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# **EMERGENCY IN INDIA AND THE UNITED STATE OF AMERICA AND COMPARISION**

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## **Chapter:1**

### **Abstract:**

A constitution is defined as the set of written rules, that are accepted by all the people living together in a country. It determines the relationship between the people and the government. The Constitution of a country may be federal or unitary. In a Federal Constitution there is Central government having certain powers which it exercises over the entire country Then there are regional governments and each of such governments has jurisdiction within a region. All kind of relations arise between the Central Government and the regional governments. For an example, India is a federal constitution. Some other Constitution are: USA, Canada, Australia Malayasia Germany etc. The Constitutional law of a country consists of both 'legal' as well as 'non legal' norms. 'Legal' norms are enforced and applied by the courts and if any such norm is violated, courts can give relief and redress. On the other hand , 'non legal' norms arises in course of time as a result in practices followed over again . Such norms are known as conventions, usages, customs practices of the Constitution. In this article we shall try to understand Constitutionalism its background and present position and difference between Constitution and Constitutionalism.

The different functions of the constitution are:

The constitution should provide a set of basic rules that allows the people to live together with trust and coordination. It should specify how the government will be constituted, and who will have the power to make the decision for a particular scenario, and so on. It expresses the aspirations of the people to create a good society. Constitutionalism speaks about governance of a country.

Introduction:

Constitution it means that the basic laws or rules of a country or organisation. In Other sense the parts of something are put together and formed a body combined, of it resembles to nation ,state or social group that determine the powers and duties of the government and guarantee certain rights to the people in it. Whether state is federal or unitary the first function of a constitution is to provide a set of basic rules that allow for minimal coordination amongst members of a society. Any group will need some basic rules that are publicly promulgated and known to all members of that group to achieve a minimal degree of Constitution. But these rules must not only be known, they must also be enforceable. It is saying that the rules are largely enforceable gives an assurance to everybody that other will follow it, for if do not so, they will be punished.

The second Function of a Constitution is to specify who has the power to make decision in a society it decides how the government will be constituted. A constitution is a body of fundamental principles to which a state is constituted or governed. It specifies the basic allocation of power in a society. It decides who gets to decide what the law will be.

In the Indian Constitution for example, it is specified that in most instances, Parliament gets to decide laws and politics and that the parliament itself be organised in a particular manner. Before identifying what the law in any given society is, we have to identify who has the authority to enact it. If Parliament has the authority to enact laws,, there must be a law that bestows this authority on Parliament

## Chapter-2

### **HISTORICAL PERSPECTIVE AND PHILOSOPHY OF CONSTITUTION:**

The Constitution of India, the precursor of the new India renaissance, became effective on 26th January.

However, a few Constitution viz. Articles 5,6,7,8,9,60,324,366,367,379,380,388,391,392,393 and 394 came into force on 26th November 1949<sup>1</sup>. There were 395 articles originally in the Constitution of India Presently the Constitution has a preamble, and 470 articles which are grouped in 25 parts and 121 schedules. Before the advent of the Indian constitution, India was governed under the government of India Act,1935 which with effect in 1937 Then India was ruled by British Empire. British Crown prevailed over the country and it was in the exercise of this sovereignty that the British Parliament had enacted the Act 1935. In this Act conferred a few limited rights of the self-government on the Indians. The executive authority in a Province was vested in the Government appointed by the Crown .He was to act ordinarily on the advice of minister who were to be

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<sup>1</sup> Indian Constitution law M.P Jain eighth edition pages no.9

responsible to the Provincial Legislature which was elected on a limited franchise .In that case the Governor could exercise certain functions in his discretion or individual judgement and he is not bound by ministerial advice and subject to the control of Governor-general .The executive authority at the Centre was vested in the Governor-general by the Crown.

Secondly, the Act of 1935 sought to change the character of the Indian Government from unitary to federal. The Indian Federation was to consist of the province in which British India was divided and the under the native princes. The ministerial form of government, as envisaged by the Act of 1935, could not be introduced at the Centre ,which continued to function under Government of India Act,1919.Before 1947,the effective power and control over the Indian Administration lay with the Secretary of the State ,the Governor General and the Governors ;Indian participation was minimal. Thus arose an insistent demand for independence which resulted in the setting up of Constituent Assembly for drafting a Constitution for a free India. The Assembly formally commenced to draft of Constitution making from December 9, 1946.The Constituent Assembly started drafting after independence ,15th August 1947 and hard work for three years finalised and adopted the Constitution on 26December 1949.

#### **THE PHILOSOPHY OF CONSTITUTION:**

There is a some belief that a Constitution merely consists of laws and that laws are one thing, values and morality are another one. Morality and values are not uniform all over the country and not in globe. Therefore we can have only a legislate , but also a political philosophy approach to the Constitution .It is true that all laws do not have moral content, but many laws are closely connected our values. Taking an example, a law might prohibit discrimination of persons on grounds of language or religion. Such a law is connected to the idea of equality. Therefore, there is connection between laws and moral values. It can be said that the Constitution as a document that based on a certain moral vision. in the same time we need a political philosophy approach to the Constitution and that would be a perfect structure of a constitution. It should include the ambit of, such as 'rights', ' citizenship', minority', and 'democracy'.

Secondly, we must endeavour to work out a coherent vision of society and political conditional upon an interpretation of the key concept of the Constitution. Final point that the Indian Constitution must be read in conjunction with the Constituent Assembly Debates in order to refine and raise to a higher degree of theoretical plane the justification review and value with proper interpretation of Constitutional laws. Indian Constitution is a living Constitution as because it can be amended without changing a basic structure .h

### Chapter – 3

#### Constitution Law:

“Constitution law” is the broader than the term “Constitution”<sup>2</sup>, as it comprises of the Constitution” statutory law, judicial decision and convention A Constitution is unique legal document. It enshrines a special kind of norm and stands at the top of the normative pyramid. Difficult to amend, it is designed to work on human behaviour for years to come, It shapes the appearance of the state and the aspirations of human history. It determines the state’s fundamental political view . It have determination on commitments and orientation. It lays the foundation for its social values. Time to time, on social need base, our constitution is changed, without changing the basic structure. (44<sup>th</sup> amendment of Indian Constitution). Indian Constitution is the longest Constitution. Indian Constitution is a flexible rather than it is a rigid one unlike United State Of America

In India, the structure of government divided into three institutional components, these are (1) Legislature to make the law; (2) Executive to implement and execute laws; and (3) Judiciary to interpret the laws and administer justice. While these three organs are basic in any country and the constitution does invariably deal with them , the Constitution may also any other organ which it may be regarded as significant and fit for inscription in the Constitution .For example, the Indian Constitution provides for the creation of a Finance Commission every five years to settle the financial relationship between the centre and state and it also establishes on a permanent footing an Election Commission to ensure free and fair election.

It is quite significant to see the aspect of relation between the government and the people is the guarantee of certain Fundamental Rights to the people. Modern Constitution lay a good deal of emphasis on people’s Fundamental Rights. There are a few basic fundamental Rights inherited, that cannot be curtailed even during emergency such as right to live and life(Article 20 and 21).The judiciary is endowed with the function of protecting these rights and acting as guardian hereof .I the legislature passes any law or executive takes an action , so as to infringes any of the Fundamental Rights ,then courts may declare in such a law or action as unconstitutional .Some of the basic Fundamental rights are : right to live , freedom of person, freedom expression right to equality freeform of conscience and religion etc.

The Constitution of a country may be federal or unitary in a nature. In a federal Constitution there is a Central Government having certain powers which it exercises over the entire country and regional have states which given power, by article257(1), in Part XI gives the relation between

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<sup>2</sup> Indian Constitution law M.P Jain eighth edition pages no.2

the Union and the State Article 245 and 246. India is an example Federal Constitution Some other Constitution are: USA, Canada, Australia, Malaysia Germany etc. The Constitutional law of a country consist of both legal as well as an 'non-legal' norms Legal norms .'Legal 'norms are enforced and applied by the courts and if such norm is violated, courts can give relief and redress. On the other hand, 'norms arise in course of time as a result of practices followed over and over again .Such norms are known as convention ,usages, customs, practices of the Constitutions<sup>3</sup>. Commitment to the Constitution is a facet of Constitutional morality. Thus, institutional respectability and adoption of precautions for the sustenance of the Constitutional values would include reverence for the Constitutional structure. It is profitable to remember that a Constitution is "written in blood rather than ink":

#### **Chapter:4**

#### **BASIC STRUCTURE AND EVOLUTION OF THE CONSTITUTION:**

One thing that has had a long-lasting effect on the evolution of the Indian Constitution is the theory of the basic structure of the Constitution This ruling has contributed to the evolution of the Constitution in the following ways <sup>4</sup> :

- >It has the specific limits to the Parliament's power to amend the Constitution. It says that no amendment can violate the basic structure of the Constitution.
- > It allows the Parliament to amend any and all parts of the Constitution (within this limitation); and
- >It places the Judiciary as the final authority in deciding if an amendment violates basic structure and what constitutes basic structure.

The Supreme Court gave the Keshavananda ruling in 1973 , In past three decades .this decision has governed all interpretations of the constitutions and all the institutions of the country have accepted the theory of basic Structure ..we may take that the theory of basic structure is itself an example of living Constitution .This theory does not found in the Constitution ,but emerged from judicial interpretation Thus the judiciary and its interpretation practically amended the Constitution without a formal amendment Then question arises how living document is evolved? Answer is simple is that it evolves in these manner through debates, arguments, competition and practical politics. Since 1973, the Court has, in many cases elaborated upon this theory of basic structure and given instances of what constitutes of the Constitution of India. The basic structure has further consolidated the balance between rigidity and flexibility by saying that certain parts

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<sup>3</sup>Indian Constitution law M.P Jain eighth edition pages no.3

<sup>4</sup> Indian Constitution of work of NCERT Director NCERT New Delhi 20<sup>th</sup> December 2005 page no211.

cannot be amended, It has underlined the rigid nature while by allowing amendments to all others it has underlined the flexible nature of the amending process. Judicial interpretation understanding of the changed our Constitution Say an example Supreme Court had held that reservations in jobs and educational institutions can not exceed fifty percent of the total seats. This has now become accepted principle. In the same manner, the Judiciary has contributed to informal amendment by interpreting various provisions concerning right to education, right to life and liberty and the right to form and manage minority educational institutions. These are examples of how rulings by Court contribute to the evolution of the Constitution

#### Review Of the Constitution<sup>5</sup>

In the nineties, efforts were made to review the entire Constitution. In the year 2000 a commission to review the working of the Constitution was appointed by the government of India under the chairmanship of a retired chief Justice Venkatchaliah. Opposition parties and many other organisations boycotted the commission. While a lot of political controversy surrounded this commission, the commission stuck to the theory of basic structure and did not suggest any measures that would endanger the basic structure of the Constitution. This shows the significance of the basic structure of the Constitution.

#### Chapter: 5

#### CONSTITUTIONALISM:

The twin test of Constitutionalism, namely 'rule of law' and 'limited government' are both visible when the governance is at work, in accordance with Sastra, and there is no occasion for governance of the nation to generate into arbitrary or tyrannical rule<sup>6</sup>.

If we go back to origin, Constitutionalism in rather primitive form began in Greece some twenty-three centuries ago. The Greek Constitution was the general system of authority by means of which functions of the state were performed. It was the essence of the state

Besides the concept of Constitution, there is all important concept of 'Constitutionalism'<sup>7</sup> Modern political thought draws a distinction between Constitutionalism and Constitution. A country may have the Constitution but not necessarily Constitutionalism. For example a country with a dictatorship, where the dictator word is final and it is a law, can be said to have a Constitution but

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<sup>5</sup> Indian Constitution of work of NCERT Director NCERT New Delhi 20<sup>th</sup> December 2005 page no 212

<sup>6</sup> <https://theleaflet.in/the-origins-of-indian-constitutionalism>

<sup>7</sup> Indian Constitution law M.P Jain eighth edition pages no.6

not Constitutionalism.

There is difference between the two concept is that a Constitution ought not merely to confer power to the various organ of the government, but also seek to restrain those powers. Constitutionalism recognise the need for the government but insists upon limitation being placed upon the governments power. Constitutionalism envisages check and balance and putting the power of legislature and the executive under some restrains and not making them uncontrolled and arbitrary .Unlimited power jeopardise freedom of the people .It is said that absolute power corrupt absolutely .If the Constitution confers unrestrained power on either the legislature or the executive , it might lead to an authoritarian, oppressive government ; therefore to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism', it should have some in-built restriction on the power conferred by it on government organs.

Elements of constitutionalism<sup>8</sup>:

It implies the following elements which characterise the Constitution in India

- >Sovereignty; It initiates that the government is free from any bias any particular authority.
- >Supremacy of the Constitution and rule of Law: It denotes the country is run through rules, not authority or powers .No one can decide the governance except the laws and regulations which already have been stated.
- >Political Democracy: In democracy, individual rights and equality should be protected.it declares equal rights to all individuals within the country.
- >Representative-limited Government: It decares the representatives are selected through a proper election process by the people and representatives are answerable to the general public for their actions.
- >Separation of Power: It divides the whole power into three branches i.e. Executive ,Legislative and Judiciary .This helps keep checks and balance in each area separately.in better way.
- >Civilian Control of the Military Force It is that military should not interfere in the democratic decision process of the country.
- >Independent Judiciary: It ensures the freedom of democratic power in India. It means that the government is free to run the country if the laws support it.

Chapter-6

Difference Between Constitutionalism and Constitution:

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<sup>8</sup> <https://unacademy.com/content/constitutionalism>

**Procedural Achievement:**

All the five core features are what might be called the substantive achievements of the Constitution. However, there were also some procedural achievements<sup>9</sup>.

First, the Indian Constitution reflects a faith in a political deliberation. We know that many groups and interests were not adequately represented in the Constituent Assembly but debates in the Assembly amply show that the makers of the Constitution wanted to be inclusive in their approaches as possible. The open ended approach indicates the willingness of people to modify their existing preferences. It also shows a willingness to recognise creative value in difference and disagreement.

Second, it reflects a spirit of compromise and accommodation. These words compromise and accommodation, should not always be seen disapproval. Not all compromise are bad. Sometimes some extent of sacrifice brings greater interest for society, if something of value is traded off for mere self-interest then we naturally have compromised in the bad sense. However, if one value is partially traded off for another value, especially in an open process of free deliberation among equals, then compromise arrived in this manner can be hardly objected to. Besides, a commitment to the idea that decisions on the most important issue must be arrived at consensually rather than by majority vote is equally normally commendable..

Thirdly, though rigid<sup>10</sup>, the Indian Constitution contains within itself elements of growth dynamism expansion and flexibility. It does not seek to impose on the country any particular philosophy or social order. It establishes a democratic process a government for near about 140 million people and for other reason India is characterised as biggest democracy in the world. The founding fathers have given people to India a Constitutional fabric which is in line with the world's most democratic concepts and which the people can use to organize a social structure according to their genius and need the following the path of rule of law.

**Chapter-7****Criticisms:**

The Indian constitution can be subject to many criticisms of which three may be concisely mentioned as in below:

- a) First, that it is unwieldy;
- b) second, that it is unrepresentative; and

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<sup>9</sup> Indian Constitution of work of NCERT Director NCERT New Delhi 20<sup>th</sup> December 2005 page no234

<sup>10</sup> Indian Constitution law M.P Jain eighth edition pages no.22

c) it is some extent alien to our conditions.

The criticism that it is unwieldy is based on the assumption that the entire Constitution of a country must be found in one compact document. But this not true even of countries such as the United State which do have a compact constitution Indian Constitution is to be identified with a compact document and with other written documents with constitutional status. Many countries for instance.do not have provisions for Election Commission or the Civil Service Commission in the document known as Constitution, but in India ,many such matters are attended by the Constitutional document itself.

A second criticism of the Constitution is that it is unrepresentative. Here, we must distinguish two components of representation., one that might be called voice and the other important. The voice component of representation is important. People must be recognised in their own language, it is indeed unrepresentative because members of the constituent Assembly were chosen by a restricted franchise not by universal suffrage. If we examine the other dimension, we may not find it altogether lacking in representativeness. In debate takes place in the Constituent Assembly, we find that a vast range of matter and opinions were mentioned members raised matters not only based on their individual social concerns but based on the perceived interests and concerns of various section as well.

A final criticism is on discussion that the Indian Constitution is an alien some extent document borrowed article by article from written constitutions and takes uncomfoting position with cultural ethos of the Indian people. This criticism voiced by many, even Constituent Assembly itself, and some voices that echo this concern, It is true Indian Constitution is modern and partly western blended with thought of Indians.

First, many Indians have not only adopted modern ways of thinking, but have made these only their own. So, this new instrument of modern law was effectively adopted by the people to address questions of dignity and social justice.

Second, when western modernity began to interact with local cultural systems, something like a hybrid culture began to emerge, possibly by creative adaption, for which a parallel can be found. Thus, when we were drafting our Constitution , efforts were made to amalgamate western and traditional Indian values. It was a process of selective adaption and not borrowing.

### **Conclusion:**

In spite of criticism, Indian Constitution contains within itself elements of growth dynamism expansion and flexibility. It is a living document with need based Constitution amendment being done and it is the core features of the Constitution that gives it this stature of a living document.

It does not seek to impose on the country any particular philosophy or social order .It establishes a democratic process a government for near about 140 million people and for other reason India is the characterised as biggest democracy in the world. Famous vision embedded in in the Constitution: we want to live together and prosper together on the basis of the principles of equality, liberty and fraternity. In 1950, making this Constitution was a great achievement and it is our pride and very important .

**---concluded---**

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