

INDIAN POLITY | MODULE 2**SALIENT FEATURES OF CONSTITUTION****WRITTEN CONSTITUTION**

- A written Constitution is a definite and systematic document defining the nature of polity, the principles that govern the political system and the rights of citizens and governments in a codified form. Unlike British Constitution, India has a written Constitution.
- It is a result of result of conscious and deliberate efforts of the people and usually framed by a representative body.
- The Constitution of India was framed by a representative Constituent Assembly and was promulgated on a definite date, i.e., 26th January 1950.
- In a country with written Constitution, ordinary law is subordinate to Constitution.

LARGEST CONSTITUTION IN THE WORLD

- Indian Constitution with 395 articles, 22 parts and 12 schedules was the lengthiest known Constitution in the world at the time of its enforcement and it still remains so.
- United States Constitution has 7 Articles, Australian Constitution has 128 Articles and Canadian Constitution has 147 articles only.
- Comparing to other written Constitutions, our Constitution is very bulky because of many reasons. Some of them are:

- 1) **Drawn from various sources:** Our Constitution borrowed heavily from many Constitutions in the world. This is why our constitution is also known as 'bag of borrowings'. By ransacking all the known Constitutions in the world, our Constitution makers wanted to incorporate the wisdom and experience of different countries.

"One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled when the first written Constitution was drafted. It has been followed by many other countries reducing their Constitution to writing....Given these facts, all Constitutions in their main provisions must look similar. The only new thing if there be any, in a Constitution framed so late in the day is the variations made to remove the faults and to accommodate it to the needs of the country."

Dr. B R Ambedkar

- 2) **Our Constitution was based on Government of India Act, 1935:** Our Constitution draws heavily from Government of India Act passed by British Government in 1935. With 321 Sections and 10 Schedules, it was the largest law ever passed by British for India. The Constitutional Advisor of Constituent Assembly B.N. Rao made sufficient changes to this Act and submitted before the Drafting Committee for further consideration.
- 3) **Geographic vastness and regional Diversity:** Owing to the geographic vastness and regional diversities, our Constitution has to incorporate many provisions to address problems and issues associated with many regions. Article 370 was added to the Constitution separately for Jammu and Kashmir. Similarly, many special provisions were added for North east states such as Nagaland, Manipur, and Mizoram, Sikkim etc.
- 4) **Ensuring Social Justice:** For ensuring social justice for social and educationally backward people, Constitution has to incorporate many special provisions. For eg., Constitution has Part XVI entirely for matters relating to Scheduled Castes, Tribes and Backward communities.
- 5) **Detailed administrative provisions:** Constitution has detailed provisions for smooth functioning of democracy.
- 6) **Distribution of Power between Centre and States:** Constitution details the manner of distribution of power relating to legislature, administration and financial matters between Centre and States.
- 7) **Elaborate Chapter on Fundamental Rights:** Constitution has a list of Fundamental Rights available to the citizens of India with detailed statements explaining their scope and restrictions allowed to impose on them.
- 8) **Incorporation of Directive Principles of State Policy:** Even though it is non-justiciable, Constitution also includes Directive Principles of State Policy, modeled on 'Principles of Social Policy' contained in Irish Constitution.

BLEND OF RIGID AND FLEXIBILITY

- In United Kingdom, there is no difference between an ordinary law and a Constitutional law. So the Constitution can be amended in the same manner in which ordinary law is amended. This is an example of Flexible Constitution.
- If there is a written Constitution and is very difficult to amend this Constitution, it is said to have a rigid Constitution. The Constitution of USA is an example for this. Here a Constitutional amendment can only be passed with the majority of 2/3 members of Congress and need to be ratified by 3/4 states. The Constitution of USA has been amended only 27 times so far.
- But in India, our Constitution is not as flexible as in England and not as rigid as in USA. Rather, it is a blend of both.
- Some parts of our Constitution can be amended with simple majority. For example, Change of name, boundaries, creation and amalgamation of states, abolition and creation of Upper House in State legislatures, Administration of Scheduled Areas and Scheduled Tribes etc.

- Some provisions in the Constitution requires special majority. It means a majority of not less than 2/3 of members of each house present and voting and must be a majority of total membership of the house.
- Some provisions require ratification by more than half of state legislatures.

FEDERAL SYSTEM WITH UNITARY BIAS

- Constitution establishes a federal system by dividing the territory of the country into various states and power distributed between centre and states.
- The word Federation is nowhere mentioned in the Constitution. Article 1 says: "India, that is Bharat, shall be a Union of States."
- Indian Union is based on the principle of federalism, but Indian federalism is unique in many aspects while comparing to many federal countries in the world, including USA.
- India follows a polity of combination of federal and unitary systems.
- Some of the federal and non-federal characteristics enshrined in Constitution are listed below:

Some federal features of Indian Constitution are:	Some non-federal features of Indian Constitution are:
<ul style="list-style-type: none">• Two Governments (Centre and States)• Division of Power• Written Constitution• Rigidity of Constitution• Bicameralism• Independent judiciary• Supremacy of the Constitution	<ul style="list-style-type: none">• A strong centre• Residuary powers with the center• Single citizenship• Flexible Constitution• Integrated judiciary• All India Services• Appointment of Governor• Emergency Provisions

- Although federal in structure, it has a unitary bias. It envisages a polity with a strong centre and has powers to transform itself into a unitary state during emergencies.
- The concept of a Federation with a powerful centre has been borrowed from Canada. In Canada also, residuary powers vests in centre not in states.

ON INDIAN FEDERALISM

- *"Federal in Form, Unitary in spirit"*, *"Quasi-Federal"* – K C Wheare
- *"Bargaining Federalism"* – Morris Jones
- *"Cooperative Federalism"* – Granville Austin
- *"Federation with a centralizing tendency"* – Ivor Jennings

FEDERALISM IN INDIA

- According to Ambedkar, the term 'Union of States' in Article 1 implies two things:
(1) *Indian Federation is not the result of an agreement by the states*
(2) *No state has right to secede from the Federation*
- But in reality the term 'Union' does not indicate any particular type of polity. It has been used in the Preamble USA Constitution (which is a Federal system), South American Constitution (which is Unitary), and Constitution of USSR (which even formally allows secession from the Federation).
- In Indian, Constitution is the supreme organic law and Union and States derives authority from this Constitution.
- In USA, double citizenship is permitted. That means, a person is a citizen of USA as well as the state he resides. But Indian Constitution allows only Single Citizenship.
- Indian Constitution envisages a two-government system, with one in Centre and in states. It details the division of administrative and legislative powers and their corresponding jurisdiction over various matters.
- Union Government can reorganize states and alter their boundaries
- The Upper House of Parliament, i.e., Rajya Sabha (Council of States) represents interests of States as the members of it are elected by the members of state legislative assemblies.
- The Seventh Schedule of the Constitution contains three lists such as the Union List, State List, and Concurrent List. Union List consists of subjects on which Parliament has exclusive power to legislate. State List consists of subjects on which state has executive power to legislate. On subjects in the concurrent list, both the central and the state legislatures may legislate.
- It is noteworthy that Union list has more number of subjects than other two lists and also contains most important and crucial powers.
- Even on state subjects, the central legislature has power to legislate in national interest.
- As per Article 249, if the Council of States (Rajya sabha) has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in national interest, Parliament can make laws with respect to any matter enumerated in the State List.
- In the case of Concurrent lists, if there is any inconsistency between laws made by Parliament and State legislatures on subjects included in the Concurrent list, then Central law prevails (Art. 254)
- The power to legislate on the subjects not mentioned in these three lists is called residuary power. In USA the residuary powers vest in the States, but in India, it is vested in Union.
- Centre can assume all powers of States to itself in emergencies. Thus it can become a pure unitary state at certain times. In cases of national emergency under

Art 352 and break down of Constitutional machinery under Art. 356, the state autonomy is reduced to nullity.

- According to Article 256, State should comply with the law made by Parliament and in the case of willful defiance or negligence, Union can issue directions to states regarding this matter. In Article 257, Constitution goes one step ahead and makes some specific provisions, which give a clear supremacy to centre over states. This article calls upon every state to not to impede the executive power of the Union in the state. In the case of con-compliance, Union can issue directs to states.
- If State Government failed to comply with the directions issued by Union under the provisions of the Constitution, then According to Article 365, the President can hold that Government cannot be carried out in accordance with the provisions of the Constitution.
- According to Article 356, if the President is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, then he can dismiss the government and assume the powers of states to himself (impose President's rule in the state).
- It a nutshell, although Indian states enjoy autonomy envisages by the Constitution, it also set some limitations to this autonomy and it is subordinate to Union in many aspects. That means, India is neither purely federal and nor purely unitary. It is a unique combination of both.

PARLIAMENTARY FORM OF GOVERNMENT

- The democratic system of government can be divided into the parliamentary and the presidential system based on the relationship between the executive and the legislature.
- India follows a parliamentary form of government, borrowed from Britain. British Parliamentary system is also known as Westminster model. This term comes from the Palace of Westminster, the seat of the British Parliament.
- The main reason for choosing Parliamentary system over Presidential system was that people had a long experience of this system under the Government of India Acts.
- Another reason was that under Presidential System, the executive and legislature are independent of each other and is likely to cause conflict between them.
- The Features of Parliamentary form of Government in India are:
 - Cabinet Government
 - Responsible Government
 - Presence of nominal and real executives
 - Membership of ministers in legislatures
 - Leadership of Prime Minister
 - Dissolution of Lower House

- Cabinet is formed by a party or front having majority in the elected House of parliament. Though president is the head of executive, the cabinet exercise the real power over executive.
- The Prime Minister is the leader of the Council of Ministers. On his advice, the ministers are appointed and dropped. He presides over the meetings of the cabinet. Prime Minister is also known as Keystone of the Cabinet arch. Some refers to him as 'first among equals'
- The Council of Ministers is collectively responsible to Lower House of Parliament in Centre and to Legislative Assembly in States.

Ministers are individually responsible to President. It is because Article 75(2) of Indian Constitution states that the Ministers shall hold office during the pleasure of the President.

- The complete and continuous responsibility of executive to legislature is another important feature of a parliamentary form of government.
- In a Parliamentary form of government, there two heads, namely, nominal and real. The nominal head is one who, though head of the state, is not head of government. His powers are more apparent than real. Real executive authority is exercised by the Cabinet.

Can President override the advice of Cabinet?

President is the head of the state and his is placed above the parliament as in the Irish Constitution. In Ireland, President can act in his discretion in many issues. But this discretionary power is not available to President of India.

The article 74(1) was amended by 42nd Amendment (1976) during emergency era to make President Constitutionally bound to act in accordance with the advice tendered by the Council of Ministers. Many parts of 42nd Amendment were reverted by the Janata Government by passing 44th Amendment but this part was left untouched. But it empowered the President to refer a matter back to Council for reconsideration. Thereafter, if the Council after reconsideration again sent back the Bill to the President for his assent, the President would have no option but to give his assent.

Difference between India and Britain

Though Indian Parliamentary System is modeled on British system, there are some fundamental differences between them. Indian Parliament is not a sovereign body like British Parliament. In India, Constitution is supreme not Parliament.

Unlike Britain where the head of the state is a monarch, India is a Republic. It means the head of the state is directly or indirectly elected by the people of India.

UNIVERSAL FRANCHISE

- The concept of popular sovereignty is another feature of the Constitution. It simply means that the people are the rulers of this country.
- The Preamble of the Constitution states that: ***“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”*** Thus the principle of popular sovereignty is inherent in the Preamble of the Constitution.
- The franchise is the only effective medium of popular sovereignty in a modern democracy. It won't be a reality if the voting right is restricted based on various grounds such as gender, property, taxation or education.
- India adopted adult franchise, meaning granting voting rights for all citizens above a particular age irrespective of their sex, place of birth, religion, caste etc.
- The electorate of India was 173 million in the first general election held in 1951-52. More than half of the enrolled voters exercised their voting right.
- Electorate was further widened after reducing voting age from 21 to 18, by 61st Constitution Amendment Act. In 2014 General election, 814.5 million people were eligible to vote.

“The (Constituent) 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 democratic government on the basis of adult-suffrage will promote well being.” – Alladi Krishna Swami Ayyar

COMPROMISE BETWEEN PARLIAMENTARY SUPREMACY AND JUDICIAL REVIEW

- The power of the courts of a country to examine a law passed by Parliament and to determine whether such actions are consistent with the Constitution.
- The Constitution of United States envisages a polity with Supreme Court having supreme power with large scope of judicial review. As Chief Justice Hughes once pointed out, “The Constitution (of USA) is what Supreme Court says it is.” It has the power to invalidate any law passed by US Congress based on vague notions. Thus Supreme Court can sit as a court of appeal against legislature.
- On the other hand, the Parliament is Supreme in Britain. Courts cannot invalidate any law passed by Britain on any ground whatsoever.
- Parliament of India is not as supreme as Britain and Supreme Court of India is not supreme as in the case of USA. It is the result of synthesis of Parliament Sovereignty and Judicial Supremacy.
- The Supreme Court, on the one hand, can declare the parliamentary laws as unconstitutional through its power of judicial review. The Parliament on the other hand, can amend the major portion of the Constitution through its constituent power.

- Indian judiciary can invalidate a law if legislature transgresses the legislative power vested in it by the Constitution or it infringes the fundamental right.

CAN JUDICIARY QUESTION THE WISDOM OF LEGISLATIVE POLICY?

Article 21 of Indian Constitution states that: ***“No person shall be deprived of his life and personal liberty except according to procedure established by law.”*** This means that State can deprive a person of his life and personal liberty through a *procedure established by law*.

The Doctrine of Procedure established by law is rooted in British Constitution. It means that a law that is duly enacted by legislature or the concerned body is valid if it has followed the correct procedure. Courts cannot invalidate this law even if it is contrary to principles of justice and equity.

The doctrine of Due process is enshrined in US Constitution. Under this doctrine, the law intended to deprive the life or personal liberty of a citizen should not only be enacted through correct procedure, but also be fair, just and not arbitrary. This doctrine gives judiciary the power to assess the intent of the law and wisdom of the legislative policy. Thus Court has boundless power to declare a law unconstitutional.

Procedure established by Law Doctrine	Due Process Doctrine
Enshrined in British Constitution (India borrowed from Japanese Constitution)	Enshrined in American Constitution
It means that a law should be duly enacted by legislature by following the correct procedure, nothing else.	This doctrine suggests that the law is not only be enacted by following correct procedure but also must be fair, just and not arbitrary.
If the law was found arbitrary, the court can save him from this arbitrariness only, but cannot invalidate the law altogether.	If the court finds a law arbitrary, they can struck down the law.
This doctrine protects individual against the arbitrary action of the only the executive, not the legislature.	This doctrine protects the individual against arbitrary action of both executive and legislature.

- In Maneka Gandhi Vs Union of India Case, 1978, the Hon. Supreme Court ruled that the mere existence of an enabling law is not enough to restrain personal liberty. Such a law must also be ‘just, fair and reasonable’.
- Thus after Maneka Gandhi Case, there is no difference between *Due process* and *Procedure established by law* in India.

INDEPENDENT AND INTEGRATED JUDICIARY

- The Constitution of India establishes an independent and integrated Judiciary.
- The Indian Constitution has adopted number of measures to ensure the independence of judiciary. The legislature is not involved in the appointment of judges to avoid any kind of partisanship. The fixed tenure of judges ensures that judges will perform without fear or favour. The Constitution prescribes difficult procedure for the removal of judges. Judiciary is not financially dependent to legislature as their salaries and allowances are not subjected to the approval of the legislature.
- But the independence of judiciary does not mean arbitrariness or absence of accountability. It is accountable to the Constitution, to the democratic traditions and to the people of the country.
- The Constitution provides for a single integrated judiciary system in India. The hierarchical structure of judiciary is such that Supreme Court is at the top, High Courts below them and district and subordinate courts at the lowest level.
- Unlike USA, where federal laws are enforced by federal court and state laws by state courts, this single integrated system of judiciary enforces both central laws and state laws in India.

FUNDAMENTAL RIGHTS

- The Constitution of India guarantees all its citizens fundamental rights. It is called fundamental to suggest that these rights are so important that Constitution has separately listed them and made special provisions for their protection.
- These rights are binding on legislature as well as executive.
- India borrowed the concept of Fundamental Rights from American Constitution.
- Fundamental rights are different from ordinary rights. While ordinary laws are protected and enforced by ordinary law, the fundamental rights are protected by Constitution itself.
- Unlike ordinary rights, fundamental rights can be changed only by amending the Constitution itself.
- The Fundamental rights enshrined in our Constitution are:
 - Right to equality (Article 14-18)
 - Right to freedom (Article 19-22)
 - Right against exploitation (Article 23-24)
 - Right to freedom of religion (Articles 25-28)
 - Cultural & educational rights (Articles 29-30)
 - Right to Constitutional remedies (Article 32)
- No branch of the state, legislature, executive or even judiciary, can act in a manner that violates these rights. Any act of legislature or order of executive can

be declared as null and void if it violates any of Fundamental Rights guaranteed in the Constitution.

- The Fundamental rights are justiciable which means they can be enforced through a court of law.
- If these rights are violated, citizens can approach Supreme Court or High Court to restore these rights. The Courts can issue various special orders called writs for the enforcement of the fundamental rights. Habeas Corpus, Mandamus, Prohibition, Quo Warranto, Certiorari are the five writs issued by Higher courts.
- But Fundamental rights are not absolute and unlimited. Government can impose reasonable restriction for common good.

DIRECTIVE PRINCIPLES OF STATE POLICY

- Constitution borrowed the principle of Directive Principles of State Policy from Ireland, modeled on 'Principles of Social Policy' contained in Irish Constitution.
- Part IV, Articles 36-51 of the Indian Constitution constitutes the Directive Principles of State Policy which contain the broad directives or guidelines to be followed by the State while establishing policies and laws.
- Article 37 of Indian Constitution states that the Directive principles are *fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*
- This is meant for promoting the ideal of a social and economic democracy.
- DPSP is not justiciable, meaning they cannot be enforced by a court of law. The court cannot declare any law as void on the ground that it contravenes the DPSP.

While most of the Fundamental Rights are negative obligations on the state (since it limits the scope of state action), DPSP are positive obligations on the state, though not enforceable in a court of law. The main objective of fundamental rights is to establish political democracy, by guaranteeing equality, liberty, religious freedom and cultural rights but the aim of directive principles of state policy is to establish just social and economic order.

FUNDAMENTAL DUTIES

- Fundamental Duties was not included in original Constitution which came to existence in January 26, 1950. It was added by the 42nd Amendment, 1976 by introducing Article 51A as Part IVA of the Constitution upon the recommendations of the Swaran Singh Committee that was constituted by the government earlier that year.
- Like Directive Principles of State Policy, it is also non-justiciable (not enforceable) in nature.
- India borrowed the concept of Fundamental Duties from USSR.
- Part IVA lists eleven fundamental duties

BORROWED FEATURES OF INDIAN CONSTITUTION

Name of Countries	Borrowed Features
Britain	1. Parliamentary government 2. Rule of Law 3. Legislative procedure 4. Single citizenship 5. Cabinet system 6. Prerogative writs 7. Parliamentary privileges 8. Bicameralism
Ireland	1. Directive Principles of State Policy 2. Method of Election of the president 3. Members nomination to the Rajya Sabha by the President
Unites States of America	1. Impeachment of the president 2. Functions of president and vice-president 3. Removal of Supreme Court and High court judges 4. Fundamental Rights 5. Judicial review 6. Independence of judiciary 7. Preamble of the Constitution
Canada	1. Centrifugal form of federalism where the centre is stronger than the states. 2. Residuary powers vest with the centre 3. Centre appoints the Governors at the states 4. Advisory jurisdiction of the supreme court
Australia	1. Concept of Concurrent list 2. Joint sitting of the two houses 3. Freedom of trade and commerce
USSR (Now Russia)	1. Fundamental duties 2. The ideals of justice (social, economic and political), expressed in the Preamble.
France	1. Concept of "Republic" 2. Ideals of Liberty, Equality and Fraternity(contained in the Preamble)

Germany	1. Fundamental Rights are suspended during Emergency
South Africa	1. Election of members of the Rajya Sabha 2. Amendment of the Constitution
Japan	1. Concept of “procedure established by Law”

SCHEDULES OF THE CONSTITUTION

- Indian Constitution originally had 8 schedules. Now it has 12 schedules.
- The 9th schedule was added via First Amendment Act in 1951, to insulate land reform acts of various state governments from judicial scrutiny. The laws listed in this schedule were exempted from judicial scrutiny. On January 11, 2007, Supreme Court ruled that all laws (including those in the Ninth Schedule) would be open to Judicial Review if they violated the basic structure of the constitution.
- 10th Schedule was first added by 35th Amendment to designate Sikkim as Associate State. Once Sikkim became a state of India in 1975, the 10 Schedule was repealed. But later added once again by 52th Amendment Act, 1985 as a part of Anti-defection law.
- 11th and 12 schedules were added as 73rd and 74th Amendments, to give constitutional status to Panchayathi Raj Institutions and Municipalities.

LIST OF SCHEDULES OF INDIAN CONSTITUTION	
First Schedule	• List of States & Union Territories
Second Schedule	• Salary of President, Governors, Chief Judges, Judges of High Court and Supreme court, CAG.
Third Schedule	• Forms of Oaths and affirmations
Fourth Schedule	• Allocate seats for each state of India in Rajya Sabha
Fifth Schedule	• Administration and control of scheduled areas and tribes
Sixth Schedule	• Provisions for administration of Tribal Area in Asom, Meghalaya, Tripura, Mizoram & Arunachal Pradesh
Seventh Schedule	• Gives allocation of powers and functions between Union & States. It contains 3 lists: Union List(Power of centre), States List(Power of states) and Concurrent List(Power of both)

Eighth Schedule	<ul style="list-style-type: none"> List of 22 languages of India recognized by Constitution <div> 1. Assamese 2. Bengali 3. Gujarati 4. Hindi 5. Kannada 6. Kashmiri 7. Manipuri 8. Malayalam 9. Konkani 10. Marathi 11. Nepali 12. Oriya 13. Punjabi 14. Sanskrit 15. Sindhi 16. Tamil 17. Telugu 18. Urdu 19. Santhali 20. Bodo 21. Maithili 22. Dogri </div> <ul style="list-style-type: none"> Originally it had 14 languages. Sindhi was added in 1967 by 21st Amendment Konkani, Manipuri and Nepali were added in 1992 by 71th amendment Santhali, Maithili, Bodo and Dogri were added in 2003 by 92th amendment
Ninth Schedule	<ul style="list-style-type: none"> Added by 1st amendment in 1951. Contains acts & orders related to land tenure, land tax, railways, industries
Tenth Schedule	<ul style="list-style-type: none"> Added by 52nd amendment in 1985. Contains provisions of disqualification of grounds of defection
Eleventh Schedule	<ul style="list-style-type: none"> By 73rd amendment in 1992. Contains provisions of Panchayati Raj.
Twelfth Schedule	<ul style="list-style-type: none"> By 74th amendment in 1992. Contains provisions of Municipal Corporation.

PARTS OF CONSTITUTION

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