



Chapter 1

CONCEPT OF STATE AND NATION

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VII. CONCEPT OF A NATION





UNIT 01: CHAPTER 1

CONCEPT OF STATE AND NATION

1. Objectives:

1. To gain knowledge of the State with respect to:

- ❖ origin and growth
- ❖ well-known definitions
- ❖ types

2. Understand

- ❖ different elements
- ❖ concept of a Nation

3. Apply knowledge

- ❖ while resolving a given problem-case study
- ❖ doing research / reference work

2. **Think it over:** Take this quiz to find out how much you know, by choosing the right option.

a. The State means people who

- i. Live in distinct groups for their own benefit
- ii. Share their resources for mutual benefit

b. A state would be formed by determining

- i. The resources available in an area
- ii. Commonality of socio-economic life of people

c. Political activities in a state aim

- i. To keep certain communities in power to defend it
- ii. To regulate the overall life and livelihood of the population

d. The term '*Machiavellian*' refers to the practice of

- i. Cunning, deceit, and extrication as means to social success
- ii. Sincere, honest and patriotic deeds for social upliftment



- e. **The authority to run a Family is conferred on the member because of**
 - i. seniority
 - ii. status, competence
- f. **The theory that taught individuals to obey and support some definite ruler with a very high moral status is called the _____ Theory.**
 - i. Divine
 - ii. Darwinian
- g. **The 'state of nature' ensured the rights of individuals relating to**
 - i. life, liberty, property
 - ii. survival, power, wealth
- h. **Nobles, Vassals and Serfs are classes of society that existed in the**
 - i. Feudal states
 - ii. Oriental states
- i. **Nature of population- which is uniform with respect to race, religion, language and culture?**
 - i. homogeneous
 - ii. heterogeneous
- j. **To which cardinal principle has the U.N.O given its approval? Choose one.**
 - i. Right to self-determination
 - ii. Right to life and property

Compare your answers and discuss what you have learnt.

I. EMERGENCE OF THE STATE FROM SOCIETY

The State is usually described as '*society politically organized*'. Society is an association of human beings, who live a collective life and form social relations to fulfil their needs of life. That may be physical, emotional, intellectual, and spiritual. The presence of the societal institutions like family, clans, tribes, villages, religious institutions, educational institutions, workplace associations etc. in a society is a fact, which cannot be denied. Society is the whole web of social relationship based on kinship affinity, language affinity, religious affinity, common conscience of individuals and territorial affinity. Social relationships are governed by necessity, custom, courtesy, morality, mutual understanding, agreement or even contract.



When a society is governed by common set of laws, rules, regulations, and obey a supreme authority, it qualifies for being a State. The State fulfils the need of political organization of society to realize the purpose of collective living. This is what we understand from the famous phrases used by Aristotle (384 -322 BCE) in his treatise Politics, where he observed that '*Man is a social animal; Man is a political animal*'.

Thus, the State is formed out of society. The Society is the primary association. A State is formed to regulate the political activity of individuals for social order. The State depends on society for its existence, and not vice versa.

R.M. MacIver (1882-1970) in his famous work **The Modern State** has observed thus: '*There are social forms like the family or church or the club, which owe neither their origin nor their inspiration to the state; and social forces, like custom or competition, which the state may protect or modify, but certainly does not create; and social motives like friendship or jealousy, which establishes relationships too intimate and personal to be controlled by the great engine of the state..... The State in a word regulates the outstanding external relationships of men in society.*'

II. DEFINITIONS OF STATE

There is no accepted definition of the state and it has been differently defined by various writers from time to time. Machiavelli, in his book **The Prince** defined state '*as the power which has authority over men*'. Notwithstanding the disagreement amongst these writers, most of them agree in ascribing to the state the three elements: people, territory and government. Disagreement became prominent in respect of the fourth element, that is, sovereignty. However, the concept of the state is the central theme of the political theory. The state is a social institution that evolves according to the socio-economic conditions of society. The state is only an aspect of the whole social system. State is a particular portion of society politically organized for the protection and promotion of its common interests. It is main political consciousness which formed the state.

An illustrative list of definitions provided some of the leading political thinkers is provided below:

Harold J. Laski (1893-1950), a British political philosopher in his literary work **An Introduction to Politics** (1931) defines State as '*a territorial society, divided into government and subjects claiming within its allotted physical area supremacy over other associations*'.

Aristotle (384-322 BCE) defines State as '*an associations of families and villages for the sake of attaining a perfect and self-sufficient existence*'.

Salmond defines state as '*an association of human beings established for the attainment of certain ends by certain means, the ends being defence against external enemies and the maintenance of peaceable and orderly relations within the community itself.*'



J.L. Brierly defines state as '*an institution, that is to say, ... a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on.*'

III. THEORIES ON THE ORIGIN OF STATE

Political philosophers have given different theories on the origin of the state.

Theory of Kinship

The theory of kinship on the origin of State is based on sociological facts. The earliest advocate of this theory is Aristotle (384-322 BCE). In his treatise **Politics** Aristotle states '*Society of many families is called a village and a village is most naturally composed of the descendants of one family, the children and the children's children..., for every family is governed by the elder, as are the branches thereof, on account of their relation, there unto.... and when many villages so entirely join themselves together as in every respect to form but one society, that society is state and contains in itself that perfection of government.*'

In other words, family was the unit of society at the beginning. The blood relationship and kinship brought the members of the family together and they all accepted the authority of the head of the family. The name of the common ancestor was the symbol of kinship. Kinship created society and society in turn created the State. With the expansion of family arose new families and multiplication of families led to the formation of clans. With the expansion of clans, tribes came into existence and ultimately the state came into existence. Family discipline, command and obedience are supposed to represent the origin of government. This view finds support from the writings of R.M. MacIver (1882-1970) according to which curbs and controls that constitute the essence of government is first seen in the family. There is a difference of opinion among the scholars regarding the nature of kinship.

Patriarchal Theory

According to Patriarchal Theory, in the origin and development of State, the eldest male descendant of the family had an important role to play. The Patriarchal theory finds its support from Sir Henry Maine (1822-1888). In his book **The Spirit of Laws** (1861), Maine explained that the state developed out of the family as legitimate legal system developed out of the unrestrained autocracy of the family head (*patria potestas*). Under *patria potestas*, the eldest male parent of the family had the final and unqualified authority over the family and the household. He expanded the family ties by polygamy and thus created the bondage among the individuals on the basis of kinship to form a state. The congregation of families formed villages, and extension of villages formed tribes or a clan, ultimately to form State.



Matriarchal Theory

Matriarchal Theory finds support from political thinkers like McLennan (1827-1881), and Edward Jenks (1861-1939). According to them, patriarchal families were non-existent in the primitive ages. Polyandry (where a woman had many husbands) was the highest authority of the household. McLennan described *mater familias* (mother as the head of family) as the *martiapotestas* (mother as the final authority) in matters of possession and disposal of property of the family.

Edward Jenks illustrates this process from his studies of primitive tribes in Australia. The Australian tribes were organized in some sort of tribes known as **totem group**. The totem groups were not organized on the basis of blood relationship but they were united by a common symbol like a tree or an animal. Men of one totem group would marry all the women of their generation belonging to another totem group. Thus the system of marriage included polygamy as also polyandry. Kinship and paternity in such cases could not be determined but maternity was a fact. Edward Jenks points out that with the passage of time and beginning of pastoral stage in human civilization, the matriarchal society evolved into the patriarchal one.

Patriarchal and matriarchal theories have been criticized on the ground that the authority of a state as a political institution over its individuals is not by nature but by the choice of individuals. The purpose of forming a state also differs to a great extent from that of a family. The authority to run a state is conferred on the ruler not because of his seniority, but on account of his status and competence.

Divine Theory

According to the Divine Theory, state is established and governed by God or some super human power or the King as his agent and the religious scriptures. As God created the animals, plants, trees, rivers, hills and other inanimate objects, the God also created the state for a particular end in view, that is, peace, protection and preservation of creatures on this earth. This theory found support from political thinkers such as James I (1566-1625) and Sir Robert Filmer (1588-1653). This theory implies individuals to obey and support some definite ruler with a high moral status equivalent to God. This theory adds moral character to state functions. Laws backed by religious sanctions appealed more to the primitive man to live under the authority of the king.

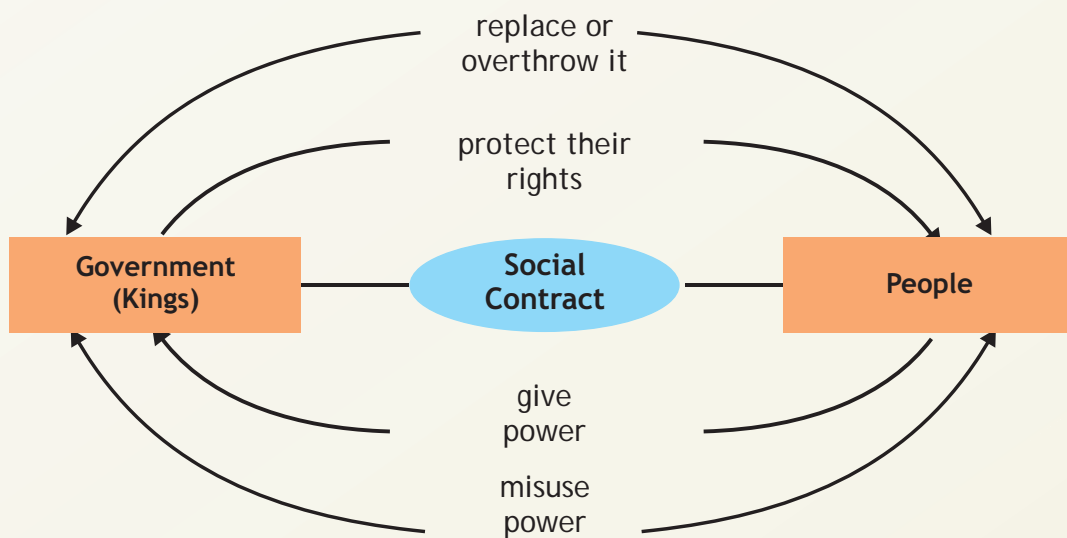
Hindus, Christians, Muslims, Jews, and many other faiths of this world hold a similar view, -that the origin of political authority had divine sanction. Hinduism considered King Rama and King Krishna as divine incarnations on this world. The Islamic states also seek to uphold the reign of God (Allah) on earth. Christianity also traced the origin of political theory to the will of God.

Social Contract Theory

The Social Contract Theory traces the existence of the State to the mutual agreement and mutual consent of the people, to form a State. Thomas Hobbes and John Locke, both from



England, and Jean Jacques Rousseau from France, are the three political philosophers who propounded this theory. They assumed that, to escape from the pre-political condition of society, individuals entered into a social contract. These theories served as the basis for modern democracy. This theory established the obedience to political authority and that ultimate political authority rested with the consent of the people. The pre-political condition of mankind was described as the state of nature.



'Man is born free, everywhere he is in chains' Jean Jacques Rousseau.

Thomas Hobbes (1588-1679), an English political philosopher, in his literary work **Leviathan** explains the origin of the state. He explains that prior to the emergence of a civil state, human beings were in the state of nature. Hobbes began his thesis with the concept of a state of nature, which he characterised as the pre-social phase of human nature. Their lives were under constant struggle with nature. The state of nature was a condition of unmitigated selfishness and capacity. It was a condition of perpetual war 'where every man was enemy to every other man.' The life of a human being was '*solitary, poor, nasty, brutish and short*'.

To evade the state of nature, and for securing their natural rights of life, liberty and property as civil rights, individuals entered into a social contract to establish a state. The people authorized their right of governing themselves to the sovereign, which came into being as a result of the contract. The person or assembly of persons to whom the rights are surrendered becomes the sovereign and the individuals who agree to submit to the authority become subjects. Sovereign here means the **King**. The ruler was not a party to the contract, and was not bound by any terms of social contract and free to rule as per his whims. The commands of the sovereign were laws for the governed and the sovereign was not accountable to people. People gave their ruler unquestioned obedience.



In the words of R.G Gettle, Hobbes created the all-powerful sovereign on account of his belief that without such sovereign power, law, order, peace and security could not be maintained in society. Hobbes deprived the people of their right to revolt against the sovereign. Hobbes allowed individuals to disobey the commands only when the sovereign deprived them of their right to self- preservation or the ruler got conquered and submitted authority to a new Emperor. According to Hobbes, a change in the government meant the dissolution of the State. Thus, he did not maintain the difference between state and government as a political institution.

John Locke (1632-1704) in his book **Two Treatises of Government** explained that the state of nature was not a state of war, but a state of peace, natural rights, preservation, goodwill and mutual assistance.

Locke's state of nature was pre-political. The people were social and had rights and liberties. The state of nature ensured three rights to individuals relating to life, liberty and property. The state of nature was one of inconvenience. Life was inconvenient because each individual had to interpret the law of nature for himself and had also to enforce it without the help of any other authority. The State of Nature did not have the machinery to enforce the natural rights of individuals. To preserve such state of affairs two contracts were made: social and governmental. Social contract led to the formation of civil society and governmental contract to the establishment of government. Social contract was among the individuals - to surrender their natural rights in exchange of civil rights. Governmental contract was between the individuals and the ruler, to establish a system of law and justice in the form of a State. The ruler was the party to the contract and was bound by its terms. Unlike Hobbes, Locke traces the source of government's authority to the consent of the community.

Locke introduced the concept of limited government, in terms of the rulers, their powers, functions and tenure. He believed in limited monarchy. The King was the trustee of the people. If the ruler abused his powers and breached the popular trust, he may be changed by revolt by the people.

According to **Jean Jaques Rousseau** (1712-1778) '*the general will of the people*' led to the creation of the institution called the state. Rousseau in his literary work, **The Social Contract** described the state of nature as a state of bliss and happiness. With the passage of time, increase in population and disparity of wealth and power, life became intolerable. Simplicity and happiness disappeared. Human beings then started to build their relations on cooperation and dependency. They entered into a 'social contract' to preserve their natural rights without submitting or subordinating to any ruler or authority.

Individuals surrendered their rights to the *General Will* of which individuals themselves were parts, and hence they shared rights even after transferring them. Individuals were governed by a new authority in the name of General Will (common good) of the people, in the form of direct democracy. Rousseau regarded General Will of the people as sovereign. The common good depends on the prevailing circumstances of a society. According to Rousseau, the government is



merely the tool to execute the popular will. Thus popular sovereignty is in continuous exercise and there is no scope of revolt in his theory.

This theory is criticized on certain common counts. First, the individuals who were naïve to the concept of political authority and civil rights could not, from any particular point of time, enter into an agreement and start living a collectivized civil life. Second, if the existence of state is based on agreement of the members of a society, then the old agreement may be revoked for new in accordance with the self-interests of the members. Thus a mechanically originated state will run under the constant fear of destabilization.

❖ **Check your understanding by marking each given statement as either true or false: [T/F]**

1. Patriarchal Theory suggests that the eldest child assumes authority in due course.	
2. The concept of a 'totem group' existed among native Australian communities.	
3. The Theory of Social-Contract was not propounded by Rousseau	
4. A symbol of kinship is the common name of the ancestor, as a community expands	
5. The role of the Government is to present limits to preserve social life	
6. Modern humanity can be attracted to God-like attributes in their leader.	
7. The Community Head guarantees civil rights to his/her subjects.	
8. Authority by the consent of the people is democratic.	
9. Individuals surrendered their rights to the General Will is the beginning of an Authoritarian government	
10. An over-controlled state may be described as being 'collectivized'	

Compare your answers and discuss what you have learnt.

IV. TYPES OF STATE

In the words of R.G. Gettle the state did not have a single origin or regular or continuous evolution. Thus, different types of State appeared on the world geography at different times, places and as a result of different causes. They are categorized as:

A. Oriental Empire

Nomadic tribes generally settled down in places where their basic needs of food, water and pasture for their cattle were fulfilled. The early nomadic tribes made the valleys of river Ganges and Indus in India, in the valley of Huang Hoangho and Yang Tse-Kiang in China, the Euphrates and Tigris in Mesopotamia and Nile in Egypt as their homelands.



Tribal centres became kingdoms and empires by conquests and re-conquests, as in the case of Aryans and Sumerians. Some of the important features of this empire included concept of private property, settlement on definite territorial area, and authority of the eldest member of the family or the person with highest physical force.

B. Greek City States

They flourished well in the city of Athens, Greece. Some of the features of this state included the system of direct democracy, governance through political organization and election rules.



Gymnasium & theatre in ancient Greece

C. Roman Empire

The Romans established a form of government - a republic - that inspired several countries for centuries. For instance, government of the United States is hugely influenced by the Roman model.



Artist's imagination of the Roman Senate (Source: <http://www.ushistory.org/civ/6a.asp>)

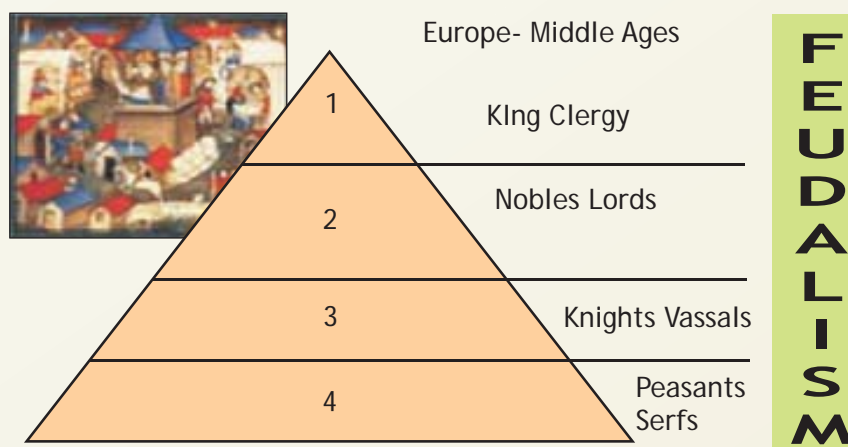


The Roman State passed through three different periods. The first period was that of the monarchies state. Monarchy was succeeded by a Republic under which civil and military power were in the hands of two consuls who were elected annually. The Patricians controlled the administration. There were struggle between the patricians and plebians for the control of power. Ultimately, both of them got equal political and civil rights. The Republic gave way to the Roman Empire which at one time extended over most parts of Europe, Asia Minor and the whole of the Mediterranean coast. Rome put before the world the ideals of unity, order, universal law and cosmopolitanism. The law of nations developed during this period.

Political thinkers like R.G Gettle and historian Edward Gobbin (1737-1794) have attributed the decline of the Roman Empire to reasons such as the sacrifice of individual liberty for the sake of unity, moral depravity of the upper class, failure to make rules for the succession of Emperors, and internal feuds.

D. Feudal States

They emerged from the long and continuous conflict between the barbarians and the Roman political institutions after the downfall of Roman Empire. Feudalism emerged as a consequence and compromise. Vast territories of disintegrated Rome fell into the hands of powerful nobles. Nobles were the patricians of the Roman Empire, who shared political power with the Monarch. They were the members of elite families by way of wealth and social prestige. They became high council officials after the decline of the empire.



Feudalism in the Middle Ages

The Nobles let their land for cultivation, harvesting or other purposes in exchange of consideration to tenants-in-chief and the tenants -in-chief in their turn gave the same to the tenants, and tenants in turn to the Vassals and Serfs. Thus a community hierarchy was set up based on the ownership of land holding.



E. Nation States

Many factors contributed to the decline of feudalism and rise in the consolidation of centralized authority, such as industrial revolution and renaissance. A new type of state emerged in England, France, Spain and Portugal based on ethnic, linguistic, religious and territorial bonds of unity by the name of Nation States.

The separation of King's rule from the demands and interference of religious heads, demand t of people for their civil and political rights, political consciousness, French Revolution in 1789 and Declaration of Rights brought about a great improvement in the political set up of nation states and led to the growth of Modern Nation States.

F. International Entities

International entities like United Nation Organization and its agencies (UNO, 1945), North Atlantic Treaty Organization (N.A.T.O, 1949) Commonwealth Group of Nations, World Trade Organization (WTO, 1995), European Union (EU, 1993) and other entities were established to deliberate upon issues of world peace and human rights, international cooperation, environmental degradation, international trade and other subjects, from a common platform.

Some scholars such as Harold J. Laski (1893-1950) and C.A Striet have regarded the role of international entities in governing the relation of a state and its individuals with rest of the world, as the next stage of development and not as the decline of Nation-States. C.A Striet, in his book Union Now advocates federal union for the existing democracies of the World.

V. ELEMENTS OF A STATE

According to J. W. Garner, '*state is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent or nearly so, of external control and possessing an organised Government to which the great body of inhabitants render habitual obedience.*' The definition given by Garner contains all the elements of the state.

The state must possess four elements, namely, population, territory, government and sovereignty.

A. Population

The state is a human association constituted by the people living there. Population is an essential element of a state. It is the people who make a state, without them there can be no state. The people are the ones who create the state. They also maintain the resources, live on the land, and form the Government. The population must be large enough to make a state and sustain it.





Plato (429-347 B.C.E) in his book **The Laws** suggested a figure of 5040 citizens for constituting an ideal State. Aristotle (384-322 BCE) states that the population of a state should neither be so large that administration may be inconvenient nor so small that people may not lead a life of peace and security.

Stephen Leacock (1869-1944), an English political writer had stated that the population must be sufficient in number to maintain a state organization, and that it ought not to be greater than the territorial area and resources that the state is capable of supporting.

On the nature of population, it may be homogeneous or heterogeneous in respect of race, religion, language or culture. Countries such as India, United States of America, and Canada have population marked with such diversity. People's Republic of China has a population of more than 1300 million people, whereas the smallest state in the world Vatican has a population of only 1200 people.

B. Territory

A state is a territorial institution. The fixed territory and population of a state gives it a physical identity in the eyes of municipal law and international law. The functions of a state, as a political and legal community of human beings, must first of all be exercised in a given territory. Territory is a geographical area that is owned and controlled by a Government or country to exercise State sovereignty. Aristotle (384-322 BCE) favoured the State having moderate size. Montesquieu (1689-1775) said that there is a necessary connection between the size of the state and the form of government best suited to it. The fact is that the states of the world vary in terms of demographic strength. San Marino has an area of 36 sq. miles, whereas the United States of America has a territory of 37,38,395 square miles.



Territory is therefore generally described as land which belongs to the state and individuals, internal waters and territorial sea (straits) which state claims for sovereignty, and the airspace above this territory.-(land, bodies of water, atmosphere and natural resources). Resources such as agriculture, livestock, minerals, oil, natural gas and forestry can be found on land.

Territories constitute the physical basis of the state. Nomads and gypsies can have no state because they lead a wandering life. It is important that a state should possess an undisputed territory of its own over which it should have exclusive jurisdiction, Furthermore, it should have territorial contiguity, i.e., geographically it should be one composite whole. A fixed territory is not essential to the existence of a state provided that



there is an acceptable degree of what is characterized as 'consistency' in the nature of the territory in question, and of its population. In fact all modern states are contained within territorial limits.

In brief, a territory does not need to possess geographical unity, and it may even consist of territorial areas which lack connection, or are distant from one another. For instance, islands or other territories which are part of the mainland still constitute of territory of a state.

C. Government

Government is the political and administrative organ of a State. The state operates through its government. The state consists of all its citizens, and is a broader concept. The Government is the sum total of legislative, executive, and judicial activities of a state. (Their functions are discussed in the upcoming chapters). It also includes internal bodies, sub - state governing authorities at the local and regional levels, such as the Municipal Corporations, Municipal Councils, *Panchayats and Gram Sabhas* in India. The government of a state makes provisions for the services of defence, foreign relations, levy of taxes, issue of currency, building of roads, bridges, transportation, communication, water supply, electricity, health education and other types of social and physical infrastructure. The government of a state shall be so organized that it enforces law to maintain order, peace and security.

As the role of a state changes, so does the form of government. (Different forms of government are discussed in the upcoming chapter).

D. Sovereignty

Sovereignty is the crucial factor that distinguishes the state from other associations. Without territory there can be no state in the technical sense of the term. Sovereignty is the most essential ingredient and characteristic in the formation of the state. No state can exist without internal and external sovereignty. Internal sovereignty means that the people residing within the territory of the state give their unqualified obedience and support to the authority of the state, and further that the state is supreme in all its internal matters. It is by virtue of its sovereignty that the state makes its laws and decisions and issue commands which are binding on all citizens. The right to use legitimate coercion in its own right is exclusive to a state. Internal revolts or external aggressions may disturb a state, but the state continues to exist so long as it has legitimate sovereignty.

External sovereignty is understood as the freedom of state from external control and influence. The state should be treated at par with other states and should not be assigned any inferior position. The state should be free to enact its own laws as well as foreign policy without any external pressure.



Presently 'international recognition' is also considered as an essential element of the state. That implies the recognition of the sovereignty of the state over a given territory and population by other states.

❖ Match the given concepts [1-10] with their respective meanings/illustrations [a-j].

1. Greek City States	a. direction and control of citizens of a state/community
2. Territory	b. transient populations dependent on only on essentials of survival
3. Plato's The Laws	c. signatories do not intervene in the domestic or foreign affairs of another state, recognize territorial gains made by force
4. International Entities	d. Heterogeneity
5. Montevideo Convention	e. applying democratic laws within a state and between states
6. Nomads and gypsies	f. land and waters or areas under the jurisdiction of a state/sovereign
7. CA Streit's view	g. lacking physical identity in the eyes of municipal law and international law
8. Diversity of people in a state/nation	h. development of cooperation, solving economic, social, cultural, and humanitarian problems
9. Oriental Empire	i. unity, order, universal law and cultural refinement
10 Government	j. theoretical analysis of population size, welfare and security

VI. ROLE OF A STATE

Political thinkers have different opinion regarding the role of the state. In the words of Professor MacIver, "the state has no finality, can have no perfected form. The state is an instrument of social man". To many scholars the functions of the state are also different. Some considers state as a moral and ethical institution whereas others consider it as an evil institution. Mac Iver has referred to different notions of the state such as class organization, legal institution, mutual insurance agency, unnecessary evil, necessary evil, the march of God on earth, welfare system, power system state as an organism etc.



Andrew Heywood, an English political writer in his book Politics, classifies the role of the State based on the functions or responsibilities which are fulfilled by the state and the ones that are left to private individuals. It will be instructive to examine the following classifications.

A. Minimal States

The ideal of minimal states is a contribution of Classical Liberals. Names of political thinkers such as John Locke, Jeremy Bentham, J. S. Mill, Herbert Spencer, Robert Nozick, Friedrich Von Hayek and Milton Friedman are generally associated with this approach. The idea is to ensure the widest possible individual liberty. People who ascribe a minimal role to the state believe that a *laissez-faire* ("let it be" or "leave it alone") approach to the economy is most likely to lead to economic prosperity. State's role is to protect individuals from interference in their liberty and that transactions between private individuals are voluntary and free. According to John Locke's theory, '*state acts as a night watchman*' whose services are called upon when orderly existence is threatened. The state must exercise the basic role of providing protection from external attacks, enforcing agreements and maintaining domestic order. Minimal states play a minimum role in interfering with the social and economic life of the subjects.

B. Developmental States

A 'developmental state' is characterized by having strong state intervention, as well as extensive regulation and planning. The term 'developmental state' describes the state's essential role in harnessing national resources and directing incentives through a distinctive policy-making process. The first person to seriously conceptualize the developmental state was Chalmers Johnson (1931-2010). Johnson defined the developmental state as a state that is focused on economic development and takes necessary policy measures to accomplish that objective.

C. Social Democratic States

Social democratic states are the ideal type of states viewed by modern liberals and democratic socialists. The state functions on the principle of fairness, equality and equal distribution of wealth to achieve social, political and economic justice, equality and empowerment of its people. The state is considered necessary to promote economic growth and social well-being of its people.

D. Collectivized States

They undertake the control of economic life, by bringing common ownership of all economic resources under their own control for the welfare of all. The state makes laws to control the private property of their citizens. Peoples' Republic of China follows such a



policy. The state takes care of the economic needs of its citizens i.e., provides food, shelter, employment and the citizens must not act against the government policies.

E. Totalitarian States

Philosophers like Hegel and dictators such as Hitler and Mussolini held that the state must have absolute powers and individuals have no right against the state. According to this view, the state can do no wrong. The whole life of an individual is within the jurisdiction of the state.

F. Modern Welfare State

Irrespective of the classification, functions of a modern welfare state include the maintenance of law and order, establishment of justice, defence, public security and foreign relations, maintenance of public health and sanitation, water supply, transport and communication system, supply of power, electricity and essential commodities, control of banking, currency and inflation, preservation of forests, checking of trading and control of prices and measurements etc. Other functions include the removal of social exploitation and establishment of social unity, provision of economic and other benefits to weaker sections, social security to old age people, widows, orphans and disabled, protection of workers by regulating minimum wages, pension, education of the masses, encouragement of art and literature, scientific and technological research and cultural exchanges to increase the spirit of cultural unity and harmony among the masses.

VII. CONCEPT OF A NATION

The terms **State** and **Nation** are used interchangeably. In the study of varied political institutions, the term 'Nation' carries a different meaning. Etymologically, the term 'Nation' emerges from the Latin term '*Natio*' meaning "*to be born*". A nation is a people descended from a common stock with homogeneous factors. It means a people brought together by the ties of blood relationship. Nation is a body of people united by common descent and language. In the views of Barker, nation is a body of persons inhabiting a definite territory and united together by the fact of living together on a common land. They may come from a number of races but by living together, they develop certain things in common. It is necessary that the people living within the state have a feeling of oneness.

Lord Bryce defines nation as a nationality which has organized itself into a political body either independent or desiring to be independent. The definition given by Barker explains that people become a nation when they live together by exercising their right of political self-determination. The **World Book Dictionary** defines a nation as "*the people occupying the same country, united under the same government, and usually speaking the same language*".



Right to Self Determination is recognized as an international principle of law based on equal rights, opportunity for the states to choose their political status with no external compulsion or interference. The United Nations Organization has given its approval to this cardinal principle. The U.N. General Assembly Resolution 1514 (XV) grants independence to colonial countries. In other words, question of government ought to be decided by the governed as a matter of the right to self-determination. The concept nation encompasses the feeling of oneness that is 'We' among the people.

A nation also has certain essential elements, such as:

- Common race
- Common religious sentiments
- Common residence on a defined territory
- Common political aspirations
- Common language
- Common culture
- Common interests of trade economy
- Common historical traditions

India's struggle for independence from British regime is the classic example of its people uniting themselves to form a nation, to establish India as an independent sovereign state. The preamble of the Indian Constitution states that the people of India have resolved to constitute India into a sovereign, socialist, secular democratic republic and to secure to all its citizens justice, liberty, equality and fraternity. Part I of the Constitution of India (Articles 1 to 4) describes the Union and its Territory; Part II of Constitution (Articles 5 to 11) describes the conditions for being a citizen of India; Part XVII of Constitution (Articles 343 to 351) describes the official languages of India. (These topics are dealt with, in detail, in the following chapters)

In modern times, most nations of the world carry a certain degree of diversity because of the effects of migration and globalization. It is said that globalization has turned the world into a small village.

The events and decisions in one part of the world can affect other States and their policies. The interdependence of states on one another for trade, market, resources and other numerous factors has added a new concept of 'pooled sovereignty' in the study of international relations and political institutions.





❖ **Based on your understanding, answer the following briefly in a word or two:**

1. An individual enjoys the highest form of freedom _____
2. A collectivized State never supports _____.
3. The ideology of Fascism is associated with _____
4. A frequently associated meaning of 'Nation' is _____
5. Political self -determination' means _____
6. Minimal States are characterised by _____ by the government.
7. Indians fought the colonial rulers after identifying themselves as a _____
8. _____ deals with the official language/s of India.
9. Diversity of population is found where there is a high degree of _____ and _____ of people.

❖ **Answer the following in a paragraph of about 150 words each:**

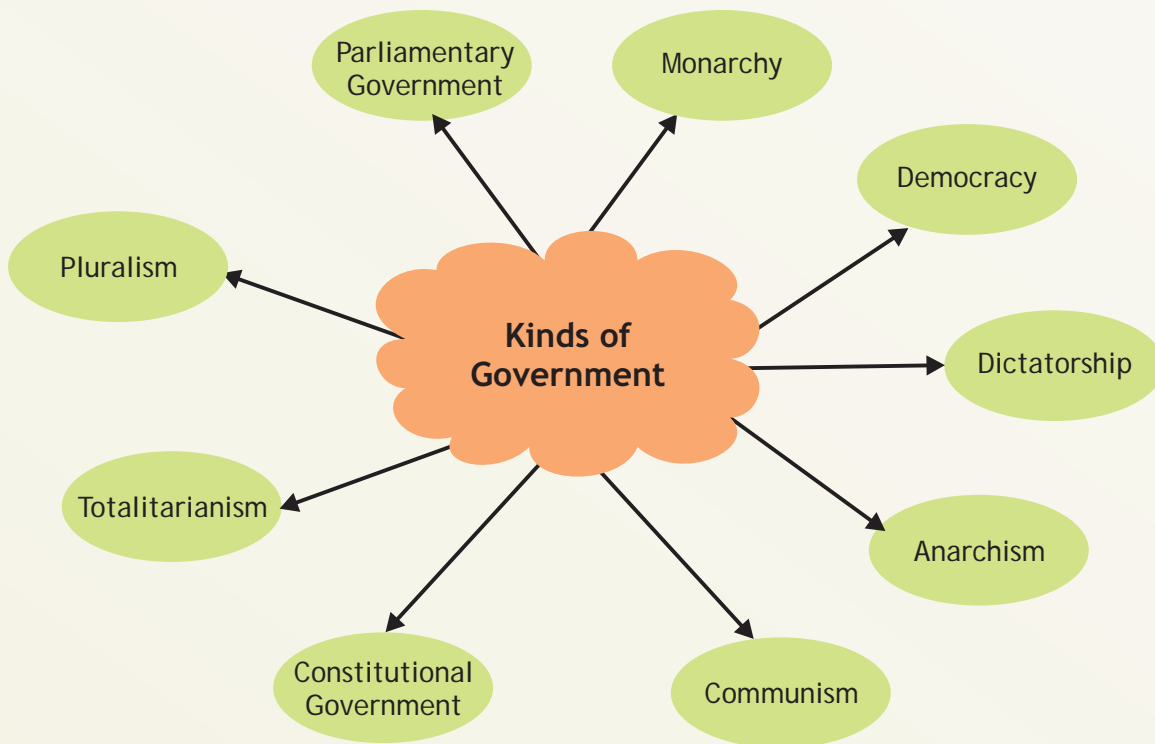
1. Define a State. Explain the emergence of a State.
2. Explain the theories about the origin of a State.
3. What necessary elements constitute a State?
4. Write notes on the following:
 - a. The role of the State.
 - b. Comparative views on the Social Contract Theory.
 - c. Concept of a Nation.
5. What are the types of states?

❖ **Work in groups/pairs or individually:**

- ❖ Allot yourself a role as a leader in one of a State type: Minimal/Oriental/Greek city/Feudal/Democratic.
- ❖ Resolve the given issue with justification for your suggestions. Share them with the class. Be ready to defend yourself by doing more reference work/research about the government of your/group's allotted role.

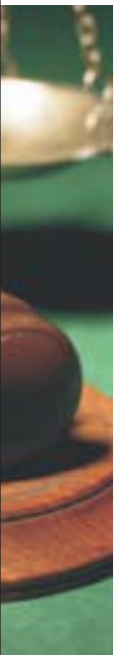


- Find out more through reference work, and share your findings with the class. Present your ideas as an illustrative poster or a short speech.





LEGAL STUDIES





Chapter 2

ORGANS OF GOVERNMENT

CONTENTS

- I. INTRODUCTION TO THE ORGANS OF GOVERNMENT
- II. FORMS OF GOVERNMENT
 - A. Monarchy
 - B. Aristocracy
 - C. Dictatorship
 - D. Democracy
- III. ORGANISATION OF THE LEGISLATURE
 - A. General Functions of Legislature as Organ of Government
 - B. General Functions of Executive as Organ of Government
 - C. General Functions of Judiciary as an Organ of the Government

Comprehension Questions





UNIT 01: CHAPTER 2

ORGANS OF GOVERNMENT

I. INTRODUCTION TO THE ORGANS OF GOVERNMENT

In the preceding chapter, we discussed 'Government' as an essential element of the 'State'. Government can be said to be a set of institutions that exercises control through legal devices and imposes penalties on those who break the law. A government normally functions by distributing its functions between its organs with each organ performing some specific functions. It primarily performs three functions: making the laws, enforcing the laws and adjudicating disputes. These *three essential functions* are termed *legislative*, *executive* and *judicial* functions.

Let us Ponder:

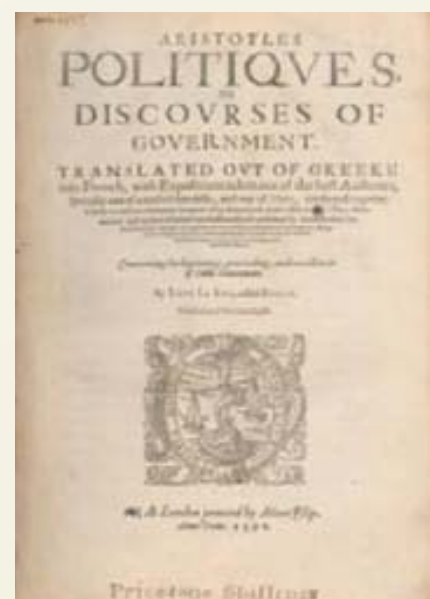
1. Out of all three organs of the Government, which seems to be the most powerful organ?
2. What will happen if a government decides to make either of the organs defunct?

A government achieves purpose of a state through the performance of the above functions. These functions constitute the minimal requirements of any form of government.

The legislature makes laws, the executive implements them and the judiciary interprets laws and decides disputes. This system of distribution of powers among the three organs of a government is called 'separation of powers', which will be discussed in Chapter III.

II. FORMS OF GOVERNMENT

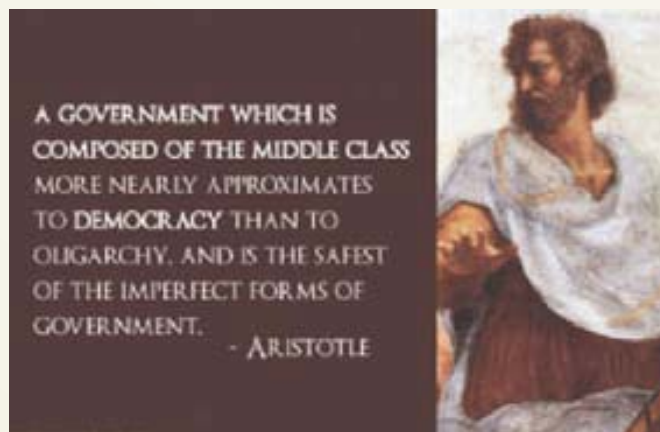
In *4th century BC*, the great Greek philosopher *Aristotle* made the first attempt to describe the political organizations of his time as *Democracy*, *Tyranny* and *Oligarchy*. In the absence of a clear-cut line of difference between state and government, *Aristotle* called it classification of states. His classification was based on two aspects: the number of persons in whose hands the authority of state vests and the purpose for which that authority is directed or used. These aspects determine the *normal* or *true* form and *perverted form* of the Government. The *Normal form* of government implies that the government exercises authority in the common interest and welfare of all. Perverted form implies that the ruling power is exercised for the self-interest of the rulers.





Number of persons having ruling power	Normal	Perverted
One	Monarchy	Tyranny
Few	Aristocracy	Oligarchy
Many	Polity Democracy	

On the grounds of quality of rule and governance, *Aristotle* justifies *Polity* as the best form of Government. *Aristotle's* use of the term Polity is equivalent to constitutional democracy of the modern state.



Let us ponder:

Andrew Heywood an English political writer in his book *Politics* states that in *Aristotle's* democracy, the masses representing the numerous classes would resent wealth of the few, and too easily fall under the sway of a demagogue.

How is the *democracy* as defined by *Aristotle* different from the democracy followed in our country?

A prominent feature of Aristotle's classification and political analysis is that no form of state remains static forever. All states pass through cycles of evolutions. Every form of government degenerates over a period of time giving place to a new one.

Aristotle's studied the conditions under which the states enjoyed stability. He held that the underlying cause of political strife and hence of revolution was inequality. Consequently, for him, the best state would have a form of constitutional government in which all citizens have access to power-- a constitution which in practice blends democratic and oligarchic features and in which the middle class is in control.



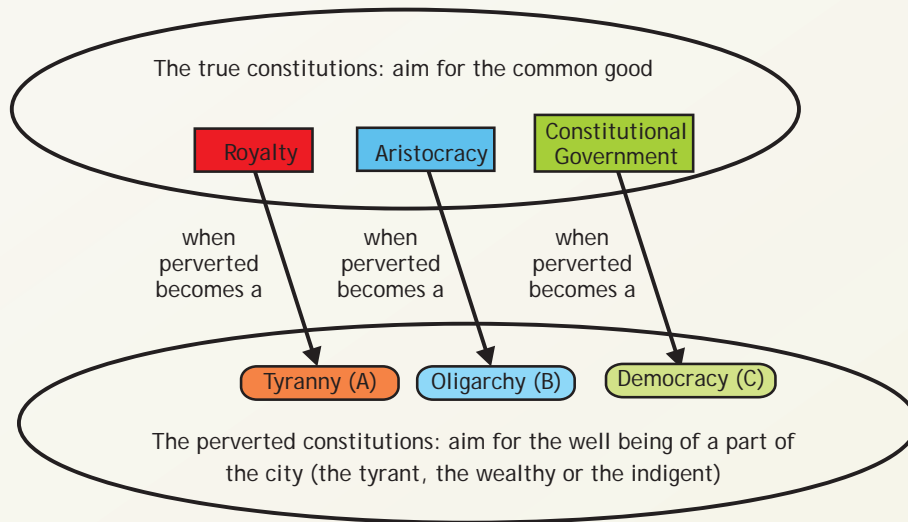


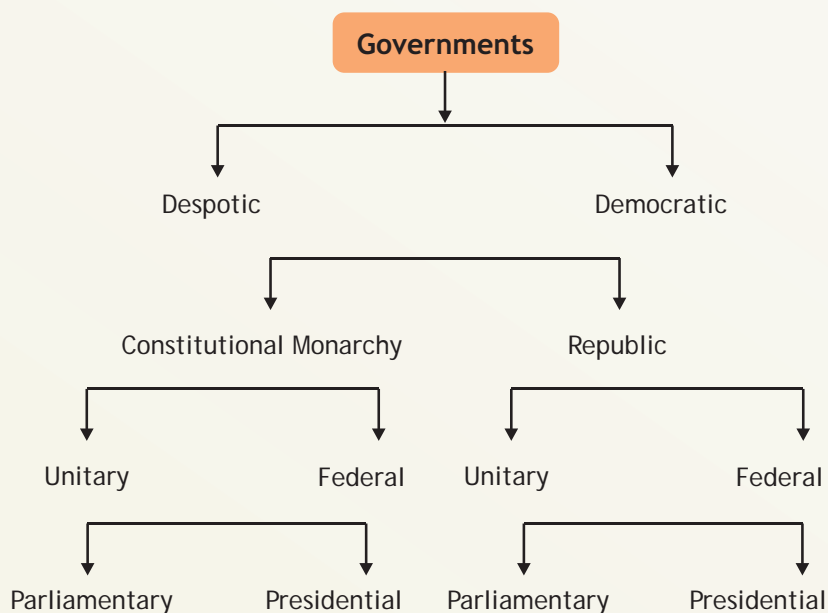
Figure: Aristotle's Government

In the modern times another writer *Burgess* suggested four principles of distinction on the forms of Government:

- ❖ On the basis of identity or non-identity of State with its Government - *Primary or Representative form of Government*;
- ❖ On the basis of tenure of executive- *Hereditary or Elective form of Government*;
- ❖ On the basis of relationship between executive and the legislature- *Parliamentary or Presidential form of Government*; and
- ❖ On the basis of concentration and distribution of powers - *Unitary or Federal Government*.

Stephen Leacock (1869-1944) presented simplified version of classification of government as given below.

- ❖ On the basis of the location of sovereign power, government is classified into two- *Dictatorship and Democracy*.
- ❖ On the basis of the method of acquiring power by the head of the state, the democratic government is classified into two - *Constitutional Monarchy and The Republic*.
- ❖ On the basis of the relation between the Executive and the Legislative, the democratic government is classified into two- *Parliamentary form and Presidential form of Government*.
- ❖ On the basis of distribution of power between the centre and the province, the government is classified into two - *the Unitary and Federal Government*.



A. Monarchy

Monarchy is the oldest form of government. The state machinery worked according to the commands and rule of the monarch. Monarchy is thus a form of political regime in which the supreme and final authority is in the hands of a single person wearing a crown, irrespective of whether his office is hereditary or elective. It is the will of one person which ultimately prevails in all matters of governance.

J.W. Garner (1871-1938) stated: 'In its widest sense, any government in which the supreme and final authority is in the hands of a single person is a monarchy, without regard to the source of his election or the nature and duration of his tenure. In this sense, it is immaterial whether his office is conferred by election (by parliament or people) or is derived by hereditary succession, or whether he bears the title of emperor, king, czar, president or dictator. It is the fact that the will of one man ultimately prevails in all matters of government which gives it the character of monarchy'.

Let us Ponder:

One of our neighbouring countries had a 'parliamentary monarchy' from 1990-1996. How is it different from an 'absolute monarchy'?

With the development of *Republican and Democratic* form of government, monarchical form of government declined. In some cases, as in the United Kingdom, monarchs are merely retained as the 'ceremonial' or 'nominal' heads of government, devoid of key political powers. As observed by *C.C Rodee*, '*Constitutional monarchs are loved and*



respected by their people as the symbols of unity of the nation or empire, but are devoid of political power'.

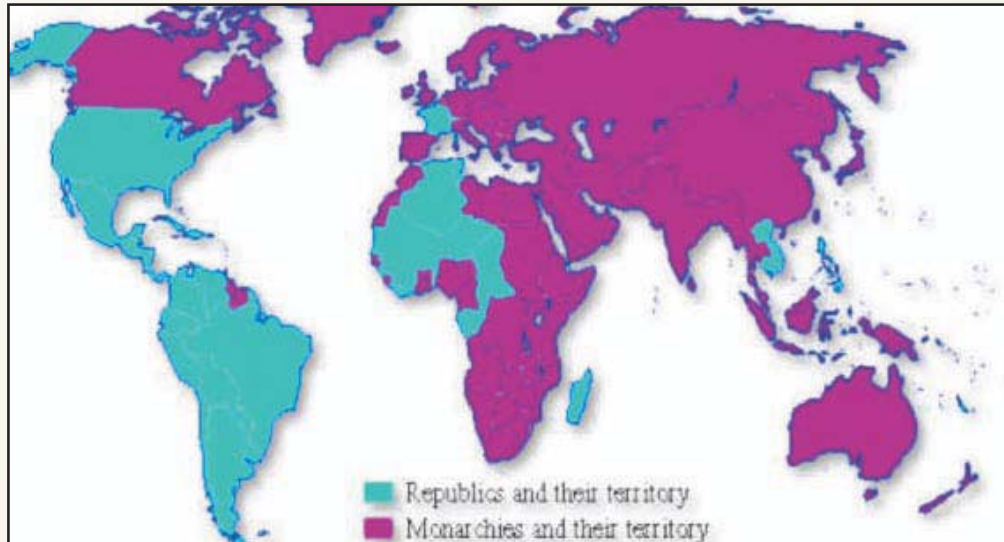


Figure: Monarchies at the beginning of the 20th Century

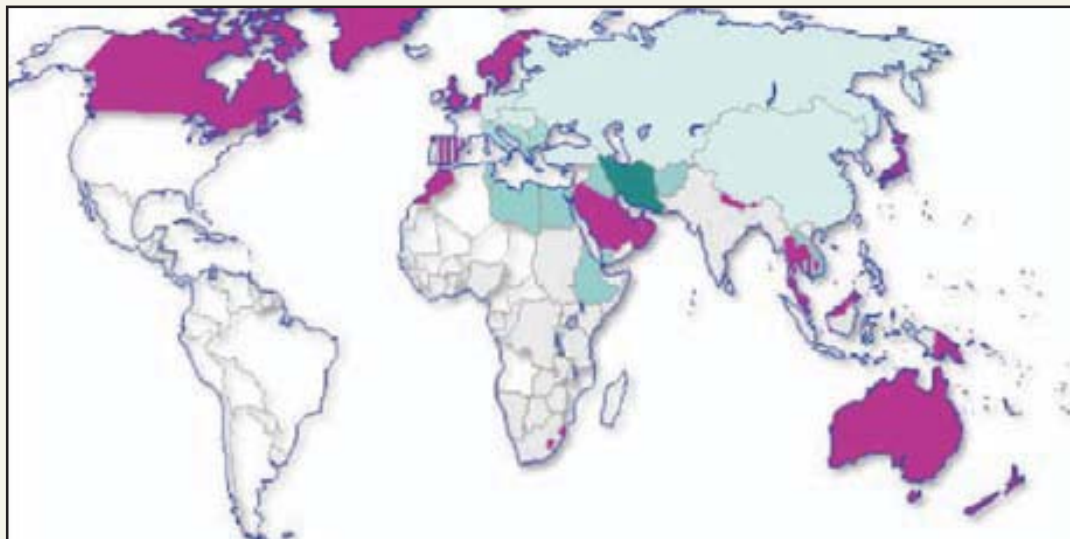
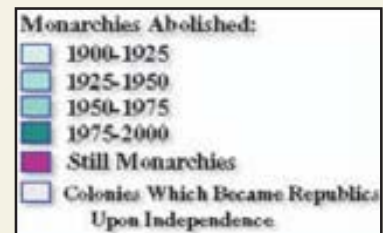


Fig: Changes in Monarchy during the 20th Century

Source: <http://users.erols.com/mwhite28/monarchy.htm>





B. Aristocracy

The word 'Aristocracy' originates from the Greek word '*aristo*' which means 'the best' and another Greek word, '*kratein*', which means 'to rule'. In aristocratic form of government, political powers of the state is vested in the hands of a few people. It is a form of government in which relatively small proportion of people determine the policies of the government. It can be a combination of priests, soldiers, professionals, landowners or men of wealth.

As defined by *Garner*, Aristocracy is the form of Government "in which relatively a small portion of citizens have a voice in choosing public officials and in determining public policies". Those few people are chosen from among the people of the state on varied basis, such as wealth (land owning class), education (nobles), religious positions (priestly class), family, succession, physical force etc. The ruler is considered as a class separate and superior from the ruled.

C. Dictatorship

In the words of Alfred Cobban (1901-1968), *'It is the government of one man who has not obtained the position by inheritance, but either by force or consent or a combination of both. He possesses absolute sovereignty, that is all the political power emanates from his will and it is unlimited in scope. It is also exercised in an arbitrary manner by decree rather than by law. The authority of the dictator is not limited in duration, is not subject to any other authority, for such a restriction would be inconsistent with his absolute rule.'*

Dictatorial form of Government is the rule by a single person or a determined set of individuals. He controls and exercises the political powers of the state. He occupies the position by force, invasion, intervention and militarism, in contrast to monarch. His dictates are law of the country. He implements them and adjudges according to his will. He holds the absolute power. He is not accountable or answerable to the citizens of the state. Modern dictatorship plays the role of totalitarian states.

D. Democracy

Pericles (495-429 B.C.) the Greek leader defined *democracy as a form of Government in which people are powerful*. Bryce defined democratic form of government as one where the ruling power of the state was vested not in a particular class or classes but in the community as a whole.

Democratic form of Government is the most popular form in the modern civilized states. The word, 'democratic' originated from the Greek word 'Demos' meaning people and 'Kratia' mean in rule, i.e. rule by a popular vote.



Let us ponder:

Some of the well known examples of Dictatorship are:

1. Germany under Adolf Hitler
2. Italy under Benito Mussolini
3. Soviet Union under Joseph Vissarionovitch Stalin
4. Libya under Mu'ammer Qaddafi (Quathafi)
5. Cuba under Fidel A. Castro
6. China under Mao Zedong

Try and grab a copy of Hitler's autobiography '**Mein Kampf**'. Some more books that you can read are:

7. The Private Life of Chairman Mao by Zhisui Li
8. Thank God They're on Our Side by David Schmitz
9. The Commissar Vanishes by David King

Abraham Lincoln (1809-1865), a former President of the U.S., in his speech at Gettysburg defined democracy as a '*government of the people, by the people and for the people*'. '*Government of the people*' implies equal distribution of political powers and influence among the citizens of the state, '*government by the people*' implies participation of all citizens in forming a government, '*government for the people*' implies the rule of government for the promotion of public welfare.



Just to point out:

'Direct democracy does not exist in its pure form as any nation's government today. Though the town meetings in the U.S. are a form of pure democracy.'

Democracy exists in two major forms: Direct or pure democracy and indirect or representative. As defined by Garner, '*A pure democracy so called is one in which will of the state is formulated or expressed directly and immediately through the people in mass meeting or primary assembly, rather than through the medium of delegates or representatives chosen to act for them*'. The political power is in the hand of the citizens of the state as a whole to enact legislations, to administer regulations and the citizens, by common vote, elect their public officers. This is referred to as initiative, plebiscite or referendum.

This form of democracy operated in Greek city state, Athens during 4th and 5th century BC and in Rome during the early stages of the Roman polity, as an ideal system of popular



participation. This form of democracy is not possible in the states having large population and territory.

In contemporary times, this form of democracy is prevalent in the provinces of Switzerland. The voters meet in open air Parliament known as Federal Assembly, to



deliberate upon and decide public affairs by way of *Initiative*, where a specified number of voters prepare a bill for acceptance or approval by legislature or general public. If approved it becomes law. *Referendum* is where the bill passed by the legislature is forwarded to the voters for final ratification. The term *plebiscite* is used where an important

issue could not be decided by the government, and is decided by the votes of people. Voters *recall* their elected representatives when they are not satisfied by their conduct.

Let us ponder:

Japan is a country where people elected agents of the people are given power to govern and they responsible for carrying out the will of the people.

What kind of a democracy is Japan? Is there any other country(ies) that fits in this example?

The other form is **Representative or Indirect Democracy**, on the basis of universal suffrage. In this form, citizens of the country elect their representatives on the basis of popular votes. The will of the state is formulated and expressed through the representatives. The representatives form a law making and law-executing agency for a fixed term. On the matters of governance, the representatives are accountable and answerable to the public in general. As observed by Garner, *'this kind of democracy resembles its pure form in the sense that political power remains vested in the people, but the two differ in respect to their exercise'*. Thus all the citizens of the state have equal opportunity of participation in the political affairs of the state in contrast to monarchy or dictatorial form of Government. The political power remains in the hands of people.

In **Parliamentary system** the legislature and the executive are related to each other, by way of membership in the two bodies and their accountability. This form of government is well prevalent in India and United Kingdom. The executive body, while implementing laws and discharging its responsibilities like health, education, food and public distribution, defense, police services etc., is responsible to the legislature.

As stated by Professor M.P. Jain, *'A notable principle underlying the working of parliamentary government is the principle of collective responsibility which represents*



ministerial accountability to the legislature. The principle of collective responsibility means that the Council of Ministers works as a team, as a unit and is responsible as a body for the general conduct of the affairs of the government. All the Ministers stand or fall together in Parliament, and the government is carried on as a unity".

Let us ponder:

Besides India name two more countries where:

1. Prime Minister is elected by the legislature
2. Legislature is elected by the people.
3. Laws are enacted by the elected representatives

How is this kind of democracy different from a 'representative democracy'?

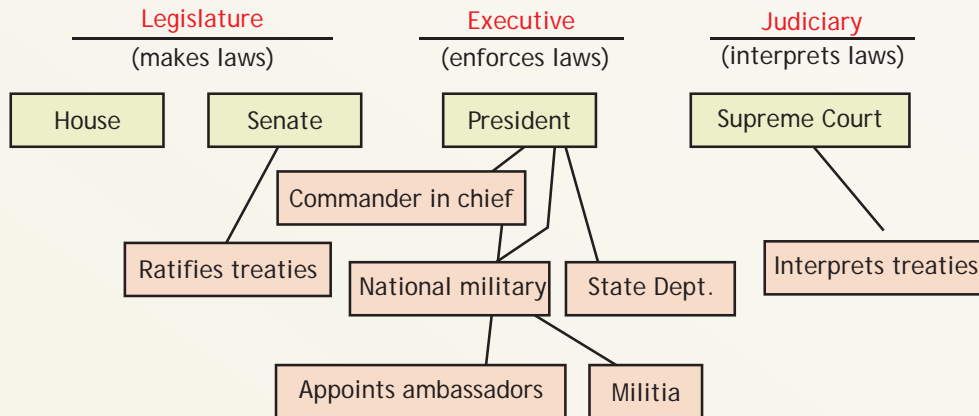
This form of Government is also termed as *Cabinet Government* by Sir Ivor Jennings (1903-1965), an English lawyer and academician, and *Prime Ministerial Government* by Richard Crossman (1907-1974), an English author and politician.

In the **Presidential system**, executive branch of the government is independent of the legislature for its tenure and actions. In the words of Garner, '*Presidential government is that form in which the chief executive is independent of the legislature as to his tenure and, to a large extent, as to his policies and acts. In this system the nominal head of the state is also the real executive*".

This form of government is prevalent in United States of America and Argentina. The President is elected by the people, whether directly or indirectly, for a fixed period unless removed on impeachment by the legislature on the grounds stated in the constitution of the country. The President appoints Secretaries, with the approval of the Congress as executive heads of the departments. They are not members of legislature (*Congress* in the case of the United States), and do not take part in legislative deliberations or in voting a bill. The President formulates national policy, mobilizes military troops and can declare state emergency. The bills passed by the legislature, except money bills are subject to ratification or veto of the President. There are provisions in the Constitution to over-ride veto power of the President, by special majority vote in the legislature. The President's policies and treaties making decisions are subject to be ratification by the Senate. In the case of the United States, the U.S. Supreme Court has the power under the constitution to declare void the acts and actions of the legislature and executive. Thus this system works on the principle of 'separation of powers' and 'checks and balances'.



United States Government Current Structure



The **Unitary form** of Government is one where the whole state with all its units and provinces is organized under a single central Government. The local/provincial Governments are created by the central Government as its subordinates for better administration. The central Government delegates powers and authority to the local/provincial Government. As remarked by Garner, *"Where the whole power of Government is conferred by the constitution upon a single central organ or organs from which the local governments derive whatever authority or autonomy they may possess, and indeed their very existence, we have a system of unitary government. It is the characteristic of this form of government that there is no constitutional division or distribution of powers between central government of the state and subordinate local governments"*.

Let us ponder:

'In India where we have cabinet form of government, the ministers can remain in office only as long as they enjoy the confidence of the legislature.'

Try and find one more country where confidence of legislature is required by the ruling party to stay in power.

As remarked by Garner, **'Federal Government as distinguished from a unitary government is a system in which a totality of governmental power is divided or distributed by the national Constitution or the organic act of Parliament creating it, between a central government and the governments of individual states or other territorial sub divisions of which the federation is composed. Local/ provincial Government is considered as part of central Government with full autonomy'**. As listed in the Seventh Schedule of the Constitution of India, the matters concerning national importance like international relations, war and peace, atomic energy, etc. are dealt with by the Central Government.



The matters of regional and local importance listed in the state list can be legislated by the state governments. There are matters on which both Central and the State governments are authorized to make law which are included in the Concurrent list.

Indian Constitution despite having adopted federal features does not claim to establish India into a federation of states. In the words of *K.C. Wheare*, **India's system of Government is federal in character and unitary in spirit.**

Let us ponder:

A federal government has an agreement and there are certain essential features that ensure its proper working. They are:

1. A written constitution
2. Division of powers
3. Independence of judiciary

How is it different from the unitary form of government.

During recent periods, Governments of most States have combined different forms stated above. For instance the British Government combines Monarchy, Democracy, and Parliamentary forms. India is a Democratic Republic with Parliamentary form of government and with Unitary and Federal features.

III. ORGANISATION OF THE LEGISLATURE

Legislature may be organized as **Bicameral or Unicameral Legislature**. In a *Bicameral System*, there are two houses or chambers. Indian Parliament is a bi-cameral legislature, its houses being the House of People (Lok Sabha) and Council of States (Rajya Sabha). In the States of the Indian Union, the legislature consists of the Vidhan Sabha (lower house) and Vidhan Parishad (upper house). However, certain states have only one house.

The *House of People (Lok Sabha)* consists of the representatives of citizens of the entire country living in states and union territories. *Council of States (Rajya Sabha)* consists of the representatives elected by the Legislative Assemblies of the states, and other nominated members from the field of art, culture, academics, sports, literature science and social service.

The purposes and functions of the second chamber are to check hasty and ill-considered pieces of legislations, with the sober advice of experts and eminent persons. Thus it becomes possible to examine issues from different standpoints, and to safeguard the interests of states in a federal system.



Structure of Parliament	Number of countries
Bicameral	80 (41.67%)
Unicameral	112 (58.33%)

Uni-Cameral legislature implies one legislative house. This system of legislature is seen in Turkey, which is known by the name of Grand National Assembly of Turkey; in Bangladesh by the name of House of Nation, etc. This system is supported by the reason that the legislative body representing people's interest must be one, failing which delays and conflicts may arise in the enactment of legislation.

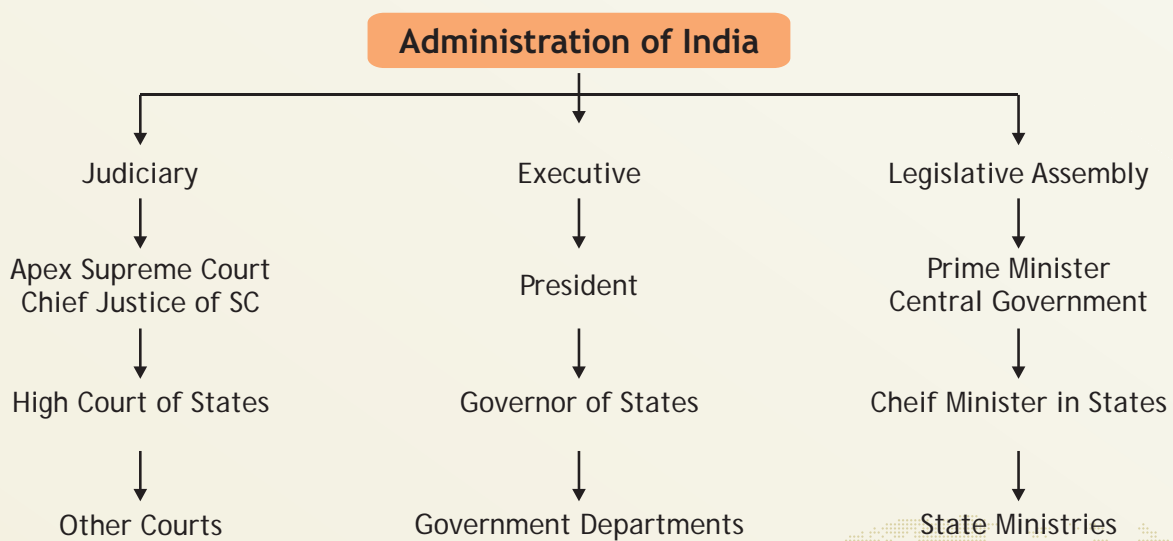
Let us ponder:

In United Kingdom, the legislative houses are known by the names of House of Commons and House of Lords. In United States of America the Congress is the legislative organ. It has two chambers namely House of Representatives and Senate.

Elaborate the differences in the structure of legislative houses of UK, US and India.

IV. FUNCTIONS OF THE ORGANS OF GOVERNMENT

Let us now try to learn about the three main organs of government (the legislature, the executive and the judiciary), their functions and various related provisions. Here we also try to explain the relationship between various organs of a government.





A. General Functions of Legislature as Organ of Government

'Parliament, 'Assembly' and 'Congress' are the synonyms used for the term 'legislature' in various countries. The word 'Parliament' is derived from the French word 'parler'. Parliament means meeting for discussion. The following are some functions of this organ:

1. Express and formulate the will of the state

The legislature formulates and expresses the 'will of the state'. The 'will of state' in a representative democracy is the will, opinion and sentiments of its citizens and the public issues concerning them. In a monarchy or dictatorial Government, the 'will of the state' is the interest and objectives of its ruler. Laws when enacted are called as 'Acts'. These acts are the direct source of law to control and regulate the institutions running in a state and society.

Just to point out:

In India, the Legislature has the power to impeach the President as well as the Chief Justice of the Supreme Court!

Let us ponder:

'In India where we have cabinet form of government, the ministers can remain in office only as long as they enjoy the confidence of the legislature.'

Try and find one more country where confidence of legislature is required by the ruling party to stay in power.

2. Enacts laws for certain purpose and objectives

All legislations are enacted for the achievement of certain objectives and purposes. For example, the Indian legislature enacted the *Consumer Protection Act, 1986* with the purpose of protecting the interest of consumers and the speedy settlement of their disputes.



3. Laws are classified

Legislative acts are classified as '*substantive acts*,' on the basis of the subject matter of the law; and '*procedural acts*', on the basis of the procedure to be followed by the executive and judiciary in implementation of those laws. *Repealing acts*, are those by which by earlier statutes have been repealed, either because they were replaced by a new act on the matter or having become obsolete or void against the constitution or so declared by the higher judiciary. *Amending acts* modify/ amend the existing laws



on the statute book, taking into account the changing social, political and economic conditions of the country. By following a special procedure, legislature may also amend the Constitution of the country.

4. Parliamentary procedure and enactment of laws

A Bill is a statute in draft and cannot become law unless it has received the approval of both the Houses of Parliament and assent of the President of India. A Bill can be introduced either by a Minister, when it is called a Government Bill; or a member other than a Minister, when it is known as a Private Member's Bill.

Let us ponder:

'The area of authority which originally belonged to the legislatures has been usurped in certain cases by the executive'.

Debate with the help of illustrations upon the statement given above.

The legislative procedure for introduction and passing of Bills is laid down in Articles 107 to 108, in the Constitution of India, in the case of ordinary Bills; and in Articles 109-110 in the case of Money Bills. Article 111 provides details of assent to Bills by the President.

Ordinary Bills may originate in either House of Parliament.

A **Money Bill** contains provisions for imposition, abolition, alteration or regulation of any tax, custody of the Consolidated Fund or Contingency Fund of India, payment of money into or withdrawal of money from any such Fund and related matters. However, a Money Bill shall be introduced only in the House of People and not in the Council of States.

Annual Financial Statement is the annual statement of estimated receipts and expenditure of the Government for the ensuing financial year. Article 112 of the Constitution of India states that the President shall cause the statement to be laid before both the Houses of Parliament.

The Members of Parliament debate on the provisions of the proposed Bill. Generally, a Bill is passed after three readings.

Article 75(3) of the Constitution of India states that the Council of Ministers shall be collectively responsible to the House of the People. Parliament exercises check and ensures executive accountability through its control over finances.



Just to point out:

The 'nominal executive' is either a monarch or an elected President. What makes him/her a 'nominal' executive is the fact that s/he does not enjoy any real powers., as in U.K. and Malaysia.

Yet there are countries like Jordan and Saudi Arabia where the monarch still enjoy the absolute power.

This Parliamentary control over finance helps in securing administrative accountability also. Parliament assesses governmental policies and performance of administration through procedures like questions, calling attention motions etc.

Motion of No-Confidence may be moved and passed against the Council of Ministers, in the Lok Sabha.



A Bill undergoes three readings in each House, i.e., the Lok Sabha and the Rajya Sabha, before it is submitted to the President for assent. --%>

The First Reading refers to (i) motion for leave to introduce a Bill in the House on the adoption of which the Bill is introduced; or(ii) in the case of a Bill originated in and passed by the other House, the laying on the Table of the House of the Bill, as passed by the other House.

The Second Reading consists of two stages. The "First Stage" constitutes discussion on the principles of the Bill and its provisions generally on any of the following motions - that the Bill be taken into consideration; or that the Bill be referred to a Select Committee of the House; or that the Bill be referred to a Joint Committee of the Houses with the concurrence of the other House; or that the Bill be circulated for the purpose of eliciting opinion there on. The "Second Stage" constitutes the clause by clause consideration of the Bill, as introduced in the House or as reported by a Select or Joint Committee, as the case may be.

In the case of a Bill passed by Rajya Sabha and transmitted to Lok Sabha, it is first laid on the Table of Lok Sabha by the Secretary-General, Lok Sabha. In this case the Second Reading refers to the motion (i) that the Bill, as passed by Rajya Sabha, be taken into consideration; or (ii) that the Bill be referred to a Select Committee (if the Bill has not already been referred to a Joint Committee of the Houses).

he Third Reading refers to the discussion on the motion that the Bill or the Bill, as amended, be passed.



Almost similar procedure is followed in Rajya Sabha in respect of Bills introduced in that House.

After a Bill has been finally passed by the Houses of Parliament, it is submitted to the President for his assent. After a Bill has received the assent of the President, it becomes the law of the land.

(Source: www.loksabha.nic.in)

5. Legislature and its judicial functions

The Legislature performs judicial functions while hearing and trying cases of impeachment (removal from office before term). The Constitution of India lays down the procedure for impeachment of President and Vice President of India, Judges of the Supreme Court and High Court and the Chief Election Commissioner.

It performs judicial function while deciding on the privileges of the Members of the House.

6. Legislature and its Administrative functions

In India, the elected members of both Houses of Parliament and elected Members of the Legislative Assemblies of the States form an electoral college to elect the President. The Vice-President is elected by an electoral college comprising of Members of both Houses of Parliament. The members of the Lok Sabha elect two members as the Speaker and Deputy Speaker, while the members of the Rajya Sabha elect the Deputy Chairman of the Rajya Sabha.

B. General Functions of Executive as Organ of Government

1. Meaning and components of Executive

Executive is often referred to as the 'government' of a state. In a representative democracy, the term 'Executive' has a broad meaning.

2. Internal and External Administration of the State

The chief function of the executive is the maintenance of internal and external administration - law and order, financial matters, infrastructure and industrial development, welfare and development of the people (health, education, labour, employment, rural and local development), environment and forests, natural resource management, trade and commerce etc., on the internal front and defence, foreign affairs, international relations etc on the external front.



3. Executive and its Legislative functions

Delegated legislative functions are performed by the executive. It frames orders, rules, regulations, ordinances, by-laws, and circulars. They carry equal force of law if framed within the sphere and policy of the parent legislation.

The political executive influences the working of legislature, by introducing the bill in the house through its party members.

4. Executive and its financial functions

The executive imposes and collects taxes and incurs expenditure on the various activities of state. It prepares budget of the financial year, maintains the accounts of government departments and prepares national policies. It also arranges financial grants from international entities like International Monetary Fund, World Bank etc.

5. Executive and Judicial functions

Judicial functions of the executive include power to grant pardon (Presidential), to suspend or lessen the punishment on special grounds or to exchange one form of punishment for another, on the petition of a person convicted of any offence by the court.

Just to point out:

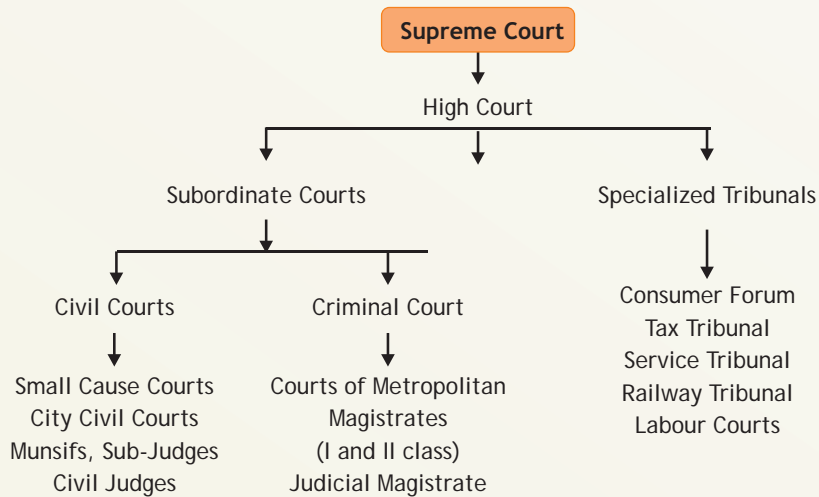
Judicial Activism. In India, perhaps the first instance of the activist role of the judiciary was after the Emergency, when the Supreme Court came up with public-interest litigation, (PIL) a tool meant to ensure justice for the under-privileged and the marginalized.

Find some examples of activist role of the judiciary





C. General Functions of Judiciary as an Organ of the Government



1. Role of Judiciary

The first and the foremost function of the judiciary is to hear and decide a case, according to the substantive and procedural law of the land. The role of the judiciary is examined in details in Unit V.

The role of the judiciary is expanding with the expanding role of the executive. Disputes may arise among citizens of a state, between citizens and state, among the federal units, between the various departments of the executive and in international relations, calling for intervention by the judiciary.

Let us ponder:

'The executive is the implementing arm of the government' Elaborate with examples.

Dispute settlement and adjudication require the independent functioning of judiciary, without political influence or interference. Impartial and time-bound justice delivery are essential requirements for the judiciary.

2. Judiciary and its Jurisdiction

Judiciary refers to the set of courts having civil and criminal jurisdiction. With the expansion and diversification of state and its agencies, and expansion of arbitration and conciliation, tribunals and various fora have also become part of the conventional



judicial system, such as the Motor Accident Claims Tribunal under Redressal Forums under the Consumer Protection Act, 1986 etc.

The judiciary exercises jurisdiction on the basis of territorial limits, pecuniary/financial limits, appealable matters, matters for review and revision. The judiciary consists of Magisterial courts, Sub-district and District Courts at the lower level and the higher judiciary comprising of High Courts and the Supreme Court. Decision given by them is known as 'judgment', 'decree', 'order', or 'award'.

Let us Ponder:

“In some countries like Switzerland and the U.S. the judges are elected, in most of the countries they are appointed by the executive.”

Compare both the methods of appointments, which method is applicable in case of the Supreme Court of India?

3. Judiciary and Interpretation of laws

Wherever the law is ambiguous (confusing) or not clear or silent or appears to be inconsistent with other laws, of the land, the courts after proper analysis determine or interpret the intent, purpose and meaning of the provisions of law. The role of the judiciary as an interpreter of laws is discussed in Unit 2.



V. EXERCISE

Comprehension Questions

1. Explain the different forms of Government as opined by Aristotle and Dr. Stephen Leacock
2. Write brief notes on the following forms of Government:
 1. Monarchy
 2. Democracy and its forms.
 3. Parliamentary and Presidential forms.
 4. Unitary and Federal forms.
3. Explain the role of legislature as an organ of the Government.



4. Explain the role of executive as an organ of the Government.
5. Explain the role of Judiciary as an organ of the Government.
6. Distinguish with examples, between unicameral and bi-cameral legislature.

Case Study

Take any 10 countries across the globe, but not more than three from a continent and do a comparative based on the given table:

Deliberation Points	Country 1	Country 2	Country 3	Country 4	Country 10
Who is the executive head of the state?					
Is the political power federal or unitary					
How is government power acquired or transferred?					
What is the relationship between the state and the individual?					
How stable is a political regime?					
How is the power shared between the organs of the state?					



Just to point out:

Any person who holds an office of profit under the Government of India or the Government of any State is disqualified from being chosen as, and for being a member of either House of Parliament.

Find out if any MP was disqualified on the above grounds.



Chapter 3

SEPARATION OF POWERS

CONTENTS

- I. OBJECTIVES
- II. CONCEPT OF SEPARATION OF POWERS
- III. HISTORICAL BACKGROUND AND ORIGIN
 - A. Montesquieu's Doctrine of Separation of Powers
 - B. Basic Features of the Doctrine Separation of Powers as Enunciated by Montesquieu
 - C. Checks and Balances of Power
 - D. Impact of the Doctrine
- IV. EVALUATION OF THE DOCTRINE OF SEPARATION OF POWERS
 - A. Key Benefits And Advantages Of The Doctrine Of Separation Of Powers
 - B. Defects of the Doctrine
- V. SEPARATION OF POWERS IN PRACTICE
 - A. Separation of Powers in Britain
 - B. Separation of Powers in the United States of America
 - C. Separation of Powers in India





UNIT 01: CHAPTER 3

SEPARATION OF POWERS

I. OBJECTIVES

Students shall:

- i. Gain knowledge about separation of powers.
- ii. Gain knowledge about the limitations.
- iii. Understand the application of the Doctrine of Separation in modern constitutions.

1. Label the pictures by choosing one of the following:

- a. Legislature
- b. Judiciary
- c. Executive



Take this quiz to find out how much you know.

2. The Legislature enables the Government to _____ laws.

- a) interpret and enforce
- b) frame laws and amend

3. The written Constitution defines the _____.

- a) power of the three organs
- b) ii role of the councilors

4. The words 'I am the State' which sparked the Separation of power are attributed to ____

- a) James I
- b) Louis XIV



5. **The words "Power halts power" suggest that the separate functions of the**
 - a) Government will operate as balance against the other two
 - b) Each will block and tackle the other to stop encroachment
6. **The famous Declaration of Rights took place in 1789, _____ the French Revolution?**
 - a) during
 - b) after
 - c) before
7. **The powers of the legislature, executive and judicial arms are better described as ____**
 - a) initiatives
 - b) ii functions
8. **The parliamentary Form of Government combines _____ powers.**
 - a) legislative and executive
 - b) executive and judiciary
9. **Greater power of the Executive arm is required to extend services and rights for the people.**
 - a) Welfare State
 - b) Theocratic State
10. **The Indian Constitution is broadly similar to that of _____**
 - a) Britain
 - b) United states
 - c) France
11. **The Executive head in India is the _____**
 - a) Prime Minister
 - b) President
 - c) Chief Minister

Share what you have learnt through the class discussion.





II. CONCEPT OF SEPARATION OF POWERS

In the previous chapter of this book, we examined the different organs of government. For the preservation of the political liberty of the individuals and democracy, it becomes necessary in a state to establish special organs for the exercise of powers. The powers of the government are divided between its organs in accordance with the nature of powers to be exercised. Broadly, the powers of a government in a state have been classified as the power to:

- i. Enact laws i.e., powers of the Legislature.
- ii. Interpret laws i.e. powers of the Judiciary.
- iii. Enforce laws i.e. powers of the Executive.

The theory of separation of powers in its simplest form implies that all the above functions should be entrusted to three different authorities. The three organs of the government should be kept separate and distinct. One organ should be independent of the control of others.



Our Constitution

Each organ shall exercise its powers within its own sphere. This doctrine entails that each organ shall not encroach upon or interfere with the powers and independence of other organs of government. If any organ encroaches into the terrain of the other organ, it shall be checked by another organ of the government. Thus, no new organ is created over and above the existing organs of government, to check encroachment.

On the whole, separation of powers requires the existence of a written Constitution to define the formal powers of each organ. The powers shall be so defined and divided to create a system of checks and balances of powers among the organs. This view finds support from the writings of Carl J. Friedrich(1901-1984), a German-American political theorist.

In the words of Wade and Phillips (*Constitutional Law, 1960*), separation of powers may mean three different things:



- i. The same persons should not form part of more than one of the three organs of the Government,
- ii. One organ of the government should not control or interfere with the exercise of its function by another organ
- iii. One organ of the government should not exercise the functions of another

III. HISTORICAL BACKGROUND AND ORIGIN

The concept of separation of powers can be traced to Aristotle (384 -322 B.C). Aristotle in his treatise Politics called the three organs of the government as *deliberative*, *executive* and *judicial*. He gave the description about the organization and functions of these organs, without mentioning their separation from each other. In the 14th century, the Italian thinker Marsilius of Padua (1275-1342) drew a clear distinction between legislative and executive functions of the government. In the 16th century, the French philosopher Jean Bodin (1530-1596) stated that judicial functions must be performed by the independent Magistrate, free from the influence of the Monarch.

In the 17th century, the British political thinker John Locke (1632-1704) deduced from a study of the English constitutional system that political power was to be divided among several bodies. According to Locke, the executive and federative powers can be combined but the union of executive and legislative organs shall be prohibited to protect the political liberty of people. According to him, an ideal form of government is civil government with limited powers.

A. Montesquieu's Doctrine of Separation of Powers

The most original, systematic as well as scientific elaboration of the concept of 'separation of powers' has been given by the French philosopher Baron De Montesquieu (1689-1755) in the 18th century. Montesquieu's theory on 'separation of powers' has become the model for governance of all democracies.

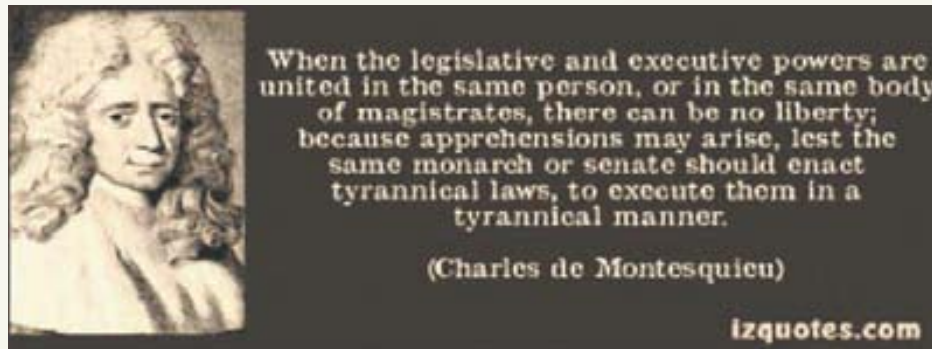
During his time, he saw the oppressive and despotic rule of French King Louis XIV (1661-1715). The ruler enjoyed the absolute powers of State, and the prevailing dictum was, "*I am the State*". Liberty of the people was suppressed under the despotic rule of the King and his administrators.

During his visit to England, Montesquieu experienced the sense of liberty and freedom enjoyed by the citizens of England. He was very impressed with the thoughts of Locke. He compared their system of governance with the system prevailing in his country. He examined the separation of powers of the government, and their exercise by separate organs of the government namely, the King, Parliament and the law courts in the governance structure in England.





The doctrine of the separation of powers emerged as a distinct doctrine in his famous book *Esprit Des Lois* (The Spirit of Laws) published in 1748.



B. Basic Features of the Doctrine Separation of Powers as Enunciated by Montesquieu

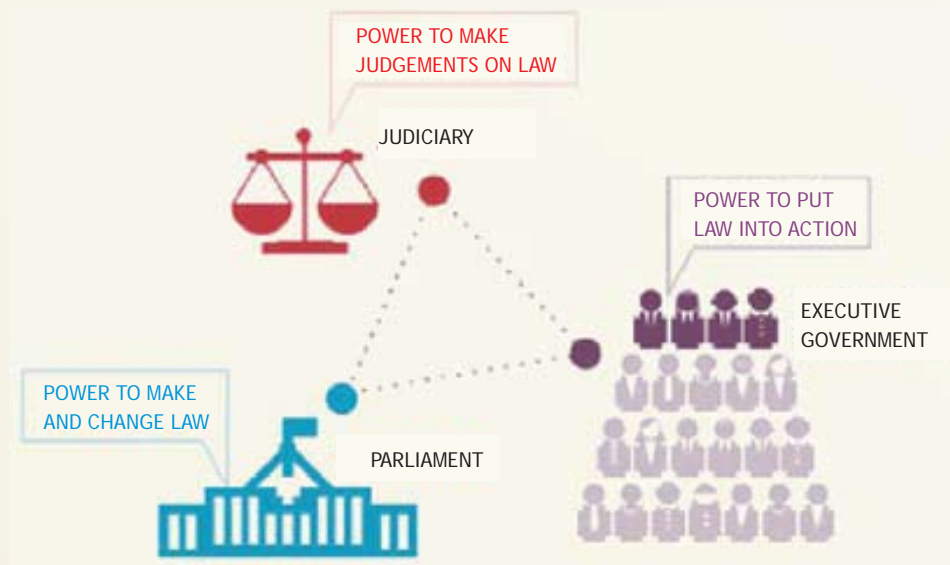
1. Division of powers. Montesquieu does not use the term "federative power" for the executive power in regard to external affairs. He uses the term "executive" to cover all internal affairs, both governmental and judicial; i.e., the power to apply and execute laws in particular cases as judicial power, and the power to enact laws as legislative power.
2. Different departments must exercise the three powers of the government with their respective personnel. He provided the reason for the division of powers between the three branches of the government as follows:
 - a) *When the legislative and executive powers are united in the same persons, there cannot be liberty. It may lead to apprehensions that the monarch may enact tyrannical laws and execute them in a tyrannical manner, as the same agency becomes the maker and executor of laws.*
 - b) *Where judicial powers are combined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, as the Judge would be the legislator.*
 - c) *Where the judicial power is combined with the executive power, the Judge might behave in a violent and oppressive manner. The prosecutor and the Judge would then be the same person and authority.*
 - d) *If powers are vested in one organ, or exercised without separation, governance would not be effective.*



3. It is inherent in any authority to abuse powers unless limitations are imposed on its exercise.
4. For safeguarding the liberty of people, each organ of the Government shall have the obligation to act within its own sphere and not beyond it. If the authority acts beyond the permitted limits, it would be checked by the other organs.

This means that the executive organ shall exercise some control over legislative and judiciary, the legislative organ over executive and judiciary, and the judiciary over legislative and executive organs. The system of checking the encroachment of powers by each organ and thus balancing the division of powers is termed as the system of 'checks and balances'.

This kind of overview is the correct meaning of the maxim *pouvoir arrete le pouvoir* which means, power halts power. By separating the functions of the executive, legislature and judiciary, one power may operate as a balance against another and thus have a check on the power exercised by another.



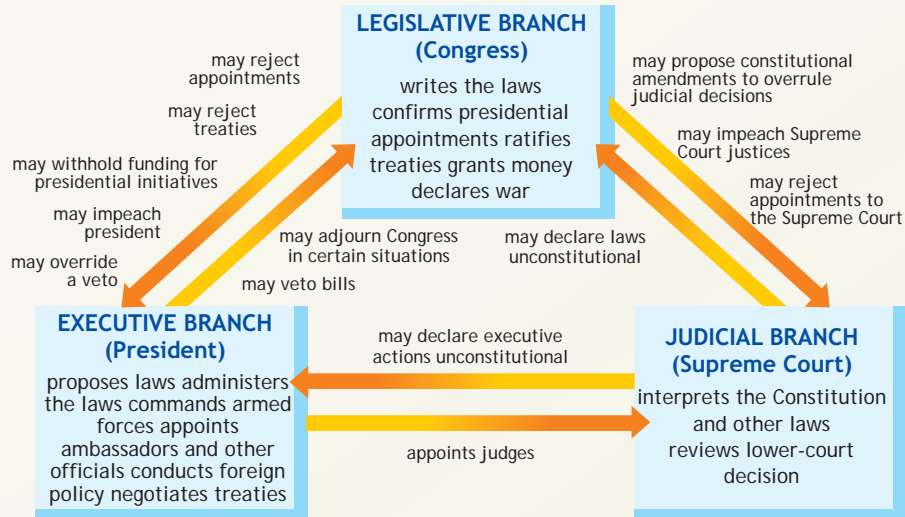
Source:: http://www.peo.gov.au/students/fact_sheets/separation_powers_parliament_executive_judiciary.html

C. Checks and Balances of Power

The origin of the concept of check and balances is specifically credited to Montesquieu. This concept provides a system-based regulation that allows one branch to limit another. The following chart explains the operation of check and balance mechanism between different organs of the government in the United States.



Separation of Power and Checks and Balances



Source: www.sville.us

D. Impact of the Doctrine

Montesquieu advocated the adoption of this doctrine in his own country's political system. His teachings gave boost to the French Revolution and led to the adoption of the **Declaration of Rights** in 1789.

The Declaration provided that:

"Every society in which Separation of Powers is not determined has no Constitution. The French Constitution, 1791, made executive, legislative and judiciary independent of one another."

English and American jurists have found merit in this doctrine. The English jurist Blackstone (1723-1780) in his book **Commentaries on the Laws of England (1765)**, observed:

*"Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason... effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. **Nothing therefore is to be more avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.**"*



James Madison (1751-1836), the 4th President of United States of America wrote in **The Federalist** that *"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."*

The doctrine of separation of powers forms the foundation on which the entire structure of the **U.S. Constitution [1787]** is based. Montesquieu thus became the intellectual father of the American Constitution.

IV. EVALUATION OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine can be better evaluated after studying its key benefits and defects.

A. Key Benefits and Advantages of the Doctrine of Separation of Powers

- ❖ Different personnel, with respective capabilities for different organs, bring efficiency to the performance of functions and administration. This indeed serves the purpose of the State and its people. Each organ must do its job to the best of its efficiency, and with due regard to its responsibility.
- ❖ The doctrine of separation of powers, safeguards the liberty and freedom of individuals. The doctrine requires that each organ must act within the sphere of law. Thus, it establishes the government of law rather than of official will.
- ❖ It aims at protecting freedom of individual from the tyrannical rule of absolute monarchy. Montesquieu developed the theory as a means of limiting the absolute powers of the ruler in France.
- ❖ One important aspect of this doctrine is to establish an independent judiciary that is free from administrative discretion. Montesquieu was interested in setting the judicial power as a check on and as arbiter between the other two organs.
- ❖ The system of check and balances within the organs of the government provides stability to the government by protecting the sovereignty of the state.
- ❖ It promotes harmonious exercise of powers and functions within the three organs.

B. Defects of the Doctrine

- ❖ Historically speaking, there was no separation of powers under the British Constitution, as construed by Montesquieu. A. V. Dicey had observed that the British Constitution had "a weak Separation of Powers". As remarked by Barnett in *Constitutional and Administrative Law(2005)*, 'Britain has *an uncodified or unwritten Constitution*. Much of the British constitution is embodied in written documents,



within statutes, court judgments and treaties as the supreme and final sources of law. The statutes of Parliament can change the Constitution by passing new legislations. The Constitution has other unwritten sources, including Parliamentary constitutional conventions.

- ❖ The three organs of government and their functions cannot be divided into water-tight compartments. It would be wrong to say that they are not inter-connected, though their mode of action may differ. The legislature deliberates; the executive takes rapid actions and gives effect to legislative enactments and judicial decisions. The Judiciary critically analyses the laws and actions of the executive, and may even declare them invalid.
- ❖ Extreme separation of powers prevents the unity and coordination needed to administer the legally expressed will of the State; extreme checks and balances create frictions and dead-locks that prevent smooth and efficient government.
- ❖ The functions performed by each organ are not unique. A Judge makes law in the form of precedents. The Executive legislates in the form of framing subordinate legislation, such as rules, bye-laws, regulations, policies, schemes etc. The Legislature acts judicially in deciding the breach of its privileges. Absolute separation of powers may even prove hazardous in the smooth functioning of the government.
- ❖ "*Power tends to corrupt, and absolute power corrupts absolutely*" arose as a part of a quotation by John Emerich Edward Dalberg (1834-1902), a historian, politician and writer, who is popularly known as Lord Acton, who expressed this opinion in a letter to Bishop Mandell Creighton in 1887.
- ❖ Separation of powers is in itself a protest against power. Its meaning can be better analyzed if the use of the word **powers** of the organs is substituted by **functions**. The word 'functions' implies attitude of service, while the word 'powers' implies force. The government performs activities to serve the purpose of the State and its individuals through its classified functions for which the different organs are created.
- ❖ The doctrine can be better understood in two forms. First, it implies that concentration of powers in the same person or same body of persons should be avoided. Secondly, it implies division of those powers which essentially and primarily belong to one organ and not the other. Then allied functions can be performed with the coordination of the other organs. Emphasis must be laid on modification of the concentration of powers. The British political scientist *Herman Finer* (1898-1969) in one of his writings on **The Theory and Practices of Modern Government** had observed that Montesquieu was searching for the means to limit the crown; to make a Constitution to build canals through which, but not over which, power should stream;



to create intermediary bodies; to check and balance probable despotism and yet did not wish to fly extreme democracy.

- ❖ The theory of separation in its strict sense cannot apply to the countries having **Parliamentary** form of Government (Parliamentary form explained in previous chapter) where the legislative and executive organs are combined.
- ❖ Harold Laski (1893-1950), a British political theorist, stated in his book **A Grammar of Politics** that this form of Government does not act as a deterrent to individual's liberty. Rather, it secures an essential coordination between organs of Government whose creative interplay is the condition of effective Government. It promotes an essential principle of democracy i.e., Government for the people.
- ❖ Montesquieu had envisaged that all the three organs of the government would be given equal and independent position in the political organization of the country. But in fact it is not so in reality. The concept of Welfare State demands more and more action and services from the government such as health, education, food and public distribution, public transport and supply of electricity. It tends to increase the powers of the executive, and develop the executive as a multifunctional organ. Today, the executive legislates, exercises judicial jurisdiction and plans the future activities of the government. As remarked by Barker: *'If the growth of legislative organ, in consequence of cabinet system, was the notable feature of 18th century, it may be said that growth of executive organ in consequence of the extension of rights and the corresponding extension of services which mostly fall to the lot of executive, is the notable feature of 20th century'*.

Complete this activity by supply suitable information. Share your observations with the class.

- i. If any governmental organ encroaches on the other, it shall be restrained. _____
- ii. Distinguish and define the formal powers given to the three organs of the government.
- iii. Government for the people is _____ in the application of its laws.
- iv. _____ has no written Constitution.
- v. Life, liberty and right to property are priority subjects to be guarded by the _____ Principles of the law.
- vi. Extreme separation of powers leads to standoffs and _____.
- vii. 'Power tends to corrupt, and absolute power corrupts absolutely' is the opinion of _____
- viii. 'Powers' are better expressed in the Constitution as ' _____ '



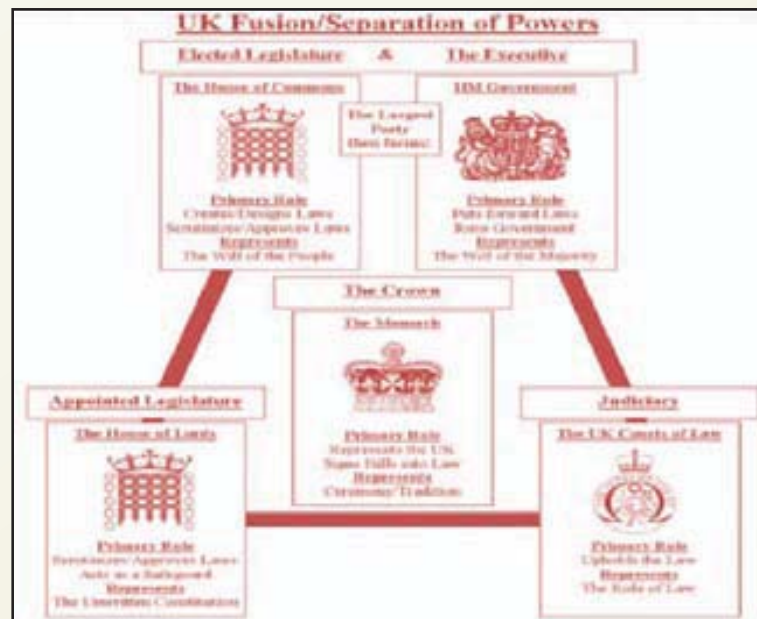
- ix. The theory of Separation cannot be applied in totality where the government is _____
- x. 'Sovereignty' of State means '_____ ' of State.

V. SEPARATION OF POWERS IN PRACTICE

Depending on the forms of Government in a State, there is overlapping of powers among the organs. This can be better explained by studying the functions performed by different organs in the State.

A. Separation of Powers in Britain

In Britain, the three organs of Government are the Executive Head (the British monarch, currently Queen Elizabeth II), Legislature comprised of House of Commons and House of Lords, and the Judiciary. The British Queen acts as the nominal executive head devoid of political powers. She holds the office by virtue of hereditary succession. The real executive powers vests with the Prime Minister and the Council of Ministers. The Queen exercises powers on the advice of Council of Ministers. Prime Minister and his Council of Ministers are part of the legislature. They are collectively responsible to it and play important role in legislative activities. They remain in office so long as they enjoy the confidence of House of Commons. They make sub-ordinate legislations. They perform judicial functions by being the members of Administrative Boards and Tribunals. The House of Commons performs judicial function in case of breach of its own privileges.



Source: <http://ourgoverningprinciples.wordpress.com/the-uks-westminster-system>



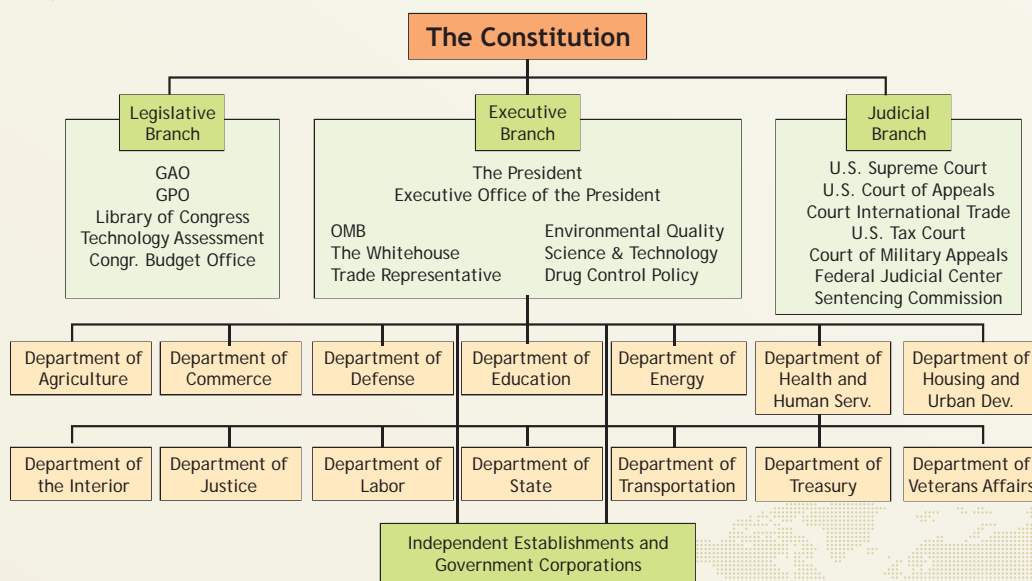
The Law Lords, who were the final arbiters of judicial disputes in Britain sat simultaneously in the House of Lords, the upper house of the legislature, although this arrangement ceased in October 2009 when the Supreme Court of the United Kingdom came into existence.

Until the **Constitutional Reform Act 2005**, the Lord Chancellor was the head of the Judiciary in Britain. He fused the Legislature, Executive and Judiciary, as he was the ex-officio Speaker of the House of Lords, a Government Minister who sat in Cabinet and was head of the Lord Chancellor's Department, which administered the courts, the justice system and appointed judges. He sat as a judge on the Judicial Committee of the House of Lords, the highest domestic court in the entire United Kingdom, and the Judicial Committee of the Privy Council, the senior tribunal court for parts of the Commonwealth.

The Constitutional Reform Act, 2005, separated the powers, with legislative functions vested with an elected Lord Speaker and the judicial functions vested with the Lord Chief Justice. The Lord Chancellor's Department was replaced with a Ministry of Justice and the Lord Chancellor currently serves in the position of Secretary of State for Justice. The British governing system follows a Parliamentary form of Government. The British Constitutional system has adopted a fusion of powers rather than separation of powers.

B. Separation of Powers in the United States of America

The **U.S. Constitution** has adopted Presidential form of Government. The three organs of the Government are the President as the executive organ, the Supreme Court of America and the subordinate courts as the judicial organ, and the Congress as the legislative organ, with two houses - Senate (the upper house) and the House of Representatives (the lower house).





The theory of separation of powers finds its best expression in the United States of America. The American Constitution did not explicitly state that powers ought to be separate. It simply distributed the powers: the legislative powers are vested in the Congress, the executive powers in the president, and the judicial powers in the court. While apportioning the lion's share of powers to one organ of Government the Constitution gave smaller slices to each of other organs. This was done to avoid concentration and consequent abuse of power. The fathers of the constitution considered that power should be limited, controlled and diffused. The law making power was vested in the Congress, but the President received his share of powers to recommend measures, to summon Congress in special session and to veto bills passed by the Congress. Similarly the Senate shared with the President his powers to make appointments, declare war and ratify treaties. The Congress acts in a judicial capacity in cases of impeachment of the President and Supreme Court Judges.

The President is elected by the people and the Congress is also elected by the people. Neither the President is responsible to the Congress nor the Congress is responsible to the President. However while the judges of the Supreme Court are nominated by the President, their appointments have to be ratified by the Senate. In certain circumstances, the Senate may refuse to ratify the choices made by the President. The Congress cannot be dissolved by the President. The President remains in power for four years, the members of the Senate sit for six years and those of the House of Representatives for two years. The President has been given the powers of making appointments but these have to be ratified by the Senate. The Supreme Court has the power of judicial review. The Court has the power to examine the laws passed by the Congress and the executive orders issued by the President and declare null and void if it contravenes the provisions of the U.S. Constitution. The President can declare war but he can do so only if he has got the approval of both the Houses of the Congress. The President could intervene in the business of the court through his power of pardon for all offences except treason.

The U.S. President appoints the members of the Cabinet with the approval of the Congress, as executive heads of the Departments. The President and Secretaries are not members of the Congress. The President has the power to call special sessions of Congress and veto the bills, (except money bills) passed by the Congress. The U.S. Congress delegates law making powers to the executive after laying down the legislative policy and principle.

C. Separation of Powers in India

India's governing system is broadly similar to that of Britain's. Both the countries have adopted **Parliamentary System of Government**.

Under the Indian Constitution, the three organs of Government are the legislature, executive and the judiciary. As stated in Article 79 of the Constitution of India, the



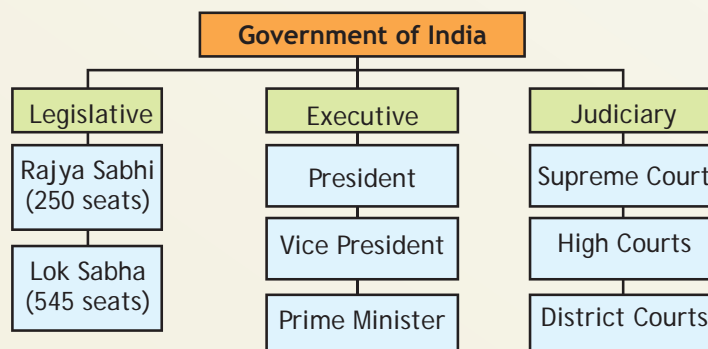
Parliament consists of the President and two Houses known as the Council of States and the House of the People.

Judiciary refers to the Supreme Court of India, High Courts and the subordinate courts. The Supreme Court of India is the final court of appeal for the whole of India.

The President is elected by the Electoral College consisting of the elected members of both houses of Parliament and the elected members of the legislative assemblies of the state. He/she is appointed for a fixed term of 5 years. The President of India is the nominal executive head. The real executive is the Prime Minister and his/her Council of Ministers. The President exercises his/her powers/functions with the aid and advice of the Prime Minister & his/her Council of Ministers. Usually the advice is binding on the President.

The Prime Minister and his/her Council are normally Members of Parliament. They play an active role in proposing a bill and voting a bill in the Parliament. A bill becomes an Act when President gives his/her assent to it. The President has wide legislative powers to issue ordinances for immediate action during the recess of legislature. An ordinance issued shall have the force and effect as that of an Act by Parliament. President has the power to dissolve House of People. The President has the power to declare a National emergency, State Emergency and Financial Emergency. The President may be authorized to exercise legislative powers in case of a State Emergency. The Council of Ministers including the Prime Minister is collectively responsible to the House of People. Thus, they remain in office so long as they enjoy the confidence of the House of People. The President may be impeached by the Parliament.

Various provisions are incorporated in the Constitution to establish an independent judiciary. Judges of the Supreme Court and High Courts shall be appointed by the President after consultation with such Judges of the Supreme Court and of the High Courts in the states, as laid down in Article 124 (2) of the Constitution. A nine-Judge Constitution Bench of the Supreme Court (In re Presidential Reference, AIR 1999 SC 1) laid down the norms and requirements of consultation process to be observed by the executive *on the appointment of judges to the Supreme Court and High Court and, transfer of the latter.*





The privileges and the allowances of a Judge cannot be varied after his appointment. No discussion shall take place in Parliament with respect to the conduct of any Judge of Supreme Court or of High Court, except when a proceeding of impeachment is initiated against him.

Article 50 of the Indian Constitution provides that the State shall take steps to separate the judiciary from the executive in the public services of the state. The object behind Article 50 is to provide for the independence of judiciary. The Judiciary in India interprets the Constitution. The judiciary is entitled to scrutinize the legislations and administrative process and assess whether or not they conform to the Constitution.

The judiciary provides for remedies for enforcement of Fundamental Rights of citizens, guaranteed by the Constitution. A **writ jurisdiction** can be invoked to move the Supreme Court under **Article 32** and High Court under **Article 226** of the Constitution.

The judiciary plays the role of legislature while laying its own procedures for the dispensation of justice. It supervises, administers and controls the subordinate judiciary and thus performs an administrative function.

The judges of Supreme Court and High Court can be removed on impeachment by the legislature, only on the grounds of proved misbehavior or incapacity.

The Constitution of India provides for the powers and functions of the legislature. Article 246 of the Constitution provides that the Parliament and the Legislatures of the States have powers to make laws. The matters are listed in **Schedule VII** of the Constitution under Union List, State List and the Concurrent List.

Article 368 of the Constitution provides for constituent powers of the Parliament, and lays down the procedure for amendment of the Constitution. In the exercise of its power of judicial review, the Supreme Court of India in **Keshavananda Bharati case (AIR1973 SC 1461)** popularly known as **Fundamental Right's Case**, held that the Parliament in exercise of its amending power under Article 368, could not alter the **Basic Structure of the Constitution**. Thus the **basic structure** limits the amending power of the Parliament.

The Judges while deciding this case could not form a unanimous opinion on the provisions of the Constitution which constitute its Basic Structure. On a perusal of different cases decided by Supreme Court, the following features seem to emerge as the Basic Structure, so as to be beyond the amending power of the Parliament under Article 368:

- a. Supremacy of the Constitution;
- b. Republic and democratic form of Government;
- c. Secular character of the Constitution and State;



- d. Sovereignty of India;
- e. Judicial Review and jurisdiction of courts under Article 32 & Article 226
- f. Separation of Powers and Independent Judiciary (In the case of *State of Bihar vs. Bal Mukund Shah* (AIR2000SC1296))
- g. Right to Equality and Rule of Law

It is, therefore, for the Supreme Court of India to determine finally the essential features constituting the framework of the Constitution. In other words, the Supreme Court has assumed to itself the constituent power in exercise of Judicial Review.

In conclusion, the Indian Constitution **has not adopted the doctrine of separation of powers in its strict sense**. Nevertheless, the Constitution of India has sufficiently differentiated the essential functions of the organs and no organ shall assume to itself what essentially belongs to other.

Fill up with appropriate details, based on your understanding

- a. Where the Monarch is the Executive head: _____.
- b. Where the President is the executive head; _____.
- c. Where the Monarch executes his/her powers through the Prime minister: _____.
- d. The Prime Minister in UK is helped by his/her _____.
- e. Where the Lords sat in Parliament: _____.
- f. The US Presidents holds his/her tenure for ____ years.
- g. In India, the legislative Houses are called _____ and _____.
- h. The Supreme Court is the _____ organ of the Indian government.
- i. Moral and ethical issues [public sentiments] are concerns in _____ form of government.
- j. The Prime Minister in the executive head in the following: _____ and _____.

Answer the following briefly, in a short paragraph:

- i. How did Wade and Phillips interpret the Separation of powers in their 1960 work?
- ii. Distinguish between Aristotle's and Locke's definitions of the 'Separation of Powers'?
- iii. What forced Montesquieu to adopt many of the principles of the British constitution?



- iv. What are the powers vested with the President of United States?
- v. How does the British Monarch exercise his/her powers?
- vi. What are the legislative powers of the Indian President?
- vi. What does Article 368 refer to?
- ix. What are the judicial functions of the Magistrate in India?
- x. How does the Indian Constitution interpret the 'separation of powers' doctrine?

Answer the following in about 200 words each:

1. Explain the Concept of Separation of Powers.
2. Explain Montesquieu's views on Separation of Powers.
3. Write brief notes on the following:
 - (i) Separation of Powers in Britain
 - (ii) Separation of Powers in the United States of America
4. Explain how the Doctrine of Separation of Powers is exercised in India.



Chapter 4

BASIC FEATURES OF THE CONSTITUTION OF INDIA

CONTENTS

- I. MEANING OF THE TERM CONSTITUTION
- II. DEFINITION OF THE TERM CONSTITUTION
- III. HISTORICAL PERSPECTIVE OF INDIAN CONSTITUTION
- IV. SALIENT FEATURES OF THE CONSTITUTION OF INDIA
 - A. A Modern Constitution
 - B. Features of the Indian Constitution
 - C. Preamble to the Constitution
 - D. Fundamental Rights; Directive Principles of State Policy; Fundamental Duties
 - i) Fundamental Rights
 - ii) Directive Principles
 - ii) Fundamental Duties
 - E. Constitutional Provision for Amendment of the Indian Constitution²⁰
 - F. Special Status to the State of Jammu and Kashmir
 - G. Adult Suffrage
 - H. Single Citizenship
 - I. Independent Judiciary
 - J. Schedules to the Constitution





3. It determines the powers and responsibilities of state and organs of government.
4. It may be written in a single document or in several documents.
5. It determines the rights and duties of the citizens of a State.
6. It is the fundamental law of a State.

The features of Constitution may vary from state to state. Government of a state operates in accordance with the principles laid down in its Constitution. It helps to maintain law and order in the country. *Georg Jellinek (1851-1911)* had even argued that in the absence of Constitution, every individual, every institution and even the government will ignore law and as a result, there will be 'reign of anarchy'.

III. HISTORICAL PERSPECTIVE OF INDIAN CONSTITUTION

Before independence, India was the part of British colonial empire. Sovereignty of British Crown prevailed over India. Parliament of Britain enacted several legislations for the governance of India.

Some of the significant legislations of the British Parliament responsible for the governance of India were:

1. Government of India Act, 1858
2. Indian Councils Act, 1861
3. Indian Councils Act, 1892
4. Indian Councils Act, 1909
5. Government of India Act, 1919
6. Government of India Act 1935.



Picture above: Pt. Jawaharlal Nehru moves the resolution for an independent sovereign republic in the Constituent Assembly in New Delhi.





In the words of *Durga Das Basu* as stated in his book *Introduction to the Constitution of India*, 'Indian Constitution draws much of its source from Government of India Act, 1935. The Government of India Act, 1935 has provided the administrative details and language to the provisions of the Constitution'

Unlike the other Government of India Acts, the Act of 1935 referred to India as a federation of Provinces and Indian States. Autonomy to provinces was given effect by dividing legislative and executive powers between the Provinces and the Centre. The Provinces were under the executive authority of Governor appointed by the Crown. Provinces were the autonomous units of administration. Governor exercised the powers on the advice of Ministers, who were in turn responsible to Provincial legislature. Governor was given discretion to carry out certain functions, without being bound by Ministerial advice, subject to the control of the Governor-General.

At the Central level, Government of India was under the executive authority of Governor-General. Governor-General was to act on the advice of Ministers of Central legislature, who were in turn responsible to the Central Legislature. The Executive Council formed under Government of India Act, 1919 functioned as the Council of Ministers. Governor-General even had discretionary functions to perform, but subject to the control of Secretary of State.

Gwalior library puts original copy of Constitution of India on display

The Central Library in Gwalior boasts of a prized and priceless possession - the original bound copy of the Constitution of India. On the occasion of the 61st Republic Day, the library authorities displayed the historical document for public view and random reference. It is said that due to the lack of good printing facilities, during the late 1940s, the Constitution was composed using lithographic machine and the Constituent Assembly members affixed their signatures to endorse the Constitution of India. The pages were made with double golden borders on all sides. While the Central Library has more than 111,891 books properly classified and well preserved in various shelves, the original bound copy of the Constitution of India has been kept separately in a wooden box and wrapped in a muslin cloth. As per the records, the library purchased this copy on March 31, 1956 for rupees 120, which is now viewed as deemed as a priceless treasure by historians. *"This original copy of the Constitution of India has been compiled in lithography and has golden-polished alphabets. It contains 255 Articles and signatures of 285 members. The library bought the copy of the Constitution in 1956 and then it was priced at rupees 120. Now it has become priceless for us and we keep it very safely,"* said R S Mahaur, the librarian.

Source: <http://news.oneindia.in/2010/01/26/gwaliorlibrary-puts-original-copy-of-constitution-of-india.html>



Government of India assumed the role of Federal Government. The Central legislature was bi-cameral consisting of Federal Assembly and Council of State. Some of the Provincial legislatures had bi-cameral legislature and other Provinces had uni-cameral legislature. The legislative powers and matters were divided between Central Legislature and Provincial Legislatures. The powers assigned to the Central legislatures and provincial legislatures were included in the Federal List, Provincial List respectively. The Centre and Provinces could exercise their combined authority on matters included in the Concurrent List.

Federal List: It dealt with matters such as Currency, External Affairs, Armed Forces, etc. on which only Central legislature had the authority to legislate.

Provincial List: It dealt with matters such as Education, Public Health, and Agriculture, etc. on which only Provincial legislature had the authority to legislate.

Concurrent List: It dealt with matters such as marriage and divorce, criminal Law, civil law and procedure, etc. on which both federal and provincial legislatures had authority to legislate.

The exercise of legislative power was subject to various limitations:

1. Governor-General's and Crown's power to veto a bill passed by the legislature.
2. Governor-General's power to issue ordinance and permanent acts, when the legislative house was not in session.
3. Governor-General's power to suspend legislature, if the proceedings would affect the discharge of his special responsibilities.
4. No bill to amend or repeal the law of British Parliament as applicable in India, can be introduced in legislature without the previous sanction of Governor-General.

Thus, the Central legislature and similarly the Provincial legislatures were to act under the instructions of Governor-General, Secretary of State and ultimately the sovereign powers of the British Crown. Indians were given very limited rights of self-governance.

Growing dissatisfaction over limited governing rights granted to Indians under 1935 Act led to widespread protests. Eventually the Colonial government conceded that the Constitution of India would be framed by an elected Constituent Assembly consisting of Indian people. It was also agreed to establish an independent Constituent Assembly free from outside interference to frame the Constitution of India. On December 9, 1946 the Constituent Assembly, a body elected by members of the provincial legislatures and state legislatures, met for the first time and formally commenced the task of '*Constitution making*'.





FIRST DAY IN THE CONSTITUENT ASSEMBLY

The Constituent Assembly met for the first time in New Delhi on 9 December 1946 in the Constitution Hall which is now known as the Central Hall of Parliament. Decorated elegantly for the occasion, the Chamber wore a new look on that day with a constellation of bright lamps hanging from the high ceilings and also from the brackets on its walls.

Overwhelmed and jubilant as they were, the members sat in semi-circular rows facing the Presidential bias. The desks which could be warmed electrically were placed on sloping green-carpeted terraces. Those who adorned the front row were Pandit Jawaharlal Nehru, Maulana Abul Kalam Azad, Sardar Vallabhbhai Patel, Acharya J.B. Kripalani, Dr. Rajendra Prasad, Smt. Sarojini Naidu, Shri. Hare-Krushna Mahatab, Pandit Govind Ballabh Pant, Dr. B.R. Ambedkar, Shri. Sarat Chandra Bose, Shri. C. Rajagopalachari and Shri. M. Asaf Ali. Two hundred and seven representatives, including nine women were present.

The inaugural session began at 11 a.m. with the introduction of Dr. Sachchidananda Sinha, the temporary Chairman of the Assembly, by Acharya Kripalani. While welcoming Dr. Sinha and others, Acharyaji said: "As we begin every work with divine blessings, we request Dr. Sinha to invoke these blessings so that our work may proceed smoothly. Now, I once more, on your behalf, call upon Dr. Sinha to take the Chair."

Occupying the Chair amidst acclamation, Dr. Sinha read out the goodwill messages received from different countries. After the Chairman's inaugural address and the nomination of a Deputy Chairman, the members were formally requested to present their credentials. The First Day's proceedings ended after all the 207 members present submitted their credentials and signed the Register.

Seated in the galleries, some thirty feet above the floor of the Chamber, the representatives of the Press and the visitors witnessed this memorable event. The All India Radio, Delhi broadcasted a composite sound picture of the entire proceedings.

Source: <http://parliamentofindia.nic.in/ls/debates/facts.htm>

The Indian Independence Act 1947

'The Indian Independence Act, 1947' enacted by the British Parliament got Royal Assent and *came into force* on July 18, 1947.

The Act provided that from 15 August 1947, referred to as 'appointment date' under Government of India Act, 1935, two independent Dominions, to be known as *India and Pakistan* would be established. *The Constituent Assembly of each Dominion was to have unlimited power to frame, adopt any Constitution. It had all authority to repeal any act of British Parliament including Indian Independence Act.*



Let us ponder:

Various features and parts of the Constitution of India were influenced by the Constitutions of different countries. For instance, separation of powers among the major branches of government was adopted from the Constitution of United States.

Find out the Constitutions from which the following were adopted:

- ❖ The concepts of Liberty, Equality and Fraternity
- ❖ The concept of 5 year plans
- ❖ The Directive Principles (socio-economic rights)
- ❖ The concept on which the Supreme Court functions

The Drafting Committee worked under the Chairmanship of Dr. Bhim Rao Ambedkar, the Law Minister from 15 August 1947 to 26 January 1950. After many discussions and deliberations to improve the existing system of administration, geographical compulsions, social and cultural diversities and historical precedents, a proposal on Draft Constitution of India was prepared. The draft received assent from the President of the Assembly Dr. Rajendra Prasad and was declared passed on 26 November 1949. The Constituent Assembly held 11 sessions and took a period of 2 years, 11 months and 18 days before it signed two copies of the document one in Hindi by the name of "Bhartiya Sanvidhan" and another in English "The Constitution of India".



Picture Above: Dr. Ambedkar Chairman, Drafting Committee of Indian Constitution with other members. (Sitting from left) Shri. N. Madhavrao, Sayyad Sadulla, Dr. Ambedkar (Chairman), Alladi Krishnaswamy Iyer, Sir Benegal, Narsingh Rao. Standing from left - Shri.S.N. Mukharjee, Jugal Kishor Khanna and Kewal Krishnan. (Aug 29, 1947).

The original Constitution of India is hand-written with beautiful calligraphy by Prem Behari Narain Raizada. Artists from Shantiniketan including Beohar Rammanohar Sinha and Nandalal Bose adorned each page. The Constitution of India was adopted on 26 November 1949. Some of



the provisions were given immediate effect. The bulk of the Constitution only became effective on 26 January 1950. This date is referred to as the *date of commencement* under *Article 394* of the Constitution. Every year 26th January is commemorated as 'Republic Day' in India.

Article 394 states that *'This Article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 shall come into force at once, and the remaining provisions of this Constitution shall come into force on the twenty sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.'*

IV. SALIENT FEATURES OF THE CONSTITUTION OF INDIA

A. A Modern Constitution

The Indian Constitution drafted in the mid-twentieth century, has assimilated the best features gathered from the existing Constitutions and fashioned to suit the existing conditions and needs of the country.

Article 1(1) declares that India, that is Bharat, shall be a Union of States.

All 552 Indian States within the geographical boundaries of the Dominion of India acceded to the Dominion of India by 15 August, 1947, thus unifying India into a compact State. Dr. B.R. Ambedkar explained that the use of the word 'Union' instead of 'Federation' has its significance (*In record from the Constituent Assembly Debates (C.A.D)*) as summarized below:

1. Indian Federation is not the result of an agreement between the units.
2. The component units have no freedom to secede from the Union so created.
3. The term *Bharat* was adopted by the Constituent Assembly because the country was so known in the ancient times. This was the only name that suited the history and the culture of the country.

The term Union was used "as symbolic of the determination of the Assembly to maintain the unity of the country" as stated by Supreme Court of India in the case of *Hinsa Virrodhak Sangh v. M.M.K. Jamat 2008 SCC33*. To promote the unitary basis of Indian Administration, the Constitution makers added detailed provisions on the distribution of powers and functions between the Union and the States in all aspects whether legislative, administrative or financial and also with regard to inter-state relations, co-ordination and adjudication of disputes amongst the states. Although the system of government is federal, the Constitution enables the federation to transform itself into a unitary state by the assumption of powers of the states by the Union in case of emergencies as described under Part XVIII. Such a combination of federal system and unitary system in the same Constitution is unique in itself..



Part III of the Indian Constitution on Fundamental Rights is inspired by the American Bill of Rights. The system of prerogative writs namely the writs of *habeas corpus*, *mandamus*, *quo warranto*, *prohibition* and *certiorari* be issued by Supreme Court and High Courts to protect fundamental rights and to exercise judicial control over administrative action as guaranteed by the Constitution of India. Some of these aspects are influenced by the British Constitutional Law. Part XX on Amendment of the Constitution is the modified version of U.S. Constitution.

Find out the Meaning and origin of the following words/phrases used for the types of writs and the context in which they are used: You may identify the invocation of particular writ remedy from the judgments of the Supreme Court of India or any High Court.

Type of writ	Origin	Literal Meaning	Purpose of issue
Habeas Corpus	Latin	You may have the body	To produce a person who has been detained, whether in prison or in private custody, before a court and to release him/her if such detention is found illegal
Mandamus	Latin	We command	A command issued by the court to any public or quasi-public legal body that has refused to perform its legal duty. It is an order by a superior court commanding a person or a public authority to do or forbear to do something in the nature of public duty.
Quowarranto	Latin	By what warrant (or authority)?	It is an order issued by the court to prevent a person from holding office to which he is not entitled and to oust him from that office.
Certiorari	Latin	To be more fully informed	It is a writ issued by a superior court to an inferior court or body exercising judicial or quasi-judicial powers to remove a suit and adjudicate upon the validity of the proceedings or body exercising judicial or quasi-judicial functions.
Prohibition	English	To forbid or to stop.	It is issued by a superior court to an inferior court in order to prevent the inferior court from dealing with a matter over which it has no jurisdiction. The aim of this writ is to keep the inferior courts within the limits of their jurisdiction.



As observed by *Dr. Basu* in his book *Introduction to the Constitution of India*, the Constitution-makers adopted the Parliamentary system of government for both the Union and States following the British model, for the primary reason that the people had the long experience of this system under the Government of India Acts. The makers deliberately rejected the Presidential form of government as followed in the U.S, apprehending conflicts on account of separation of executive from the legislature, which our infant democracy would not have been able to afford. Unlike the British model, India declared itself as a Republic.

Part IV of Indian Constitution on Directive Principles of State Policy is inspired by the Irish Constitution. Special provisions for promoting freedom of trade and commerce in the country as included in Part XIII are influenced by the Australian system.

The Indian Constitution is unique in its form and contents. By virtue of the 73rd and 74th Constitution Amendment Act, 1993, Part IX and Schedule XI were added to the Constitution. These amendments provide the framework for the establishment and election of Panchayats and Municipalities. Part XIV of the Constitution contains provisions regarding service matters of personnel appointed to public services under the Union and States, and provisions on the establishment and functions of Public Service Commissions. Part XIV-A contains provisions on the setting-up and functioning of Administrative Tribunals for the adjudication of matters thereunder. Part XV contains provisions on the conduct of elections and concerned authorities thereof.

Let us ponder:

Our constitution is one of the longest in the world, with 395 original articles, 12 schedules and 97 amendments. The American constitution is the shortest. The earliest form of a constitution in the world dated 2300 BC was found in Iraq.

Subsequent articles were added to the Constitution of India through amendments; these have been inserted with alpha numeric enumeration so as not to disturb the original numbering.

Exercise: Try to find out the unique features of the Constitution of some of the modern democracies.

B. Features of the Indian Constitution

Durga Das Basu in his book *Introduction to the Constitution of India* has stated that "the Constitution of India has the distinction of being the lengthiest, detailed, elaborate Constitutional document the world has so far produced." It consists of 395 Articles (many articles were added subsequently and some were repealed by way of amendments). The additions have been given alpha numeric enumeration alongside the original article. Originally the Constitution consisted of 8 schedules; now it consists of 12 Schedules.



Just to point out

It took almost three years (two years, eleven months and seventeen days to be precise) for the Constituent Assembly to complete its task of drafting the Constitution for Independent India. It held eleven sessions covering a total of 165 days. Of these, 114 days were spent on the consideration of the Draft Constitution.

The Constitution of India provides for the organization, structure and functioning of not only Central Government organs, but also of the organs of the State Governments. It contains a detailed framework on fundamental rights, fundamental duties, functions and powers of the Executive, functions and powers of the Parliament, Judiciary and judicial appointments, official language, citizenship, emergency provisions, etc. Detailed provisions were incorporated in the Constitution to address issues concerning the Scheduled Castes and Tribes, Backward Classes, Religious and Linguistic Minorities etc.

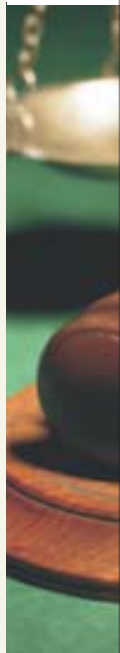
The Directive Principles of State Policy outlined in Part IV of the Constitution shall not be enforceable in any Court, but nevertheless are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

C. Preamble to the Constitution

The Constitution of India starts with its Preamble. The Supreme Court of India in the *Fundamental Rights Case (Keshavananda Bharati v. Union of India, 1973 SC 1461)* held that *Preamble does form part of the Constitution*. The objectives specified in the Preamble contain the 'basic structure' of the Constitution. The Preamble is the guide to interpret the provisions of the Constitution.

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all;
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this twentysixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.





The Preamble to the Constitution reaffirms that the people of India have adopted, enacted and given to themselves the Constitution. Supreme Court in *Charan Lal Sahu v. Union Of India (AIR 1990 SC 1480)* popularly known as *Bhopal Gas Leak Tragedy Case* held that Sovereign denotes that India is not subject to any external authority and that India as a state has the power to legislate on any subject in conformity with Constitutional limitations.

The Preamble to the Constitution states that India's governing system is based on Republican and Democratic principles. In *S. R. Bommai v. U.O.I. AIR 1994 SC 1918*, the Supreme Court held that the word '*democratic*' signifies that '*India has a responsible parliamentary form of Government, which is accountable to the elected legislature*'. '*Republic*' denotes that the head of the state is an elected person and not a hereditary monarch. Any Indian without any discrimination as to the caste, creed, and religion can contest for Presidential elections and can occupy the office provided he fulfills the eligibility conditions as provided by the Constitution. The Preamble seeks to achieve for all citizens, social, economic and political justice; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; fraternity, unity and integrity of the nation.

The Preamble and the Constitutional provisions aim to secure to its citizens *equality of status & equality of opportunity* in state affairs such as elections, and in state employment without any special privilege or discrimination based on the ground of religion, race, caste, sex, place of birth. The word '*socialist*' was added by the Constitution (forty-second Amendment) Act, 1976. This term is not defined in the Constitution. In general it means a system under which the means of production and distribution are State owned. The Supreme Court in the case of *S.R. Bommai v. Union of Indoa (AIR 1994 SC 1918)* held that the *principal aim of socialism* is to eliminate inequality of income, status, standards of life and to provide a decent standard of life to working people.

The Preamble establishes India as a *Secular State*. India is a country of multifarious religions, beliefs and sects. Its people profess and practise different religions. But, India as a Union of states has no official religion. There is no state-recognized place of worship. The state does not identify itself with or favour any particular religion. State laws and policies prohibit any discrimination on the grounds of religion. It treats all religious equally and confers protection to citizens to profess, propagate and practise their religions. The word '*Secular*' was added by the Constitution (forty-second Amendment) Act, 1976. Even before the Amendment, operation of the concept of secularism was visible in the Fundamental Rights and Directive Principles. This has also been given the status of *Basic Structure of the Constitution in Keshavananda Bharati's case*.



Let us ponder:

The phrase "we the people" in the preamble of the Indian Constitution emphasizes upon the concept of popular sovereignty as laid down by J. J. Rousseau. It signifies that the power emanates from the people and the political system will be accountable and responsible to the people.

Find out the significance and implied meanings of the following terms used in the preamble:

1. Sovereign
2. Socialist
3. Secular
4. Democratic
5. Republic

D. Fundamental Rights; Directive Principles of State Policy; Fundamental Duties

i) Fundamental Rights

The Constitution of India guarantees its people certain basic human rights and freedoms known as '*Fundamental Rights*', which are listed in Part- III of the Constitution (Articles 12 to 35.) These are broadly rights of equality (equality before laws and prohibition of discrimination on grounds of religion, race, caste, sex or place of birth; equality of opportunity in matters of public employment; abolition of untouchability and titles); right to freedom ([rights regarding freedom of speech such as freedom of speech and expression, right to free movement, to form associations, to practice any trade or occupation]; protection in respect to conviction for offences; protection of life and personal liberty; protection against arrest and detention in certain cases); right against exploitation, right to freedom of religion; cultural and education rights and right to constitutional remedies. The right to education was inserted as Article 21A vide the Constitution (eighty-sixth Amendment) Act, 2002. Fundamental Rights stated under Article 14 and 21 are even conferred to non-citizens.

Just to point out

Right to property was originally a fundamental right, but after the 44th Amendment Act, 1978, right to property ceased to be a Fundamental right. Instead the right to property is mentioned under 300A of Indian Constitution, stating that no person can be deprived of his property save by law.

The Fundamental Rights guarantee to the people certain basic rights. The legislative and executive actions which infringe upon or violate the Fundamental Rights are declared ultra vires the Constitution. The Supreme Court shall have power to issue



directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of fundamental rights under Article 32; and the High Courts under Article 226 of the Constitution. The speedy and effective remedy under Article 32 is itself guaranteed as a Fundamental Right. Therefore, these guaranteed rights are termed justiciable rights.

ii) Directive Principles

Part- IV of the Constitution contains Directive Principles of State Policy. Article 37 states that these provisions shall not be enforceable by any court, but the principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. These directives put an obligation on the State to take positive action in order to promote the welfare of people. Article 38 (1) states that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life; and Article 38 (2) states that the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Some of the important Directive Principles include the right to an adequate means of livelihood for citizens, equal pay for equal work for both men and women, living wages for workers, equal justice and free legal aid, organization of village Panchayats, provision of just and humane conditions of work and maternity relief, uniform civil code for citizens, promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections, duty of the state to raise the level of nutrition and to improve public health, protection and improvement of environment and promotion of international peace and security.

A large number of laws have been enacted and adopted to implement the Directive Principles of State Policy. Examples include the Legal Services Authority Act, 1987, Right to Free and Compulsory Education, 2009, Child Labour Prohibition Act, 1986, Environment Protection Act, 1986, Wild Life Protection Act, 1972, Minimum Wages Act, 1948, Equal Pay for Equal Work Act, etc. The Constitution (seventy-third, seventy-fourth Amendment) Acts, 1992 led to the establishment of Panchayati Raj Institutions and Urban Local Bodies based on democratic principles. Importantly, the Constitution (eighty - Amendment) Act, 2002 paved way for introduction of Right to Education for children in the age group of 6 to 14 years as a Fundamental Right.

The Supreme Court of India while interpreting Constitutional provisions elevated some Directive Principles to the status of Fundamental Rights., for instance, Right to



Equal pay for Equal work in *Randhir Singh v. U.O.I.* (AIR 1982 SC 879); Right to Clean and Healthy Environment in case of *M.C Mehta v. Kamal Nath*, (AIR 2000 SC 1997); Right to Free Legal Aid in the case of *Hussainara Khatoon V. Home secretary*, (AIR 1979 SC 1369).

On the question of inter-relationship between Fundamental Rights and Directive Principles, the Supreme Court in *Kesavananda Bharti's case* held that 'Fundamental Rights and Directive Principles constitute the conscience of the Constitution... There is no antithesis between the Fundamental Rights and Directive Principles... and one supplements the other'. In *Ashok Kumar Thakur v. Union of India* (2008 (6) SCC 1) Supreme Court held that no distinction can be made between the two sets of rights. The Fundamental Rights represents the Political and Civil Rights and the Directive Principles embody Social and Economic Rights. Merely because the directive principles are non-justiciable by the judicial process, it does not mean that they are of subordinate importance.

Fundamental Duties

It shall be the duty of every citizen of India

- ◆ to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- ◆ to cherish and follow the noble ideals which inspired our national struggle for freedom;
- ◆ to uphold and protect the sovereignty, unity and integrity of India;
- ◆ to defend the country and render national service when called upon to do so;
- ◆ to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities to renounce practice derogatory to the dignity of women;
- ◆ to value and preserve the rich heritage of our composite culture;
- ◆ to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures;
- ◆ to develop the scientific temper, humanism and the spirit of inquiry and reform;
- ◆ to safeguard public property and to abjure violence;
- ◆ to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement.

iii) Fundamental Duties

The Constitution (forty-second Amendment) Act, 1976 added Part IV-A, Article 51-A on Fundamental Duties of citizens, to the Constitution. These are eleven in number (see Box above).



There is no provision in the Constitution to enforce Fundamental Duties. Supreme Court in *Bijoe Emmanuel v. State of Kerala (AIR 1987 SC478)* held that duties imposed on the citizens may be enforced through the enactment of legislations. For example 'The Prevention of Insult to National Honours Act, 1971' punishes a person who insults the national honours. These duties are read along with Fundamental Rights. As stated by the Supreme Court in *Mohan Kumar v. Union of India AIR 1992 SC 1*, the courts may also enforce the duties while balancing and harmonizing them with the Fundamental Rights.

Let us ponder:

Till date there have been quite a few significant amendments in the constitution

- ❖ Find out about 10 amendments, in groups.
- ❖ Compare and discuss each individual amendment and how it relates to the people of India.

E. Constitutional Provision for Amendment of the Indian Constitution

Part XX of the Constitution of India provides in detail the procedure for amendment of the Constitution. Article 368 specifies the powers of the Parliament to amend the Constitution and lays down the procedure. There is no limitation on the constituent power of the Parliament for amending by adding, removing or improving the provisions in the Constitution.

The initial step of an Amendment is the introduction of a Bill for the purpose in either House of Parliament. The bill has to be passed in each House by a **majority** of the total membership of that House and by a majority of not less than two-thirds of that House present and voting. The Bill is then sent for President's assent.

Some amendments also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

Ninety-Seven amendments have been made to the Constitution of India, so far. The Supreme Court in the case of *Kesavananda Bharthi v. State of Kerala AIR 1973SC 1461* case has restrained the powers of Parliament to amend the Indian Constitution in respect of its Basic Structure. (Discussed in the previous chapter).

F. Special Status to the State of Jammu and Kashmir

The State of Jammu and Kashmir is part of the Indian Union as defined under Article 1 read with the first schedule of the Indian Constitution. However, under Article 370 it enjoys a



special status. The State has its own Constitution drafted by its Constituent Assembly. The State is governed under this Constitution. Article 370 empowers the President to define the Constitutional relationship of that State in terms of the provisions of the Indian Constitution. (On October 26, 1947, the Maharaja of Jammu and Kashmir signed the Instrument of Accession for Jammu and Kashmir to accede to the Indian Dominion.)

Article 370 further states that the power of Parliament to make laws for the said State shall be limited to (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

G. Adult Suffrage

Article 326 confers on the citizens of India the right to vote in the general elections to the House of People and to the Legislative Assemblies of States. Every citizen who is not less than 18 years of age (reduced from 21 years by the Constitution (sixty-first Amendment) Act, 1988 and otherwise not disqualified under the Constitution or any other law on the grounds of unsoundness of mind, non-residence, crime or corrupt or illegal practice shall be entitled to be registered as a voter at any such election.

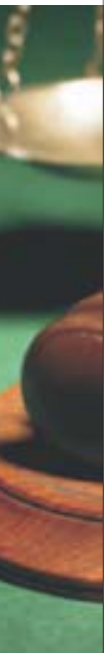


There is one general electoral roll for every territorial constituency, as stated in Article 325 of the Constitution, for election to either House of Parliament or to the House or Houses of State Legislature. This Article further specifies that no person shall be ineligible for inclusion to the electoral roll on the grounds only of religion, race caste sex or any of them.

Just to point out

Afto v. Staer the Doctrine of Basic Structure propounded by Supreme Court in Kesavananda Bharati case and in I.R. Coelhte of Tamil Nadu (AIR 2007 861) Supreme Court held that object behind Article 31-B was to remove difficulties and not to obliterate rights guaranteed under Part-III and Judicial Review. Thus every law passed and amendment made must not destroy the Basic Structure of the Constitution. Thus any law added to the Ninth Schedule may be reviewed by the Courts.

Articles 330 and 332 provide for reservation of seats for the Scheduled Castes and Scheduled Tribes, in the House of People and Legislative Assemblies respectively; and





Article 331 provides for representation for members of the Anglo-Indian community in the House of People.

In the case of *Indira Nehru Gandhi v. Raj Narain (AIR 1975 SC 2299)*, popularly known as *Election case*, right to free and fair elections has been declared to constitute the Basic Structure of the Constitution.

H. Single Citizenship

The Constitution of India provides single citizenship to its citizens. Part II of the Constitution of India contains provisions regarding citizenship at the commencement of the Constitution and other matters. The Citizenship Act 1955 provides that citizenship can be acquired by way of birth, descent or registration. (The Act also provides for citizenship by naturalization and by incorporation of territory.) The citizens of India enjoy political and civil rights enshrined under the Constitution such as the right to vote, right to contest elections, right to hold high offices such as that of the President, Vice President, Governor, Judges, subject to satisfaction of other criteria prescribed for the purpose. No citizen can be denied employment in any State on the grounds of being non-resident of that State.



I. Independent Judiciary

Another notable feature of the Constitution of India is its provisions which uphold the independence of the judiciary from the influence of other organs of the Government. The Judiciary functions in accordance with the set principles of the Constitution. This topic has been dealt with in the preceding chapters.

J. Schedules to the Constitution

There are 12 Schedules attached to the Constitution of India. They provide necessary administrative details to the functioning of the organs of Government. These Schedules are amendable by Parliament.

The subject matters dealt with by the schedules are given below:

- ❖ **First Schedule** contains list of States and Union Territories of India.
- ❖ **Second Schedule** contains provision on the emoluments, allowances and privilege, of President; Governors; Speaker and Deputy Speaker of the House of People; Chairman and Deputy Chairman of the Council of States; Speaker and Deputy Speaker of the Legislative Assembly; Chairman and Deputy Chairman of the Legislative Council of a State; Judges of the Supreme Court and of the High Courts; and Comptroller and Auditor General of India.



- ❖ **Third Schedule** of Constitution lists the forms of oath or affirmation.
- ❖ **Fourth Schedule** deals with allocation of seats in the Council of States.
- ❖ **Fifth Schedule** deals with provisions regarding administration and control of Scheduled Areas and Scheduled Tribes.
- ❖ **Sixth Schedule** deals with provision regarding administration of Tribal Areas in the state of Assam, Meghalaya and Mizoram.
- ❖ **Seventh Schedule** lists the subject matters in the form of three lists namely List I - Union list, List II - State list and List III - Concurrent list, over which the Union and State Governments have authority to make laws.
- ❖ **Eighth Schedule** contains the list of languages recognized by the Constitution.
- ❖ **Ninth Schedule** covers validation of Acts and Regulations.
- ❖ **Tenth Schedule** contains provisions as to disqualification on grounds of defection.
- ❖ **Eleventh Schedule** contains provisions on the powers, authority and responsibilities of Panchayats.
- ❖ **Twelfth Schedule** contains provisions on the powers, authority and responsibilities of Municipalities.



Picture Above: Pt. Jawaharlal Nehru was the first one to sign on the Constitution of India

Let us ponder

Did you ever get an opportunity to read the Constitution of India? If not, have you heard of some of the above Parts in it? Being a citizen of India, don't you think it is not late for you to know at least some details, if not all about it? Don't you think that you should have a copy of the Constitution of India in your home for your reading and reference as well as of your family members? May be one written in simple language?



Comprehension Questions

- Q1. Write in brief historical perspective of Indian Constitution.
- Q2. Write brief notes on the following:
- Schedules attached to the Constitution
 - Fundamental Rights and Duties
 - Preamble to the Constitution.
 - A Modern Constitution
- Q3 Write your observations on the study of basic features of Indian Constitution.
- Q4. Explain the significance of Fundamental Rights in a democracy like India
- Q5. There is no provision directing the citizens of India to totally abide by the Fundamental Duties. Do you think there should be such a provision?
- Q6. What rights do Article 20 and 21 deal with? Can these rights be restricted or temporarily suspended?
- Q 7. Can the Indian Parliament amend the basic structure of the Constitution?
- Q 8. What are the provisions in the constitution of India that make it a 'welfare state'? Elaborate how.

Case Study

The names that we associate with the Constitution of India are Dr. B.R. Ambedkar, Chairman of the drafting committee of the Constituent Assembly and leaders like Pt. Jawaharlal Nehru, Sardar Patel, Dr. Rajendra Prasad, Maulana Azad etc. Our Constitution, which is the lengthiest and probably the most comprehensive one in the world, had other unsung heroes also associated with it. Here are the names of some of them.

- Alladi Krishnaswami Ayyar
- Benegal Narsing Rau
- B. Pattabhi Sitaramayya
- Dr. Sachchidananda Sinha
- G. Durgabai
- H.C. Mookerjee
- K.M. Munshi



8. M. A. Ayyangar
9. N. Gopalswami Ayyar
10. T.T. Krishnamachari

Divide the class into 4 groups and assign following tasks to each group:

- ❖ Group 1: Try and find out at least 5 more people associated with the making of the Constitution and prepare a presentation on their contribution
- ❖ Group 2: Write a brief biography of any two out of the ten contributors mentioned above
- ❖ Group 3: Enact a dialogue between the members of the Constitution drafting committee after they have finished the task. (Focus on their excitement, apprehensions and other such feelings)
- ❖ Group 4: A panel discussion on the importance and significance of a written and living constitution. (A living Constitution is the one that can be amended)





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