



## Making of the Constitution of India : A Critical Analysis

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A country is governed by a set of policies through a framework of laws, rules and regulations. Constitution of a democratic country is a fundamental legal document which lays down the basic structure of the government, and other public bodies, their powers, functions; rights and duties of its people and their interrelations. It also contains the principles to be followed by the state in the governance of the country.

The writing of the Indian Constitution has often been celebrated for its momentousness, as it came at the end of a long period of anti-colonial struggle. However, very little has been written on the making of the Constitution. Often, the event of drafting the Constitution is written-off as part of a logical end to the British Empire in India or as part of a fulfilling of the promise made by India's anti-colonial leaders.

However, this has led to a severe impoverishment of the field of Indian Constitutional history. In this essay, we suggest that we could benefit so much more by considering the long, complicated, and fraught history of Constitution making separately from the process of the making of independent India. By separating nation-making from Constitution-



making, the field of Constitutional and political history can only be a richer and more informative resource to understand the complex postcolonial developments in India.

### **Making of the Constitution:**

Constitution is a living document, an instrument which makes the government system work. A Constitution is the highest law of the land,

which defines and limits the powers of government and its various branches, vis-à-vis each other, and the people, and provides a strong foundation for a state based on the rule of law. The design of a Constitution and its process of development can play an important role in peaceful political transitions and post-conflict peace building. It can also play a critical prevention role. Constitution-making presents moments of great opportunity to

create a common vision of the future of a state, the results of which can have profound and lasting impacts on peace and stability. The *Constitution of India* is the supreme law of India. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers and duties of government institutions and



sets out fundamental rights, directive principles and the duties of citizens. It is the longest written Constitution of any sovereign country in the world, containing 448 articles in 25 parts, 12 schedules, 5 appendices and 98 amendments (out of 120 Constitution Amendment Bills). Besides the English version, there is an official Hindi translation. *Dr. Bhimrao Ramji Ambedkar* is widely regarded as the architect of the Indian Constitution.

The Constitution follows *parliamentary system of government* and the executive is directly accountable to the legislature. Article 74 provides that there shall be a Prime Minister of India as the head of government. It also states that there shall be a President of India and a Vice-President of India under Articles 52 and 63. Unlike the Prime Minister, the President largely performs ceremonial roles. The Constitution of India is federal in nature. Each state and each Union territory of India has its own government. Analogues to President and Prime Minister, each has a *Governor (in case of states) or Lieutenant Governor (in the case of Union territories)* and a *Chief Minister*. The 73<sup>rd</sup> and 74<sup>th</sup> Amendment Act also introduced the system of Panchayati Raj in rural areas and Municipality in urban areas. Also, Article 370 of the Constitution gives special status to the State of Jammu and Kashmir. The Constitution was adopted by the *India Constituent Assembly* on 26 November 1949, and came into effect on 26 January 1950. The date of 26 January was chosen to commemorate the *Purna Swaraj declaration of independence* of 1930. With its adoption, the *Union of India* officially became the modern and contemporary *Republic of India* and it replaced the *Government of India Act 1935* as the country's fundamental governing document. To ensure *Constitutional autochthony*, the framers of Constitution inserted Article 395 in the Constitution and by this Article

the Indian Independence Act, 1947 was repealed. The Constitution declares India to be a *sovereign, socialist, secular, democratic republic*, assuring its citizens of *justice, equality, and liberty*, and endeavours to promote *fraternity* among them. The words "socialist" and "secular" were added to the definition in 1976 by Constitutional amendment (mini constitution). India celebrates the adoption of the Constitution on 26 January each year as *Republic Day*.

### **Previous Legislations as Source:**

The Constitution of India is drawn from many sources. Keeping in mind the needs and conditions of India the framers of the Constitution of India borrowed different features freely from previous legislation.

### **Government of India Act 1858:**

After the Indian Rebellion of 1857, the British Government took direct control of territories formerly ruled by the *English East India Company*. To calm down the after effects of 1857 revolt, the Act of 1858 was introduced. This act abolished East India Company and transferred powers towards the British crown to establish direct rule. The Provisions of the Bill are:

- Provision for the creation of an Indian Civil Service under the control of the Secretary of State.
- The Crown was empowered to appoint a Governor-General and the Governors of the Presidencies.
- The Company's territories in India were to be vested in the Queen, the Company ceasing to exercise its power and control over these territories. India was to be governed in the Queen's name.
- All the property of the East India Company was transferred to the Crown. The Crown



also assumed the responsibilities of the Company as they related to treaties, contracts, and so forth.

- The Queen's Principal Secretary of State received the powers and duties of the Company's Court of Directors. A council of fifteen members was appointed to assist the Secretary of State for India. The council became an advisory body in India affairs. For all the communications between Britain and India, the Secretary of State became the real channel.
- Abolition of double government.

#### **Indian Councils Act 1861:**

Indian Councils Act 1861 enacted by Parliament of the United Kingdom that transformed the Viceroy of India's executive council into a cabinet run on the portfolio system. This cabinet had six "ordinary members" who each took charge of a separate department in Calcutta's government: home, revenue, military, law, finance, and (after 1874) public works. Indian Councils Act 1861 is an essential landmark in the constitutional and political good reputation for India. The 1861 Act restored the legislative power taken away by the Charter Act of 1833. The legislative council at Calcutta was given extensive authority to pass laws for British India as a whole, while the legislative councils at Bombay and Madras were given the power to make laws for the "Peace and good Government" of their respective presidencies. The Governor General was given the power to create new provinces for legislative purposes. He also could appoint Lt. Governors for the same. Its features are:

- Indians were involved with law-making process. For this purpose, Viceroy nominated

the Raja of Benaras, the Maharaja of Patiala and Sir Dinkar Rao.

- Decentralization of legislative powers.
- Establishment of recent legislative councils in Bengal, NWFP and Punjab in 1862, 1866 and 1897 respectively.
- Introduction of portfolio system.
- It empowered the Viceroy to issue ordinances with no concurrence of the legislative council throughout an emergency. The life of such an ordinance was 6 months.

#### **Indian Councils Act 1892:**

Enacted due to the demand of the Indian National Congress to expand legislative council, the number of non-official members was increased both in central and provincial legislative councils, the non official members of Indian legislative councils were henceforth to be nominated by Bengal chamber of commerce and provincial legislative council. In 1892, the council consisted of 24 members, only five being where Indians. Its features are:

- Power discussing budget to legislative councils.
- It delivers to the nomination of some non official people in the central legislative council through the viceroy on the recommendation of the provincial legislative councils which of the provincial legislative councils through the governors on the recommendations of the district boards, municipalities, universities, trade associations, zamindars and chambers.

The Act amended the Indian Councils Acts of 1861 and 1892. Its features are:

1. The maximum number of nominated and elected members of the Legislative Council at the Centre was increased from 16 to 60.



The number did not include ex-officio members.

2. The right of separate electorate was given to the Muslims.
3. Official members were to form the majority but in provinces non-official members would be in majority.
4. The members of the Legislative Councils were permitted to discuss the budgets, suggest the amendments and even to vote on them; excluding those items that were included as non-vote items. They were also entitled to ask supplementary questions during the legislative proceedings.
5. The Secretary of State for India was empowered to increase the number of the Executive Councils of Madras and Bombay from two to four.
6. Two Indians were nominated to the Council of the Secretary of State for Indian Affairs.

### **Indian Councils Act 1909:**

Indian Councils Act 1909 commonly known as the *Morley-Minto Reforms* was an Act of the Parliament of the United Kingdom that brought about a limited increase in the involvement of Indians in the governance of British India. The Act of 1909 was important for the following reasons:

- It effectively allowed the election of Indians to the various legislative councils in India for the first time. Previously some Indians had been appointed to legislative councils.
- The introduction of the electoral principle laid the groundwork for a parliamentary system even though this was contrary to the intent of Morley.
- Muslims had expressed serious concern that a first past the post electoral system, like that

of Britain, would leave them permanently subject to Hindu majority rule. The Act of 1909 stipulated, as demanded by the Muslim leadership.

### **Government of India Act 1919:**

After World War I, the British Government opened the door for Indians to public office and employment. The Provisions of the Bill are:

- Relaxation of central treatments for the provinces by demarcating and separating the central and provincial subjects.
- It further divided the provincial subjects into two parts – transferred (That have been administered by governor by the help of ministers who are responsible to legislative council) and reserved (that has been to be administered by the governor and the executive council without being responsible towards the legislative council).
- Introduction of diarchy, Bicameralism, direct elections and establishment of central public service commission in 1926.
- Franchise was granted to some limited people on foundation of property, tax and education.
- Separation of central budget from provisional budget.
- Appointment of statutory commission.

### **Government of India Act 1935:**

The provisions of the Government of India Act 1935, though never implemented fully, had a great impact on the Constitution of India. Many key features of the Constitution were directly taken from this Act. It is really a lengthy and detailed document having 321 sections and 10 schedules. The majority of the today's Constitution has drawn from this. Its features are:



- It delivers to the establishment of an All India Federation. The previous names transferred and reserved subjects are changed as federal and provincial lists and concurrent list is definitely an addendum.
- Abolition of Diarchy and introduced provincial autonomy.
- Abolition of Council Asia.
- Establishment of RBI, Federal Court, Provincial PSUs and Joint PSUs.
- Extension of bicameralism, communal representation and franchise.

The federal structure of government, provincial autonomy, a bicameral central legislature consisting of a federal assembly and a Council of States and the separation of legislative powers between the centre and states are some of the provisions of the Act which are present in the Constitution of India.

#### **Indian Independence Act 1947:**

The legislation was formulated by the government of Prime Minister Clement Attlee and the Governor General of India Lord Mountbatten, after representatives of the Indian National Congress, the Muslim League, and the Sikh community came to an agreement with the Viceroy of India, Lord Mountbatten of Burma, on what has come to be known as the *3 June Plan* or *Mountbatten Plan*. The Prime Minister of the United Kingdom announced on 20 February 1947 that:

1. British Government would grant full self-government to British India by June 1948 at the latest,
2. Partition of India and Pakistan.
3. The future of Princely States would be decided after the date of final transfer is decided.

4. Empowering of Constitution for the nations.

On 18 July 1947, British India divided into two new independent states, India and Pakistan, which were to be dominions under the Commonwealth of Nations until they had each finished drafting and enacted a new constitution. The Constituent Assembly was divided into two for the separate states, with each new Assembly having sovereign powers transferred to it for the respective dominion. The Act also terminated British suzerainty over the princely states, each of which was left to decide whether to accede to one or other of the new dominions or to continue as independent states in their own right.

#### **Constituent Assembly:**

The Constitution was drafted by the Constituent Assembly, which was elected by the elected members of the provincial assemblies. *Dr. B.R. Ambedkar, Sanjay Phakey, Jawaharlal Nehru, C. Rajagopalachari, Rajendra Prasad, Sardar Vallabhbhai Patel, Kanaiyalal Munshi, Purushottam Mavalankar, Sandipkumar Patel, Maulana Abul Kalam Azad, Shyama Prasad Mukherjee, Nalini Ranjan Ghosh, and Balwantrai Mehta* were some important figures in the Assembly. There were more than 30 members of the scheduled classes. Frank Anthony represented the Anglo-Indian community, and the Parsis were represented by *H. P. Modi*. The Chairman of the Minorities Committee was *Harendra Coomar Mookerjee*, a distinguished Christian who represented all Christians other than Anglo-Indians. *Ari Bahadur Gururung* represented the Gorkha Community. Prominent jurists like *Alladi Krishnaswamy Iyer, Benegal Narsing Rau and K. M. Munshi, Ganesh Mavlankar* were also members of the Assembly. *Sarojini Naidu, Hansa Mehta, Durgabai Deshmukh, Rajkumari Amrit Kaur and Vijayalakshmi Pandit* were important

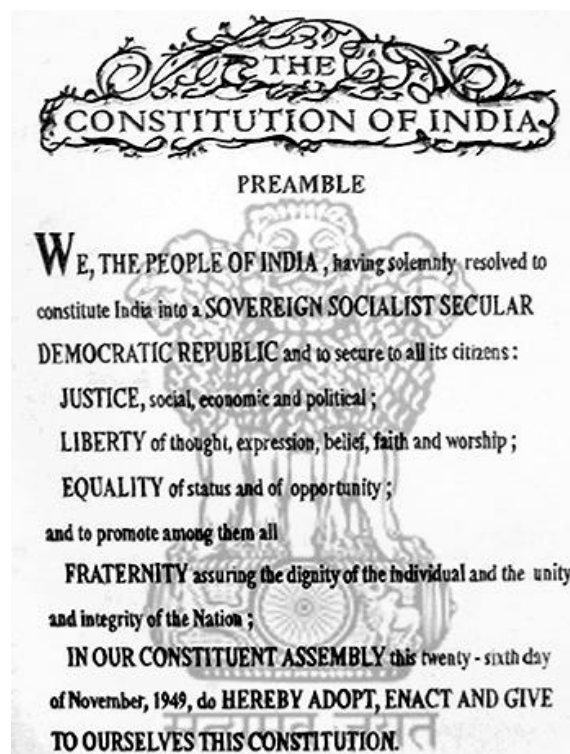


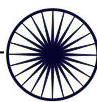
women members. The first temporary 2-day President of the Constituent Assembly was *Dr. Sachidanand Sinha*. Later, *Rajendra Prasad* was elected President of the Constituent Assembly. The members of the Constituent Assembly met for the first time on 9 December 1946.

### Drafting:

On the 14 August 1947 meeting of the Assembly, a proposal for forming various committees was presented. Such committees included a Committee on Fundamental Rights, the Union Powers Committee and Union Constitution Committee. On 29 August 1947, the Drafting Committee was appointed, with *Dr. B. R. Ambedkar* as the Chairman along with six other members assisted by a constitutional advisor. These members were *Pandit Govind Ballabh Pant*, *Kanaiyalal Maneklal Munshi* (*K M Munshi, Ex- Home Minister, Bombay*), *Alladi Krishnaswamy Iyer* (*Ex- Advocate General, Madras State*), *N Gopaldaswami Ayengar* (*Ex- Prime Minister, J&K and later member of Nehru Cabinet*), *B L Mitter* (*Ex-Advocate General, India*), *Md. Saadullah* (*Ex- Chief Minister of Assam, Muslim League member*) and *D P Khaitan* (*Scion of Khaitan Business family and a renowned lawyer*). The constitutional advisor was *Sir Benegal Narsing Rau* (*who became First Indian Judge in International Court of Justice, 1950–54*). Later *B L Mitter* resigned and was replaced by *Madhav Rao* (*Legal Advisor of Maharaja of Vadodara*). Owing to death of *D P Khaitan*, *T T Krishnamachari* was chosen to be included in the drafting committee. A Draft Constitution was prepared by the committee and submitted to the Assembly on 4 November 1947. Draft constitution was debated and over 2000 amendments were moved over a period of two

years. Finally on 26 Nov. 1949, the process was completed and Constituent assembly adopted the constitution. 284 members signed the document and the process of Constitution making was complete. The Assembly met in sessions open to the public, for 166 days, spread over a period of 2 years, 11 months and 18 days before adopting the Constitution, the 308 members of the Assembly signed two copies of the document (one each in Hindi and English) on 24 January 1950. The original Constitution of India is hand-written with beautiful calligraphy, each page beautified and decorated by artists from *Shantiniketan* including *Beohar Rammanohar Sinha* and *Nandalal Bose*. Two days later, on 26 January 1950, the Constitution of India became the law of all the States and territories of India. Rs.1,00,00,000 was official estimate of expenditure on constituent assembly. The





Constitution has undergone many amendments since its enactment.

### **Structure:**

The Constitution, in its current form (September 2012), consists of a preamble, 25 parts containing 448 articles, 12 schedules, 5 appendices and 98 amendments to date.

### **Parts**

The individual Articles of the Constitution are grouped together into the following Parts:

#### **Preamble**

**Part I** – Union and its Territory

**Part II** – Citizenship.

**Part III** – Fundamental Rights.

**Part IV** – Directive Principles of State Policy.

**Part IVA** – Fundamental Duties.

**Part V** – The Union.

**Part VI** – The States.

**Part VII** – States in the B part of the First schedule (*Repealed*).

**Part VIII** – The Union Territories

**Part IX** – The Panchayats.

**Part IXA** – The Municipalities.

**Part IXB** – The Co-operative Societies.

**Part X** – The scheduled and Tribal Areas

**Part XI** – Relations between the Union and the States.

**Part XII** – Finance, Property, Contracts and Suits

**Part XIII** – Trade and Commerce within the territory of India

**Part XIV** – Services under the Union, the States.

**Part XIVA** – Tribunals.

**Part XV** – Elections

**Part XVI** – Special Provisions relating to certain classes.

**Part XVII** – Languages

**Part XVIII** – Emergency Provisions

**Part XIX** – Miscellaneous

**Part XX** – Amendment of the Constitution

**Part XXI** – Temporary, Transitional and Special Provisions

**Part XXII** – Short title, date of commencement, Authoritative text in Hindi and Repeals

### **Schedules:**

Schedules are lists in the Constitution that categorize and tabulate bureaucratic activity and policy of the Government.

- **First Schedule** (Articles 1 and 4) - This lists the states and territories of India, lists any changes to their borders and the laws used to make that change.
- **Second Schedule** (Articles 59(3), 65(3), 75(6), 97, 125, 148(3), 158(3), 164(5), 186 and 221)- – This lists the salaries of officials holding public office, judges, and Comptroller and Auditor General of India.
- **Third Schedule** (Articles 75(4), 99, 124(6), 148(2), 164(3), 188 and 219)—Forms of Oaths – This lists the oaths of offices for elected officials and judges.
- **Fourth Schedule** (Articles 4(1) and 80(2)) – This details the allocation of seats in the Rajya Sabha (the Upper House of Parliament) per State or Union Territory.
- **Fifth Schedule** (Article 244(1)) – This provides for the administration and control of Scheduled Areas and Scheduled Tribes



(areas and tribes needing special protection due to disadvantageous conditions).

- **Sixth Schedule** (Articles 244(2) and 275(1))— Provisions for the administration of tribal areas in Assam, Meghalaya, Tripura, and Mizoram.
- **Seventh Schedule** (Article 246) —The union (central government), state, and concurrent lists of responsibilities.
- **Eighth Schedule** (Articles 344(1) and 351)—The official languages.
- **Ninth Schedule** (Article 31-B) – Validation of certain Acts and Regulations.
- **Tenth Schedule** (Articles 102(2) and 191(2))—"Anti-defection" provisions for Members of Parliament and Members of the State Legislatures.
- **Eleventh Schedule** (Article 243-D) — *Panchayati Raj* (rural local government).
- **Twelfth Schedule** (Article 243-W) — Municipalities (urban local government).

#### Appendices:

- **Appendix I**—The Constitution (Application to Jammu and Kashmir) Order, 1954.
- **Appendix II**— Re-statement, with reference to the present text of the Constitution, of the exceptions and modifications subject to which the Constitution applies to the State of Jammu and Kashmir.
- **Appendix III**—Extracts from the Constitution (Forty-fourth Amendment) Act, 1978.
- **Appendix IV**—The Constitution (Eighty-sixth Amendment) Act, 2002.
- **Appendix V**— The Constitution (Eighty-eighth Amendment) Act, 2003.

#### Amendment :

The process of rewriting any part of the Constitution is called amendment. Amendments to the Constitution are made by the Parliament, the procedure for which is laid out in Article 368. An amendment bill must be passed by both the Houses of the Parliament by a two-thirds majority and voting. In addition to this, certain amendments which pertain to the federal nature of the Constitution must be ratified by a majority of state legislatures. Unlike the ordinary bills (with exception to money bills), there is no provision for joint sitting of the two houses of the Parliament to pass a Constitutional Amendment Bill. As of September 2013 there have been 120 amendment bills presented in the Parliament, out of which 98 have been passed to become Amendment Acts. Most of these amendments address issues dealt with by statute in other democracies. However, the Constitution is so specific in spelling out government powers that many of these issues must be addressed by constitutional amendment. As a result, the document is amended roughly twice a year. In 2000 the National Commission to Review the Working of the Constitution (NCRWC) was set up to look into updating the Constitution.

#### Limitations :

The Supreme Court has ruled in *Kesavananda Bharati v. State of Kerala* case that not every Constitutional amendment is permissible; the amendment must respect the "basic structure" of the Constitution, which is immutable. This "Doctrine of Basic Features" of the Constitution lays down that certain basic features of the Constitution cannot be abridged or deleted or repealed; what are the "basic features" has not been defined exhaustively anywhere and whether a particular provision of the Constitution of India is a "basic feature" will





be decided as and when an issue is raised before the court in an individual case.

### Adoptions from other Constitutions

The architects of Indian Constitution were most heavily influenced by the British model of parliamentary democracy. In addition, a number of principles were adopted from the Constitution of the United States of America, including the separation of powers among the major branches of government and the establishment of a Supreme Court. The principles adopted from Canada were federal government with strong centre and also distribution of powers between central government and state governments along with placing residuary powers with central government. From Ireland, directive principle of state policy was adopted. From Germany, the principle of suspension of fundamental rights during emergency was adopted. From Australia, the idea of having a Concurrent list of shared powers was used as well and some of the terminology was utilized for the preamble.

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