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Introducing the Constitution and Indian Constitution

Part 1

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Topics to be Discussed

Constitution: Definition

Works of the Constitution: Fact Sheet

What do we mean by the Constitution?

Age of Modern Constitutions

Classifying the Constitution

Works of the Constitution: Detailed Discussion

Rule of Law

Constitutionalism

Defining the Constitution

1. A constitution has become an imperative, necessary requirement of a nation-state, institution, or a political community in the modern period.
2. In a narrow sense, a constitution is the **supreme authoritative document** or **highest law of the land** in a **political community** that could be written, unwritten, and it is followed, accepted, by people, citizens, institutions, organisations operating in that political community.
3. It develops the necessary mutual trust and a sense of cooperation among the differing individuals living or operating in a political community.
4. **Narrowly, the major aim of the constitution is to codify the constitutional provisions** in the polity.
5. In **broad sense**, a constitution seeks to Establish
 1. the duties, powers, and functions of the various institutions of government,
 2. Regulate the relationships between them, and
 3. define the relationship between the state and the individual

THINK
WHY?

Why is the constitution called an official document?

Why is the constitution considered the supreme law of the land/nation?

Why is the constitution found in the political community rather than in a society?

Works of the Constitution

Decides the form of the government and puts limits on its authority.

The constitution determines and outlines the separation and division of power between institutions of state and organs of the government.

It provides a balanced framework of institutions to restrain centralization of state-power detrimental to common good.

The democratic constitution divides the power of the state into the legislature, executive, judiciary, independent constitutional bodies thereby restraining the possibility of concentration of power under a small group or individual that could destroy the constitution for the fulfilment of their whimsical or virulent purposes.

The Constitution establishes relations between citizens, individuals, communities, groups, and the State.

The Constitution sets up the rights with reciprocal obligations and duties.

The Constitution is the fundamental/highest and moral and authoritative law of the land.

The Constitution sets up the constitutional-moral aims, goals, and end-destination of the State/polity towards which it must orient itself.

The constitution establishes the basis of administration of the country outlining the basic structure on which polity shall get constructed.

What do we mean by the Constitution?

1. Behaviourally, many kinds of constitutions are present in a political community that govern organisations and institutions such as universities, hospitals, training academies, communities, social groups, and political parties.
2. However, here by the term constitution we are concerned with the **principle, supreme authoritative document** at the **level of nation-state** whose basic structure, rules, norms, laws, normative values determine the functioning, and working of the political system or polity.

Age of the Modern Constitutions

The era of 'modern constitution' began from the late 18th century.

The Treaty of Magna Carta (1215) is considered as the first attempt to frame/draft a constitution. It also enjoys the **status of the first constitution of the world**.

But the usage of the term 'era of the modern constitution' is associated with the coming into force of those constitutions that were codified in a single document, like the US Constitution of 1787 and the 'French Declaration of the Rights of Man and the Citizen in 1789.

The **making of constitution marks a rupture moment**. It is seen as a hallmark of change and difference in the polity formation. It **reflects extraordinary circumstances** such as war, disturbances, or national independence.

Classification of the Constitution

- **Form**
- **Change: Rigid or Flexible**
- **Effect: Whether the constitution is effective, or nominal in nature.**
- **Content: This deals with the State Apparatus that the constitution establishes.**
 - **Republican or Monarchical**
 - **Federal or Unitary**
 - **Parliamentary or Presidential**
 - **Pluralist versus Monoplist**
 - **Social Transformation or Normative Goals**

Form of the Constitution

The constitution is divided based on whether it is written or unwritten.

In the words of Andrew Heywood, this distinction is primarily concerned with the “status of formal rules and procedures present in the constitution” (Heywood 2013) and its impact on state authority.

Written constitutions are also known as **made/build/created constitutions** since they are usually the result of a legal contract or drafting process by a constituent assembly at a particular point of time in history like the constitution of India or the constitution of the United States of America.

Unwritten constitutions are also known as **developed constitutions** as they gradually develop through time (past) based on different customs, traditions, and conventions. Usually the constitution of England, Israel, Bhutan, Oman is put in the category of unwritten constitutions.

However, this division is not beneficial for understanding constitutions in the 21st century.

It is important to note that **no constitution is completely written**.

Instead of following the written/unwritten dichotomy, it is **better to inquire to what extent the constitutional provisions have been codified in a single document known as the constitution of the land**.

Form's implication for Polity

In the **nation-states where the constitution has not been codified extensively in a single document** like in England, the Parliament or Sovereign has power to implement, interpret, and formulate constitutional provisions in a **discretionary manner**.

At times, elements of '**elected dictatorship**' have also been found in the functioning of Parliament or by Head of the State in this type of political community.

With this behavioural aspect in the backdrop, authorities on constitution refer to the parliamentary supremacy in England as an example of elected dictatorship.

Contrastingly, in some nation-states constitutional provisions are **codified under a single document** known as the constitution of that country/nation state like in India.

This codified document establishes a hierarchy of laws. The constitution is highest in the hierarchy of laws in that political community.

Here instead of establishing the supremacy of any institution (Parliament/Sovereign/Crown/President) or custom, **the constitution is supreme and constitutional provisions are entrenched making it difficult to abolish or amend them arbitrarily.** These provisions are justiciable in the court of law.

In comparison to **Britain**, the **Constitution of India** places parliamentary supremacy within the ambit of the Constitution. Unlike the parliament in England, the **Indian parliament does not enjoy the same kind of plenary powers.**

Article 13 (laws inconsistent with and derogatory to the Fundamental Rights), Article 32 (remedies for the enforcement of the rights conferred by this Part), Article 142 (supreme court's power to do complete justice), balanced power sharing between the institutions of the state or organs of the government forms the basis of rule of law in Indian polity and limit the power of each organ.

Change: Rigid or Flexible

- **This deals with the ease with which institutions or representatives in power could change/amend the constitution.**
- It is not solely dependent on formality of the constitution's procedures and rules.
- The constitutions of the United States and France were formulated in the same period, yet in comparison to the former, France, because of the easy amendment procedure, has seen at least seventeen constitutions so far.
- **Amendment procedures could be complex/difficult, easy or a mixture of both.**
- Politics in Australia, Denmark, Ireland, Spain follow simple majority procedure to amend the constitution. These politics with Switzerland use referendum, while Germany requires special majority and USA requires special majority and two thirds majority in both houses of the congress and ratification by three-quarters of the States, respectively.

Change in the Indian Constitution

Indian Constitution can be kept in a mixed category.

- i. Some provisions of the constitution can be changed by passage of law through ordinary procedure by the Parliament of India.
- ii. However, according to Article 368 (Power of Parliament to amend the Constitution and procedure therefore) of the Constitution of India, while some amendments require special majority in the two houses of the Parliament, amendments affecting the federal structure have an added stipulation.
- iii. All such amendments must be ratified by more than half of the state legislatures.

Effect: Whether the constitution is effective, or nominal in nature

An Effective Constitution

- i. **Conversely, a constitution is considered effective in a political community where the constitutional provisions are effectively implemented following the spirit of constitutionalism.** For example, the polities in India, Jordan, South Korea, the United States of America etcetera.
- ii. In the polity of countries like India, constitutional provisions have been codified with the aim of preventing the state from becoming autocratic or arbitrary, to establish a limited constitutional state.
- iii. Balanced distribution of state power between the organs of the government is ensured to prevent concentration of authority under an organ of the government which is detrimental to the common good.
- iv. Efforts have been put to protect the constitution by the formation of an independent judiciary which performs the task of being the custodian of the constitution that has constituent power to do complete justice.
- v. Supreme court has derived this power through judicial pronouncements. It was not explicitly mentioned by the constituent assembly of India while formulating clause of power of Supreme Court to do complete justice (Article 142).
- vi. **In other words, this deals with relation between constitutional rules and principles on the one hand and the practice of the government on the other. An effective constitution requires both.**

An Ineffective Constitution

- The ineffectiveness or effectiveness of the constitution is related to the gap/void between the constitutional provisions and the functioning of the state in the polity.
- It is possible that a political community has a constitution but lacks constitutionalism and rule of law like former Soviet Russia (U.S.S.R), contemporary China, Saudi Arabia, Myanmar etcetera.
- In fact, the constitution is virtually ineffective in such polities since there is no constitutional control over the coercive, arbitrary power of the State.

Content: State Apparatus that the constitution establishes

- **Republic**
 - In a Republic, the Head of the State is elected and all other positions under the State are open for fair competition based on equal opportunity for public employment and occupation. India being a republic means following:
 - In the polity, the people are sovereign, and the elected person occupies the position of the head of the state.
 - Occupation of all offices under state control is governed by the principle of equality of opportunity for all citizens.
 - Every office under the state has ensured the equality-based representation of the people.
 - A republic can take presidential, parliamentary, or semi-presidential form.
- **Monarchy**
 - This political system is based on “undivided sovereignty” or “single person’s rule.”
 - The supreme authority is vested in the monarch.
 - She/her acts as the head of state and is dynastically appointed or hereditarily.
 - Modern and Traditional Monarchies: Modern monarchies are different from traditional monarchies; the former usually operate under a constitution and the monarch is a nominal head. Despite this in some monarchies the monarch retains immense power.

Federal or Unitary

It deals with the nature of power sharing that the constitution sets up between various levels of the government.

The primary question here is whether the constitution divides power among two or more levels of the government or concentrates sovereignty in a single national body.

Unitary System

Unlike the federal political system, the sovereign power is vested in a single-national institution in a unitary political system like Parliament in the United Kingdom.

Sovereignty and state power are concentrated at one level that possesses theoretically exclusive or unchallengeable legislative authority.

Any kind of power granted to lower/peripheral levels exists at the pleasure of the central authority.

The lower units are mere administrative appendages of the national government which can transform, change, or abolish the former on mere will.

Local levels do not share sovereignty with the national government.

Local government and developed assemblies are the two primary forms of peripheral authorities existing in a unitary system.

Federal System

In a federal system the state sovereignty and power is shared and divided between different levels of the government (Union and state level).

In a federal system the power is distributed within a state through legal and political structures.

Politically it requires the existence of two distinct levels of government that have an independent base and jurisdiction.

No level of government is politically or legally subordinate to the other.

There is a difference between administrative and dual federalism as well. Many reasons are responsible for the development of a federal system of government (discussed later in chapter on federalism).

Essential Features: Presence of two relatively autonomous levels of government, written constitution, neutral constitutional arbiter, linking institutions in the polity, independent fiscal basis are considered as fundamental aspects of a federal polity.

Federal System in India

Authorities on federalism have used **multiple names** to refer to the federal system in India.

K C Wheare addresses the Indian polity by the name of **quasi-federal/semi-federal**.

For **Ivor Jennings**, another authority on federalism, Indian federalism is a 'federalism with strong centralizing tendencies.'

Interpreting the provisions of constitution as a harmonious whole focussed on maintaining unity through cooperation between Union and states for pursuing the goal of social revolution, **Granville Austin categorizes Indian federalism as a 'co-operative federalism.'**

For **W. H. Morris Jones**, Indian federalism emphasizes on **bargaining federalism** by the presence of implicit tactics of relative power positions between units in the federal polity of India and bargaining between them.

Why Quasi Federal?

What makes India Federal: According to him, the presence of a

- Written constitution,
- Division of powers between the Union and State governments,
- Rigid Amendment Procedure,
- Neutral and independent federal Supreme Court (Neutral Constitutional Arbiter) etcetera provide federal character to Indian polity.

Why Quasi Federal (Brief): However,

- No separate constitution of states,
- Tilt towards the Union in the distribution of powers schema,
- Legal authority vested in the Union to override and exclude the area of the state government by law,
- The appointment of governors by the president,
- Financial dependence of states on the Union, and
- President's rule favour the Union in comparison to states in the federal structure of Indian polity.

Parliamentary or Presidential

It deals with relation between legislative assembly (legislature) and the executive power (Executive) in the polity.

Parliamentary: In a parliamentary form of government, the polity/governmental apparatus is structured in such a manner that the executive is derived from the legislature/parliament and is made collectively responsible to it (essentially democratically elected house/popular chamber).

Presidential: The presidential system is based on separation between the two branches of government (legislature and executive) where each organ/unit functions independently of the other under the provision of strict separation of power. The executive is not derived from the legislature. It is based on the strict division of power from the legislature and works independently.



Doctrine of Separation of Power

- **Montesquieu** formulated the doctrine of separation of power between the organs of government in his book '**Esprit de Law**' in **1748**. According to Montesquieu, **the division of state power was the optimum method to secure individual liberty from the abuse of power through tyrannical centralization of authority.**
- **Separation of Powers among special organs of the State is necessary for the preservation of individual liberty**

Major features of Doctrine of Separation of Power

1. Instead of conceptualizing the state as a static, unified, single institution the doctrine of separation of power conceptualizes it as a collective of functionally differentiated institutions that form a unified whole.
2. The scope of work of each organ is kept independent/separate from the scope of work of the other body.
3. One body is not responsible to the other body.
4. All bodies are accountable to the constitution or law.
5. The possibility of encroachment between functionally separate work zones is controlled and restrained through institutional mechanisms.
6. Practically/behaviourally, examples of polity based on this doctrine is the polity of the United States of America.
7. Provision of judicial Review is also present.
8. However, considering the complex working style and enhanced workload over modern state-government, it is reasonable to claim that this theory cannot be put into practice.

Polities that are not or partially based on separation of power

- Some polities are not based on the doctrine of separation of power, or they are based on it only in a limited sense, such as Britain and India, respectively.
- In these polities the possibility of concentration of state authority and development of an autocratic regime under a single body is restrained by deriving executive from the legislature and making it accountable to it.
- Freedom of individuals is ensured by making the legislature accountable to the public through representational processes.
- The provision of judicial review keeps the functions of the legislature and the executive bound by constitutionalism.
- The separation of power between the judiciary and the legislature-executive (parliamentary executive) is present in the Indian polity.
- According to Article 50 of the Indian Constitution, the state shall take steps to separate the judiciary from the executive in matters pertaining to the public services.
- Indian constitution contains item-based division of power between Union and State government in the seventh schedule and article 246.

Pluralist versus Monopolist

- This is concerned with access of people to corridors of the state power.
- Does the constitution ensure democratic distribution of power in the society or its opposite?
- A **pluralist constitution** aims at democratic dispersal of power through ensuring participation of citizens in the polity.
 - It includes different procedures for democratic distribution of power such as public participation, adult suffrage, responsible executive and legislature, elected president, fundamental rights, and others.
- Contrarily, irresponsible harmful concentration of power is seen in the constitution promoting **monopolistic** tendencies.
 - Monopolistic constitutions aim at entrenching and sustaining the power of the state in a ruling party or supreme leader as witnessed in authoritarian and communist states like China, erstwhile USSR, and Hitler's Germany.
- The **Indian constitution establishes a pluralistic society** as compared to the constitution of China, North Korea, former Soviet Russia. It tries to fulfil this task through provision of equality based fundamental rights, directive principles of state policy, responsible executive, regulation of parliamentary procedures, fair and independent judiciary, and other institutional mechanisms.

Social Transformation or Normative Goals

- A constitution can also be seen from the **point of view of social orientation**.
- This deals with the **normative and valuable goals/ends that the constitution aims for and aspires to achieve**.
- It is usually **found in the constitutions that were codified in twentieth century**, or nation states that emerged against historical oppression and injustices like colonialism, apartheid, racism in South Africa and caste atrocities like India.
- **Progressive constitution** is expected to orient society and polity towards democratic ethos and values of constitutional morality such as rule of law, public interest, social justice, democratic politics, non-discriminatory conduct, and others.
- In absence of this a conservative constitution is created.
- **Indian Constitution** - For example, the Preamble of the Indian Constitution, Fundamental Rights, Directive Principles of Policy, and the authority to do complete justice granted by the Constituent Assembly to the Supreme Court through the Constitution orients the polity towards an egalitarian future. There are some other ways in which the Indian constitutions orients polity towards a democratic egalitarian future

Purpose, Work and Significance of the Constitution

1) Polity (State Apparatus) and Administration,

- a) State Formation,
- b) Constitutional Government and Society, and
- c) Power Distribution

2) Social Transformation,

3) Constitutional Identity

Polity (State Apparatus) and Governance

1. State Formation

a) Determining the edifice/basic structure of the polity

- I. The constitution is a set of those codified fundamental moral-legal provisions on the basis of which the state apparatus is constructed or brought into existence and governance is done in a political community.
- II. The constitution does this work by providing institutional structure to the state and the system of government.
- III. The Indian constitution does this work by setting up an elaborated constitutional framework of the State like parliamentary system of government, federal polity tilted towards centre, separation of power between institutions of State to ensure checks and balances, significant rights-based provisions to pursue equality in meaningful sense and constitutional values

b) Establishing a Constitutional (limited) government and Society, Power Relations

- I. There are many types of power-relationships at various levels in the society which sometimes lead to unjust relations, undemocratic inhumane practices, and anti-democratic majoritarian tendencies.
- II. In addition to this, political institutions present in modern political communities, such as the State are extremely powerful.
- III. **Limited Government:** In these situations, the constitution constitutes a constitutional Society and a constitutional government by limiting their powers.
- IV. Sometimes the state and the people also take unwise decisions under the influence of extremism, confusion, and bigotry as witnessed during the regime of Hitler in Germany.
- V. **Limited Society:** The constitution here protects the political community from the “whims and fancy” of the masses by putting reasonable restrictions on rights and functions of different units of the polity (both state and the individual).

c) Law and Power Distribution

- I. The constitution distributes powers among the organs of government—the legislature, the executive, and the judiciary—at various levels.
- II. It regulates the relations between these organs and demarcates their jurisdictional area to prevent concentration of state power detrimental to the common good.
- III. The Constitution stipulates
 - A. How will the government be formed?
 - B. Who will have the decision-making power?
 - C. Who will make laws for society?
 - D. Who or which institution shall make laws (The Constitution of India has made it clear that Parliament of India shall make most laws)?

Ways to create a limited society and government

By giving rights to individuals/Persons and Citizens (fundamental rights, constitutional remedies, special provisions),

By effectively limiting the possibility of arbitrary exercise of political power by the State. The constitution distributes or divides power among the organs of the state due to which each institution is subjected to reciprocal control and checks. This ensures the spirit of cooperation by reconciliation.

By establishing the moral-constitutional objective of the State and the Government (Fundamental Rights, Directive Principles of State Policy, Preamble).

Question
asked in
UPSC
Examination
(2020)

**Q: A Constitutional Government
by definition is a?**

- a) Government by Legislature
- b) Popular government
- c) Multi-party government
- d) Limited government

Practice Question

Q: Work/function of a democratic constitution is?

1. State Formation
2. Protecting rights of Individuals
3. Protecting Minority Communities
4. Protecting from Whims and Fancies of common masses

Choose the correct answer from below

- a) 1 and 2
- b) 1, 3 and 4
- c) 1, 2, and 3
- d) 1, 2, 3 and 4

Purpose, Work and Significance of the Constitution Continued...

2. Social Transformation

- a) Constitutions, especially, the constitutions of post-colonial societies (India, South Africa) give special transformative capacity to the government (state) so that,
 - a) It could address public aspirations such as ending of social discrimination, historical inequalities like untouchability, racial discrimination.
 - b) Fulfil objectives of social justice and public welfare, and,
 - c) Develop the basic/fundamental conditions or conducive environment necessary for creating a just society.
- b) **Granville Austin** has used the term **social revolution** for this transformative potential present in the Indian Constitution in his book 'Indian Constitution: Cornerstone of a Nation'. He has addressed **Fundamental Rights and Directive Principles of State Policy as conscience of the constitution**.
- c) The Indian Constitution orients the state to change the conditions that create injustice and inequality in the society through Directive Principles of State Policy and Fundamental Rights.
- d) Over the years, the honourable Supreme Court of India has started using the term **Transformative Constitutionalism** for this ability present in the Indian Constitution. This ability makes the Indian Constitution a living document oriented towards public welfare. The living basis of the Constitution is also displayed in the amendment process

Purpose, Work and Significance of the Constitution Continued...

3. Identity

- a) The constitution gives us a moral-constitutional identity as a mass of people (nation, country). It presents before the people and the political system their normative path and end/destination of the polity.
- b) The Preamble of the Indian Constitution gives a moral identity to India and the people of India.
- c) The constitution gives a political identity to the society by agreeing on the basic principles according to which the political community is governed.
- d) For example, the Preamble of the Indian Constitution unites all Indians as a people who will live in a society where justice (social, economic, political) prevail, freedom (idea, expression, belief, religion, and worship) shall be guaranteed, equality (prestige and opportunity) shall be ensured, and individual's dignity shall be upheld.
- e) Expressing public aspirations, the constitution provides a normative dimension to the society, which also gives it a moral identity.
- f) The constitution gives national identity to the society by accepting the historical traditions, collective identities, political relations of the society.
- g) As a guiding document, the constitution clearly sets the ideal, goal and direction before the state machinery and citizens, individuals, and groups as a society.

Practice Questions

Which among the following is not a work of the Constitution? (For Pre)

- a) Codifying the machinery of the government.
- b) Limiting the powers of the government.
- c) Bringing educated people to power through elections.
- d) Give a moral path to the nation.

Long Answer Type Questions (For Main Examination)

- Why is the constitution necessary? Is the working of a political community not possible without a constitution?
- In the Indian context, why was the emphasis laid on making a constitution in our freedom struggle?
- In a political community, what situations or issues does the constitution deal with that today all nation-states are seen to be governed by their own constitutions at the contemporary global scene?
- Do the constitutions of all the nation-states contain the same rules? Or do some constitutions govern with special provisions to address the specific demands emerging due to historical circumstances?
- How does the Constitution protect individuals and communities?
- Why is it important to formulate a balanced framework of institutions in the Constitution?
- Does the Indian Constitution give constitutional power to the government to establish justice? If yes, how?
- What special capability does the constitution provide to the state-government in a post-colonial society?

Write in 150 words

Rule of Law

- **Brief Background:** It is necessary to go through an important development in England in 1215 that forms the background rule of law and constitutionalism. The feudatories and individuals from other affluent classes in England revolted and protested the unpopular decisions and unjust rule of King John of England (reigned 1199–1226 AD). A demand arose during the growing anger against King John in England that there should be a system which must treat the King and the public equally. On **June 15th, 1215**, a historic treaty was signed between the king and the feudatories, which is known as **Magna Carta** (considered as the first constitution of the world). **Magna Carta formally made the law supreme in the polity.** The king had to work under this supreme law.

A V Dicey's
conceptualization
of Rule of Law

- In 1885, reflecting on the idea of supremacy of law, A. V. Dicey in his book "**An Introduction to the Study of the Law of the Constitution**" conceptualized this and limits set on governmental power through the idea of the "Rule of Law." It has three major parts

- **Supremacy of law**
- **Equality Before the Law**
- **Supremacy of the legal spirit as the basis of individual liberty**

Supremacy of Law

- No one is above the law.
- Law is the primary, above all and is equally applicable to all.
- There shall be no arbitrary power. It aims at preventing the discriminatory and arbitrary behaviour of the state and harmful concentration of state power. This principle limits the power of the state.
- Resultantly, the division of powers among the various organs of the state at various levels, provision for judicial review, etcetera is considered as one of the main instruments for maintaining the law's supremacy.
- An individual should be punished only for a breach of law.
- Articles 13, 32, 136, 142, to mention a few, of the Indian Constitution establish the supremacy of law in the Indian Constitution.

Equality Before the Law

- The law treats everyone equally and does not discriminate between individuals, citizens, persons, groups on the basis of their religion, caste, sex, place of birth, ethnicity, race, colour, language or any other.
- Everyone has equal access to justice. Everyone has equal opportunity to justice before the law. But this does not mean that the law cannot have special provisions to protect the oppressed, weak, or discriminated sections of the society.
- Law only differentiates on reasonable grounds for pursuing goals of substantive equality.
- Therefore, over time the idea of 'equal protection of laws' has also been included in 'equality before the law'.
- Article 14 of the Indian Constitution guarantees both equality before the law and equal protection of the law.

Supremacy of the legal spirit as the basis of individual liberty

- The liberty of the individual should be considered as the foundation of law.
- The person does not get the rights only from the constitution. Rather the principles of the constitution are themselves the result of juridical decisions by the court.
- In expanded form, the law or the constitution also respects the rights of the persons regardless of whether they are present or codified in the constitution or not.
- Such rights are considered natural.
- Constitutional theorists sometimes put these rights under the category of natural rights that an individual gets by birth.
- John Locke conceptualized the idea of natural rights.
- The right to life, liberty, and possession are natural rights under the Lockean framework.
- It includes freedom and civil rights of individuals as well.
- In the Indian context, the Supreme Court, while ruling on the right to privacy, argued that the Indian Constitution respects rights to life and personal liberty.

Question
asked in
UPSC
Examination
(2018)

Q: Which of the following would be considered as the main features of "rule of law"?

1. Delimitation of Powers
2. Equality before the law
3. Public Responsibility to the Government
4. Freedom and Civil Rights

Choose the correct answer from below

- a) 1 and 3 only,
- b) 2 and 4 only
- c) 1, 2, and 4 only
- d) 1, 2, 3, and 4

Constitutionalism

It is possible that in a political community, despite the constitution or the law, there could be a lack of constitutionalism.

Definition: Narrowly, constitutionalism means limiting the power of the state, or limited government, or regulating the unlimited power of the state through the constitution.

Broadly, constitutionalism is a set of institutional arrangements that reinforce each other.

Although constitutionalism is a product of British colonialism, which was originally brought to serve the interests of the British Empire, today, this idea is considered as an important basis of the legitimacy of the modern state.

Rule of law and constitutionalism are not possible without each other.

Major aspects that fall under constitutionalism

Rule of Law

Government by the
Constitution

Separation of Powers

Constitutional Remedies
and Judicial Review

Independent Judiciary

Sovereignty of the people

Democratic government
accountable to the
people

Military and Police under
Civilian Control over the
repressive institutions of
the state such as the
police or the army

Limited power of State to
suspend parts of the
Constitution or to curb
rights of the individual

Independent Media

Rule of Law

Briefly, according to A. V. Dicey, Rule of law means supremacy of law, equality before the law, predominance of legal spirit as the basis of individual liberty (law should be as per justice and not view-versa).

Its meaning has extended over time. It refers to the durable system of laws, norms, institutions, and commitments which delivers justice (impartial, fair, and accessible); accessible, fair, and open government; just law equally applicable to all; and accountability of both government and private sector.

Distribution of power among the organs of state-government, fair and independent judiciary to implement this principle, public participation is important for rule of law.

Government by the Constitution

In simple words, government refers to the set of processes by which society is governed.

Government is a distinct agency that frames rules and possess capacity to enforce them.

Government is also defined as the administrative apparatus of the modern state (the political institution that has highest authority in the society).

It has three organs, the legislature, the executive, and the judiciary.

The main function of the government is to bring the state into existence and to govern on behalf of the state in the society.

This idea of government as an agency is different from a government that is formed post elections by parties/party.

It refers to the structured system that continues to run the polity in an orderly manner, both in the presence of the government in the executive or in the absence or vacancy.

In this point, the major meaning of government is the executive (the government).

In India there is a parliamentary system of government, where the executive is derived from the legislature and is collectively responsible to the parliament (the democratically elected chamber).

Institutional arrangements are made to ensure that the executive maintains its responsible character.

Different channels have been ensured and developed over time to ensure this. For example, the executive should get a vote of confidence, or the demands of the grants made by the executive should be scrutinized by parliamentary committees, and others.

Executive's acts are made responsible and accountable by keeping a check on them by the judiciary.

The Indian Constitution creates a constitutional government through all these parameters.

Separation of Powers

It refers to the distribution of state power among the organs of government.

Montesquieu and Blackstone formulated the doctrine of separation of power.

Through this, the harmful concentration of state power is prevented to reduce the possibility of rise of autocratic power in the polity.

Each organ of the government is brought into a system of balanced power sharing through separation of power.

Limitations are placed on the power of the state by ensuring division and balanced sharing of power

Constitutional Remedies and Judicial Review

It is important for individuals to have the right to constitutional remedies against the exercise of arbitrary power on behalf of the state, especially executive, for constitutionalism.

Article 32 of the Indian constitution guarantees the right to constitutional remedies.

Constitutional control is imposed on the power of the state through the provision of judicial review.

Independent Judiciary

It refers to a judicial structure in which the constitution of the judiciary, the process of appointment and removal of judges, judicial authority/jurisdiction is not subordinate to other organs of the government.

The constitution of an independent judiciary depends on numerous factors such as the process of appointment and removal of judges, financial dependence of the judiciary on the executive, qualifications considered necessary to hold the office of judge, autonomous authority, and privileges etcetera.

An independent judiciary monitors the actions of other organs of the government and protects the rights of the individual.

For example, in the Indian context, the executive performs special functions in the appointment of the judges.

However, the Indian constitution empowers the legislature on matters concerning removal of judges from office. The authority of the legislature in judicial matters is not arbitrary. It cannot make any changes disadvantages to the position of judges post appointment during normal circumstances. Only a qualified person can be appointed to the post of judge.

In the past years, the judiciary has developed an autonomous collegium system to make appointments, transfers, and promotions.

Sovereignty of the people

It refers to the supreme sovereignty of the people in the polity.

The people are the source behind legitimate authority of the state.

The constitution situates and establishes the legitimacy of the state in public consent.

The government must work for the people and be accountable to them.

The people of India are the source of the Indian constitution according to the Preamble.

Democratic government accountable to the people

The formation of a responsible democratic government is a prime way of ensuring public sovereignty.

The democratic government is formed by making the executive transparent and accountable to the representative system and legislature.

Limited state and government subject to rights of the individual are enshrined in the Constitution.

One among many ways of limiting the state power is to make this power and the government respect the rights of the individual. This does not imply that the state cannot impose limits/reasonable restrictions on these rights in the public interest.

Military and Police under Civilian Control

The existence of the state is usually associated with coercion, that is, military or police power.

In the words of Max Weber, the state has the monopoly over violence in a political community.

This power is limited by making it accountable to the constitution, elected government, and the judiciary.

Limited power of State

Limited power of State to suspend parts of the Constitution or to curb rights of the individual.

Rights are claims of citizens and individuals against the state.

Fundamental and non-fundamental rights are different from each other. Fundamental rights refer to those rights against which the state cannot act arbitrarily.

But in the context of polity, fundamental rights are granted by the law and non-fundamental rights are the result of social agreement between parties or interest groups usually.

Since they are granted by law the state can put reasonable restrictions on them. This power to reasonably restrict the fundamental rights is intrinsic in nature.

However, it does not mean that the state can completely abrogate them.

Despite being non-absolute they are fundamental.

Independent Media

Independent media is the fourth pillar of democracy.

Independent media is necessary for mobilizing the people against non-constitutional activities committed by the state.

It helps in making the state power accountable.



Inputs for
next
chapter

There was neither the rule of law nor constitutionalism during British rule.

The British ruled arbitrarily.

The British rule was based on Colonial Difference.

In the words of former CJI, Justice N. Ramana, '**Law was used as a tool of political repression during colonial rule**'.

Rule of law reflects on an individual's freedom, autonomy, and constitutionalism, which is necessary for understanding the demand of the Constituent Assembly by Indians and the Indian Constitution.

In short, the demand for the Constituent Assembly was for establishing constitutionalism and rule of law in India.

Key Point: Takeaway

The constitution is a set of written, unwritten rules, the supreme document of law in any political community, which the individuals, citizens, institutions living in the society as a whole accept and are governed by.

The need, function and importance of the constitution can be understood from three major arguments:

- **Polity:**
 - State and Governance: The constitution establishes the basis of state and governance by regularizing the framework of fundamental laws.
 - Limited Government: Constitutions establish a limited constitutional government and society by limiting the powers of the state, government, citizen, community, etcetera. The rights of the individual, community, citizens are protected from autocratic authority or bigotry, unjust decisions taken as per whims and fancies of the people.
 - Law and Order: The constitution determines how the government will be formed, who will make laws for the society and how these laws will be made.
- **Social Change/Transformation:** The constitution gives the state-government a special transformative capacity to develop the basic conditions necessary for social justice or a just society.
- **Constitutional Identity:** The constitution gives a moral identity to the people (nation, country). It provides momentum to the political community.

Rule of Law: The concept of rule of law was formulated by AV Dicey in his book "An Introduction to the Study of the Law of the Constitution." He formulated this concept while analysing the law based constitutional system in post Magna Carta England. It has three major aspects:

- supremacy of law
- equality before the law
- Predominance of legal spirit as the basis of individual liberty

Constitutionalism means limiting or regulating the unlimited power of the state through the constitutional provisions. In broad terms, constitutionalism is a set of institutional arrangements that reinforce each other.