

# **Constitutional Law and Public Administration in India**

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## **Salient Features of the Constitution of India**

The Indian Constitution is a bulky document and understanding that will be the primary basis of understanding public administration and public policy in India. The Constitution as the foundation, lays down the pillars of democratic society, public policy, and public administration. Hence, taking a bird's eye view at this stage of the course will be very important.

Salient features of the Constitution are important for us to understand because the Indian Constitution is quite unique in its content, and we will talk about some of these unique features because we have largely customized the Constitution, and it resonates with the spirit of the people of India to an extent. As we know that India, that is Bharat was a place which was earlier dominated by only Hindus, who were on the other side of the Indus River or the Sindh River. Later, Mughals invaded and then the British colonized us. This country did occupy so many kinds of communities that became part of this nation. The Constitution draws a lot of values and systems from the historical evolution of the country. Has the Indian Constitution changed from what it was as originally adopted in 1949? Lot of authors and jurists would say that the Indian Constitution has changed. A large part of the original Constitution continues to remain the same despite a mini amendment of the Constitution in the year 1976 which is the 42<sup>nd</sup> Amendment of the Constitution.

The 42<sup>nd</sup> Amendment is called the mini-Constitution because it was so huge that it was like one small Constitution on its own. It is one of the most important turn of events in the Constitutional history of India where Mrs. Indira Gandhi had to impose an emergency on the country and a lot of historians and jurists of that time have written that it was an abuse of the Constitutional power. It was important for the country and the parliament to ensure that such an imposition of emergency does not happen again. Hence, the 42<sup>nd</sup> Amendment brought in some checks and balances on government, and it made the Constitution a much better document. The original Constitution as it were continues to remain but the 42<sup>nd</sup> Amendment refined it and other amendments which have happened to the Constitution which are more than 100 amendments that have taken place have only made the Constitution a better working document. The improvement of any law is very important

for social transformation. The Constitution is also one such document that needs to undergo the change and Article 368 of the Constitution provides for amendment to the Constitution. It was accepted that the Constitution was adopted as the base document but the changes to the Constitution will be inevitable and hence the amendment process is something that must be undertaken from time to time. So, post 1976, there substantial change to the Constitution has been made and one should know the 12 main features of the Indian Constitution briefly.

The first and the foremost is that this Constitution of India is the lengthiest written Constitution. Unwritten Constitutions can be far lengthier if you consider the nature of documents that must be collated as what is the Constitution. One can argue that Constitutions must be comprehensive but there is no problem if the Constitution is allotted and a detailed document. This only strengthens the Constitution. However, on the other side of the pitfall of a lengthy Constitution is varied interpretation. For example, in many of the law schools where the Constitution is a subject or a core paper, it cannot be taught in one semester. Analyzing and evaluating this lengthy document has its own challenges. Currently, this Constitution has around 470 articles and it is divided into 25 parts, and it has 12 schedules. So, 470 articles, 25 parts and 12 schedules. But the Constitution originally had 395 articles, 22 parts and 8 schedules. 4 schedules, 3 parts and around 75 new articles were later added to the Constitution and have extended the length of the Constitution from what it originally was. There are many factors which can justify such a long Constitution and among those factors is the vastness of the country, the diversity of the population, its culture, and the geographical factors.

We have friendly neighbors such as Bangladesh and Sri Lanka, but we have some challenging neighbors like China and Pakistan which also something that the Constitution must draw and take some issues from. The Constitution is not a regular legislation and hence a Constitutional document for India must take all these diverse issues and challenges into consideration. For example, the seven sister states in the Northeast have posed a lot of challenges because they have a unique way of autonomous councils to govern and hence protecting the identity of people from the Northeast and giving them that kind of separation in terms of keeping intact those kinds of governance structures was something that the Constitution had to envisage.

The second salient feature for us to consider is that we have drawn the Constitution from various sources. Drawing from the USSR, France or South African or Japanese Constitution is a very important comparative lesson that we had undertaken in bringing the salient feature of our Constitution. But let us not forget the Indian Constitution heavily borrowed from the Government of India Act of 1935. That has been the core part of the Constitution. The periphery of that core has been drawn from the lessons across the world.

Third, the Constitution is a very important document which has flexibility in terms of amendment. There is a blend between what should be kept rigid, and which may be modified. Amendment to a Constitution is not like amending a regular legislation. Amending the Constitution requires a lot of procedural aspects, sometimes it would require consent of the states or it requires two thirds majority in each house and so on. A special majority is always relevant for a Constitutional amendment to come into place. This ensures an element of rigidity, if required and that clearly shows the blend that the Constitution framers wanted to get.

Fourth feature is the federal system. India is a quasi-federal country. Quasi-federal is not entirely federal. The unique feature is that the states are independent in their own territories of legislative dominance. The process of public administration between the central and the state in India is known as cooperative federalism, which means the state and the centre cooperate to fulfill the visions of the Constitution to take the country forward. And the best method is the method of cooperative federalism, the opposite of which is competitive federalism. So, the state and the central are not competing for investments and so on instead they cooperate so that the welfare of the citizens can be achieved. Parliamentary form of government based on the Westminster model is also another feature of the Constitution of India. In the past, India did borrow a few from the American Constitution. The American Constitution, especially at the federal level and for the states envisages a presidential form of government. India did not opt for the presidential form of government; instead it opted for the parliamentary form of government. These are broadly the two forms of government across the world, parliamentary form of government and the presidential form of government. Both systems have their own advantages and disadvantages. The constituent assembly debates shows us why the decision to choose the parliamentary form of government was made and this was mainly borrowed from the United Kingdom. Under this system, the President is a nominal executive as against a proper executive in the United States. The President of the United States is also the chief of the armed forces, so is the President of India but he is a nominal chief, not the real chief. In the parliamentary form of government, the party that forms the government is generally a party that has a majority in the floor of the house, and it then nominates its leader called as the prime minister. But what is also important in the parliamentary form of government is that though the majority party elects its leader, they also form a cabinet. The cabinet is supposed to be the collective body responsible for running the government.

This is precisely what you would expect post-emergency- that though you have the prime minister who is supposed to have the real executive power, the prime minister shall only work on the aid and advice of the council of ministers. This brings about collective leadership and a greater degree of accountability and transparency. It will also check abuse of power or also help to emit the power in terms of concentration in the hands of just one individual. We have a bicameral system of a parliament in the central government. There

is a lower house, which has the direct representative of the people and you have an upper house, which is the indirect representative of the people. The lower house is called the Lok Sabha and the upper house is called the Rajya Sabha. Similarly the UK also has the House of Commons and House of Lords.

What is important is that once the prime minister has been given the oath to head the government, he becomes a prime minister of the country. He is the leader of the party. He will have the prerogative to appoint his council of ministers. The council of ministers can be of cabinet rank, state rank or independent rank. And that depends upon how the parliament holds these kinds of ministers accountable in terms of the debate or in terms of the legislations that are actually being made.

The next feature of the Indian Constitution is parliamentary sovereignty and judicial supremacy. But parliament is not sovereign, the people are but here the word sovereignty means that the parliament is supreme in making legislations and work. Whatever is made by the parliament is the law of the land. Unless the parliament has authorized any other agency of the government, no one can make actual law without the consent, approval and authority of the parliament. The parliament is supreme, it is sovereign, it represents the wish and will of the people and what the parliament says shall be the law of the land. Judicial review has been so supreme that it has been able to check the legislature and the executive. It has been able to hold these two other organs of the government accountable.

For democracy to survive, thrive and progress, judicial supremacy is important. The Constitution did realize that the Supreme Court and the high courts (Constitutional courts) must have an upper hand in determining the final word of interpretation in the Constitution. Judiciary is the custodian of the Constitution, judiciary is the watchdog of the Constitutional agencies, judiciary is the final word on interpretation of what the Constitution should mean and what the Constitution should look like. Judicial supremacy is drawn from the American model.

Fundamental rights are also an important feature. We have the right to equality, right against exploitation, religion, freedom, educational rights for certain institutions and Constitutional liberties as well. Directive Principles of State Policy (DPSP) are also part of the Constitution. We have fundamental duties as well under Part IVA. There is a duty to respect the national flag, the national anthem, protect the sovereignty and unity and integrity of the country, to promote the spirit of common brotherhood among the people, preserve rich heritage of all composite cultures and so on.

The next interesting feature of the Constitution is secular state. The term secular was not a part of the original Constitution; it was introduced by the 42<sup>nd</sup> Amendment in 1976. Secularism may mean many things. But if one just has to look at the secular character of the Indian state, the state does not have a religion of its own, the state is secular. But

communities and citizens can have their own religious practices. So, we are not an Islamic state or a Hindu state or a Christian state; we are just a secular state. The state has the duty to treat every religion equally. The term secular is used in the Preamble of the Constitution. But if you want to track and trace secular obligations of the Constitution, you can definitely trace it to Article 14, which talks about equality; the state should treat everyone equally, be it citizens or institutions. And you cannot delay or deny equal protection of law to any religious institution, community, be it major or minor communities. Article 15 says that the state shall not discriminate on the ground of race, sex and religion. Article 15 also very clearly mandates and puts an obligation on the state not to discriminate on the basis of religion. That clearly states a secular principle. Hence, while the word secular came in 1976, Articles 14 and 15 were already part of the original Constitution. So, secularism was something probably intended to but not used by the Constituent Assembly. Look at Article 16 which talks about equal opportunity for all citizens in matters of public employment. So, you cannot give preference to only one religion or one community. Article 25 says that every person has their equal entitlement to the freedom of conscientious right to practice, profess and propagate any religion. So, if you read Articles 26, 27, 28 and 29, you will notice that to a larger extent, secularism is an important bedrock of the Indian Constitution. Minorities can have the right to run their own educational institution. This is provided in Article 30, which means that the state will encourage minority institutions to get into the business practice of education and they can continue to seek protection under the Constitution. So, not really major, but even minority communities have the right and ability to do the same. Finally, Article 44 of the Constitution, which mandates the state to endeavor to bring in a uniform civil code which also to a larger extent, puts in the element of secularism as a DPSP.

However, one will have to clearly appreciate and understand that secularism or a secular state in a western concept and secularism under the Indian Constitution can actually be called different. For example, in the west, when secularism was being advocated, it clearly meant that there must be a separation from the church vis-a-vis the state. In the west, the state and the church were together and what the church said was actually the law of the land. And hence they said that the state must not necessarily be a spokesman of the church and it should not just come to get every law that the church wants it to do. That is when the concept of secularism was introduced to distinguish the politics of the church from the politics of the state. But please note in India, we are not looking at secularism from this angle. For us, secularism is a positive concept. In the west, it was used as a negative concept because you wanted to split the church from the state. Keep the church different from the state; let the state be neutral, equal, and transparent. Religious law or canon law is not necessarily something that the state has to adopt. So, let the state embrace all religion, all communities, and all people, whether they are part of the church or not. But in India, secularism is positive because we want to provide equal opportunity to people from all religions. So, secularism and religion or religious based rights are not necessarily one and the same.

So, in India, preference to one religion by the state is something that is not permitted. Here we are talking of a very positive aspect of secularism where the state has to treat every religion, every religious community equally in all matters of public administration. Taking the step forward on secularism, we have made a very systematic and significant contribution, positively in terms of treatment of Scheduled Tribes and Scheduled Castes. Very often than not, you are not ascribing them with any special religion, which is the major religion in the state. But by fairly treating these marginalized communities and giving them Constitutional status, the state has acted secularly. So, scheduled tribes and scheduled castes have been given their dues. So, the state is not only a state that represents the majoritarian views or ideas or concerns or challenges, but it represents every person from every walk of the society.

The ninth saving feature is the universal adult franchise. In India, one can vote if one is above 18 years of age. This right to vote for a person above 18 years was introduced in 1989 through the 61<sup>st</sup> Constitutional amendment. Until 1989, the age was 21. The broad-based democratic process in India is one of the biggest processes in the world. We have a powerful autonomous body called the Election Commission of India, which is a Constitutional body. And their performance has been one of the unique features of the Indian Constitution. The self-respect of a common man is upheld when the democratic process of elections takes place for either the central government or to the state election and assembly and also to the local governments. So, the representation of people and their ability to decide the governance model is something of a great unique feature of the Indian Constitution.

Emergency provisions under Articles 352, 356 and 360 are one of the important features of the Constitution, because to a larger extent, they have maintained the unity of the nation. This power has been able to keep the states binded with the union and the federal government. And have allowed no state to split from the union, which is not possible under the Constitution at all. There is no provision for states to leave the union. That includes the state of Jammu and Kashmir which was annexed to India with the special provision in Article 370. We have three kinds of emergencies. First is national emergency that can be imposed on the ground of war or external aggression or armed rebellion under Article 352. Second is a state emergency that can be imposed under Article 356, where the states fail to follow the directions of the central government. What is critical is about Article 356 is the imposition of a state emergency by imposing the President's rule. So, the failure of a Constitutional machinery of the state, the central government can dismiss the state government and impose the rule of the central government. The final emergency is called a financial emergency. If there is financial instability, a financial emergency can be imposed in this country. We have Maoism and Marxism in certain parts of the country, some parts of Northeast which even now have militants. The emergency powers have been the basis of protecting the unity, integrity, and sovereignty of the nation. While emergency

provisions have been used in extraordinary and legitimate circumstances, it should not have a political undertone to it. This is an important element for governance of the Constitution itself.

The eleventh salient feature is single citizenship and the twelfth is cooperative society. In India individual states cannot grant you any kind of citizenship. What the Citizenship Act of 1955 does is that through the single citizenship you will be able to owe allegiance to one nation and that brings about a very patriotic flavor to how the Indian Constitution will be taken into. Cooperative society is again one important aspect of the Constitution. A Constitutional intervention to promote cooperative societies was brought about by the 97<sup>th</sup> Constitutional amendment of 2011 which said that the cooperative societies must get Constitutional protection. Article 19 gives the right to form cooperative societies because Article 19(1)(g) gives you the freedom of trade, occupation and business among which cooperatives can be one such model of that kind of a business. Through Article 43B, the state government is supposed to promote cooperatives. It could be a milk cooperative, it could be any other farmers' cooperatives and the cooperative model is a win-win situation for the members of the cooperative who are part of the producers and part of the community. So, it is an empowering legislation where the state intervenes and promotes the cooperative model. The cooperative model has a socialistic undertone to it, but it is an empowering measure, and the Constitution speaks about the kind of production of goods and services the cooperative model brings into place. Usually, cooperatives are regulated under the state legislature because of the division of subjects. However, the central government has come up with an interesting law, the Multi-State Cooperative Societies Act, 2002.

Earlier a cooperative was confined only to a state because it was registered under that state and in 2011 the parliament recognized that the cooperatives are of national importance, they should go beyond the state, they should be able to do business in an integrated manner on a national basis and they could register under the Multi-State Cooperative Act and the state government will not object to it and the central government will start regulating the multi-state cooperatives. So, for that purpose, the cooperative societies feature in the Constitution was added. Getting a brief overview of the salient features of the Constitution helps us understand the structure of what the Constitution looks like and as we go forward we will take each of these provisions in greater detail as well.