
UNIT 34 MAKING OF THE INDIAN CONSTITUTION*

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34.1 INTRODUCTION

The Constitution of India was adopted on 26th November, 1949, which means it was finalised by the Constituent Assembly on that day. But it became operative two months after its adoption, i.e., on 26th January, 1950, which is also known as the date of its “commencement”. However, some provision of it (those relating to citizenship, elections, provisional Parliament, temporary and transitional provisions) had become operative on 26th November, 1949 itself. The reasons for its commencement after two months of its adoption was to signify the January 26th as the original date as date of achievement of Independence. It is important to note that the Constitution on India is product of long drawn process and deliberations. This Unit deals with some issues relating to the making of the Indian Constitution. After going through this Unit, you will be able to learn about the:

- stages of constitution making prior to the formation of Constituent Assembly;
- nature of representation of the Constituent Assembly;
- philosophy of the Indian Constitution; and
- debate within the Constituent Assembly on some of the salient features of the Indian Constitution.

34.2 EVOLUTION OF THE INDIAN CONSTITUTION 1858-1935

The Constitution of India embodies the provisions providing basic democratic rights of human beings including the persons who are not the citizens of the country. It also embodies provisions for the availability of the institutions for

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legislation, execution and jurisdiction for the fulfillment of these rights. It presents vision for the social transformation and deepening of democracy. The process of evolution of democratic institutions and rights had started much before the Constituent Assembly really made the Constitution of India. It, however, must be underlined that the features of democratic institutions and values which were introduced during the colonial period were meant to serve the colonial interests in contrast the purpose of the provisions of the Constitution made by the Constituent Assembly of India.

Although the Indian Constitution was result of the deliberations (from Dec 9, 1947 to November 26, 1949) of the Constituent Assembly of the country, some of its features had evolved over a long time through various Acts i.e., from 1958 to 1935. The measures by the colonial authorities to introduce the institutions of governance were indeed responses to the protests against the British. If the transfer of rule from the East India Company was a reaction to revolt of 1857, subsequent Acts were the British response to the national movement against them. The main purpose of doing so was to continue colonial rule and to adapt it to the changing challenges. With the transfer of power from the East India Company to the British Crown, the British Parliament got involved in managing affairs of India. For this purpose it introduced different rules which laid the foundation of our constitution or provided a background to it. During this period the British Parliament introduced Acts, which defined nature of organs of government – judiciary and executive; introduced the notion of representative democracy, though of a limited nature, decentralisation, minority rights/communal representation and provincial autonomy. It is important to note that these form significant features of the Constitution which commenced in Independent India. As mentioned earlier, the nature of these provisions, however, was different from those the Constitution which people of India adopted. These provisions were introduced through different Acts in the pre-Independence period – Government of India Acts – of 1857, 1919 and 1935; The Council of India Acts of 1861, 1892; The Morely-Minto Reforms 1909. These Acts were consolidated into a single Act, i.e., Government of India Act of 1935. This Act aimed at putting separate provisions about the legislative, executive and judicial branches which till now scattered in different Acts into one single Act. As you know the Congress opposed the provisions of the Government of India Act, 1919 and launched non-cooperation movement. And in response the British government appointed the Simon Commission to review the functioning of the Act of 1919. Though Simon Commission was boycotted by the Congress, a large section of people did give representations to the Simon Commission. The Simon Commission submitted its report in 1930. The British government brought up the Simon Commission Report for discussion in the Round Table Conference in London. However, the British Prime Minister issued a “Communal Award” on August 4, 1932, which underlined that before discussion of the Simon Commission Report there Hindus and Muslims have to agree to some agreement for solution. It noted that the division between Hindus and Muslims had widened after the introduction of the Government of India Act, 1919. Following the discussion in the Round Table Conference, the British Government passed Government of India Act, 1935, which provided for separate representations to Muslims, Sikhs, the Europeans, Indian Christians and Anglo-Indians. In the light of the Government of India Act, 1935, the election to the provincial assembly was held in 1937, and the Congress formed government in many provinces. The Congress governments, however, could not complete their terms and had to resign before completing their terms.

These developments took place in the backdrop of clamouring for formation of constitution for Indians by themselves. In 1928 the first attempt to prepare a Constitution of India was made in the Nehru Report in the conference of the established All India parties (except the Justice Party in Madras and Unionist Party in Punjab). The Nehru Report demanded universal suffrage for adults and responsible government both in the centre and the provinces. It, however, supported the Dominion Status and not complete independence, which disappointed the younger generation of the Congress. Indeed, in 1934 the Congress officially demanded a constitution of Indian people, without the interference of outsiders. The Indian National Congress realised this with the failure of the Statutory Commission and Round Table Conference. Although the demand for the swaraj (self-rule) by the National leaders was made during the non-cooperation movement in 1922, it was only in 1938 that Jawaharlal Nehru and the Congress demanded that a Constituent Assembly be formed to draft a Constitution to govern the affairs of Independent India. The Congress Working Committee reiterated the demand in 1939.

34.3 FORMATION OF THE CONSTITUENT ASSEMBLY

34.3.1 The Cripps Mission

Initially the colonial authorities resisted the demand for creation of a Constitution. But with the change in the circumstances – the outbreak of the World War II and formation of the new Coalition (labour-led) government in Britain – forced the British government to acknowledge the urgency to solve the problem related to Constitution of Indians. In 1942 the British government sent its cabinet member – Sir Stafford Cripps – with the draft declaration on proposals (regarding a constitution for Indians) to be implemented at the end of the World War II provided both the Muslim League and the INC had agreed to accept them. The draft proposals of the Cripps Mission recommended the following: providing the Dominion Status, i.e., equal partnership of the British Commonwealth of Nations; all Provinces and Indian States should constitute one India Union by the British Constitution; the Constitution of India should be framed by an elected Constituent Assembly of the Indian people but if any province (or Indian State) which was not prepared to accept the Constitution was to be free to retain its constitutional position which had existed at that time, such provinces were to be free to enter into separate constitutional arrangements.

Both the Indian National Congress and the Muslim League did not accept the proposals of the Cripps Mission. The Muslim League demanded that India should be divided on the communal lines and some provinces should form an independent state of Pakistan, and there should be two Constituent Assemblies, one for Pakistan and another for India.

34.3.2 The Cabinet Mission

The British Indian government made several attempts to bridge the differences between the Congress and the Muslim League. But it was unsuccessful. The British government sent another delegation of the Cabinet members, known as the Cabinet Delegation, which also came to be known as the Cabinet Mission

Plan. It consisted of three cabinet members – Lord Pethick-Lawrence, Sir Stafford Cripps and Mr. A.V. Alexander. The Cabinet Delegation also failed to bring the Indian National Congress and the Muslim League to an agreement. It, however, made its own proposal which was announced simultaneously on 16th May, 1946 in England as well as in India. The Cabinet delegation made the following recommendations: there should a Union of India consisting of British India and the States, which will have jurisdiction over subjects of Foreign Affairs, Defense and Communication; all residuary powers would belong to the Provinces and the States; the Union should have Executive and Legislature consisting of the representatives from the Provinces and the States but for decision relating to a major communal issue in the legislature a majority of representatives of two major communities present, and voting along with the majority of all members present and voting would be required, and; the provinces would be free to form Groups with executives and legislatures, and each group would be free to determine the Provincial Subjects which would be taken up by the Group organisation.

34.3.3 Election to the Constituent Assembly

Meanwhile, According to the proposals of the Cabinet Mission, the election to the Constituent Assembly was held in which members of both the Congress and the Muslim League were returned. The members of the Constituent Assembly were elected by the Provincial Legislative Assemblies. However, differences between the Congress and the Muslim League arose on interpretation of “Group Clauses” of the Cabinet Mission. The British government intervened at this stage and explained to the leaders in London that the contention of the Muslim League was correct. And on December 6, 1946, the British Government published a statement, which for the first time acknowledged the possibility of two Constituent Assemblies and two States. As a result when the Constituent Assembly first met on December 9, 1946, it was boycotted by the Muslim League, and it functioned without the participation of the Muslim League.

34.4 NATURE OF THE CONSTITUENT ASSEMBLY’S REPRESENTATION

It is often argued that the Constituent Assembly of India did not represent the masses of India because its representatives were not elected through the universal adult franchise. Rather they were indirectly elected by the restricted adult franchise confined to the elite sections of society – the educated and tax payers. According to Austin, reasons for the restricted franchise and indirect election of the Constituent Assembly members were spelled by the Cabinet Mission Plan – to avoid the cumbersome and slow progress in the process of Constitution making. The Cabinet Mission provided for the indirect election to the Constituent Assembly by the elected members of the provincial legislature. Congress agreed to this proposal of the Cabinet Mission forsaking the claim of adult franchise to hold election to the Constituent Assembly. Despite having been elected through the restricted adult franchise, the Constituent Assembly represented different shades of opinions and religious communities of India. Austin observes that though there was a majority of the Congress in the Constituent Assembly, it had an “unwritten and unquestioned belief” that Congress should represent social and ideological diversity. There was also its “deliberate policy” that the

representatives of various minority communities and viewpoints should be represented in the Constituent Assembly. The Constituent Assembly consisted of members with different ideological orientations, and three religious communities – Sikhs, Muslims and General (Hindus and all other communities like the Anglo-Indians, Parsis, etc.). In words of K. Santaram “There was hardly any shade of opinion not represented in the Assembly” (see Austin, 2012, p.13, fn.48). Majority of the Constituent Assembly members belonged to the Congress. It also included non-Congress members like A.K. Ayer and N.G. Ayyanger who were brought by the Congress as “experts”; Dr. Ambedkar and John Matthai, who were also the cabinet ministers; S.P. Mukherjee represented the Hindu Mahasabha. The Constituent Assembly included representatives from the Princely States as well. It needs to be underscored that Dr. Ambedkar was initially elected to the Constituent Assembly from Bengal as member of the Scheduled Caste Federation. But he lost this seat due to the partition of Bengal and was re-elected by the Bombay Congress (as a non-Congress candidate) at the request of the Congress High Command. The Constituent Assembly sought to address concerns of every person irrespective of their social and cultural orientations. Before incorporating a provision in the constitution, it held elaborate deliberations. Thus the members of the Constituent Assembly were able to overcome the limitations of having been elected by the restricted franchise. As we will discuss in this Unit the Constituent Assembly sought to accommodate universal values of democracy. The Constituent Assembly adopted several provisions from different constitutions of world and adapted to the needs of India. In fact, Austin argues that while incorporating different provisions in the Constitution including those which were borrowed from other countries the Constituent Assembly adopted “two wholly Indian concepts” of resolving differences among its members i.e., consensus and accommodation. Even as the concept of accommodation was used to the principles which were included in the Constitution, that of consensus was adopted in the decision making process.

Most of the members of the Constituent Assembly participated in its proceedings. But these were twenty individuals who played the most influential role in the Assembly. Some of them were Prasad, Asad, Patel, Nehru, Pant, Sitaramayya, Ayyar, Ayyanger, Ambedkar and Satyanarayan Sinha. Though the Constituent Assembly was the sole forum where deliberations took place, yet the deliberations took place in coordination of three bodies – the Constituent Assembly, the Congress Party, and the interim government. Some members of the Constituent Assembly were also members of other bodies at the same time. Austin said that “an oligarchy” of four – Nehru, Patel, Prasad and Asad had enjoyed unquestioned honour and prestige in the assembly. They dominated the proceedings of the Constituent Assembly. Some of these were simultaneously in the government, Congress Party and the Constituent Assembly. Prasad was President of Congress before becoming the President of the Constituent Assembly. Nehru and Patel were Prime Minister and Deputy Prime Minister at the same time. They were part of the inner circles of the committees of the Constituent Assembly. The Constitution Drafting Committee meticulously incorporated in the draft constitution decisions of the Constituent Assembly. Dr. B.R. Ambedkar, chairman of the Drafting Committee, played the leading role in drafting of the Constitution. Acknowledging the pivotal role of Ambedkar, T.T. Krishnamachari, a member of the Drafting Committee, said in one of his speeches:

“The House is perhaps aware that out of the seven members nominated by you, one had resigned from the house and was replaced. One had died and was not replaced. One was away in America and his place was not filled up, and another person was engaged in State Affairs, and there was a void to that extent. One or two people were far away from Delhi and perhaps reasons of health did not permit them to attend. So it happened ultimately that the burden of drafting this constitution fell upon Dr. Ambedkar and I have no doubt that we are grateful to him for having achieved this task in a manner which is undoubtedly commendable.”

34.5 ROLE OF THE CONSTITUENT ASSEMBLY 1946-1949

The inaugural session of the Constituent Assembly was held on the 9th December 1946. It was supposed to be attended by all 296 members but only 207 members could attend it because the Muslim League members were absent from it as they had boycotted the Constituent Assembly. In this meeting, J.B. Kripalani requested Dr. Sachchidanand to take the chair as temporary chairman of the House. The members passed a resolution on the 10th December 1946 for election of a permanent member, and on the 11th December 1946, Dr. Rajendra Prasad was elected as the permanent Chairman of the Constituent Assembly. On 13th December 1946, Jawaharlal Nehru moved resolution regarding Aims and Objectives.

The Constituent Assembly divided its work among different committees for its smooth functioning. Some of the important committees were: (a) Union Power Committee. It was chaired by Jawaharlal Nehru and had nine members; (b) Committee on Fundamental Rights and Minorities. It had 54 members and Sardar Ballabhbai Patel was its chairman; (c) Steering Committee and its 3 members which included Dr. K.M. Munshi (chairman), Gopaldaswami Iyengar and Bhagwan Das; (d) Provincial Constitution Committee. It had 25 members with Sardar Patel as its chairman; (e) Committee on Union Constitution. It had 15 members with Jawaharlal Nehru as its chairman.

After discussing the reports of these committees, the Assembly appointed a Drafting Committee on 29th August 1947 under the chairmanship of Dr. B.R. Ambedkar. The draft was prepared by Sir B.N. Rau, Advisor to the Constituent Assembly. A 7-member Committee was constituted to examine the draft. Dr. B.R. Ambedkar, who Law Minister as well as chairman of the Drafting, Committee piloted the draft in the Assembly. Dr. Ambedkar presented “Draft Constitution of India” which was an alternative to the proposals given in the reports of the committees; besides it also contained additional resolutions. The “Draft Constitution” was published in February, 1948. It was discussed by the Constituent Assembly clause by clause (this was known as the second reading) in its several sessions and was completed by October 17, 1949. The Constituent Assembly again met on 14th November to discuss the draft further or to give it a third reading. It was finalised on 26th November, 1949 after receiving the signature of the President of the Constituent Assembly. But it was January 26, 1950 which became the date of commencement of the Constitution.

34.6 PHILOSOPHY OF THE INDIAN CONSTITUTION

As is evident from the Preamble of the Constitution given below in sub-section 34.6.1, the philosophy of Indian Constitution is based on the principles of liberal democracy and secularism, with some elements of social democracy. It seeks to protect the rights – justice, liberty, equality, fraternity, of individuals and cultural and religious rights of social and religious communities. It was after a thorough discussion in the Constituent Assembly of the Objective Resolution that the Preamble of the Constitution was adopted. Indeed the deliberations within the Constituent Assembly virtually began with the deliberations of the Objective Resolution. We will discuss below the Objective Resolution and the Preamble.

Objective Resolution and the Preamble of the Constitution

As mentioned earlier, on the 13th December 1946, the fourth day of the meeting of the Constituent Assembly, Jawaharlal Nehru moved the resolution regarding the Aims and Objectives of the Constituent Assembly. This resolution came to be known as the OBJECTIVE RESOLUTION. The Resolution laid down eight points or paragraphs of the Resolution as they were alluded to, as aims and objective. These aims and objectives included:

- 1) To proclaim India as an Independent Sovereign Republic and to draw up for its future governance a constitution;
- 2) India would be a Union of the territories consisting of the British India, those covered by the Indian States, and territories which were willing to be constituted into the Independent Sovereign India;
- 3) The territories in the Union would possess and retain status of autonomous Units, shall have residuary powers, and exercise all powers of government and administration, except those powers and functions as were assigned to or vested in the Union;
- 4) All powers and Authority of the Sovereign Independent India and its constituent parts and organs were derived from the people;
- 5) It will guarantee and secure to all people of India Justice, Social, Economic and Political Equality of status, of opportunity and before law; Freedom of thought, expression belief, faith, worship, vocation, association and action, subject to law and public morality;
- 6) It will provide adequate safeguards for minorities, backward and tribal areas, and depressed and other backward classes;
- 7) It shall maintain integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of the civilised nations; and
- 8) To ensure the rightful and honoured place of this ancient land in the world and make its full and willing contribution to the promotion of world peace and the welfare of the mankind.

The debate on the Objective Resolution had specific significance for Dr. Ambedkar. On the resolution he made a “historic speech”. When the House met on the 16th December 1946 to discuss the Objective Resolution Dr. M.R. Jayakar

moving an amendment to the Objective Resolution demanded the postponement of the discussion on the resolution, as he wanted the Muslim League and the Indian States to join the debate resulting in creation of “a tense atmosphere in the House”. In such a situation Dr. Rajendra Prasad was “unexpectedly” invited on the 17th December 1946 to make his speech. As a result of the impact of his speech the discussion on the resolution was postponed till next session

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 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 twenty-sixth day of November, 1949 do **Hereby Adopt, Enact and Give to Ourselves this Constitution.**

34.7 SALIENT FEATURES OF THE CONSTITUTION

The Indian Constitution has some salient features. These features give Indian Constitution a distinct identity. It is based on the features of different constitutions of the world. In the words of Dr. Ambedkar, it was prepared “after ransacking all the known Constitutions of the world”. The chapter on Fundamental Rights is based on the American Constitution; the Parliamentary System has been adapted from the British Constitution; the Directive Principles of State Policy have been adopted from the constitution of Ireland; the Emergency provisions are based on the Constitution of German Reich and Government of India Act, 1935. But as mentioned earlier, the features which have been borrowed from other Constitutions have been modified in the light of the needs of our country. It is the longest written constitution. At the time of its formation, there were 395 Articles and 8 Schedules. It ensures both Justiciable and Non-Justiciable Rights: Fundamental Rights and the Directive Principles of the State Policy. We will discuss two of these important features – the Fundamental Rights and the Directive Principles of State Policy, abandonment of the separate electorate and universal adult franchise.

34.7.1 The Fundamental Rights and the Directive Principles of State Policy

The Fundamental Rights restrict state from encroaching upon the rights of individuals and Directive Policies of the State Policy make it obligatory for the state to introduce measures for carrying out social revolution. They are enshrined in the III and IV Parts respectively of the Constitution. The Fundamental Rights are divided into seven parts in the Indian Constitutions – the Right of Equality, the Right of Freedom, the Right against Exploitation, the Right to Freedom of Religion, Cultural and Educational Rights, the Right to Property, and the Right to Constitutional Remedies. Before their inclusion in the Constitution of India,

the need for providing Fundamental Rights and the state measures for social transformation were emphasised by the Indian National Congress in several resolutions: Annie Basant's draft of the Commonwealth of India Bill, Nehru Report, Karachi resolution, *Sapru Report* of 1945. The *Sapru Report* was of special significance because apart from the Fundamental Rights and Directive Policy of the State Policy, it suggested the provisions for the protection of minority rights. It was also first to make a distinction between the Fundamental Rights as the justiciable and the Directive Policy of the State Policy as the non-justiciable rights.

In the sub-Committee of the Constituent Assembly on Fundamental Rights there were no differences in principles on the rights, though there were some on techniques. It suggested that the Fundamental Rights should be made justiciable. The sub-Committee, however, suggested that despite the negative restriction on it in relation to the Fundamental Rights, state could intervene with regard to the social revolution. Amrit Kaur who was supported by Ayyar opposed inclusion to allow free "practice" of religion in the Fundamental Rights because it could include "anti-social" practices such as Devdasi, sati and Purdah. As an impact of this opposition, a provision was made in the Constitution that right to freely practice religion should not prevent the state from making the laws for social welfare and reform. With regard to suggestion of the sub-Committee about the "equality before law", Ayyar opined that it could be discriminatory against the marginalised groups of the society like factory workers, children and women. He suggested that the "equality before law" should be replaced by the clause stating that "no person should be denied equal protection of law". This suggestion was included in the Constitution. The Sub-committee also discussed matters relating to conflict between individual liberty and state responsibility, and protection of minority rights. As a result of this debate the provisions abolishing forced labour and human trafficking, freedom to practice religion, special provisions for the protection of script, culture and right of the minorities to maintain their educational institutions. These found place in the Constitution.

34.7.2 Universal Adult Suffrage and Abolition of the Separate Electorate

After debating its draft list of Fundamental rights the Sub-Committee on Fundamental Rights did not recommend inclusion of all of them in the section III of the Constitution as the Fundamental Rights. Instead it suggested that these should be incorporated in other places in the Constitution. One such example is that of the Universal suffrage and periodic elections. The sub-Committee agreed unanimously in favour of the Universal suffrage but suggested that it should not be part of the Fundamental Rights. Accordingly, it was placed in the Article 326 of the Part XV on election. The word "universal", however, is missing from the Article 326. But the fact that every adult citizen of the country is entitled to vote makes it practically a universal adult franchise. As mentioned earlier, before Indians got the right to universal adult franchise, the prominent leaders of the Indian National movement strove for the abolition of the separate electorate in favour of the joint electorate. As we know the British sought to continue separate electorate in India since the Morley-Minto reforms 1909 till the Communal Award of 1932 in the Constitution. The Communal Award sought to accord separate electorate for Muslims, Europeans, Sikhs, Indian Christians and Anglo-Indians. It also provided for seats for the Depressed Classes which were to be filled by

election from special constituencies. In such constituencies only depressed classes could vote. In addition the depressed classes were also entitled to vote in general constituencies. Gandhi protested against the recommendation of the notion of separate electorate for the depressed classes. He sat on fast unto death in September 1932. Gandhi's fast evoked opposition from Ambedkar. However, both Gandhi and Ambedkar reached compromise in Poona Pact. According to the Poona Pact, seats were reserved for the depressed classes in the general constituencies. This resulted in the abolition of the separate electorate. The abolition of separate electorate got reflected in the reservation of seats in the legislative bodies Constitution.

34.8 SUMMARY

The making of Indian Constitution largely consisted of two phases – 1857 to 1935 and 1946 to 1949. With the transfer of power from the Company to the British Crown, the British government introduced different elements of governance through different Acts. These also included the elements of representation of Indians in the institutions of governance. The motive of the British to introduce them was to serve their colonial interests rather than to provide democratic rights to them. The provision for communal representation introduced through the Morley-Minto Reforms in 1909 and through the Communal Award in 1932 was opposed by the leaders of the Indian National Movement, particularly in case of the Depressed Classes. Gandhi's fast which resulted in the Poona Pact resulted in the abolition of the separate electorate but in giving the reservation to the depressed classes in the provincial legislature. After the Congress emphasised the need for making of a Constitution of India by their own Constituency, the British reluctantly realised the urgency for establishment of the Constituent Assembly of India for Indians in the changed political situation following the Second World War and change of government in Britain. The Constituent Assembly which was set up following the recommendations of the Cabinet Mission Plan was elected through the restricted adult franchise by the provincial assemblies. Despite having been elected by the privileged sections of the society, the Constituent Assembly represented different shades of opinions and ideologies. It also represented different social groups of India. Before reaching any decision the Constituent Assembly discussed all issues thoroughly. The decision and suggestions by different sub-Committees of the Constituent Assembly were finally incorporated in the Constitution of India. The Constitution of India is the document which provided vision for social change. The Constitution is an embodiment of principles of liberal democracy and secularism, with some elements of social democracy. It ensures protection of the rights – justice, liberty, equality, fraternity, of individuals and cultural and religious rights of social and religious communities.

34.9 EXERCISES

- 1) What were the provisions of the Nehru Report? What were its shortcomings?
- 2) Discuss the role of the Constituent Assembly in making of the Indian Constitution.
- 3) Describe the important provisions of the Indian Constitution.