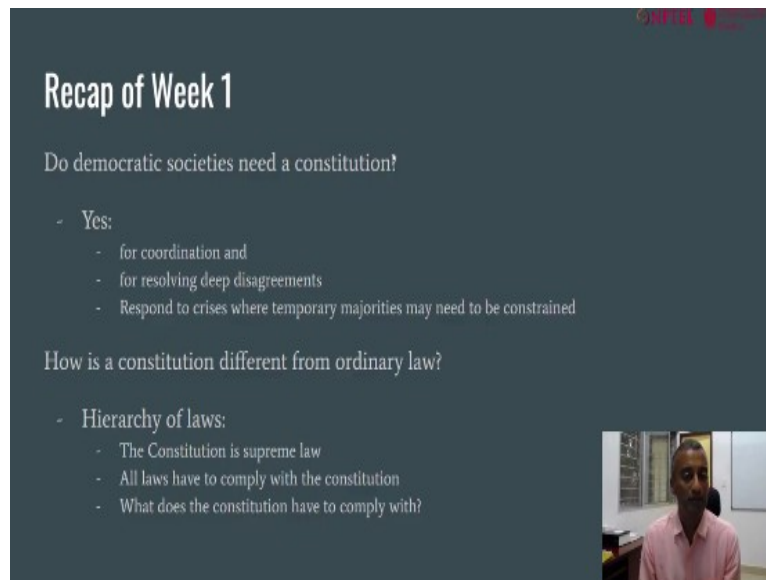


Constitutional Studies
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Lecture No. 04
How Should a Society Make a Constitution?

Welcome back to week 2 of the Constitutional Studies course. First thank all of you for enrolling, I am Sudhir Krishnaswamy and I am from the National Law School. I am sorry that I missed the first week with you and I believe you already got started. I want to begin this session with a quick recap of where we were last week and then take things from there.

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A slide titled "Recap of Week 1" with a dark blue background. The text is white. It asks "Do democratic societies need a constitution?" and lists three reasons: "Yes: for coordination and resolving deep disagreements, Respond to crises where temporary majorities may need to be constrained". It then asks "How is a constitution different from ordinary law?" and lists three points: "Hierarchy of laws: The Constitution is supreme law, All laws have to comply with the constitution, What does the constitution have to comply with?". A small video inset in the bottom right shows the professor speaking.

Recap of Week 1

Do democratic societies need a constitution?

- Yes:
 - for coordination and
 - for resolving deep disagreements
 - Respond to crises where temporary majorities may need to be constrained

How is a constitution different from ordinary law?

- Hierarchy of laws:
 - The Constitution is supreme law
 - All laws have to comply with the constitution
 - What does the constitution have to comply with?

In week 1, we focused on 4 different questions. The first was, do democratic societies need a constitution, they asked. Do we need a constitution at all? why do not we just leave all political societies to make all decisions by majority votes and does that. Is there any good reason why a democratic society needs a constitution? To that we worked around to a conclusion that all democratic societies do need a constitution.

To answer that in fact, yes and the answer that the yes is based on some independent, different reasons which deserve some closer attention. First, even if we were to organize the small meeting in room let us assume a student meeting around a debating club it would work better and sometimes only work at all if we had some common rooms for coordination. So, we might say that x or y person would be nominated as judge and participants would get a certain amount of time and who would go first, who would speak second and so on.

These are simple coordination problems, but as social groups get larger and larger, coordination problems can become very significant. A constitution even in a democratic society even if we did nothing else must help resolve these basic coordination problems that are (())(2:31) then all societies even societies that are relatively homogeneous and relatively share the common history and culture.

The second reason that we explore at some length last week was that societies need not be all of these things. They may not be homogenous, they may not share a common culture or a common history and they might have deep disagreements about big ideas, the ideas of what is a good life, what is a good society, they may they may have deep disagreements about common place questions what is the role of the family in our public life? What is the role of religion in politics and so on and so forth?

These deep disagreements are not disagreements that you can resolve easily by political majorities because societies may be fractured enough that they may not be held together, if we allow these deep disagreements to erupt every now and then. Constitution serves as important second thoughts in that they either resolve these deep disagreements in some particular way or they defer these deep disagreements.

They confer the power of this or that institution let us say court or let us say parliament to resolve these disagreements. The third reason that democratic societies may need a constitution is that there are historical episodes where a political majority is formed, but majorities might make some very poor decisions about how these political societies should be governed in constitutional history, in constitutional theory.

The most common example that is that is can this problem of the Yemen republic in the late 1930s in Germany. Yemen Republic was a democracy, but it is still allowed the consolidation in majority (())(04:47) and the rise of the Third Reich and with Hitler we see a range of disastrous consequences both for Germany and for much of Europe, but one that is emerged through the democratic processes. So, it is often agreed commonly agreed that even if we had a robust democracy.

Democracies are susceptible to the problem the temporary majorities might take a decision, that might that might help disastrous and poor consequences for that political societies. These three reasons, reasons of coordination, the resolution of the disagreements and the problem that temporary majorities being misleading the nation. Our problem across all societies and

are commonly understood as good reasons. Why even a democratic society moves a constitution.

Now it is not clear that in the emergence of the Indian constitution that one of these three reasons governance, but it is fair to conclude that all of these three reasons contribute to the constant assertion in the freedom movement in the earlier part of the twentieth century calling for a constitutional a constitutional democracy. The second question that we brought up and addressed in the last session is what is the constitution, how is it different from ordinary law?

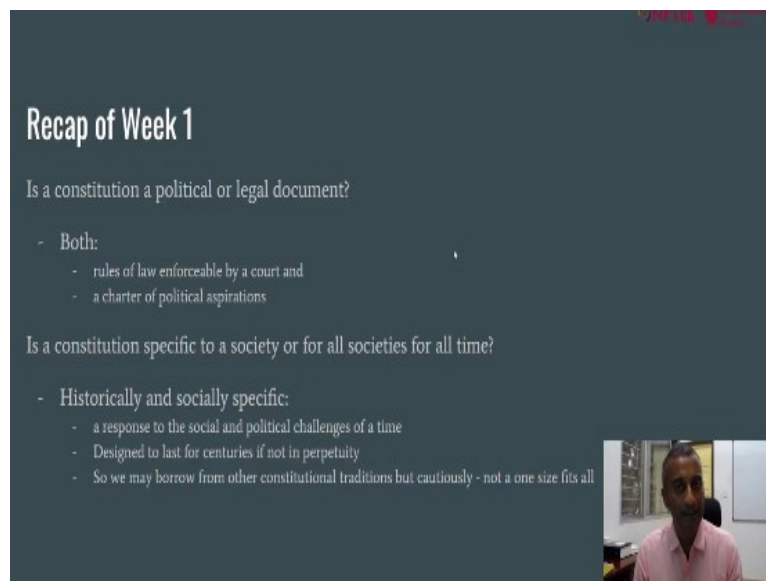
And the answer to these questions and a clarification that is necessary is that we understand that constitutions are placed at the upper most coin in the hierarchy of laws. All laws are ordered and the constitution sits at the very top. What does that mean when we assert that the constitution is supreme law? It means at the very least that all our laws made by the legislature and made by the executive branch must comply with the constitution in order to be valid law.

So, the validity of all other ordinary laws is tested on constitutional grounds and you might say what constitutional grounds and we have the opportunity to go into these questions, these issues in some more details later in the course. It is important even at this early stage that we recognize that constitutions are a touchstone for legal validity. The failure of laws to satisfy the constitutional standard would meaning that the law is not law at all.

So, this is the second question that we raised in week one and we answered and explored in this school. The position of the constitution in the hierarchy of laws often starts peculiar student to ask what is the constitution have to comply with. Does the constitution have to be valid, can there be an invalid Constitution? This is an interesting and important puzzle in political theory, in political philosophy. It is not a puzzle that I can try and resolve with any length today.

Let me just say this that the problem of constitutional validity is more likely to be a political problem rather than a legal problem. So, we may not be able to develop a test of legal validity of the constitution. But maybe we can have some political norms on the basis of which we judge whether a constitution is a good constitution or a bad constitution.

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Recap of Week 1

Is a constitution a political or legal document?

- Both:
 - rules of law enforceable by a court and
 - a charter of political aspirations

Is a constitution specific to a society or for all societies for all time?

- Historically and socially specific:
 - a response to the social and political challenges of a time
 - Designed to last for centuries if not in perpetuity
 - So we may borrow from other constitutional traditions but cautiously - not a one size fits all

The third question that we addressed in week 1 is to ask whether the constitution is a political or a legal document and the answer to that question has been explored last week it is that it is both. They are rules of law enforceable by court as well as being a charter of political aspirations. They tell us the constitution tells us about the kind of society we want to be, what kind of political society do we want to be?

The preamble and you discussed the objectives of resolution which was then crystallize in some form in the preamble to the constitution in 1950. The preamble says many things about the kind of constitution and the kind of political society we are it tells us that we are sovereign, socialist, secular, democratic and a republic and I am only talking about the first phrase, first passage, paragraph of the preamble and highlights some of the big values.

There are many other values in in the preamble, but please remember that when we say it is a charter of political aspirations, these are all choices that our constitution framers make. We need not have been sovereign, we could have been a demonian under the British crown, we need not have been socialist, we could have been we may have adopted a libertarian political model, we we we need not have been secular, we could have a theocratic state.

We need not have been democratic, we could have chosen a form of representation that was indirect and not popular and we need not have been the republic, we could have remained a subsidiary state of the British Empire. All of these are choices made through the process of the freedom movement which are then crystallized and contained in the constitution. So, the constitution as a document performs both these functions.

It tells us about the kind of political society, we are trying to create while simultaneously that creating some legal rules that are fully enforceable by a court of law. The fourth question that we ask and we partially answered in week 1 is whether a constitution is specific to a society or if it is for all societies for all time. In other words, this fourth question is being asked if the constitution is universal in character or it is particular to a particular society and location.

And the answer to this question in this way, we concluded that the constitution is historically and socially specific. It must respond a successful constitution, must respond to the social and political challenges of time. So, in for India in 1950s you have a poor, low literacy, under developed economic society with sharp social individuals on the basis of religion and caste and gender among others and with a significant rural population.

This kind of social conflicts informs the kind of constitution that we have written for ourselves. If the constitution did otherwise and just spoke in terms abstract principles which were unconnected to the social contest of our time, the constitution would not really have roots in that political society. Why we emphasize that good constitutions are rooted in the political social circumstances in which they are created.

We must remember that a good constitution is not one that last for a few months or a few years or a few decades. We generally ascribe the constitutions the quality of durability and the durability that we seek to achieve across centuries. So, the US constitution which is survived two centuries more is the kind of example that we look to as being a successful constitution, but if a constitution has to survive across this period of historical time, how can that constitution be very specific?

It has to speak in terms of general consequences, create institutions that can survive in this period of historical time while at the same time responding to the political and social problems of of any particular society. This question of specificity also makes us to ask, so are all constitution is the same? Should we borrow from other constitutions at all? Should we just, we know that the US constitution is often showed up as a model of a good constitution that can survived overtime and hence create a prosperous society?

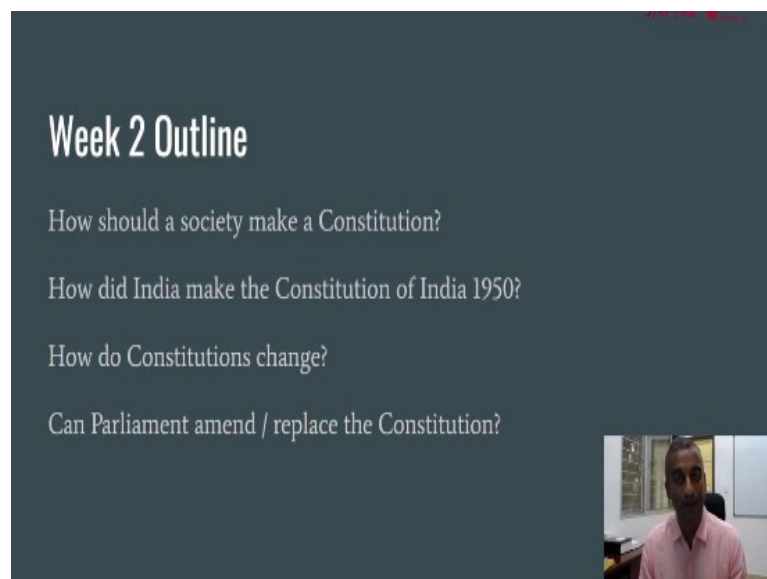
So, does that means that we just take the US constitution and adopt it why do we need to write another constitution. The problem and the tension between the universal approach to creating a constitution and the specificity of the certain contest means that we have to trade cautiously while we look to borrow constitutional principles.

Constitutional principles and institutional design we must be open and learn from others, but be clear that “one size fits all” strategy is likely to end in tragedy rather than the success. So, these four questions were the questions of week 1. My colleague from the National Law School Professor Aparna Chandra took you through these questions in a particular way and explore them at length.

I hope that my summary addresses some of the questions and issues she raised and pushes you to think a little beyond what might have been covered in week 1. You also had an assignment where you had the opportunity to test your understanding of that initial material. In the weeks to come, we will put together and share more well-rounded body of materials that can help all of you, study and prepare for this course.

But till then in our introductory weeks we will go light on the material so that we give you the opportunity to genuinely openly think about these important questions and engage with the constitutional experiment that India represents.

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The outline for week 2 is what I am going to move to next. In week 2 once again I am looking to ask and respond to four different questions. The first question is how should a society make a constitution? Please remember that the word is very important because what I want to unpack is what are the models, what are the broad ideas that can inform a constitution making project?

Imagine for a moment you are invited to a newly formed political republic. Let us say somewhere in specific Island which wants to adopt a new constitution. What kind of method would you advocate to such a society to make its new constitution? The second question is to address a question about political history. This is something you are familiar with civics books in a school, but let us try and build on what we already know to sketch out a wider sense of this constitution history.

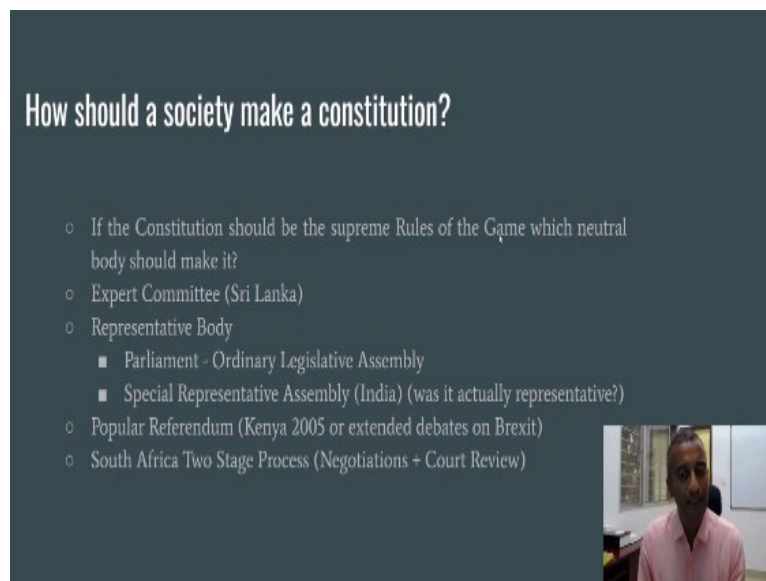
How did India make the constitution in the year 1950? We can ask this question as a question across a large swathe of historical time. I will be a little more specific and look closely at the period meeting up to constitution between 1947 and 1950. Now that we have given ourselves a constitution in 1950, we must ask is that – do all constitutions once made are there forever? Why should so many of you born in the twentieth first century be bound by a constitution that is made in the middle of the twentieth century?

So, a partial answer to that question is to acknowledge the constitution change, how do constitutions change? Should we just replace the constitution every 25 years or some such thing or is there a more organic manner in which constitution change can be managed and carried out. The fourth question is can parliament amend and replace the constitution. Many of you have might have read last week that a Pontiff Shri Kesavananda passed away and the newspaper reported that this Pontiff was a key petitioner in the case called Kesavananda Bharati versus State of Kerala.

And this case went into the question of the parliamentary power amend and replace the constitution at length and while I may not in the second week of this course dragging to detail legal acknowledges hardly the point of this course. The case raises questions that we want to be conscious of and particularly attentive to for in response to this question. So, those are the four questions that we will address in week 2. And I will do this through short videos on each of the questions excluding the question at some greater depth.

So, let me begin with the first of these questions how should a society make a constitution?

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How should a society make a constitution?

- If the Constitution should be the supreme Rules of the Game which neutral body should make it?
- Expert Committee (Sri Lanka)
- Representative Body
 - Parliament - Ordinary Legislative Assembly
 - Special Representative Assembly (India) (was it actually representative?)
- Popular Referendum (Kenya 2005 or extended debates on Brexit)
- South Africa Two Stage Process (Negotiations + Court Review)

Video inset: A man in a pink shirt speaking.

So, the key puzzle that we are confronted with when you ask how should a society make a constitution is that we understand the constitution making is suppose to sit above the fray of ordinary politics. If you want to meet the supreme rules of the game can you be a participant in the game.

For example, in ordinary sport in cricket or in football you might have an umpire. The umpire is not playing the game as you might have a referee in in in football. The referee is not playing a game and the rules of the game are qualified and put together by authorities who do not have any state in the outcome of the game, but when we think about how a constitution should be made our general institution is that constitution should be made by the people that the constitution might govern.

But does this not raise problem to the (())(21:54). Why should I as I know exactly that I am going to be once this constitution is made. Hence, I want to design a constitution that best serves my own interest, how do we create this neutral space from which a constitution may emerge? Ultimately, if the constitution is going to do all the things we spoke about, you must solve coordination problems resolve the disagreements.

And also deal with problem that political majorities may get swayed that is supremely important that the constitution has the allegiance of the people and is not seen as a partial document created by one party or another. The answer to this question how do we create a mutual sticks for the for the making of a constitution has then has been answer in several ways and let us explore a few of these and recognize where India might fit with (())(23:04).

The first approach is to think that making a constitution is ultimately exercise in legal expertise, may be legal and political science expertise. There are people in the world who have been highly educated in the fields of law or political science or related cognate fields that might have significant gathering on constitution design. These are people who outlook and understand the society well understand how to design and write a constitution and these people might be the people who give the constitution writing process too.

This has been attempted in some jurisdictions and words proposed for India. Sri Lanka is one of these jurisdictions neighbor to the South who were a constitution was created on the basis of an expert meeting. Now the Sri Lankan experience with an expert committee drafting the constitution has not been has not been the best experience for us to learn from Sri Lankan constitutional legerity durability.

And battles around the constitution continue until today, we have been following the newspaper last week the constitution has been amended once again to confirm wide in speaking power to President. So, Sri Lanka constitutional history is a is a is sagely cautioned against relying too much on expert committee based constitution. Option number 2 is to allow constitution making to be conferred the power of constitution making to be to be conferred in a representative body.

This representative body can be the ordinary legislative assembly in India parliament on a special representative assembly like the constituent assembly. So, let us think through these questions at some care and precision. What why should constitution making be done by a representative body at all? Ultimately, we might we might all agree that the wisdom and the and foresight as to what constitutional design may work in a society where we widely spreads in any event.

We want the widest range of the population to accept the constitution and see it as a legitimate rules of the game. So, for both these reasons it may be good for us to have a widely representative body that can command the affection of the people while making constitution. Now Parliament is precisely that kind of body elected on universal adult in 1950 and allowing for widest range of people to select their representatives.

And these representatives might act in the best interest of their constituents and hence we might get a constitution, but there is a problem with relying with relying on an ordinary legislative assembly. We all know that political parties and the nature of electoral (())(26:55)

means that that parties will represent marginal interests. It is not always clear that representatives in a legislative assembly elected on party basis may rise above their party affiliation and their particular community or religion class backgrounds and think about a constitution project in this forward looking multiple century's kind of way.

So, for that reason for the reason that parliaments ordinary legislative assembly seem to be too political in their orientation that scholars about and argue that they may not be best suited for a designing constitution. What options do we have? The option we have is to try and create a representative assembly, but one that is uniquely representative. Representative of the widest range of people who may not have been they might be small minorities that may not have the ability to elect a representative even in a majority vote system.

Even those communities maybe represented in this special representative assembly. This is certainly the model that Indian constitution makers sought to adopt and this model is model that the Indian constitute assembly takes for. There are arguably at least two other significant page in which a constitution society may make the constitution. The first is that it can be drafted by some entity, but then it might be approached to popular vote.

Now please remember that what the formidable challenges of a popular vote referendum on the constitution might be. At the best of times in our political lives for the for the electorate the popular electorate to understand the constitutional text in its in its range and complexity is is challenges and for them to then understand and endorse an entire constitutional text may may seem particularly daunting and may not be both politically for that matter cognitively of a feasible mind, but may be then we simplify the questions.

If we simplify the questions and then just make it simple yes no vote for example should India be a sovereign country, we might ask as a referendum question and then just allow the people to o vote in an up and down way either yes or no. This is an appealing approach to the question of constitutional choice and there are many who argue that this is the only legitimate way in which constitution making can be a progress.

However, this novel as for those of who have followed the recent debate on Brexit, it makes clear that even a simplified question that is posed to the wider population may yield a very close result and one that may drive the nation in directions that that may not in historical retrospect we seemed to be either wise or feasible. Now the jury is still out on whether the Brexit referendum and choice of people is ultimately India overall interest.

But you can see the intermediate stages while the while the legalities of Brexit has been negotiated that this was no easy choice to make or to deliver and so there are reasons overall to be skeptical about a popular referendum groups to constitution. I am going to close with the first question of week 2 by paying attention to South Africa's approach while it emerged from decades of market.

The South African approach was that while it was clear that white minority rule was no longer sustainable, the transition to a democratic nation was one that have to be negotiated in what is called Kempton Park negotiation interested in the South African story these are all reasonably well documented and available on the internet. So, you have political negotiations between the representatives of the black majority and the political representative of the white minority, but that is not what concluded it.

After the constitution is drafted, there was a concerted way in which the the constitutional court of South Africa had to review and confirm that the constitution that had been making was one that stuck to the negotiations into the negotiated result between the white minority and the black majority. These two is a structured and tiered way in which the constitution can be made and one that gives the judiciary a place in constitution.

This occurred in 1990s, there was no anticipation or thought that this could be done in at an earlier time and if the Indian constitution certainly did not anticipate such a more. So, let me conclude this discussion that whenever we think about how a constitution should be made, we have an array of options to choose from. We must remember that the end result must satisfy the core functions, the core purposes of a constitution.

It must be one that a society can embrace and adhere to for the long periods of time and it is that kind of constitution that must emerge from whatever process and design method that we choose. I mentioned earlier that India choose a special representative assembly mainly the constituent assembly as the way to go forward and in my next lecture I will focus my attention on how the constituent assembly will setup. Who is in it, what did it discuss and some key ideas that emerge from this process.

Thank you for your time and attention and look forward to engaging with the second lecture of week 2.