers and jurisdiction of high court.
- explain the working of a district court.
- understand the qualifications and appointment of Judges.
- understand the meaning of the Lok Adalat.
- describe the features of the Lok Adalat.
- explain the meaning of the Public Interest Litigation.
- analyse some principles of Public Interest Litigation
- describe the Supreme Court guidelines for admitting Public Interest Litigation.

Introduction

During the early years of the functioning of the judicial system, the judicial process, attuned to the principles of natural justice, adopted the well-established adversarial system of adjudication. The pattern of the court, in its ascending order, followed the hierarchical structure and was accessible, under the Constitution, to every citizen of the country. The courts on rare occasions defaulted, delayed, and deviated from the desirable path. But such instances have been rectified later by the larger benches or criticized by jurists or set right by means of the constitutional amendments. Thus, despite all odds, the Indian judicial system stayed put, by and large, within the broad jurisdictional domains set out by the Constitution.Justice should be free from any favour or influences. So, judiciary has been kept independent of legislative and executive interference. Judiciary has been provided with the Writ jurisdiction for protection of Fundamental Right of the people. Judiciary is provided with various powers which helps it to constitute as the guardian of the Constitution. The

structure of courts in India is like a pyramid. The Supreme Court is theApex Court in India. The Highest Court in the State is High Court. Then thereare Subordinate Courts at District, Sub-Division and Tehsil level. The growth, evolution and development of modern Indian Judicial System are not the creation of one man or of one day. It is rather an outcome of the concerted efforts and experience of a number of able administrators who labored patiently for generations.

14.1 High Court

The Constitution of India provides a High Court for each State. Articles 214 to 231 in Part VI of the Constitution deal with the organisation, independence, jurisdiction, powers, procedures and so on of the high courts. The Parliament may, however, establish a common High Court for two or more States and a Union Territory (Article 214 & 231). Similar to the Supreme Court, 'every High Court is also a Court of record and has the entire original and appellate jurisdiction together with the power to punish for contempt' (Article 215). The institution of high court originated in India in 1862 'when the high courts were set up at Calcutta, Bombay and Madras. In 1866, a fourth high court was established at Allahabad. In the course of time, each province in British India came to have its own high court. After 1950, a high court existing in a province became the high court for the corresponding state'.The Constitution of India provides for a high court for each state, but the Seventh Amendment Act of 1956 authorized the Parliament to establish acommon high court for two or more states or for two or more states and a union territory. The 'territorial jurisdiction of a high court is co-terminus with the territory of a state. Similarly, the territorial jurisdiction of a common high court is co-terminus with the territories of the concerned states and union territory'.

The Chief Justice of a High Court is appointed by the President after consulting the Chief Justice of India and Governor of the State and in case of appointment of Judges, other than the Chief Justice, the Chief Justice of the concerned High Court is also consulted.For a person to be appointed as a Judge of the High Court he/she must:

- be a citizen of India,
- have ten years of service in Judicial Office, or
- have ten years of experience as a High Court Advocate.

Oath or Affirmation

A person appointed as a judge of a high court, before entering upon his office, has to make and subscribe an oath or affirmation before the governor of the state or some person appointed by him for this purpose. In his oath, a judge of a high court swears:

a) to bear true faith and allegiance to the Constitution of India;
b) to uphold the sovereignty and integrity of India;
c) to duly and faithfully and to the best of his ability, knowledge and judgement perform the duties of the office without fear or favour, affection or ill-will; and
d) to uphold the Constitution and the laws.

Tenure of Judges

The Constitution has not fixed the tenure of a judge of ahigh court. However, it makes the following four provisions in this regard:

a) He holds office until he attains the age of 62 years. Any questionsregarding his age is to be decided by the president after consultation withthe chief justice of India and the decision of the president is final.
b) He can resign his office by writing to the president.
c) He can be removed from his office by the President on therecommendation of the Parliament.
d) He vacates his office when he is appointed as a judge of the SupremeCourt or when he is transferred to another high court.

14.2 Jurisdiction and Powers of High Court

Like the Supreme Court, the high court has been vested with quite extensive and effective powers. It is the highest court of appeal in the state. It is the protector of the Fundamental Rights of the citizens. It is vested with the power to interpret the Constitution. At present, a high court enjoys the following jurisdiction and powers:

1. Original jurisdiction.

2. Writ jurisdiction.

3. Appellate jurisdiction.

4. Supervisory jurisdiction.

5. Control over subordinate courts.

6. A court of record.

7. Power of judicial review.

The present jurisdiction and powers of a high court are governed by (a) the constitutional provisions, (b) the Letters Patent, (c) the Acts of Parliament, (d) the Acts of State Legislature, (e) Indian Penal Code, 1860, (f) Cirminal Procedure Code, 1973, and (g) Civil Procedure Code, 1908.

1. *Original Jurisdiction*

It means the power of a high court to hear disputes in the first instance, not by way of appeal. It extends to the following:

(a) Matters of admirality, will, marriage, divorce, company laws and contempt of court.

(b) Disputes relating to the election of members of Parliament and state legislatures.

(c) Regarding revenue matter or an act ordered or done in revenue collection.

(d) Enforcement of fundamental rights of citizens.

(e) Cases ordered to be transferred from a subordinate court involving the interpretation of the Constitution to its own file.

2. *Writ Jurisdiction*

Article 226 provides that every High Court under its jurisdiction has power to issue writs including habeas corpus, mandamus, certiorari, prohibition and quowarrenfor enforcement of the Fundamental Rights or for any other purpose. By inserting the word 'any other purpose' the High Court has been given much wider power than the Supreme Court. It can issue writs in all the cases of breach of any right while Supreme Court can issue only in the breach of Fundamental Rights. The writ jurisdiction of the high court (under Article 226) is not exclusive but concurrent with the writ jurisdiction of the Supreme Court (under Article 32).

3. *Appellate Jurisdiction*

A high court is primarily a court of appeal. It hears appeals against the judgements of subordinate courts functioning in its territorial jurisdiction. It has appellate jurisdiction in both civil and criminal matters. Hence, the appellate jurisdiction of a high court is wider than its original jurisdiction. Its appellatejurisdiction extends to both civil and criminal matters. On the civil side, an appealto the High Court is either a first appeal or second appeal.The criminal appellate jurisdiction consists of appeals from the decisions of:
(a) A Session Judge, or an additional Session Judge where the sentence is ofimprisonment exceeding 7 years
(b) An Assistant session judge, Metropolitan Magistrate of other JudicialMagistrate in certain certified cases other than 'petty' cases.

4. *Supervisory Jurisdiction*

A high court has the power of superintendence over all courts and tribunals functioning in its territorial jurisdiction (except military courts or tribunals). Thus, it may:

(a) call for returns from them;

(b) make and issue, general rules and prescribe forms for regulating the practice and proceedings of them;

(c) prescribe forms in which books, entries and accounts are to be kept by them; and

(d) settle the fees payable to the sheriff, clerks, officers and legal practitioners of them.

This power of superintendence of a high court is very broad because:

a) it extends to all courts and tribunals whether they are subject to the appellate jurisdiction of the high court or not;
b) it covers not only administrative superintendence but also judicial superintendence;
c) it is a revisional jurisdiction; and,
d) it can be suo-motu (on its own) and not necessarily on the application of a party.

5. ***Control over Subordinate Courts***

In addition to its appellate jurisdiction and supervisory jurisdiction over the subordinate courts as mentioned above, a high court has an administrative control and other powers over them. These include the following:

(a) It is 'consulted by the governor in the matters of appointment, posting and promotion of district judges and in the appointments of persons to the judicial service of the state' (other than district judges).

(b) It deals with 'the matters of posting, promotion, grant of leave, transfers and discipline of the members of the judicial service of the state' (other than district judges).

(c) It can withdraw a case 'pending in a subordinate court if it involves a substantial question of law that require the interpretation of the Constitution'.

(d) Its law is 'binding on all subordinate courts functioning within its territorial jurisdiction in the same sense as the law declared by the Supreme Court is binding on all courts in India'.

6. ***A Court of Record***

As a court of record, a high court has two powers:

(a) The judgements, proceedings and acts of the high courts are 'recorded for perpetual memory and testimony'. These records are admitted to be of 'evidentiary value and cannot be questioned when produced before any subordinate court'. They are recognised as legal precedents and legal references.

(b) It has power to 'punish for contempt of court', either with simple imprisonment or with fine or with both.

As a court of record, a high court also has the power to review and correct its own judgement or order or decision, even though no specific power of review is conferred on it by the Constitution. The Supreme Court, on the other hand, has been specifically conferred with the power of review by the constitution.

7. ***Power of Judicial Review***

Judicial review is the power of a high court to examine the constitutionality of legislative enactments and executive orders of both the Central and state governments. On examination, if they are found to be violative of the Constitution (ultra-vires), they can be declared as illegal, unconstitutional and invalid (null and void) by the high court. Consequently, they cannot be enforced by the government.

14.3 District Courts

The state judiciary consists of a high court and a hierarchy of subordinate courts, also known as lower courts. The subordinate courts are so called because of their subordination to the state high court. They function below and under the high court at district and lower levels.

Constitutional Provisions

Articles 233 to 237 in Part VI of the Constitution make the following provisions to regulate the organization of subordinate courts and to ensure their independence from the executive.

1. Appointment of District Judges The appointment, posting and promotion of district judges in a state are made by the governor of the state in consultation with the high court. A person to be appointed as district judge should have the following qualifications:

(a) He should not already be in the service of the Central or the state government.

(b) He should have been an advocate or a pleader for seven years.

(c) He should be recommended by the high court for appointment.

2. Appointment of other Judges Appointment of persons (other than district judges) to the judicial service of a state are made by the governor of the state after consultation with the State Public Service Commission and the high court.

3. Control over Subordinate Courts The control over district courts and other subordinate courts including the posting, promotion and leave of persons belonging to the judicial service of a state and holding any post inferior to the post of district judge is vested in the high court.

4. Interpretation The expression 'district judge' includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge. The expression 'judicial service' means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

14.4 Structure and Jurisdiction

The organisational structure, jurisdiction and nomenclature of the subordinate judiciary are laid down by the states. Hence, they differ slightly from state to state. Broadly speaking, there are three tiers of civil and criminal courts below the High Court. This is shown as follows:

The district judge is the highest judicial authority in the district. He possesses original and appellate jurisdiction in both civil as well as criminal matters. In other words, the district judge is also the sessions judge. When he deals with civil cases, he is known as the district judge and when he hears the criminal cases, he is called as the session's judge. The district judge exercises both judicial and administrative powers. He also has supervisory powers over all the subordinate courts in the district. Appeals against his orders and judgements lie to the High Court. The session's judge has the power to impose any sentence including life imprisonment and capital punishment (death sentence). However, a capital punishment passed by him is subject to confirmation by the High Court, whether there is an appeal or not. Below the District and Sessions Court stands the Court of Subordinate Judge on the civil side and the Court of Chief Judicial Magistrate on the Criminal side. The subordinate judge exercises unlimited pecuniary jurisdiction over civil suits. The chief judicial magistrate decides criminal cases which are punishable with imprisonment for a term up to seven years. At the lowest level, on the civil side, is the Court of Munsiff and on the criminal side, is the Court of Judicial Magistrate. The munsiff possesses limited jurisdiction and decides civil cases of small pecuniary stake. The judicial magistrate tries criminal cases which are punishable with imprisonment for a term up to three years. In some metropolitan cities, there are city civil courts (chief judges) on the civil side and the courts of metropolitan magistrates on the criminal side. These courts decide the civil cases of small value in a summary manner. Their decisions are final, but the High Court possesses a power of revision.In some states, Panchayat Courts try petty civil and criminal cases. Theyare variously known as Nyaya Panchayat, Gram Kutchery, AdalatiPanchayat, Panchayat Adalat and so on.

14.5 Lok Adalat

Lok Adalat is a voluntary agency. It settles disputes between the parties outside the courts with the help of public-spirited lawyers and like-minded citizens. It was established by Legal Services and Authorities Act, 1987. It has been given the widest possible jurisdiction, and it can take up any matter, pending in any court including the apex court. The Lok Adalat is guided by legal principles including principles of justice, equality, and fairplay. The judicial officers of the area and other such members possessing such qualifications conduct the affairs of Lok Adalat. It is being urged by many that Lok Adalat has therapeutic role to fulfill in aid of justice. So, the legal system must encourage the government and voluntary agencies should reach out to aid them, and the parties must trust them so that it can share the burden of accumulated litigation of the courts.

In Lok Adalat proceedings, there are no victors and vanquished and, thus, no rancour.The experiment of 'Lok Adalat' as an alternate mode of dispute settlementhas come to be accepted in India, as a viable, economic, efficient and informal one.The Lok Adalat is another alternative in judicial justice. This is a recentstrategy for delivering informal, cheap and expeditious justice to the common man by way of settling disputes, which are pending in courts and also those, which have not yet reached courts by negotiation, conciliation and by adopting persuasive, common sense and human approach to the problems ofthe disputants, with the assistance of specially trained and experiencedmembers of a team of conciliators.

Hence, the institution of Lok Adalat has been given statutory status under the Legal Services Authorities Act, 1987. The Act makes the following provisions relating to the organization and functioning of the Lok Adalats:

1. The State Legal Services Authority or the District Legal Services Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee or the Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

2. Every Lok Adalat organized for an area shall consist of such number of serving or retired judicial officers and other persons of the area as may be specified by the agency organizing such Lok Adalat. Generally, a Lok Adalat consists of a judicial officer as the chairman and a lawyer (advocate) and a social worker as members.

3. A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of :

(i) any case pending before any court; or

(ii) any matter which is falling within the jurisdiction of any court and is not brought before such court.

Thus, the Lok Adalat can deal with not only the cases pending before acourt but also with the disputes at pre-litigation stage. Matters such as Matrimonial / Family Disputes, Criminal (Compoundable Offences) cases, Land Acquisition cases, Labourdisputes, Workmen's compensation cases, Bank Recovery cases, Pension cases, Housing Board and Slum Clearance cases, Housing Finance cases, Consumer Grievance cases, Electricity matters, Disputes relating to Telephone Bills, Municipal matters including House Taxcases, Disputes with Cellular Companies etc. are being taken up in Lok Adalats.

But, the Lok Adalat shall have no jurisdiction in respect of any caseor matter relating to an offence not compoundable under any law. Inother words, the offences which are non-compoundable under any law fall outside the purview of the Lok Adalat.

4. Any case pending before the court can be referred to the Lok Adalat for settlement if :

(i) the parties thereof agree to settle the dispute in the Lok Adalat; or

(ii) one of the parties thereof makes an application to the court, for referring the case to the Lok Adalat; or

(iii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat.

In the case of a pre-litigation dispute, the matter can be referred to the Lok Adalat for settlement by the agency organizing the Lok Adalat, on receipt of an application from any one of the parties to the dispute.

5. The Lok Adalat shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure (1908), while trying a suit in respect of the following matters:

(a) the summoning and enforcing the attendance of any witnessexamining him on oath;

(b) the discovery and production of any document;

(c) the reception of evidence on affidavits;

(d) the requisitioning of any public record or document from any court or office; and

(e) such other matters as may be prescribed.

Further, a Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it. Also, all proceedings before a Lok Adalat shall be

deemed to be judicial proceedings within the meaning of the Indian Penal Code (1860) and every Lok Adalat shall be deemed to be a Civil Court for the purpose of the Code of Criminal Procedure (1973).

6. An award of a Lok Adalat shall be deemed to be a decree of a Civil Courtor an order of any other court. Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute. No appeal shall lie to any court against the award of the Lok Adalat.

14.6 Judicial Activism

Judicial activism denotes the proactive role played by the judiciary in theprotection of the rights of citizens and in the promotion of justice in thesociety. In other words, it implies the assertive role played by the judiciary toforce the other two organs of the government (legislature and executive) todischarge their constitutional duties.In this process, the judicial creativity orcraftsmanship is utilized to fill in the gaps between the law as it is and the law asit ought to be built in this process is the proper perception and commitment toproper social values. This judicial creativity is called 'judicial activism'. In otherwords it means "an active interpretation of existing legislation by a judge madewith a view to enhance the utility of legislation for social betterment".

The concept of judicial activism originated and developed in the USA.This term was first coined in 1947 by Arthur Schlesinger Jr., anAmerican historian and educator.In India, the doctrine of judicial activism was introduced in mid-1970s.Justice V.R. Krishna Iyer, Justice P.N. Bhagwati, Justice O. ChinnappaReddy and Justice D.A. Desai laid the foundations of judicial activism in thecountry.

Judicial Activism is a powerful weapon which the judges have to wield tosubserve the ends of justice by making the law responsive to the felt necessitiesof the changing times. The scope of judicial activism varies with the courtspower of Judicial Review.Recognizing this justice Bhagwati observed: "Judicial activism is now a central feature of every politicalsystem that vests adjudicatory power in a free and independentjudiciary".

Justice J.S. Verma has been more emphatic in laying down the exact norms of sufficient activist criterion. The learned judge has remarked: "Judicial Activism is required only when there is inertia inothers. Proper judicial activism is that which brings about results with the least judicial intervention. If everyone else isworking we do not have to step in".Justice Cardoze said, "The law has its epochs of ebb and flow, the flood tides are onus. The old order may change yielding place to new; but thetransition is never an easy process."

Justification of Judicial Activism

According to Dr. B.L. Wadehra, the reasons for judicial activism are asfollows:

a) There is near collapse of the responsible government, when the Legislatureand Executive fail to discharge their respective functions. This results inerosion of the confidence in the Constitution and democracy amongst thecitizens.

b) The citizens of the country look up to the judiciary for the protection oftheir rights and freedoms. This leads to tremendous pressure on judiciaryto step in aid for the suffering masses.

c) Judicial Enthusiasm, that is, the judges like to participate in the socialreforms that take place in the changing times. It encourages the PublicInterest Litigation and liberalises the principle of 'Locus Standi'.

d) Legislative Vacuum, that is, there may be certain areas, which have notbeen legislated upon. It is therefore, upon court to indulge in judiciallegislation and to meet the changing social needs.

e) The Constitution of India has itself adopted certain provisions, whichgives judiciary enough scope to legislate or to play an active role.

Similarly, Subhash Kashyap observes that certain eventualities may beconceived when the judiciary may have to overstep its normal jurisdictionand intervene in areas otherwise falling within the domain of the legislatureand the executive:

i. When the legislature fails to discharge its responsibilities.

ii. In case of a 'hung' legislature when the government it provides is weak,insecure and busy only in the struggle for survival and, therefore, unableto take any decision which displeases any caste, community, or othergroup.

iii. Where the legislature and the executive fail to protect the basic rights ofcitizens, like the right to live a decent life, healthy surroundings, or toprovide honest, efficient and just system of laws and administration.

iv. Where the court of law is misused by a strong authoritarian parliamentaryparty government for ulterior motives, as was sought to be done during theemergency aberration.

According to Dr. Vandana, the concept of judicial activism can be seen tobe reflecting from the following trends, namely:

i. Expansion of rights of hearing in the administrative process.
ii. Excessive delegation without limitation.
iii. Expansion of judicial control over discretionary powers.
iv. Expansion of judicial review over the administration.
v. Promotion of open government.
vi. Indiscriminate exercise of contempt power.
vii. Exercise of jurisdiction when non-exist.
viii. Over extending the standard rules of interpretation in its search toachieve economic, social and educational objectives.
ix. Passing of orders which are per se unworkable.

Apprehensions of Judicial Activism

The same jurist Upendra Baxi also presented a typology of fears which aregenerated by judicial activism. He observes: "The facts entail invocation of awide range of fears. The invocation is designed to bring into a nervousrationality among India's most conscientious justices".. He described thefollowing types of fears:

a) ***Ideological fears***: (Are they usurping powers of the legislature, theexecutive or of other autonomous institutions in a civil society?)

b) ***Epistemic fears***: (Do they have enough knowledge in economic mattersof a Manmohan Singh, in scientific matters of the Czars of the atomicenergy establishment, the captains of the Council of Scientific andIndustrial Research , and so on?).

c) ***Management fears***: (Are they doing justice by adding this kind oflitigation work load to a situation of staggering growth of arrears?).

d) ***Legitimation fears***: (Are not they causing depletion of their symbolicand instrumental authority by passing orders in public interest litigationwhich the executive may bypass or ignore? Would not the people's faithin judiciary, a democratic recourse, be thus eroded?).

e) ***Democratic fears***: (Is a profusion of public interest litigation nurturingdemocracy or depleting its potential for the future?).

f) ***Biographic fears***: (What would be my place in national affairs aftersuperannuation if I overdo this kind of litigation?).

14.7 Judicial Restraint

The judiciary has been assigned active role under the constitution. Judicial activism and judicial restraint are facets of that uncourageous creativity and pragmatic wisdom.The concept of judicial activism is thus the polar opposite of judicial restraint. Judicial activism and judicial restraint are the two terms used to describe the philosophy and motivation behind some judicial decision. At most level, judicial activism refers to a theory of judgment that takes into account the spirit of the

law and the changing times, while judicial restraint relies on a strict interpretation of the law and the importance of legal precedent. Judicial restraint is a theory of judicial interpretation that encourages judges to limit the exercise of their own power. It asserts that judges should hesitate to strike down laws unless they are obviously unconstitutional. Judicially-restrained judges respect stare-decisis, the principle of upholding established precedent handed down by past judges.

Judicial restraint, a procedural or substantive approach to the exercise of judicial review. As a procedural doctrine, the principle of restraint urges judges to refrain from deciding legal issues, and especially constitutional ones, unless the decision is necessary to the resolution of a concrete dispute between adverse parties. As a substantive one, it urges judges considering constitutional questions to grant substantial deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated. Compare judicial activism. The courts should hesitate to use judicial review to promote new ideas or policy preferences. In short, the courts should interpret the law and not intervene in policy-making. Judges should always try to decide cases on the basis of:

i. The original intent of those who wrote the constitution.

ii. Precedent – past decisions in earlier cases.

iii. The court should leave policy making to others.

They "restrain" themselves from setting new policies with their decisions. They make decisions strictly based on what the Constitution says. One can identify at least four institutional reasons for judicial restraint. Theseare concerns about 1) judicial expertise, 2) the incrementalist nature of judicial law- making, 3) institutional legitimacy and 4) the reputation of the courts.

Supreme Court Observations

While delivering a judgement in December 2007, the Supreme Court of Indiacalled for judicial restraint and asked courts not to take over the functions ofthe legislature or the executive, saying there is a broad separation of powersunder the Constitution and each organ of the state must have respect forothers and should not encroach on others' domain. In this context, theconcerned Bench of the court made the following observations:

1. The Bench said, "We are repeatedly coming across cases where judgesare unjustifiably trying to perform executive or legislative functions. Thisis clearly unconstitutional. In the name of judicial activism, judges cannotcross their limits and try to take over functions which belong to anotherorgan of the state".
2. The Bench said, "Judges must know their limits and must not try to runthe government. They must have modesty and humility, and not behavelike emperors".
3. Quoting from the book 'The Spirit of Laws' by Montesquieu on theconsequences of not maintaining separation of powers among the threeorgans, the Bench said the French political philosopher's "warning isparticularly apt and timely for the Indian judiciary today, since very oftenit is rightly criticised for 'overreach' and encroachment on the domain ofthe other two organs."
4. "The courts must not embarrass administrative authorities and mustrealise that administrative authorities have expertise in the field ofadministration while the court does not."
5. The Bench said, "The justification often given for judicial encroachmenton the domain of the executive or the legislature is that the other twoorgans are not doing their jobs properly. Even assuming this is so, thesame allegations can be made against the judiciary too because there arecases pending in courts for half-a-century".
6. If the legislature or the executive was not functioning properly, it was forthe people to correct the defects by exercising their franchise properly inthe next elections and voting for candidates who would fulfil theirexpectations or by other lawful methods, e.g., peaceful demonstrations.
7. "The remedy is not in the judiciary taking over the legislative or theexecutive functions, because that will not only violate the delicate balanceof power enshrined in the

Constitution but also (because) the judiciaryhas neither the expertise nor the resources to perform these functions."

8. The Bench said: "Judicial restraint is consistent with and complementaryto the balance of power among the three independent branches of thestate. It accomplishes this in two ways: first, judicial restraint not onlyrecognises the equality of the other two branches with the judiciary, italso fosters that equality by minimising inter-branch interference by thejudiciary. Second, judicial restraint tends to protect the independence ofthe judiciary. When courts encroach on the legislative or administrativefields almost inevitably voters, legislators, and other elected officials willconclude that the activities of judges should be closely monitored".

14.8 Public Interest Litigation

The concept of Public Interest Litigation (PIL) originated and developed in the USA in the 1960s. In the USA, it was designed to provide legal representation to previously unrepresented groups and interests. It was undertaken in recognition of the fact that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.1 In India, the PIL is a product of the judicial activism role of the Supreme Court. It was introduced in the early 1980s. Justice V.R. Krishna Iyer and Justice P.N. Bhagwati were the pioneers of the concept of PIL. PIL is also known variously as Social Action Litigation (SAL), Social Interest Litigation (SIL) and Class Action Litigation (CAL).

The PIL is considered to be an offshoot of social forces where freedomsuffered in the cruel hands and public participation was required to checkthe system. It was an opportunity for like-minded citizens to participate andreaffirm their faith in the legal process. The petition can be filed by any voluntaryagency or a member of the public. However, the court must satisfyitself while accepting the petition and see that the person is acting bona fid and not for personal gain or profit.The PIL involves issues connected with environmental protection, anda set of evolved fundamental rights including right to free legal aid, rightagainst torture, right to humane treatment in prison, etc., reflecting thehuman dimension of the PIL. Further, it extended its domain in a delicatetask of mediating between social actualities and social change. Issues, likedegraded bonded labour, humiliated inmates of protective homes, womenprisoners, custodial violence, and other victimized groups are attractingremedial attention of the courts. For this, Article 32 emerged as a forum ofPIL in the recent years, and it has become a byword for judicial involvement in social, political, and economic affairs of the society.

PIL is absolutely necessary for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objectives. In other words, the real purposes of PIL are:

(i) vindication of the rule of law,

(ii) facilitating effective access to justice to the socially and economically weaker sections of the society, and

(iii) meaningful realisation of the fundamental rights.

14.9 Features of PIL

The various features of the PIL are explained below:

1. PIL is a strategic arm of the legal aid movement and is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity.

2. PIL is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claims seeking relief against the other and that other opposing such claim or resisting such relief.

3. PIL is brought before the Court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest.

4. PIL demands that violations of constitutional and legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.

5. PIL is essentially a co-operative effort on the part of the petitioner, the State or Public Authority, and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.
6. In PIL, litigation is undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, diffused rights and interests or vindicating public interest.
7. In PIL, the role held by the Court is more assertive than in traditional actions; it is creative rather than passive and it assumes a more positive attitude in determining acts.
8. Though in PIL court enjoys a degree of flexibility unknown to the trial of traditional private law litigations, whatever the procedure adopted by the court it must be procedure known to judicial tenets and characteristics of a judicial proceeding.
9. In a PIL, unlike traditional dispute resolution mechanism, there is no determination on adjudication of individual rights.

Summary

The top-heaviness of the Indian judiciary is striking, both in terms of the relative power of theupper judiciary and the number of cases these courts hear in relation to the subordinate. On the face of it, the Indian Constitution organizes the country's judicial system with a striking unity.Appeals progress up a set of hierarchically organised courts, whose judges interpret law under asingle national constitution.Each State in India has its own judicial service for the subordinate judiciary, and judges of theHigh Court in a State are overwhelmingly selected from the State's judicial service and the State HighCourt's practicing bar. At the same time, each State provides funds for the operation of its judiciary.Since States in India are so socio-economically diverse, levels of funding for the judiciary can varyconsiderably, as can the legal cultures, litigant profile, and governance capability of different States.As a result, State judiciaries can perform strikingly differently in terms of professionalism, backlog,and other measures of functioning and quality.Unlike other institutions of governance, judiciary stands apart because of certain unique features. First, it is also accessible; it is receptive and responsive to the seekers of justice. Second it listens to everyone. The Courts do not take a decision until both sides of a case have been heard. Third, each decision taken by the judge is accompanied by reasons, which in itself provides for a very high level of accountability. These reasons are guarantees against the possible whims of arbitrariness of judges.
Why judiciary has not been able to live up to people's expectation is on account of doubts about the capability of the judiciary. These doubts are because of delays in deciding cases, and also because of instances of corruption that have started occurring in judiciary (though they are rare). Finally, accusations have been made about the credibility of the courts. Justice Lahoti feels that any system of justice, to be effective, needs to have a proper procedure to follow and the reasonableness of the procedure take its toll in terms of time. According to the 120th Report of the Law Commission, we need 10 times the existing strength of judges to clear the backlog in the Supreme Court, High Courts, and subordinate court the sanctioned strength judges is 26, 704 and 13, 204, respectively. In contrast, the actual numbers are 22, 496 and 11, 103 in that order. The gap is glaring. At the end, the fact remains that for the success of Indian democracypeople still have their faith and hope in an independent judiciary and ourSupreme Court has not entirely disappointed them.

Keywords

Governance: The act of governing; exercising power.
Judicial interpretation: The method by which courts establish the meaning of constitutional provisions or legislative acts.
Judicial review: Powers of the courts to decide upon the constitutionality of a legislative or an executive act and invalidate that act if it is determined to be contrary to constitutional provisions or principles.
Judiciary: The branch of government that is endowed with the authority to interpret the law, adjudicates legal disputes, and otherwise administers justice. "Judiciary" is also used to refer to judges of a court considered as a group.
Ratification: Making something valid by formally approving or confirming it: 'a referendum may ratify a constitution'; 'Parliament may ratify a treaty'.

Self Assessment

1. The transfer of Judges from one High Court to another High Court may be made by the:

A. President of India in consultation with the Chief Justice of that High Court.
B. Chief Justice of the concerned High Court
C. Governor of the concerned State in consultation with the Chief Justice of India.
D. President of India after consultation with the Chief Justice of India.

2. Who among the following extends the jurisdiction of a High Court to, or excludes from, any Union territory?
A. Parliament by law
B. The President of India
C. The Chief Justice of India
D. Legislature of the State in which the High Court is situated

3. The nature of 'consultation' with the Chief Justice of India in matters of appointment of a judge to a High Court is correctly described as:
A. Inspection of the file by the Chief Justice
B. Concurrence of the Chief Justice
C. Conformity with the opinion of the Chief Justice
D. Formal reference to the Chief Justice without any obligation to carry out his wishes.

4. A Judge of a High Court can be removed from office during his tenure by:
A. The Governor, if the State Legislature passes a resolution to this effect by two-thirds majority.
B. The President, on the basis of a resolution passed by the Parliament by two-thirds majority.
C. The Chief Justice of the Supreme Court, on the recommendation of the Parliament.
D. The Chief Justice of the High Court, on the recommendation of the State Legislature.

5. How many High Courts are in the India currently?
A. 24
B. 31
C. 27
D. 38

6. Who does not participate in the appointment of the High Court Judge?
A. Governor of the State
B. Chief Minister of the state
C. Chief Justice of the High Court of the respective state
D. President of India

7. Where did the concept of judicial activism originate?
A. India
B. USA
C. Germany
D. Japan

8. Who amongst the following is associated with judicial activism in India?
A. Justice P.N. Bhagwati

B. Justice O. Chinnappa Reddy
C. Justice D.A. Desai
D. All of the above

9. Public Interest Litigation in India is to be linked with ----------
A. Judicial Review
B. Judicial Activism
C. Judicial Intervention
D. Judicial Sanctity

10. Which of the following statements are correct about judicial activism?
A. It is the process of lawmaking by judges.
B. It is the practice in the judiciary of protecting individual rights.
C. Judges depart from strict adherence to judicial precedents.
D. All of the above

11. Who coined the term judicial activism?
A. Montesquieu
B. Justice V.R. Krishna Iyer
C. Arthur Schlesinger Jr.
D. None of the above

12. ……. is a theory of judicial interpretation that encourages judges to limit the exercise of their own power.
A. Judicial restraint
B. Judicial Power
C. Precedent
D. None of the Above

13. …….being one of the biggest countries in the world with a fabulous population has a very strong judiciary system which is inherent with the structure of the courts and its hierarchy and the judicial system.
A. USA
B. India
C. Germany
D. Japan

14. The district judge is also called….?
A. Metropolitan session judge
B. Cosmopolitan Judge
C. High Class Judges
D. None of the above

15. …….pertain to disputes between two or more persons regarding property, breach of agreement or contract, divorce or landlord – tenant disputes.
A. Civil Cases
B. Criminal Cases

C. Both A and B
D. None of the Above

16. Which among the following is an old form of adjudicating system prevailed in ancient India?
A. Lok Adalat
B. Supreme Court
C. High Court
D. District Court

17. What does Lok Adalat mean?
A. Women Court
B. District Court
C. Male Court
D. People's Court

18. When the first Lok Adalat camp in the post-independence era was organized?
A. 1947
B. 1976
C. 1982
D. 1954

19. Public Interest Litigation in India is to be linked with ----------
A. Judicial Review
B. Judicial Activism
C. Judicial Intervention
D. Judicial Sanctity

20. ……. is a theory of judicial interpretation that encourages judges to limit the exercise of their own power.
A. Judicial restraint
B. Judicial Power
C. Precedent
D. None of the Above

21. Where was the concept of Public Interest Litigation (PIL) originated and developed?
A. India
B. Germany
C. Japan
D. USA

Answers for Self Assessment

1.	D	2.	A	3.	C	4.	B	5.	A
6.	B	7.	B	8.	D	9.	B	10.	D

11. C 12. A 13. B 14. B 15. A

16. A 17. D 18. C 19. B 20. A

21. D

Review Questions

1. How does the President of India appoint the Judges of the High Courts?
2. Mention any two functions of the High Court.
3. Describe the features of the District Courts? How District Courts are distinct from High Courts?
4. Discuss the powers and functions of the District Courts?
5. What is meant by 'Judicial Activism' and how does it help in the redressed of injustice?
6. What is the difference between judicial activism and judicial restraint?
7. How are judges to exercise a constitutionally appropriate degree of restraint, without ceding questions about the legality of decisions under scrutiny to the elected branches?
8. Write a detailed not on Lok Adalat? Identify key elements of Lok Adalat.
9. What is the constitutional status of the Lok Adalat? How it functions?
10. What do you mean by the Public Interest Litigation? Illustrate some of the key features of the Public Interest Litigation?
11. Discuss what is Public Interest Litigation in the Indian Constitution?

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