Indian Constitution at Work

Political Science for Class XI

Political Science | Class XI

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Chapter One

CONSTITUTION: WHY AND HOW?

INTRODUCTION

This book is about the working of the Indian Constitution. In the chapters that follow, you will read information about various aspects of the working of our Constitution. You will learn about the various institutions of the government in our country and their relationship with each other.

But before you begin to read about elections, governments, and presidents and prime ministers, it is necessary to understand that the entire structure of the government and the various principles that bind the institutions of government have their origin in the Constitution of India.

After studying this chapter, you will learn:

- *what a constitution means;*
- *what a constitution does to the society;*
- *how constitutions govern the allocation of power in society; and*
- *what was the way in which the Constitution of India was made.*

Why Do We Need a Constitution?

What is a constitution? What are its functions? What role does it perform for a society? How does a constitution relate to our daily existence? Answering these questions is not as difficult as you might think.

Constitution allows coordination and assurance

Imagine yourself to be a member of a reasonably large group. Further imagine that this group has the following characteristics. The members of this group are diverse in various ways. They have different religious allegiances: some are Hindus, some are Muslims, some Christians and some perhaps profess no religion at all. They are also varied in many different respects: they pursue different professions, have different abilities, have different hobbies, different tastes in everything from films to books. Some are rich and some are poor. Some are old, some young. Imagine further that members of this group are likely to have disputes over various aspects of life: How much property should one be allowed to own? Should it be compulsory that every child be sent to school or should the parents be allowed to decide? How much should this group spend on its safety and security? Or should it build more parks instead? Should the group be allowed to discriminate against some of its members? Every question will elicit a variety of answers from different people. But, for all their diversity, this group has to live together. They are dependent upon each other in various ways. They require the cooperation of each other. What will enable the group to live together peacefully?

This group is very much like the people of my village.

Yes, this could be my colony as well! Does this apply to your village or town or colony too?

One may say that perhaps members of this group can live together if they can agree on some basic rules. Why will the group need certain basic rules? Think of what would happen in the absence of some basic rules. Every individual would be insecure simply because they would not know what members of this group could do to each other, who could claim rights over what. Any group will need some basic rules that are publicly promulgated and known to all members of that group to achieve a minimal degree of coordination. But these rules must not only be known, they must also be enforceable. If citizens have no assurance that others will follow these rules, they will themselves have no reason to follow these rules. Saying that the rules are legally enforceable gives an assurance to everybody that others will follow these, for if they do not do so, they will be punished.

The first function of a constitution is to provide a set of basic rules that allow for minimal coordination amongst members of a society.

Activity

Enact the thought experiment of this section in the classroom. The entire class should discuss and arrive at some decisions that would apply to everyone for this entire session. The decision could be about:

- *How would the class representatives be chosen?*
- *Which decisions will the representative be able to take on behalf of the entire class?*
- *Are there some decisions that the class representative cannot take without consulting the entire class?*
- *You can add any other items to this list (collection of common kitty for the class, organisation of picnic and trips, sharing of common resources, …) as long as everyone agrees to it. Make sure that you include those subjects that have led to any differences in the past.*
- *How to revise these decisions in case you need to?*

- Write down all these decisions on a paper and put it up on the notice board. Which problems did you encounter in this decision? Were there differences among different students? How did you resolve these differences? Did the entire class gain something from this exercise?

Specification of decision making powers

A constitution is a body of fundamental principles according to which a state is constituted or governed. But what should these fundamental rules be? And what makes them fundamental? Well, the first question you will have to decide is who gets to decide what the laws governing the society should be? You may want rule X, but others may want rule Y. How do we decide whose rules or preferences should govern us? You may think the rules you want everyone to live by are the best; but others think that *their* rules are the best. How do we resolve this dispute? So even before you decide what rules should govern this group you have to decide: Who gets to decide?

The constitution has to provide an answer to this question. It specifies the basic allocation of power in a society. It decides who gets to decide what the laws will be. In principle, this question, who gets to decide, can be answered in many ways: in a monarchical constitution, a monarch decides; in some constitutions like the old Soviet Union, one single party was given the power to decide. But in democratic constitutions, broadly speaking, the people get to decide. But this matter is not so simple. Because even if you answer that the people should decide, it will not answer the question: how should the people decide? For something to be law, should everyone agree to it? Should the people directly vote on each matter as the ancient Greeks did? Or should the people express their preferences by electing representatives? But if the people act through their representatives, how should these representatives be elected? How many should there be?

In the Indian Constitution for example, it is specified that in most instances, Parliament gets to decide laws and policies, and that Parliament itself be organised in a particular manner. Before identifying what the law in any given society is, you have to identify

who has the authority to enact it. If Parliament has the authority to enact laws, there must be a law that bestows this authority on Parliament in the first place. This is the function of the constitution. It is an authority that constitutes government in the first place.

The second function of a constitution is to specify who has the power to make decisions in a society. It decides how the government will be constituted.

Limitations on the powers of government

But this is clearly not enough. Suppose you decided who had the authority to make decisions. But then this authority passed laws that you thought were patently unfair. It prohibited you from practising your religion for instance. Or it enjoined that clothes of a certain colour were prohibited, or that you were not free to sing certain songs or that people who belonged to a particular group (caste or religion) would always have to serve others and would not be allowed to retain any property. Or that government could arbitrarily arrest someone, or that only people of a certain skin colour would be allowed to draw water from wells. You would obviously think these laws were unjust and unfair. And even though they were passed by a government that had come into existence based

Read a Cartoon

Countries of the European Union tried to create a European constitution. The attempt failed. Here is a cartoonist's impression of this attempt. Does this always happen in any constitution making?

"European Constitution" by Patrick Chappate, International Herald Tribune, 21SEP04 Copyright Cagle Cartoons.

Ah! So you first create a monster and then start worrying about saving yourself from it! I would say, why create this monster called government in the first place?

on certain procedures there would be something obviously unjust about that government enacting these laws.

So the third function of a constitution is to set some limits on what a government can impose on its citizens. These limits are fundamental in the sense that government may never trespass them.

Constitutions limit the power of government in many ways. The most common way of limiting the power of government is to specify certain fundamental rights that all of us possess as citizens and which no government can ever be allowed to violate. The exact content and interpretation of these rights varies from constitution to constitution. But most constitutions will protect a basic cluster of rights. Citizens will be protected from being arrested arbitrarily and for no reason. This is one basic limitation upon the power of government. Citizens will normally have the right to some basic liberties: to freedom of speech, freedom of conscience, freedom of association, freedom to conduct a trade or business etc. In practice, these rights can be limited during times of national emergency and the constitution specifies the circumstances under which these rights may be withdrawn.

Aspirations and goals of a society

Most of the older constitutions limited themselves largely to allocating decision-making power and setting some limits to government power. But many twentieth century constitutions, of which the Indian Constitution is the finest example, also provide an enabling framework for the government to do certain positive things, to express the aspirations and goals of society. The Indian Constitution was particularly innovative in this respect. Societies with deep entrenched inequalities of various kinds, will not only have to set limits on the power of government, they will also have to enable and empower the government to take positive measures to overcome forms of inequality or deprivation.

For example, India aspires to be a society that is free of caste discrimination. If this is our society's aspiration, the government will have to be enabled or empowered to take all the necessary steps to achieve this goal. In a country like South Africa, which had a deep history of racial discrimination, its new constitution had to enable the government to end racial discrimination. More positively, a

READ A CARTOON

Shankar. Copyright: Children's Book Trust.

The constitution makers have to address themselves to very different aspirations. Here is Nehru trying to balance between different visions and ideologies. Can you identify what these different groups stand for? Who do you think prevailed in this balancing act?

constitution may enshrine the aspirations of a society. The framers of the Indian Constitution, for example, thought that each individual in society should have all that is necessary for them to lead a life of minimal dignity and social self-respect — minimum material well being, education etc. The Indian Constitution enables the government to take positive welfare measures some of which are legally enforceable. As we go on studying the Indian Constitution, we shall find that such enabling

What does it take to write nice things in the constitution? What is the point in writing down lofty aspirations and goals if they cannot change the life of the people?

provisions have the support of the Preamble to our Constitution, and these provisions are found in the section on Fundamental Rights. The Directive Principles of State of Policy also enjoin government to fulfil certain aspirations of the people.

The fourth function of a constitution is to enable the government to fulfil the aspirations of a society and create conditions for a just society.

Enabling provisions of the Constitution

Constitutions are not only rules and regulations controlling the powers of the government. They also give powers to the government for pursuing collective good of the society.

- Constitution of South Africa assigns many responsibilities to the government: it wants the government to take measures to promote conservation of nature, make efforts to protect persons or groups subjected to unfair discrimination, and provides that the government must progressively ensure adequate housing to all, health care, etc.
- In the case of Indonesia also, the government is enjoined to establish and conduct national education system. The Indonesian Constitution ensures that the poor and destitute children will be looked after by the government.

Fundamental identity of a people

Finally, and perhaps even most importantly, a constitution expresses the fundamental identity of a people.

This means the people as a collective entity come into being only through the basic constitution. It is by agreeing to a basic set of norms about how one should be governed, and who should be governed that one forms a collective identity. One has many sets of identities that exist prior to a constitution. But by

agreeing to certain basic norms and principles one constitutes one's basic *political identity*. Second, constitutional norms are the overarching framework within which one pursues individual aspirations, goals and freedoms. The constitution sets authoritative constraints upon what one may or may not do. It defines the fundamental values that we may not trespass. So the constitution also gives one a *moral identity*. Third and finally, it may be the case that many basic political and moral values are now shared across different constitutional traditions.

If one looks at constitutions around the world, they differ in many respects — in the form of government they enjoin in many procedural details. But they also share a good deal. Most modern constitutions create a form of government that is democratic in some respects, most claim to protect certain basic rights. But constitutions are different in the way they embody conceptions of natural identity. Most nations are an amalgamation of a complex set of historical traditions; they weave together the diverse groups that reside within the nation in different ways. For example, German identity was constituted by being ethnically German. The constitution gave expression to this identity. The Indian Constitution, on the other hand, does not make ethnic identity a criterion for citizenship. Different nations embody different conceptions of what the relationship

Read a Cartoon

"Iraqi Constitution", John Trever, *Albuquerque Journal*, 18AUG05. Copyright. Cagle Cartoons.

The writing of the new Iraqi constitution after the collapse of Saddam Hussain's regime saw a lot of conflict between different ethnic groups in the country. What do these different people stand for? Compare the conflict depicted here with that depicted in earlier cartoons for the European Union and India.

between the different regions of a nation and the central government should be. This relationship constitutes the national identity of a country.

Check your progress

Here are some provisions of the Indian and other constitutions. For each of these write the function that this provision performs.

The government cannot order any citizen to follow or not to follow any religion	Limitations on the power of the government
The government must try to reduce inequalities in income and wealth	
The President has the power to appoint the Prime Minister	
The Constitution is the supreme law that everyone has to obey	
Indian citizenship is not limited to people of any race, caste or religion	

The Authority of a Constitution

We have outlined some of the functions a constitution performs. These functions explain why most societies have a constitution. But there are three further questions we can ask about constitutions:

a) What is a constitution?
b) How effective is a constitution?
c) Is a constitution just?

In most countries, 'Constitution' is a compact document that comprises a number of articles about the state, specifying how the state is to be constituted and what norms it should follow. When we ask for the constitution of a country we are usually referring to this document. But some countries, the United Kingdom for instance, do not have one single document that can be called the Constitution. Rather they have a series of documents and decisions that, taken collectively, are referred to as the constitution. So, we can say that constitution is the document or set of documents that seeks to perform the functions that we mentioned above.

But many constitutions around the world exist only on paper; they are mere words existing on a parchment. The crucial question is: how effective is a constitution? What makes it effective? What ensures that it has a real impact on the lives of people? Making a constitution effective depends upon many factors.

Mode of promulgation

This refers to how a constitution comes into being. Who crafted the constitution and how much authority did they have? In many countries constitutions remain defunct because they are crafted by military leaders or leaders who are not popular and do not have the ability to carry the people with them. The most successful constitutions, like India, South Africa and the United States, are constitutions which were created in the aftermath of popular national movements. Although India's Constitution was formally created by a Constituent Assembly between December 1946 and November 1949, it drew upon a long history of the nationalist movement that had a remarkable ability to take along different sections of Indian society together. The Constitution drew enormous legitimacy from the

What do people do if they find out that their constitution is not just? What happens to people when a constitution exists only on paper?

fact that it was drawn up by people who enjoyed immense public credibility, who had the capacity to negotiate and command the respect of a wide cross-section of society, and who were able to convince the people that the constitution was not an instrument for the aggrandisement of their personal power. The final document reflected the broad national consensus at the time.

Some countries have subjected their constitution to a full-fledged referendum, where all the people vote on the desirability of a constitution. The Indian Constitution was never subject to such a referendum, but nevertheless carried enormous public authority, because it had the consensus and backing of leaders who were themselves popular. Although the Constitution itself was not subjected to a referendum, the people adopted it as their own by abiding by its provisions. Therefore, the authority of people who enact the constitution helps determine in part its prospects for success.

The substantive provisions of a constitution

It is the hallmark of a successful constitution that it gives *everyone* in society some reason to go along with its provisions. A constitution

Debate over Constitution making in Nepal:

Making a constitution is not always an easy and smooth affair. Nepal is an example of the complicated nature of constitution making. Since 1948, Nepal has had five constitutions, in 1948, 1951, 1959, 1962 and 1990. But all these constitutions were 'granted' by the King of Nepal. The 1990 constitution introduced a multi-party competition, though the King continued to hold final powers in many respects. For the last ten years Nepal was faced with militant political agitations for restructuring the government of the country. The main issue was the role of the monarchy in the constitution of Nepal. Some groups in Nepal wanted to abolish the institution of monarchy and establish republican form of government in Nepal. Others believed that it may be useful to shift to limited monarchy with a reduced role for the King. The King himself was not ready to give up powers. He took over all powers in October 2002.

Many political parties and organisations were demanding the formation of a new constituent assembly. The Communist Party of Nepal (Maoist) was in the forefront of the struggle for a popularly elected constituent assembly. Finally, under pressure of popular agitation, the King had to instal a government acceptable to the agitating parties. This government has stripped the King of almost all powers. Now, all the parties are trying to decide the manner in which a constituent assembly will be formed.

that, for instance, allowed permanent majorities to oppress minority groups within society would give minorities no reason to go along with the provision of the constitution. Or a constitution that systematically privileged some members at the expense of others, or that systematically entrenched the power of small groups in society, would cease to command allegiance. If any group feels their identity is being stifled, they will have no reason to abide by the constitution. No constitution by itself achieves perfect justice. But it has to convince people that it provides the framework for pursuing basic justice.

Do this thought experiment. Ask yourself this question: What would be the content of some basic rules in society, such that they gave *everyone* a reason to go along with them?

The more a constitution preserves the freedom and equality of all its members, the more likely it is to succeed. Does the Indian Constitution, broadly speaking, give everyone a reason to go along with its broad outlines? After studying this book, one should be able to answer this question in the affirmative.

Balanced institutional design

Constitutions are often subverted, not by the people, but by small groups, who wish to enhance their own power. Well crafted constitutions fragment power in society intelligently so that no single group can subvert the constitution. One way of such intelligent designing of a constitution is to ensure that no single institution acquires monopoly of power. This is often done by fragmenting power across different institutions. The Indian Constitution, for example, horizontally fragments power across different institutions like the Legislature, Executive and the Judiciary and even independent statutory bodies like the Election Commission. This ensures that even if one institution wants to subvert the Constitution, others can check its transgressions. An intelligent system of checks and balances has facilitated the success of the Indian Constitution.

Another important aspect of intelligent institutional design is: that a constitution must strike the right balance between certain values, norms and procedures as authoritative, and at the same time allow enough flexibility in its operations to adapt to changing needs and circumstances. Too rigid a constitution is likely to break under the weight of change; a constitution that is, on the other

Read a Cartoon

"Castle of Cards" , Ares, copyright Cagle Cartoons, SEP05

Why does the cartoonist describe the new Iraqi Constitution as the castle of cards? Would this description apply to the Indian Constitution?

hand, too flexible, will give no security, predictability or identity to a people. Successful constitutions strike the right balance between preserving core values and adapting them to new circumstances. You will notice the wisdom of makers of the Indian Constitution in the chapter on the Constitution as a living document (Chapter 9). The Indian Constitution is described as 'a living' document. By striking a balance between the possibility to change the provisions and the limits on such changes, the Constitution has ensured that it will survive as a document respected by people. This arrangement also ensures that no section or group can, on its own, subvert the Constitution.

Therefore in determining whether a constitution has authority you can ask yourself three questions:

- Were the people who enacted the constitution credible? This question will be answered in the remaining part of this chapter.
- Secondly, did the constitution ensure that power was intelligently organised so that it was not easy for any group to subvert the constitution? And, most importantly, does the constitution give everyone some reason to go along with it? Most of this book is about this question.
- Also, is the constitution the locus of people's hopes and aspiration? The ability of the constitution to command voluntary allegiance of the people depends to a certain extent upon whether the constitution is just. What are the principles of justice underlying the Indian Constitution? The last chapter of this book will answer this question.

How was the Indian Constitution made?

Let us find out how the Indian Constitution was made. Formally, the Constitution was made by the Constituent Assembly which had been elected for undivided India. It held its first sitting on

9 December1946 and re-assembled as Constituent Assembly for divided India on 14 August 1947. Its members were elected by indirect election by the members of the Provisional Legislative Assemblies that had been established in 1935. The Constituent Assembly was composed roughly along the lines suggested by the plan proposed by the committee of the British cabinet, known as the Cabinet Mission. According to this plan:

- Each Province and each Princely State or group of States were allotted seats proportional to their respective population roughly in the ratio of 1:10,00,000. As a result the Provinces (that were under direct British rule) were to elect 292 members while the Princely States were allotted a minimum of 93 seats.
- The seats in each Province were distributed among the three main communities, Muslims, Sikhs and general, in proportion to their respective populations.
- Members of each community in the Provisional Legislative Assembly elected their own representatives by the method of proportional representation with single transferable vote.
- The method of selection in the case of representatives of Princely States was to be determined by consultation.

An article of faith

Much before the Constituent Assembly finally came into being, the demand for such an assembly had already been made. This was echoed by Dr. Rajendra Prasad in his first address as the Chairman of the Constituent Assembly of India on 9 December 1946. Rajendra Prasad quotes Mahatma Gandhi that swaraj would mean wishes of the people as expressed through their freely chosen representatives. He said

"……the idea of a Constituent Assembly had come to prevail largely as an article of faith in almost all the politically-minded classes in the country."

Rajendra Prasad
CAD, Vol. I, p.6

The previous section discusses the three factors that make a constitution effective and respectable. How far does the Indian Constitution pass this test?

Composition of the Constituent Assembly

As a consequence of the Partition under the plan of 3 June 1947 those members who were elected from territories which fell under Pakistan ceased to be members of the Constituent Assembly. The numbers in the Assembly were reduced to 299 of which 284 were actually present on 26 November 1949 and appended their signature to the Constitution as finally passed. The Constitution was thus framed against the backdrop of the horrendous violence that the Partition unleashed on the sub-continent. But it is a tribute to the fortitude of the framers that they were not only able to draft a constitution under immense pressure, but also learnt the right lessons from the unimaginable violence that accompanied Partition. The Constitution was committed to a new conception of citizenship, where not only would minorities be secure, but religious identity would have no bearing on citizenship rights.

But this account of the composition of the Constituent Assembly that drafted the Constitution touches upon only the surface of how our Constitution was made. Although, the members of the Assembly were not elected by universal suffrage, there was a serious attempt to make the Assembly a representative body. Members of all religions were given representation under the scheme described above; in addition, the Assembly had twenty-six members from what were then known as the Scheduled Classes. In terms of political parties, the Congress dominated the Assembly occupying as many as eighty-two per cent of the seats in the assembly after the Partition. The Congress itself was such a diverse party that it managed to accommodate almost all shades of opinion within it.

What would have happened if the Constituent Assembly was elected by all the people of India? Could it be very different from what it was?

The Principle of Deliberation

The authority of the Constituent Assembly does not come only from the fact that it was broadly, though not perfectly, representative. It comes from the procedures it adopted to frame the Constitution and the values its members brought to their deliberations. While in any assembly that claims to be representative, it is desirable that diverse sections of society participate, it is equally important that they participate not only as representatives of their own identity or community. Each member deliberated upon the Constitution with the interests of the whole nation in mind. There were often disagreements amongst members, but few of these disagreements could be traced to members protecting their own interests.

There were legitimate differences of principle. And the differences were many: should India adopt a centralised or decentralised system of government? What should be the relations between the States and the centre? What should be the powers of the judiciary? Should the Constitution protect property rights? Almost every issue that lies at the foundation of a modern state was discussed with great sophistication. Only one provision of the Constitution was passed without virtually any debate: the introduction of universal suffrage (meaning that all citizens reaching a certain age, would be entitled to be voters irrespective of religion, caste, education, gender or income). So, while the members felt no need at all to discuss the issue of who should have the right to vote, every other matter was seriously discussed and debated. Nothing can be a better testament to the democratic commitment of this Assembly.

The Constitution drew its authority from the fact that members of the Constituent Assembly engaged in what one might call *public reason*. The members of the Assembly placed a great emphasis on discussion and reasoned argument. They did not simply advance their own interests, but gave principled reasons to other members for their positions. The very act of giving reasons to others makes you move away from simply a narrow consideration of your own interest because you have to give reasons to others to make them go along with your view point. The voluminous debates in the

Constituent Assembly, where each clause of the Constitution was subjected to scrutiny and debate, is a tribute to public reason at its best. These debates deserved to be memorialised as one of the most significant chapters in the history of constitution making, equal in importance to the French and American revolutions.

Shankar. Copyright: Children's Book Trust

Cartoonist's impression of the 'snail's pace' with which the Constitution was made. Making of the Constitution took almost three years. Is the cartoonist commenting on this fact? Why do you think, did the Constituent Assembly take so long to make the Constitution?

Procedures

The importance of public reason was emphasised in the mundane procedures of the Assembly as well. The Constituent Assembly had eight major Committees on different subjects. Usually, Jawaharlal Nehru, Rajendra Prasad, Sardar Patel, Maulana Azad or Ambedkar chaired these Committees. These were not men who agreed with each other on many things. Ambedkar had been a bitter critic of the Congress and Gandhi, accusing them of not doing enough for the upliftment of Scheduled Castes. Patel and Nehru disagreed on many issues. Nevertheless, they all worked together. Each Committee usually drafted particular provisions of the Constitution which were then subjected to debate by the entire Assembly. Usually an attempt was made to reach a consensus with the belief that provisions agreed to by all, would not be detrimental to any particular interests. Some provisions were subject to the vote. But in each instance every single argument, query or concern was responded to with great care and

in writing. The Assembly met for one hundred and sixty six days, spread over two years and eleven months. Its sessions were open to the press and the public alike.

Inheritance of the nationalist movement

But no constitution is simply a product of the Assembly that produces it. An Assembly as diverse as the Constituent Assembly of India could not have functioned if there was no background consensus on the main principles the Constitution should enshrine. These principles were forged during the long struggle for freedom. In a way, the Constituent Assembly was giving concrete shape and form to the principles it had inherited from the nationalist movement. For decades preceding the promulgation of the Constitution, the nationalist movement had debated many questions that were relevant to the making of the constitution — the shape and form of government India should have, the values it should uphold, the inequalities it should overcome. Answers forged in those debates were given their final form in the Constitution.

Perhaps the best summary of the principles that the nationalist movement brought to the Constituent Assembly is the Objectives Resolution (the resolution that defined the aims of the Assembly) moved by Nehru in 1946. This resolution encapsulated the aspirations and values behind the Constitution. What the previous section terms as substantive provisions of the constitution is inspired by and summed up by the values incorporated in the Objectives Resolution. Based on this resolution, our Constitution gave institutional expression to these fundamental commitments: equality, liberty, democracy, sovereignty and a cosmopolitan identity. Thus, our Constitution is not merely a maze of rules and procedures, but a moral commitment to establish a government that will fulfil the many promises that the nationalist movement held before the people.

What would have happened if we got independence in 1937? Or if we had to wait till 1957? Would our Constitution be very different from what it is today?

Main points of the Objectives Resolution

- √ India is an independent, sovereign, republic;
- √ India shall be a Union of erstwhile British Indian territories, Indian States, and other parts outside British India and Indian States as are willing to be a part of the Union;
- √ Territories forming the Union shall be autonomous units and exercise all powers and functions of the Government and administration, except those assigned to or vested in the Union;
- √ All powers and authority of sovereign and independent India and its constitution shall flow from the people;
- √ All people of India shall be guaranteed and secured social, economic and political justice; equality of status and opportunities and equality before law; and fundamental freedoms - of speech, expression, belief, faith, worship, vocation, association and action - subject to law and public morality;
- √ The minorities, backward and tribal areas, depressed and other backward classes shall be provided adequate safeguards;
- √ The territorial integrity of the Republic and its sovereign rights on land, sea and air shall be maintained according to justice and law of civilized nations;
- √ The land would make full and willing contribution to the promotion of world peace and welfare of mankind.

Institutional arrangements

The third factor ensuring effectiveness of a constitution is a balanced arrangement of the institutions of government. The basic principle is that government must be democratic and committed to the welfare of the people. The Constituent Assembly spent a lot of time on evolving the right balance among the various institutions like the executive, the legislature and the judiciary. This led to the adoption of the parliamentary form and the federal arrangement, which would distribute governmental powers between the

legislature and the executive on the one hand and between the States and the central government on the other hand.

While evolving the most balanced governmental arrangements, the makers of our Constitution did not hesitate to learn from experiments and experiences of other countries. Thus, the framers of the Constitution were not averse to borrowing from other constitutional traditions. Indeed, it is a testament to their wide learning that they could lay their hands upon any intellectual argument, or historical example that was necessary for fulfilling the task at hand. So they borrowed a number of provisions from different countries.

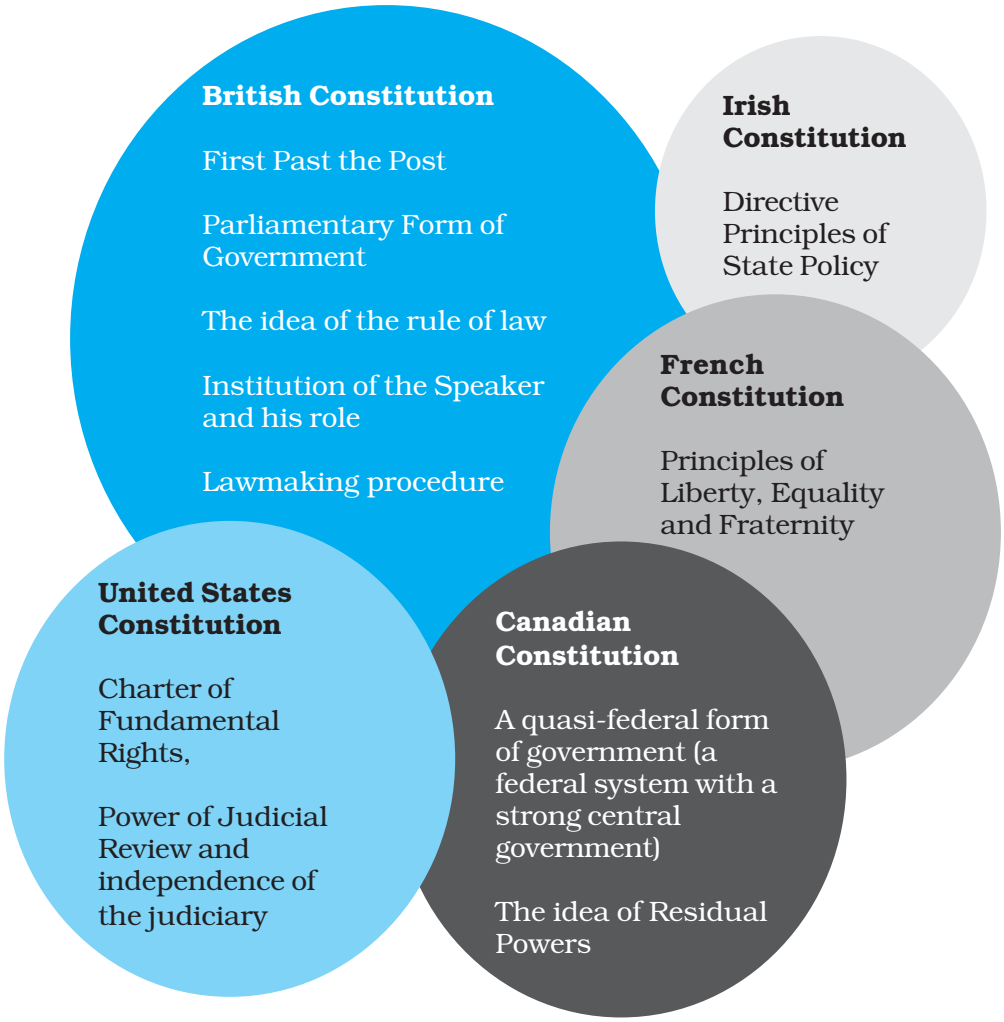
But borrowing these ideas was not slavish imitation. Far from it. Each provision of the Constitution had to be defended on grounds that it was suited to Indian problems and aspirations. India was extremely lucky to have an Assembly that instead of being parochial in its outlook could take the best available everywhere in the world and make it their own.

*Was it a borrowed **constitution then? Why** could we not have a constitution that does **not borrow anything from** anywhere else?*

"One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world... The only new thing, if there can be any, in a constitution framed so late in the day are the variations, made to remove the failures and accommodate it to the needs of the country."

Dr. B.R. Ambedkar
CAD, Vol. VII, p. 37

Provisions borrowed from constitutions of different countries



Conclusion

It is a tribute to the wisdom and foresight of the makers of the Constitution that they presented to the nation a document that enshrined fundamental values and highest aspirations shared by the people. This is one of the reasons why this most intricately crafted document has not only survived but become a living reality, when so many other constitutions have perished with the paper they were first written on.

India's Constitution is a unique document which in turn became an exemplar for many other constitutions, most notably South Africa. The main purpose behind the long search that went on for almost three years was to strike the right balance so that institutions created by the Constitution would not be haphazard or tentative arrangements but would be able to accommodate the aspirations of the people of India for a long time to come. You will know more about these arrangements through the study of the remaining chapters in this book.

Exercises

1. Which of these is not a function of the constitution?
   a. It gives a guarantee of the rights of the citizen.
   b. It marks out different spheres of power for different branches of government.
   c. It ensures that good people come to power.
   d. It gives expression to some shared values.

2. Which of the following is a good reason to conclude that the authority of the constitution is higher than that of the parliament?
   a. The constitution was framed before the parliament came into being.
   b. The constitution makers were more eminent leaders than the members of the parliament.
   c. The constitution specifies how parliament is to be formed and what are its powers.
   d. The constitution cannot be amended by the parliament.

3. State whether the following statements about a constitution are True or False.
   a. Constitutions are written documents about formation and power of the government.
   b. Constitutions exist and are required only in democratic countries.
   c. Constitution is a legal document that does not deal with ideals and values.
   d. A constitution gives its citizens a new identity.

4. State whether the following inferences about the making of the Indian Constitution are Correct or Incorrect. Give reasons to support your answer.
   a. The Constituent Assembly did not represent the Indian people since it was not elected by all citizens.
   b. Constitution making did not involve any major decision since there was a general consensus among the leaders at that time about its basic framework.
   c. There was little originality in the Constitution, for much of it was borrowed from other countries.

5. Give two examples each to support the following conclusions about the Indian Constitution:
   a. The Constitution was made by credible leaders who commanded peoples' respect.
   b. The Constitution has distributed power in such a way as to make it difficult to subvert it.
   c. The Constitution is the locus of people's hopes and aspirations.

6. Why is it necessary for a country to have a clear demarcation of powers and responsibilities in the constitution? What would happen in the absence of such a demarcation?

7. Why is it necessary for a constitution to place limitations on the rulers? Can there be a constitution that gives no power at all to the citizens?

8. The Japanese Constitution was made when the US occupation army was still in control of Japan after its defeat in the Second World War. The Japanese constitution could not have had any provision that the US government did not like. Do you see any problem in

this way of making the constitution? In which way was the Indian experience different from this?

9. Rajat asked his teacher this question: " The constitution is a fifty year old and therefore outdated book. No one took my consent for implementing it. It is written in such tough language that I cannot understand it. Tell me why should I obey this document?" If you were the teacher, how would you answer Rajat?

10. In a discussion on the experience of the working of our Constitution, three speakers took three different positions:
    a. Harbans: The Indian Constitution has succeeded in giving us a framework of democratic government.
    b. Neha: The Constitution made solemn promises of ensuring liberty, equality and fraternity. Since this has not happened, the Constitution has failed.
    c. Nazima: The Constitution has not failed us. We have failed the Constitution.

    Do you agree with any of these positions? If yes, why? If not, what is your own position?

Chapter Two

RIGHTS IN THE INDIAN CONSTITUTION

INTRODUCTION

A constitution is not only about the composition of the various organs of government and the relations among them. As we studied in the last chapter, the constitution is a document that sets limits on the powers of the government and ensures a democratic system in which all persons enjoy certain rights. In this chapter, we shall study the Fundamental Rights contained in the Indian Constitution. Part three of the Constitution of India lists the Fundamental Rights and also mentions the limits on these rights. In the past fifty years, the scope of rights has changed and in some respects, expanded. After studying this chapter, you would know

- *what are the various Fundamental Rights listed in the Constitution of India;*
- *how these rights are protected;*
- *what role the judiciary has played in protecting and interpreting these rights; and*
- *what is the difference between the Fundamental Rights and the Directive Principles of State Policy.*

The importance of Rights

In 1982 *during the construction work for Asian Games the government engaged a few contractors. These contractors employed a large number of very poor construction workers from different parts of the country to build the flyovers and stadiums. These workers were kept in poor working conditions and were paid less than the minimum wages decided by the government.*

A team of social scientists studied their poor condition and petitioned the Supreme Court. They argued that employing a person to work for less than the minimum prescribed wage amounts to begar *or forced labour, which is a violation of the Fundamental Right against exploitation. The court accepted this plea and directed the government to ensure that thousands of workers get the prescribed wages for their work.*

Machal Lalung *was 23 when he was arrested. A resident of Chuburi village of Morigaon district of Assam, Machal was charged of causing grievous injuries. He was found mentally too unstable to stand trial and was sent as under trial to Lok Priya Gopinath Bordoloi Mental Hospital in Tejpur for treatment.*

Machal was treated successfully and doctors wrote twice to jail authorities in 1967 and 1996 that he was fit to stand trial. But no one paid any attention. Machal Lalung remained in "judicial custody."

Machal Lalung was released in July 2005. He was 77 then. He spent 54 years under custody during which his case never came up for hearing. He was freed when a team appointed by the National Human Rights Commission intervened after an inspection of undertrials in the State.

Machal's entire life was wasted because a proper trial against him never took place. Our Constitution gives every citizen the right to 'life and liberty': this means that every citizen must also have the right to fair and speedy trial. Machal's case shows what happens when rights granted by the Constitution are not available in practice.

What if Machal was a rich and powerful man? What if those working with the construction contractor were engineers? Would their rights have been violated?

In the case of the first instance also there was violation of rights provided in the Constitution. But it was challenged in the court. As a result, workers could get what was due to them in the form of their rightful wages. The constitutional guarantee of the right against exploitation ensured justice to these workers.

Bill of Rights

Both these examples show the importance of having rights and of the actual implementation of these rights. A democracy must ensure that individuals have certain rights and that the government will always recognise these rights. Therefore it is often a practice in most democratic countries to list the rights of the citizens in the constitution itself. Such a list of rights mentioned and protected by the constitution is called the 'bill of rights'. A bill of rights prohibits government from thus acting against the rights of the individuals and ensures a remedy in case there is violation of these rights.

From whom does a constitution protect the rights of the individual? The rights of a person may be threatened by another person or private organisation. In such a situation, the individual would need the protection of the government. So, it is necessary that the government is bound to protect the rights of the individual. On the other hand, the organs of the government (the legislature, executive, bureaucracy or even the judiciary), in the course of their functioning, may violate the rights of the person.

I get it! The bill of rights is like a warrantee card that we get when we purchase a TV or a fan. Isn't it?

Fundamental Rights in the Indian Constitution

During our freedom struggle, the leaders of the freedom movement had realised the importance of rights and demanded that the British rulers should respect rights of the people. The Motilal Nehru committee had demanded a bill of rights as far back as in 1928. It was therefore, natural that when India became independent and the Constitution was being prepared, there were no

two opinions on the inclusion and protection of rights in the Constitution. The Constitution listed the rights that would be specially protected and called them 'fundamental rights'.

The word fundamental suggests that these rights are so important that the Constitution has separately listed them and made special provisions for their protection. The Fundamental Rights are so important that the Constitution itself ensures that they are not violated by the government.

Fundamental Rights are different from other rights available to us. While ordinary legal rights are protected and enforced by ordinary law, Fundamental Rights are protected and guaranteed by the constitution of the country. Ordinary rights may be changed by the legislature by ordinary process of law making, but a fundamental right may only be changed by amending the Constitution itself. Besides this, no organ of the government can act in a manner that violates them. As we shall study below in this chapter, judiciary has the powers and responsibility to protect the fundamental rights from violations by actions of the

Bill of rights in the South African Constitution

The South African Constitution was inaugurated in December 1996. Its creation and promulgation took place at a time when South Africa still faced the threat of a civil war after the dissolution of the Apartheid government. The South African Constitution says that its "Bill of Rights is a cornerstone of democracy in South Africa". It forbids discrimination on the grounds of "race, gender, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth". It grants perhaps the most extensive range of rights to the citizens. A special constitutional court enforces the rights enshrined in the constitution.

Some of the Rights included in the constitution of South Africa include:

- Right to Dignity
- Right to Privacy
- Right to fair labour practices
- Right to healthy environment and right to protection of environment
- Right to adequate housing
- Right to health care, food, water and social security
- Children's rights
- Right to basic and higher education
- Right of cultural, religious and linguistic communities
- Right to information

government. Executive as well as legislative actions can be declared illegal by the judiciary if these violate the fundamental rights or restrict them in an unreasonable manner. However, fundamental rights are not absolute or unlimited rights. Government can put reasonable restrictions on the exercise of our fundamental rights.

Check your progress

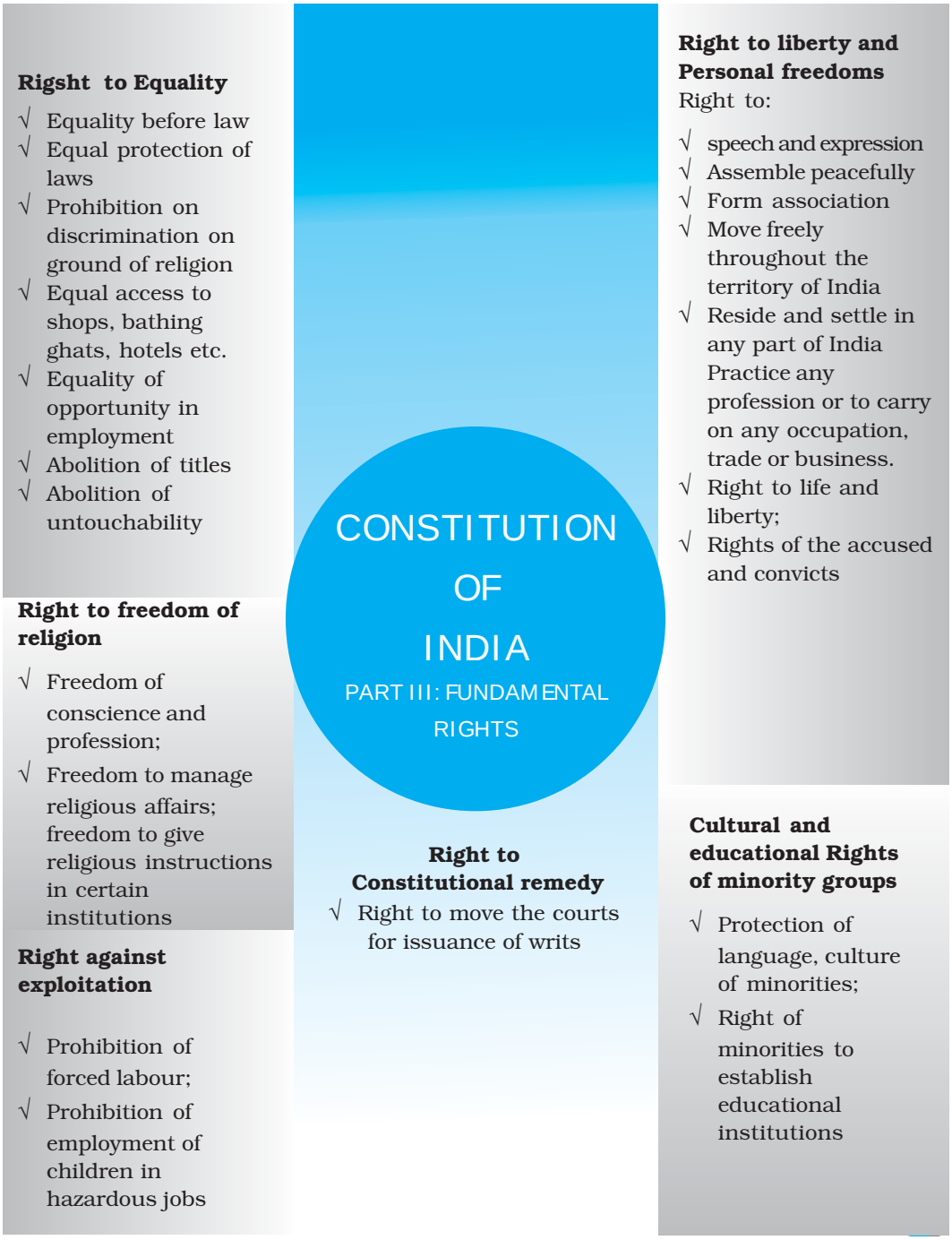
Compare the Fundamental Rights in the Indian Constitution with the Bill of Rights in the South African Constitution. Make a list of rights that are:

- Common to both the constitutions
- Available in South Africa but not in India
- Clearly granted in South Africa but implicit in the Indian Constitution

Right to Equality

Consider the following two situations. These are imaginary situations. But similar things do happen and can happen. Do you think they involve violation of fundamental rights?

- *Swadesh Kumar is visiting his village. He is accompanied by one of his friends. They decided to have a cup of tea at the village roadside hotel. The shopkeeper knew Swadesh Kumar but asked the name of his friend to know his caste. After this the shopkeeper served tea to Swadesh Kumar in a nice mug while his friend was given tea in an earthen cup because he was dalit.*
- *An order is served to four newsreaders of a television channel that they would no longer read the news on screen. They are all women. The reason given is that they are above the age of forty-five. Two male newsreaders above the same age are not barred from presenting the news.*


CONSTITUTION OF INDIA
PART III: FUNDAMENTAL RIGHTS
Rigsht to Equality
√ Equality before law
√ Equal protection of laws
√ Prohibition on discrimination on ground of religion
√ Equal access to shops, bathing ghats, hotels etc.
√ Equality of opportunity in employment
√ Abolition of titles
√ Abolition of untouchability
Right to freedom of religion
√ Freedom of conscience and profession;
√ Freedom to manage religious affairs; freedom to give religious instructions in certain institutions
Right against exploitation
√ Prohibition of forced labour;
√ Prohibition of employment of children in hazardous jobs
Right to liberty and Personal freedoms
Right to:
√ speech and expression
√ Assemble peacefully
√ Form association
√ Move freely throughout the territory of India
√ Reside and settle in any part of India Practice any profession or to carry on any occupation, trade or business.
√ Right to life and liberty;
√ Rights of the accused and convicts
Right to Constitutional remedy
√ Right to move the courts for issuance of writs
Cultural and educational Rights of minority groups
√ Protection of language, culture of minorities;
√ Right of minorities to establish educational institutions

Do such things really happen in our country? Or are these purely imaginary?

These are examples of clear discrimination. In one instance the discrimination is based on caste and in another it is based on gender. Do you think that such discrimination is justified?

Right to equality tries to do away with such and other discriminations. It provides for equal access to public places like shops, hotels, places of entertainment, wells, bathing *ghats* and places of worship. There cannot be any discrimination in this access on the basis of caste, creed, colour, sex, religion, or place of birth. It also prohibits any discrimination in public employment on any of the above mentioned basis. This right is very important because our society did not practice equal access in the past.

The practice of untouchability is one of the crudest manifestations of inequality. This has been abolished under the right to equality. The same right also provides that the state shall confer no title on a person except those who excel themselves in military or academic field. Thus right to equality strives to make India a true democracy by ensuring a sense of equality of dignity and status among all its citizens.

Have you read the Preamble to our Constitution? How does it describe equality? You will find that the Preamble mentions two things about equality: equality

Article 16 (4): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

of status and equality of opportunity. Equality of opportunity means that all sections of the society enjoy equal opportunities. But in a society where there are various kinds of social inequalities, what does equal opportunity mean? The Constitution clarifies that the government can implement special schemes and measures for improving the conditions of certain sections of society: children, women, and the socially and educationally backward classes. You may have heard about 'reservations' in jobs, and in admissions. You would have wondered why there are reservations if we follow the principle of equality. In fact Article 16(4) of the constitution explicitly clarifies that a policy like reservation will not be seen as a violation of right to equality. If you see the spirit of the Constitution, this is required for the fulfilment of the right to equality of opportunity.

You are the Judge

You have received a post card from Hadibandhu, who identifies himself as a "member of the dalit community" in Puri district in Orissa. Men from this community refused to follow a custom that required them to wash the feet of the groom and guests of the 'upper caste' during marriage ceremonies. In revenge, four women from this community were beaten up and another was paraded naked. The post card writer says "Our children are educated and they are not willing to do the customary job of washing the feet of upper caste men, clear the left-overs after the marriage feast and wash the utensils."

Assuming that the facts given above are correct, you have to decide:
Does this case involve violation of Fundamental Rights?
What would you order the government to do in this case?

Article 21: Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law.

Right to Freedom

Equality and freedom or liberty, are the two rights that are most essential to a democracy. It is not possible to think of the one without thinking of the other. Liberty means freedom of thought, expression and action. However it does not mean freedom to do anything that one desires or likes. If that were to be permitted then a large number of people will not be able to enjoy their freedom. Therefore, freedoms are defined in such a manner that every person will enjoy her freedom *without* threatening freedom of others and *without* endangering the law and order situation.

Right to life and personal liberty

The foremost right among rights to freedom is the right to life and personal liberty. No citizen can be denied his or her life except by procedure as laid down under the law. Similarly no one can be denied his/her personal liberty. That means no one can be arrested without being told the grounds for such an arrest. If arrested, the person has the right to defend himself by a lawyer of his choice. Also, it is mandatory for the police to take that person to the nearest magistrate within 24 hours. The magistrate, who is not part of the police, will decide whether the arrest is justified or not.

This right is not just confined to a guarantee against taking away of an individual's life but has wider application. Various judgments of Supreme Court have expanded the scope of this right. The Supreme Court

Does it mean that in some cases someone's life can be taken away by law? That sounds strange. Can you think of an example?

has ruled that this right also includes right to live with human dignity, free from exploitation. The court has held that right to shelter and livelihood is also included in the right to life because no person can live without the means of living, that is, the means of livelihood.

Preventive detention

Ordinarily, a person would be arrested *after* he or she has reportedly committed some offence. However there are exceptions to this. Sometimes a person can be arrested simply out of an apprehension that he or she is likely to engage in unlawful activity and imprisoned for some time without following the above mentioned procedure. This is known as preventive detention. It means that if the government feels that a person can be a threat to law and order or to the peace and security of the nation, it can detain or arrest that person. This preventive detention can be extended only for three months. After three months such a case is brought before an advisory board for review.

On the face of it, preventive detention looks like an effective tool in the hands of the government to deal with anti-social elements or subversives. But this provision has often been misused by the government. Many people think that there must be greater safeguards in this law so that it may not be misused against people for reasons other than that which are really justified. In fact, there is a clear tension between right to life and personal liberty and the provision for preventive detention.

Other freedoms

You can see that under the right to freedom there are some other rights as well. These rights however are not absolute. Each of these is subject to restrictions imposed by the government.

For example right to freedom of speech and expression is subject to restrictions such as public order, peace and morality etc. Freedom to assemble too is to be exercised peacefully and without arms. The government may impose restrictions in certain areas declaring the assembly of five or more persons as unlawful. Such powers can be easily misused by the administration. The genuine protest against an act or policy of government by the people may be denied

permission. However, if the people are aware and vigilant in regard to their rights and choose to protest against such acts of administration such misuse becomes rare. In the Constituent Assembly itself, some members had expressed their dissatisfaction about restrictions on rights.

I feel that many of these fundamental rights have been framed from the point of view of a police Constable... you will find that very minimum rights have been conceded and are almost invariably followed by a proviso. Almost every article is followed by a proviso which takes away the right almost completely,..
...What should be our conception of fundamental rights ?....We want to incorporate every one of those rights which our people want to get.

Somnath Lahiri
[CAD, Vol. III, p. 404]

Rights of accused

Our Constitution ensures that persons accused of various offences would also get sufficient protection. We often tend to believe that anyone who is charged with some offence is guilty. However, no one is guilty unless the court has found that person guilty of an offence. It is also necessary that a person accused of any crime should get adequate opportunity to defend herself or himself. To ensure a fair trial in courts, the Constitution has provided three rights:

- no person would be punished for the same offence more than once,
- no law shall declare any action as illegal from a backdate, and
- no person shall be asked to give evidence against himself or herself.

Check your progress

Do you think that the following situations demand restrictions on right to freedom? Give reasons to support your answer.

a. People have assembled for a peace march after communal riots in the city.
b. Dalits are denied entry in a temple. A march is being organised to forcibly enter the temple.
c. Hundreds of tribals armed with their traditional weapons bows arrows and axes have blocked the road. They are demanding that the surplus land taken for an industry be returned to them.
d. A caste panchayat is meeting to decide the punishment to a young couple for marrying outside their caste.

Right against Exploitation

In our country there are millions of people who are underprivileged and deprived. They may be subjected to exploitation by their fellow human beings. One such form of exploitation in our country has been *begar* or forced labour without payment. Another closely related form of exploitation is buying and selling of human beings and using them as slaves. Both of these are prohibited under the Constitution. Forced labour was imposed by landlords, money lenders and other wealthy persons in the past. Some form of bonded labour still continues in the country, specially in brick kiln work. It has now been declared a crime and it is punishable.

Name the fundamental rights whose violation is depicted in this photograph.

The Constitution also forbids employment of children below the age of 14 years in dangerous jobs like factories and mines. With child labour being made illegal and right to education becoming a fundamental right for children, this right against exploitation has become more meaningful.

Right to Freedom of Religion

According to our Constitution, everyone enjoys the right to follow the religion of his or her choice. This freedom is considered as a hallmark of democracy. Historically, there were rulers and emperors in different parts of the world who did not allow residents of their countries to enjoy the right to freedom of religion. Persons following a religion different from that of the ruler were either persecuted or forced to convert to the official religion of the rulers. Therefore, democracy has always incorporated the freedom to follow the religion of one's choice as one of its basic principles.

Freedom of faith and worship

In India, everyone is free to choose a religion and practice that religion. Freedom of religion also includes the freedom of conscience. This means that a person may choose any religion or may choose not to follow any religion. Freedom of religion includes the freedom to profess, follow and propagate any religion. Freedom of religion is subject to certain limitations. The government can impose restrictions on the practice of freedom of religion in order to protect public order, morality and health. This means that the freedom of religion is not an unlimited right. The government can interfere in religious matters for rooting out certain social evils. For example in the past, the government has taken steps banning practices like sati, bigamy or human sacrifice. Such restrictions cannot be opposed in the name of interference in right to freedom of religion.

The limitations on the right to freedom of religion always produce tensions between followers of various religions and the government. When the government seeks to restrict some activities of any religious group, people of that religion feel that this is interference in their religion.

Freedom of religion becomes a matter of political controversy for yet another reason. The Constitution has guaranteed the right to propagate one's religion. This includes persuading people to

convert from one religion to another. However, some people resent conversions on the ground that these are based on intimidation or inducement. The Constitution does not allow forcible conversions. It only gives us the right to spread information about our religion and thus attract others to it.

Equality of all religions

Being a country which is home to several religions, it is necessary that the government must extend equal treatment to different religions. Negatively, it means that government will not favour any particular religion. India does not have any official religion. We don't have to belong to any particular religion in order to be a prime minister or president or judge or any other public official. We have also seen that under the right to equality, there is a guarantee that government will not discriminate on the basis of religion in giving employment. The institutions run by the state will not preach any religion or give religious education nor will they favour persons of any religion. The objective of these provisions is to sustain and nurture the principle of secularism.

Activity

Make a list of public religious activities that take place in your village or city.

Which of these involve an exercise of right to religious freedom?

Discuss what could have happened if this right was not available to people in your locality.

Cultural and Educational Rights

When we talk of the Indian society, the image of diversity comes before our minds. India is not made up of a monolithic society. We are a society that has vast diversity. In such a society that is full of diversity, there would be social sections which are small in numbers compared to some other groups. If a group is in minority, will it have to adopt the culture of the majority?

Our Constitution believes that diversity is our strength. Therefore, one of the fundamental rights is the right of the minorities to maintain their culture. This minority status is not dependent only

Sardar Hukam Singh
[CAD VIII p. 322,]

A heavy responsibility would be cast on the majority to see that in fact the minorities feel secure. ...the only safety for the minorities lies in a secular State. It pays them to be nationalists .....The majority community should not boast of their national outlook. .....They should try to place themselves in the position of the minorities and try to appreciate their fears. All demands for safeguards .....are the products of those fears that the minorities have in their minds, ...as regards their language, their script and also about the services.

upon religion. Linguistic and cultural minorities are also included in this provision. Minorities are groups that have common language or religion and in a particular part of the country or in the country as a whole, they are outnumbered by some other social section. Such communities have a culture, language and a script of their own, and have the right to conserve and develop these.

All minorities, religious or linguistic, can set up their own educational institutions. By doing so, they can preserve and develop their own culture. The government will not, while granting aid to educational institutions, discriminate against any educational institution on the basis that it is under the management of minority community.

Right to Constitutional Remedies

One would agree that our Constitution contains a very impressive list of Fundamental Rights. But merely writing down a list of rights is not enough. There has to be a way through which they could be realised in practice and defended against any attack on these rights.

Right to constitutional remedies is the means through which this is to be achieved. Dr. Ambedkar considered the right to constitutional remedies as 'heart and soul of the constitution'. It is so because this right gives a citizen the right to approach a High Court or the Supreme Court to get any of the fundamental rights restored in case of their violation. The Supreme Court and the High Courts can issue orders and give directives to the government for the enforcement of rights.

The courts can issue various special orders known as writs.

- **Habeas corpus:** A writ of habeas corpus means that the court orders that the arrested person should be presented before it. It can also order to set free an arrested person if the manner or grounds of arrest are not lawful or satisfactory.
- **Mandamus:** This writ is issued when the court finds that a particular office holder is not doing legal duty and thereby is infringing on the right of an individual.
- **Prohibition:** This writ is issued by a higher court (High Court or Supreme Court) when a lower court has considered a case going beyond its jurisdiction.
- **Quo Warranto:** If the court finds that a person is holding office but is not entitled to hold that office, it issues the writ of quo warranto and restricts that person from acting as an office holder.
- **Certiorari:** Under this writ, the court orders a lower court or another authority to transfer a matter pending before it to the higher authority or court.

Apart from the judiciary, many other mechanisms have been created in later years for the protection of rights. You may have heard about the National Commission on Minorities, the National Commission on Women, the National Commission on Scheduled Castes,

I am in minority in my locality but majority in the town, minority if you look at my language but majority if you go by my religion... Aren't we all minorities?

etc. These institutions protect the rights of women, minorities or Dalits. Besides, the National Human Rights Commission has also been established by law to protect the fundamental and other kinds of rights.

Human Rights Commission

The real test of the rights given by any constitution is in their actual implementation. The poor, illiterate and the deprived sections of the society must be able to exercise their rights. Independent organisations like the People's Union for Civil Liberties (PUCL) or People's Union for Democratic Rights (PUDR) have been working as watchdogs against the violations of rights. In this background, the government has established in 2000 an institution, the National Human Rights Commission.

The National Human Rights Commission (NHRC) is composed of a former chief justice of the Supreme Court of India, a former judge of the Supreme Court, a former chief justice of a High Court and two other members who have knowledge and practical experience in matters relating to human rights.

The commission's functions include inquiry at its own initiative or on a petition presented to it by a victim into complaint of violation of human rights; visit to jails to study the condition of the inmates; undertaking and promoting research in the field of human rights etc.

The commission receives complaints in thousands every year. These relate to custodial death, custodial rape, disappearances, police excesses, failure in taking action, indignity to women etc. Its most significant intervention has been on disappeared youth in Punjab and investigation and trial of Gujarat riot cases where its intervention proved effective.

The commission does not have the power of prosecution. It can merely make recommendations to the government or recommend to the courts to initiate proceedings based on the inquiry that it conducts.

Directive Principles of State Policy

The makers of our Constitution knew that independent India was going to face many challenges. Foremost among these was the challenge to bring about equality and well-being of all citizens. They also thought that certain policy direction was required for handling these problems. At the same time, the Constitution did not want future governments to be bound by certain policy decisions.

Therefore, some guidelines were incorporated in the Constitution but they were not made legally enforceable: this means that if a government did not implement a particular guideline, we cannot go to the court asking the court to instruct the government to implement that policy. Thus, these guidelines are 'non-justiciable' i.e., parts of the Constitution that cannot be enforced by the judiciary. Those who framed our Constitution thought that the moral force behind these guidelines would ensure that the government would take them seriously. Besides, they expected that the people would also hold the governments responsible for implementing these directives. So, a separate list of policy guidelines is included in the Constitution. The list of these guidelines is called the Directive Principles of State Policy.

What do the Directive Principles contain?

The chapter on Directive Principles lists mainly three things:

- the goals and objectives that we as a society should adopt;
- certain rights that individuals should enjoy apart from the Fundamental Rights; and
- certain policies that the government should adopt.

You may get some idea of the vision of makers of our Constitution by looking at some of the Directive Principles shown below.

The governments from time to time tried to give effect to some Directive Principles of State Policy. They passed several zamindari abolition bills, nationalised banks, enacted numerous factory laws, fixed minimum wages, cottage and small industries were promoted and provisions for reservation for the uplift of the scheduled castes and scheduled tribes were made. Such efforts to give effect to the

Directive Principles include the right to education, formation of panchayati raj institutions all over the country, partial right to work under employment guarantee programme and the mid-day meal scheme etc.

Fundamental Duties of citizens

- In 1976, the 42nd amendment to the Constitution was passed. Among other things, this amendment inserted a list of Fundamental Duties of Citizens. In all, ten duties were enumerated. However, the Constitution does not say anything about enforcing these duties.
- As citizens, we must abide by the Constitution, defend our country, promote harmony among all citizens, protect the environment.
- However, it must be noted that our Constitution does not make the enjoyment of rights dependent or conditional upon fulfilment of duties. In this sense, the inclusion of fundamental duties has not changed the status of our fundamental rights.

Check your progress

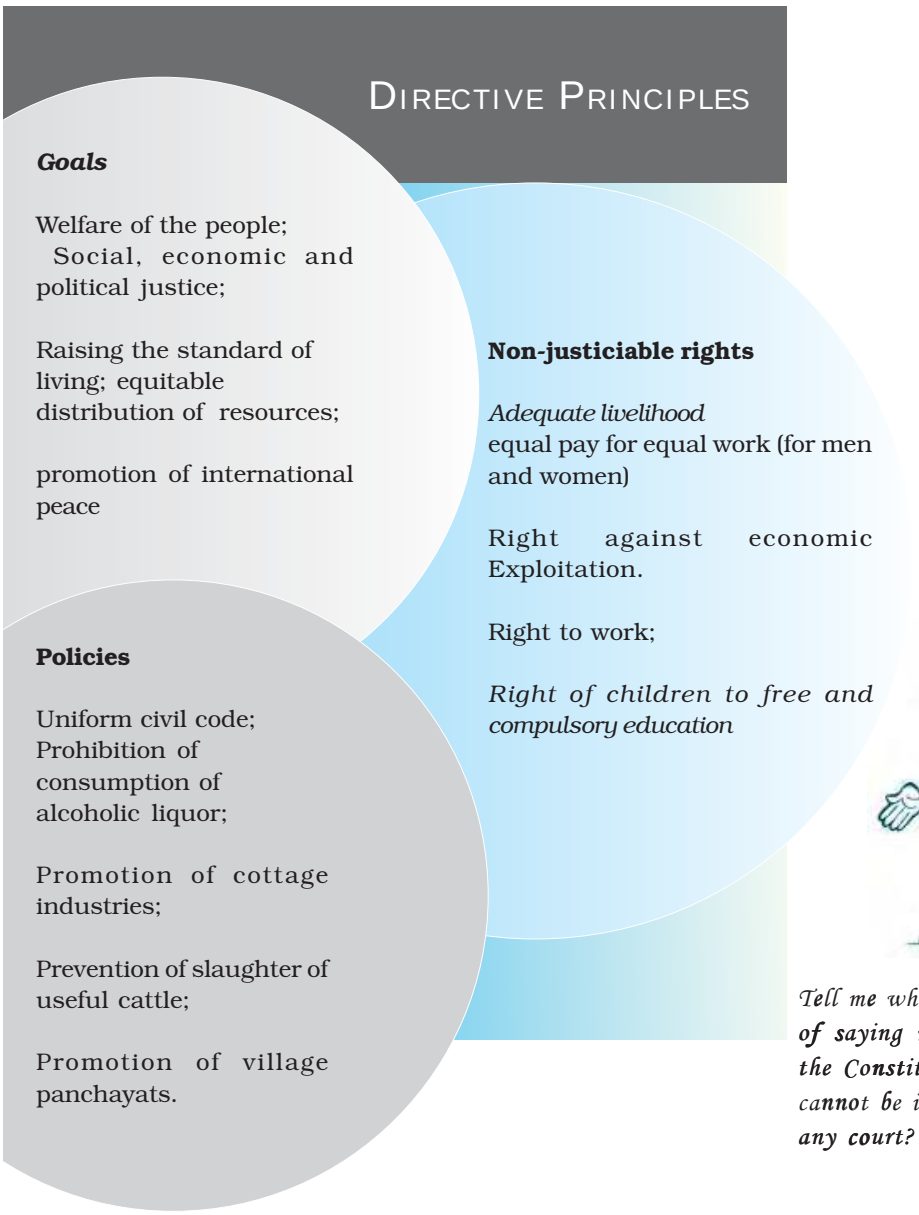
It is estimated that there are about three million urban homeless in India. Night shelters are not available for more than five per cent of this population. Hundreds of these old, sick homeless people are killed by cold wave during winter. They cannot have ration and voting cards in the absence of any 'proof of residence'. Without these documents they also cannot avail government help as needy patients. A large number of these homeless people are casual workers, who earn very low wages. They travel to the city in search of work from different parts of the country.

Use these facts to write a petition to the Supreme Court of India under the Right to Constitutional Remedies. Your petition should mention:

a. What Fundamental Rights are being denied to the homeless in their everyday life?
b. What kind of order would you request the Supreme Court to issue?

Relationship between Fundamental Rights and Directive Principles

It is possible to see both Fundamental Rights and Directive Principles as complementary to each other. Fundamental Rights restrain the government from doing certain things while Directive



Tell me what is the point of saying nice things in the Constitution if these cannot be implemented by any court?

Principles exhort the government to do certain things. Fundamental Rights mainly protect the rights of individuals while directive principles ensure the well-being of the entire society.

However, at times, when government intends to implement Directive Principles of State Policy, it can come in conflict with the Fundamental Rights of the citizen.

This problem arose when the government sought to pass laws to abolish zamindari system. These measures were opposed on the ground that they violated right to property. However, keeping in mind the societal needs that are greater than the individual interests, the government amended the Constitution to give effect to the Directive Principles of State Policy. This led to a long legal battle. The executive and the judiciary took different positions. The government claimed that rights can be abridged for giving effect to Directive Principles. This argument assumed that rights were a hindrance to welfare of the people. On the other hand, the court held the view that Fundamental Rights were so important and sacred that they cannot be limited even for purposes of implementing Directive Principles.

Right to Property

Behind the controversy about the relationship between rights and directive principles, there was one important reason: in the Constitution, originally, there was a fundamental right to 'acquire, possess and maintain' property. But the Constitution made it clear that property could be taken away by the government for public welfare. Since 1950, government made many laws that limited this right to property. This right was at the centre of the long debate over the relationship between rights and directive principles. Finally, in 1973, the Supreme Court gave a decision that the right to property was not part of the basic structure of the Constitution and therefore, parliament had power to abridge this right by an amendment. In 1978, the 44th amendment to the Constitution removed the right to property from the list of Fundamental Rights and converted it into a simple legal right.

What difference, do you think, this change of status makes to the right to property?

This generated another complicated debate. This related to the amendment of the Constitution. The government was saying that Parliament can amend any part of the Constitution. The court was saying that Parliament cannot make an amendment that violated Fundamental Rights. This controversy was settled by an important decision of the Supreme Court in Kesavananda Bharati case. In this case, the court said that there are certain basic features of the Constitution and these cannot be changed by Parliament. We shall discuss this in greater detail in Chapter 9 on 'Constitution as a Living Document'.

भ्रूण हत्या और यौन उत्पीड़न के खिलाफ मुहिम

आठ मार्च से जिला स्तर पर संवेदना परामर्श केंद्र खोलने का एलान

Dalit family finally gets some respite from court

Sessions court sends the case back to magistrate with direction to pass a fresh order

Special Correspondent

• Verdict of ACJM quashed

• Family alleges persecution by high caste people

वार्ड सदस्य खातून को दबंगों ने कालिख पोत कर घुमाया

स्त्री भ्रूण हत्याएं रोकी जाएं: पाटील

बाल विवाह के खिलाफ आवाज उठाई दो बहादुर बच्चियों ने

डायन कह कर यातना देने वालों की अब खैर नहीं

Check your progress

Read the main points of the Bill of Rights in the South African Constitution and the Directive Principles in India.
Which are the common points in the two lists?
Why did the South African Constitution put these in the Bill of Rights?
If you were writing the constitution for a new country, what would you suggest?

Conclusion

In the writings of Jotirao Phuley (1827-1890), a radical social reformer from Maharashtra, we find one of the earliest expressions of the view that rights include both freedom and equality. During the national movement, this idea of rights was further sharpened and expanded to constitutional rights. Our Constitution reflected this long tradition and listed the fundamental rights. Since 1950, the judiciary has functioned as an important protector of rights.

Judicial interpretations have expanded the scope of rights in many respects. The government and administration of our country function within this overall framework. Rights enforce limitations on the functioning of the government and ensure democratic governance of the country.

Exercises

1. Write true or false against each of these statements:
   a) A Bill of Rights lays down the rights enjoyed by the people of a country.
   b) A Bill of Rights protects the liberties of an individual.
   c) Every country of the world has a Bill of Rights.
   d) The Constitution guarantees remedy against violation of Rights.

2. Which of the following is the best description of Fundamental Rights?
   a) All the rights an individual should have.
   b) All the rights given to citizens by law.
   c) The rights given and protected by the Constitution.
   d) The rights given by the Constitution that cannot ever be restricted.

3. Read the following situations. Which Fundamental Right is being used or violated in each case and how?
   a) Overweight male cabin crew are allowed to get promotion in the national airlines but their women colleagues who gain weight are penalised.
   b) A director makes a documentary film that criticises the policies of the government.
   c) People displaced by a big dam take out a rally demanding rehabilitation.
   d) Andhra society runs Telugu medium schools outside Andhra Pradesh.

4. Which of the following is a correct interpretation of the Cultural and Educational Rights?
   a) Only children belonging to the minority group that has opened educational institution can study there.
   b) Government schools must ensure that children of the minority group will be introduced to their belief and culture.
   c) Linguistic and religious minorities can open schools for their children and keep it reserved for them.
   d) Linguistic and religious minorities can demand that their children must not study in any educational institution except those managed by their own community.

5. Which of the following is a violation of Fundamental Rights and why?
   a) Not paying minimum wages
   b) Banning of a book
   c) Banning of loudspeakers after 9 pm.
   d) Making a speech

6. An activist working among the poor says that the poor don't need Fundamental Rights. What they need are Directive Principles to be made legally binding. Do you agree with this? Give your reasons.

7. Several reports show that caste groups previously associated with scavenging are forced to continue in this job. Those in positions of authority refuse to give them any other job. Their children are discouraged from pursuing education. Which of their Fundamental Rights are being violated in this instance?

8. A petition by a human rights group drew attention of the court to the condition of starvation and hunger in the country. Over five crore tonnes of food grains was stored in the godowns of the Food Corporation of India. Research shows that a large number of ration cardholders do not know about the quantity of food grains they can purchase from fair price shops. It requested the court to order the government to improve its public distribution system.
   a. Which different rights does this case involve? How are these rights interlinked?
   b. Should these rights form part of the right to life?

9. Read the statement by Somnath Lahiri in the Constitutent Assembly quoted in this chapter. Do you agree with him? If yes, give instances to prove it. If not, give arguments against his position.

10. Which of the Fundamental Rights is in your opinion the most important right? Summarise its provisions and give arguments to show why it is most important.

Chapter 3

ELECTION AND REPRESENTATION

INTRODUCTION

Have you ever played chess? What would happen if the black knight suddenly started moving straight rather than two and a half squares? Or, what would happen if in a game of cricket, there were no umpires? In any sport, we need to follow certain rules. Change the rules and the outcome of the game would be very different. Similarly a game needs an impartial umpire whose decision is accepted by all the players. The rules and the umpire have to be agreed upon before we begin to play a game. What is true of a game is also true of elections. There are different rules or systems of conducting elections. The outcome of the election depends on the rules we have adopted. We need some machinery to conduct the elections in an impartial manner. Since these two decisions need to be taken before the game of electoral politics can begin, these cannot be left to any government. That is why these basic decisions about elections are written down in the constitution of a democratic country.

In this chapter we shall study the constitutional provisions regarding elections and representation. We shall focus on the importance of the method of election chosen in our Constitution and the implications of the constitutional provisions regarding impartial machinery for conducting elections. We shall also look at some suggestions for amending the constitutional provisions in this respect. After reading this chapter, you would understand:

- *different methods of election;*
- *the characteristics of the system of election adopted in our country;*
- *the importance of the provisions for free and fair elections; and*
- *the debate on electoral reforms.*

Elections and Democracy

Let us begin by asking ourselves two simple questions about elections and democracy.

- Can we have democracy without holding elections?
- Can we hold elections without having democracy?

Let us have a discussion in the classroom on both these questions by using examples from whatever we have learnt so far in the previous classes.

Read a Cartoon

Shankar. Copyright: Children's Book Trust.

They say elections are carnival of democracy. But this cartoon depicts chaos instead. Is this true of elections always? Is it good for democracy?

The first question reminds us of the necessity of representation in a large democracy. All citizens cannot take direct part in making every decision. Therefore, representatives are elected by the people. This is how elections become important. Whenever we think of India as a democracy, our mind invariably turns to the last elections. Elections have today become the most visible symbol of the democratic process. We often distinguish between direct and indirect democracy. A direct democracy is one where the citizens directly participate in the day-to-day decision making and in the running of the government. The ancient city-states in Greece were considered examples of direct democracy. Many would consider local governments, especially gram sabhas, to be the closest examples of direct

democracy. But this kind of direct democracy cannot be practiced when a decision has to be taken by lakhs and crores of people. That is why rule by the people usually means rule by people's representatives.

In such an arrangement citizens choose their representatives who, in turn, are actively involved in governing and administering the country. The method followed to choose these representatives is referred to as an election. Thus, the citizens have a limited role in taking major decisions and in running the administration. They are not very actively involved in making of the policies. Citizens are involved only indirectly, through their elected representatives. In this arrangement, where all major decisions are taken by elected representatives, the method by which people elect their representatives becomes very important.

The second question reminds us of the fact that not all elections are democratic. A large number of non-democratic countries also hold elections. In fact non-democratic rulers are very keen to present themselves as democratic. They do so by holding election in such a way that it does not threaten their rule. Can you think of some examples of such non-democratic elections? What do you think would distinguish a democratic from a non-democratic election? What can be done to ensure that elections in a country would be conducted in a democratic way?

This is where constitution comes in. The constitution of a democratic country lays down some basic rules about elections. The details are usually left to be worked out by laws passed by the legislatures. These basic rules are usually about

- Who is eligible to vote?
- Who is eligible to contest?
- Who is to supervise elections?
- How do the voters choose their representatives?
- How are the votes to be counted and representatives elected?

What is the need of writing these rules in the constitution? Why can't these be decided by the Parliament? Or by all the parties before every election?

Like most democratic constitutions, the Constitution of India answers all these questions. As you can see, the first three questions are about ensuring that elections are free and fair and can thus be called democratic. The last two questions are about ensuring a fair representation. In this chapter you will consider both these aspects of the Constitutional provisions about elections.

Activity

Collect newspaper clippings about elections in India and any other country. Classify the clippings in the following categories:

a. System of representation
b. Voter eligibility
c. Role of the Election Commission. If you have access to internet, visit the website of the project Election Process Information Collection (www.epicproject.org) and collect the information mentioned above for at least four countries.

Election System in India

You may have noted above a reference to different methods or the systems of elections. You may have wondered what these were all about. You may have seen or read about different methods of electioneering or campaigning in the elections. But what are different methods of elections? There is a system of conducting elections. There are authorities and rules about do's and don'ts. Is that what election system is all about? You may have wondered why the constitution needs to write down how the votes are to be counted and representatives elected. Isn't that very obvious? People go and vote. The candidate who gets highest votes gets elected. That is what elections are all over the world. Why do we need to think about it?

We need to, because this question is not as simple as it appears to us. We have got so used to our system of elections that we think that there cannot be any other way. In a democratic election, people vote and their preference decides who will win the contest. But there

Activity

Hold mock elections in your class to elect four class representatives. Hold the election in three different ways:

- Each student can give one vote. The four highest vote getters are elected.
- Each student has four votes and can give them all to one candidate or split the votes among different candidates. The four highest vote getters are elected.
- Each voter gives a preference ranking to candidates and the counting follows the method of election of Rajya Sabha members described below.

  Did the same four persons win the election in each of these methods? If not, what was the difference? Why?

can be very different ways in which people make their choices and very different ways in which their preferences can be counted. These different rules of the game can make a difference to who the winner of the game will be. Some rules can favour bigger parties; some rules can help the smaller players. Some rules can favour the majority community, others can protect the minorities. Let us look at one dramatic instance to see how this happens.

First Past the Post System

Look at the newspaper clipping.

नवभारत टाइम्स

रविवारीय संस्करण

पहली बार कांग्रेस को तीन-चौथाई बहुमत

हेगड़े सरकार का इस्तीफा

Less than 50 per cent votes and more than 80 per cent seats! Isn't that unfair? How could our Constitution makers accept such an unfair system?

It talks of one historic moment in India's democracy. In the Lok Sabha elections of 1984, the Congress party came to power winning 415 of the 543 Lok Sabha seats – more than 80% of the seats. Such a victory was never achieved by any party in the Lok Sabha. What did this election show?

The Congress party won four-fifths of the seats. Does it mean that four out of five Indian voters voted for the Congress party? Actually not. Take a look at the enclosed table. The Congress party got 48% of the votes. This means that only 48% of those who voted, voted in favour of the candidates put up by the Congress party, but the party still managed to win more than 80% of the seats in the Lok Sabha. Look at the performance of other parties. The BJP got 7.4 per cent votes but less than one per cent seats. How did that happen?

Votes and seats won by some major parties in Lok Sabha Election of 1984

Party	Votes (%)	Seats
Congress	48. 0	415
BJP	7.4	2
Janata	6.7	10
Lok Dal	5.7	3
CPI (M)	5.7	22
Telugu Desam	4.1	30
DMK	2.3	2
AIADMK	1.6	12
Akali Dal	1.0	7
AGP	1.0	7

This happened because in our country we follow a special method of elections. Under this system:

- The entire country is divided into 543 constituencies;
- Each constituency elects one representative; and
- The candidate who secures the highest number of votes in that constituency is declared elected.

It is important to note that in this system whoever has

more votes than all other candidates, is declared elected. The winning candidate need not secure a majority of the votes. This method is called the First Past the Post (FPTP) system. In the electoral race, the candidate who is ahead of others, who crosses the winning post first of all, is the winner. This method is also called the Plurality System. This is the method of election prescribed by the Constitution.

Let us now go back to our example. The Congress party won greater share of seats than its share of votes because in many of the constituencies in which its candidates won, they secured less than 50% of the votes. If there are several candidates, the winning candidate often gets much less than 50% of the votes. The votes that go to all the losing candidates go 'waste', for those candidates or parties get no seat from those votes. Suppose a party gets only 25 per cent of the votes in every constituency, but everyone else gets even less votes. In that case, the party could win all the seats with only 25 per cent votes or even less.

Proportional Representation

Let us compare this to how elections take place in Israel that follows a very different system of elections. In Israel once the votes are counted, each party is allotted the share of seats in the parliament in proportion to its share of votes (see Box). Each party fills its quota of seats by picking those many of its nominees from a preference list that has been declared before the elections. This system of elections is called the Proportional Representation (PR) system. In this system a party gets the same proportion of seats as its proportion of votes.

In the PR system there could be two variations. In some countries, like Israel or Netherlands, the entire country is treated as one constituency and seats are allocated to each party according to its share of votes in the national election. The other method is when the country is divided into several multi-member

This is very confusing! How do I know who is my MP or my MLA in this system? Who would I go to if I have any work?

constituencies as in Argentina and Portugal. Each party prepares a list of candidates for each constituency, depending on how many have to be elected from that constituency. In both these variations, voters exercise their preference for a party and not a candidate. The seats in a constituency are distributed on the basis of votes polled by a party. Thus, representatives from a constituency, would and do belong to different parties. In India, we have adopted PR system

Proportional Representation in Israel

Israel follows proportional representation system of election. Elections to the legislature (Knesset) take place every four years. Every party declares a list of its candidates, but voters vote for the party and not for the candidates. A party gets seats in the legislature in proportion to the votes polled by it. This allows even smaller parties with very small support base to get representation in the legislature. (A party must get a minimum of 1.5 per cent votes in order to be eligible to get seats in the legislature.) This often leads to a multi-party coalition government.

The following table shows the result of the 2003 elections to the Knesset. Based on this, you can find out what percentage of votes various parties got in that election.

Party	Seats	Share of Seats	Share of Votes
Likud	37		
Shas	11		
National Union	7		
National Religious Party	5		
UTJ	5		
Yisrael B'Aliya	2		
Labour	19		
Shinui	15		
Arab parties	9		
Meretz	6		
Am Ehad	4		
Total Seats	120		

on a limited scale for indirect elections. The Constitution prescribes a third and complex variation of the PR system for the election of President, Vice President, and for the election to the Rajya Sabha and Vidhan Parishads.

Comparison of FPTP and PR system of election

FPTP	PR
The country is divided into small geographical units called constituencies or districts	Large geographical areas are demarcated as constituencies. The entire country may be a single constituency
Every constituency elects one representative	More than one representative may be elected from one constituency
Voter votes for a candidate	Voter votes for the party
A party may get more seats than votes in the legislature	Every party gets seats in the legislature in proportion to the percentage of votes that it gets
Candidate who wins the election may not get majority (50%+1) votes	Candidate who wins the elections gets majority of votes.
Examples: U.K., India	Examples: Israel, Netherlands

How does PR work in Rajya Sabha elections

A third variant of PR, the Single Transferable Vote system (STV), is followed for Rajya Sabha elections. Every State has a specific quota of seats in the Rajya Sabha. The members are elected by the respective State legislative assemblies. The voters are the MLAs in that State. Every voter is required to rank candidates according to her or his preference. To be declared the winner, a candidate must secure a minimum quota of votes, which is determined by a formula:

$$\left(\frac{\text{Total votes polled}}{\text{Total number of candidates to be elected} + 1}\right) + 1$$

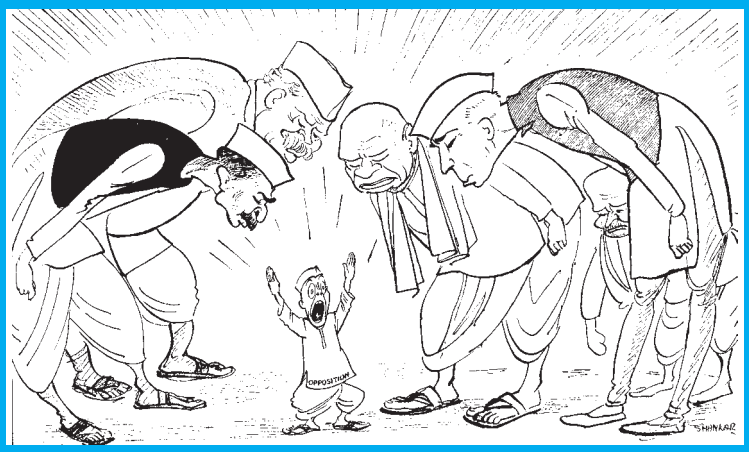
For example if 4 Rajya Sabha members have to be elected by the 200 MLAs in Rajasthan, the winner would require (200/4+1= 40+1) 41 votes. When the votes are counted it is done on the basis of first preference votes secured by each candidate, of which the candidate has secured the first preference votes. If after the counting of all first preference votes, required number of candidates fail to fulfil the quota, the candidate who secured the lowest votes of first preference is eliminated and his/her votes are transferred to those who are mentioned as second preference on those ballot papers. This process continues till the required number of candidates are declared elected.

Why did India adopt the FPTP system?

The answer is not very difficult to guess. If you have carefully read the box explaining the Rajya Sabha elections, you would have noticed that it is a complicated system which may work in a small country, but would be difficult to work in a sub-continental country like India. The reason for the popularity and success of the FPTP system is its simplicity. The entire election system is extremely simple to understand even for common voters who may have no specialised

knowledge about politics and elections. There is also a clear choice presented to the voters at the time of elections. Voters have to simply endorse a candidate or a party while voting. Depending on the nature of actual politics, voters may either give greater importance to the party or to the candidate or balance the two. The FPTP system offers voters a choice not simply between parties but specific candidates. In other electoral systems, especially PR systems, voters are often asked to choose a party and the representatives are elected on the basis of party lists. As a result, there is no one representative who represents and is responsible for one locality. In constituency based system like the FPTP, the voters know who their own representative is and can hold him or her accountable.

READ A CARTOON



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These members of the ruling party are trying to listen to the 'tiny' opposition! Was this the effect of our electoral system?

More importantly, the makers of our Constitution also felt that PR based election may not be suitable for giving a stable government in a parliamentary system. We shall study the nature of parliamentary system of executive in the next chapter. This system requires that the executive has majority in the legislature. You will notice that the PR system may not produce a clear majority because seats in the legislature would be divided on the basis of share of votes. The FPTP

Check your progress

Here are the results of the Tamil Nadu Assembly Election held in 1996.

- What would be the composition of the Assembly if it was a PR system like in Israel?
- Which party would have a majority?
- Who would form the government?
- What would be the effect of this system on the relationship of political parties?

Total Seats: 234			
Party system	**Votes**	**Seats**	**Seats in PR**
DMK	42.1	173	
AIADMK	21.5	4	
Congress	5.6	—	
CPI	2.1	8	
CPI (M)	1.7	1	
TMC	9.3	39	
PMK	3.8	4	
Others & Independents	13.9	5	

system generally gives the largest party or coalition some extra bonus seats, more than their share of votes would allow. Thus this system makes it possible for parliamentary government to function smoothly and effectively by facilitating the formation of a stable government. Finally, the FTPT system encourages voters from different social groups to come together to win an election in a locality. In a diverse country like India, a PR system would encourage each community to form its own nation-wide party. This may also have been at the back of the mind of our constitution makers.

The experience of the working of the Constitution has confirmed the expectation of the constitution makers. The FPTP system has proved to be simple and familiar to ordinary voters. It has helped larger parties to win clear majorities at the centre and the State level. The system has also discouraged political parties that get all their

votes only from one caste or community. Normally, the working of the FPTP system results in a two-party system. This means that there are two major competitors for power and power is often shared by these two parties alternately. It is difficult for new parties or the third party to enter the competition and share power. In this respect, the experience of FPTP in India is slightly different. After independence, though we adopted the FPTP system, there emerged a one party dominance and along with it, there existed many smaller parties. After 1989, India is witnessing the functioning of the multi-party coalitions. At the same time, gradually, in many States, a two party competition is emerging. But the distinguishing feature of India's party system is that the rise of coalitions has made it possible for new and smaller parties to enter into electoral competition in spite of the FPTP system.

Reservation of Constituencies

We have noticed that in the FPTP election system, the candidate who secures the highest votes in a particular constituency is declared elected. This often works to the disadvantage of the smaller social groups. This is even more significant in the Indian social context. We have had a history of caste based discrimination. In such a social system, the FPTP electoral system can mean that the dominant social groups and castes can win everywhere and the oppressed social groups may continue to remain unrepresented. Our Constitution makers were aware of this difficulty and the need to provide a way to ensure fair and just representation to the oppressed social groups.

This issue was debated even before independence and the British government had introduced 'separate electorates'. This system meant

> "Separate electorates have been a curse to India, have done incalculable harm to this country..... .... Separate electorates have blurred our progress... .....We (Muslims) want to merge in the nation. .....For God's sake, keep your hands off reservations for the Muslim community.."
>
> Tajamul Hussain
> *CAD*, Vol. VIII, p. 333

that for electing a representative from a particular community, only those voters would be eligible who belong to that community. In the constituent assembly, many members expressed a fear that this will not suit our purposes. Therefore, it was decided to adopt the system of reserved constituencies. In this system, all voters in a constituency are eligible to vote but the candidates must belong to only a particular community or social section for which the seat is reserved.

There are certain social groups which may be spread across the country. In a particular constituency, their numbers may not be sufficient to be able to influence a victory of a candidate. However, taken across the country they are a significantly sizeable group. To ensure their proper representation, a system of reservation becomes necessary. The Constitution provides for reservation of seats in the Lok Sabha and State Legislative Assemblies for the Scheduled Castes and Scheduled Tribes. This provision was made initially for a period of 10 years and as a result of successive constitutional amendments, has been extended up to 2010. The Parliament can take a decision to further extend it, when the period of reservation expires. The number of seats reserved for both of these groups is in proportion to their share in the population of India. Today, of the 543 elected seats in the Lok Sabha, 79 are reserved for Scheduled Castes and 41 are reserved for Scheduled Tribes.

> .....But I have come to say a few words on behalf of the Adibasis of India.... .....In the past, thanks to the major political parties, thanks to the British Government and thanks to every enlightened Indian citizen, we have been isolated and kept, as it were, in a zoo. ....We are willing to mix with you, and it is for that reason, ..., that we have insisted on a reservation of seats as far as the Legislatures are concerned. We have not asked ....(for) separate electorates; ....Under the 1935 Act, throughout the Legislatures in India, there were altogether only 24 Adibasi MLAs. out of a total of 1585, ...and not a single representative at the Centre.
>
> Jaipal Singh
> CAD, Vol. V, p. 226

Who decides which constituency is to be reserved? On what basis is this decision taken? This decision is taken by an independent body called the Delimitation Commission. The Delimitation Commission is appointed by the President of India and works in collaboration with the Election Commission of India. It is appointed for the purpose of drawing up the boundaries of constituencies all over the country. A quota of constituencies to be reserved in each State is fixed depending on the proportion of SC or ST in that State. After drawing the boundaries, the Delimitation Commission looks at the composition of population in each constituency. Those constituencies that have the highest proportion of Scheduled Tribe population are reserved for ST. In the case of Scheduled Castes, the Delimitation Commission looks at two things. It picks constituencies that have higher proportion of Scheduled Caste population. But it also spreads these constituencies in different regions of the State. This is done because the Scheduled Caste population is generally spread evenly throughout the country. These reserved constituencies can be rotated each time the Delimitation exercise is undertaken.

The Constitution does not make similar reservation for other disadvantaged groups. Of late there has been a strong demand seeking reservation of seats in the Lok Sabha and State Assemblies for women. Given the fact that very few women are elected to representative bodies, the demand for reserving one-third seats for women is increasingly being articulated. Reservation of seats for women has been provided for in rural and urban local bodies. We shall discuss this in the chapter on Local Governments. A similar provision for Lok Sabha and Vidhan Sabhas would require an amendment to the Constitution. Such an amendment has been proposed several times in the Parliament but has not yet been passed.

Free and Fair Elections

The true test of any election system is its ability to ensure a free and fair electoral process. If we want democracy to be translated into reality on the ground, it is important that the election system is impartial and transparent. The system of election must also allow the aspirations of the voter to find legitimate expression through the electoral results.

Check your progress

The proportion of Muslims in the population of India is about 13.5 per cent. But the number of Muslim MPs in the Lok Sabha has usually been less than 6 per cent, less than half of their share in population. A similar situation prevails in most State Assemblies. Three students drew different conclusions from this fact. Write down whether and why you agree or disagree with each of them.

Hilal: This demonstrates the unfairness of the FPTP system. We should have opted for PR system.

Arif: This shows the wisdom of granting reservations to SC and ST. What is needed is a reservation of seats for Muslims on the same lines as for SC and ST.

Saba: There is no point in talking about Muslims as a whole. Muslim women are not going to get any share in any of these systems. We need a separate quota for Muslim women.

Am I or am I not an adult? I am mature enough to choose my future career, old enough to get a driving license, but not old enough to vote! If laws can apply to me, why can't I decide on who makes those laws?

Universal franchise and right to contest

Apart from laying down a method of elections, the Constitution answers two basic questions about elections: Who are the voters? Who can contest elections? In both these respects our Constitution follows the well established democratic practices.

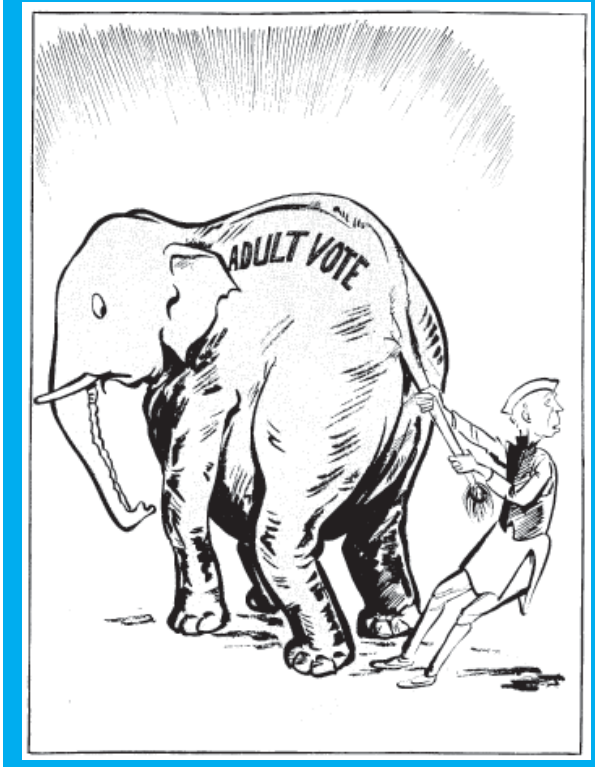
You already know that democratic elections require that all adult citizens of the country must be eligible to vote in the elections. This is known as universal adult franchise. In many countries, citizens had to fight long battles with the rulers to get this right. In many countries, women could get this right very late and only after struggle. One of the important decisions of the framers of the Indian Constitution was to guarantee every adult citizen in India, the right to vote.

Till 1989, an adult Indian meant an Indian citizen above the age of 21. An amendment to the Constitution in 1989, reduced the eligibility age to 18. Adult franchise ensures that all citizens are able to participate in the

process of selecting their representative. This is consistent with the principle of equality and non-discrimination that we studied in the chapter on rights. Many people thought and many think so today that giving the right to vote to everyone irrespective of educational qualification was not right. But our Constitution makers had a firm belief in the ability and worth of all adult citizens as equals in the matter of deciding what is good for the society, the country and for their own constituencies.

What is true of the right to vote is also true of right to contest election. All citizens have the right to stand for election and become the representative of the people. However, there are different minimum age requirements for contesting elections. For example, in order to stand for Lok Sabha or Assembly election, a candidate must be at least 25 years old. There are some other restrictions also. For instance, there is a legal provision that a person who has undergone imprisonment for two or more years for some offence is disqualified from contesting elections. But there are no restrictions of income, education or class or gender on the right to contest elections. In this sense, our system of election is open to all citizens.

Read A Cartoon



Shankar. Copyright: Children's Book Trust.

Why is universal adult franchise compared to an elephant? Is it unmanageable? Or is it like the story in which everyone describes the elephant only by its part?

Independent Election Commission

Several efforts have been made in India to ensure the free and fair election system and process. The most important among these is the

creation of an independent Election Commission to 'supervise and conduct' elections. Do you know that in many countries, there is an absence of an independent mechanism for conducting elections?

> ***Article 324: (1)***
> ***The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).***

Article 324 of the Indian Constitution provides for an independent Election Commission for the 'superintendence, direction and control of the electoral roll and the conduct of elections' in India. These words in the Constitution are very important, for they give the Election Commission a decisive role in virtually everything to do with elections. The Supreme Court has agreed with this interpretation of the Constitution.

To assist the Election Commission of India there is a Chief Electoral Officer in every state. The Election Commission is not responsible for the conduct of local body elections. As we shall study in the chapter on Local Government, the State Election Commissioners work independently of the Election Commission of India and each has its own sphere of operation.

The Election Commission of India can either be a single member or a multi-member body. Till 1989, the Election Commission was single member. Just before the 1989 general elections, two Election Commissioners were appointed, making the body multi-member. Soon after the elections, the Commission reverted to its single member status. In 1993, two Election Commissioners were once again appointed and the Commission became multi-member and has remained multi-member since then. Initially there were many apprehensions about a multi-member Commission. There was a sharp difference of opinion between the then Chief Election

Commissioner and the other Commissioners about who had how much power. The matter had to be settled by the Supreme Court. Now there is a general consensus that a multi-member Election Commission is more appropriate as power is shared and there is greater accountability.

The Chief Election Commissioner (CEC) presides over the Election Commission, but does not have more powers than the other Election Commissioners. The CEC and the two Election Commissioners have equal powers to take all decisions relating to elections as a collective body. They are appointed by the President of India on the advice of the Council of Ministers. It is therefore possible for a ruling party to appoint a partisan person to the Commission who might favour them in the elections. This fear has led many to suggest that this procedure should be changed. Many persons have suggested that a different method should be followed that makes consultation with the leader of opposition and the Chief Justice of India necessary for the appointment of CEC and Election Commissioners.

The Constitution ensures the security of the tenure of the CEC and Election Commissioners. They are appointed for a six year term or continue till the age of 65, whichever is earlier. The CEC can be removed before the expiry of

Has this now been settled? Or can the government go back to a single member Election Commission? Does the Constitution allow this game?

Special majority

Special majority means:

- Two-thirds majority of those present and voting, and
- Simple majority of the total membership of the House.

Let us say that you have to pass a resolution in your class with a special majority. Imagine further that your class has a total student strength of 57. But on the day of voting, only 51 students are present and 50 students participated in voting. When would you say that the resolution has been passed with 'special majority' in this situation?

In this book you will find mention of 'special majority' in at least three other chapters. One is in the next chapter on Executive, where we discuss the impeachment of the President of India. Find out the other two places where special majority is discussed.

the term, by the President if both Houses of Parliament make such a recommendation with a special majority. This is done to ensure that a ruling party cannot remove a CEC who refuses to favour it in elections. The Election Commissioners can be removed by the President of India.

The Election Commission of India has a wide range of functions.

- It supervises the preparation of up-to-date voters' list. It makes every effort to ensure that the voters' list is free of errors like non-existence of names of registered voters or existence of names of those non-eligible or non-existent.
- It also determines the timing of elections and prepares the election schedule. The election schedule includes the notification of elections, date from which nominations can be filed, last date for filing nominations, last date of scrutiny, last date of withdrawal, date of polling and date of counting and declaration of results.
- During this entire process, the Election Commission has the power to take decisions to ensure a free and fair poll. It can postpone or cancel the election in the entire country or a specific State or constituency on the grounds that the atmosphere is vitiated and therefore, a free and fair election may not be possible. The Commission also implements a model code of conduct for parties and candidates. It can order a re-poll in a specific constituency. It can also order a recount of votes when it feels that the counting process has not been fully fair and just.
- The Election Commission accords recognition to political parties and allots symbols to each of them.

The Election Commission has very limited staff of its own. It conducts the elections with the help of the administrative machinery. However, once the election process has begun, the commission has control over the administration as far as election related work is concerned. During the election process, the administrative officers of the State and central governments are assigned election related duty and in this respect, the Election Commission has full control over them. The EC can transfer the officers, or stop their transfers; it can take action against them for failing to act in a non-partisan manner.

Over the years, the Election Commission of India has emerged as an independent authority which has asserted its powers to ensure fairness in the election process. It has acted in an impartial and unbiased manner in order to protect the sanctity of the electoral process. The record of Election Commission also shows that every

improvement in the functioning of institutions does not require legal or constitutional change. It is widely agreed that the Election Commission is more independent and assertive now than it was till twenty years ago. This is not because the powers and constitutional protection of the Election Commission have increased. The Election Commission has started using more effectively the powers it always had in the Constitution.

In the past fifty five years, fourteen Lok Sabha elections have been held. Many more State assembly elections and bye-elections have been conducted by the Election Commission. The EC has faced many difficult situations such as holding elections in militancy affected areas like Assam, Punjab or Jammu and Kashmir. It has also faced the difficult situation of having to postpone the election process mid-way in 1991 when the ex-Prime Minister Rajiv Gandhi was assassinated during campaigning. In 2002, the Election Commission faced another critical situation when the Gujarat Assembly was dissolved and elections had to be conducted. But the Election Commission found that unprecedented violence in that State had made it impossible to hold free and fair elections immediately. The Election Commission decided to postpone elections to the State Assembly by a few months. The Supreme Court upheld this decision of the Election Commission.

Read A Cartoon

Watch out! Winning the elections is going to be tough. We'll have to face new situations like the code of conduct, fair and free polling, strict . . . !

R K Laxman in The Times of India.

The Netaji is afraid of EC. Why do leaders fear the Election Commission? Is this good for democracy?

Check your progress

Why do you think does the Election Commission have the following powers and privileges? What could have happened if these did not exist?

The Commission can issue orders to government employees engaged in any election related duty.

The government cannot remove the Chief Election Commissioner.

The Commission can cancel an election if it thinks that it was not fair.

Can we reduce the influence of money and muscle power by changing the law? Does anything change in reality by changing the law?

Electoral Reforms

No system of election can ever be perfect. And in actual election process, there are bound to be many flaws and limitations. Any democratic society has to keep searching for mechanisms to make elections free and fair to the maximum. With the acceptance of adult suffrage, freedom to contest elections, and the establishment of an independent Election Commission, India has tried to make its election process free and fair. However, the experience of the last fifty five years has given rise to many suggestions for reforming our election system. The Election Commission, political parties, various independent groups, and many scholars have come up with proposals for electoral reform. Some of these suggestions are about changing the constitutional provisions discussed in this Chapter:

- Our system of elections should be changed from the FPTP to some variant of the PR system. This would

ensure that parties get seats, as far as possible, in proportion to the votes they get.

- There should be a special provision to ensure that at least one-third women are elected to the parliament and assemblies.
- There should be stricter provisions to control the role of money in electoral politics. The elections expenses should be paid by the government out of a special fund.
- Candidates with any criminal case should be barred from contesting elections, even if their appeal is pending before a court.
- There should be complete ban on the use of caste and religious appeals in the campaign.
- There should be a law to regulate the functioning of political parties and to ensure that they function in a transparent and democratic manner.

These are but a few suggestions. There is no consensus about these suggestions. Even if there was a consensus, there are limits to what the laws and formal provisions can do. Free and fair elections can be held only if the candidates, the parties and those involved in the election process agree to abide by the spirit of democratic competition.

Apart from legal reforms, there are two other ways of ensuring that elections reflect the expectations and democratic aspirations of the people. One is, of course, that people themselves have to be more

READ A CARTOON

Forget that old habit and face the camera! Remember you have been nominated and are standing for the election now!

R K Laxman in The Times of India.

A comment of the criminal-politician nexus?

vigilant, more actively involved in political activities. But there are limits to the extent to which ordinary people can engage in politics on a regular basis. Therefore, it is necessary that various political institutions and voluntary organisations are developed and are active in functioning as watchdog for ensuring free and fair elections.

Conclusion

In countries where representative democracy is practiced, elections and the representative character of those elections are crucial factors in making democracy effective and trustworthy. The success of India's election system can be gauged from a number of factors.

- Our election system has allowed the voters not only to freely choose representatives, but also to change governments peacefully both at the State and national level.
- Secondly, voters have consistently taken a keen interest in the election process and participated in it. The number of candidates and parties that contest elections is on the rise.
- Thirdly, the system of election has proved to be accommodative and inclusive. The social composition of our representatives has changed gradually. Now our representatives come from many different social sections, though the number of women legislators has not increased satisfactorily.
- Fourthly, the election outcome in most parts of the country does not reflect electoral malpractices and rigging. Of course, many attempts at rigging do take place. You must have read about violence, about complaints that voters' names disappear from the voters' list, about intimidation, and so on. Yet, such instances rarely directly affect the outcome of the election.
- Finally and most importantly, elections have become a part and parcel of our democratic life. No one can imagine a situation where a government would disrespect the verdict of an election. Similarly, no one can imagine that a government would be formed without holding elections. In fact, regularity and periodicity of elections has earned fame for India as a great democratic experiment.

All these factors have earned for our election system a respect within and outside the country. The voter in India has gained confidence. The legitimacy of the Election Commission has increased in the eyes of the people. This vindicates the basic decisions taken by our Constitution makers. If the election process becomes more flawless, we as voters and citizens would be able to share more effectively in this carnival of democracy and make it more meaningful.

Exercises

1. Which of the following resembles most a direct democracy?
   a. Discussions in a family meeting
   b. Election of the class monitor
   c. Choice of a candidate by a political party
   d. Decisions taken by the Gram Sabha
   e. Opinion polls conducted by the media

2. Which of the following tasks are not performed by the Election Commission?
   a. Preparing the Electoral Rolls
   b. Nominating the candidates
   c. Setting up polling booths
   d. Implementing the model code of conduct
   e. Supervising the Panchayat elections

3. Which of the following is common to the method of election of the members of Rajya Sabha and Lok Sabha?
   a. Every citizen above the age of 18 is an eligible voter
   b. Voter can give preference order for different candidates
   c. Every vote has equal value
   d. The winner must get more than half the votes

4. In the First Past the Post system, that candidate is declared winner who
   a. Secures the largest number of postal ballots

b. Belongs to the party that has highest number of votes in the country
c. Has more votes than any other candidate in the constituency
d. Attains first position by securing more than 50% votes

5. What is the difference between the system of reservation of constituencies and the system of separate electorate? Why did the Constitution makers reject the latter?

6. Which of the following statements are incorrect? Identify and correct them by substituting, adding or rearranging only one word or phrase.
   a. FPTP system is followed for all the elections in India.
   b. Election Commission does not supervise Panchayat and Municipal elections.
   c. President of India cannot remove an Election Commissioner.
   d. Appointment of more than one Election Commissioners in the Election Commission is mandatory.

7. Indian electoral system aims at ensuring representation of socially disadvantaged sections. However we are yet to have even 10 per cent women members in our legislatures. What measures would you suggest to improve the situation?

8. Here are some wishes expressed in a conference to discuss a constitution for a new country. Write against each of these whether FPTP or Proportional Representation system is more suited to meet each of these wishes.
   a. People should clearly know who is their representative so that they can hold him or her personally accountable.
   b. We have small linguistic minorities who are spread all over the country; we should ensure fair representation to them.
   c. There should be no discrepancy between votes and seats for different parties.
   d. People should be able to elect a good candidate even if they do not like his or her political party.

9. A former Chief Election Commissioner joined a political party and contested elections. There are various views on this issue. One view is that a former Election Commissioner is an independent citizen and has a right to join any political party and to contest election. According to the other view, leaving this possibility open

can affect the impartiality of the Election Commission. So, former Election Commissioners must not be allowed to contest any elections. Which position do you agree with and why?

10. "Indian democracy is now ready to shift from a crude First Past the Post system to a system of Proportional Representation". Do you agree with this statement? Give your reasons for or against this statement.

Chapter 4

EXECUTIVE

INTRODUCTION

Legislature, executive and judiciary are the three organs of government. Together, they perform the functions of the government, maintain law and order and look after the welfare of the people. The Constitution ensures that they work in coordination with each other and maintain a balance among themselves. In a parliamentary system, executive and the legislature are interdependent: the legislature controls the executive, and, in turn, is controlled by the executive. In this chapter we shall discuss the composition, structure and function of the executive organ of the government. This chapter will also tell you about the changes that have occurred in recent times due to political practice. After reading this chapter, you will be able to

- *make a distinction between the parliamentary and the presidential executive;*
- *understand the constitutional position of the President of India;*
- *know the composition and functioning of the Council of Ministers and the importance of the Prime Minister; and*
- *understand the importance and functioning of the administrative machinery.*

What is an Executive?

Who is in charge of the administration of your school? Who takes important decisions in a school or a university? In any organisation, some office holder has to take decisions and implement those decisions. We call this activity administration or management. But administration requires a body at the top that will take policy decisions or the big decisions and supervise and coordinate the routine administrative functioning. You may have heard about the executives of big companies, banks or industrial units. Every formal group has a body of those who function as the chief administrators or the executives of that organisation. Some office holders decide the policies and rules and regulations and then some office holders implement those decisions in actual day-to-day functioning of the organisation. The word executive means a body of persons that looks after the implementation of rules and regulations in actual practice.

In the case of government also, one body may take policy decisions and decide about rules and regulations, while the other one would be in charge of implementing those rules. The organ of government that primarily looks after the function of implementation and administration is called the executive.

What are the principal functions of the executive? Executive is the branch of government responsible for the implementation of laws and policies adopted by the legislature. The executive is often involved in framing of policy. The official designations of the executive vary from country to country. Some countries have presidents, while others have chancellors. The executive branch is not just about presidents, prime ministers and ministers. It also extends to the administrative machinery (civil servants). While the heads of government and their ministers, saddled with the overall responsibility of government policy, are together known as the political executive, those responsible for day to day administration are called the permanent executive.

I remember somebody saying that the executive in a democracy is accountable to people. Is that also true of executives in big companies? Aren't they called CEOs? Who are they accountable to?

What are the Different Types of Executive?

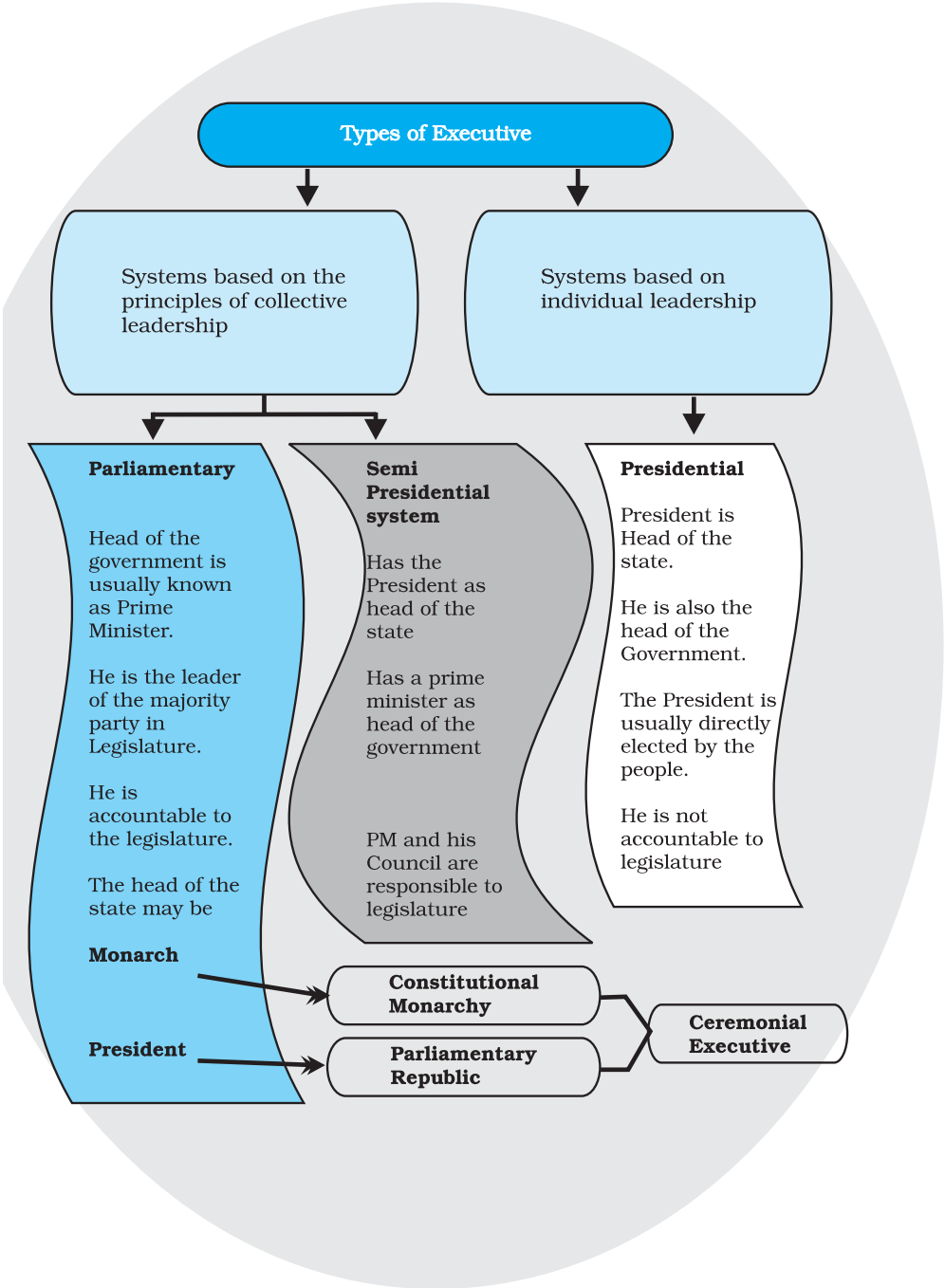
Every country may not have the same type of executive. You may have heard about the President of the USA and the Queen of England. But the powers and functions of the President of the USA are very different from the powers of the President of India. Similarly, the powers of the Queen of England are different from the powers of the King of Nepal. Both India and France have prime ministers, but their roles are different from each other. Why is this so?

Activity

Procure a photograph of the SAARC summit meeting or the meeting of G-8 countries and list those who attended the meeting. Can you imagine why those people and not some others are attending the meeting?

To answer this question we will briefly outline the nature of executive existing in some of these countries. The USA has a presidential system and executive powers are in the hands of the president. Canada has a parliamentary democracy with a constitutional monarchy where Queen Elizabeth II is the formal chief of state and the prime minister is the head of government. In France, both the president and the prime minister are a part of the semi-presidential system. The president appoints the prime minister as well as the ministers but cannot dismiss them as they are responsible to the parliament. Japan has a parliamentary system with the Emperor as the head of the state and the prime minister as the head of government. Italy has a parliamentary system with the president as the formal head of state and the prime minister as the head of government. Russia has a semi-presidential system where president is the head of state and prime minister, who is appointed by the president, is the head of government. Germany has a parliamentary system in which president is the ceremonial head of state and the chancellor is the head of government.

In a presidential system, the president is the Head of state as well as head of government. In this system the office of president is very powerful, both in theory and practice. Countries with such a system include the United States, Brazil and most nations in Latin America.


Types of Executive
Systems based on the principles of collective leadership
Systems based on individual leadership
Parliamentary
Head of the government is usually known as Prime Minister.
He is the leader of the majority party in Legislature.
He is accountable to the legislature.
The head of the state may be
Monarch
President
Semi Presidential system
Has the President as head of the state
Has a prime minister as head of the government
PM and his Council are responsible to legislature
Presidential
President is Head of the state.
He is also the head of the Government.
The President is usually directly elected by the people.
He is not accountable to legislature
Constitutional Monarchy
Parliamentary Republic
Ceremonial Executive

Semi-Presidential Executive in Sri Lanka

In 1978 the constitution of Sri Lanka was amended and the system of Executive Presidency was introduced. Under the system of Executive Presidency, people directly elect the President. It may happen that both the President and the Prime Minister belong to the same political party or to different political parties.

The President has vast powers under the constitution. The President chooses the Prime Minister from the party that has a majority in the Parliament. Though ministers must be members of the Parliament, the President has the power to remove the Prime Minister, or ministers. Apart from being the elected Head of State and the Commander-in-Chief of the Armed Forces, the President is also the Head of the Government.

Elected for a term of six years, the President cannot be removed except by a resolution in the parliament passed by at least two-thirds of the total number of Members of Parliament. If it is passed by not less than one-half of the total number of Members of Parliament and the Speaker is satisfied that such allegations merit inquiry then the Speaker can report the matter to the Supreme Court.

How is the position of the President and Prime Minister in Sri Lanka different from India? Compare the role of Supreme Court in the impeachment of the President in India and Sri Lanka.

In a parliamentary system, the prime minister is the head of government. Most parliamentary systems have a president or a monarch who is the nominal Head of state. In such a system, the role of president or monarch is primarily ceremonial and prime minister along with the cabinet wields effective power. Countries with such system include Germany, Italy, Japan, United Kingdom as well as Portugal. A semi-presidential system has both a president and a prime minister but unlike the parliamentary system the president may possess significant day-to-day powers. In this system, it is possible that sometimes the president and the prime minister may belong to the same party and at times they may belong to two different parties and thus, would be opposed to each other. Countries with such a system include France, Russia, Sri Lanka, etc.

Check your progress

Neha: It is really very simple. A country having a president has a presidential executive and one with a prime minister has parliamentary executive.

How would you explain to Neha that this is not always the case?

Parliamentary Executive in India

When the Constitution of India was written, India already had some experience of running the parliamentary system under the Acts of 1919 and 1935. This experience had shown that in the parliamentary system, the executive can be effectively controlled by the representatives of the people. The makers of the Indian Constitution wanted to ensure that the government would be sensitive to public expectations and would be responsible and accountable. The other alternative to the parliamentary executive was the presidential form of government. But the presidential executive puts much emphasis on the president as the chief executive and as source of all executive power. There is always the danger of personality cult in presidential executive. The makers of the Indian Constitution wanted a government that would have a strong executive branch, but at the same time, enough safeguards should be there to check against the personality cult. In the parliamentary form there are many mechanisms that ensure that the executive will be answerable to and controlled by the legislature or people's representatives. So the Constitution adopted the parliamentary system of executive for the governments both at the national and State levels.

According to this system, there is a President who is the formal Head of the state of India and the Prime Minister

Haven't we had very strong Prime Ministers? Does it mean that even the parliamentary system is not fool proof against personality cult? That means people and the legislatures have to be constantly vigilant!

and the Council of Ministers, which run the government at the national level. At the State level, the executive comprises the Governor and the Chief Minister and Council of Ministers.

The Constitution of India vests the executive power of the Union formally in the President. In reality, the President exercises these powers through the Council of Ministers headed by the Prime Minister. The President is elected for a period of five years. But there is no direct election by the people for the office of President. The President is elected indirectly. This means that the president is elected not by the ordinary citizens but by the elected MLAs and MPs. This election takes place in accordance with the principle of proportional representation with single transferable vote.

The President can be removed from office only by Parliament by following the procedure for impeachment. This procedure requires a special majority as explained in the last chapter. The only ground for impeachment is violation of the Constitution.

Power and position of President

Article 74 (1): There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall in the exercise of his functions, act in accordance with such advice.

Provided that the President may require the Council of Ministers to reconsider such advice....., and the President shall act in accordance with the advice tendered after such reconsideration.

Do you know what the word *shall* means here? It indicates that the advice is binding on the President. In view of the controversy about the scope of the President's powers, a specific mention was made in the Constitution by an amendment that the advice of the Council of Ministers will be binding on the President. By another amendment made later, it was decided that the President can ask the Council of Ministers to reconsider its advice but, has to accept the reconsidered advice of the Council of Ministers.

We have already seen that President is the formal head of the government. In this formal sense, the President has wide ranging executive, legislative, judicial and emergency powers. In a parliamentary system, these powers are in reality used by the President only on the advice of the Council of Ministers. The Prime Minister and the Council of Ministers have support of the majority in the Lok Sabha and they are the real executive. In most of the cases, the President has to follow the advice of the Council of Ministers.

"We did not give him any real power but we have made his position one of authority and dignity. The constitution wants to create neither a real executive nor a mere figurehead, but a head that neither reigns nor governs; it wants to create a great figurehead..."

Jawaharlal Nehru
CAD, Vol. VI, p. 734

Discretionary Powers of the President

On the basis of the above discussion can we infer that the President has no discretionary power under any circumstances? This will be an incorrect assessment. Constitutionally, the President has a right to be informed of all important matters and deliberations of the Council of Ministers. The Prime Minister is obliged to furnish all the information that the President may call for. The President often writes to the Prime Minister and expresses his views on matters confronting the country.

Am I just a figurehead or am I asking real questions? Did the textbook writers give me power to ask questions I wish to ask or am I asking questions they have in their mind?

It is very well to talk of the President as He or She, but has a woman ever become the President?

Besides this, there are at least three situations where the President can exercise the powers using his or her own discretion. In the first place, we have already noted that the President can send back the advice given by the Council of Ministers and ask the Council to reconsider the decision. In doing this, the President acts on his (or her) own discretion. When the President thinks that the advice has certain flaws or legal lacunae, or that it is not in the best interests of the country, the President can ask the Council to reconsider the decision. Although, the Council can still send back the same advice and the President would then be bound by that advice, such a request by the President to reconsider the decision, would naturally carry a lot of weight. So, this is one way in which the president can act in his own discretion.

Secondly, the President also has veto power by which he can withhold or refuse to give assent to Bills (other than Money Bill) passed by the Parliament. Every bill passed by the Parliament goes to the President for his assent before it becomes a law. The President can send the bill back to the Parliament asking it to reconsider the

We saw that there is no time limit on the President for giving his assent to a bill. Do you know that such a thing has already happened? In 1986, the Parliament passed a bill known as Indian Post office (amendment) bill. This bill was widely criticised by many for it sought to curtail the freedom of the press. The then President, Gyani Zail Singh, did not take any decision on this bill. After his term was over, the next President, Venkataraman sent the bill finally back to the Parliament for reconsideration. By that time, the government that brought the bill before the Parliament had changed and a new government was elected in 1989. This government belonged to a different coalition and did not bring the bill back before the Parliament. Thus, Zail Singh's decision to postpone giving assent to the bill effectively meant that the bill could never become a law!

bill. This 'veto' power is limited because, if the Parliament passes the same bill again and sends it back to the President, then, the President has to give assent to that bill. However, there is no mention in the Constitution about the time limit within which the President must send the bill back for reconsideration. This means that the President can just keep the bill pending with him without any time limit. This gives the President an informal power to use the veto in a very effective manner. This is sometimes referred to as 'pocket veto'.

Then, the third kind of discretion arises more out of political circumstances. Formally, the President appoints the Prime Minister. Normally, in the parliamentary system, a leader who has the support of the majority in the Lok Sabha would be appointed as Prime Minister and the question of discretion would not arise. But imagine a situation when after an election, no leader has a clear majority in the Lok Sabha. Imagine further that after attempts to forge alliances, two or three leaders are claiming that they have the support of the majority in the house. Now, the President has to decide whom to appoint as the Prime Minister. In such a situation, the President has to use his own discretion in judging who really may have the support of the majority or who can actually form and run the government.

Since 1989 major political changes have considerably increased the importance of the presidential office. In the four parliamentary elections held from 1989 to 1998, no single party or coalition attained

President's role in choosing the Prime Minister

After 1977, party politics in India became more competitive and there have been many instances when no party had clear majority in the Lok Sabha. What does the President do in such situations? No political party or coalition secured majority in the elections held in March 1998. The BJP and its allies secured 251 seats, 21 short of a majority. President Narayanan adopted an elaborate procedure. He asked the leader of the alliance, Atal Behari Vajpayee, "to furnish documents in support of his claim from concerned political parties." Not stopping at this the President also advised Vajpayee to secure a vote of confidence within ten days of being sworn in.

a majority in the Lok Sabha. These situations demanded presidential intervention either in order to constitute governments or to grant a request for dissolution of Lok Sabha by a Prime Minister who could not prove majority in the House. It may thus be said that presidential discretion is related to political conditions. There is greater scope for presidential assertiveness when governments are not stable and coalitions occupy power.

For the most part, the President is a formal power holder and a ceremonial head of the nation. You may wonder why then do we need a President? In a parliamentary system, the Council of Ministers is dependent on the support of the majority in the legislature. This also means that the Council of Ministers may be removed at any time and a new Council of Ministers will have to be put in place. Such a situation requires a Head of the state who has a fixed term, who may be empowered to appoint the Prime Minister and who may symbolically represent the entire country. This is exactly the role of the President in ordinary circumstances. Besides, when no party has a clear majority, the President has the additional responsibility of making a choice and appointing the Prime Minister to run the government of the country.

The Vice President of India

The Vice President is elected for five years. His election method is similar to that of the President, the only difference is that members of State legislatures are not part of the electoral college. The Vice President may be removed from his office by a resolution of the Rajya Sabha passed by a majority and agreed to by the Lok Sabha. The Vice President acts as the ex-officio Chairman of the Rajya Sabha and takes over the office of the President when there is a vacancy by reasons of death, resignation, removal by impeachment or otherwise. The Vice President acts as the President only until a new President is elected. B. D. Jatti acted as President on the death of Fakhruddin Ali Ahmed until a new President was elected.

Check your progress

Imagine that the Prime Minister wants to impose 'President's rule' in one State because the State government has failed to effectively curb atrocities against the Dalits in that State. The President has a different position. He is saying that the provision regarding President's rule should be used only sparingly. In this situation which of the following courses are open to the President?

a. Tell the Prime Minister that he will not sign on the order promulgating President's rule.
b. Dismiss the Prime Minister.
c. Ask the Prime Minister to send CRPF to that State.
d. Make a press statement about how the Prime Minister is wrong.
e. Discuss the matter with the Prime Minister and try to dissuade him from taking this action, but if he insists, agreeing to sign the said order.

Prime Minister and Council of Ministers

Read a Cartoon

Shankar. Copyright: Children's Book Trust.

There is no Council of Ministers without the Prime Minister. This cartoon shows how, literally, the Prime Minister 'leads' the Council of Ministers!

No discussion of government or politics in India, would normally take place without mentioning one office: the Prime Minister of India. Can you imagine why this is so?

We have already seen earlier in this chapter that the President exercises his powers *only* on the advice of the Council of Ministers. The Council of Ministers is headed by the Prime Minister. Therefore, as head of the Council of Ministers, the Prime Minister becomes the most important functionary of the government in our country.

In the parliamentary form of executive, it is essential that the Prime Minister has the support of the majority in the Lok Sabha. This support by the majority also makes the Prime Minister very powerful. The moment this support of the majority is lost, the Prime Minister loses the office. For many years after independence, the Congress party had the majority in the Lok Sabha and its leader would become the Prime Minister. Since 1989, there have been many occasions when no party had majority in the Lok Sabha. Various political parties have come together and formed a coalition that has majority in the House. In such situations, a leader who is acceptable to most partners of the coalition becomes the Prime Minister. Formally, a leader who has the support of the majority is appointed by the President as Prime Minister.

The Prime Minister then decides who will be the ministers in the Council of Ministers. The Prime Minister allocates ranks and portfolios to the ministers. Depending upon the seniority and political importance, the ministers are given the ranks of cabinet minister, minister of State or deputy minister. In the same manner, Chief Ministers of the States choose ministers from their own party or coalition. The Prime Minister and all the ministers have to be members of the Parliament. If someone becomes a minister or Prime Minister

Read a Cartoon

Is that all that matters, the portfolio? The house, the car, the servants, travel, the foreign trips, the security, the secretaries, etc., don't they mean anything to you?

R K Laxman in The Times of India.

Why do people want to be ministers? This cartoon seems to suggest that it is only for perks and status! Then why is there competition for some portfolios?

without being an MP, such a person has to get elected to the Parliament within six months.

There were some members in the Constituent Assembly who felt that ministers should be elected by the legislature and not selected by the Prime Minister or Chief Minister: "Swiss system under which the legislature elects the executive for a certain period ...is to my mind the best form of government for the provinces... ... .The system of single transferable vote is ..the best system that can be adopted for the appointment of the executive because in that all interests will be represented and no party in the legislature will have any occasion to feel that it is not represented." Begum Aziz Rasul

CAD, Vol. IV, p. 635

Size of the Council of Ministers

Before the 91st Amendment Act (2003), the size of the Council of Ministers was determined according to exigencies of time and requirements of the situation. But this led to very large size of the Council of Ministers. Besides, when no party had a clear majority, there was a temptation to win over the support of the members of the Parliament by giving them ministerial positions as there was no restriction on the number of the members of the Council of Ministers. This was happening in many States also. Therefore, an amendment was made that the Council of Ministers shall not exceed 15 percent of total number of members of the House of People (or Assembly, in the case of the States).

In the chapter on the legislature, you will study in detail the various mechanisms through which the Parliament controls the executive. But remember that the most important feature of parliamentary executive is that the executive is routinely under the control and supervision of the legislature.

The Council of Ministers is collectively responsible to the Lok Sabha. This provision means that a Ministry which loses confidence

of the Lok Sabha is obliged to resign. The principle indicates that the ministry is an executive committee of the Parliament and it collectively governs on behalf of the Parliament. Collective responsibility is based on the principle of the solidarity of the cabinet. It implies that a vote of no confidence even against a single minister leads to the resignation of the entire Council of Ministers. It also indicates that if a minister does not agree with a policy or decision of the cabinet, he or she must either accept the decision or resign. It is binding on all ministers to pursue or agree to a policy for which there is collective responsibility.

In India, the Prime Minister enjoys a pre-eminent place in the government. The Council of Ministers cannot exist without the Prime Minister. The Council comes into existence only after the Prime Minister has taken the oath of office. The death or resignation of the Prime Minister automatically brings about the dissolution of the Council of Ministers but the demise, dismissal or resignation of a minister only creates a ministerial vacancy. The Prime Minister acts as a link between the Council of Ministers on the one hand and the President as well as the Parliament on the other. It is this role of the Prime Minister which led Pt. Nehru to describe him as 'the linchpin of Government'. It is also the constitutional obligation of the Prime Minister to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation. The Prime Minister is involved in all crucial decisions of the government and decides on the policies of the government. Thus, the power wielded by the Prime Minister flows from various sources: control over the Council of Ministers, leadership of the Lok Sabha, command over the bureaucratic machine, access to media, projection of personalities during elections, projection as national leader during international summitry as well as foreign visits.

Is it that a person becomes Prime Minister because he/she is powerful or is it that you become powerful once you have become the Prime Minister?

However, the power which the Prime Minister wields and actually puts into use depends upon the prevailing political conditions. The position of the Prime Minister and Council of Ministers has been unassailable whenever a single political party has secured majority in the Lok Sabha. However, this has not been the case when governments have been led by coalitions of political parties. Since 1989, we have witnessed many coalition governments in India. Many of these governments could not remain in power for the full term of the Lok Sabha. They were either removed or they resigned due to loss of support of the majority. These developments have affected the working of the parliamentary executive.

In the first place, these developments have resulted in a growing discretionary role of the President in the selection of Prime Ministers. Secondly, the coalitional nature of Indian politics in this period has necessitated much more consultation between political partners, leading to erosion of prime ministerial authority. Thirdly, it has also brought restrictions on various prerogatives of the Prime Minister like choosing the ministers and deciding their ranks and portfolios. Fourthly, even the policies and programmes of the government cannot be decided by the Prime Minister alone. Political parties of different ideologies come together both as pre-poll and post-poll allies to form a government. Policies are framed after a lot of negotiations and compromises among the allies. In this entire process, the Prime Minister has to act more as a negotiator than as leader of the government.

At the State level, a similar parliamentary executive exists, though with some variations. The most important variation is that there is a Governor of the State appointed by the President (on the advice of

READ A CARTOON

My troubles are not over - I won the confidence vote!

R K Laxman in The Times of India.

This Chief Minster is not happy even after winning the confidence motion! Can you imagine why this is so?

the central government). Though the Chief Minister, like the Prime Minister is the leader of the majority party in the Assembly, the Governor has more discretionary powers. However, the main principles of parliamentary system operate at the State level too.

Check your progress

Suppose the Prime Minister is to select the Council of Ministers. What will he/she do?

a. Select those who are experts in the various subjects.
b. Select only those who are from his/her party.
c. Select those who are personally loyal and dependable.
d. Select those who are supporters of the government.
e. Take into account the political weight of the various aspirants and choose from among them.

Permanent Executive: Bureaucracy

Who implements the decisions of the ministers?

The Executive organ of the government includes the Prime Minister, the ministers and a large organisation called the bureaucracy or the administrative machinery. To underline the difference between this machinery and the military service, it is described as civil service. Trained and skilled officers who work as permanent employees of the government are assigned the task of assisting the ministers in formulating policies and implementing these policies.

In a democracy, the elected representatives and the ministers are in charge of government and the administration is under their control and supervision. In the parliamentary system, the legislature also exercises control over the administration. The administrative officers cannot act in violation of the policies adopted by the legislature. It is the responsibility of the ministers to retain political control over the administration. India has established professional administrative

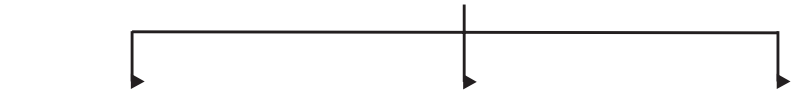
machinery. At the same time, this machinery is made politically accountable. The bureaucracy is also expected to be politically neutral. This means that the bureaucracy will not take any political position on policy matters. In a democracy, it is always possible that a party is defeated in elections and the new government wants to opt for new policies in the place of policies of the previous government. In such a situation, it is the responsibility of the administrative machinery to faithfully and efficiently participate in drafting the policy and in its implementation.

The Indian bureaucracy today is an enormously complex system. It consists of the All-India services, State services, employees of the local governments, and technical and managerial staff running public sector undertakings. Makers of our Constitution were aware of the importance of the non-partisan and professional bureaucracy. They also wanted the members of the civil services or bureaucracy to be impartially selected on the basis of merit. So, the Union Public Service Commission has been entrusted with the task of conducting the process of recruitment of the civil servants for the government of India. Similar public service commissions are provided for the States also. Members of the Public Service Commissions are appointed for a fixed term. Their removal or suspension is subject to a thorough enquiry made by a judge of the Supreme Court.

While efficiency and merit are the norms for recruitment, the Constitution also ensures that all sections of the society including the weaker sections have an opportunity to be part of the public bureaucracy. For this purpose, the Constitution has provided for reservation of jobs for the *Dalits* and *Adivasis*. Subsequently, reservations have also been provided for women and other backward classes. These provisions ensure that the bureaucracy would be more representative and social inequalities will not come in the way of recruitment to the civil service.

Yes, I know that the officers are there to serve the people. But people are always afraid of these officers. And officers also behave as if they were the masters!

Classification of Civil Services



All India Services:	Central Services:	State Services:
Indian Administrative Service	Indian Foreign Service	Sales Tax Officers
Indian Police Service	Indian Revenue Service	

Persons selected by the UPSC for Indian Administrative Service and Indian Police Service constitute the backbone of the higher level bureaucracy in the States. You may know that the collector of a district is the most important officer of the government at the district level. Do you know that the collector is normally an IAS officer and that the officer is governed by the service conditions laid down by the central government? An IAS or IPS officer is assigned to a particular State, where he or she works under the supervision of the State government. However, the IAS or IPS officers are appointed by the central government, they can go back into the service of the central government and most importantly, only the central government can take disciplinary action against them. This means that the key administrative officers of the States are under the supervision and control of the central government. Apart from the IAS and the IPS officers appointed by the UPSC, the administration of the State is looked after by officers appointed through the State Public Service Commissions. As we shall study later in the chapter on federalism, this feature of the bureaucracy strengthens the control of the central government over the administration of the States.

The bureaucracy is an instrument through which welfare policies of the government must reach the people. But most often, it is so powerful that people are afraid of approaching a government officer. It is a common experience of the people that bureaucracy is insensitive to the demands and expectations of the ordinary citizen. Only if the democratically elected government controls the bureaucracy, some of these problems can be effectively handled. On the other hand, too much political interference turns the bureaucracy into an instrument in the hands of the politician. Though the Constitution has created independent machinery for recruitment, many people think that there is no provision for protecting the civil

servants from political interference in the performance of their duties. It is also felt that enough provisions are not there to ensure the accountability of the bureaucracy to the citizen. There is an expectation that measures like the Right to Information may make the bureaucracy a little more responsive and accountable.

Conclusion

The modern executive is a very powerful institution of government. The executive enjoys greater powers compared to other organs of the government. This generates a greater need to have democratic control over the executive. The makers of our Constitution thought with foresight that the executive must be put firmly under regular supervision and control. Thus, a parliamentary executive was chosen. Periodic elections, constitutional limits over the exercise of powers and democratic politics have ensured that executive organ cannot become unresponsive.

Exercises

1. A parliamentary executive means:
   a. Executive where there is a parliament
   b. Executive elected by the parliament
   c. Where the parliament functions as the Executive
   d. Executive that is dependent on support of the majority in the parliament

2. Read this dialogue. Which argument do you agree with? Why?

   Amit: Looking at the constitutional provisions, it seems that the President is only a rubber stamp.

   Shama: The President appoints the Prime Minister. So, he must have the powers to remove the Prime Minister as well.

   Rajesh: We don't need a President. After the election, the Parliament can meet and elect a leader to be the Prime Minister.

3. Match the following

i. Works within the particular State in which recruited	a. Indian Foreign Service
ii. Works in any central government office located either at the national capital or elsewhere in the country	b. State Civil Services
iii. Works in a particular State to which allotted; can also be sent on deputation to the centre	c. All India Services
iv. Works in Indian missions abroad	d. Central Services

4. Identify the ministry which may have released the following news items. Would this be a ministry of the central government or the State government? Why?
   a. An official release said that in 2004-05 the Tamil Nadu Textbooks Corporation would release new versions for standards VII, X and XI.
   b. A new railway loop line bypassing the crowded Tiruvallur-Chennai section to help iron ore exporters. The new line, likely to be about 80 km long, will branch off at Puttur and then reach Athipattu near the port.
   c. The three-member sub-divisional committee formed to verify suicide by farmers in Ramayampet mandal has found that the two farmers who committed suicide this month have had economic problems due to failure of crops.

5. While appointing the Prime Minister, the President selects
   a. Leader of the largest party in the Lok Sabha
   b. Leader of the largest party in the alliance which secures a majority in the Lok Sabha
   c. The leader of the largest party in the Rajya Sabha
   d. Leader of the alliance or party that has the support of the majority in Lok Sabha

6. Read this discussion and say which of these statements applies most to India.

   Alok: Prime Minister is like a king, he decides everything in our country.

   Shekhar: Prime Minister is only 'first among equals', he does not have any special powers. All ministers and the PM have similar powers.

   Bobby: Prime Minister has to consider the expectations of the party members and other supporters of the government. But after all, the Prime Minister has a greater say in policy making and in choosing the ministers.

7. Why do you think is the advice of the Council of Ministers binding on the President? Give your answer in not more than 100 words.

8. The parliamentary system of executive vests many powers in the legislature for controlling the executive. Why, do you think, is it so necessary to control the executive?

9. It is said that there is too much political interference in the working of the administrative machinery. It is suggested that there should be more and more autonomous agencies which do not have to answer to the ministers.
   a. Do you think this will make administration more people-friendly?
   b. Do you think this will make administration more efficient?
   c. Does democracy mean full control of elected representatives over the administration?

10. Write an essay of two hundred words on the proposal to have an elected administration instead of an appointed administration.

Chapter Five

LEGISLATURE

Introduction

You have already studied the importance of elections and the method of election adopted in India. Legislatures are elected by the people and work on behalf of the people. In this chapter you would study how elected legislatures function and help in maintaining democratic government. You will also learn about the composition and functioning of the parliament and State legislatures in India and their importance in democratic government. After reading this chapter you would know

- *the importance of the legislature;*
- *the functions and powers of the Parliament of India;*
- *the law making procedure;*
- *how the Parliament controls the executive; and*
- *how the Parliament regulates itself.*

Why do we need a Parliament?

Legislature is not merely a law making body. Lawmaking is but one of the functions of the legislature. It is the centre of all democratic political process. It is packed with action; walkouts, protests, demonstration, unanimity, concern and co-operation. All these serve very vital purposes. Indeed, a genuine democracy is inconceivable without a representative, efficient and effective legislature. The legislature also helps people in holding the representatives accountable. This is indeed, the very basis of representative democracy.

Yet, in most democracies, legislatures are losing central place to the executive. In India too, the Cabinet initiates policies, sets the agenda for governance and carries them through. This has led some critics to remark that the Parliament has declined. But even very strong cabinets must retain majority in the legislature. A strong leader has to face the Parliament and answer to the satisfaction of the Parliament. Herein lies the democratic potential of the Parliament. It is recognised as one of the most democratic and open forum of debate. On account of its composition, it is the most representative of all organs of government. It is above all, vested with the power to choose and dismiss the government.

Activity

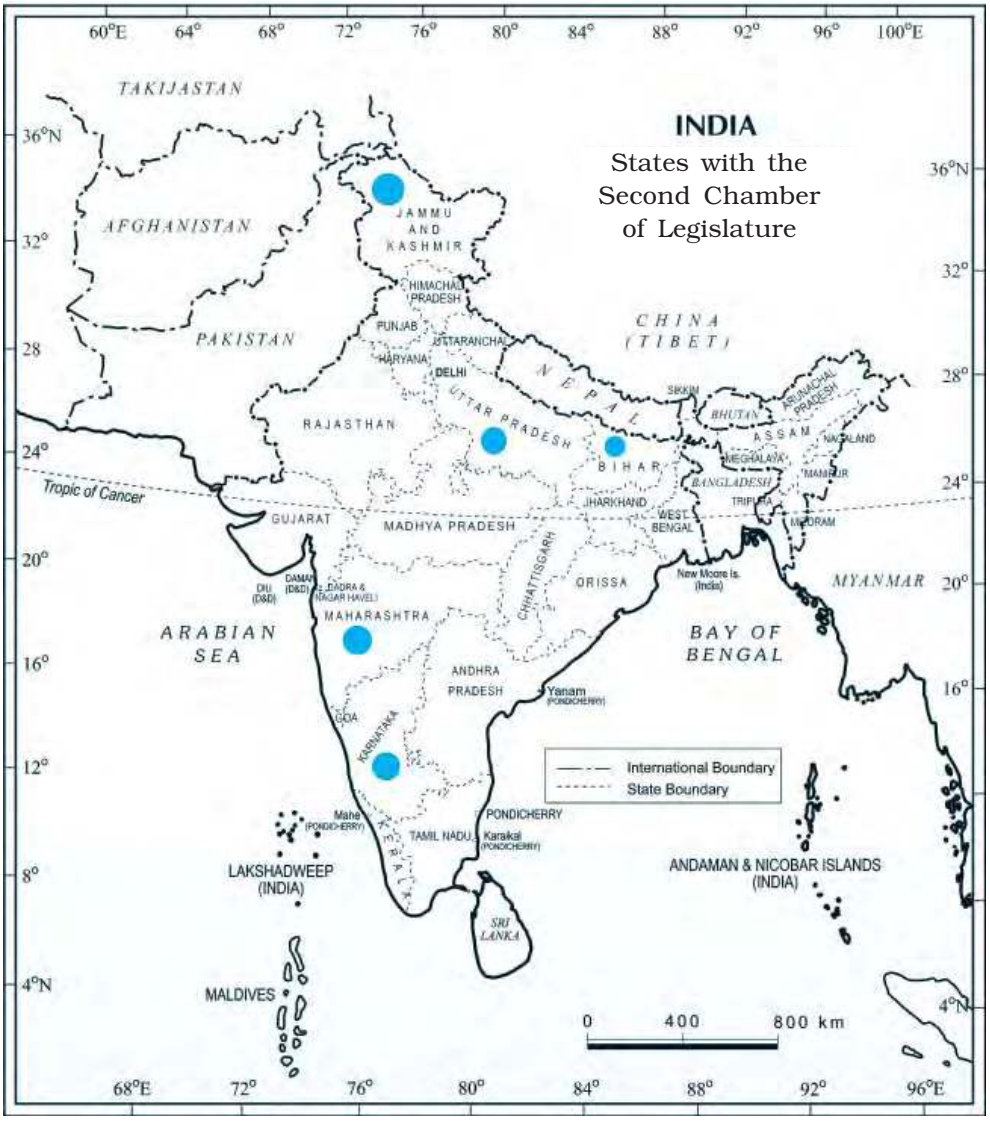
Consider these newspaper reports and then think: what would happen if there were no legislatures? After reading each news report, state how the legislature succeeded or failed in maintaining control over the executive.

- 28th February 2002: The Union Finance Minister, Jaswant Singh, announced in the Union budget proposal an increase of Rs. 12 in the price of a 50 kg bag of urea and a smaller increase in the price of two other fertilizers which constituted about 5 per cent rise in prices. The current urea price of Rs. 4,830 a tonne carries a subsidy of as much as 80 per cent.

- MARCH 11, 2002. The Finance Minister had to roll back the increases in fertilizer prices under intense opposition pressure (The Hindu, 12th March, 2002)
- On 4th June 1998, the Lok Sabha witnessed acrimonious scenes over the hike in urea and petroleum process. The entire opposition staged a walkout. The issue rocked the house for two days leading to walkout by opposition. The finance minister in his budget proposal had proposed a hike of 50 paisa per kilogram of urea to reduce subsidy on it. This forced the finance minister Mr. Yashwant Sinha to roll back the hike in urea prices (Hindustan Times, 4th and 5th June, 1998)
- 22nd Feb, 1983: In a rare move, the Lok Sabha today unanimously decided to suspend official business and give precedence to debate on Assam. Home Minister P.C.Sethi made a statement "I seek the cooperation of all members whatever their views and policies, in promoting harmony among different communities and groups living in Assam. What is needed now is not acrimony but a healing touch." (Hindustan Times, 22nd February, 1983)
- Congress Members voiced protest against atrocities on Harijans in Andhra Pradesh (The Hindu, 3rd March, 1985)

Why do we need Two Houses of Parliament?

The term 'Parliament' refers to the national legislature. The legislature of the States is described as State legislature. The Parliament in India has two houses. When there are two houses of the legislature, it is called a bicameral legislature. The two Houses of the Indian Parliament are the Council of States or the Rajya Sabha and the House of People or Lok Sabha. The Constitution has given the States the option of establishing either a unicameral or bicameral legislature. At present only five States have a bicameral legislature.



States having a bicameral legislature:
Bihar,
Jammu and Kashmir,
Karnataka,
Maharashtra,
Uttar Pradesh

Countries with large size and much diversity usually prefer to have two houses of the national legislature to give representation to all sections in the society and to give representation to all geographical regions or parts of the country. A bicameral legislature has one more advantage. A bicameral legislature makes it possible to have every decision reconsidered. Every decision taken by one house goes to the other house for its decision. This means that every bill and policy would be discussed twice. This ensures a double check on every matter. Even if one house takes a decision in haste, that decision will come for discussion in the other house and reconsideration will be possible.

> " .....an upper house could perform the..useful function of being a revising body, and ....its views may count but not its votes.... ..,those who could not enter into the rough and tumble of active politics could...advise the lower house."
>
> Purnima Banerji
> CAD, Vol. IX, p. 33

Rajya Sabha

Each of the two Houses of the Parliament has different bases of representation. The Rajya Sabha represents the States of India. It is an indirectly elected body. Residents of the State elect members to State Legislative Assembly. The elected members of State Legislative Assembly in turn elect the members of Rajya Sabha.

We can imagine two different principles of representation in the second chamber. One way is to give equal representation to all the parts of the country irrespective of their size or population. We may call this as symmetrical representation. On the other hand, parts of the country may be given representation according to their

population. This second method means that regions or parts having larger population would have more representatives in the second chamber than regions having less population.

In the U.S.A, every state has equal representation in the Senate. This ensures equality of all the states. But this also means that a small state would have the same representation as the larger states. The system of representation adopted for the Rajya Sabha is different from that in the USA. The number of members to be elected from each State has been fixed by the fourth schedule of the Constitution.

What would happen if we were to follow the American system of equality of representation in the Rajya Sabha? Uttar Pradesh with a population of 1718.29 lakhs would get seats equal to that of Sikkim whose population is only 5.71 lakhs. The framers of the Constitution wanted to prevent such discrepancy. States with larger population get more representatives than States with smaller population get. Thus, a more populous State like Uttar Pradesh sends 31 members to Rajya Sabha, while a smaller and less populous State like Sikkim has one seat in the Rajya Sabha.

Members of the Rajya Sabha are elected for a term of six years. They can get re-elected. All members of the Rajya Sabha do not complete their terms at the same time. Every two years, one third members of the Rajya Sabha

Bicameralism in Germany

Germany has a bicameral legislature. The two Houses are known as Federal Assembly (Bundestag) and Federal Council (Bundesrat). Assembly is elected by a complex system combining direct and proportional representation for a period of four years.

The 16 federal states of Germany are represented in the Federal Council. The 69 seats of the *Bundesrat* are divided among states on the basis of a range of populations. These members are generally the ministers in the governments at the state level and are appointed, not elected, by the governments of the federal states. According to the German law, all the members from one state have to vote as a bloc as per the instructions of the state governments. Sometimes due to coalition government at the state level, they fail to reach an agreement and may have to abstain.

The Bundesrat does not vote on all legislative initiatives but all the policy areas on which the federal states have concurrent powers and are responsible for federal regulations must be passed by it. It can also veto such legislation.

complete their term and elections are held for those one third seats only. Thus, the Rajya Sabha is never fully dissolved. Therefore, it is called the permanent House of the Parliament. The advantage of this arrangement is that even when the Lok Sabha is dissolved and elections are yet to take place, the meeting of the Rajya Sabha can be called and urgent business can be conducted.

Apart from the elected members, Rajya Sabha also has twelve nominated members. The President nominates these members. These nominations are made from among those persons who have made their mark in the fields of literature, arts, social service, science etc.

Activity

Find out the number of representatives elected from different States. Prepare a chart showing number of representatives and the population of the State according to the 2001 census.

I don't understand why there is a provision for nominating these sportspersons and artists and scientists. Whom do they represent? And, do they really contribute much to the proceedings of the Rajya Sabha?

Lok Sabha

The Lok Sabha and the State Legislative Assemblies are directly elected by the people. For the purpose of election, the entire country (State, in case of State Legislative Assembly) is divided into territorial constituencies of roughly equal population. One representative is elected from each constituency through universal, adult suffrage where the value of vote of every individual would be equal to another. At present there are 543 constituencies. This number has not changed since 1971.

The Lok Sabha is elected for a period of five years. This is the maximum. We have seen in the chapter on the executive that before the completion of five years, the Lok Sabha can be dissolved if no party or coalition can form the government or if the Prime Minister advices the President to dissolve the Lok Sabha and hold fresh elections.

Check your progress

- Do you think that composition of Rajya Sabha has protected the position of States of India?
- Should indirect election of Rajya Sabha be replaced by direct elections? What would be its advantages and disadvantages?
- Since 1971 the number of seats in the Lok Sabha has not increased. Do you think that it should be increased? What should be the basis for this?

What does the Parliament do?

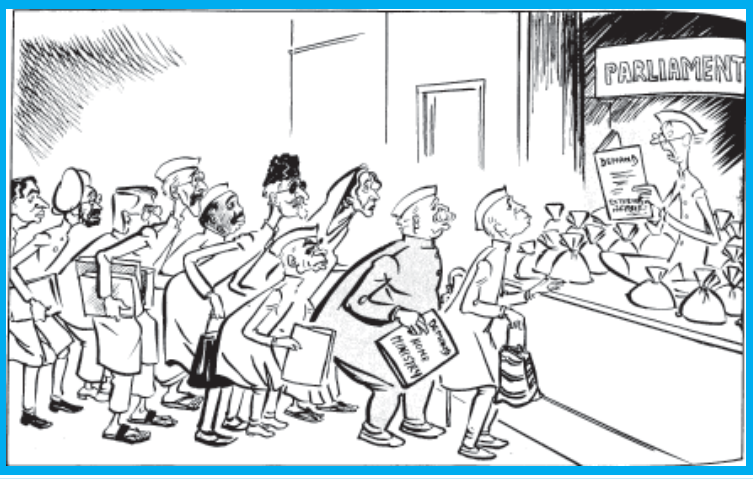
What is the function of the legislature? Do both Houses of the Parliament have similar functions? Is there a difference in the powers of the two Houses?

Apart from law making, the Parliament is engaged in many other functions. Let us list the functions of the Parliament.:

- Legislative Function: The Parliament enacts legislations for the country. Despite being the chief law making body, the Parliament often merely approves legislations. The actual task of drafting the bill is performed by the bureaucracy under the supervision of the minister concerned. The substance and even the timing of the bill are decided by the Cabinet. No major bill is introduced in the Parliament without the approval of the Cabinet. Members other than ministers can also introduce bills but these have no chance of being passed without the support of the government.
- Control of Executive and ensuring its accountability: Perhaps the most vital function of the Parliament is to ensure that the executive does not overstep its authority and remains responsible to the people who have elected them. We shall discuss this function in greater detail later in this chapter.
- Financial Function: Government is about spending a lot of money on various matters. Where does this money come from? Every

government raises resources through taxation. However, in a democracy, legislature controls taxation and the way in which money is used by the government. If the Government of India proposes to introduce any new tax, it has to get the approval of the Lok Sabha. The Financial powers of the Parliament, involve grant of resources to the government to implement its programmes. The government has to give an account to the Legislature about the money it has spent and resources that it wishes to raise. The legislature also ensures that the government does not misspend or overspend. This is done through the budget and annual financial statements.

READ A CARTOON



Shankar. Copyright: Children's Book Trust.

The Parliament is the boss and the ministers are looking very humble here. That is the effect of the Parliament's power to sanction money to different ministries.

- Representation: Parliament represents the divergent views of members from different regional, social, economic, religious groups of different parts of the country.
- Debating Function: The Parliament is the highest forum of debate in the country. There is no limitation on its power of discussion. Members are free to speak on any matter without fear. This makes

it possible for the Parliament to analyse any or every issue that faces the nation. These discussions constitute the heart of democratic decision making.

- Constituent Function: The Parliament has the power of discussing and enacting changes to the Constitution. The constituent powers of both the houses are similar. All constitutional amendments have to be approved by a special majority of both Houses.
- Electoral functions: The Parliament also performs some electoral functions. It elects the President and Vice President of India.
- Judicial functions: The judicial functions of the Parliament include considering the proposals for removal of President, Vice-President and Judges of High Courts and Supreme Court.

Powers of Rajya Sabha

We discussed above, the functions that are performed by the Parliament in general. However, in a bicameral legislature, there is some difference between the powers of the two Houses. Look at the charts showing the powers of Lok Sabha and Rajya Sabha.

Powers of the Lok Sabha	**Powers of Rajya Sabha**
◈ Makes Laws on matters included in Union List and Concurrent List. Can introduce and enact money and non money bills. ◈ Approves proposals for taxation, budgets and annual financial statements. ◈ Controls the executive by asking questions, supplementary questions, resolutions and motions and through no confidence motion. ◈ Amends the Constitution. ◈ Approves the Proclamation of emergency. ◈ Elects the President and Vice President and removes Judges of Supreme Court and High Court. ◈ Establishes committees and commissions and considers their reports.	◈ Considers and approves non money bills and suggests amendments to money bills. ◈ Approves constitutional amendments. ◈ Exercises control over executive by asking questions, introducing motions and resolutions. ◈ Participates in the election and removal of the President, Vice President, Judges of Supreme Court and High Court.It can alone initiate the procedure for removal of Vice President. ◈ Can give the Union parliament power to make laws on matters included in the State list.

Special Powers of Rajya Sabha

As you know, the Rajya Sabha is an institutional mechanism to provide representation to the States. Its purpose is to protect the powers of the States. Therefore, any matter that affects the States must be referred to it for its consent and approval. Thus, if the Union Parliament wishes to remove a matter from the State list (over which only the State Legislature can make law) to either the Union List or Concurrent List in the interest of the nation, the approval of the Rajya Sabha is necessary. This provision adds to the strength of the Rajya Sabha. However, experience shows that the members of the Rajya Sabha represent their parties more than they represent their States.

Powers exercised *only* by the Lok Sabha: Then, there are powers that only the Lok Sabha exercises. The Rajya Sabha cannot initiate, reject or amend money bills. The Council of Ministers is responsible to the Lok Sabha and not Rajya Sabha. Therefore, Rajya Sabha can criticise the government but cannot remove it.

Can you explain why? The Rajya Sabha is elected by the MLAs and not directly by the people. Therefore, the Constitution stopped short of giving certain powers to the Rajya Sabha. In a democratic form as adopted by our Constitution, the people are the final authority. By this logic, the representatives, directly elected by the people, should have the crucial powers of removing a government and controlling the finances.

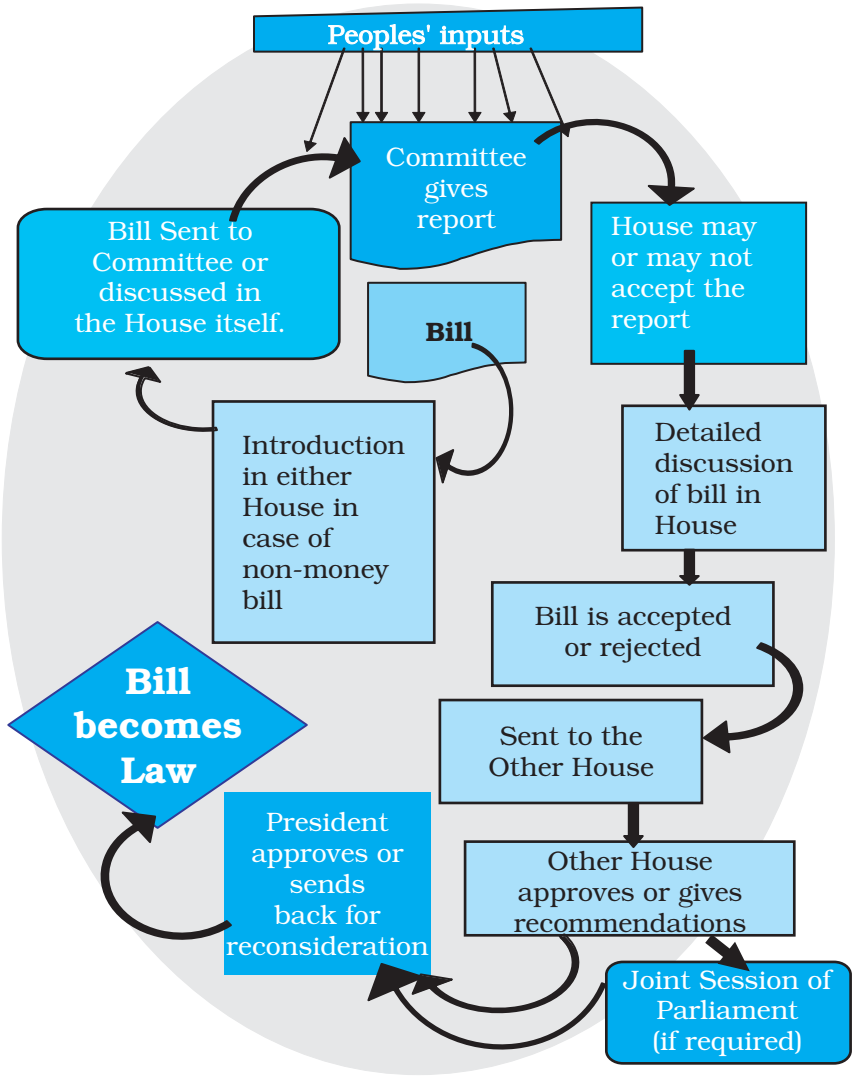
In all other spheres, including passing of non-money bills, constitutional amendments, and impeaching the President and removing the Vice President the powers of Lok Sabha and Rajya Sabha are co-equal.

So, the Lok Sabha controls the purse! Then it must be the more powerful House.

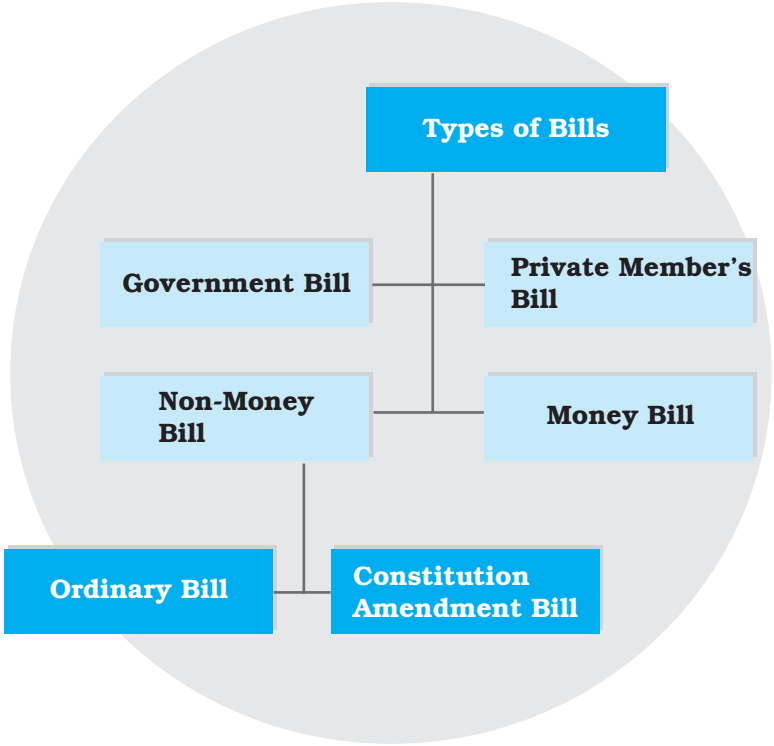
How does the Parliament make Laws?

The basic function of any legislature is to make laws for its people. A definite procedure is followed in the process of making law. Some of the procedures of law making are

mentioned in the Constitution, while some have evolved from conventions. Follow a bill through the legislative process and you will clearly see that the law making process is technical and even tedious.



A bill is a draft of the proposed law. There can be different types of bills. When a non-minister proposes a bill, it is called private member's Bill. A bill proposed by a minister is described as Government Bill. Let us now see the different stages in the life of a bill.



Even before a bill is introduced in the Parliament there may be a lot of debate on the need for introducing such a bill. A political party may pressurise the government to initiate a bill in order to fulfil its election promises or to improve its chances of winning forthcoming elections. Interest groups, media and citizens' forums may also persuade the government for a particular legislation. Law making is thus not merely a legal procedure but also a political course of action. The preparation of a bill itself involves many considerations such as resources required to implement the law, the support or opposition that the bill is likely to produce, the impact that the law may have on

the electoral prospect of the ruling party etc. In the era of coalition politics especially, a bill proposed by the government has to be acceptable to all the partners of the coalition. Such practical considerations can hardly be ignored. The Cabinet considers all these before arriving at a decision to enact a law.

Once the Cabinet approves the policy behind the legislation, the task of drafting the legislation begins. The draft of any bill is prepared by the concerned ministry. For instance a bill raising the marriageable age of girls from 18 to 21 will be prepared by the law ministry. The ministry of women and child welfare may also be involved in it.

Within the Parliament, a bill may be introduced in the Lok Sabha or Rajya Sabha by a member of the House (but often a minister responsible for the subject introduces the bill). A money bill can be introduced only in Lok Sabha. Once passed there, it is sent to the Rajya Sabha.

A large part of the discussion on the bills takes place in the committees. The recommendation of the committee is then sent to the House. That is why committees are referred to as miniature legislatures. This is the second stage in the law making process. In the third and final stage, the bill is voted upon. If a non-money bill is passed by one House, it is sent to the other House where it goes through exactly the same procedure.

As you know, a bill has to be passed by both Houses for enactment. If there is disagreement between the two Houses on the proposed bill, attempt is made to resolve it through Joint Session of Parliament. In the few instances when joint sessions of the parliament were called to resolve a deadlock, the decision has always gone in favour of the Lok Sabha.

If it is a money bill, the Rajya Sabha can either approve the bill or suggest changes but cannot reject it. If it takes no action within 14 days the bill is deemed to have been passed. Amendments to the bill, suggested by Rajya Sabha, may or may not be accepted by the Lok Sabha.

READ A CARTOON

R K Laxman in The Times of India.

Is this how they follow the 'rules of the game'?

Article 109
Special procedure in respect of Money Bills.—(1)
A Money Bill shall not be introduced in the Council of States

When a bill is passed by both Houses, it is sent to the President for his assent. The assent of the President results in the enactment of a bill into a law.

Check your progress

- From the discussion of the law making process, do you think that Parliament can devote enough time for thorough discussion of the bills? If not, then what remedies would you suggest to overcome this difficulty?

How does the Parliament Control the Executive?

In a parliamentary democracy, the executive is drawn from the party or a coalition of parties that has a majority in Lok Sabha. It is not difficult for the executive to exercise unlimited and arbitrary powers with the support of the majority party. In such a situation, parliamentary democracy may slip into Cabinet dictatorship, where the Cabinet leads and the House merely follows. Only if the Parliament is active and vigilant, can it keep regular and effective check on the executive. There are many ways in which the Parliament can control the executive. But basic to them all is the power and freedom of the legislators as people's representatives to work effectively and fearlessly. For instance, no action can be taken against a member for

whatever the member may have said in the legislature. This is known as parliamentary privilege. The presiding officer of the legislature has the final powers in deciding matters of breach of privilege.

The main purpose of such privileges is to enable the members of the legislature to represent the people and exercise effective control over the executive. How does the Parliament exercise such control? What are the means available at its disposal? Is parliamentary control successful in curbing executive excesses?

Instruments of Parliamentary Control

The legislature in parliamentary system ensures executive accountability at various stages: policy making, implementation of law or policy and during and post-implementation stage. The legislature does this through the use of a variety of devices:

- Deliberation and discussion
- Approval or Refusal of laws
- Financial control
- No confidence motion

Deliberation and discussion: During the law making process, members of the legislature get an opportunity to deliberate on the policy direction of the executive and the ways in which policies are implemented. Apart from deliberating on bills, control may also be exercised during the general discussions in the House. The Question Hour, which is held every day during the sessions of Parliament, where Ministers have to respond to searching questions raised by the members; Zero Hour where members are free to raise any matter that they think is important (though the ministers are not bound to reply), half-an – hour discussion on matters of public importance, adjournment motion etc. are some instruments of exercising control.

Perhaps the question hour is the most effective method of keeping vigil on the executive and the administrative agencies of the government. Members of Parliament have

With so many sting operations are MPs still free to speak anything anywhere?

It must be difficult to be a minister. This is like giving an examination almost every day!

shown great interest in question hour and maximum attendance is recorded during this time. Most of the questions aim at eliciting information from the government on issues of public interest such as, price rise, availability of food grains, atrocities on weaker sections of the society, riots, black-marketing etc. This gives the members an opportunity to criticise the government, and represent the problems of their constituencies. The discussions during the question hour are so heated that it is not uncommon to see members raise their voice, walk to the well of the house or walk out in protest to make their point. This results in considerable loss of legislative time. At the same time, we must remember that many of these actions are political techniques to gain concessions from government and in the process force executive accountability.

Approval and ratification of laws: Parliamentary control is also exercised through its power of ratification. A bill can become a law only with the approval of the Parliament. A government that has the support of a disciplined majority may not find it difficult to get the approval of the Legislature. Such approvals however, cannot be taken for granted. They are the products of intense bargaining and negotiations amongst the members of ruling party or coalition of parties and even government and opposition. If the government has majority in Lok Sabha but not in the Rajya Sabha, as has happened during the Janata Party rule in 1977 and N.D.A rule in 2000, the government will be forced to make substantial concessions to gain the approval of both the Houses. Many bills, such as the Lok Pal Bill have failed enactment, Prevention of Terrorism bill (2002) was rejected by the Rajya Sabha.

Financial control: As mentioned earlier, financial resources to implement the programmes of the government are granted through the budget. Preparation and presentation of budget for the approval of the legislature is constitutional obligation of the government. This obligation allows the legislature to exercise control

over the purse strings of the government. The legislature may refuse to grant resources to the government. This seldom happens because the government ordinarily enjoys support of the majority in the parliamentary system. Nevertheless, before granting money the Lok Sabha can discuss the reasons for which the government requires money. It can enquire into cases of misuse of funds on the basis of the report of the Comptroller and Auditor General and Public Accounts committees. But the legislative control is not only aimed at financial propriety. The legislature is concerned about the policies of the government that are reflected in the budget. Through financial control, the legislature controls the policy of the government.

No Confidence Motion: The most powerful weapon that enables the Parliament to ensure executive accountability is the no-confidence motion. As long as the government has the support of its party or coalition of parties that have a majority in the Lok Sabha, the power of the House to dismiss the government is fictional rather than real. However, after 1989, several governments have been forced to resign due to lack of confidence of the house. Each of these governments lost the confidence of the Lok Sabha because they failed to retain the support of their coalition partners.

Thus, the Parliament can effectively control the executive and ensure a more responsive government. It is however important for this purpose, that there is adequate time at the disposal of the House, the members are interested in discussion and participate effectively and there is willingness to compromise amongst the government and the opposition. In the last two decades, there has been a gradual decline in sessions of the Lok Sabha and State Legislative Assemblies and time spent on debates. Moreover, the Houses of the Parliament have been plagued by absence of quorum, boycott of sessions by members of opposition which deprive the house the power to control the executive through discussion.

Activity

Watch the Dooradarshan telecast of Parliament sessions for three continuous days. Or collect the newspaper reports for three continuous days and make a wallpaper. Take care to observe the issues

being discussed, the role of the speaker, questions being asked, the political parties of the representatives, representatives from your region, nature of the issues of discussion – whether they were all of national or regional in character.

Read a Cartoon

Irfan

Walkout is a frequently adopted measure by the opposition to register their protest against the government. Has there been an overuse of that weapon?

What do the Committees of Parliament do?

A significant feature of the legislative process is the appointment of committees for various legislative purposes. These committees play a vital role not merely in law making, but also in the day-to-day business of the House. Since the Parliament meets only during sessions, it has very limited time at its disposal. The making of law for instance requires in-depth study of the issue under consideration. This in turn demands more attention and time. Similarly, there are other important functions also, like studying the demands for grants made by various ministries, looking into expenditure incurred by various departments, investigating cases of corruption etc. Parliamentary committees perform such functions. Since 1983, India has developed a system of parliamentary standing committees. There are over twenty such departmentally related committees. Standing Committees supervise the work of various departments, their budget, their expenditure and bills that come up in the house relating to the department.

Apart from standing committees, the Joint Parliamentary Committees have occupied a position of eminence in our country. Joint Parliamentary Committees (JPCs) can be set up for the purpose of discussing a particular bill, like the joint committee to discuss

bill, or for the purpose of investigating financial irregularities. Members of these committees are selected from both Houses.

The committee system has reduced the burden on the Parliament. Many important bills have been referred to committees. The Parliament has merely approved the work done in the committees with few occasional alterations. Of course legally speaking, no bill can become law, and no budget will be sanctioned unless approved by the Parliament. But the Parliament rarely rejects the suggestions made by the committees.

> As far as the nature of legislature is concerned it is such that there are restrictions only so far as procedure is concerned. But in substance there are no restrictions, no limitations on the sovereignty of the legislature or parliament....

N.V. Gadgil
CAD Vol XI, p.659.

How does the Parliament Regulate Itself?

Parliament as mentioned earlier is a debating forum. It is through debates that the parliament performs all its vital functions. Such discussions must be meaningful and orderly so that the functions of the Parliament are carried out smoothly and its dignity is intact. The Constitution itself has made certain provisions to ensure smooth conduct of business. The presiding officer of the legislature is the final authority in matters of regulating the business of the legislature.

So, the law makers too, are subject to some laws!

READ A CARTOON

Irfan

These MPs are not walking out, they are 'thrown out' by the speaker. Do such tragic situations occur ever so frequently?

I don't understand why they change parties. Do they even come back to the party they once left?

There is one more way in which the presiding officers control the behaviour of the members. You may have heard about the anti-defection law. Most of the members of the legislatures are elected on the ticket of some political party. What would happen if they decide to leave the party after getting elected? For many years after independence, this issue was unresolved. Finally there was an agreement among the parties that a legislator who is elected on one party's ticket must be restricted from 'defecting' to another party. An amendment to the Constitution was made (52nd amendment act) in 1985. This is known as anti-defection amendment. It has also been subsequently modified by the 91st amendment. The presiding officer of the House is the authority who takes final decisions on all such cases. If it is proved that a member has 'defected', then such

member loses the membership of the House. Besides, such a person is also disqualified from holding any political office like ministership, etc.

What is defection? If a member remains absent in the House when asked by the party leadership to remain present or votes against the instructions of the party or voluntarily leaves the membership of the party, it is deemed as defection.

Experience of the past twenty years shows that the anti-defection amendment has not been able to curb defections, but it has given additional powers to the party leadership and the presiding officers of the legislatures over the members.

Conclusion

Have you watched the live telecast of the proceeding of the Parliament? You will find that our Parliament is truly a rainbow of colourful dresses symbolising different regions of the country. Members speak different languages in the course of the proceedings. They come from various castes, religions and sects. They often fight bitterly. Many times an impression is created that they are wasting the time and money of the nation. But we have seen in this chapter that these same parliamentarians can effectively control the executive. They can express the interests of various sections of our society. On account of its composition, Legislature is the most representative of all organs of government. The sheer presence of members of diverse social backgrounds makes the legislatures more representative and potentially more responsive to people's expectations. In a parliamentary democracy, legislature, as a body representing the wishes of the people occupies a high position of power and responsibility. Herein lies the democratic potential of the Parliament.

Exercises

1. Alok thinks that a country needs an efficient government that looks after the welfare of the people. So, if we simply elected our Prime Minister and Ministers and left to them the task of government, we will not need a legislature. Do you agree? Give reasons for your answer.

2. A class was debating the merits of a bicameral system. The following points were made during the discussion. Read the arguments and say if you agree or disagree with each of them, giving reasons.
   - √ Neha said that bicameral legislature does not serve any purpose.
   - √ Shama argued that experts should be nominated in the second chamber.
   - √ Tridib said that if a country is not a federation, then there is no need to have a second chamber.

3. Why can the Lok Sabha control the executive more effectively than the Rajya Sabha can?

4. Rather than effective control of the executive, the Lok Sabha is a platform for the expression of popular sentiments and people's expectations. Do you agree? Give reasons.

5. The following are some proposals for making the Parliament more effective. State if you agree or disagree with each of them and give your reasons. Explain what would be the effect if these suggestions were accepted.
   - √ Parliament should work for longer period.
   - √ Attendance should be made compulsory for members of Parliament.
   - √ Speakers should be empowered to penalise members for interrupting the proceedings of the House.

6. Arif wanted to know that if ministers propose most of the important bills and if the majority party often gets the government bills passed, what is the role of the Parliament in the law making process? What answer would you give him?

7. Which of the following statements you agree with the most? Give your reasons.
   - √ Legislators must be free to join any party they want.
   - √ Anti-defection law has contributed to the domination of the party leaders over the legislators.
   - √ Defection is always for selfish purposes and therefore, a legislator who wants to join another party must be disqualified from being a minister for the next two years.

8. Dolly and Sudha are debating about the efficiency and effectiveness of the Parliament in recent times. Dolly believed that the decline of Indian Parliament is evident in the less time spent on debate and discussion and increase in the disturbances of the functioning of the House and walkouts etc. Sudha contends that the fall of different governments on the floor of Lok Sabha is a proof of its vibrancy. What other arguments can you provide to support or oppose the positions of Dolly and Sudha?

9. Arrange the different stages of passing of a bill into a law in their correct sequence:.
   - √ A resolution is passed to admit the bill for discussion
   - √ The bill is referred to the President of India – write what happens next if s/he does not sign it
   - √ The bill is referred to other House and is passed
   - √ The bill is passed in the house in which it was proposed
   - √ The bill is read clause by clause and each is voted upon
   - √ The bill is referred to the subcommittee – the committee makes some changes and sends it back to the house for discussion
   - √ The concerned minister proposes the need for a bill
   - √ Legislative department in ministry of law, drafts a bill

10. How has the system of parliamentary committee affected the overseeing and appraisal of legislation by the Parliament?

Chapter Six

JUDICIARY

Introduction

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

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

Why do we Need an Independent Judiciary?

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

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

Independence of Judiciary

Simply stated independence of judiciary means that

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

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

Read a cartoon

R K Laxman in The Times of India.

No fisticuffs please, this is rule of law!

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

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

How can the independence of judiciary be provided and protected?

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

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

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

Activity

Hold a debate in class on the following topic.

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

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

Appointment of Judges

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

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

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

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

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

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

Removal of Judges

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

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

Unsuccessful Attempt to Remove a Judge

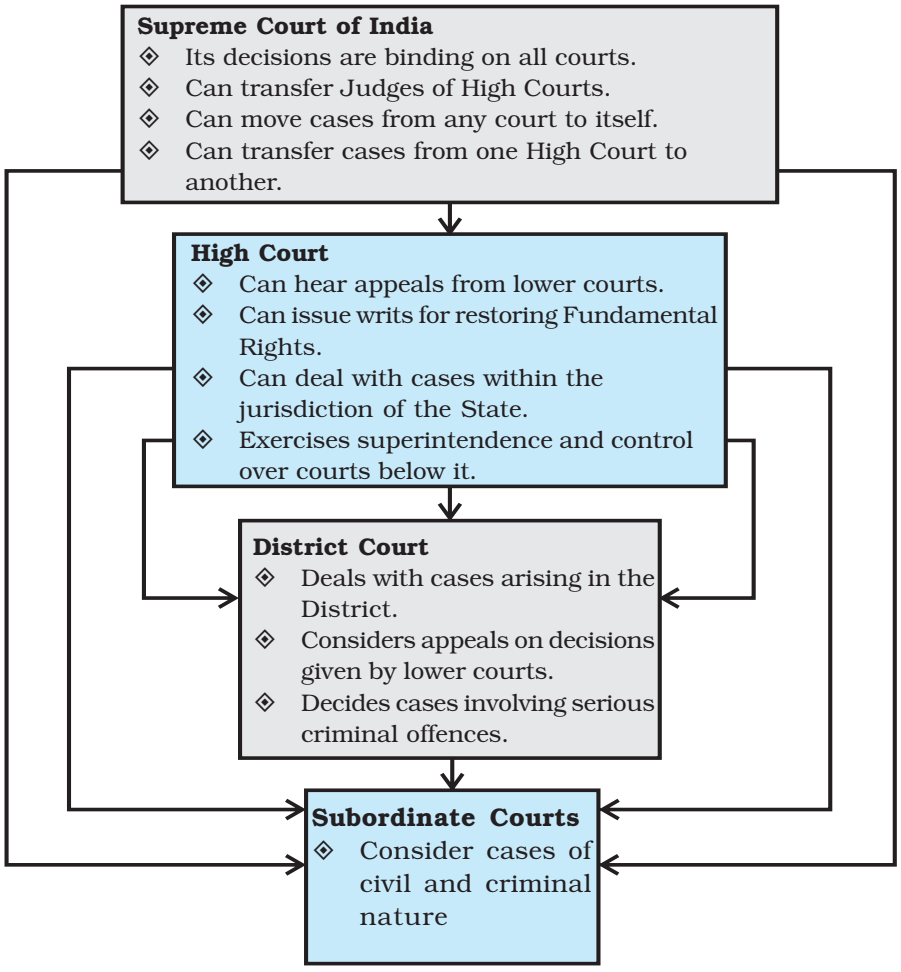
In 1991 the first-ever motion to remove a Supreme Court Justice was signed by 108 members of Parliament. Justice Ramaswamy, during his tenure as the Chief Justice of the Punjab High Court was accused of misappropriating funds. In 1992, a year after the Parliament had started the impeachment proceedings,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

Check your progress

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

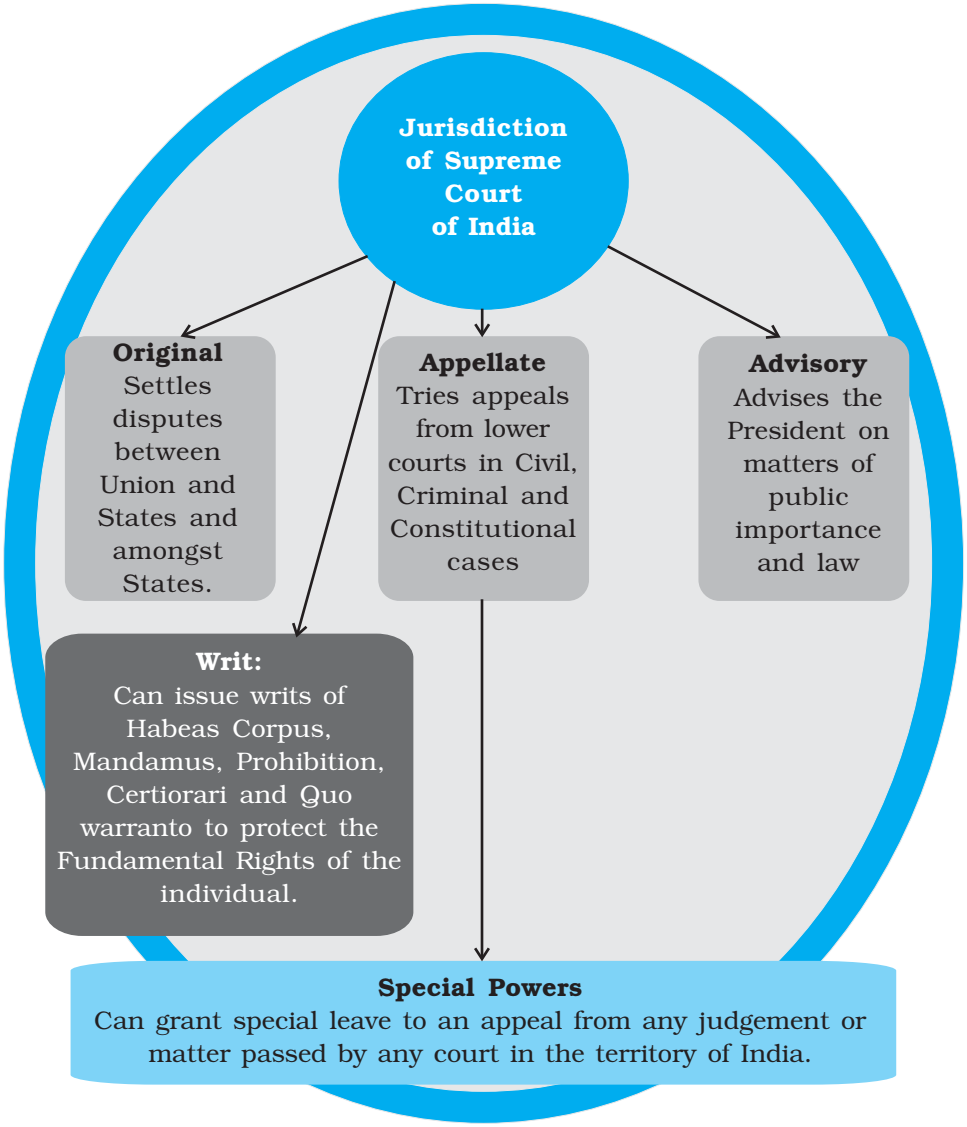
Structure of the Judiciary

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



Jurisdiction of Supreme Court

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



Original Jurisdiction

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

Writ Jurisdiction

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

Appellate Jurisdiction

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

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

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

Advisory Jurisdiction

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

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

Article 137
..... the Supreme Court shall have power to review any judgment pronounced or order made by it.

Article 144
... All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

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

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

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

Check your progress

Match the following

Dispute between State of Bihar and Union of India will be heard by	High Court
Appeal from District court of Haryana will go to	Advisory Jurisdiction
Single Integrated Judiciary	Judicial review
Declaring a law unconstitutional	Original Jurisdiction
	Supreme Court
	Single Constitution

Judicial Activism

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

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

READ A CARTOON

Irfan

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

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

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

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

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

Some Early PILs

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

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

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

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

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

Activity

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

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

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

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

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

You are the Judge

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

Imagine that you are the judge.

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

Judiciary and Rights

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

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

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

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

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

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

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

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

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

Check your progress

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

Judiciary and Parliament

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

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

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

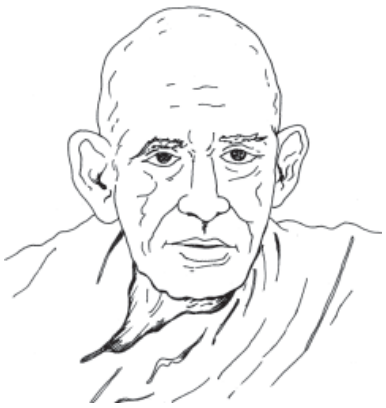
We have already mentioned the differences that emerged between the Parliament and the judiciary over right to property and the Parliament's power to amend the Constitution. Let us recapitulate that briefly:

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

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

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

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



Aladi Krishnaswami Ayyar
CAD, vol. XI, p. 837

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

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

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

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

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

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

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

Check your progress

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

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

Conclusion

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

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

READ A CARTOON

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

R K Laxman in The Times of India.

At least this gentleman seems to be happy with the judiciary!

NATIONAL NETWORK

The Indian EXPRESS
www.expressindia.com

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

SC to hear petition by month-end

EXPRESS NEWS SERVICE
NEW DELHI, FEBRUARY 2

IN listing a petition challenging a common practice in Rajya Sabha polls for hearing this month-end, Sabha member Fali Nariman informed the apex bench of the need for urgency in the matter since polls to the Upper House were slated to begin by February 28.

In fact, Nayyar's petition

Manmohan Singh tops the list of such persons having been elected to the Upper House from Assam, the state he does not belong to. The Congress and BJP too have such members of the Upper ...se. Bharatiya Janata ...ders M Venkaiah ... Rajagopal were ...

Cash-for-query: Centre wants cases of MP

▸ NEW DELHI: The Supreme ... notices to the 11 expelled MPs, a... should not be clubbed ... ...e issued by a bench of ... and Justice C K Tha... ...ogesh Secretary Parliam...

Judiciary a partner in development: Kalam

President inaugurates the golden jubilee celebrations of the Punjab and Haryana High Court

सुप्रीम कोर्ट को सांसदों के निष्क
मामले में दखल का हक नहीं

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

Supreme Court indicts Governor

Exercises

1. What are the different ways in which the independence of the judiciary is ensured? Choose the odd ones out.
   i. Chief Justice of the Supreme Court is consulted in the appointment of other judges of Supreme Court.
   ii. Judges are generally not removed before the age of retirement.
   iii. Judge of a High Court cannot be transferred to another High Court.
   iv. Parliament has no say in the appointment of judges.

2. Does independence of the judiciary mean that the judiciary is not accountable to any one? Write your answer in not more than 100 words.

3. What are the different provisions in the constitution in order to maintain the independence of judiciary?

4. Read the news report below and identify the following aspects:
   √ What is the case about?
   √ Who has been the beneficiary in the case?
   √ Who is the petitioner in the case?
   √ Visualise what would have been the different arguments put forward by the company.
   √ What arguments would the farmers have put forward?

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

Our Corporate Bureau 24 March 2005

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

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

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

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

Centre, Delhi join hands on CNG issue

By Our Staff Reporter, The Hindu 23 September 2001

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

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

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

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

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

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

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

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

7. Read the following statements: Match them with the different jurisdictions the Supreme Court can exercise - Original, Appellate, and Advisory.
   - √ The government wanted to know if it can pass a law about the citizenship status of residents of Pakistan-occupied areas of Jammu and Kashmir.
   - √ In order to resolve the dispute about river Cauvery the government of Tamil Nadu wants to approach the court.
   - √ Court rejected the appeal by people against the eviction from the dam site.

8. In what way can public interest litigation help the poor?

9. Do you think that judicial activism can lead to a conflict between the judiciary and the executive? Why?

10. How is judicial activism related to the protection of fundamental rights? Has it helped in expanding the scope of fundamental rights?

Chapter Seven

FEDERALISM

INTRODUCTION

Look at the political maps (on next two pages) of India 1947 and 2001. They have changed dramatically over the years. Boundaries of States have changed, names of States have changed, and the number of States has changed. When India became independent, we had a number of provinces that the British government had organised only for administrative convenience. Then a number of princely states merged with the newly independent Indian union. These were joined to the existing provinces. This is what you see in the first map. Since then boundaries of States have been reorganised many times. During this entire period, not only did boundaries of State change, but in some cases, even their names changed according to the wishes of the people of those States. Thus, Mysore changed to Karnataka and Madras became Tamil Nadu. The maps show these large scale changes that have taken place in the span of over fifty years. In a way, these maps also tell us the story of functioning of federalism in India.

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

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

INDIA IN 1947
AFGHANISTAN
IRAN
TIBIT
CHINA
NEPAL
SIKKIM
BHUTAN
ASSAM
BURMA
SIAM
WEST PAKISTAN
KASHMIR
PUNJAB
RAJPUTANA
UNITED PROVINCES
BIHAR
CENTRAL INDIA
CENTRAL PROVINCES
ORISSA
BOMBAY
HYDERABAD
MADRAS
MYSORE
TRAVANCORE
GUJARAT
ARABIAN SEA
BAY OF BENGAL
INDIAN OCEAN
CEYLON
Gilgit
Chitral
Shrinagar
Peshawar
Rawalpindi
Leh
Jammu
Quetta
Lahore
Amritsar
Jalandhara
Kalat
Delhi
Aligarh
Mathura
Agra
Jaisalmer
Bermer
Jaipur
Ajmer
Lucknow
Patna
Gangtok
Punaka
Shillong
Imphal
Karachi
Hyderabad
Allahabad
Benares
Dacca
Ahmadabad
Baroda
Bhopal
Jabalpur
Indore
Calcutta
Chittagaon
Mandalay
Nagpur
Bombay
Poona
Cuttak
Vishakhapatnam
Rangoon
Moulmein
Hyderabad
Goa
(Portuguese)
Nellore
Madras
Bangalore
Pondicherry
(French)
Mercara
Calicut
Cochin
Trivandrum
International Boundary
Pakistan (entire Sind, Baluchistan, N.W.F.P. Greater part of Punjab and Bengal Bahawalpur State)
India Protected States
Native

INDIA
2001
68°E
72°
76°
80°
84°
88°
92°
96°E
36°N
32°
28°
24°
20°
16°
12°
8°N
JAMMU AND KASHMIR
Srinagar
PAKISTAN
HIMACHAL PRADESH
Shimla
PUNJAB
Chandigarh
UTTARANCHAL
Dehra Dun
HARYANA
DELHI
CHINA (TIBET)
NEPAL
SIKKIM
Gangtok
BHUTAN
ARUNACHAL PRADESH
Itanagar
ASSAM
Dispur
NAGALAND
Kohima
MEGHALAYA
Shillong
Imphal
MANIPUR
BANGLADESH
Agartala
Aizawl
TRIPURA
MIZORAM
Tropic of Cancer
UTTAR PRADESH
BIHAR
Patna
Lucknow
Jaipur
RAJASTHAN
I N D I A
JHARKHAND
Ranchi
WEST BENGAL
Kolkata
New Moore Is. (India)
MYANMAR
Gandhinagar
GUJARAT
Bhopal
MADHYA PRADESH
DAMAN (D&D)
DIU (D&D)
DADRA & NAGAR HAVELI
Silvassa
Raipur
CHHATTISGARH
ORISSA
Bhubaneshwar
Mumbai
MAHARASHTRA
ARABIAN SEA
BAY OF BENGAL
Hyderabad
ANDHRA PRADESH
Yanam (PONDICHERRY)
Panaji
GOA
KARNATAKA
Bangalore
Chennai
PONDICHERRY
Karaikal (PONDICHERRY)
Mahe (PONDICHERRY)
Kavaratti
LAKSHADWEEP (INDIA)
TAMIL NADU
KERALA
Tiruvananthapuram
SRI LANKA
Port Blair
ANDAMAN & NICOBAR ISLANDS (INDIA)
International Boundary
State Boundary
0
200
400
600 km
INDIAN OCEAN

What is Federalism?

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

Federalism in West Indies

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

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

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

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

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

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

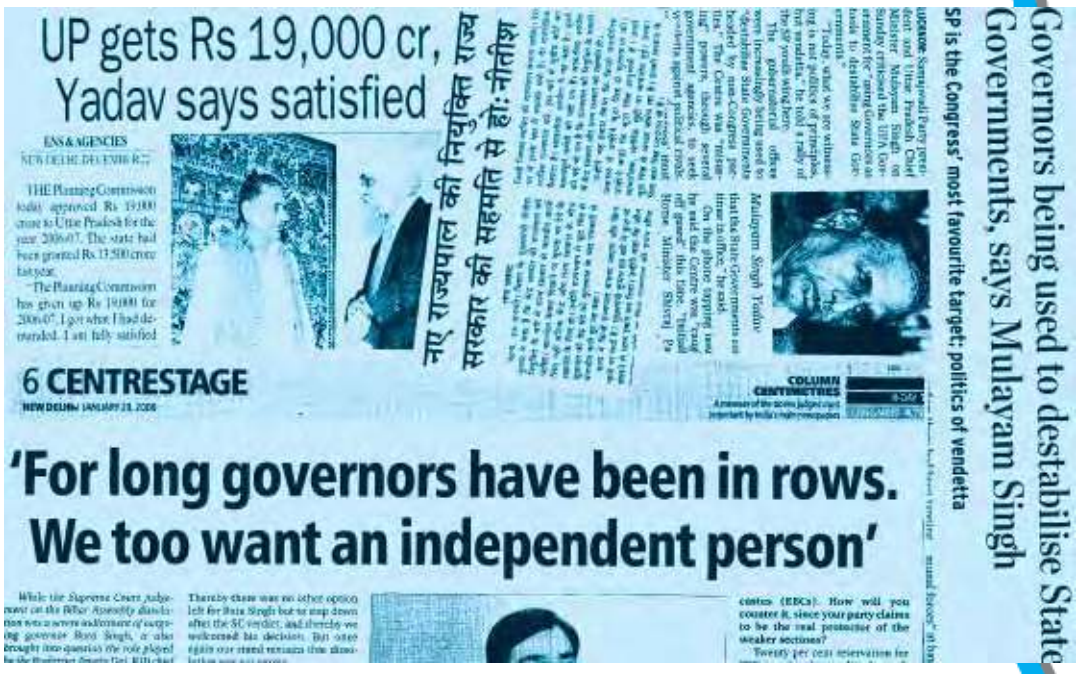
I get it! It's like our school. We have our identity as students of class XI or XII and so on. And we also have competition among the various divisions. But we all belong to the school and are proud of it.

matters are the responsibility of the regional or State government.

- To prevent conflicts between the centre and the State, there is an *independent judiciary to settle disputes*. The judiciary has the powers to resolve disputes between the central government and the States on legal matters about the division of power.

Real politics, culture, ideology and history determine the actual working of a federation. A culture of trust, cooperation, mutual respect and restraint helps federations to function smoothly. Political parties also determine the way a constitution would work. If any single unit or State or linguistic group or ideology comes to dominate the entire federation it could generate a deep resentment among people or its units not sharing the dominant voice. These situations could lead to demands for secession by the aggrieved units or could even result in civil wars. Many countries are embroiled in such conflict situations.

Yes, I remember what we read in the first chapter: a constitution decides who should have how much power.



UP gets Rs 19,000 cr, Yadav says satisfied

नए राज्यपाल की नियुक्ति राज्य सरकार की सहमति से हो: नीतीश

Governors being used to destabilise State Governments, says Mulayam Singh

SP is the Congress' most favourite target; politics of vendetta

'For long governors have been in rows. We too want an independent person'

Federalism in Nigeria

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

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

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

Check your progress

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

Federalism in the Indian Constitution

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

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

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

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

After all, the purpose of living together must be that all of us are happy and must make each other be happy.

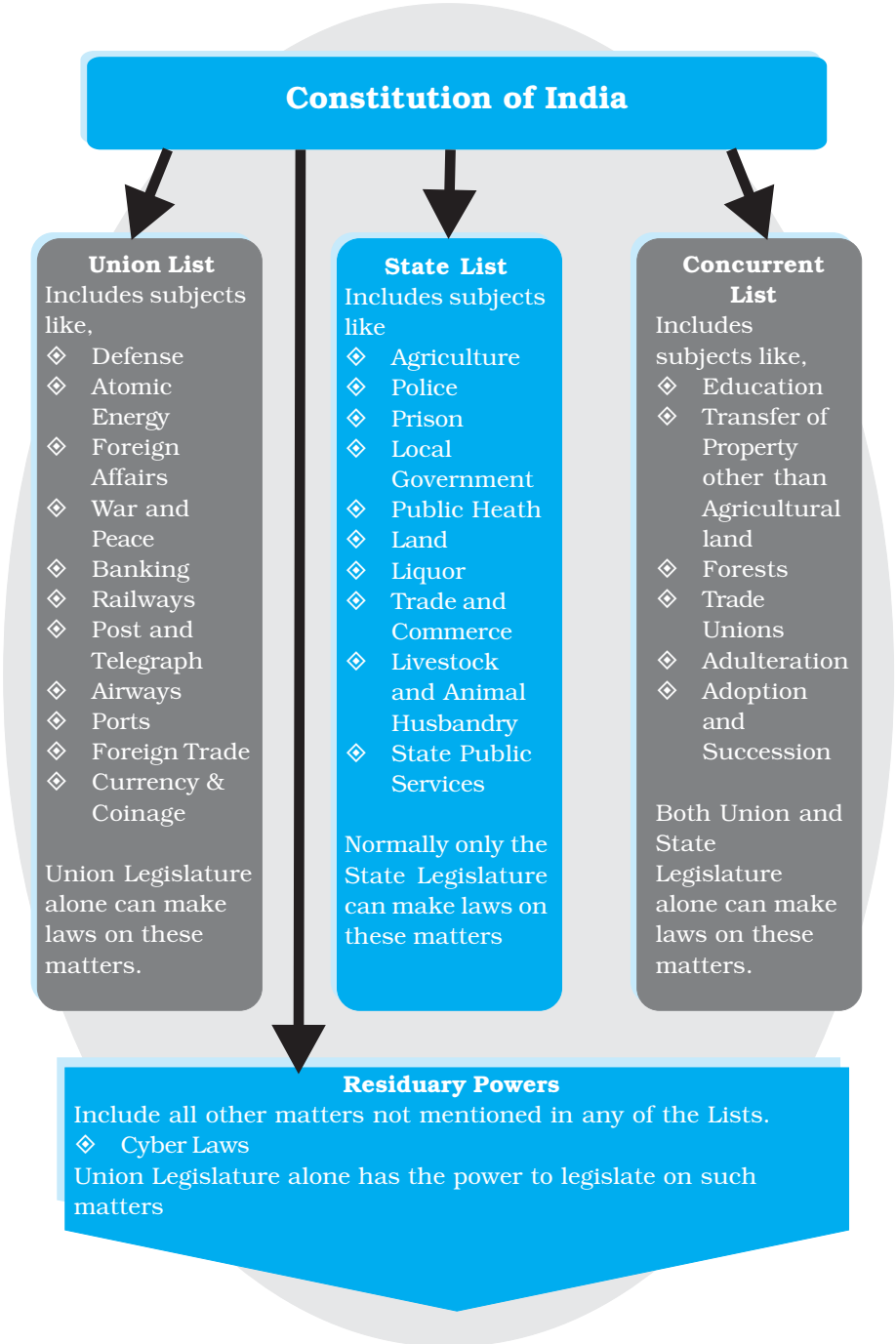
I feel that States would have very little money of their own. How can they manage their affairs? It is like some families where the money is with the husband and the wife has to manage the household.

Division of Powers

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

Check your progress

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


Constitution of India
Union List
Includes subjects like,
Defense
Atomic Energy
Foreign Affairs
War and Peace
Banking
Railways
Post and Telegraph
Airways
Ports
Foreign Trade
Currency & Coinage
Union Legislature alone can make laws on these matters.
State List
Includes subjects like
Agriculture
Police
Prison
Local Government
Public Heath
Land
Liquor
Trade and Commerce
Livestock and Animal Husbandry
State Public Services
Normally only the State Legislature can make laws on these matters
Concurrent List
Includes subjects like,
Education
Transfer of Property other than Agricultural land
Forests
Trade Unions
Adulteration
Adoption and Succession
Both Union and State Legislature alone can make laws on these matters.
Residuary Powers
Include all other matters not mentioned in any of the Lists.
Cyber Laws
Union Legislature alone has the power to legislate on such matters

Federalism with a Strong Central Government

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

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

T.T. Krishnammachari
CAD, Vol. 7, p. 234

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

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

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

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

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

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

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

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

- You have already studied in the chapter on executive that we have an integrated administrative system. The all-India services are common to the entire territory of India and officers chosen for these services serve in the administration of the States. Thus, an IAS officer who becomes the collector or an IPS officer who serves as the Commissioner of Police, are under the control of the central government. States cannot take disciplinary action nor can they remove these officers from service.

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

Check your progress

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

Conflicts in India's Federal System

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

Centre-State Relations

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

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

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

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

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

Demands for Autonomy

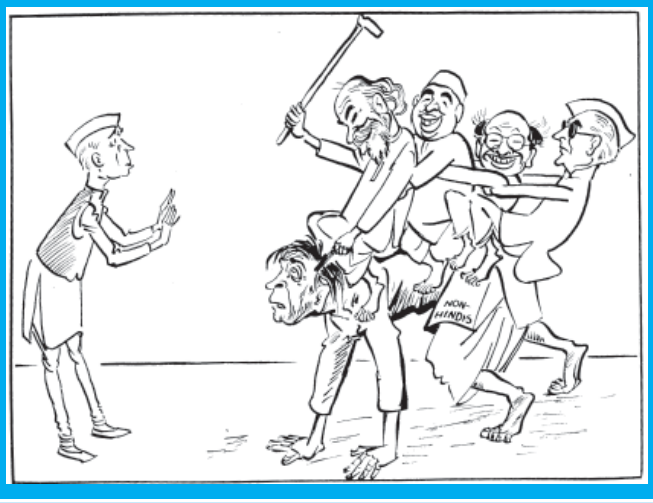
Many States and even many political parties have, from time to time, demanded that States should have more autonomy vis-à-vis the central government. However,

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

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

Yes, I know that Hindi is our national language. But my friends from Manipur and also from Tamil Nadu find it difficult to speak in Hindi.

READ A CARTOON



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Are such conflicts good for the country?

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Shankar. Copyright: Children's Book Trust.

Is this how Governors should be 'appointed'?

Role of Governors and President's Rule

The role of Governors has always been a controversial issue between the States and the central government. The Governor is not an elected office holder. Many Governors have been retired military officers or civil servants or politicians. Besides, the Governor is appointed by the central government and therefore, actions of the Governor are often viewed as interference by the Central government in the functioning of the State government. When two different parties are in power at the centre and the State, the role of the Governor becomes even more controversial. The Sarkaria Commission that was appointed by the central government (1983; it submitted its report in 1988) to examine the issues relating to centre-State relations, recommended that appointments of Governors should be strictly non-partisan.

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

READ A CARTOON

R K Laxman in The Times of India.

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

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

Demands for New States

The other dimension of tension in our federal system has been the demand to create new States. The national movement not only created a pan-Indian national unity; it also generated distinct unity around a common language, region and culture. Our national movement was also a movement for democracy. Therefore, in the course of the national movement itself, it was decided that as far as possible, States would be created on the basis of common cultural and linguistic identity.

This ultimately led to the demand for the creation of

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Flood of demands for creating new States

linguistic States after Independence. In 1954, the States Reorganisation Commission was set up and it recommended the creation of linguistic States, at least for the major linguistic groups. In 1956, reorganisation of some States took place. This saw the beginning of the creation of linguistic States and the process is still continuing. Gujarat and Maharashtra were created in 1960; Punjab and Haryana were separated from each other in 1966. Later, the north-east region was reorganised and several new States were created like, Meghalaya, Manipur or Arunachal Pradesh.

Activity

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

In the 1990s, some of the larger States were further divided both to meet the demands for a separate State as well as to meet the need for greater administrative efficiency. Thus Bihar, UP, and Madhya Pradesh were divided to create three new States. They are: Jharkhand, Uttaranchal and Chhattisgarh respectively. Some regions and linguistic groups are still struggling for separate Statehood like Telangana (in AP) and Vidarbha (in Maharashtra).

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

Interstate Conflicts

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

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

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

Activity

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

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

Check your progress

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

Special Provisions

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

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

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

Jammu and Kashmir

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

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

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

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

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

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

Conclusion

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

Exercises

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

- √ CU Status for Manipur University: Rajya Sabha on Wednesday passed a Bill to convert the Manipur University into a Central University with the Human Resource Development Minister promising such institutions in the North Eastern States of Arunachal Pradesh, Tripura and Sikkim as well.
- √ Funds released: The Centre has released Rs. 553 lakh to Arunachal Pradesh under its rural water supply scheme. The first instalment was of Rs. 466.81 lakh.
- √ We'll teach the Biharis how to live in Mumbai: Around 100 Shiv Sainiks stormed J. J. Hospital, disrupted daily operations, raised slogans and threatened to take matters into their own hands if no action was taken against non-Maharashtrian students.
- √ Demand for dismissal of Government: The Congress Legislature Party (CLP) in a representation submitted to State Governor recently, has demanded dismissal of the ruling Democratic Alliance of Nagaland (DAN) government for its alleged financial mismanagement and embezzlement of public money.
- √ NDA government asks naxalites to surrender arms: Amid a walkout by opposition RJD and its allies Congress and CPI (M), the Bihar government today appealed to the naxalites to shun the path of violence and reaffirmed its pledge to root out unemployment to usher in a new era of development in Bihar.

2. Think which of the following statements would be correct. State why.

   - √ Federalism enhances the possibility of people from different regions to interact without the fear of one's culture being imposed upon them by others.
   - √ Federal system will hinder easier economic transaction between two different regions that have distinct types of resources.
   - √ A federal system will ensure that the powers of those at the centre will remain limited.

3. Based on the first few articles of Belgian constitution – given below – explain how federalism is visualised in that country. Try and write a similar Article for the Constitution of India.

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

Article 1 : Belgium is a Federal State made up of communities and regions.
Article 2 : Belgium is made up of three communities: The French Community, the Flemish Community and the German Community.
Article 3 : Belgium is made up of three regions: The Walloon region, the Flemish region and the Brussels region.
Article 4 : Belgium has four linguistic regions: The French-speaking region, the Dutch-speaking region, the bilingual region of Brussels Capital and the German-speaking region. Each «commune» (county borough) of the Kingdom is part of one of these linguistic regions. ……..
Article 5 : The Walloon region is made up of the following provinces: The Walloon Brabant, Hainault, Liege, Luxemburg and Namur. The Flemish region is made up of the following provinces: Antwerp, the Flemish Brabant, West Flanders, East Flanders and Limburg. ……

4. Imagine that you were to rewrite the provisions regarding federalism. Write an essay of not more than 300 words making your suggestions about:
   a. division of powers among the centre and the States,
   b. distribution of financial resources,
   c. methods of resolving inter-State disputes and
   d. appointment of Governors

5. Which of the following should be the basis for formation of a State? Why?
   a. Common Language
   b. Common economic interests
   c. Common religion
   d. Administrative convenience

6. Majority of people from the States of north India – Rajasthan, Madhya Pradesh, Uttar Pradesh, Bihar—speak Hindi. If all these States are combined to form one State, would it be in tune with the idea of federalism? Give arguments.

7. List four features of the Indian Constitution that give greater power to the central government than the State government.

8. Why are many States unhappy about the role of the Governor?

9. President's rule can be imposed in a State if the government is not being run according to the provisions of the Constitution. State whether any of the following conditions are a fit case for imposition of President's rule in the State. Give reasons.
   - √ two members of the State legislative assembly belonging to the main opposition party have been killed by criminals and the opposition is demanding dismissal of the State government.
   - √ Kidnapping of young children for ransom is on rise. The number of crimes against women are increasing.
   - √ No political party has secured majority in the recent elections of the State Legislative Assembly. It is feared that some MLAs from the other parties may be lured to support a political party in return for money.
   - √ Different political parties are ruling in the State and at the centre and they are bitter opponents of each other.
   - √ More than 2000 people have been killed in the communal riots.
   - √ In the water dispute between the two States, one State government refused to follow the decision of the Supreme Court.

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

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

Chapter Eight

LOCAL GOVERNMENTS

Introduction

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

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

Why Local Governments?

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

*There is another story of yet another woman achiever. She was the President (*Sarpanch*) of a Gram Panchayat of Vengaivasal village in Tamil Nadu. In 1997, the Tamil Nadu government allotted two hectares of land to 71 government employees. This piece of land fell within the vicinity of this Gram Panchayat. On the instructions of higher authorities the District Collector of Kancheepuram directed the President of the Gram Panchayat to pass a resolution endorsing the allotment of the said land for the purpose already decided. The President and the Gram Panchayat refused to pass such an order and the Collector issued an order to acquire the land. The Gram Panchayat filed a writ petition in the Madras High Court against the Collector's action. The single judge bench of the High Court upheld the Collector's order and ruled that there was no need to take the Panchayat's consent. The Panchayat appealed to the Division bench against the single judge's order. In its order, the Division Bench reversed the order of the single judge. The judges held that the government order amounted to not only infringement of the powers of the Panchayats but a gross violation of the constitutional status of the Panchayats.* —, Panchayati Raj Update, Vol. 12: Vol. XII, June 2005

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

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

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

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

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

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

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

Check your progress

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

Growth of Local Government in India

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

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

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

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

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

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

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

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

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

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

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

Ananthasayanam Ayyangar
CAD, Vol. VII, p. 428

Local Governments in Independent India

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

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

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

Check your progress

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

73RD AND 74TH AMENDMENTS

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

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

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

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

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

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

73rd Amendment

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

Three Tier Structure

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

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

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

Elections

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

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

Reservations

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

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

We read in the chapter on Elections that the bill for reservations for women in the Assemblies and in the Parliament could not be passed. How come women's reservations in local bodies were accepted so easily?

Transfer of Subjects

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

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

Some subjects listed in the eleventh schedule

1. Agriculture, ...
3. Minor irrigation, water management and watershed development.

....

8. Small scale industries, including food processing industries.

.....

10. Rural housing.
11. Drinking water.

.....

13. Roads, culverts,....
14. Rural electrification,....

.....

16. Poverty alleviation programme.
17. Education, including primary and secondary schools.
18. Technical training and vocational education.
19. Adult and non-formal education.
20. Libraries.
21. Cultural activities.
22. Markets and fairs.
23. Health and sanitation, including hospitals, primary health centres and dispensaries.
24. Family welfare.
25. Women and child development.
26. Social welfare, ...
27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes.
28. Public distribution system.

.....

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

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

State Election Commissioners

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

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

State Finance Commission

The State government is also required to appoint a State Finance Commission once in five years. This Commission would examine the financial position of the local governments in the State. It would also review the distribution of revenues between the State and local governments on the one hand and between rural and urban local governments on the other. This innovation ensures that allocation of funds to the rural local

vill not be a political matter.

Activity

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

74th Amendment

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

What is an urban area? It is very easy to identify a big city like Mumbai or Kolkata, but it is not so easy to say this about some very small urban areas that are somewhere between a village and a town. The Census of India defines an urban area as having: (i) a minimum population of 5000; (ii) at least 75 per cent of male working population engaged in non-agricultural occupations and (iii) a density of population of at least 400 persons per sq. km. As per the 2001 census, nearly 28% of India's population lives in urban areas.

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

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

Implementation of 73rd and 74th Amendments

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

READ AN IMAGE

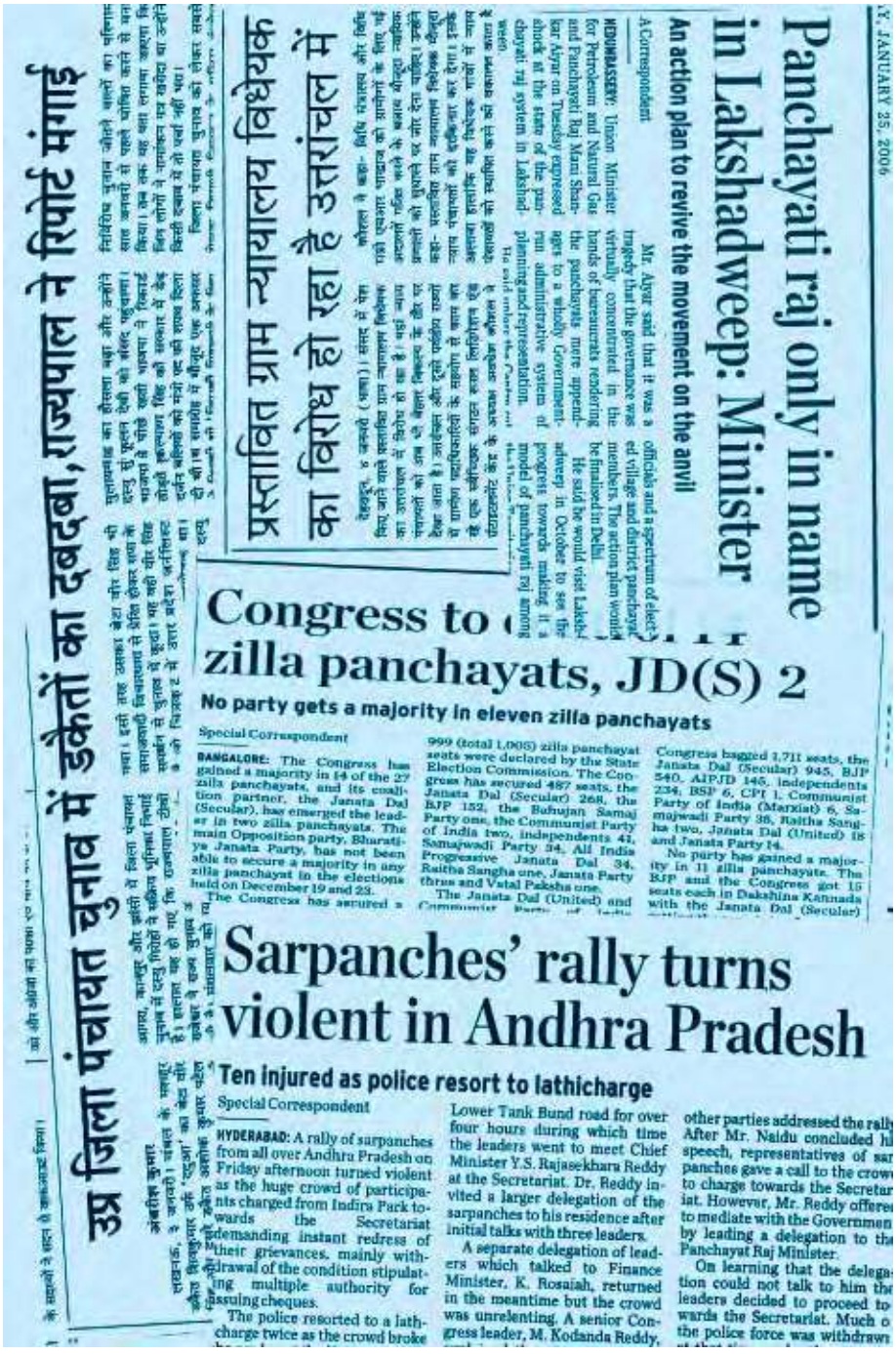
This flag is a symbol of the expectations of the people about local governments. People don't want only formal laws. They want genuine implementation of those laws. Write briefly what you think about this slogan — We are the government here in the village!

so far.

Today there are nearly 500 Zilla Panchayats, about 6,000 block or intermediary Panchayats, and 2,50,000 Gram Panchayats in rural India and over 100 city Corporations, 1400 town Municipalities and over 2000 Nagar Panchayats in urban India. More than 32 lakh members are elected to these bodies every five years. Of these, at least 10 lakhs are women. In the State Assemblies and Parliament put together we have less than 5000 elected representatives. With local bodies, the number of elected representatives has increased significantly.

The 73rd and 74th amendments have created uniformity in the structures of Panchayati Raj and Nagarpalika institutions across the country. The presence of these local institutions is by itself a significant achievement and would create an atmosphere and platform for people's participation in government.

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



उग्र जिला पंचायत चुनाव में डकैतों का दबदबा, राज्यपाल ने रिपोर्ट मंगाई

प्रस्तावित ग्राम न्यायालय विधेयक का विरोध हो रहा है उत्तरांचल में

Panchayati raj only in name in Lakshadweep: Minister

An action plan to revive the movement on the anvil

A Correspondent

KAVARATTI, JANUARY 25, 2006

Congress to ... zilla panchayats, JD(S) 2

No party gets a majority in eleven zilla panchayats

Special Correspondent

Sarpanches' rally turns violent in Andhra Pradesh

Ten injured as police resort to lathicharge

Special Correspondent

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

READ AN IMAGE

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

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

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

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

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

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

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

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

Conclusion

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

Exercises

1. Constitution of India visualised village panchayats as units of self-government. Think over the situation described in the following statements and explain how do these situations strengthen or weaken the panchayats in becoming units of self-government.
   a. Government of a State has allowed a big company to establish a huge steel plant. Many villages would be adversely affected by the steel plant. Gram Sabha of one of the affected villages passed a resolution that before establishing any big industries in the region, village people must be consulted and their grievances should be redressed.
   b. The government has decided that 20 % of all its expenditure would be done through the panchayats.
   c. A village panchayat kept on demanding funds for a building for village school, the government officials turned down their proposal saying that funds are allocated for certain other schemes and cannot be spent otherwise.
   d. The government divided a village Dungarpur into two and made a part of village Jamuna and Sohana. Now village Dungarpur has ceased to exist in government's books.
   e. A village panchayat observed that water sources of their region are depleting fast. They decided to mobilise village youth to do some voluntary work and revive the old village ponds and wells.

2. Suppose you are entrusted to evolve a local government plan of a State, what powers would you endow to the village panchayats to function as units of self-government? Mention any five powers and the justification in two lines for each of them for giving those powers.

3. What are the provisions for the reservations for the socially disadvantaged groups as per the 73rd amendment? Explain how these provisions have changed the profile of the leadership at the village level.

4. What were the main differences between the local governments before 73rd amendment and after that amendment?

5. Read the following conversation. Write in two hundred words your opinion about the issues raised in this conversation.

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

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

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

6. Read the provisions of the 73rd Amendment. Which of the following concerns does this amendment address?
   a. Fear of replacement makes representatives accountable to the people.
   b. The dominant castes and feudal landlords dominate the local bodies.
   c. Rural illiteracy is very high. Illiterate people cannot take decisions about the development of the village.
   d. To be effective the village panchayats need resources and powers to make plans for the village development.

7. The following are different justifications given in favour of local government. Give them ranking and explain why you attach greater significance to a particular rationale than the others. According to you, on which of these rationales the decision of the Gram panchayat of Vengaivasal village was based? How?
   a. Government can complete the projects with lesser cost with the involvement of the local community.
   b. The development plans made by the local people will have greater acceptability than those made by the government officers.
   c. People know their area, needs problems and priorities. By collective participation they should discuss and take decisions about their life.
   d. It is difficult for the common people to contact their representatives of the State or the national legislature.

8. Which of the following according to you involve decentralisation? Why are other options not sufficient for decentralisation?
   a. To hold election of the Gram Panchayat.
   b. Decision by the villagers themselves about what policies and programmes are useful for the village.

c. Power to call meeting of Gram Sabha.

d. A Gram Panchayat receiving the report from the Block Development Officer about the progress of a project started by the State government.

9. A student of Delhi University, Raghavendra Parpanna, wanted to study the role of decentralisation in decision making about primary education. He asked some questions to the villagers. These questions are given below. If you were among those villagers, what answer would you give to each of these questions?

A meeting of the Gram Sabha is to be called to discuss what steps should be taken to ensure that every child of the village goes to the school.

a. How would you decide the suitable day for the meeting? Think who would be able to attend / not attend the meeting because of your choice.
   (i) A day specified by the BDO or the collector
   (ii) Day of the village haat
   (iii) Sunday
   (iv) Naag panchami / sankranti

b. What is a suitable venue for the meeting? Why?
   (i) Venue suggested by the circular of the district collector.
   (ii) Religious place in the village.
   (iii) Dalit Mohalla.
   (iv) Upper caste Tola
   (v) Village school

c. In the Gram Sabha meeting firstly a circular sent by the district collector was read. It suggested what steps should be taken to organise an education rally and what should be its route. The meeting did not discuss about the children who never come to school or about girls' education, or the condition of the school building and the timing of the school. No women teacher attended the meeting as it was held on Sunday.

What do you think about these proceedings as an instance of people's participation?

d. Imagine your class as the Gram Sabha. Discuss the agenda of the meeting and suggest some steps to realise the goal.

Chapter Nine

CONSTITUTION AS A LIVING DOCUMENT

INTRODUCTION

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

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

Are Constitutions Static?

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

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

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

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

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

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

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

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

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

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

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

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

Check your progress

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

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

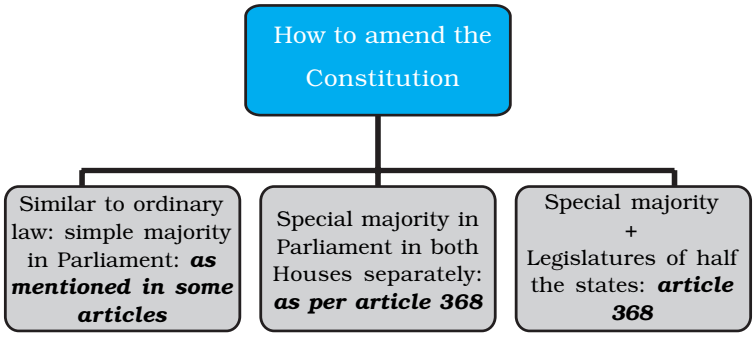
How to Amend the Constitution?

Article 368:
...Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

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

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

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



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

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

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

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

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

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

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

Special Majority

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

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

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

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

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

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

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

"Those who are dissatisfied with the constitution need only two-third majority. If they are not able to obtain even that their dissatisfaction with the constitution cannot be deemed to be shared by the general public."

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

Dr. Ambedkar
CAD, Vol. XI, p. 976.

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

Ratification by States

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

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

Check your progress

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

Subject of amendment	Special majority	Ratification by States
Citizenship clause		
Right to freedom of religion		
Changes in the Union List		
Changes in State boundaries		
Provision regarding Election Commission		

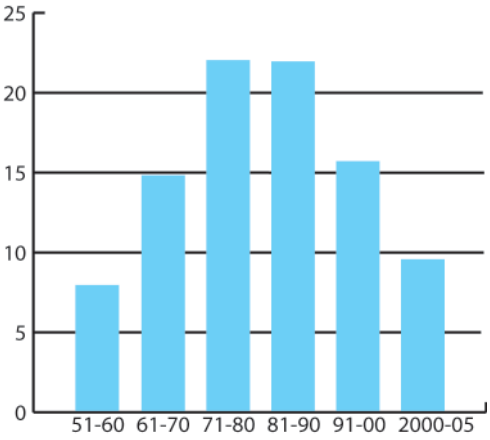
Why Have There Been so Many Amendments?

On 26 January 2006, the Constitution of India completed 56 years of its existence. In these fifty-six years, it was amended 93 times. Given the relatively difficult method of amending the Constitution, the number of amendments appears quite high. Let us try to find out how it is that so many amendments took place and what it means.

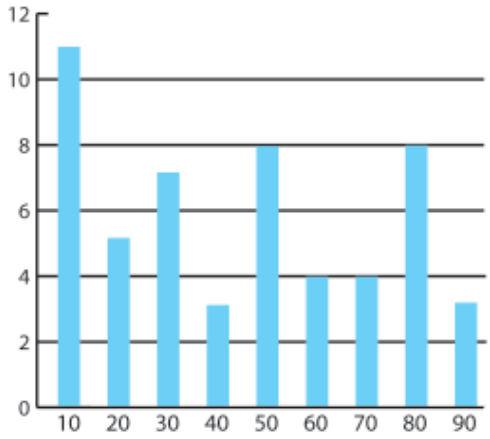
Let us first look at the brief history of the amendments: look carefully at the graphs below. The same information is presented in two different ways. The first graph depicts the number of constitution amendments made every ten years; the bar indicates the number of amendments in that period. The second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

Is there something wrong with our Constitution or us? I think 90 amendments in fifty years is too much!

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



Graph 1
Amendments per decade



Graph 2
Years taken for every ten amendments

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

Contents of Amendments made so far

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

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

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

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

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

Differing Interpretations

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

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

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

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

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

Amendments through Political Consensus

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

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

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

Controversial Amendments

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

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

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

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

Activity

Find out the amendment about the right to education. What do you think is the importance of this amendment?

Basic Structure and Evolution of the Constitution

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

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

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

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

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

Review of the Constitution

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

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

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

Check your progress

State whether the following statements are correct or not:

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

Constitution as a Living Document

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

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

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

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

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

Contribution of the Judiciary

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

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

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

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

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

Maturity of the Political Leadership

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

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

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

Even within the Constituent Assembly, there were some members who felt that this Constitution was not suited to the Indian situation: "The ideals on which this ....constitution is framed have no manifest relation to the spirit of India. ....this constitution ...would not prove suitable and would break down soon after being brought into operation." ——
Lakshminarayan Sahu, *CAD*, Vol. XI, p. 613

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

Conclusion

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

than the others. They will also always fight over what constitutes the welfare of the people. But in the last instance, the final authority lies with the people. People, their freedoms and their well-being constitute the purpose of democracy and also the outcome of democratic politics.

Exercises

1. Choose the correct statement from the following.
   A constitution needs to be amended from time to time because,
   - √ Circumstances change and require suitable changes in the constitution.
   - √ A document written at one point of time becomes outdated after some time.
   - √ Every generation should have a constitution of its own liking.
   - √ It must reflect the philosophy of the existing government.

2. Write True / False against the following statements.
   a. The President cannot send back an amendment bill for reconsideration of the Parliament.
   b. Elected representatives alone have the power to amend the Constitution.
   c. The Judiciary cannot initiate the process of constitutional amendment but can effectively change the Constitution by interpreting it differently.
   d. The Parliament can amend any section of the Constitution.

3. Which of the following are involved in the amendment of the Indian Constitution? In what way are they involved?
   a. Voters
   b. President of India
   c. State Legislatures
   d. Parliament
   e. Governors
   f. Judiciary

4. You have read in this chapter that the 42nd amendment was one of the most controversial amendments so far. Which of the following were the reasons for this controversy?
   a. It was made during national emergency, and the declaration of that emergency was itself controversial.
   b. It was made without the support of special majority.
   c. It was made without ratification by State legislatures.
   d. It contained provisions, which were controversial.

5. Which of the following is not a reasonable explanation of the conflict between the legislature and the judiciary over different amendments?
   a. Different interpretations of the Constitution are possible.
   b. In a democracy, debates and differences are natural.
   c. Constitution has given higher importance to certain rules and principles and also allowed for amendment by special majority.
   d. Legislature cannot be entrusted to protect the rights of the citizens.
   e. Judiciary can only decide the constitutionality of a particular law; cannot resolve political debates about its need.

6. Identify the correct statements about the theory of basic structure. Correct the incorrect statements.
   a. Constitution specifies the basic tenets.
   b. Legislature can amend all parts of the Constitution except the basic structure.
   c. Judiciary has defined which aspects of the Constitution can be termed as the basic structure and which cannot.
   d. This theory found its first expression in the Kesavananda Bharati case and has been discussed in subsequent judgments.
   e. This theory has increased the powers of the judiciary and has come to be accepted by different political parties and the government.

7. From the information that many amendments were made during 2000-2003, which of the following conclusions would you draw?
   a. Judiciary did not interfere in the amendments made during this period.
   b. One political party had a strong majority during this period.
   c. There was strong pressure from the pubic in favour of certain amendments.

d. There were no real differences among the parties during this time.
e. The amendments were of a non-controversial nature and parties had an agreement on the subject of amendments.

8. Explain the reason for requiring special majority for amending the Constitution.

9. Many amendments to the Constitution of India have been made due to different interpretations upheld by the Judiciary and the Parliament. Explain with examples.

10. If amending power is with the elected representatives, judiciary should NOT have the power to decide the validity of amendments. Do you agree? Give your reasons in 100 words.

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

8. Why is it said that the making of the Indian Constitution was unrepresentative? Does that make the Constitution unrepresentative? Give reasons for your answer.

9. One of the limitations of the Constitution of India is that it does not adequately attend to gender justice. What evidence can you give to substantiate this charge? If you were writing the Constitution today, what provisions would you recommend for remedying this limitation?

10. Do you agree with the statement that "it is not clear why in a poor developing country, certain basic socio-economic rights were relegated to the section on Directive Principles rather than made an integral feature of our fundamental rights"? Give reasons for your answer. What do you think are the possible reasons for putting socio-economic rights in the section of Directive Principles?

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d. that state will recognise rights of religious groups
e. that state will have limited powers to intervene in affairs of religions

6. Match the following.

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

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

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

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

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

2. Which of the options given below cannot be used to complete the following statement?
   Democratic countries need a constitution to
   i. Check the power of the government.
   ii. Protect minorities from majority.
   iii. Bring independence from colonial rule.
   iv. Ensure that a long-term vision is not lost by momentary passions.
   v. Bring social change in peaceful manner.

3. The following are different positions about reading and understanding Constituent Assembly debates.
   i. Which of these statements argues that Constituent Assembly debates are relevant even today? Which statement says that they are not relevant?
   ii. With which of these positions do you agree and why?
      a. Common people are too busy in earning livelihood and meeting different pressures of life. They can't understand the legal language of these debates.
      b. The conditions and challenges today are different from the time when the Constitution was made. To read the ideas of Constitution makers and use them for our new times is trying to bring past in the present
      c. Our ways of understanding the world and the present challenges have not changed totally. Constituent Assembly debates can provide us reasons why certain practises are important. In a period when constitutional practises are being challenged, not knowing the reasons can destroy them.

4. Explain the difference between the Indian Constitution and western ideas in the light of
   a. Understanding of secularism.
   b. Articles 370 and 371.
   c. Affirmative action.
   d. Universal adult franchise.

5. Which of the following principles of secularism are adopted in the Constitution of India?
   a. that state will have nothing to do with religion
   b. that state will have close relation with religion
   c. that state can discriminate among religions

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

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

Exercises

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

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

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

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

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

Conclusion

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

> "……we wanted the music of Veena or Sitar, but here we have the music of an English band. That was because our constitution makers were educated that way. …… ……That is exactly the kind of Constitution Mahatma Gandhi did not want and did not envisage." K. Hanumanthaiya, *CAD*, Vol. XI, p. 616.

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

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

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

Limitations

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

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

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

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

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

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

How far is this charge true?

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

If something of value is traded off for mere self-interest, then we naturally have compromised in the bad sense. However, if one value is partially traded off for another value, especially in an open process of free deliberation among equals, then the compromise arrived in this manner can hardly be objected to. We may lament that we could not have everything but to secure a bit of all things important cannot be morally blameworthy. Besides, a commitment to the idea that decisions on the most important issues must be arrived at consensually rather than by majority vote is equally morally commendable.

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

Criticisms

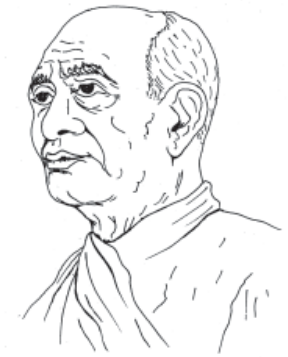
The Indian Constitution can be subjected to many criticisms of which three may be briefly mentioned: first, that it is unwieldy; second, that it is unrepresentative and third, that it is alien to our conditions.

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

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

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

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



Sardar Patel
CAD, Vol. VIII, p. 272.

Procedural Achievements

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

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

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

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

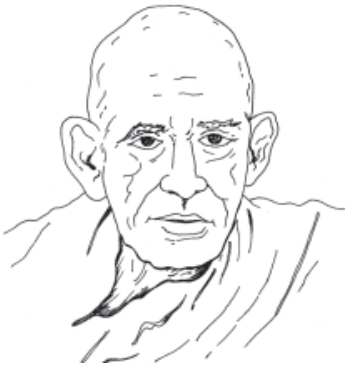
Although the Constitution did not originally envisage this, India is now a multi-lingual federation. Each major linguistic group is politically recognised and all are treated as equals. Thus, the democratic and linguistic federalism of India has managed to combine claims to unity with claims to cultural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

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

National identity

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

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



Aladi Krishnaswami Ayyar
CAD, Vol. XI, p. 835.

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

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

Federalism

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

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

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

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

Universal franchise

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

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

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

- *Rights of Religious Groups*

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

- *State's Power of Intervention*

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

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

Secularism

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

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

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

Have they started teaching us the Political Theory course?

Respect for diversity and minority rights

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

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

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

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

Check your progress

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

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

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

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

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

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

Individual freedom

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

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

Social Justice

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

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

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

What is the Political Philosophy of our Constitution?

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

Read a Cartoon

Shankar. Copyright: Children's Book Trust.

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

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

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

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

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

Activity

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

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

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

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

Constitution as Means of Democratic Transformation

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

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

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

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

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

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

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

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

Article 9 of the Japanese constitution states —

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

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

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

What is Meant by Philosophy of the Constitution?

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

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

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

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

Chapter Ten

THE PHILOSOPHY OF THE CONSTITUTION

INTRODUCTION

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

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

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