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EVOLUTION AND PHILOSOPHY BEHIND INDIAN CONSTITUTION

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EVOLUTION AND PHILOSOPHY BEHIND INDIAN CONSTITUTION

Constitution is the fundamental and organic law of a nation, establishing the concepts, character and organization of its Government as well as prescribing the extent of Government, sovereign power & manner of its exercise. It is the supreme law of the land. All other laws & customs in order to be legally valid must confirm to the provisions of the Constitution.

It also possesses ideas and aspirations of the people of a country. It enjoys special legal sanctity. Organic law is the one that establishes an administrative agency in the form of Union and State Executive and Enjoys special legal sanctity: because it derives its power and authority from people directly. Other law enjoys legal sanctity but not special sanctity. Thus, Constitution is superior to all other laws. Other laws stress their source to legislature. Parliament draws authority from Constitution.

MAKING OF THE CONSTITUTION

1. Indian Constitution was adapted and enacted by a Constituent Assembly (CA), which was formed under Cabinet Mission Plan, 1946.
2. Members of CA were indirectly elected by the members of the Provincial Legislative Assembly (Lower House only), in ratio of 1 member per 1 million populations. Representation was also given to Princely States.
3. The seats in each province were distributed among the three main communities- Muslim, Sikh, and General, in proportion to their respective population.
4. Members of each community in the Provincial Legislative Assembly elected their own representatives by the method of proportional representation by means of single transferable vote.
5. The method of selection in the case of representatives of Indian States was to be determined by nomination.
6. CA, which had been elected for undivided India held its first sitting on 9th December 1946. Out of total 389 members 296 were elected from British Provinces and rest 93 were nominated by Princely States.
7. But as a result of the partition under the Plan of June 3, 1947, a separate Constituent Assembly was set up for Pakistan. The representatives of Bengal, Punjab, Sind, North-Western Frontier Province, Baluchistan and Sylhet district of Assam (which had joined Pakistan by a referendum) ceased to be members of the Constituent Assembly of India, and there was a fresh election in the new Provinces of West Bengal and East Punjab.
8. Hence, when the Constituent Assembly reassembled on 31st October 1947, the membership of the House was reduced to 299.
9. Of these 284 were actually present on 26th November 1949 and appended their signatures to the Constitution as finally passed.

Date Line of Constituent Assembly

9th December 1946: First meeting of the CA under interim President Sachinanda Sinha

11th December 1946: Dr Rajendra Prasad elected as President of CA

13th December 1946: Pt. Jawaharlal Nehru moved 'Objective Resolution'

29th August 1947: Drafting Committee was appointed under Dr. B.R. Ambedkar

October 1947: First draft of the Constitution was prepared.

26th November 1949: People of India through CA adopted the Constitution

24th January 1950: CA members finally signed the Constitution

Important committees of the Constituent Assembly & their Chairman

Committee	Chairman
1. Steering Committee	Dr Rajendra Prasad
2. Rules of Procedure Committee	Dr Rajendra Prasad
3. Committee for Negotiating with States	Jawaharlal Nehru
4. Union Constitution Committee	Jawaharlal Nehru
5. Union Power Committee	Jawaharlal Nehru
6. Provincial Constitution Committee	Sardar Patel
7. Committee on Fundamental Rights & Minorities	Sardar Patel
8. Fundamental Rights Sub-Committee	J.B. Kripalani
9. Minorities Sub-Committee	H.C. Mukherjee
10. Committee to examine Draft Constitution	Sri Alladi Krishnaswamy Iyer
11. Order of Business Committee	K.M. Munshi
12. House Committee Sitaramayya	Pattabhi
13. Ad-hoc committee on National Flag	Dr Rajendra Prasad

Composition of Drafting Committee

1. Dr. B.R. Ambedkar (Chairman)
2. N. Gopalaswami Ayyangar
3. Alladi Krishnaswamy Iyer
4. K. M. Munshi
5. Mohammed Sadullah
6. B.L. Mittar (replaced by N. Madhav Rao)
7. D.P. Khaitan (who died in 1948 and replaced by T.T. Krishnamachari)

26th January 1950: Constitution was commenced.

PHILOSOPHIES IN THE CONSTITUTION

The Preamble of the Indian Constitution is the best part where we can find a glimpse of the major philosophical influences guiding the Constitution.

Regarded as an introduction or prelude to the constitution, the Preamble is modeled on US's constitution Preamble. The Supreme Court says that the Preamble is nothing but the theme of the Constitution which is also said to be the philosophy of the Constitution and this philosophy is largely 'co-terminus' with the ideals and aspirations of the people of India which were basically drawn from the freedom movement of India. The 'ideals' listed in the Preamble are

'Sovereignty' 'Socialism' 'Secularism' 'Democracy' and 'Republic' while the aspirations to be achieved are mentioned as 'Justice' 'Liberty' 'Equality' and 'Fraternity'. These ideals and aspirations are however related to each other in the sense that the ideals are more or less established but aspirations are to be achieved by applying the instruments of these ideals. Further as there is no end to achievements, aspirations are ever evolving goals and we have to constantly strive for them.

Ideals in the Preamble

The ideals listed in the Preamble mainly constitute the essentials of an independent, strong and welfare oriented State:

- **Sovereignty:** This is inspired mainly from the concept of 'State' which is fundamental to all civilizations thus is an attribute of the State. This is denoted by the supreme

political power of a state which is unlimited. It means the country does not acknowledge any political power outside its boundaries as supreme. Sovereignty means that the country is supreme internally and independent externally. In a democracy sovereignty lies with the people.

- **Socialism:** The Constitution provides for Fabian Socialism also called as democratic socialism, rather than Marxian socialism, and envisages to build a society on socialist principles. The thrust over socialistic goals placed in the Constitution is evident from the provisions listed under the Directive principles of State Policy. The ideal of building a socialist society is the fundamental principle behind the welfare nature of the State.
- **Secularism:** A very important tenet of the Indian Constitution, secularism in the Indian context is different from the common idea of secularism in the West. In the Indian context it implies that the State shall be neutral on religious questions but shall be positively 'a-religious' in its functioning. The term 'a-religious' implies that the State shall be neither religious nor anti-religious nor irreligious but only non-religious. Secularism means that the State does not recognize any particular state religion instead it recognizes the rights of all religions which have made India as their home and their right to co-exist on the soil of India. The concept is one of the stabilizing factors which help our society to sustain and perpetuate itself despite infinite diversity.
- **Democracy:** The idea of democracy in its representative sense as it exist in India today, is mainly borrowed from the West and owes its origin to the Magna Carta in the English history. It implies that people are paramount and the State exists for the people, by the people and of the people. People in India enjoy representative democracy in India.
- **Republic:** One of the terms borrowed from the French revolution and implies that the head of the State in India shall be elected for a fixed period of time.

Aspirations in the Preamble: Mainly borrowed from the charter of the French Revolution and the American Revolution. Four of them are listed in the Preamble.

- **Justice:** It is a very wide term which implies social, economic as well as political justice. Article 326 which provides for universal adult franchise or Article 19 which provides for basic freedoms or the chapter on fundamental rights provides for political justice. Economic justice has to be achieved by implementing the provisions of the Directive Principles of State Policy over a period of time while social justice is ensured by provisions such as the Article 17 which provides for a prohibition of practices like untouchability.
- **Liberty:** It implies freedom from arbitrary or undue restraints especially by the government or the freedom to do what an individual thinks is best for him, provided he does not violate others' rights. Therefore liberty means responsibility as well. Liberty is necessary for intellectual and mental development of the citizens and is essential for a democracy to function.
- **Equality:** Equality of status and opportunity without discrimination to all citizens. This aspect is enforced by provisions like the Article 15 and 16 which promises equality of opportunity to all citizens in matters of public employment free from any kind of discrimination on any grounds of caste, religion, place of birth, gender, language, ethnicity, etc.
- **Fraternity:** Sense of brotherhood which should prevail among the people of India and is essential for the promotion of national integration and can be achieved by providing secularism, justice, liberty, democracy, equality, etc.

Apart from these there are other important inspirations to the Constitution as well. The following list gives a non exhaustive account of these features:

- I. Government of India Act 1935:** Conceived primarily by the British, till Jan 26 1950, this was the code which used to run the government of India. Even the present Constitution, almost 60% provisions are borrowed from the GoI Act 1935.
- Federal scheme
 - Office of the Governor

- Powers of the Federal Judiciary
- Emergency powers

II. Constitution of the UK:

- Parliamentary form of government
- Law making procedures
- Rule of law
- Single citizenship
- Office of the Comptroller and Auditor General.
- Writ Jurisdiction of the SC and the HCs
- Civil Services

III. Constitution of USA:

- Fundamental Rights
- Independence of Judiciary
- Judicial Review
- Removal of Judges of the SC and HCs
- Preamble
- Role of Vice President

IV. Constitution of Canada:

- Federation with a strong Centre and weak States
- Residuary powers with the Centre

V. Constitution of Ireland:

- Directive Principles of State Policy
- Election of President method
- Nomination to Rajya Sabha

VI. Weimar Constitution of Germany (1921):

- Emergency Provisions
- Suspension of fundamental requirements during Emergency

VII. Australian Constitution:

- Concept of Cooperative Federalism
- Concept of Concurrent List
- Freedom of inter-state trade and commerce

VIII. Constitution of South Africa:

- Amendment procedure
- Election of members of Rajya Sabha.

NATURE OF THE INDIAN CONSTITUTION

Nature of the Indian Constitution means whether it is Federal, Unitary or Quasi-Federal.

Federal - There are two set of Government at Central and Provincial level with clear distribution of powers under a written Constitution.

Unitary - Only one set of Government at the Center; Provinces are only sub-ordinate of Center. All power vested with the Center.

Quasi-Federal - Comprising features of both federal and unitary government;

Constitution Drafting Committee headed by Dr. Ambedkar called it federal. Supreme Court also said it federal. Scholars like Apple Alexander also described it federal. However, western scholar led by Prof. Wheare called it quasi-federal. On the other hand Prof. Tripathi called it unitary. U.S. Constitution is the oldest Federal constitution in the world, so scholars keep it as a model of federal form of constitution. Thus whether Indian Constitution is federal or unitary is a question of degree and not of kind. Therefore, whether it is federal or not is to be decided by number of federal or unitary features it contains.

Federal Features of the Indian Constitution:

1. **Division of Powers:** Existence of a dual polity, which means existence of two sets of government i.e. one at Center (Union Government) and other at Provincial level (State Governments). Powers and authority is divided between Central & State Governments. Further, Center & State Governments are not sub-ordinate to each other rather they are co-ordinate bodies, each originating in and controlled by the Constitution. Each one is independent in its allotted sphere of activity.
2. **Supremacy of the Constitution:** (Art 13 of the Indian Constitution explicitly talks about its supremacy.) Supremacy in the context of federation means it is binding on Central as well as State Governments. Neither Center nor State Government alone is in a position to amend constitutional provision

regarding separation of powers between Center and States. It can be only amended by joint effort of both the Center and States Governments.

3. **Written Constitution:** For clear distribution of powers between Union and States, a written Constitution is very necessary.
4. **Rigidity of the Constitution:** Provisions of the Constitution that requires a special procedure for amendment
 - (a) Arts. 53 & 54- Election of the President.
 - (b) Art. 73- Extent of Executive power of the Union.
 - (c) Art. 162- Extent of Executive powers of the States.
 - (d) Art. 241 – High Courts for Union Territories
 - (e) Union Judiciary (Arts. 124-147)
 - (f) High Courts (Arts. 214-231)
 - (g) Legislative relationship between Center and States (Arts. 245-255 & VIIth Schedule)
 - (h) Representation of the States to Lok Sabha and Rajya Sabha
 - (i) Art. 368- Procedure of Amendment to the Constitution

It is corollary of supremacy of the Constitution.

5. **Authority of Courts:** It includes two things:
 - (a) Establishment of an authority independent of Central and State government to resolve any disputes that may arise between Center and State or among States on issues relating to distribution of power.
 - (b) Courts shall be given power to finally interpret the Constitution, which is binding on both Center & States.

Indian Constitution bears all the above federal features. However, on the basis of such federal features can we conclude that Indian Constitution is federal? That requires a close look of certain unitary features in the Constitution.

Unitary features of Indian Constitution:

1. **States do not have separate Constitution:** Consequence of this fact is single citizenship. State govt. cannot

confer special rights on its inhabitants who are ordinarily residents of the nation. It also meant that State administration can be brought under Centre under certain circumstances.

2. **Art. 352:** It empowers the President to proclaim a National Emergency under certain circumstances. During such Emergency, the provisions regarding distribution of power between Center and State remain suspended. Therefore, Constitution starts functioning as if it is unitary. Thus Constitution is designed to function as a federal in ordinary circumstance and unitary in extraordinary situations whereas in U.S. the Constitution always works as federal.
3. **Art. 4:** It empowers the Parliament to change area, name and boundary of the State even without the consent of the State. So States do not enjoy the territorial equality whereas in U.S. there is territorial equitability among all units.
4. **VIIIth Schedule:** Distribution of legislative subjects under VIIIth Schedule are heavily in favour of the Center [97 subjects in Union List]. All most important legislative subjects are under the Union List. All taxes of importance are also in the Union List. The Parliament has exclusive legislative jurisdiction over subject under Union List.

Most important subjects under Union List are: Defence; Atomic Energy; Foreign Affairs; War and Peace; Citizenship; Railways; Airways, Air Craft, Air Navigation; Post & Telegraph; Currency, Coinage and Foreign Exchange; Reserve Bank of India; Inter-state Trade & Commerce; Banking; Stock Exchanges; All India Services; Election to Parliament and State Legislature; Union Duties & Taxes, etc.

On the other hand State List includes 61 subjects of local importance. In revenue matter sales tax is the only important subject under State List. Therefore, States are financially dependent on Center.

Most important subjects under State List are: Public Order; Police; Prisons and Reformatories; Local Government; Public Health & Sanitation; Fisheries; Market and Fairs; Agriculture; State Taxes & Duties, etc.

But States also do not enjoy exclusive legislative jurisdiction on the subjects placed under State List. Parliament can legislate on State List under 5 conditions.

- (a) **Art. 249**– If Rajya Sabha passes a resolution supported by not less than 2/3 of its members present and voting, it is necessary and expedient for the Parliament to legislate on one or more subject specified in State List in national interest. Under such provision Parliament has jurisdiction to legislate on State List for a period of one year at each time it passes such resolution. Rajya Sabha can pass any number of resolutions to this effect.
- (b) **Art. 250** - When National Emergency is in force then Parliament assumes concurrent legislative powers. Thus State List becomes Concurrent List and Union can legislate on State List.
- (c) **Art. 252** – When two or more States passed resolutions authorizing Parliament to legislate on one or more subjects in State List then Parliament shall have power to legislate. Law so, passed shall be binding on States concern. The laws will remain in operation till it is repealed by Parliament. For example, in 1976, Punjab & Haryana Urban Land Ceiling Regulation Act. (ULCRA-1976), it was repealed in 1995.
- (d) **Art. 253** – Parliament can legislate on State List in order to give effect to international treaty or agreement even against the wishes of the States.
- (e) **Art. 356**.– When President’s Rule is imposed in a State then President may authorize Parliament to legislate on subject under State List for the concerned State.

Concurrent List: Though Concurrent List (includes 47 items) provides equal power to Center and State, Parliament is prior and superior. Although both Union and State can enact law over Concurrent List, laws enacted by Parliament prevail over State laws.

Most important subjects under Concurrent List are: Criminal Law and Procedure; Civil Procedure; Marriage and Divorce; Contracts;

Ports; Trusts and Trustees; Welfare of Labour and Trade Union; Social Security; Economic and Social Planning; Population Control and Family Planning; Education; Forests and Wild Life, etc.

5. **Residuary Power:** (That is the power to legislate with respect to any matter not enumerated in any one of the three Lists.) Art. 248 of the Constitution talk about residuary power, which belongs to the Center in India whereas in USA it belongs to the State.
6. **Appointment of Governor:** Under Art. 155, Governors are appointed by the President and holds office during the pleasure of the President. President need not have to consult the concerned State while appointing the Governor. Governor enjoys immense power including discretionary powers. (Discretionary powers refer to power exercised by head of the State without advice of the Council of Ministers.) Besides, Governor is not accountable to the State Legislature. He is only accountable to the President. So by controlling Governor, Centre can influence State and even stall a Bill passed by the State Legislative Assembly.
7. **Administrative Directions:** Under Arts. 256-257, Center can issue administrative direction to the State indicating the manner in which properties of railways and means of communication shall be maintained by State government. These directions are binding on the State. If States ignore it, Union can assume that constitutional machinery has been broken down in the State and therefore it can proclaim Art 356 in that State.
8. **Financial Emergency:** Under Art 360, Center can impose a Financial Emergency and during such period distribution of financial resources between Center and State remains suspended. President can direct the State to carry out certain financial discipline including reduction of salaries of civil servants and Judges of Supreme Court and High Courts. He also can direct the Governors to reserve all Financial Bills for his consent passed by Legislative Assemblies of the States.

9. **Presence of All India Services:** Art 312 provides for an All India Services including creation of new All India Services e.g. IAS, IPS and IFS. Officers of these three services can function under both Center as well as State but mostly work at State level. They occupy the top civil post in the State Government and carry out the administration for the state. However, they are recruited by Center and the State governments have no disciplinary control over them except suspending.
10. **Single Election Commission:** Election Commission of India holds all elections in whole India including Parliamentary and State Legislative Assemblies elections.
11. **Single Unified Judiciary:** There is a single and unified judiciary in India being the Supreme Court at the apex level. Below the Supreme Court there are High Courts in State level. However, High Court Judges are appointed and transferred by the President of India in consultation with the Center.
12. **Amendments to Constitution:** Most of the provisions of the Constitution are amended by Parliament alone. States do not play any significant role in amendment procedure except some special provisions.
13. **Unequal Representation of State in Rajya Sabha:** States are represented in the Rajya Sabha on the basis of their population. So principle of equality of States is not followed.

The above provisions clearly indicate that Indian Constitution has a strong bias towards the Center. Thus it can be concluded that India is a federation having strong unitary character. It is Federation Sui Genesis' (Of its own kind).

THE DOCTRINE OF THE 'BASIC STRUCTURE OF THE CONSTITUTION'

The process of evolution of this aspect dawned with the opening of the Shankari Prasad Vs Union of India case in 1951 in which the SC held that the Parliament enjoyed two types of legislative powers: ordinary legislative powers and the constituent legislative powers. Further

any enactment passed by virtue of its ordinary legislative power is a law. Power of the legislature under Article 368 is comparable to the creative power of the constituent assembly. Any enactment under Article 368 cannot be termed as law as per Article 13(2). So the Parliament cannot make or amend by a simple majority. The main inference drawn from the ruling was that fundamental rights were subject to the constitutional amendments.

However in the Golaknath Vs the State of Punjab case (1967) the SC overruled its earlier ruling and held that the Parliament enjoyed only one type of legislative power i.e. ordinary legislative power and not the constituent legislative power because Article 368 was the procedure to amend the Constitution and does not confirm the power of the legislature to amend it. Further the FRs have been given a transcendental position and therefore no organ functioning under the Constitution can amend the FRs and thus FRs were unamendable or could be amended only by establishing a new constituent assembly.

As a response to this judgment, the government in 1971 passed the 24th Amendment Act 1971 and amended Article 13 and introduced Art 13(4) which states that "Nothing in Article 13 shall apply to a constitutional amendment passed under Article 368". The 24th amendment act also amended Article 368 of the Constitution which replaced the word 'procedure' with the word 'power' i.e. the Act now reads as "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article". It also introduced Article 368 (3) which stated that nothing in Article 13 shall apply to an amendment made under this Article.

The excerpts of this judgment were once again challenged under the Keshvananda Bharati Vs the State of Kerala (1973) case in which the SC upheld the constitutional validity of the 24th Amendment Act i.e. the Parliament enjoys the powers to amend any part of the Constitution including the fundamental rights. However it also stated that the amending powers of the Parliament are limited to the extent of not destroying the basic structure of the Constitution.

The essence of this landmark judgment was once again challenged by the 42nd Amendment act which introduced Article 368(4) which stated that no amendment of this Constitution shall be called in question in any court of law. Another Article 368(5) was introduced which stated that for removal of doubts it is hereby declared that there shall be no limitation whatsoever to the constituent power of the Parliament to amend the Constitution under this Article.

These features introduced by the 42nd Amendment were once again subjected to judicial scrutiny in the *Minerva Mills Vs UoI* case 1980. In this case, SC held that the Clauses 368(4) and 368(5) were extra-constitutional. Further,

the power of judicial review is a part of the basic structure of the Constitution, therefore Article 368(5) was void and therefore the power to amend is subject to not destroying the basic structure of the Constitution.

The verdict in the *Minerva Mills* case not only asserted the indestructibility of the basic structure of the Constitution but also reinstated the supremacy of the ideas represented by the 'basic structure' over legal and constitutional entanglements in the form of amendments, verdicts and legal pronouncements which ultimately fail to eclipse the spirit of truth and freedom which is a characteristic of the larger Indian culture.

