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Overview and Architecture of the Indian Constitutional Arrangement

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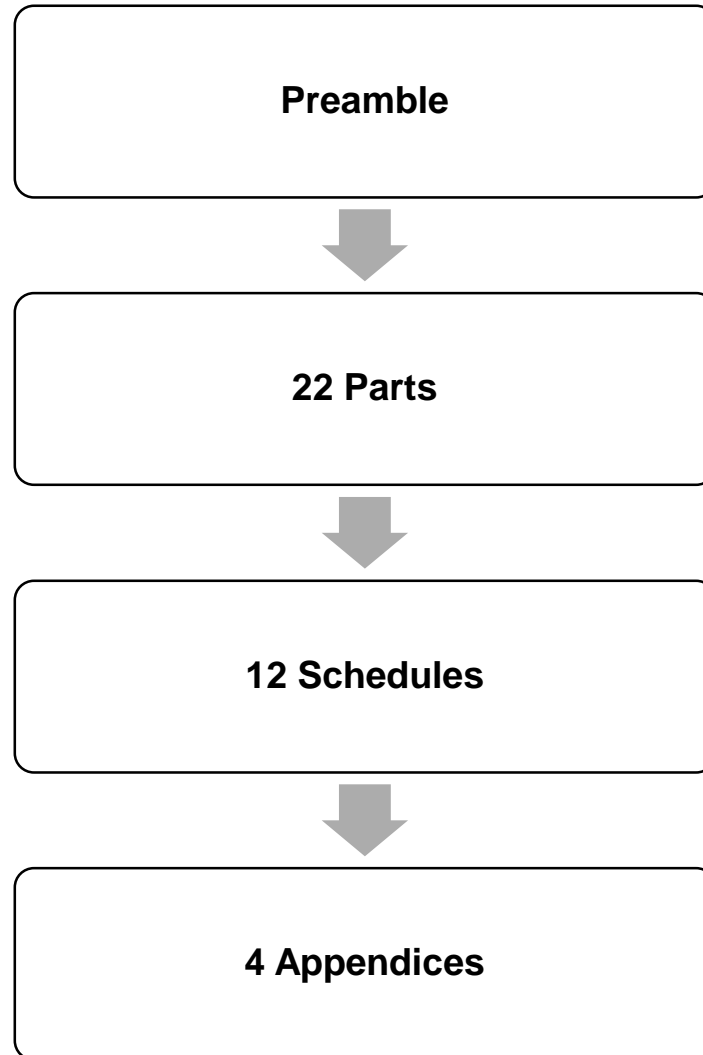
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The Constitution of India, 1950



- The World's longest codified constitution;
- India's 'Supreme Law of the Land';
- 101 Amendments in 68 years – it is one of the most frequently amended governing documents in the world. Averaging more than 1 amendment per

Parts of the Constitution of India, 1950

Part I – The Union and its Territory

Part II – Citizenship

Part III – Fundamental Rights

Part IV – Directive Principles of State Policy

Part IVA – Fundamental Duties

Part V – The Union

Part VI – The States

Part VIII – The Union Territories

Part IX – The Panchayats

Part IXA – The Municipalities

Part X – The Scheduled and Tribal Areas

Part XI – Relations between the Union and the States

Parts of the Constitution of India, 1950 (CONTD.)

Part XII – Finance, Property,
Contracts and Suits

Part XIII – Trade, Commerce and
Intercourse within the Territory of
India

Part XIV – Services under the Union
and the States

Part XIVA – Tribunals

Part XV – Elections

Part XVI – Special Provisions relating
to Certain Classes

Part XVII – Official Language

Part XVIII – Emergency Provisions

Part XIX – Miscellaneous

Part XX – Amendment to the
Constitution

Part XXI – Temporary, Transitional
and Special Provisions

Part XII – Short Title,
Commencement, Authoritative Text



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Basic Structure Doctrine



The Basic Structure of the Constitution

- ❖ The **leading case of Kesavananda Bharati v State of Kerala** (1973 4 SCC 225) considered the contentious issue on the scope of Parliament's power to amend the Constitution. The decision was entrusted to a thirteen-judge bench, which was legally capable of overruling the *Golak Nath* judgement (AIR 1967 SC 1643) -
 - Eleven separate opinions were delivered. Majority on the Court is understood to have held that **Parliament can amend any provision of the Constitution (including fundamental rights), so long as it does not alter, abrogate, or destroy the 'basic structure' or 'essential features' of the Constitution**
 - There was no unanimity of opinion between the judges as to what features were covered by the basic structure.
- ❖ **Judicial precedents on what constitutes basic structure of the constitution**
 - **Indira Gandhi v. Raj Narain** (AIR 1975 SC 865) – 'Democracy, including free and fair elections', 'separation of power' and 'rule of law' declared to be part of the basic structure.
 - **Minerva Mills v. Union of India** (AIR 1980 SC 1789) - 'Judicial review' and balance between the Fundamental Rights and the DPSPs was held to be a fundamental feature of the basic structure of the Constitution.
 - **I. Coelho v State of Tamil Nadu** (AIR 2007 SC 861), the Supreme Court held that all laws were subject to the test of being consistent with fundamental rights, which are a part of the basic structure.
 - Nevertheless, the **sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens** etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements.

Preamble

- ❖ Constitution begins with the Preamble which sets out the nature of the Indian state and the objectives that it seeks to achieve.

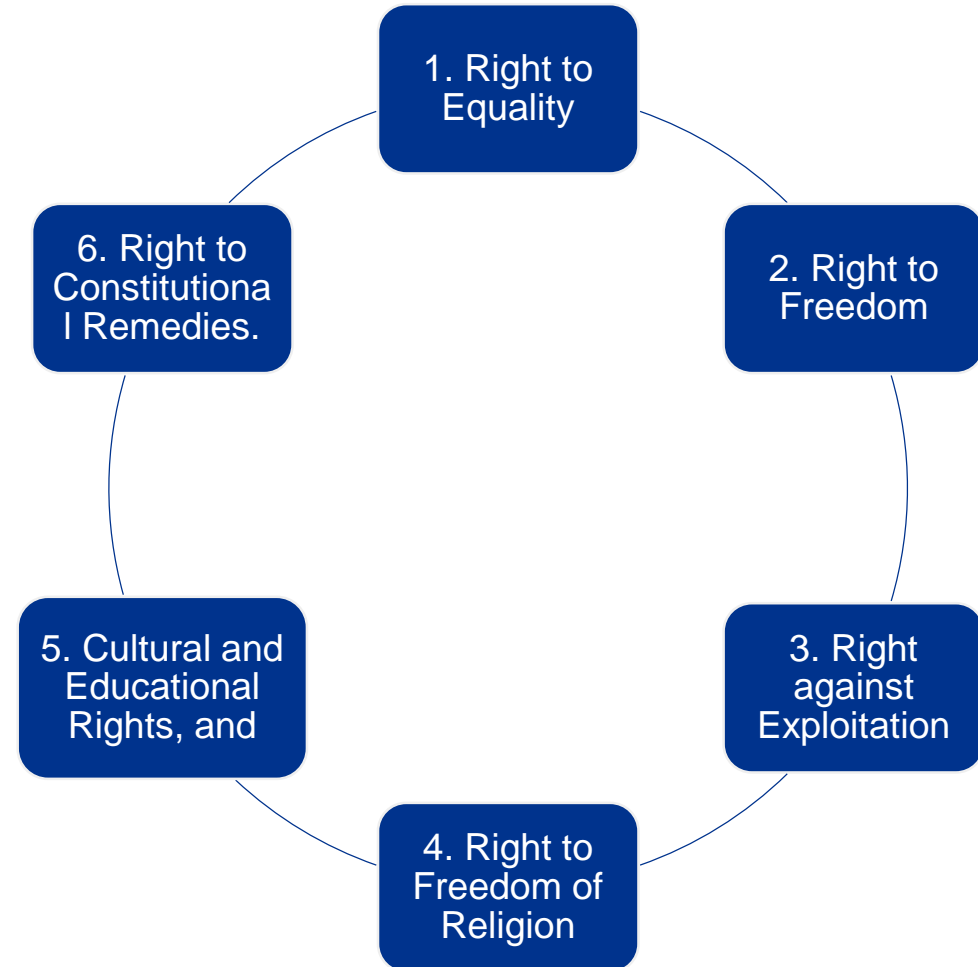
 - ❖ It begins with ‘We the People...’ which indicates that the people of India are its source, authority and subjects.

 - ❖ It is a statement of objects, which the Constitution makers expect to be realized through the implementation of the Constitution. It is a guide to interpretation of the provisions of the Constitution.

 - ❖ Objectives of the Preamble –
 - To set up a ‘sovereign democratic republic’;
 - To secure the citizens of India various rights enumerated in the Constitution
- The words ‘socialist’ and ‘secular’ were added by the 42nd Constitutional Amendment in 1976.
-
- ❖ The Preamble has been held to be a part of the Constitutional text itself. (Supreme Court in the case of **Berubari Union and Exchange of Enclaves**, AIR 1960 SC 845). Further, Preamble has been held to be a part of the basis structure of the Constitution – SR Bommai v. Union of India; (1994) 3 SCC 1

Fundamental Rights

- ❖ Charter of fundamental rights contained in Part III (Articles 12 to 35) of the Constitution of India.
- ❖ These rights impose limitations on the powers of the State. The State cannot take away or abridge these Fundamental Rights of the citizen guaranteed by the Constitution. If it passes such a law it may be declared as unconstitutional by the Courts.
- ❖ However, the Fundamental Rights are not absolute and are subject to reasonable restrictions, based on social interests.
- ❖ Significant changes in the Fundamental Rights –
 - Formerly seven Fundamental Rights were enshrined in the Constitution of India. However, Right to Property was removed from the list of Fundamental Rights by the 44th Amendment Act of the Constitution in the year 1976. Since then, it has been made a legal right.
 - 86th Amendment Act - the Right to Education has been included in the list of Fundamental Rights as part of the Right to Freedom by adding Article 21(A).



“Government by laws is superior to government by men” - Aristotle

- ❖ The rule of law is the legal principle that law should govern a nation, as opposed to being governed by arbitrary decisions of the government. Judicial precedents have interpreted Article 14 as a fundamental right against arbitrariness.
- ❖ In the Kesavananda Bharti case, the Rule of Law has been referred to as one of the most important aspects of the doctrine of basic structure.
- ❖ In our constitutional system, the concept of rule of law refers to the authority of courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside when the aggrieved approaches the Court.

Golden Triangle of the Indian Constitution –

- ❖ Article 14 (Right to Equality), 19 (Right to Freedom) and 21 (Right to Life and Liberty) are popularly known as the ‘golden triangle’ of the Indian Constitution. They are of prime importance and breathe vitality in the concept of the rule of law.
- ❖ These rights are regarded as the basic principles for the smooth running of life for a citizen. The golden triangle provides full protection to individuals from any encroachment upon their rights.
- ❖ The Supreme Court in the case of **Maneka Gandhi v. Union of India** (AIR 1978 SC 597) held that a law depriving a person of ‘personal liberty’ has not only to stand the test of Article 21 but also Article 14 and Article 19

Fundamental Duties & DPSPs

- ❖ The Directive Principles of State Policy contained in Part IV set out the aims and objectives to be taken up by the States in the governance of the country. It aims at the material and moral well-being of the people and to transform India into a Welfare State. Illustrations of the DPSPs include:-
 - Equal justice and free legal aid
 - Right to work, to education and to public assistance in certain cases
 - Provision for just and humane conditions of work and maternity relief
 - Living wage , etc. for workers
 - Uniform Civil Code for citizens
 - Promotion of educational and economic interests of SCs, STs and other weaker sections.

- ❖ Though the Directive Principles for State Policies are not enforceable in Courts of law but the Supreme Court of India by its proactive approach in giving meaning and life to the words embodied in the Constitution, has read these Directive Principles with the Fundamental Rights and enforced them through Court directives.

- ❖ Fundamental duties (Article 51A) are a list of moral obligations of all citizens to help promote a spirit of patriotism and uphold the unity of India. Some of the key fundamental duties include
 - ❖ To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem
 - ❖ To uphold and protect the sovereignty, unity and integrity of India
 - ❖ To value and preserve the rich heritage of our culture

- ❖ Fundamental duties, like the Directive Principles of State Policy, cannot be judicially enforced.



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Nature of Co-operative Federalism



Co-operative Federalism

- ❖ A concept of federalism in which national, state, and local governments interact cooperatively and collectively to solve common problems, rather than making policies separately but more or less equally.
- ❖ The relation between the centre, the states and the local tiers lies at the heart of India's sense of nationhood. Both centre and state governments must attend to the task of preserving our nationhood through constructive cooperative federalism.
- ❖ Division of legislative powers between the Union and the State by way of the Union, State and the Concurrent lists provided in the 7th Schedule to the Constitution. Only the Centre deals with the issues mentioned in the Union List, States on the areas mentioned in the State List while the Concurrent List contains areas where both the Center and the State can legislate.

GST: a shining example of Cooperative federalism

- ❖ The 7th Schedule gives both the Centre and States the power to impose taxes in the Union and State List respectively. Before the GST regime, the Union imposed taxes such as the Central Excise Duty (on manufacture) and Service Tax (on provision of services), while the States imposed taxes on the sale of goods (State VAT), Entry taxes, etc.
- ❖ With the implementation of the Goods and Services Tax, States and the Centre have ceded their power to tax and come up with a single tax system to realize the dream of 'One India, One Market'.
 - ❖ **Article 246A introduced by the 101st Constitutional Amendment Act, 2016** – Concurrent power with Centre and State to levy GST. Exclusive power with Centre to levy GST on interstate supplies

Why a Federal Structure?

- Separate union and state governments
- Division of powers
- Written Constitution
- Supremacy and rigidity of Constitution
- Independent judiciary
- Bicameralism

Why a Unitary Structure?

- Strong Centre
- Single Constitution
- Single citizenship
- Flexibility of Constitution
- Integrated judiciary
- Appointment of state governor by the Centre
- Emergency provisions



Hence, Federal in form but Unitary in Spirit



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Separation of Powers



Separation of powers - concept

- ❖ Concentration of power in one person or group results in tyranny. Decentralization of power necessary to check arbitrariness. Decentralization achieved by vesting governmental power in three different organs – the legislature, the executive and the judiciary
- ❖ The **principle of ‘separation of powers’** requires that each organ should be independent of the other and no organ should perform functions that belong to the other
- ❖ **The doctrine of ‘separation of powers’ is a check against tyrannical rule**
- ❖ The term **‘separation of powers’** coined by French political philosopher **Baron de Montesquieu** in his book *Esprit des Lois* (‘The spirit of the laws’) **in 1748**:
 - **According to Montesquieu**:- “*when the legislature and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty....**there is no liberty if the powers of judging is not separated from the legislative and executive....there would be an end to everything, if the same man or the same body were to exercise those powers**”*
 - Interestingly, **Montesquieu’s formulation of this doctrine is couched in terms of independence of judiciary**
- ❖ Present in **rudimentary form** in **ancient Greece** and **Rome** too
- ❖ **The doctrine of ‘separation of powers’ has been adopted in almost all Constitutions of the World**

Separation of powers – not rigidly followed

- ❖ The doctrine of **'separation of powers'** has not been rigidly followed in most of the **Constitutions** of the world. For example, the **American Constitution** doesn't speak of 'separation of powers' but the same can be inferred from the first three articles:
 - Article I vests the legislative power in the Congress (consisting of Senate and House of Representatives)
 - Article II vests the executive power in the President of the United States
 - Article III vests the judicial power in the Supreme Court of America and the courts below
- ❖ In **United Kingdom** too, 'separation of powers' was diluted – so much so, till 2009 when the Supreme Court of UK was established, the House of Lords (part of the legislature) acted as the final arbiter of disputes
- ❖ **In India, the blurring of the edges of 'separation of powers' is more pronounced:**
 - Indian Constitution expressly vests executive powers in the President and the Governor [vide articles 53(1) and 154(1)] – but **no corresponding vesting provision for legislature and judiciary**
 - **President/Governor exercise legislative functions** through ordinances, formulating law while proclamation of emergency is in force [Article 357(1)] and **judicial functions** through granting of pardons
 - **Parliament/State legislatures exercise judicial powers** for breach of privilege (contempt powers)
 - **Judiciary exercises administrative/executive** powers by making rules for Supreme Court appointments

Separation of powers – practically understood as....

- ❖ The doctrine of ‘separation of powers’ has **practically** been implemented as a system of ‘**checks and balances**’ between these three wings with an emphasis on **independence of the judiciary**
- ❖ **Interesting quote from US Jurist Alexander Bickel, equally relevant for India:**
 - “***Our Government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it is often the sweaty intimacy of creatures locked in combat***”
- ❖ In India, there is **effectively a fusion of Government power** where all three organs are required to perform almost all the three functions – the **three organs need to work in close coordination and are interdependent on each other** due to the principle of ‘checks and balances’
 - Parliament checks the actions of the president and the judiciary through the impeachment process [Articles 61 and article 124(4) and (5)]
 - **Judiciary scrutinizes the actions of the executive and the legislature through its power of judicial review**
- ❖ ‘Separation of powers’ (interpreted as above) held to be **part of the ‘basic structure’ of the Indian Constitution** in Keshavananda Bharati’s case



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Emergency Powers in the Constitution



Emergency Powers

Part XVIII of the Constitution of India provides for three types of extraordinary situations -

- ❖ Article 352 – National security emergencies owing to military conflict or armed rebellion –
 - Allows the President to proclaim an emergency when ‘satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion’.
 - Following such a proclamation, the Union is allowed to direct, and Parliament is allowed to legislate for, any State.
 - In the event of military conflict, the President is also authorised to suspend Article 19.
 - More generally, the President is permitted to restrict the ability of citizens to move courts for the enforcement of the fundamental rights listed in Part III of the Constitution (except for Articles 20 and 21).

- ❖ Article 356 - failures of constitutional machinery in the States
 - permits the President to proclaim such a breakdown should he be 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’.
 - A number of consequences follow from such a proclamation, the most important being that the President can assume to himself all or any of the functions of the Government of the State.

- ❖ Article 360 – Financial Emergency
 - Article 360 allows the President to proclaim such an emergency when he is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened.



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Trade, Commerce and Finance



Trade and Commerce

- ❖ Article 19(1)(g) - Guarantees to every Indian citizen a fundamental right to carry on trade and business, subject to such reasonable restrictions as may be imposed in the interests of the general public.
- ❖ Articles 301 to 307 of Part XIII of the Constitution – Freedom of Trade, Commerce and Intercourse
- ❖ Article 301 guarantees that trade, commerce and intercourse shall be free throughout the territory of India.
- ❖ It imposes a general limitation on the exercise of legislative power, whether of the Union or of the States, to secure unobstructed flow of trade, commerce and intercourse from one part of the territory of India to another. Article 301 only extends to lawful trading activity or commerce.

Taxation

- ❖ Chapter I of Part XII of the Constitution contains various financial provisions.
- ❖ Article 265 of the Constitution provides embodies an important constitutional principle, namely, that no tax shall be levied or collected except by the authority of the law. The term 'law' in this article means statute law, i.e. an Act of the legislature.
- ❖ Where the law does not authorize the tax imposed, Article 265 is infringed.



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