

Constitutional Studies
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Lecture 2
Why Have a Constitution

Hello. And welcome to lecture 2 in week 1 of your Constitutional Law course.

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**Lecture II:
Why have a
Constitution?**

Concepts Covered:

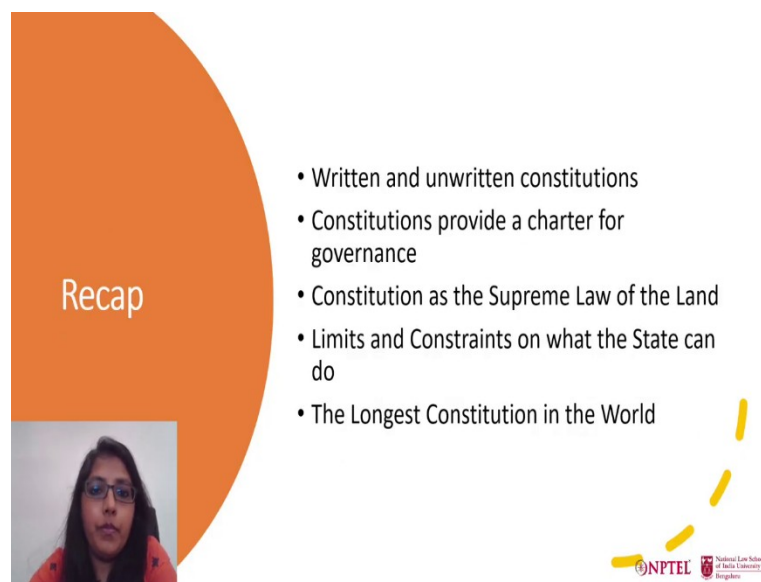
- What do Constitutions Do?
- Do Democratic Societies Need a Constitution?

Keywords: Constitution of India, supreme law, limited government, enabling power, Democracy and Constitutionalism, dead hand of the past

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Today, we are going to look at some of the key themes that have been outlined for this week. What is it that Constitutions do? And do democratic societies need a Constitution?

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Recap

- Written and unwritten constitutions
- Constitutions provide a charter for governance
- Constitution as the Supreme Law of the Land
- Limits and Constraints on what the State can do
- The Longest Constitution in the World

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Let us begin with a slight recap of the previous lecture. In the previous lecture, we discussed that Constitution can have written and unwritten components. Likewise, there can be

Constitutions ~~themselves in entire Constitution that is~~ that are unwritten. The British Constitution is an interesting example of a Constitution that is not written ~~d~~Down in one single document. It comprises of many-many documents and many unwritten conventions. So, you can have Constitutions that are written in a single document. There are Constitutions that are mostly written in a single document supplemented with conventions. And you can have Constitutions that are completely unwritten.

We saw that Constitutions provide a charter for governance in that sense, they constitute the Government, they constitute the State. And by constituting the State, we mean that they define the powers, the limits and the structures of government. We saw that the Constitution is the supreme law of the land. So, any other law, the ordinary laws passed by Parliament, any action taken by the Executive, all of these have to be in compliance with the Constitution. To the extent that they are not in compliance with the Constitution, they are invalid. We saw that the Constitution places limits and constraints on what the State can do. And we saw that we have the longest Constitution in the world.

So, let us take the first idea that we discussed, that of Constitution constitutes the State, and it provides the powers and defines the powers and limits and structures of the State. If that is the case, then every State, every polity will have a Constitution. Imagine an absolute monarchy, where all the power of the State, all the law-making power, all the power to implement the laws to resolve any disputes, all of that is vested in one single individual, the monarch of that, the king of that State. In that situation, the Constitution of that State might have a single rule. And that rule will be that anything that the monarch says, anything that the king says is the law.

But that is the Constitution of that State. ~~that, that's, I~~ that one line principle is the Constitution of that State. So, in its most basic form, every State will have a Constitution. The Constitution of India that came into force in 1950 was itself preceded by a range of colonial instruments ~~that act,~~ that serve the same constitutive function. So, we have the the Government of India Act 1935, which heavily influenced the Constitution of India in 1950, and that was a Constitutional document. Before that, was the Government of India Act of 1919. So, on and so forth, we had Colonial Constitutions.

In a similar way, you can talk about Mughal Constitutionalism, what were the Constitutional principles, what was the basic Constitutional rules of, during the Mughal period, was that was there a single constitute, single set of constitute rules, or did that change over the course of

the Mughal period? These are questions that one can ask. But the larger point that I am making is that every polity has a Constitution defined, when we define Constitutions as a document or as a set of tools that constitute the State.

The Constitution of India 1950 does something different than the Constitutions that came before it; the Colonial Constitutions and the Mughal Constitutions. ~~They place, the~~ Constitution of India 1950, places limits and constraints on what the State can do. So, it does not just empower or define who has the power. It also places limits and constraints on what the State can do.

And the best example of that is, of course, fundamental rights, where the State cannot transgress the limits set by fundamental rights. So, the Indian Constitution then follows a tradition of what is called constitutionalism, the idea that the Constitution sets limits and constraints on what the State can do, and it is only by observing the limits and constraints that the Constitution places that the State and the government of the day is legitimate.

So, that is the idea of constitutionalism. And the Indian Constitution, the Constitution of India 1950 follows the approach of constitutionalism. So, ~~if the, so,~~ this is a point to keep in mind about the Indian Constitution ~~— that —~~ it places limits and constraints on what the State can do and that is why the Constitution of India follows a different tradition from that ~~have an of an~~ absolute monarchy. So, it would not be right to say that the Indian Constitution is just another Constitution ~~— like —~~ the Constitution of an absolute monarchy might be.

Well, that is true at the very abstract level, ~~i, in~~ in its design, the Indian Constitution does different things; ~~Mm~~ most specifically, it places limits on what the State can do. And because we have the longest Constitution in the world, therefore, that means that there are many-~~many-many~~ more limits upon the State in the Indian Constitution, as compared to ~~many of the~~ other Constitutions.

So, what happens when the Constitution does not speak about a particular issue? If ~~the,~~ the Indian Constitution speaks about many issues. There are other Constitutions, for example, the American Constitution that is very brief, or comparatively very brief, and does not touch upon many issues. So, if that is the case, the Constitution does not speak about those issues, that means there is no Constitutional limit upon the State in dealing with those issues.

And so, then it would devolve upon the State or the government of the day, the Government in terms of the Executive power, the Legislature in terms of the Legislative power to deal

with that issue. So, think about many questions around technology, advanced technology or the regulation of the internet, which might not even have been in the imagination of the framers of the Constitution.

And so, they have not discussed these issues, they have not spoken about these issues. So, today, ~~the,~~ if those issues have to be regulated, they have to be regulated by the by Parliament, or by the Executive of the day. The Constitution might have principles, it might have rights, it might have other kinds of restrictions that might be applicable, but there might not be any direct provision with respect to some of these issues.

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Now, this ~~peeks-begs~~ the question. Are Constitutions undemocratic? Why do I say so? Think about it this way, the Constitution says that “we the people are giving ourselves this Constitution.” Why does the Constitution speak of the people? Why does it not speak of, why does it not say we the Constituent Assembly, giving ourselves this Constitution? Because, ~~the,~~ as we discussed in the previous lecture, the framers of the Constitution wanted to, symbolically entrench the idea that this was a democratic Constitution. It was a Constitution, where the power, all the political power in society lies with the people. And why is that an important idea?

The importance of political democracy is a recognition that each of us individually, each of us as individuals are free, equal, rational human beings, and we are best suited to make decisions about our shared lives. So, it is for us to decide how we should govern ourselves.

The consent of the governed is the most basic principle of political legitimacy today. Democracy is the most legitimate form of organizing political societies today.

I mean, imagine, whether it be your local ~~RWA, your~~ Resident Welfare Association or the government of the day, ~~if you were,~~ if you have to take a decision, and that decision is being imposed upon you rather than everyone getting a chance to speak and to vote for that decision ~~or that government, the, that government or.~~ That decision will always be challenged on the ground that it is not democratic.

So, democracy ~~is give,~~ lends itself to a lot of legitimacy. And the reason why it lends itself to a lot of legitimacy, is because democracy recognizes that we are all free, equal human beings, and we should have an equal say in how we are governed. There is also a recognition ~~there —~~ that — in the most basic matters that affect us, the basic matters of how our lives should be governed.

There can be no expertise on top of us. These are matters in which each of us has our own views and ~~our~~ each of our views are legitimate views. And so therefore, what we do is we collect our views together, we can deliberate upon those views in society, we can try and convince each other, but at the end of the day, we each get to have an equal say and no more than an equal say in how such issues are resolved.

So, that is why we do not say that we should have a technocratic route, a rule by experts, we do not say we should have a monarchy or ~~some,~~ ruled by some divine power.; We say that we should have a democracy and that each of us should have an equal say on the most basic matters of how this country should be governed. So, consent of the governed is entrenched into our Constitution and the very first words of the Constitution. So, we now come upon a contradiction.

On the one hand, we say, that we the people should be making decisions about how we should be governed, but on the other hand, the Constitution has placed limits on what we the people here and now today can do for, in terms of our own governance, because the people who are there and then ~~in the,~~ during the framing of the Constitution, the members of the Constituent Assembly have placed limits on what we can do today here and now through our own parliament.-

So, the question is, is this Constitution then undemocratic? And ~~our Constitutions generally~~ Constitutions that follow the tradition of constitutionalism, are they inherently undemocratic

because they are limiting the power of people today here and now to govern themselves in the manner that they best see fit? Because they have placed Constitutional limitations. And these Constitutional limitations have been placed by people who are generally long dead and gone. So, this is the idea of the dead hand of the past, ~~is the dead hand of the past~~ coming to govern us and limit our own democratic potential and the scope of ~~our, of~~ giving expression to our own democratic ideals.

So put another way, the idea here is this ~~is~~; that ~~the~~ Constitution limits what the Government of the day can do. A democracy allows people to express their political will through their governments. But since the Constitution limits what the people today can get their government to do, Constitutions are undemocratic. This is a question that we need to ask, are Constitutions undemocratic? ~~W~~~~This question, lets, we~~ can unpack this question in multiple ways. Let us look at the framing of our own Constitution.

Who are the people who got to exercise franchise, and exercise their franchise and elect the people who went on to ~~have to~~ sit in the Constituent Assembly? First, ~~and~~ there were no direct elections to the Constituent Assembly. ~~There were~~ These elections had taken place in 1945 to the various provincial legislatures, and these provincial legislatures then subsequently nominated people from the provincial legislatures or even outside ~~to~~ to the Constituent Assembly. And the ~~Princely States~~, the rulers of the Princely States ~~nominated the~~, nominated members to the Constituent Assembly ies. So, the Constituent Assembly itself was not a particularly representative body. It was not based on universal ~~lateral~~ adult franchise; everyone did not get a vote.

Even ~~the elections~~, the 1945 Elections to the Provincial Legislatures ~~had~~, were not based on universal ~~lateral~~ adult franchise. There were restrictions, there were restrictions in terms of property ownership, in terms of literacy, in terms of taxes. So, only people who met these criteria or certain criteria of having some mode of property, of having certain amount of taxes, of having some amount of education, only such people could vote. That meant that a large part of the country was excluded.

So, the numbers vary, but in different parts of the State, ~~about between 15 to 28 percent of the~~ adult population, only about 15 to 28 percent of the adult population was part of ~~the, was on~~ the electoral roles. This was even worse for women ~~for the, what would then call the~~ depressed classes scheduled caste, what we now would call scheduled caste, scheduled Tribes and for depressed classes, whom we now call Scheduled Castes and Scheduled Tribes.

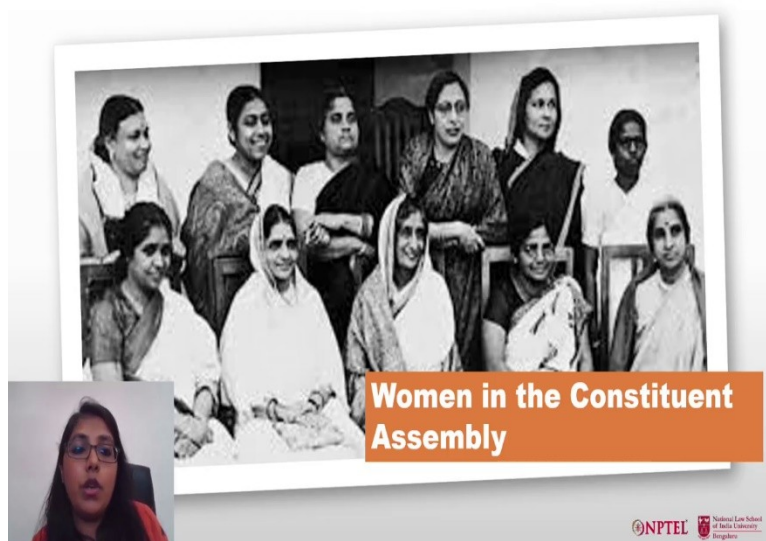
So, for example, there are studies to indicate that in UP only about 2.5 percent of the adult scheduled caste population was on the electoral rolls. So, the election, the selection of people, a nomination of process of people to get into the Constituent Assembly itself was not very democratic. Next, ~~look at the,~~ look at who is in the Constituent Assembly, who makes it to the Constituent Assembly.

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Again, there is a large-scale exclusion of historically marginalized groups from the Constituent Assembly.

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You ~~have only~~, you have very few women, you have only 15 women in the Constituent Assembly. ~~T~~, there ~~are~~ very few, ~~the~~ very few scheduled caste members, scheduled tribe members much lower than ~~there, than there~~ their share of the population in the Constituent Assembly. So, if the Constituent Assembly was not representative in terms of who got to vote, it was not representative in terms of who was on the Constituent Assembly, and they definitely cannot speak to the people here and now, you and I today, who were not even alive at that point and could therefore not have been part of the Constituent Assembly. ~~T~~ the question does arise, Why do they get to place limits upon the, upon us here and now?

So, ~~that is~~, that is the question that we have to ask, why do they get to set the agenda? Why do they get to restrict what we can do, what we cannot do? So, let me take an example, in the Constituent Assembly, in the original text of the Constitution, there is no mention of the right to privacy. There was a provision which dealt with certain aspects of privacy, that provision did not find place in the ultimate Constitution.

You might even say that ~~that~~ that provision was thereby rejected. But because the framers rejected it, should that limit how ~~today~~ we think today about the right to privacy and whether the right to privacy protected by the Constitution, is not protected, should be protected, should not be protected? Why should the agenda on privacy be set by people long dead and gone? So, that is the question.

And that is it, that question has many ~~many~~ many ramifications in how we think about the Constitution and how we engage with many issues that come up regularly, as we will see as many of these issues through the weeks ahead. Now, it is in the nature of Constitutionalism that it places limits on the democratic possibilities today. Why is that? We saw that Constitutionalism seeks to limit what the Government can do.

How does it seek to limit what the Government can do? It can only limit what the Government can do when the Government cannot very easily overcome those limits. If not very easily, if the government has the power to just pass any law, and by passing a law overthrew the Constitution, then the Constitution would not be placing any significant limits on the on the Government of the day.

So, what the Constitution does is, it makes it very difficult to amend the Constitution. The Constitution is much more difficult to amend compared to ordinary laws. And that is both to

ensure that the limits are observed and also to give the Constitution some longevity, so that the underlying structures of the State have some stability.

If every government, every 5 years could change the very fundamentals of the State, then we would have a lot of instability, and that is seem to be not very good for the well-functioning society and a well-functioning polity. So, if that is the case, we are in a situation where the Constitution is difficult to amend.-

The Constitution places limits on what the Government of the day can do or cannot do, ~~and~~ at the same time, the Constitution says that we are democratic and we the people here and now today can and should have, should govern ourselves, and we are the source of all sovereign power in the State.

So, ~~there~~, therein lies the contradiction. And this issue becomes even more stark in the Indian context, because there are certain parts of the Constitution that can never be met. Now, if you look at the amendment provisions of the Constitution, there are certain provisions of the Constitution that can be amended by ordinary law, the Constitution itself provides for that.

There are certain other parts of the Constitution that can be amended only by following a special majority procedure, but it is not very onerous. There are certain other parts of the Constitution, particularly those that deal with federalism that require the ratification of half the states. ~~So, For example, the GST,~~ the amendment to the Constitution to bring in the entire GST framework, ~~required, for example,~~ the ratification of half the states.

So, that is a much more onerous way of amending the Constitution. But on top of that, the Supreme Court of India has said that there are certain basic features of the Constitution, some basic structural elements of the Constitution, that are core to the identity of this Constitution. These include that we are democratic, that we are secular, that we are a federal State that there is separation of powers with judicial review to this judicial independence and the judiciary can review the actions of other parts of the State, and these are inherent, these are core to the identity of this Constitution.

These cannot be amended away at all. If you amend these features out of the Constitution, then it would not remain this Constitution. And so, the Court has said that these features can never be amended. So today, even when there is a Constitutional Amendment, that the Supreme Court can look at the Constitutional Amendment and say, thus, is this Constitutional

Amendment itself valid or does it violate the basics, what is called the basic structure of the Constitution, does it violate the basic structure of the Constitution?

So, ~~the~~, in the last few years, the Indian Supreme Court struck down the National Judicial Appointments Commission (NJAC) for violating the principle of Judicial Independence and said that this ~~this~~ amendment to the Constitution is invalid because it strikes at the basic structure of the Constitution.

Currently before the court, the repeal of Article 370, which is also Constitutional Amendment is lined with the Supreme Court. ~~The~~, ~~the EWS~~, Economically Weaker Section (EWS) Reservation Provision, that was also brought in through a Constitutional Amendment is also lined for the courts, and the courts have to look at whether these ~~—~~, ~~the~~ repeal of Article 370 or the EWS Reservation ~~—~~, ~~whether~~ these amendments to the Constitution ~~violate the~~, violate the basic structure of the Constitution.

What this means is that the framers of the Constitution had a big huge agenda setting up. This was, the limits that they imposed with were strong limits. These were not limits that could be overcome lightly. And the question that we have to ask ourselves is, why should they have the power to ~~limit our~~, limit what provisions, we would want to introduce into the Constitution? Think for yourself, if you were on the Constituent Assembly, if there was a Constituent Assembly today, and if you were on the Constituent Assembly, what kind of provisions might you have wanted to see in the Constitution? Put yourself in that place, and then ask yourself, why should not you have that power?

Why should not you have that power to decide what should go into the Constitution and what should not go into the Constitution? What the basic framework of the State should look like? And that is the question that we asked when we say our Constitution is undemocratic. How would you respond to that question? You can we say, of course, yes, the Constitution is undemocratic, and that we should not have Constitutions. But the question then arises, ~~if you cannot have a~~, if you do not have a Constitution, how do you have stability in society?:-

If every government can change the basic structure of the society, the basic principles on which the society and the polity, the status organized at its own ~~women-whim and~~ fancy, then how do you have any kind of certainty in society? Further, issues arise where, at the moment, there is a lot of hysteria, there is a lot of passion, there is some kind of an emergency, and there is a lot of upheaval in society.

And the Government might be pushed to take certain decisions, that with the benefit of hindsight, we might think were not necessarily the right decisions. Constitutions serve to place a break on the State in these situations. It takes a long-term view, and says that there are certain non-negotiables, we are setting out these non-negotiables. And whatever policy decision that you have to take, take within the framework of these non-negotiables, so that a certain basic interest that we think are most fundamental to the governance of this country are protected.

And you do not get swayed by the passing passions of the day and remove these particular hurdles. So, that is why we have Constitutions. That is why we want to ~~_limit or~~ limit the power of the Government. We also want to ensure that because the democratic system is based on majority voting, people who are perpetual losers, perpetual losers because they do not have the numbers to constitute the majority, then they do not lose out in the political process, and that they have certain guarantees and protections.

Because we have seen in history has been witness to the tyranny of the majority, where majorities can act in very tyrannical ways. And then majorities and minorities be here, I mean, not only, for example, religious majorities or minorities, but minorities and majorities based on a range of descriptive identities, range of identities, that could be sexual minorities, they could be religious minorities, they could be cultural minorities, they could be linguistic minorities, they could be political minorities in terms of their set of political beliefs.

And we have seen, history is witness to the fact that minorities of all hues and stripes have faced persecution at the hands of tyrannical majorities unless there are certain strong checks and balances. So, that is what the Constitution seeks to do and that is where Constitutionalism comes from. The idea of Constitutionalism limited government, and the idea of limited government comes from the fact that the Government is the biggest bully in the backyard.

It ~~is the, it~~ holds the most power and ~~therefore is,~~ therefore has the most ability to infringe upon certain basic guarantees and rights that we might want people to have. And so therefore, the Constitution seeks to limit the powers of the Government. So, there is a tension here. On the one hand, we might need the Government to be limited. On the other hand, the moment we place limits on the Government, ~~we are recking that,~~ we are saying, we are admitting to a distrust in democratic possibilities.

And how do we balance these tools? It might be a conundrum that is unresolvable, and debate continues to this date on whether Constitutions are undemocratic. But though, ~~the~~ this is not just a theoretical debate, this has a lot of implications on how we conduct our ~~our~~ Constitutional businesses. ~~F~~for example, the basic structure doctrine that I told you about, is that a valid doctrine, or is that something that the court should rethink.

Should it place these hard limits on what can be amended, cannot be amended? Or should it say, no, we should allow for as much amendment as possible, because if you have a very rigid amendment procedure or if you say that there are certain amendments that are not possible, then you are being undemocratic.

You could, this has the question of constitutionalism and democracy and whether Constitutions are undemocratic, has a bearing on what should be the appropriate rule of the judiciary, ~~when it when it,~~ whenever law made by Parliament is challenged before it on the ground ~~that, that it,~~ that the law violates the Constitution? Should it give a lot of deference to the parliament?

Or should it ~~place it,~~ place the law under the most searching scrutiny to understand whether it has complied with the Constitution or not? On the one hand, you could say that because you want to enforce the limits of the Constitution, any law that looks like it is violating the Constitution has to be, the Parliament has to have very-very strong justification before the, before the judges should allow the law to stand.

On the other hand, you could argue that because we live in a democracy, and we want the people here and now through their representatives in Parliament, to have a say, in how they should be governed, therefore, we should give the greatest amount of deference to law made by Parliament, and it is only when the most, the strongest of cases is made out that this, there is no way that this law can survive Constitutional scrutiny, only then should judges strike down.

~~Th,~~ these are just a few examples of the kinds of issues that come up when, because of this conundrum between constitutionalism and democracy and whether Constitutions are and where the Constitutionalism is undemocratic. We will pause, we will stop this lecture here. And we will return for the 3rd lecture and take forward our introduction to some of the key issues and debates in Constitutional law. Thank you.