

UNIT I – Social Contract

The Constitution as a Social Contract

The Social Contract is a pact through which individuals willingly give in their individual rights to an authority for the collective good. A similar act, where “people have surrendered the sovereign power to the State for the common good”, is seen in the establishment and agreement to a Constitution.

The constitution is a form of social contract that is agreed upon by members of a nation. The constitution, similar to the social contract, is a flexible agreement that alters according to the general consent. It serves the purpose put forward by Hobbes – escaping the violent state of nature- by protecting one’s right to life (there are exceptions) and property whilst maintaining order in society through a legal framework.

The American Declaration of Independence and the Bill of Rights and the French Declaration of the Rights of Man and the Citizen are important illustrations of social contract in political practice. These constitutional developments were influenced greatly by ideas popularised by the Enlightenment period; the social contract theory being one of the major ones. Accordingly, these constitutions launched the right to life, liberty and property. And demanded that the government serve as the protector of these rights along with the “collective good”

The emergence of constitutional republics which aimed for the ‘common good’ through social contract proved to be revolutionary and influenced various other countries in Europe. The influence of such constitutions has been extended to countries around the world, such as India, as well. The Fundamental Rights assured by the Constitution of India, exemplifies principles of liberty and equality to all of its citizens. This displays the significance of the social contract theory in shaping societies even in the present.

However, the social contract is not positively viewed by all. The practice of the theory in politics is regarded by many as an excuse to exercise control over people by exploiting their individual will. The determination of what is the “general will” is also a major concern when creating a constitution.

The constitution can be defined as a form of social contract executed by modern civil societies. Although the procedure of implementing laws in a society is criticized by many, constitutions have functioned as long-lasting and successful agreements to preserve order in society and protect the land, liberty and life of its members.

The Republic and its Government Constitution of India and its supremacy

The Constitution of India is the supreme law of India. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers and duties of government institutions and sets out fundamental rights, directive principles and the duties of citizens. It is the longest written constitution of any sovereign country in the world. B. R. Ambedkar, the chairman of the Drafting Committee, is widely considered to be its chief architect.

The major portion of the Indian subcontinent was under British rule from 1857 to 1947. When the Constitution of India came into force on 26 January 1950, it repealed the Indian Independence Act. India ceased to be a dominion of the British Crown and became a sovereign democratic republic. The date of 26 January was chosen to commemorate the Purna Swaraj declaration of independence of 1930.

Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392, 393 and 394 of the Constitution came into force on 26 November 1949 and the remaining articles on 26 January 1950.

It imparts constitutional supremacy and not parliamentary supremacy, as it is not created by the Parliament but, by a constituent assembly, and adopted by its people, with a declaration in its preamble. Parliament cannot override the constitution.

With its adoption, the Union of India became the modern and contemporary Republic of India replacing the Government of India Act, 1935 as the country's fundamental governing document. To ensure constitutional autochthony, the framers of the constitution repealed the prior Acts of the British Parliament via Article 395 of the constitution. India celebrates its coming into force on 26 January each year, as Republic Day.

It declares India a sovereign, socialist, secular, democratic republic, assuring its citizens of justice, equality, and liberty, and endeavors to promote fraternity among them.

The Constitution provides for a Parliamentary form of government which is federal in structure with certain unitary features. The constitutional head of the Executive of the Union is the President. As per Article 79 of the Constitution of India, the council of the Parliament of the Union consists of the President and two Houses known as the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). Article 74(1) of the Constitution provides that there shall be a Council of Ministers with the Prime Minister as its head to aid and advise the President, who shall exercise his/her functions in accordance to the advice. The real executive power is thus vested in the Council of Ministers with the Prime Minister as its head.

Sources of Indian Constitution

The Constitution refers to the fundamental laws and principles which prescribe the nature, functions and the limits of a government. It reflects the aspirations of the people it belongs to.

In India, the Constituent Assembly was constituted in November 1946, under the scheme formulated by the Cabinet Mission Plan. The Constituent Assembly was to be a partly elected and partly nominated body. The members were to be indirectly elected by the members of the provincial assemblies, who themselves were elected on a limited franchise. It comprised of representatives of all sections of Indian society.

The Constitution framers adopted from several sources, features which are present in the Indian Constitution. The main sources may be identified as

i. Government of India Act, 1935

- Federal Scheme
- Office of Governor
- Judiciary
- Public Service Commissions
- Emergency provisions
- Administrative details.

ii. British Constitution

- Parliamentary government
- Rule of Law

- Legislative procedure
- Single citizenship
- Cabinet System
- Prerogative Writs.

iii. US Constitution

- Preamble
- Fundamental Rights,
- Judicial Review,
- Impeachment of the President
- Equal Protection under law
- Independence of the judiciary and separation of powers among the three branches of the government

iv. Irish Constitution

- Directive Principles of State Policy,
- Nomination of members to Rajya Sabha and method of election of President, Federation with a strong centre,
- Vesting of residuary powers in the Centre,
- Appointment of State Governors by the Centre and advisory jurisdiction of the Supreme Court.

v. Canadian Constitution

- Federation with a strong centre
- Residuary powers with the centre
- Appointment of state governors by the centre and advisory jurisdiction of the Supreme Court.

vi. Australian Constitution

- Concurrent List
- Freedom of trade
- Commerce and intercourse joint sitting of the two Houses of Parliament.

vii. Weimar Constitution

- Suspension of Fundamental Rights during Emergency.

viii. Soviet Constitution

- Fundamental duties,
- The ideal of justice (social, economic and political) in the Preamble.

ix. French Constitution

- Republic and the ideals of liberty equality and fraternity in the Preamble.

x. South African Constitution

- Procedure for amendment
- The Constitution and election of the members of Rajya Sabha.

xi. Japanese Constitution

- Procedure established by law.
- The drafted Constitution was finally adopted on November 26, 1949.

Salient Features of Indian Constitution

The Constitution of India has some outstanding features which distinguish it from other constitutions. The framers of our constitution studied other constitutions, selected their valuable features and put them with necessary modifications in our constitution. Ours is not a borrowed constitution, though it has been influenced by other constitutions.

The framers of the constitution of India did not aim at a completely new or original constitution. They just wanted to produce "a good and workable" constitution. And they succeeded doing this. The fact that the constitution, for last 59 years, has been working satisfactorily is a testimony to its quality and utility. The salient features of the constitution are analyzed below.

1. Preamble

The Preamble, the preface to the constitution, describes the source nature, ideology, goals and objectives of the constitution. It describes India as a sovereign socialist, secular, democratic republic and underlines the national objective of social just: economic justice and political justice as well as fraternity. It emphasizes the dignity of the individual and the unity and integrity of the nation. It declares that in India the people sovereign.

2. Written Constitution

There are two types of constitutions in the world. Most of the constitutions are written. The first modern written constitution was the American constitution. On the other hand, the British constitution is unwritten. It consists of customs and conventions which have grown over the years. In India, we have a written constitution. The framers of our constitution tried to put everything in black and white.

3. Longest Constitution

The Constitution of India is the longest one in the world. Originally it had 395 Articles and 8 schedules. During the period since 1950 a few Articles have been deleted, but many more have been added through amendments.

4. Partly Rigid, Partly Flexible

Whether a constitution is rigid or flexible depends on the nature of amendment. If the constitutional laws and ordinary laws are amended separate ways, it is a rigid constitution. On the contrary, in a flexible constitution constitutional laws and ordinary laws are amended in the same way.

5. Parliamentary Democracy

In India, there is a parliamentary form of govern. The majority party in the Lower House (Lok Sabha) forms government. The Council Ministers is responsible to the Lok Sabha. The Cabinet is the real executive head. In Presidential form of government, the President is the executive head. In India, the President is only the nominal head.

6. Role of Conventions

Though India has a very detailed constitution, there is some scope for conventions to influence its functioning. On some vital issues constitution is silent and one has to depend upon well established parliament conventions on such occasions.

For example, the constitution does not say whether government, defeated on a 'snap vote' in the Lok Sabha, will be required to resign whether the recommendation of a defeated government for the dissolution of the Sabha is to be accepted by the President of India.

7. Federal Government with Unitary Bias

India is a federation, although word 'federation' does not find a place in the whole text of the Indian Constitution. The elements of federation are present in the Indian Constitution. It is a written and rigid constitution. There is dual polity and there is constitutional division

of powers between the centre and the states. There is also an independent judiciary. The Supreme Court arbitrates the disputes between the centre and the states. All these provisions make India a federation.

8. Fundamental Rights

The Fundamental Rights are guaranteed to the individuals by our constitution. These are enumerated in Part III of the constitution. These rights are fundamental because they are basic to the moral and spiritual development of the individual and these rights cannot be easily abridged by the parliament.

The six fundamental rights are (1) Right to Equality, (2) Right to Freedom, (3) Right against Exploitation, (4) Right to Freedom of Religion, (5) Cultural and Educational Rights and (6) Right to Constitutional Remedies. The Fundamental Rights are subject to some restrictions.

The idea of fundamental rights has been borrowed from the American Constitution.

9. Directive Principles of State Policy

The Directive Principles of State Policy are enumerated in Part IV of the constitution. They are instructions or directives from the constitution to the state and the government. It is the duty of the government to implement them.

Originally there were 20 Directive Principles. Three more were added by the 42nd Amendment Act, 1976. Thus, in total, there are now 23 Directive Principles.

10. An Independent and Integrated Judiciary

An independent judiciary is a feature of any federation. The judiciary in India is independent and impartial. It is an integrated judiciary with the Supreme Court at the apex of the hierarchy. The High Court's stand in its middle, and the lower courts are located at its bottom.

11. Universal Franchise

Article 326 of the Constitution of India provides universal adult suffrage. The voting age has now come down from 21 to 18. Anybody who has completed 18 years of age is eligible to vote in general elections. This is one of the most revolutionary aspects of Indian democracy.

12. Secularism

India is a secular state. Although the 42nd Amendment Act, inserted the word 'secular' in the Preamble to the constitution, India has been secularism since independence.

India is a country of several religions and each individual has fundamental profess any religion he likes. The state cannot force him to accept any specific India is a secular state. In India, there is no State Religion. In matters relating to the state is neutral and non-interfering.

It does not patronize any religion. Nor discriminate against any religion.

13. Single Citizenship

In the United States of America, there is double citizenship. An American is a citizen of America and at the same time he is also a citizen of the 50 States of America. In India, there is only single citizenship. An Indian is a citizen of India only. He is not a citizen of any Indian state. Single citizenship is meant to s national unity and national integration.

14. Fundamental Duties

Fundamental Duties did not form part of the constitution. Ten Fundamental Duties were inserted in Part IV of the constitution 42nd Amendment Act, 1976. Some of the important Fundamental Duties are:

(1) To abide by the constitution and respect the ideals and institutions, the national flag and the national anthem; (2) To uphold and protect the sovereignty, unity and integrity of India; (3) To defend the country and render national service; (4) To protect and improve the natural environment; (5) To safeguard public property and to abjure violence. A new Article 51A enumerates ten Fundamental Duties. These duties are assigned only to citizens and not to aliens. These duties are not justifiable, but, in case of conflict, they will prevail over Fundamental Rights.

15. Welfare State:

Our constitution aims at building a Welfare State. It provides for development of weaker and depressed sections of the society. It underlines the need of improving the conditions of women, Scheduled Castes and Scheduled Tribes who have remained neglected for long. Our constitution is opposed to concentration of wealth and means of production. Workers should be involved in management and they should get fair wages. Children should

not be exposed to hazards. All these provisions are expected to help in building a Welfare State.

16. Democratic System

Our constitution lays a lot of emphasis on democratic values, and a number of democratic institutions have been established to give shape to these values. The centre, states and local self governing bodies follow democratic principles, and all elections from gram panchayats to parliament are democratically held.

All persons of 18 years age and more, irrespective of their caste, religion and gender, are eligible to vote in elections, and the constitution has provided for reservations in elections for dalits and tribal's. No democracy can survive if citizens are not allowed fundamental rights. The Indian constitution has granted a number of valuable fundamental rights to the citizens.

Unit-II: History of Constitution

Constitution of India and its Supremacy

Constitution of India

The Constitution of India is the supreme law of India. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers and duties of government institutions and sets out fundamental rights, directive principles and the duties of citizens. It is the longest written constitution of any sovereign country in the world. The nation is governed by it. B. R. Ambedkar is regarded as its chief architect. It imparts constitutional supremacy and not parliamentary supremacy, as it is not created by the Parliament but, by a constituent assembly, and adopted by its people, with a declaration in its preamble. Parliament cannot override the constitution.

It was adopted by the Constituent Assembly on 26 November 1949, and came into effect on 26 January 1950. With its adoption, the Union of India became the modern and contemporary Republic of India replacing the Government of India Act, 1935 as the country's fundamental governing document. To ensure constitutional autochthony, the framers of the constitution repealed the prior Acts of the British Parliament via Article 395 of the constitution. India celebrates its coming into force on 26 January each year, as Republic Day. It declares India a sovereign, socialist, secular, democratic republic, assuring its citizens of justice, equality, and liberty, and endeavors to promote fraternity among them.

Supremacy of Indian Constitution

In India, as inscribed in Preamble, the Constitution derives its powers from "**We the people**". So, we the people are sovereign, while we have given the supreme authority to Constitution, as the supreme law of the land. Parliament runs according to the laws given in the constitution. Whenever the parliament passes any bill/act in transgression with the Constitution, the Supreme Court voids that particular Act.

Thus, the rules mentioned in the Constitution are supreme in the land. The power to the constitution, however, is given by the sovereign, the people of India, who are directly represented by the Parliament.

Constitution is supreme because of reason that parliament work's according to constitution and not just parliament every union state and executive body work's according to the constitution of India.

Constitutional supremacy

The term Constitutional supremacy means that, the constitution is supreme over the parliament. And parliament can exercise its function being only within bounds of the constitution. Constitutional supremacy is only possible where the constitution is written and rigid.

Why the constitution of India is Supreme

Some intrinsic features of constitutional supremacy are given below.

1. The condition of the constitutional supremacy is that, the constitution must be written.
2. The constitution must be rigid and maintain procedure.
3. In constitutional supremacy, there has distinction between constitutional law and ordinary law.
4. Parliament is created by the constitution itself.
5. Parliament can exercise its function being only within the bounds of the constitution.
6. In constitutional supremacy, there has judicial review.

If any contradiction between constitutional law and ordinary law of the republic, the constitution shall get prevail and get priority.

History of Indian Constitution

The Constitution of India came into force on 26 January 1950. Since then, the day is celebrated as Republic Day. However, before 1950, 26 January was called Independence Day. Since 26 January 1930, it was the day on which thousands of people, in villages, in towns, in small and big groups would take the independence pledge, committing themselves to the complete independence of India from British rule. It was only fitting that the new republic should come into being on that day, marking from its very inception the continuity between the struggle for independence and the adoption of the Constitution that made India a Republic.

The process of the evolution of the Constitution began many decades before 26 January 1950 and has continued unabated since. Its origins lie deeply embedded in the struggle for independence from Britain and in the movements for responsible and constitutional government in the princely states.

On 19 February 1946, the British government declared that they were sending a Cabinet Mission to India to resolve the whole issue of freedom and constitution making. The Cabinet Mission, which arrived in India on 24 March 1946, held prolonged discussions with Indian leaders. On 16 May 1946, having failed to secure an agreement, it announced a scheme of its own. It recognized that the best way of setting up a constitution-making machinery would 'be by election based on adult franchise; but any attempt to introduce such a step now would lead to a wholly unacceptable delay in the formulation of the new constitution. Therefore, it was decided that the newly-elected legislative assemblies of the provinces were to elect the members of the Constituent Assembly on the basis of one representative for roughly one million of the population. The Sikh and Muslim legislators were to elect their quota based on their population.

It was only after this process had been completed that the representatives of all the provinces and those of the princely states were to meet again to settle the Constitution of the Union. The Congress responded to the Cabinet Mission scheme by pointing out that in its view the Constituent Assembly, once it came into being, would be sovereign. It would have the right to accept or reject the Cabinet Mission's proposals on specifics.

The Constituent Assembly was to have 389 members. Of these, 296 were to be from British India and 93 from the princely Indian states. Initially, however, the Constituent Assembly comprised only of members from British India. Elections of these were held in July-August 1946. Of the 210 seats in the general category. Congress won 199. It also won 3 out of the 4 Sikh seats from Punjab. The Congress also won 3 of the 78 Muslim seats and the 3 seats from Coorg, Ajmer- Merwara, and Delhi. The total Congress tally was 208. The Muslim League won 73 out of the 78 Muslim seats.

At 11 a.m., on 9 December 1946, the Constituent Assembly of India began its first session. For all practical purposes, the chronicle of independent India began on that historic day. Independence was now a matter of dates. The real responsibility of deciding the constitutional framework within which the government and people of India were to function

had been transferred and assumed by the Indian people with the convening of the Constituent Assembly.

207 members attended the first session. The Muslim League, having failed to prevent the convening of the Assembly, now refused to join its deliberations. Consequently, the seventy-six Muslim members of the League stayed away and the four Congress Muslim members attended the session. On 11 December, Dr Rajendra Prasad was elected the permanent Chairman; an office later designated as President of the Assembly.

The third session was held from 28 April to 2 May 1947 and the League still did not join. On 3 June, the Mountbatten Plan was announced which made it clear that India was to be partitioned. With India becoming independent on 15 August 1947, the Constituent Assembly became a sovereign body, and also doubled as the legislature for the new state. It was responsible for framing the Constitution as well as making ordinary laws. The work was organized into five stages: first, committees were asked to present reports on basic issues; second, B.N. Rau, the constitutional adviser, prepared an initial draft on the basis of the reports of the reports of these committees and his own research into the constitutions of other countries; third, the drafting committee, chaired by Dr Ambedkar presented a detailed draft constitution which was published for public discussion and comments; fourth, the draft constitution was discussed and amendments proposed; fifth, and lastly the constitution was adopted.

Preamble of the Constitution

The Constitution of India initiates with a Preamble. The Preamble consists of the ideals, objectives and basic principles of the Constitution. The salient features of the Constitution have developed directly and indirectly from these objectives which flow from the Preamble. The Preamble is described as an introduction or preface of a book. As an overview, it is not a part of the contents but it explains the purposes and objectives with which the document has been written. So is the case with the 'Preamble' to the Indian Constitution. As such the 'Preamble' provides the guide lines of the Constitution. Basically, it is a brief introductory statement that sets out the guiding purpose and principles of the document, and it indicate the source from which derives its authority, meaning, and the people.

The Preamble describes the objectives of the Constitution in two ways: one, is about the structure of the governance and secondly, it explains the ideals to be achieved in independent India. It is because of this, the Preamble is considered to be the major element of the Constitution.

The objectives, which are laid down in the Preamble, are:

1. Description of Indian State as Sovereign, Socialist, Secular, Democratic Republic. (Socialist, Secular added by 42nd Amendment, 1976).
2. Provision to all the citizens of India i.e.
 - a. Justice social, economic and political.
 - b. Liberty of thought, expression, belief, faith and worship.
 - c. Equality of status and opportunity.
 - d. Fraternity assuring dignity of the individual and unity and integrity of the nation.

The Preamble to the Constitution of India is a well drafted document which signifies the values of the constitution. It asserts India to be a Sovereign Socialist Secular Democratic Republic and a welfare state committed to secure justice, liberty and equality for the people and for promoting fraternity, dignity the individual, and unity and integrity of the nation. The Preamble is the nature of Indian state and the objectives it is committed to secure for the people.

Citizenship- Preamble

Citizenship constitutes the indispensable foundational principle of democratic polity. According to Merriam, a citizen means a person owing allegiance to and entitled to the protection of a sovereign state. Citizenship provides rights such as right to vote, and are also subjected to duties or obligation, such as paying taxes. Citizenship is covered in Part II of the constitution, within articles 5-11. It took an enormous amount of drafts and took two years to be finalized.

Constitution Part II has the following articles

- Article 5. Citizenship at the commencement of the Constitution.
- Article 6. Rights of citizenship of certain persons who have migrated to India from Pakistan.

- Article 7. Rights of citizenship of certain migrants to Pakistan.
- Article 8. Rights of citizenship of certain persons of Indian origin residing outside India.
- Article 9. Persons voluntarily acquiring citizenship of a foreign State not to be citizens.
- Article 10. Continuance of the rights of citizenship.
- Article 11. Parliament to regulate the right of citizenship by law.

Article 5-8 conferred citizenship on each person who met the criteria below at the commencement of the Constitution:

- Domiciled in India and born in India
- Domiciled not born in India but either of whose parents was born in India
- Domiciled, not born in India but ordinarily resident for more than five years
- Resident in India but migrated to Pakistan after 1 March 1947 and later returned to India on resettlement permit
- Resident in Pakistan but who migrated to India after 19 July 1948 or who came after that date but had resided for more than six months and got registered in prescribed manner.
- Resident outside India but who or either of whose parents or grandparents were born in India.

Thus, Citizenship at the commencement of the constitution included provisions for Citizenship-by domicile, of migrants from Pakistan and of Indians residing in foreign countries.

Domicile

Domicile of a person is his permanent home. No person can be without a domicile and no person may have more than one operative domicile. National boundaries do not constitute a hindrance in one's choice of domicile. This implies that a person may be national of one country, but his/her domicile may be another country. Domicile denotes the connection of a person with a territorial system of law. In fact; citizenship is denoted by domicile and not vice-versa. The latter is distinguishable from citizenship inasmuch as it is

vitaly connected with territory and not membership of the community which is at the root of the notion of citizenship. There is only one citizenship, which is of the Union of India, there is no separate state Citizenship as in the United States of America.

Migrants from Pakistan

Article 6 provides citizenship rights to migrants from Pakistan before commencement of constitution. A person who migrated from Pakistan to India before 19 July 1948 shall be considered a citizen of India, provided either of the person's parents or any of his grandparents were born in India as stated in the Government of India act, 1935 and has been residing since the date of migration . For person/s migrated after 19 July 1948, the person should be registered as a citizen of India by an officer from the Government of India, but for registration the subjected person has to be a resident of India for at least six months, at the date of his application.

Migrants to Pakistan

Article 7 makes special provisions regarding the citizenship rights of persons who migrated to Pakistan after March 1 1947 but returned to India subsequently. Such person/s becomes entitled to Citizenship of India, provided they fulfill the conditions stated for Migrants from Pakistan stated in Article 6. It is necessary that in such cases too the visits of the migrants must not be for short/limited periods or be of a temporary nature or on purposes of business or otherwise. It has to be noted that such cases are subjected to this article, as they were before the commencement of the constitution; cases pertaining to the period thereafter are to be governed by the Citizenship Act, 1955.

Persons of origin residing outside India

Article 8 provides that any person who or either of whose parents or grandparents was born in India as defined in Government of India Act 1955 and who is ordinarily residing in any country outside India shall be deemed to be a citizen of India if he has registered as an Indian Citizen by the diplomatic or consular representative of India in that country on an application made by him/her in the prescribed form to such diplomatic or consular representative, whether before or after the commencement of the Constitution.

Voluntary Acquisition of Citizenship of foreign state

Article 9 states no person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State.

Continuance of the rights of citizenship

Article 10 reads every person who is or is deemed to be a citizen of India under any of the foregoing provisions of article 5-10 shall continue to be a citizen of India, subject to the provisions of any law that may be made by Parliament. In the other words, the right of citizenship cannot be taken away from a person except through express parliamentary legislation.

Parliament to regulate the right of citizenship by law

Article 11 in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

Indian Citizenship Act 1955

The Citizenship Act, 1955 that came into force with effect from 30th December 1955 deals with matters relating to the acquisition, determination and termination of Indian citizenship. It provides for the acquisition of Indian citizenship by birth, by descent, by registration and by naturalization. The act has been amended by the Citizenship (Amendment) Act 1986, the Citizenship (Amendment) Act 1992, the Citizenship (Amendment) Act 2003, and the Citizenship (Amendment) Act, 2005.

The Original Act provided:

- A person born in India after 26 January 1950 would, subject to certain exceptions be a citizen of India by Birth
- Anyone born outside India after 26 January 1950, subject to certain requirements, would be a citizen of India if his/her father was an Indian citizen at the time of his/her birth
- Under certain conditions, certain category of persons could acquire Indian citizenship by registration in prescribed manner

- Foreigners could acquire Indian citizenship on application for naturalization on certain conditions
- If any territory became part of India, the Government of India could by order specify the persons who would become citizens of India as a result thereof
- Citizenship could be lost by termination, renunciation or deprivation on certain grounds
- A citizen of commonwealth country would have the status of commonwealth citizen of India. Government could make suitable provisions on the basis of reciprocity

Fundamental Duties

It is widely believed that Rights and Duties are two sides of a coin. There are no rights without duties, no duties without rights. In fact, rights are born in a world of Duties. A major difference between the fundamental rights and duties mentioned in the Indian constitution is that- while fundamental rights are justiciable, fundamental duties are non justiciable in nature – which means if a citizen does not performs his/her fundamental duties, they can still enjoy the fundamental rights enshrined the Indian constitution.

The original Constitution was enforced in 1950, but it did not mention Fundamental Duties of the citizens. It was hoped that citizens would perform their duties willingly.

But, 42nd Amendment to the Constitution added a new list consisting of 10 duties in chapter IV under Article 51-A of the Constitution.

The Fundamental Duties were added to the constitution on the recommendations of the Swaran Singh Committee. There were ten fundamental duties at the time of incorporation but the eleventh was added by the 86th Amendment Act in 2002.

It is said about Fundamental Duties that – The “Fundamental Duties’ come as moral obligations of all citizens of India for national integration, growth and development of society.

Though these duties are not themselves enforceable and their violation is also not punishable. But still, these fundamental duties can serve as a reference point for cases regarding enforcement of fundamental rights. Courts can consider refusing enforcement of a

fundamental right in view of violation of fundamental duties. This in a way curtails emphasis from fundamental rights in the constitution.

Fundamental Duties of constitution are as under

A new part IV (A) after the Directive Principles of State Policy was combined in the constitution by the 42nd Amendment, 1976 for fundamental duties. These duties are mentioned below:

1. To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem.
2. To apprise and follow the noble ideals, which inspired our national struggle for freedom.
3. To sustain and protect the sovereignty, unity and integrity of India.
4. To defend the country and render national service when called upon to do so.
5. To promote coordination and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, regional or sectional diversities, to renounce practices derogatory to the dignity of woman.
6. To value and preserve the rich heritage of our composite culture.
7. To protect and improve the natural environments including forests, lakes, rivers and wild life and to have compassion for living creatures.
8. To develop scientific temper, humanism and the spirit of inquiry and reform.
9. To defend public property and to abjure violence.
10. To endeavour towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of Endeavour and achievement.

The main aim of integrating these duties in the Constitution is to remind the people that while enjoying their right as citizens, should also perform their duties as rights and duties are correlative.

Fundamental Rights (Articles 14, 19, 20, 21, 22 and 32)

The Fundamental Rights is defined as the basic human rights of all citizens. These rights, defined in Part III of the Constitution, apply irrespective of race, place of birth, religion, caste, creed, or gender. They are enforceable by the courts, subject to specific restrictions. The Constitution of India grants and guarantees Fundamental Rights to its

citizens. It is called the Indian Bill of Rights. Initially, seven Fundamental Rights were granted but after the deletion of the Right to Property from the list of Fundamental Rights (44th Amendment Act 1979) their number came down to six. The constitution of India confirms the basic principle that every individual is permitted to enjoy certain basic rights and part III of the Constitution deals with those rights which are known as fundamental right.

It guarantees civil rights to all Indians, and prevent the State from encroaching on individual liberty while simultaneously placing upon it an obligation to protect the citizens' rights from encroachment by society.

The purpose of the Fundamental Rights is to preserve individual liberty and democratic principles based on equality of all members of society. Dr Ambedkar said that the responsibility of the legislature is not just to provide fundamental rights but also and rather more importantly, to safeguard them.

The Six Fundamental Rights are under:

Right to Equality (Articles 14-18)

Article 14 (Equality before law)

- Article 14 says that state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
- Art. 14 is available to any person including legal persons viz. statutory corporation, companies, etc.
- Art. 14 is taken from the concept of equal protection of laws has been taken from the constitution of USA.
- The concept of the rule of law is a negative concept while the concept of equal protection of laws is a positive concept.
- The concept of *equality before the law* is equivalent to the second element of the concept of the 'rule of law' propounded by A.D. dicey, the British jurist. But certain exceptions to it are, the president of India, state governors, Public servants, Judges, Foreign diplomats, etc., who enjoy immunities, protections, and special privileges.

Article 15 (Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth)

- Article 15 says that the state shall not discriminate against only of religion, race, sex, and place of birth or any of them.
- Under Article 15 (3) & (4), the government can make special provisions for women & children and for a group of citizens who are economically and socially backward.

Article 16 (Equality of opportunities in matters of public employment)

- **Article 16** says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

Article 17 (Abolition of Untouchability) - Article 17 says that *Untouchability* is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offense punishable by law.

Article 18 (Abolition of titles)

- Article 18 says that no title, not being a military or academic distinction, shall be conferred by the State. No citizen of India shall accept any title from any foreign state.
- The awards, Bharat Ratna, Padma Vibhuan, Padma Bhusan and Padma Shri, called as The National Awards would not amount to title within the meaning of Article 18(i).

Right to Freedom (Articles 19-22)

Article 19 (Protection of certain rights regarding freedom of speech, etc.):

Article 19 says that all citizens shall have the right

1. To freedom of speech and expression.
2. To assemble peacefully and without arms.
3. To form associations or unions.
4. To move freely throughout the territory of India.
5. To practice any profession or to carry on any occupation, trade or business.

Article 20

Protection in respect of conviction for offenses): Article 20 says that state can impose reasonable restrictions on the groups of security of the state, friendly relations with foreign states, public order, decency, morality, contempt of court, defamation, etc.

Article 21

It deals with Protection of life and personal liberty.

Article 21A

It states that that state shall provide free and compulsory education to all children of the age of 6-14 years.

Article 22

It deals with protection against arrest and detention in certain cases.

Right against Exploitation (Articles 23-24)

Article 23 deals with the prohibition of traffic in human beings and forced labour.

Article 24 deals with prohibition of employment of children in factories, etc.

Right to Freedom of Religion (Articles 25-28)

Article 25 deals with freedom of conscience and free profession, practice, and propagation of religion.

Article 26 deals with freedom to manage religious affairs.

Article 27 deals with freedom as to payment of taxes for promotion of any particular religion.

Article 28 deals with freedom as to attendance at religious instructions or religious worship in certain educational institutions.

Cultural and Educational Rights (Articles 29-30)

Article 29 deals with the protection of language, script, and culture of minorities.

Article 30 deals with the right of minorities to establish and administer educational institutions.

Right to Constitutional Remedies (Article 32)

Article 32 deals with the right to move to the Supreme Court for the enforcement of Fundamental Rights including the Writs of (i) Habeas corpus, (ii) Mandamus, (iii) Prohibition, (iv) Certiorari and (iv) Quo warranto.

Unit III: Wings of the Government

Directive Principles of State Policy

The Directive Principles of State Policy (DPSP) is the guidelines or principles given to the federal institutes governing the state of India, to be kept in citation while framing laws and policies. These provisions, contained in Part IV (Article 36-51) of the Constitution of India, are not enforceable by any court, but the principles laid down therein are considered irrefutable in the governance of the country, making it the duty of the State to apply these principles in making laws to establish a just society in the country. The principles have been inspired by the Directive Principles given in the Constitution of Ireland relate to social justice, economic welfare, foreign policy, and legal and administrative matters.

Directive Principles are classified under the following categories: economic and socialistic, political and administrative, justice and legal, environmental, protection of monuments and peace and security.

The concept of Directive Principles of State Policy was borrowed from the Irish Constitution. The makers of the Constitution of India were influenced by the Irish nationalist movement, particularly the Irish Home Rule Movement. Hence, the Directive Principles of the Indian constitution have been greatly influenced by the Directive Principles of Social Policy. The idea of such policies "can be traced to the Declaration of the Rights of Man proclaimed by Revolutionary France and the Declaration of Independence by the American Colonies." The Indian constitution was also influenced by the United Nations Universal Declaration of Human Rights.

Characteristics

Directive Principles of State Policy aim to create social and economic conditions under which the citizens can lead a good life. They also aim to establish social and economic democracy through a welfare state. They act as a check on the government, theorized as a yardstick in the hands of the people to measure the performance of the government and vote it out of power if it does not fulfill the promises made during the elections. Though the Directive Principles are non-justifiable rights of the people but fundamental in the

governance of the country. It shall be the duty of the State to apply these principles in making laws per Article 37. Besides, all executive agencies of union and states should also be guided by these principles. Even the judiciary has to keep them in mind in deciding cases.

Per Article 37, state and union governments, as duty, shall make further detailed policies and laws for implementation considering DPSPs as fundamental policy. In contrary to Article 37, many policies have been implemented by state and union governments which go against the DPSPs such as using intoxicating drinks as source of major tax revenue instead of implementing prohibition for better health of people, separation of judiciary from executive, uniform civil code for the citizen, etc. When the union government feels that a DPSP is no longer useful to the nation, it shall be deleted from Constitution by bringing a constitutional amendment to remove ambiguity in policy making / direction. Judiciary can repeal any policy/law devised by the government which is diametrically opposite to any DPSP.

An existing policy in line with DPSP can not be reversed, however it can be expanded further in line with DPSP. The policy changes applicable under DPSP shall not be reversible unless the applicable DPSP is deleted by constitutional amendment (ex. prohibition implemented once in a state cannot be repealed later as long as it is part of DPSP). The Directive Principles of State Policy are the followings;

Article 36: Definition

In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.

Article 37: Application of the principles contained in this Part

The provisions contained in this Part shall not be enforced 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: State to secure a social order for the promotion of welfare of the people

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst

individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39: Certain principles of policy to be followed by the State

The State shall, in particular, direct its policy towards securing –

- (a) That the citizen, men and women equally, have the right to an adequate means of livelihood;
- (b) That the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;
- (c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) That there is equal pay for equal work for both men and women;
- (e) That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39A: Equal justice and free legal aid

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 40: Organization of village panchayats

The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self government.

Article 41: Right to work, to education and to public assistance in certain cases

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 42: Provision for just and humane conditions of work and maternity relief

The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 43: Living wage, etc., for workers

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

Article 43A: Participation of workers in management of industries

The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisation engaged in any industry.

Article 44: Uniform civil code for the citizen

The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Article 45: Provision for free and compulsory education for children

The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Article 46: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Article 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

Article 48: Organization of agriculture and animal husbandry

The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

Article 48A: Protection and improvement of environment and safeguarding of forests and wild life

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 49: Protection of monuments and places and objects of national importance.

It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

Article 50: Separation of judiciary from executive

The State shall take steps to separate the judiciary from the executive in the public services of the State.

Article 51: Promotion of international peace and security

The State shall endeavour to –

- (a) Promote international peace and security;
- (b) Maintain just and honorable relations between nations;
- (c) Foster respect for international law and treaty obligations in the dealings of organized people with one another; and
- (d) Encourage settlement of international disputes by arbitration.

Amendments

Changes in Directive Principles require a Constitutional amendment which has to be passed by a special majority of both houses of the Parliament. This means that an amendment requires the approval of two-thirds of the members present and voting and by the absolute majority of the house – whether the Lok Sabha or Rajya Sabha.

- **Article 31-C** amended by the 42nd Amendment Act of 1976 seeking to upgrade the DPSPs. If laws are made to give effect to any of the Directive Principles overriding Fundamental Rights, they shall not be invalid on the grounds that they take away the Fundamental Rights. In *Minerva Mills v. Union of India* case, Supreme Court ruled that 42th Amendment Act to the Article 31C is not valid and ultra vires.
- **Article 45**, which ensures **Provision for free and compulsory education for children**, was added by the 86th Amendment Act, 2002.^[8]
- **Article 48-A**, which ensures **Protection and improvement of environment and safeguarding of forests and wild life**, was added by the 42nd Amendment Act, 1976.

Executive, Legislature and Judiciary

Executive

The executive is the organ exercising authority in and holding responsibility for the governance of a state. The executive executes and enforces law.

In political systems based on the principle of separation of powers, authority is distributed among several branches (executive, legislative, judicial) — an attempt to prevent the concentration of power in the hands of a small group of people. In such a system, the executive does not pass laws (the role of the legislature) or interpret them (the role of the judiciary). Instead, the executive enforces the law as written by the legislature and interpreted by the judiciary. The executive can be the source of certain types of law, such as a decree or executive order. Executive bureaucracies are commonly the source of regulations.

Functions of Executive

In the modern state a variety of functions are performed by the executive, as stated below.

1. Administrative Function

The administration function of the executive includes the following.

(a) Execution of Laws and Judicial Decision

The executive is entrusted with the responsibility to execute laws made by the legislature, and decisions of the Judiciary coming in the forms of judgments of courts.

(b) Maintenance of Law and Order

Another important function of the executive is to maintain law and order. The police are mainly in charge of this task.

(c) Policy-Formation

In respect of policy-making, the executive has a crucial role. It prepares the blue-print of the policy which goes to the legislature in the form of bill. The policy emerges after the bill is passed by the legislature and the head of state gives assent to it.

(d) Appointment and Promotion

The political executive enjoys the power of appointment, promotion, removal and suspension of civil servants.

2. Diplomatic function

It means the conduct of foreign relations. The executive appoints diplomatic representatives to foreign states and receives representatives from them. Treaties and international conventions are negotiated and concluded by the executive, often subject to the approval of one or both houses of the legislature.

3. Military Function

The chief executive, in most of the states, is made the supreme commander of the defence forces. The power of waging war and concluding peace with any foreign state is assigned to the executive. In times of emergency and grave national crisis the chief executive may declare martial law and suspend the rights of citizens.

4. Financial and Economic Function

(a) Budget-preparation

In almost all the countries, the budget or the Annual Financial Statement is prepared by the executive and presented to the legislature for approval.

(b) Revenue-collection

The executive prepares the sources of revenue of the government, collects taxes, and after the approval of the budget spends money on various heads.

(c) Auditing

The auditing and accounting of public expenditure are done under the supervision of the executive.

(d) Economic policy

The executive determines the economic policy of the country. This policy is designed to expedite economic development and make the country self-reliant. The executive prepares plans relating to production, distribution and exchange of goods and resources.

5. Judicial Function

The chief executive has the right of pardon or clemency. He may suspend, remit or commute the sentence of a person convicted of an offence. This power is exercised in exceptional cases. In most of the states the executive officials decide administrative cases like tax evasions, industrial disputes, damages claimed against government and encroachments. This is known as 'administrative adjudication'.

6. Constituent Function

The constitution may require certain changes. It executive which determines what changes are necessary in the constitution, and such changes. It also takes the lead in piloting those constitutional amendments.

7. Legislative Function

The following are the legislative functions of the executive wing

(a) Law-Making

Law-making is the main function of the legislature, contribution of the executive to law-making is also significant. The executive pre legislative proposals, sends them in the form of bills to the legislature, pilots and them on the floor of the legislature and works hard for the passing of bills by the legislature.

A bill passed by the legislature, however, cannot be law unless it obtains the Asser of the head of state. He has the power to veto a bill or send it back to the legislature reconsideration.

(b) To summon and provoke the House:

The head of state (President in A India, and King or Queen in Britain) has the power to summon and prorogue the legislature. In India, for examples, he can dissolve the lower house of the legislature recommendation of the council of ministers.

(c) Promulgation of Ordinance:

When the national legislature is not in session head of state can promulgate ordinances to meet exigencies. The ordinance has force as law. It has to be placed before the legislature for approval when it meets passed by the legislature, it becomes a law.

(d) Delegated Legislation- For lack of time and technical competence, the le delegates the power to make detailed laws and regulations to the executive. The volume of such 'delegated legislation' has increased in recent years.

8. Welfare Function:

As people have become increasingly conscious of the fact that the state has a responsibility to provide basic amenities of life to them, they are the same and the governments, in general, are trying to meet their demand. It is the duty of the government to ensure that the people have food, clothes, shelter and access to education etc. The states are generally becoming 'welfare states'.

9. Miscellaneous Functions - The executive gives leadership to the government. It leads the legislature. It leads the party in power. It leads the nation in general, leadership to the state and represents it in various international conferences and organizations.

Legislature

The functions of legislatures are not the same in every country. The form of government in each state determines their function. The nature and extent of role a legislature plays under a monarchy or aristocracy is different from that of a legislature in a democracy.

The legislature plays very significant role in a Parliamentary System of government under such a system the legislature is superior to the executive. The executive remains responsible and answerable to the legislature for all its actions. Continuing in power on the part of the executive depends on the satisfaction and support of the legislature.

Although the organisation, nature and functions of the legislatures differ from country to country, their main functions are more or less the same. They may be classified as legislative, regulatory, financial, deliberative, judicial, constituent and electoral functions.

Functions of Legislature

The functions of legislature are as follows;

1. Legislative functions

Law making is the foremost function of a legislature as it is the direct source of legislation. Law is regarded as the expression or the will of the people. The laws reflect the

changing conditions of society and the new social environment. The policies of the government are put to executive through the laws made by legislature. The laws have to adjust themselves to the ever changing requirements of the society. Therefore one of the major functions of the legislature besides making law, amending and repealing them wherever they become obsolete or outdated. Laws are enacted according to prescribed procedure of the constitution. The law making powers of the legislatures are absolute. They are limited by the provisions of the constitution.

2. Regulatory Functions

Under Parliamentary System of government the legislature exercises its immediate and direct control over the executive. The executive is under responsible and answerable to the legislature for all its actions. The legislature exercises its control by a) asking questions to the ministers to elicit important information relating to matters of administration and matters of public importance. Secondly b) it, can move adjournment motions or raise debates to point out specific lapses of the government and most importantly c) it can move no confidence motion. Though such a motion it can express its lack of confidence in the government, which if passed by the legislature forces the party in power to resign. These powers of the legislature regulate the working of the government to a large extent.

3. Financial Powers

The legislature has very important powers in the field of finance. It acts as the guardian of national purse. It regulates the "income and expenditure of the government in respect of its various projects, administrative and welfare. People's money must be controlled and spent under the supervision and control of their representatives to prevent its misuse and wasteful expenditure. The theory no taxation without representation recognises the supremacy of the legislature, which is the fund raising and fund granting authority. It is a fundamental principle, recognised in all civilized country, that no tax shall be collected or expenditure be made without the approval of the legislature. All proposals for financial legislation are routed through the popular chamber.

4. Deliberative Functions

The Legislature is a deliberative body, a forum where many persons represent numerous interests, various points of view of different sections of the community. This is a body which facilitates determination of policies and legislation through a process of debate

and discussion. This discussion provides with opportunities to each member not only to present the view and perception of his party but also permits to mould his own views in light of the discussion made in the House Over and above the various viewpoints presented in the House contribute to the growth of political consciousness of the people in general and educate the members of executive to find out the solutions to various problems in particular. Through this power the legislative acts as a link between the public and the government.

5. Judicial Functions

The legislature also exercises some judicial function. Certain countries have entrusted to their legislatures the function of trying high constitutional authorities like the head of the executive, members of judicially and other constitutional bodies through the motion of impeachment. In India the President, the judges of Supreme Court, the members of U.P.S.C, the Comptroller and Auditor General can be impeached by the Parliament after fulfilling certain constitutional formalities. In England the Upper House of the Parliament Acts as the highest court of appeal. Also in United States the President can be impeached by the Senate. Very often the legislatures appoint commissions of inquiry relating to trade, commerce, agriculture, industry etc.

6. Constitutional Functions

The legislatures also have constitutional functions to perform. Most of the legislatures have been entrusted with the powers to amend the constitution. In India all amendment proposals can be initiated only in the legislature.

7. Electoral Functions

Many of the legislatures participate in electoral functions. The Indian Parliament takes part in the election of the President and Vice-President of India. It also elects some its members to various committees of the House. It elects its presiding and deputy presiding officers.

8. Miscellaneous Functions

Some legislatures are assigned specific executive tasks. In India, the Rajya Sabha has been given the power to establish or eliminate any All India Service. Legislatures also perform the function of approving or rejecting or amending all the policies and plans made by the executive. In the US Constitution, the Congress (Legislature) enjoys the power to declare war.

Thus the legislative organs of the government play a very important and active role in the exercise of the sovereign power of the state. In fact legislature is the legal sovereign in the State. It has the power to transform any decision of the state into a law.

Legislature is the chief source of law. It is the mirror of national public opinion and the symbol of the power of the people.

Judiciary

The Judiciary is the third organ of the government. It has the responsibility to apply the laws to specific cases and settle all disputes. The real 'meaning of law' is what the judges decide during the course of giving their judgments in various cases. From the citizen's point of view, Judiciary is the most important organ of the government because it acts as their protector against the possible excesses of legislative and executive organs.

Role of Judiciary as the guardian-protector of the constitution and the fundamental rights of the people makes it more respectable than other two organs.

Functions of Judiciary

The functions of the judiciary are as follows,

1. To Give Justice to the people

The first and foremost function of the judiciary is to give justice to the people, whenever they may approach it. It awards punishment to those who after trial are found guilty of violating the laws of the state or the rights of the people.

The aggrieved citizens can go to the courts for seeking redress and compensation. They can do so either when they fear any harm to their rights or after they have suffered any loss. The judiciary fixes the quantity and quality of punishment to be given to the criminals. It decides all cases involving grant of compensations to the citizens.

2. Interpretation and Application of Laws

One of the major functions of the judiciary is to interpret and apply laws to specific cases. In the course of deciding the disputes that come before it, the judges interpret and apply laws. Every law needs a proper interpretation for getting applied to every specific case. This function is performed by the judges. The law means what the judges interpret it to mean.

3. Role in Law-making

The judiciary also plays a role in law-making. The decisions given by the courts really determine the meaning, nature and scope of the laws passed by the legislature. The interpretation of laws by the judiciary amounts to law-making as it is these interpretations which really define the laws.

Moreover, 'the judgments delivered by the higher courts, which are the Courts of Records, are binding upon lower courts. The latter can decide the cases before them on the basis of the decisions made by the higher courts. Judicial decisions constitute a source of law.

4. Equity Legislation

Where a law is silent or ambiguous, or appears to be inconsistent with some other law of the land, the judges depend upon their sense of justice, fairness, impartiality, honesty and wisdom for deciding the cases. Such decisions always involve law-making. It is usually termed as equity legislation.

5. Protection of Rights

The judiciary has the supreme responsibility to safeguard the rights of the people. A citizen has the right to seek the protection of the judiciary in case his rights are violated or threatened to be violated by the government or by private organizations or fellow citizens. In all such cases, it becomes the responsibility of the judiciary to protect his rights of the people.

6. Guardian of the Constitution

The judiciary acts as the guardian of the Constitution. The Constitution is the supreme law of the land and it is the responsibility of the judiciary to interpret and protect it. For this purpose the judiciary can conduct judicial review over any law for determining as to whether or not it is in accordance with the letter and spirit of the constitution. In case any law is found ultra vires (unconstitutional), it is rejected by the judiciary and it becomes invalid for future. This power of the court is called the power of judicial review.

7. Power to get its Decisions and Judgments enforced

The judiciary has the power not only to deliver judgments and decide disputes, but also to get these enforced. It can direct the executive to carry out its decisions. It can summon any person and directly know the truth from him. In case any person is held:

- (i) Guilty of not following any decision of the court, or
- (ii) Of acting against the direction of the court, or

(iii) Misleading the court, or

(iv) Of not appearing before the court in a case being heard by it, the Court has the power to punish the person for the contempt of court.

8. Special Role in a Federation

In a federal system, the judiciary has to perform an additionally important role as the guardian of the constitution and the arbiter of disputes between the centre and states. It acts as an independent and impartial umpire between the central government and state governments as well as among the states. All legal centre-state disputes are settled by the judiciary.

9. Running of the Judicial Administration

The judiciary is not a department of the government. It is independent of both the legislature and the executive. It is a separate and independent organ with its own organisation and officials. It has the power to decide the nature of judicial organisation in the state. It frames and enforces its own rules.

These govern the recruitment and working of the magistrates and other persons working in the courts. It makes and enforces rules for the orderly and efficient conduct of judicial administration.

10. Advisory Functions

Very often the courts are given the responsibility to give advisory opinions to the rulers on any legal matter. For example, the President of India the power to refer to the Supreme Court any question of law or fact which is of public importance.

11. To Conduct Judicial Inquiries

Judges are very often called upon to head Enquiry Commissions constituted to enquire into some serious incidents resulting from the alleged errors or omissions on the part of government or some public servants. Commissions of enquiry headed by a single judge are also sometimes constituted for investigating important and complicated issues and problems.

12. Miscellaneous Functions

Besides the above major functions, the judiciary also performs several other functions. Some such functions are the appointment of certain local officials of the court, choosing of clerical and other employees. Cases relating to grant of licenses, patents, and

copy rights, the appointment of guardians and trustees, the admission of wills, to appoint trustees to look after the property of the minors, to settle the issues of successions of property and rights, issue of administrating the estates of deceased persons, the appointment of receivers, naturalization of aliens, marriage and divorce cases, election petitions and the like.

Through all these functions, the Judiciary plays an important role in each state. It also plays a role in the evolution of Constitution through the exercise of its right to interpret and safeguard it against all legislative and executive excesses.

Unit IV Emergency

Federalism

Federalism is the mixed or compound mode of government, combining a general government (the central or 'federal' government) with regional governments (provincial, state, cantonal, territorial or other sub-unit governments) in a single political system.

Federalism differs from confederalism, in which the general level of government is subordinate to the regional level, and from devolution within a unitary state, in which the regional level of government is subordinate to the general level. It represents the central form in the pathway of regional integration or separation, bounded on the less integrated side by confederalism and on the more integrated side by devolution within a unitary state.

The Constitution of India gives a federal structure to the Republic of India, declaring it to be a "Union of States". Part XI of the Indian constitution specifies the distribution of legislative, administrative and executive powers between the Union, also known as the Central government, and the States of India. The legislative powers are categorized under a Union List, a State List and a Concurrent List, representing, respectively, the powers conferred upon the Union government, those conferred upon the State governments and the shared powers.

The federalism is asymmetric in that the devolved powers of the constituent units are not all the same. The state of Jammu and Kashmir was accorded a higher degree of autonomy than other States under the Article 370. The Union Territories are directly governed by the Union government. However, Delhi and Puducherry have been accorded their own legislatures under Article 239A and 239AA respectively.

The Government of India (referred to as the *Union Government*) was established by the Constitution of India, and is the governing authority of a *federal union* of 29 states and 7 union territories.

The government of India is based on a 3 tiered system, in which the Constitution of India delineates the subjects on which each tier of government has executive powers. The Constitution originally provided for a two-tier system of government, the Union Government (also known as the Central Government), representing the Union of India, and the State

governments. Later, a third tier was added in the form of Panchayats and Municipalities. In the current arrangement, The Seventh Schedule of the Indian Constitution delimits the subjects of each level of governmental jurisdiction, dividing them into three lists:

- **Union List includes** subjects of national importance such as defence of the country, foreign affairs, banking, communications and currency. The Union Government alone can make laws relating to the subjects mentioned in the Union List.
- **State List contains** subjects of State and local importance such as police, trade, commerce, agriculture and irrigation. The State Governments alone can make laws relating to the subjects mentioned in the State List.
- **Concurrent List includes** subjects of common interest to both the Union Government as well as the State Governments, such as education, forest, trade unions, marriage, adoption and succession. Both the Union as well as the State Governments can make laws on the subjects mentioned in this list. If their laws conflict with each other, the law made by the Union Government will prevail.

Asymmetric federalism

A distinguishing aspect of Indian federalism is that unlike many other forms of federalism, it is asymmetric. Article 370 makes special provisions for the state of Jammu and Kashmir as per its Instrument of Accession. Article 371 makes special provisions for the states of Andhra Pradesh, Arunachal Pradesh, Assam, Goa, Mizoram, Manipur, Nagaland and Sikkim as per their accession or state-hood deals. Also one more aspect of Indian federalism is system of President's Rule in which the central government (through its appointed Governor) takes control of state's administration for certain months when no party can form a government in the state or there is violent disturbance in the state.

Coalition politics

Although the Constitution does not say so, India is now a multilingual federation. India has a multi-party system, with political allegiances frequently based on linguistic, regional and caste identities, necessitating coalition politics, especially at the Union level.

Emergency

Emergency is a unique feature of Indian Constitution that allows the center to assume wide powers so as to handle special situations. In emergency, the center can take full legislative and executive control of any state. It also allows the center to curtail or suspend freedom of the citizens. Emergency “as a failure of social system to deliver reasonable conditions of life”. The term emergency may be defined as “circumstances arising suddenly that calls for immediate action by the public authorities under the powers especially granted to them”. Dr. B.R Ambedkar claimed that the Indian Federation was unique as during the times of emergency it could convert itself into an entirely unitary system. In India, the emergency provisions are such that the constitution itself enables the federal government acquire the strength of unitary government whenever the situation demands. During such urgent needs all the pacific methods should be exhausted and emergency should also be the last weapon to use as it affects India’s federal feature of government.

There are three types of emergencies under the Indian Constitution namely-

- National Emergency
- Failure of constitutional machinery in states
- Financial Emergency

National Emergency

Article 352 of the Indian Constitution talks about the national emergency. National emergency is imposed whereby there is a grave threat to the security of India or any of its territory due to war, external aggression or armed rebellion. Such emergency shall be imposed by the president on the basis of written request by the council of ministers headed by the Prime Minister. When they are satisfied that they are satisfied that there is an eminent danger thereof.

Every proclamation is required to be laid before each House of Parliament, it will cease to operate after one month from the date of its issue unless in the meantime it is approved by the parliament, the proclamation may continue for a period of 6 months unless revoked by the president. For further continuance of emergency the resolution has to be passed by either house of parliament by a majority of not less than two-third members of the houses.

During the times of such emergency the executive, legislative and financial power rests with the centre whereas the state legislature is not suspended. The union government under Art.250 of the constitution gets the power to legislate in regards to subjects enumerated in the state list. Except Art20 and 21 all the fundamental rights are suspended. Under Art.359 the president may suspend the right to move to the courts for enforcement of fundamental rights during the time of emergency.

National emergency has been imposed thrice in the country- in 1962 at time of Chinese aggression, in 1971 during the indo-pak war, in 1975 on the grounds of internal disturbances.

Failure of Constitutional Machinery in State

Article 256 talks about the failure of constitutional machinery in state also known as the President's rule. If the president on Governor's report or otherwise is satisfied that the situation has arisen that the government can't be carried in accordance with the constitutional provisions then, he may issue State emergency.

President can declare emergency either by the report of Governor or he himself is satisfied that the situation is such that the emergency has to be imposed. But at times, President may declare emergency when a report is not received from the governor. This was done by President Venkataraman in 1991 in the state of Tamil Nadu even though he didn't receive a report from the governor.

After the 42th Amendment of the constitution the state emergency was made immune from judicial review. But later in the 44th Amendment the legality of President's rule could be challenged

The proclamation relating to state emergency shall be laid before each House of Parliament unless both Houses approve it, the emergency shall cease to have effect after the expiry of a period of two months. Further the duration of proclamation can be extended to 6 months each time by both Houses of Parliament passing resolution approving its continuance. Beyond the period of an year the proclamation can only be continued if the Election Commission certifies that it is not possible to hold election in the state or that territory. The consequences of state emergency are-

- The president assumes all the executive power of the state himself. The state administration runs by him or any person appointed by him generally the Governor.

- During such proclamation, the state assembly is either dissolved or suspended. But the MLA's do not lose their membership of the Assembly.
- Parliament makes laws regarding the state list. The parliament only passes the budget for the state.
- The High court of the state functions independently.
- President also proclaims ordinances in the state.

During the state emergency the Union government has absolute control over the state except the judiciary. If one looks at the past instances of state emergency in the country, three common grounds emerge that have been invoked under Art.356- breakdown of law and order, political instability, corruption and maladministration.

In *Rameshwar Prasad V. UOI (Bihar Assembly Dissolution Case)* it was held that the presidential proclamation dissolving state assembly in Bihar under Art.356 was unconstitutional on extraneous and irrelevant ground. The court said that the state governor misled the centre in recommending dissolution of state assembly.

In the historic case of *S.R Bommai V. UOI*, a full bench of the Karnataka High court produced different opinion about the imposition of the President's rule in Karnataka, while in other states the court held that it was in violation of the constitution and would have restored the original position.

Financial Emergency

The president under Article 360 of the constitution has the power to declare financial emergency if he is satisfied that the financial stability or the credit of India or any part of its territory is threatened. It has to be laid before both the Houses of Parliament and ceases to operate at the expiration of two months unless meanwhile approved by the resolution of Houses.

During the operation of financial emergency, the executive authority of the union extends to the giving of directions to any state to observe certain specified canons or financial propriety and such other directions that the President may find necessary. The directions may include reduction of salaries or allowance of those serving a state, of all those in connection with the affairs of union including judges of high court and Supreme Court. There has been no occasion of financial emergency in India.

During the period of emergency for the execution of power there might be infringement of Fundamental rights of individuals, which are judicially granted by the Constitution of India. The validity of actions must be reviewed to deter political gains and give way to political interest. Despite abuse of powers of the emergency provisions still have an important role to play in the conditions prevailing in India, though it still remains a controversial issue in the country

Article 311 of Indian Constitution

Article 311 of Constitution of India deals with **Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State. It states that**

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed].

Provided further that this clause shall not apply

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) Where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon

of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

Article 370 of Indian Constitution

Article 370 of the Indian constitution is an article that grants special autonomous status to the state of Jammu and Kashmir. The article is drafted in Part XXI of the Constitution: Temporary, Transitional and Special Provisions. The state's constituent assembly was empowered to recommend the articles of the Indian constitution to be applied to the state or to abrogate the Article 370 altogether. After the state constituent assembly has dissolved itself without recommending abrogation, the Article 370 was deemed to have become a permanent feature of the Indian constitution.

Article 370 - Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything contained in this Constitution,—

(a) The provisions of article 238 shall not apply now in relation to the state of Jammu and Kashmir;

(b) The power of Parliament to make laws for the said state shall be limited to—

(i) Those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) Such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation: For the purpose of this article, the Government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadr-i-Riyasat (now Governor) of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.

(c) The provisions of article 1 and of this article shall apply in relation to that State;

(d) Such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub clause (b) of clause (1) or in the second provision to sub clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir made *The Constitution (Application to Jammu and Kashmir) Order, 1950* which came into force on 26 January 1950 and was later superseded by the *Constitution (Application to Jammu and Kashmir) Order, 1954* which came into force on 14 May 1954.

In addition, 47 Presidential orders have been issued between 11 February 1956 and 19 February 1994 making various other provisions of the Constitution of India applicable to Jammu and Kashmir. All these orders were issued with the 'concurrence of the Government of the State'. The effect of these orders has been to extend 94 of the 97 subjects in the Union List (the powers of the Central Government) to the State of Jammu and Kashmir, and 260 of the 395 Articles of the Constitution of India. This process has been termed the 'erosion' of the Article 370.

Article 370 embodied six special provisions for Jammu and Kashmir:

1. It exempted the State from the complete applicability of the Constitution of India. The State was allowed to have its own Constitution.

2. Central legislative powers over the State were restricted to the three subjects of defence, foreign affairs and communications.

3. Other constitutional provisions of the Central Government could be extended to the State only with the concurrence of the State Government.

4. The `concurrence' was only provisional. It had to be ratified by the State's Constituent Assembly.

5. The State Government's authority to give `concurrence' lasted only until the State Constituent Assembly was convened. Once the State Constituent Assembly finalized the scheme of powers and dispersed, no further extension of powers was possible.

6. The Article 370 could be abrogated or amended only upon recommendation of the State's Constituent Assembly.

Once the State's Constitutional Assembly convened on 31 October 1951, the State Government's power to give `concurrence' lapsed. After the Constituent Assembly dispersed on 17 November 1956, adopting a Constitution for the State, the only authority provided to extend more powers to the Central Government or to accept Central institutions vanished. This understanding of the constitutionality of the relations between the Centre and the State informed the decisions of India till 1957. However, it was abandoned afterwards.

Article 356 of Indian Constitution

In the Republic of India, the phrase "President's rule" refers to the imposition of Article 356 of the Constitution of India on a State whose constitutional machinery has failed. In the event that a State government is not able to function as per the Constitution, the State comes under the direct control of the central government; in other words, it is "under President's rule". Subsequently, executive authority is exercised through the centrally appointed Governor, who has the authority to appoint retired civil servants or other administrators to assist him.

On the other hand, when the State government is functioning normally, it is run by an elected Council of Ministers, who is collectively responsible to State's legislative assembly (Vidhan Sabha). The Council is headed by the Chief Minister who is the *de facto* chief executive of the State; The Governor is only a *de jure* constitutional head.

However, during President's rule, the Council of Ministers stands dissolved, the office of Chief Minister becomes vacant and the Vidhan Sabha is either put in suspended animation or dissolved (necessitating a fresh election).

In the state of Jammu and Kashmir, failure of constitutional machinery results in Governor's rule, imposed by invoking Section 92 of the Constitution of Jammu and Kashmir. The proclamation is issued by the state's Governor after obtaining the consent of the President of India. If it is not possible to revoke Governor's rule before within six months of imposition, President's Rule under Article 356 of the Indian Constitution is imposed. There is little practical difference between the two provisions.

In practice president's rule has been imposed under different circumstances such as these:

- State Legislature is unable to elect a leader as Chief Minister
- Breakdown of a coalition
- Loss of majority in the assembly
- Elections postponed for unavoidable reasons

If approved by both houses, President's Rule can continue for 6 months. It can be extended for maximum 3 years with approval of Parliament in every 6 months. If Lok Sabha is dissolved during this time, rule is valid for 30 days from the first sitting of Lok Sabha provided that continuance has already been approved by Rajya Sabha. The 44th Amendment Act of 1978 introduced a new provision to put a restraint on the power of the Parliament to extend President's rule in a state. According to this provision, President's rule can only be extended over a year in every 6 months under following conditions:

1. There is National emergency already in whole of India, or in the whole or any part of the state.

2. Election commission certifies that elections can not be conducted in the concerned state. Although, President's rule can be revoked anytime by the President and it does not need Parliament's approval.

Most often, until the mid1990s, it was imposed in states through abuse of the authority of Governors in collusion with the federal government. However, following a landmark judgment by the Supreme Court of India in March 1994, such abuse has been reduced drastically.

Critics

Article 356 gave wide powers to the central government to assert its authority over a state if civil unrest occurred and the state government did not have the means to end the unrest. This is one of the articles that gave the Indian constitution some amount of unitary character. Though the purpose of this article is to give more powers to central government to preserve the unity and integrity of the nation, it has often been misused by the ruling parties at the center. It has been used as a pretext to dissolve state governments ruled by political opponents. Thus, it is seen by many as a threat to the federal state system. Since the adoption of Indian constitution in 1950, the central government has used this article several times^[3] to dissolve elected state governments and impose President's rule.

The article was used for the first time in up 1954. It has also been used in the state of Patiala and East Punjab States union (PEPSU) and then during Vimochana samaram to dismiss the democratically elected Communist state government of Kerala on 31 July 1959. In the 1970s and 1980s it almost became common practice for the central government to dismiss state governments led by opposition parties. The Indira Gandhi regime and post emergency Janata Party were noted for this practice. Indira Gandhi's government between 1966 and 1977 is known to have imposed President' rule in 39 times in different states. Similarly Janata Party which came to power after the emergency had issued President's rule in 9 states which were ruled by Congress.

It is only after the landmark judgement in 1994 in the *S. R. Bommai v. Union of India* case that the misuse of Article 356 was curtailed. In this case, the Supreme Court established strict guidelines for imposing President's rule. Subsequent pronouncements by the Supreme Court in Jharkhand and other states have further whetted down the scope for misuse of Article 356. Hence since the early 2000, the number of cases of imposition of President's rule has come down drastically.

Article 356 has always been the focal point of a wider debate of the federal structure of government in Indian polity. The Sarkaria Commission Report on Centre–State Relations 1988 has recommended that Article 356 must be used "very sparingly, in extreme cases, as a measure of last resort, when all the other alternatives fail to prevent or rectify a breakdown of constitutional machinery in the state". Dr. Ambedkar also said that it would be like a dead letter that is would be used rarely

Amendments

Amending the Constitution of India is the process of making changes to the nation's fundamental law or supreme law. The procedure of amendment in the constitution is laid down in Part XX (Article 368) of the Constitution of India. This procedure ensures the sanctity of the Constitution of India and keeps a check on arbitrary power of the Parliament of India.

However, there is another limitation imposed on the amending power of the constitution of India, which developed during conflicts between the Supreme Court and Parliament, where Parliament wants to exercise discretionary use of power to amend the constitution while the Supreme Court wants to restrict that power.

Amendments under article 368

Part-xx Article 368 (1) of the Constitution of India grants constituent power to make formal amendments and empowers Parliament to amend the Constitution by way of addition, variation or repeal of any provision according to the procedure lay down therein, which is different from the procedure for ordinary legislation. Article 368 has been amended by the 24th and 42nd Amendments in 1971 and 1976 respectively. The following is the full text of Article 368 of the Constitution, which governs constitutional amendments. New clauses 368 (1) and 368 (3) were added by the 24th Amendment in 1971, which also added a new clause (4) in article 13 which reads, "Nothing in this article shall apply to any amendment of this Constitution made under article 368." The provisions in italics were inserted by the 42nd Amendment, but were later declared unconstitutional by the Supreme Court in *Minerva Mills v. Union of India* in 1980. After the 24th amendment, Article 4(2), etc. of the constitution are superseded/made void by article 368 (1) which is the only procedure for amending the constitution however marginal may be the nature of the amendment. Supreme court ruled that the constituent power under article 368 must be exercised by the Parliament in the prescribed manner and cannot be exercised under the legislative powers of the Parliament.

368. Power of Parliament to amend the Constitution and Procedure therefore:

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

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in –

- (a)** Article 54, article 55, article 73, article 162 or article 241, or
- (b)** Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c)** Any of the Lists in the Seventh Schedule, or
- (d)** The representation of States in Parliament, or
- (e)** The provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

As per the procedure laid out by article 368 for amendment of the Constitution, an amendment can be initiated only by the introduction of a Bill in either House of Parliament. The Bill must then be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. There is no provision for a joint sitting in case of disagreement between the two Houses. Total membership in this context has been defined to mean the total number of members comprising the House irrespective of any vacancies or absentees on any account

vide Explanation to Rule 159 of the Rules of Procedure and Conduct of Business in Lok Sabha.

The Bill, passed by the required majority, is then presented to the President who shall give his assent to the Bill. If the amendment seeks to make any change in any of the provisions mentioned in the proviso to article 368, it must be ratified by the Legislatures of not less than one-half of the States. These provisions relate to certain matters concerning the federal structure or of common interest to both the Union and the States viz., the election of the President (articles 54 and 55); the extent of the executive power of the Union and the States (articles 73 and 162); the High Courts for Union territories (article 241); The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI); the distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); the representation of States in Parliament; and the provision for amendment of the Constitution laid down in article 368. Ratification is done by a resolution passed by the State Legislatures. There is no specific time limit for the ratification of an amending Bill by the State Legislatures. However, the resolutions ratifying the proposed amendment must be passed before the amending Bill is presented to the President for his assent.

Unit V - Constitutional Amendments

Constitutional Amendments Pertaining to Criminal Justice

As of September 2016, there have been 101 (latest by GST Act) **Amendments to the Constitution of India** since it was first enacted in 1950.

There are two types of amendments to the constitution which are governed by article 368.

- The first type includes amendments that can be effected by Parliament of India by a prescribed 'special majority'; and
- The second type of amendments includes those that require, in addition to such "special majority", ratification by at least one half of the State Legislatures. The second type amendments made to the constitution are amendments # 3, 6, 7, 8, 13, 14, 15, 16, 22, 23, 24, 25, 28, 30, 31, 32, 35, 36, 38, 39, 42, 43, 44, 45, 46, 51, 54, 61, 62, 70, 73, 74, 75, 79, 84, 88, 95, 99 and 101.

The following constitutional amendments are important amendment be relevant to with criminal justice.

No	Amendment	Objectives
1	18 June 1951- 1st Amendment - Amend articles 15, 19, 85, 87, 174, 176, 341,342, 372 and 376. Insert articles 31A and 31B. Insert schedule 9.	Added special provision for the advancement of any socially and educationally backward classes or for the Scheduled Castes and the Scheduled Tribes. To fully secure the constitutional validity of zamindari abolition laws and to place reasonable restriction on freedom of speech. A new constitutional device, called Schedule 9 introduced to protect laws that are contrary to the Constitutionally guaranteed fundamental rights. These laws encroach upon property rights, freedom of speech and equality before law
2	27 April 1955- 4th Amendment -Amend articles 31, 35 and 305. Amend schedule 9.	Restrictions on property rights and inclusion of related bills in Schedule 9 of the constitution
3	24 December 1955 – 5th Amendment Amend article 3.	Empowered the President to prescribe a time limit for a State Legislature to convey its views on proposed Central laws relating to the formation of new States and alteration of areas, boundaries or names of existing States. Also permitted the President to extend the

		prescribed limit, and prohibited any such bill from being introduced in Parliament until after the expiry of the prescribed or extended period.
4	5 January 1960 – 8th Amendment Amend article 334.	Extended the period of reservation of seats for the Scheduled Castes and Scheduled Tribes and Anglo-Indians in the Lok Sabha and the State Legislative Assemblies till 1970
5	19 December 1961- 11th Amendment Amend articles 66 and 71.	Election of Vice President by Electoral College consisting of members of both Houses of Parliament, instead of election by a Joint Sitting of Parliament. Indemnify the President and Vice President Election procedure from challenge on grounds of existence of any vacancies in the electoral college
6	20 June 1964- 17th Amendment Amend article 31A. Amend schedule 9.	To secure the constitutional validity of acquisition of Estates and place land acquisition laws in Schedule 9 of the constitution
7	22 December 1966- 20th Amendment Insert article 233A.	Indemnify & validate judgments, decrees, orders and sentences passed by judges and to validate the appointment, posting, promotion and transfer of judges barring a few who were not eligible for appointment under article 233. Amendment needed to overcome the effect of judgment invalidating appointments of certain judges in the state of Uttar Pradesh
8	November 1971- 24th Amendment Amend articles 13 and 368.	Enable parliament to dilute fundamental rights through amendments to the constitution
9	20 April 1972- 25th Amendment Amend article 31. Insert article 31C.	Restrict property rights and compensation in case the state takes over private property. However, the Supreme Court quashed a part of Article 31C; to the extent it took away the power of judicial review. This was done in the landmark case of Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 which for the first time enunciated the Basic structure doctrine.
10	9 June 1972 – 29th Amendment Amend schedule 9.	Place land reform acts and amendments to these act under Schedule 9 of the constitution
11	27 February 1973- 30th Amendment Amend article 133.	Change the basis for appeals in Supreme Court of India in case of Civil Suits from value criteria to one involving substantial question of law
12	1 August 1975- 38th Amendment Amend articles 123, 213, 239B, 352, 356, 359 and 360.	Enhances the powers of President and Governors to pass ordinances

13	27 May 1976- 40th Amendment Amend article 297. Amend schedule 9.	Enable Parliament to make laws with respect to Exclusive Economic Zone and vest the mineral wealth with Union of India Place land reform & other acts and amendments to these act under Schedule 9 of the constitution
14	2 November 1976- 42nd Amendment Amend articles 31, 31C, 39, 55, 74, 77, 81, 82,83, 100, 102, 103, 105, 118, 145, 150, 166, 170,172, 189, 191, 192, 194, 208, 217, 225, 226, 227, 228, 311, 312, 330, 352, 353, 356, 357,358, 359, 366, 368 and 371F.Insert articles 31D, 32A, 39A, 43A, 48A, 131A,139A, 144A, 226A, 228A and 257A.Insert parts 4A and 14A. Amend schedule 7.	Amendment passed during internal emergency by Indira Gandhi. Provides for curtailment of fundamental rights, imposes fundamental duties and changes to the basic structure of the constitution by making India a Socialist Secular" Republic However, the Supreme Court, in Minerva Mills v. Union of India, quashed the amendments to Articles 31C and 368 as it was in contravention with the basic structure of the Constitution.
15	13 April 1978- 43rd Amendment Amend articles 145, 226, 228 and 366. Remove articles 31D, 32A, 131A, 144A, 226A and 228A.	Amendment passed after revocation of internal emergency in the Country. Repeals some of the more 'Anti-Freedom' amendments enacted through Amendment Bill 42
16	6 September 1978 – 44th Amendment Amend articles 19, 22, 30, 31A, 31C, 38, 71, 74, 77, 83, 103, 105, 123, 132, 133, 134, 139A, 150, 166, 172, 192, 194, 213, 217, 225, 226, 227, 239B, 329, 352, 356, 358, 359, 360 and 371F. Insert articles 134A & 361A. Remove articles 31, 257A and 329A. Amend part 12. Amend schedule 9.	Amendment passed after revocation of internal emergency in the Country. Provides for human rights safeguards and mechanisms to prevent abuse of executive and legislative authority. Annuls some Amendments enacted in Amendment Bill 42
17	11 September 1984– 50th Amendment Amend article 33.	Technical Amendment to curtailment of Fundamental Rights as per Part III as prescribed in Article 33 to cover Security Personnel protecting property and communication infrastructure

18	28 March 1989 – 61st Amendment Amend article 326.	Reduce age for voting rights from 21 to 18
19	12 March 1990 – 65th Amendment Amend article 338.	National Commission for Scheduled Castes and Scheduled Tribes formed and its statutory powers specified in The Constitution.
20	24 April 1992 – 73rd Amendment Insert part 9	Statutory provisions for Panchyat Raj as third level of administration in villages
21	1 June 1992 – 74th Amendment Insert part 9A, amend article 280.	Statutory provisions for Local Administrative bodies as third level of administration in urban areas such as towns and cities
22	17 June 1995 – 77th Amendment Amend article 16.	A technical amendment to protect reservation to SC/ST Employees in promotions
23	9 June 2000 – 81st Amendment Amend article 16.	Protect SC / ST reservation in filling backlog of vacancies
24	8 September 2000 – 82nd Amendment Amend article 335.	Permit relaxation of qualifying marks and other criteria in reservation in promotion for SC / ST candidates
25	12 December 2002- 86th Amendment Amend articles 45 and 51A. Insert article 21A.	Provides Right to Education until the age of fourteen and Early childhood care until the age of six
26	28 September 2003- 89th Amendment Amend article 338. Insert article 338A.	The National Commission for Scheduled Castes and Scheduled Tribes was bifurcated into The National Commission for Scheduled Castes and The National Commission for Scheduled Tribes
27	1 January 2004 – 91st Amendment - Amend articles 75 and 164. Insert article 361B. Amend schedule 10.	Restrict the size of council of ministers to 15% of legislative members & to strengthen Anti Defection laws
28	20 January 2006 – 93rd Amendment Amend article 15.	To enable provision of reservation(27%) for other backward classes (OBC) in government as well as private educational institutions

Fundamental Rights: General Nature

One of the reasons for saying that someone has a **right** to do something or to have something done, rather than saying that should be able to do something or that something should be done, is that the language of rights is more emphatic. This is probably due not only to the intimate relationship between the ethical language of rights and the legal language of rights and the law, but also to the indirect connection with the traditional physical language of 'laws'. The association with legal laws and physical 'laws' is direct and explicit in the notions of 'natural law' and 'natural rights'. Yet, as has been pointed out, normative rights lose their force when the concept of right is overused. Also in this respect their employment in normative discourse can be compared to the use of the concept of law in science. A scientific fundamental principle reading that there is a certain order or relation of phenomena which is invariable can only be relied upon if no other, contradictory principle has been formulated and is proposed at the same time by other scientists. And to be very influential its scope must also be universal or quite general. The conditions which are a prerequisite for the principle to hold should not be so specific that it is called "a fundamental law" while merely applying to rare instances.

Now, the language of fundamental rights must be equally free from incompatible counter rights and must, similarly, remain of a general nature. A language of fundamental rights which is not of a general nature loses its emphatic character and instead of talking in terms of *rights*, one might as well speak in terms of *should*, *should not* and the state or activity in question or its opposite. In this respect also 'special' non derivative rights are to be defined in general terms. To say, for example, that someone has a right to what has been promised to is a general statement, free from specific ballast.

There is nothing against a very specific formulation of a right in itself, so long as it is not alleged that it is fundamental. If such a specific right is only mentioned in isolation though, apart from all specific rights which could be derived from the same fundamental right, then such a specific right is given the specious appearance of being fundamental (or 'natural' in isolation). This does not only lead to rights depreciation in general, but also to the immediate weakening, if not nullification, of related rights which can be derived from the

same fundamental right. Thus a law, declaration or normative theory which exclusively recognizes or mentions the right to freedom from racial discrimination, and to freedom of religion, impairs or nullifies indirectly all other specific, derivative rights to freedom from discrimination. Those who are or could be discriminated against on the basis of any other factor than race or skin color, or the sort of religion they are supposed to adhere to, see their rights unrecognized in a conceptually most hidden or hideous way. Unless it is eventually realized that a right to freedom from racial discrimination, or of religion, must be a derivative of a universal right to freedom, or to freedom from discrimination (on the basis of whatever irrelevant factor), they were better off without an exclusive recognition of a right to freedom from racial discrimination, or of religion. Such is the negative of any declaration of specific rights: the effect of its selective neglect, the effect of its omissions.

The General natures of fundamental rights are follows;

(a) Most Elaborate:

One of the most conspicuous features of the Indian Bill of Rights is that it is the most elaborate chapter in the world. A full chapter containing twenty four articles is devoted to it. The voluminous size of the chapter is due to the enumeration of seven rights in the minutest details along with an elaborate set of limitations imposed upon them. Since the passage of 44th Amendment Act in 1978, right to property has ceased to exist as a Fundamental Right. It has been reduced to a mere legal right. As such, there are now six fundamental rights in the Constitution.

(b) Negative and Positive Rights:

Rights incorporated in the Indian Constitution are of two types—Negative and Positive. Negative rights comprise constitutional restrictions on the state. Article 10 forbids the state to confer any title, other than a military or academic distinction, on any individual. It hardly confers any right. It imposes a restriction on the legislative and executive branches of the government. Likewise Article 17 abolishing untouchability removes a social evil. It hardly bestows a special privilege on the untouchables.

Right to freedom, right to acquire, hold and dispose off (Article 19) property and right to religion and cultural and educational rights fall in the category of positive rights. In fact, it is difficult to draw a very clear line of demarcation between the two, yet the hairsplitters of

the constitution point out one difference. Negative rights are absolute, but positive rights are hedged with restrictions.

(c) Special Provision for their Enforcement:

These rights, both negative and positive, do not exist merely on the paper. They are guaranteed to the people as they are legally enforceable. A special right i.e., “right to Constitutional Remedies” has been introduced in the constitution to safeguard the rest of the fundamental rights. The Supreme Court is the guarantor and guardian of the fundamental rights. Even the High Courts, according to article 226, are empowered to issue writs for the enforcement of these rights, within the limits of their respective jurisdiction.

(d) They are not absolute:

Unlike that of American Bill of Rights, our fundamental rights are not absolute in character. Not only constitution has hedged these rights with restrictions, even the Parliament has been authorized to impose restrictions, if it deems fit.

The Fundamental Rights are not merely restricted by the constitution. They can be further restricted by an amendment of the constitution. According to Article 33, the Fundamental Rights may be restricted or abrogated in their application to the members of Armed Forces or the forces charged with the maintenance of public order.

These provisions of Article 33 are applicable to ordinary police, responsible for the maintenance of public order as well. Article 34 which empowers Parliament to pass an Indemnity law legalizing acts done during the enforcement of these rights, may also be similarly suspended.

Besides, Parliament through procedure of amendment can abrogate Fundamental Rights. The 24th and 25th amendments of the constitution (which curtailed right to private property and which eventually ceased to be Fundamental Right in 1976), for furtherance of Directive Principles pertaining to socialism, were upheld by the Supreme Court of India in its historic decision made on April 24, 1973. This further established that Fundamental Rights are not at all absolute as is presumed by some critics.

(e) All Rights not of Equal Weight: All rights are not of equal weight. A hierarchy of values is discernible. In the words of Justice M. Hidayatullah in the Golak Nath case (1967) “the right to property, is the weakest of all rights.”

Recommended Readings

1. Basu D.D., (1993) *Introduction to the Constitution of India, P.H.L.*
2. Guar K.D., (1995) *Criminal Law*, Oxford University Press.
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6. Krishnamurthy S, (1987), *Impact of Social Legislations, on the Criminal Law in India*, R R Publishers, Bangalore.
7. Parmar, Lalit., (1998). *Human Rights*, Anmol Publications Pvt Ltd. New Delhi.
8. Pillai, A.P. S., (1996) *Criminal Law*, N.M. Tripathi.
9. Pylee M.V., (1994) *India's Constitution*, S. Chand & Company Ltd, New Delhi.
10. Sen S. (1998) *Human Rights in Developing Society*, APH Publishing Corporation, New Delhi.