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What is Constitution?

A constitution is a set of rules for the government to govern the country and defines the nature of polity of that country.

The polity lays down the relations between the legislature, executive and the judiciary apart from defining the basic structure of law, and the rights and obligations of both the state and the citizens. Without the constitution, there can hardly be any rule of law.

**Need of a Constitution**

The Modern State is considered to be a state for the welfare of the people. It is therefore, suggested that it should have a government of a particular form with appropriate powers and functions.

The document containing laws and rules which determine and describe the form of the government, the relationship between the citizens and the government, is called a Constitution.

As such, a constitution is concerned with two main aspects: the relation between the different levels of government, and between the government and the citizens.

- A constitution is the basic fundamental law of a state.
- It lays down the objectives of the state which it has to achieve.
- It also provides for the constitutional framework that is, various structures and organs of the government at different levels.
- In addition, it describes the rights and duties of the citizens.
- It is, therefore, considered to be the basis for the governance of the country both in terms of goals and objectives as well as their structures and functions.
Functions of a Constitution

The constitution is a political structure, whether it is written or not-written and followed or not. They have several functions:

- **Expression of Ideology**: It reflects the ideology and philosophy of a nation state. For example: the ideology of Indian Constitution is based on a socialist and secular social system. On the other hand, the U.S.A. follows the ideal of a capitalist social order.

- **Expression of Basic Law**: Constitution present basic laws which could be modified or replaced through a process called extra-ordinary procedure of amendment. There is a special law also which usually focuses upon the rights of the citizens, for instance, rights concerning language, speech, religion, assembly, the press, property and so on.

- **Organizational framework**: It provides organizational framework for the governments. It defines the functions of the legislature, executive and judiciary, their inter-relationship, restrictions on their authority etc.

- **Levels of Government**: Constitution generally explains the levels of different organs of the government. Whether it is federal, quasi-federal or unitary, will be described by the constitution. They delineate the power levels of national and provincial governments.

- **Amendment provision**: As it would not be possible to foretell all possibilities in future with great degree of accuracy, there must be sufficient provisions for amendment of the constitution. It should contain a set of directions for its own modifications. The system might collapse if it lacks in scope for modification. An inherent capacity to change according to changing times and needs, help any system to survive and improve.

Classification of Constitutions

Constitutions are broadly classified:

- **Unitary Constitution**: This type of constitution establishes a single, central organ of government without dividing powers between two separate entities. For example, the British Constitution, which recognizes only one central organ i.e., the British Parliament and the central government. In England, there is no state type legislatures or governments. There may be other legislative and executive authorities under a unitary constitution but they enjoy only delegated powers and not constitutionally granted powers.

- **Federal Constitution**: It is based on power sharing between two distinct entities namely, the federal or the union government and the state governments. These two levels of government enjoy coordinate authority and none is inferior to each other as both derive their respective authorities directly from the constitution. Countries with large population, geographical size, social, cultural and linguistic diversities generally adopt federal form of constitution to allow autonomy of governance to the constituent states. For example, the US, Canadian, Australian Constitutions are federal constitutions.

**SIGNIFICANCE OF A WRITTEN CONSTITUTION**

**Constitution as a Positive Law**

A constitution derives its authority from itself. It is, therefore, future oriented. As a body of supreme laws the constitution takes precedence not only over all other laws but also, over all customs, traditions and faiths. Such customs and traditions, etc., are valid as long as they do not conflict with the constitution. In other words, no provision of the constitution can be challenged on the plea that it is inconsistent with the tradition, belief and faith inherited from the past.

**Contractual Nature**

A democratic Constitution is a kind of contract among the people or, at least, the bulk of the people. It is based on consensus - a product of bargain among several persons and groups.

**Philosophy of a Constitution**

Every democratic constitution has a philosophy and a vision which can be summed up as growth with stability. These two concepts are inter-related. Without growth no stability can be ensured and without stability no growth can be achieved.
Written Constitution: Written constitution is contained in one document, such as of Soviet Union or Constitution of India or Swiss Constitution. Thus a written constitution has to be prepared by a body called as Constituent Assembly which is elected by the people for whom the constitution is being written. The federal constitutions are generally written ones because they involve two partners viz., the union and the states.

Unwritten Constitution: An unwritten constitution, unlike a written one, is not committed to systematic writing by a particular constituent assembly. It is based on evolution of a number of customs, usages, parliamentary acts and traditions. The British Government does not possess a document called 'Constitution'. There are number of different documents that are part of the body of what is referred to as British Constitutional Law. The British constitution has evolved on the basis of all these over a period of many centuries.

Constitutionalism

- One needs to know the 'Constitutionalism' and "Constitutional Law" before understanding the philosophy of Constitution of India. Having a constitution itself is not constitutionalism. Even a dictator could create a rulebook calling it constitution, which never meant that such a dictator had any faith in constitutionalism. Recognizing the need for governance, the constitutionalism equally emphasizes the necessity of restricting those powers.
- The Constitutional Law means the rule, which regulates the structure of the principal organs of the government and their relationship to each other, and determines their principal functions. The rules consist both legal rules enacted or accepted as binding by all who are concerned in government. All the constitutions are the heirs of the past as well as the pioneers of the future.
- Thus the constitutionalism, in brief, is specific limitations on general governmental powers to prevent exercise of arbitrary decision-making. Unlimited powers concentrated in a few hands at the helm of affairs and their exercise would jeopardize the freedom of the people. These powers have to be checked and balanced with equally powerful alternatives in a system, where it will be nearly impossible for dictators to emerge. In one word ‘Limited Governance’ is the constitutionalism, which is supposed to reflect in the Constitutional Law of a democratic state. Constitution of India is the Constitutional Law incorporating the constitutionalism. The listed fundamental rights and guaranteed remedies, creation of judiciary as an impartial arbiter with all independent powers besides broad based legislative check on the executive are the reflections of such constitutionalism. From these essential characters the doctrines of judicial review, rule of law, separation of powers, universal franchise, transparent executive, fundamental right to equality and quality of life emerged and consolidated.
- The right as the individual power in the hands of people and authority as the ruling power in the hands of institutions cannot go arbitrary and anarchic undermining the democratic peace. The democratic constitutionalism is three pronged in Indian Constitution, one- guaranteeing freedoms, two- restricting governing institutions, three- empowering the independent arbiter of judiciary with power to review the executive and legislative orders affecting the interests of people in general or afflicting basic norms of rule of law.

Salient Features of Indian Constitution

The constitution of India is an elaborate document which is considered to be one of the lengthiest constitutions in the world.

Like every other Constitution, the Indian Constitution also seeks to establish the fundamental organs of government and administration, lays down their structure, composition, powers and principal functions, defines the inter-relationship of one organ with another, and regulates the relationship between the citizen and the state, more particularly the political relationship. The states have reasserted certain principles of law through written constitution.

- Parliamentary Democracy: India has a parliamentary form of democracy. This has been adopted from the British system. In a parliamentary democracy there is a close relationship between the legislature and the executive. The Cabinet is selected from among the members of legislature. The Cabinet is responsible to the latter. In this form of democracy, the Head of the State is nominal. In India, the President is the Head of the State. Constitutionally the President enjoys numerous powers but in practice the Council of Ministers headed by the Prime Minister, which really exercises these powers. The President acts on the advice of the Prime Minister and the Council of Ministers.
Parliamentary democracy has three important characteristics namely:

- The executive is responsible to the Lower House;
- The Lower House has a democratic basis (i.e. it is elected by the people); and
- The ultimate legislative and financial control is vested in this Lower House.

**A combination of Federal and Unitary Government:** The Constitution of India, unlike the Constitution of the USA and Australia, embodies provisions relating to both union and state governments. Though it did not mention ‘federal state’ anywhere but it adopted a federal structure with a union government. Hence, it is an indestructible union with destructible states.

**Special Provisions for Certain Sections:** Special provisions are made for certain backward classes of people like SCs, STs, OBCs and minorities. Many provisions had to be included in the nature of transitional provisions like provisions for the state of J & K.

**Fundamental Rights, Fundamental Duties and Directive Principles of State Policy:** The constitution embodies a list of fundamental rights, and a number of directive principles of state policy. The fundamental duties were incorporated in the constitution by the 42nd Amendment. The fundamental rights incorporated in the constitution are not absolute in nature, but are subject to the limitations which are expressly defined by the constitution itself. The DPSPs are the guidelines provided by the constitution to the states regarding various issues of governance. However, it is non-justifiable in nature.

**Rigid and flexible at the same time:** The Indian Constitution is a combination of rigidity and flexibility. A constitution may be called rigid or flexible on the basis of its amending procedure. In a rigid constitution, amendment of the constitution is not easy. The Constitution of India provides for three categories of amendments. In the first category, amendment can be done by the two houses of Parliament by simple majority of the members present and voting before sending it for the President’s assent. In the second category, amendments require a special majority. Such an amendment can be passed by each House of Parliament by a majority of the total members of that House as well as by the 2/3rd majority of the members present and voting in each house of Parliament and send to the President for his assent which cannot be denied. In the third category, besides the special majority mentioned in the second category, the same has to be approved also by at least 50% of the State legislatures. Thus, the Indian Constitution provides for the type of amendments ranging from simple to most difficult procedure depending on the nature of the amendment.

**One of the longest and lengthiest Constitution:** Detailed provisions, relating to the working of various institutions set up under the constitution, have been included mainly with a view to avoid difficulties which a newly born democratic republic might have experienced in working the constitution efficiently.

**Detailed provisions on distribution of Power:** Among the various parts of the government, detailed provisions with respect to the exercise of executive and administrative powers are laid down because the constitution makers were not sure about the strength of democracy then and its capacity to effectively regulate those powers.

**Independent and Integrated Judicial System:** The judiciary system is kept free from the influence of the executive and the legislature. As an integrated system, India has the Supreme Court as the apex court below which High Courts come. The High Courts in turn supervise the lower courts.

**Single Citizenship:** In a federal state, usually the citizens enjoys double citizenship as is the case in the USA. In India, there is only single citizenship.

**Universal Adult Franchise:** Indian democracy functions on the basis of ‘one person one vote’. Every citizen of India who is 18 years of age or above is entitled to vote in the elections; irrespective of caste, sex, race, religion or status.

**Features of the Presidential Type of Government**

- The President is the head of the State and also the head of the Governments. He is the real executive and not merely notional executive. The powers vested in him are in practice actually exercised by him.

- All executive powers are vested in the President. The Cabinet appointed by President is merely to advise him. S/he is not bound by their advice. S/he may obtain their advice and yet may choose to act on his own judgment.
The President is elected directly by the people who constitute the electorate. The term of the office of the President is not dependent on the will of the legislature.

The President and the members of the Cabinet are not members of legislature. The President has no power to dissolve the legislature before the expiry of its term. The legislature cannot terminate the term of the President except by way of impeachment. In this way the President and the legislature are elected for fixed terms and are independent from each other.

Advantages of Presidential Systems

- **Stability** - In a presidential form of government, the President remains in office for a fixed term and is not dependent on the legislature for continuing in office. This provides stability to government.

- **Faster decision making** - All executive powers are vested in one individual who is the President. In times of war or emergency or any other national crisis, he can arrive at a decision quickly.

- **Role of experts** - The President is free to select such persons as he may deem proper to be his advisors. He may select experts to head several departments. These heads would constitute his Cabinet. In a parliamentary form, the ministers are appointed not because of their administrative ability or expertise in a particular area but on the grounds of political expediency.

- **Party divisions are not prominent** - After assuming office, the President is accepted as a leader of the nation and not merely of a party. He views each problem as national problem and not from a party angle. This provides greater unity and cohesion to the nation. In a parliamentary form of government, the party divisions are never eliminated. The Prime Minister always identifies himself as belonging to a particular party.

- **Separation of legislative and executive powers** - Presidential form of Government is based on the doctrine of separation of powers and provides for checks and balances to keep the different organs within their allotted areas. This provides better protection to liberty. In a parliamentary form, the legislative and executive powers are concentrated in the Council of Ministers headed by the Prime Minister, which may sometime pose a threat to human rights.

Drawbacks of the Presidential Form of Government

- **Concentration of power:**
  In a presidential form of government, the only person who is responsible for thinking and planning for the whole nation is the President. This concentration of power sometimes paves the way for dictatorship.

- **Lack of Collective leadership**
  Collective leadership has built-in capability of correcting itself. This is lacking in the Presidential form.

- **Lack of accountability**
  In the presidential system the assessment of responsibility is periodic. The people may review it only when the election of a new President is due. In the parliamentary form, the assessment is on a daily basis because the Government has to justify its action before the legislature in every session.

Essentials of Parliamentary Form of Government

- Presence of a nominal executive (i.e. the President) who acts only on the advice of the Cabinet.
- A Cabinet form of government led by the Prime Minister which has the support of the majority in the legislature.
- The Prime Minister’s dominant position in the Cabinet.
- Collective responsibility of the Council of Ministers to the Lok Sabha.

However, India has adopted the parliamentary form of government particularly because of the following reasons:

- It is a system with which India had grown familiar during the British Rule.
- It can provide effective leadership during emergencies.
- It is based on fusion between the executive and legislature and thereby ensures harmonious relationship between the two.
- It provides for accountability of the government to the legislature.
- It ensures representation of all sections of people both in legislatures and government.

Basically, the debate between the parliamentary & presidential forms of government is a debate between accountability and stability. No doubt the presidential form of government can provide more stability than the parliamentary form of government in India in its present form. But it is accountability which is more important than stability. With all its stability, the presidential form is not an accountable form of government. It can lead to dictatorship in a country like India. Because of its diversity in culture, religion and social moorings, the presidential form of government would be less representative and might lead to concentration of power in a few sections of society. Therefore, even with its inherent defects, the parliamentary form of government is still more suitable for India. What is more important is not the form of government but how system is run.

**Model Questions**

Q 1. When some states are functioning successfully without constitution, then why there is a pressing need to have constitution as displayed by newly independent countries?

Q 2. Why can't constitution makers define and codify a constitution at one go, instead of providing for detailed provisions for the amendments later on?

Q 3. What are some unique features of the Indian Constitution?

Q 4. Indian Constitution contains unnecessary administrative provisions, even including the detailed unit level provisions and is an unusually long combination of administrative law and constitutional law. Critically evaluate.

Q 5. India adopted the parliamentary system only because of familiarity factor, as it was already introduced to the same, through various ‘Government of India’ Acts introduced by British. Critically analyze.