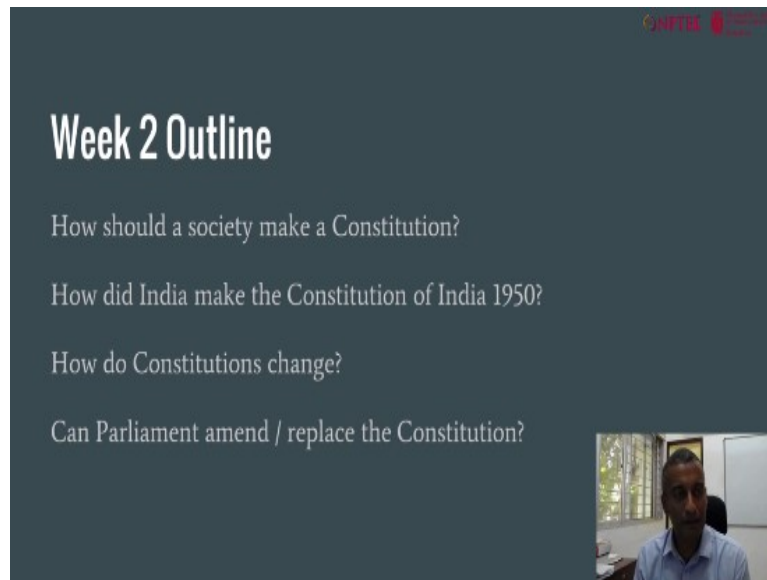


Constitutional Studies
Professor. Sudhir Krishnaswamy
Department of National Law School of India University
Indian Institute of Technology, Bengaluru
Lecture No. 05
Making India's Constitution

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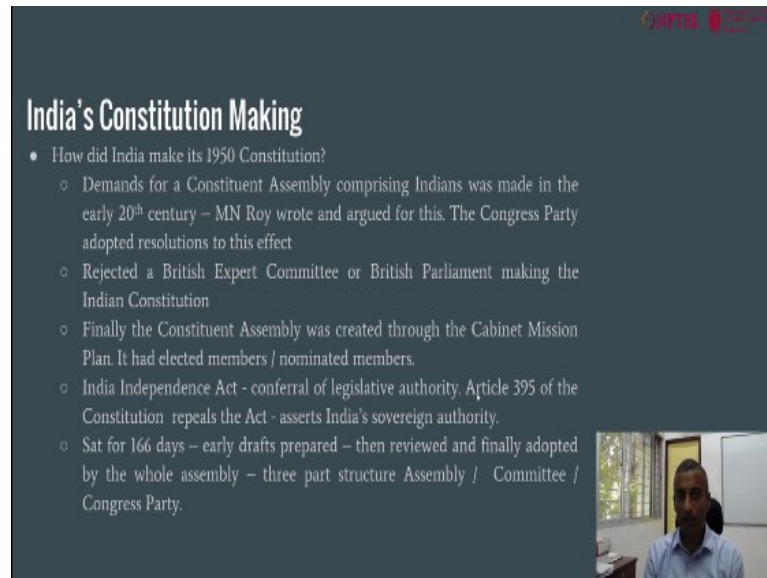
Welcome back to lecture 2 in week 2 of this course on Constitutional Studies. In lecture 1, I focused on the question how should a society make a constitution? We considered different models of constitution making and identified that the Indian constitution makers chose a special representative assembly mainly the constituent assembly to make the constitution in the year 1950.

In this lecture, I will focus on the last three questions for week 2 of the three questions, I will spend much of my time to explore how did India make the constitution in the year 1950? The story of Indian constitution making is reasonably well known, but it is important for us to announce some critical ideas about who are the members, what were the processes adopted and some key issues that came up before the constituent assembly.

Then I will turn to question number-3. Now that we have made a constitution, can a constitution change if a constitution would change, how do constitutions change? I will close up with a very brief assessment to the questionnaire assessment in a response to the question; can parliament amend or replace the constitution? And this has to do as much to do with the evolution of constitution history in politics in India.

And I will not cover that in the greatest detail, but we will spend some time to give you an idea at least of one key event in Indian constituent in the political history.

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India's Constitution Making

- How did India make its 1950 Constitution?
 - Demands for a Constituent Assembly comprising Indians was made in the early 20th century – MN Roy wrote and argued for this. The Congress Party adopted resolutions to this effect
 - Rejected a British Expert Committee or British Parliament making the Indian Constitution
 - Finally the Constituent Assembly was created through the Cabinet Mission Plan. It had elected members / nominated members.
 - India Independence Act - conferral of legislative authority. Article 395 of the Constitution repeals the Act - asserts India's sovereign authority.
 - Sat for 166 days – early drafts prepared – then reviewed and finally adopted by the whole assembly – three part structure Assembly / Committee / Congress Party.

Qatar

Qatar

So, let us begin. How did India make a constitution? Let us begin with a broad overview. The demand for a constituent assembly comprising in the Indian was made in the early part of the twentieth century. MN Roy a very interesting figure in Indian politics in history wrote and argued for this in some early work. The Congress Party had already adopted some resolution to this effect in the early part of 1900.

And as we worked our way towards independence in 1947 is demand for Indian constituent assembly grew louder and stronger. The Indian constitution makers in the Indian freedom movement expressly reject the possibility that British parliament or a British expert committee or an expert committee comprising Indian and the British would make the Indian constitution. And they made very clear that this was not the plan for post independence India.

So, finally when the constituent assembly was created through the cabinet mission plan it had a mix of elected and nominated members who were brought together to make up the constituent assembly. I will say little more about this later in this talk. The final in premature on Indian independence was delivered through the Indian Independence Act.

The Indian Independence Act was enacted by British parliament recognizing the transfer of power and conferral of legislative authority on Indian parliament. This Act was finally repealed for Article 395 of the constitution thereby asserting India's optometrist sovereignty or

autonomous sovereignty. What do the constituent assembly do? Exact for about 166 days there was some early drafts that have already been prepared prior to the constituent assembly sitting. They reviewed, discussed, modified and finally adopted these drafts by the entire assembly.

So in the slides to follow and through much of his lecture, I am going to reflect on the details in the institution through which constitution making in India was processed. This overview slide gives you a broad sense of what is to follow in the rest of this lecture.

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Let us begin by identifying the key institutions that were involved in constitution making. While I have spoken so far about the constituent assembly as a whole has been one key institution that made the constitution. We must recognize that it did at all times sit all together in the preliminary session. The assembly was broken up into various committees which played important role in fashioning different parts of the constitution.

The drafting committee which brought together not only the work of preliminary sessions, but also the work of the various subcommittees of the constituent assembly played a key role in pulling together and then fashioning the overall constitutional document that we now know is the constitution of India 1950. The last body institutional body that had a key role in Indian constitution making was the Congress Assembly Party.

You must remember that the Congress Party was not just a political party, but it was the party of the freedom movement. It was a large umbrella, tent which included all kinds and

strengths of political opinion and beliefs that had been put together in a coalition committed to the freedom from British rule. So, the Congress Assembly Party also convened simultaneously with the constituent assembly as a separate party body. Key figures in the constituent assembly were not members of the Congress Assembly Parties.

I will just take one as an example - Dr. B. R. Ambedkar was not a member of the Congress Assembly Party. It is reasonably well known that some discussions regarding the structural form of the constitution occurred in the Congress Assembly Party and so it is fair to say that it was an important institution in constitution making.

Let us be clear, the historical matter that the entire proceedings of the constituent assembly are duly recorded in and archived in a multiple volume sets that are available from the union government publishing departments, but also available on websites including constitution of India dot net. The works of the committees of the constituent assembly are less accessible, some reports are available in collections like the collection by Shiva Rao.

Other reports are less accessible and are found in archive and it is an important job for both historians, scholars and for the general population that we make these committee reports more accessible to the public at large. The drafting committee's outputs are reasonably accessible in Shiva Rao collection as well as well as in the archives. It is the Congress Assembly Party for which we have no structured historical record.

One may read from autobiographies and biographies of important political figures that constitutional discussions did occur in the Congress Assembly Party. However, we do not have a structured record of the deliberations in the party sessions. Putting all of these institutional actors together, we can picture the process of constitution making between the period 1947 to 1950.

Constitution making began in (1947) 1946. It began arguably almost 70, 80 years ago where early versions, proto versions of an Indian constitution were made by various actors and freedom movement and beyond. The British also produced some versions, governance, documents including the Government of India Acts and these are all these are key documents that make the long history of constitution making in India.

So, for anyone interested in that longer history you would want to explore these historical antecedent constitutions that finally result in the constitution in the 1950s. Whatever else we

might think we can be reasonably certain that the constitution that we that we arrived at in 1950 was the result of concerted effort of nearly a century between Indians and occasionally some British actors.

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What does the constituent assembly look like? And here I have shared with you an early photograph of all the constituent assembly members and this might be very small on your screen, but for those of you who have access please go out and explore and you will see as you work through that the list of members that you see some of the most significant figures in Indian politics in public life who were a part of this assembly.

It is a scalar assembly that recently cannot imagine as being the representative party of all Indians in contemporary times. So, this kind of time and attention was tent to ensure that the constituent assembly both drew on the best talents that the country had to offer legal and political as well while maintaining a wild diversity of representation not just the religion, caste and communities, but also of political views.

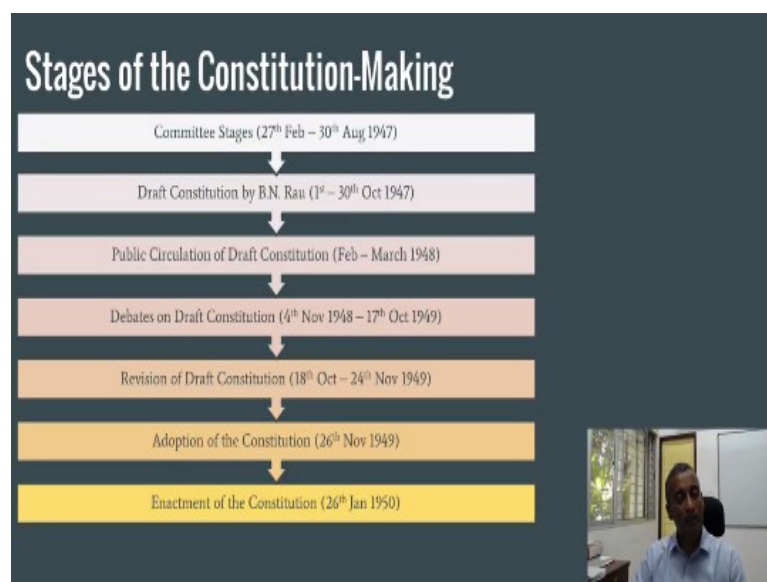
And if that coming together that the constituent assembly represents. The drafting committee picture in the second photograph of the slide is a much much more much smaller body, but a body that labored through the most difficult parts of constitution. B. R. Ambedkar as the chairman of the drafting committee sitting at the center of the photograph was one person who has its imprint on almost every article that emerged from this constituent assembly.

And one requires an astute admiration and understanding of the singular role he played in drafting this constitution. Many times it has been argued that this assembly was not representative enough, did not have enough women, it did not have enough representation of the backward classes, from the Dalit communities or other shades of political opinion. And it is fair to say that no assembly, no constituent or otherwise would be perfectly representative of a country as diverse and as separated as ours.

And the Indian constituent assembly did a fair job of putting together key constituencies, but in our day and time we might argue for forms of representation and extend of representation that is quite different from the structure of this constituent assembly. And this is this is a question that all of us must pay attention to and understand that you were seeing the link attached a very short video to the role of women in the constituent assembly.

Though there were fewer number than the proportion and the population, they played a significant role not just in Indian constitution making, but also in the drafting of the universal declaration human rights and some key international human rights treaties created at that time.

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Let me move on now to the stages of constitution making that emerged in the in the period immediately after the creation of the constituent assembly. We begin by noting that the early months was spend primarily in the committee stages, committees different committees were constituted let us say a states committee that deals with federalism and provinces, a human

rights committee, fundamental rights committee that deals with fundamental rights in constitution and so on.

So, several committees were subject matter communities were created and tasks were producing a few articles or chapter of the constitution. The next stage that deserves close attention is the preparation of the draft constitution by B.N. Rau. B.N. Rau is a critical and important figure and does a recent interesting biography of B.N. Rau that I would recommend to all of you.

B.N. Rau was a civil servant, he was not a politician and he was not an elective member of the assembly. He had a position that was called a constitutional advisor. He was partly a secretary to the drafting committee, but had a key role in putting together these documents with the kind of meticulousness it takes to produce as voluminous constitution that we have. Once a draft constitution was put together in late 1947 there was a public circulation of the draft constitution.

Not many people are aware that the Indian draft constitution was circulated to the general public and brought 1000s of comments. Comments that that were all recorded and archived from the most diverse actors across the country, small associations from different regions in the country, community groups and other interest groups, journalist and so on were writing in in response to the draft constitution arguing out positions either in support or against the early drafts.

The debates then moved into the constituent assembly and in the early sittings of the constituent assembly. Some of the important contours of the constitution of India as we know a broad shape was settled in these early debates. We then have the revisions of the draft constitution which was a meticulous article by article process not every article was discussed to the same length or extent and some were easily accepted.

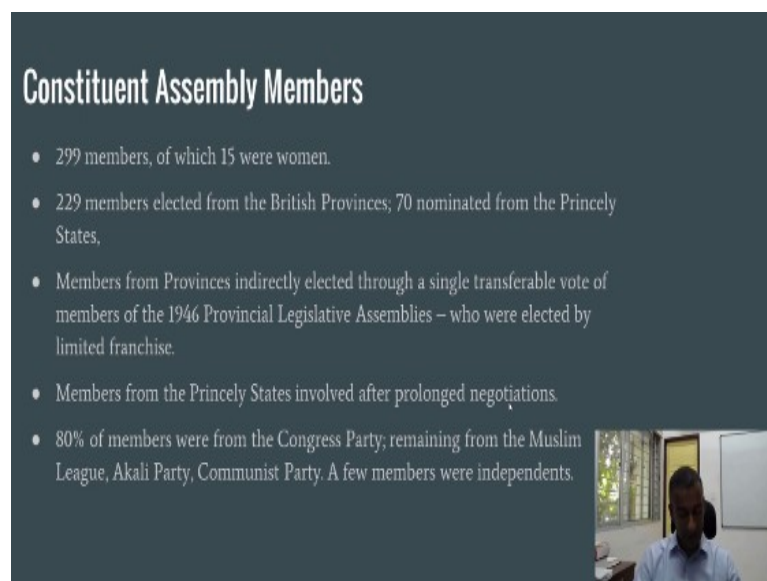
Others were hotly contested and those debates are captured in the constituent assembly process. We then move finally towards the adoption of affine of the constitution while the debates on articles of the constitution were often followed by a vote a division between the constituent assembly where some members agreed and others did not. The adoption of the constitution was carried out through a unanimous adoption.

All members of the assembly came together to adopt the constitution with the final document though and we now celebrate that they of the adoption of the constitution twentieth sixth November 1949 as constitution did. The constitution finally came in to effect on the twenty sixth of January 1950 the day we call Republic Day and celebrate as Republic Day.

So, notice here that the stages of constitution making across that period of a little more than 2 years is marked by a journey through the institutional the key institutions that we outlined in the slide. The constitution early drafts emerged from the committees, consolidated they go out to the public, come back into the assembly are carefully debated and discussed re put together by the committees and then finally adopted in (())(18:23).

This understanding of the constitution making process is crucial for our appreciation, for the nature of constitution we have and the difficulty that that was the rigor and difficulty that the process of constitution making requires.

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Constituent Assembly Members

- 299 members, of which 15 were women.
- 229 members elected from the British Provinces; 70 nominated from the Princely States,
- Members from Provinces indirectly elected through a single transferable vote of members of the 1946 Provincial Legislative Assemblies – who were elected by limited franchise.
- Members from the Princely States involved after prolonged negotiations.
- 80% of members were from the Congress Party; remaining from the Muslim League, Akali Party, Communist Party. A few members were independents.

The slide includes a small video inset in the bottom right corner showing a man in a light blue shirt speaking.

Let us turn our attention now to the membership of the composition of the constituent assembly. So, I mentioned earlier that it was partly elected and partly nominated. Let us dive a little deeper into these members and look at a few key members. The constituent assembly all put together had 299 members of which 15 were women. I mentioned that there were not as many women, but some of the women members were very prominent and influential.

229 members from among these 299 were elected from the British provinces and 70 were nominated by the princely states. Now for those of us who are not so clear about the nature of

British India may be we need to pay a little bit of attention to the political map while the British provinces occupied nearly 60 to 65 percent of the territory of India and these were directly ruled by the crown about 30 to 35 percent of the territory of India were ruled by princes of various sorts who had entered into treaties with the British Raj.

So, while they were princely states they had some arrangements, some tighter, some weaker arrangements of treaties with the British state. So, when the British crown created the independent India there was a choice to be made while it was clear that the British provinces composed a single political unit the princely states were not so cohesive. And as we know, some of those lingering debates about how princely states joined the Indian union, remain politically controversial today as we know with the recent amendments to the status of Kashmir.

Members from provinces were indirectly elected through a single transferable vote of the members of the 1946 provincial legislative assemblies. Now when we remember that the provincial legislative assemblies created by the government of India at 1935 had had democracy it was a democracy with the limited franchise. Approximately 30 to 40 percent of the population at that time had the right to vote.

Now these voters elected their assemblies the assemblies in turn elected at their representatives through the constituent assembly. So, you would call the constituent assembly an indirectly elected assembly much like the Rajya Sabha is today composed of its one level removed from the popularly elected. We also recognized that unlike the assembly is today the provincial legislative assemblies under the government of India act were elected by a limited franchise.

Now members from the princely states got involved after prolonged negotiations because as I said the princely status of the princely states after independence was not forgone conclusion. They had to be negotiated and the Indian union had to negotiate individually with many of these princes to cajole and in some instances mildly coerce these princely states to come into the Indian union and to send their representatives to the constituent assembly.

That history of Indian nation making is wonderfully told by V. P. Menon in his account of the process in which he was closely involved and also by Ramachandra Guha in his story about the making of the Indian nation is history of making the Indian nation where 80 percent of the members all these processes after these indirect elections, after these princely state

nominations, 80 percent of the members in the constituent assembly were from the Congress Party.

The remaining was on the Muslim league, the Kalli party the communist party and a few independents. You must remember that when the constituent assembly was first put together, the Muslim league had a significant presence in parts of British India that now that now are parts of the nation states of Bangladesh and Pakistan, Muslim league had a significant presence in other parts of India, but with the partition of British India into the states, the Muslim league lost much of their presence in the constituent assembly.

And this was one of the early founding battles in the constituent assembly while it is partly captured in the debates one would have to read elsewhere to understand why the members of the Muslim league took the view that they could not participate in the constituent assembly around as it was initially constituted. So, much for the constituent assembly members and broad outlines of that assembly.

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A presentation slide titled "B.R. Ambedkar" featuring a portrait of him on the left and a bulleted list of his achievements on the right. The list includes: Born in Mhow Cantonment, in the Central Provinces (now Madhya Pradesh) to a Dalit family; Trained as a lawyer after receiving scholarships to study abroad; Active in movements for the empowerment of Scheduled Castes, like Mahad Satyagraha and was a member of the Scheduled Castes Federation party; Chairman of the Drafting Committee – known as the Father of the Indian Constitution; and First Law Minister of independent India. A small inset video shows a man speaking in a meeting room.

B.R. Ambedkar

- Born in Mhow Cantonment, in the Central Provinces (now Madhya Pradesh) to a Dalit family.
- Trained as a lawyer after receiving scholarships to study abroad.
- Active in movements for the empowerment of Scheduled Castes, like Mahad Satyagraha and was a member of the Scheduled Castes Federation party
- Chairman of the Drafting Committee – known as the Father of the Indian Constitution.
- First Law Minister of independent India.

I am going to move on and focus on some key members, some of who are well known and others lesser. I think Dr. B.R. Ambedkar has witnessed a resurgence in the public imagination and series of political life it was not something that that that he was not as prominent in the 1950s and 60s because there was a failure to recognize how someone born to a Dalit family and educated initially after receiving scholarships in a princely state.


And then the scholarships to study abroad at Columbia University and the London School of Economics that someone as erudite and accomplished as Dr. B.R. Ambedkar was not only involved in the political movements of India including related to the Government of scheduled castes as well as the labour movement and that started his own party extremely involved in the round table negotiations.

So, he was a very significant figure, but not a figure who emerged from within the congress sole. When the history of Indian constitution making is told, it is very important that we begin with Dr. Ambedkar because his is not just the story of personal triumph coming from adversity but the story of an exceptional contribution, the constitution making in republic that two most political vouchers from the outside had unlikely odds of success.

He was the chairman of the drafting committee in the constituent assembly and the role that he plays as the chairman of the drafting committee established him as the pivotal figure around the constitution of India 1950 was built. Post constitution making he became the first law minister of independent India and his resignation on questions related to Hindu code bills and others is one of the early political crisis faced by the post-independence government.

But those are very important concerns, but once that I will lead to another location. So, Dr. Ambedkar was a key figure in the constitution making process and in the constituent assembly. The constituent assembly retreat with debates and references where he played a part and he almost cannot read those debates unless you notice that he makes a key intervention here or a nudging intervention in some other place.

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Maulana Abul Kalam Azad

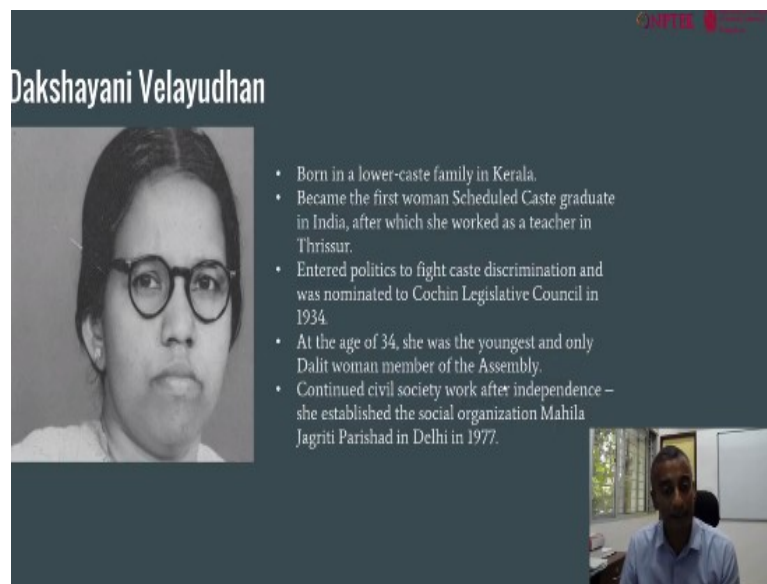
- Born in Saudi Arabia to renowned Islamic scholar Maulana Khairuddin, Azad was inspired by the modernist writings of Sir Syed Ahmed Khan.
- As a journalist, he published Al-Hilal, an Urdu newspaper in Calcutta - banned by the British
- Participated in the Khilafat movement; inspired by Gandhi to participate in Dandi March and Quit India movements
- Minister for Education from 1948-58.

Maulana Abul Kalam Azad came from a very different background. He came from a religious family he was born to renowned Islamic scholar, and but was deep and had an education that was steeped in Islamic scholarly traditions, but he came to be very highly influenced by the writing the Sir Syed Ahmed Khan who is a crucial figure in in the evolution of the Indian ideas of the nation and the place of the Muslim community in that nation.

And what he did was that initially began to gave prominence by the quality of his right as a journalist and as a speaker in this year. He found common cause with the freedom movement around the Khilafat movement and was inspired by Gandhi to then come center stage in the Dandi March and the Quit India Movements. Not only was Abul Kalam Azad a key figure in the constituent assembly.

He also came to be the minister for education from 1948 to 1958 critical decades in the formulation of education policy in India.

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A presentation slide with a dark blue background. At the top left, the name "Dakshayani Velayudhan" is written in white. Below the name is a black and white portrait of a woman with glasses. To the right of the portrait is a bulleted list of her achievements. In the bottom right corner, there is a small inset video frame showing a man speaking.

Dakshayani Velayudhan

- Born in a lower-caste family in Kerala.
- Became the first woman Scheduled Caste graduate in India, after which she worked as a teacher in Thrissur.
- Entered politics to fight caste discrimination and was nominated to Cochin Legislative Council in 1934.
- At the age of 34, she was the youngest and only Dalit woman member of the Assembly.
- Continued civil society work after independence – she established the social organization Mahila Jagriti Parishad in Delhi in 1977.

The third figure that I want to spend some time on is Dakshayani Velayudhan. Dakshayani Velayudhan did not come from either educational or social privilege like Abdul Kalam Azad was born in a lower caste family in Kerala and then became the first woman scheduled caste graduate and a teacher in Thrissur in Kerala. She entered politics very early, at the age of 34 she entered the constituent assembly.

She had already contested in one elections for she have been nominated to the Cochin Legislative Council and she had developed a place of intervention on the question of caste discrimination. She continued with this civil society work post independence and setup a women's organization that worked on issues of gender empowerment and caste, post the constitution.

So, Dakshayani Velayudhan was also a member of the assembly and while there are not as many speeches made by her let us say, made by Dr. B. R. Ambedkar. She plays a critical role with her participation and voice in the assembly.

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A presentation slide with a dark blue background. On the left, there is a black and white portrait of Jaipal Singh Munda, a man in a suit and tie. To the right of the portrait, the name "Jaipal Singh Munda" is written in white. Further right, there is a bulleted list of facts about him. In the bottom right corner of the slide, there is a small inset video frame showing a man in a light blue shirt speaking.

Jaipal Singh Munda

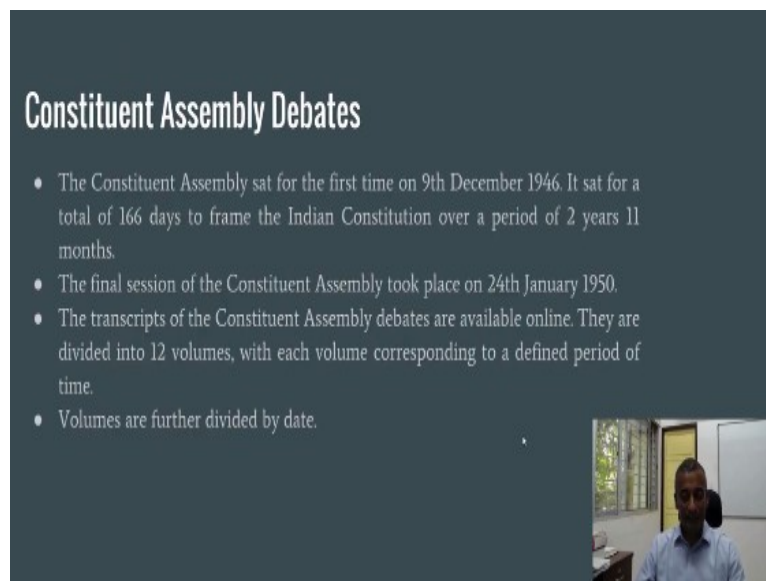
- Born in Munda in present-day Chhattisgarh in a tribal family.
- Studied on scholarship at Oxford, where he was the first Indian to become an Oxford Blue in hockey.
- Captained Indian men's hockey team at the 1928 Amsterdam Olympics, where India won its first-ever Olympic gold medal.
- President of the Adibasi Mahasabha – he was active in the movement for tribal rights.
- Post-independence campaigned for the creation of the new state of Jharkhand; this demand was realized only in 2000.

I want to close this round of the key figures in the constituent assembly by talking about Jaipal Singh Munda. So, Jaipal Singh Munda came out of the present-day state of Chhattisgarh. He was born in a tribal family, but he worked his way up in two senses – to study at Oxford on a scholarship, but also to become a key hockey player representing in the Indian men's hockey team as a captain in the Amsterdam Olympics where India went on to win an Olympic gold medal.

But Jaipal Singh Munda was not just any other hockey player. He also was a key figure and a key voice on the questions of tribal rights; he was the President of the Adibasi Mahasabha where he remained active during the constitution-making period after on questions of tribal rights in India. He played a crucial role in key debates in the constituent assembly and argued that the original people of India must indeed have more political representation.

And the political autonomy to governance services. So, Jaipal Singh Munda runs off four figures that I want to spend some time on; you will notice that almost every figure in the constituent assembly has a remarkable history both about what brought them to the constituent assembly and then what they went on to do post the constituent assembly and I would invite you to explore many of the other figures who played a critical role in constitution-making constituent assembly.

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Constituent Assembly Debates

- The Constituent Assembly sat for the first time on 9th December 1946. It sat for a total of 166 days to frame the Indian Constitution over a period of 2 years 11 months.
- The final session of the Constituent Assembly took place on 24th January 1950.
- The transcripts of the Constituent Assembly debates are available online. They are divided into 12 volumes, with each volume corresponding to a defined period of time.
- Volumes are further divided by date.

The slide also features a small video inset in the bottom right corner showing a man in a light blue shirt speaking in a room with a whiteboard and a window.

Now I will turn from the questions of membership who made up the constituent assembly to questions of the debates. Often times it is mistakenly portrayed as if the constituent assembly was a name bureaucratic organization and at the constitution was somehow mysteriously produced by some other process. It does somehow reflect the work of Indians who sat in the constituent assembly for this long period.

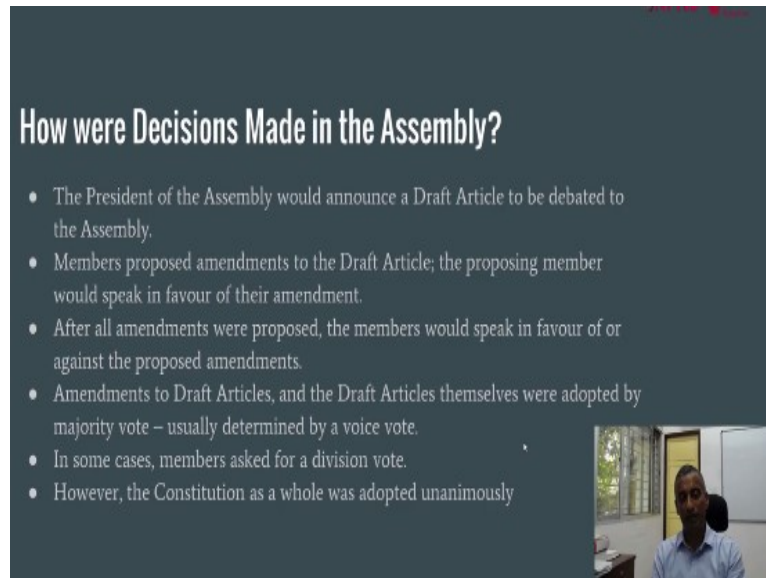
And so I want to spend some time outlining the process and the debates in the constituent assembly. This is a wonderful resource for any young person who is interested in understanding while we have created the kind of political society that we currently inhabit and I would I would encourage all of you to go to these debates to look for new ideas and old. The constituent assembly sat for the first time on ninth December, 1946.

We have already looked at the stages of constitution making. Now let us look at the few key numbers. It sat for 166 days, but these 166 days were spread over a period of 2 years and 11 months. In between the sitting there was the public consultation, there was the synthesizing of drafts and all of these other activities that go into making the constitution what it is.

The final session of the constituent assembly took place on twenty fourth January 1950 in preparation for all the twenty sixth event where the constitution was brought into effect. I mentioned earlier that the transcripts of the constituent assembly are well preserved, available in print and online. They are divided in 12 volumes, in each volume it focuses on a specific time period that that you may be interested in.

Volumes are further divided by date. So, each unit of the debate is a date on which these debates occurred. So, this is the overall description of the constituent assembly debates.

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How were Decisions Made in the Assembly?

- The President of the Assembly would announce a Draft Article to be debated to the Assembly.
- Members proposed amendments to the Draft Article; the proposing member would speak in favour of their amendment.
- After all amendments were proposed, the members would speak in favour of or against the proposed amendments.
- Amendments to Draft Articles, and the Draft Articles themselves were adopted by majority vote – usually determined by a voice vote.
- In some cases, members asked for a division vote.
- However, the Constitution as a whole was adopted unanimously

The slide includes a small video inset in the bottom right corner showing a man in a light blue shirt speaking in a room with a whiteboard.

Let us pay some attention to how the process by which an article was proposed, how it meandered its way through the assembly and arrived in its final. So, as a hypothetical imagination, a day of the assembly would begin with the President of the assembly announcing a draft article to be debated on that date. Members were proposed amendments to the draft article would speak and suggest why they were proposing these drafts and what needed to be changed.

The proposing member had the opportunity to both defend the draft as it stands and more often than not Dr. Ambedkar was left to stand and defend the formulations in the draft constitution. After all amendments were proposed, members will speak either in favor of or against the proposed amendments. This would go beyond those who were formally tabled amendments, members were allowed to express his view either in support of the draft article or in support of some particular amendments.

Amendments were made to draft articles and draft articles or the article to adopt it was finally put to majority vote through a voice vote in the event that a unanimous view could not be developed. The constituent assembly debates revealed that there are occasions when members asked for a division vote and those division votes for record. Once the individual articles crystallized through this process deliberated and voting process, the constitution is put together the consolidated form.

But this consolidated constitution of Indian 1950, as I mentioned earlier was adopted by the assembly in full. So, the entire constitution was adopted and adopted without dissents. So, while there might be dissents with respect to particular article it is both symbolic and politically salient that the constitution as a whole was adopted unanimously.

It gives us caution and cause to think today that we were to give ourselves the tasks of making a constitution. Would we satisfy that threshold where all members present a very diverse constituent assembly would put their signature and pen to the final outcome unanimously that is the threshold the political threshold that the constitution of India met in its when it was adopted.

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The slide is titled "Free Speech and Contempt of Court" in white text on a dark blue background. It features two historical quotes with small portraits of the speakers. The first quote is by T.T. Krishnamachari, dated 17th October 1949, regarding the right of freedom of speech and expression. The second quote is by R.K. Sidhwa, also dated 17th October 1949, discussing the powers of judges and the interest of the public. A small video inset in the bottom right corner shows a man speaking.

Free Speech and Contempt of Court

"A person might be speaking on a matter which is sub judice and thereby interfere with the administration of justice. That is a category of offences which is not covered by the exceptions mentioned in clause (2) or [Draft] article 11, so far as the right of freedom of speech and expression is concerned. It was not our intention to allow contempt of court to take place without any let or hindrance."
- T.T. Krishnamachari, 17th October 1949; 10.154.92 [Constitutionofindia.net]

"We know, Sir, about this contempt of court, how the judges have been exercising their powers in the past, as if they are infallible, as if they do not commit any mistakes. They are liable to commit mistakes. Why should we show so much leniency to them? We must safeguard the interest of the public. If a citizen by way of making a speech condemns the action of a third class magistrate or a fourth class magistrate who has passed structures upon the public, is he not entitled to make a speech and comment upon it?"
- R.K. Sidhwa, 17th October 1949; 10.154.109 [Constitutionofindia.net]

I am going to focus now on a few key debates that have political relevance today and I want to what I want to do with this exercise is to actually confirm and allow all of you to see that these debates are serious debates, well informed debates of members who may not always disagree, who may not who may not always agree about the end outcomes and what the constitution must look. Let us begin with a debate on free speech and contempt of court.

All of you are familiar that in the in the last month we have had a contentious supreme court proceeding around the question of content to be used against the lawyer for some communications. When we read T. T. Krishnamachari's intervention and I will just briefly exert and summarize his interventions. He says look person might be speaking on a matter which is sub judies that is a proceeding that is ongoing and caught and interfere with the administration of justice.

And we do not have a category of offences this category offences is not an exception to the free speech thought and so if you if you want to allow if you if you want to ensure that courts function in handling the way, you have to allow for a contempt of court offence. So, it is arguing for a contempt of court to be an exception what is now article 19 free speech. R.K Sidhwa response: yes we know that there could be a contempt of court he tell us.

And he says yes judges may exercise their powers as if they are infallible and do not commit any mistakes, but indeed they are liable to commit mistakes. So, what is the reason for us to carve out an exception for contempt of court? What is more important Sidhwa mentions is that for us to protect the interest of the public. So, it is all right if a if a court and a judge makes any makes any observations of any sort and public comments on it.

It would keep the judges on their rails. As it turns out article 19 did carry exception that allowed for the contempt of court and as we know these debates are alive and with us in our contemporary political situation.

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The slide is titled "Universal Adult Franchise" and features two portraits: H.N. Kunzru on the left and B.R. Ambedkar on the right. The text on the slide discusses the historical context and challenges of universal adult franchise in India. In the top right corner, there is a logo for "KJ Somaiya Institute of Management Studies & Research".

Universal Adult Franchise

"But we have to consider whether the sudden expansion of the franchise that will be brought about by adult franchise will be helpful to the development of democratic ideas and that sense of discrimination and restraint on which the successful exercise of democracy depends. It seems to me therefore that to go at one bound from a greatly restricted to universal franchise is not the part of wisdom. Had we graduated the lowering of the franchise so as to bring about adult franchise within a definite period of time—say 15 years—and been content immediately with say, the enfranchisement of between 40 to 50 per cent of the people, we should probably have allowed less room for demagoguery and made it easier both for political parties and individual candidates to meet the electors and educate them."

- H.N. Kunzru, 22nd November 1949, 11.162.74 [Constitutionofindia.net]

"Firstly, in spite of the ignorance and illiteracy of the large mass of the Indian people, the Assembly has adopted the principle of adult franchise with an abundant faith in the common man and the ultimate success of democratic rule...The principle of adult suffrage was adopted in no light-hearted mood but with the full realisation of its implications. If democracy is to be broad based and the system of governments that is to function is to have the ultimate sanction of the people as a whole, in a country where the large mass of the people are illiterate and the people owning property are so few, the introduction of any property or educational qualifications for the exercise of the franchise would be a negation of the principles of democracy."

Let us briefly discuss universal adult franchise. Now most of you know that India was a country that adopted universal adult franchise right from when we got independence and into our constitution. Makes no staggered approach to the question of where the only people property or people with education or people male or female would have the vote almost everybody had the vote from the start.

So, while this was an article of faith in the freedom movement there are debates at the assembly about whether we should adopt this before. While the political opposition to the British arguments were made that we must adopt universal adult franchise. These were questions that came up for discussion on the constituent assembly. So, Kunzru is the first view that we that we we encounter on this slide and Kunzru is hesitant about whether universal franchise is necessary at this stage of development.

He is particularly concerned that with universal franchise and with low levels of education and low levels of development that we might we might actually allow for a kind of demagogory or a demagogy. Allow for a popular authoritarian leader to emerge who can rouse the masses with rhetorical speeches and not allow them to be as he puts it they may not have the sense of discrimination and restrained on which the successful exercise of democracy depends.

So, Kunzru expressed his some skepticism about whether the Indian constitution should at this stage and he says may be 15 years later, 15 years later we could adopt universal adult franchise. In response, Alladi Krishnaswami Iyer goes in the opposite direction. He suggests that the ignorance and illiteracy of a large mass of Indian people is not a constraint and that we must adopt a principle of adult universal adult franchise.

Having faith in the common man in the certain native wisdom that we can assumeh that that that need not come from formal education, but might come from people who have a sense of a general sense of the good society that they want to build. So, he suggests that it is not the adoption of universal adult franchise is not a whimsical. It is one that recognizes that ultimately the governments must depend on the faith and confidence of the people.

So when large masses of people are illiterate and those who own property are so few any form of limit on the franchise would result in very minor base of people who would have the opportunity to elect their leaders. And hence as we know that Krishnaswami Iyer view wins out of this question there were other participant in the debates, but for the minor example that we have that his view wins out and India adopted universal adult franchise right on the start.

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Federalism

"The draft [Constitution], practically makes the Indian Union a Unitary State and not a Federal State. This tendency, I am afraid, will not make for what is called the strength of the Centre. I have read experts on constitutions and one of the accepted tests whether a country enjoys freedom is to see how far the units and the local bodies enjoy freedom and autonomy. This is a great impediment in the way of the States people agreeing to have a common constitutional set-up for the units. Before the States agree to come on a par with the provinces, they will have to be assured real autonomy, not autonomy to ignore the interests of the State as a whole, but sufficient powers and responsibility to manage their affairs well and efficiently."
-Kengal Hanumanthaiah, 8th November 1948, 731191 [Constitutionofindia.net]

"Democracy has got a tendency to let loose tickle emotions and disruptive forces. In the circumstances without a strong Centre, I do not think we can have a successful democracy. We are at the beginning of nation-building. The question is the survival of a nation in a world of international conflicts. If that is so, we have to decide in favour of a strong Centre. When you look at the grip of emotions and the centrifugal forces set adrift by the advent of democracy, you will find that for the sake of political welfare and security of law and order, there must be a strong Centre, so that the nation can survive."
-Annie Mascarene, 18th November 1949, 1115931 [Constitutionofindia.net]

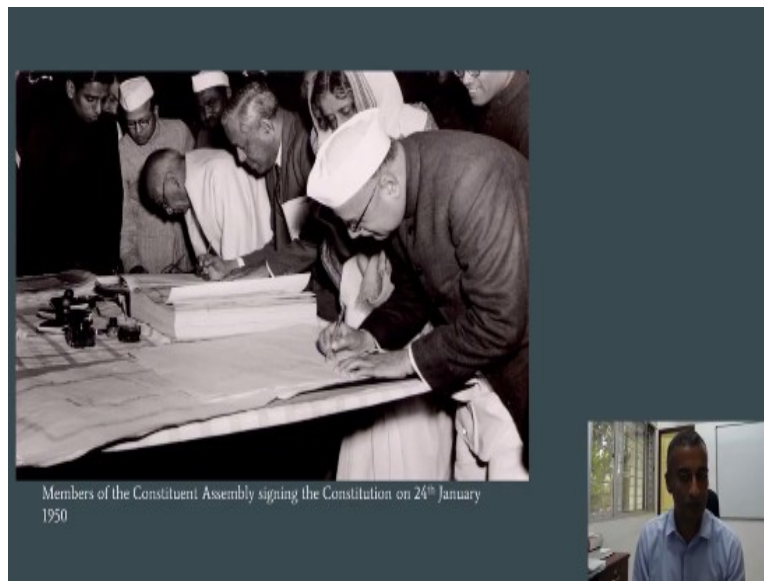
The third debate that we will spend a little bit of time and attention on is, the debate on federalism. Once again on federalism there were sharply divergent views about the nature of the balance power between the central government and the states. Kengal Hanumanthaiah in the first exerts says if you compare Indian constitution to other constitutions there seems to be a lack of freedom in autonomy to the states.

We seem to give the central government too much power and allow them to make their decisions that might over a period of time undermine the states and he expressed his skepticism about whether people coming from the princely states would be comfortable with this kind of strong central government. Annie Mascarene in response suggests that the international and the crisis context in which the Indian nation has emerged might require a strong central government.

It may be that if we do not have a strong central government, the nation itself may not survive due to both external pressures and internal pressures and hence she suggests that that a strong central government approach might be a way out. Now what is striking is that after partition of British India and the widespread and ugly violence that followed, the concentration of power in the center increased.

And we find that the constitution of India as we adopted it finally became a constitution that has a very strong a very strong emphasis on central power. So, those are three debates that we looked at to give us some idea of what the constitution making process was like.

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At the end of that process the members came together and signed a beautifully designed artistically produced document that is the original constitution of India and you can see in this photograph members lining up to put their signature on this document, copies of this document are available at various museums and universities and also images of these documents are available on the internet. And I would encourage to look at them not just for the the the text and the language, but the beautiful calligraphy and design.

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What is the constitution of India 1950, what is the putting all the part together, what does it look like? It is clearly a very long constitution we understand that. It is divided into 22 parts

each part has a title and these parts are subdivided into chapters which have specific titles. 395 articles altogether and there are numerous lettered articles in sub clauses. So, if you want to count every single clause in the constitution 395 is the way of under counting.

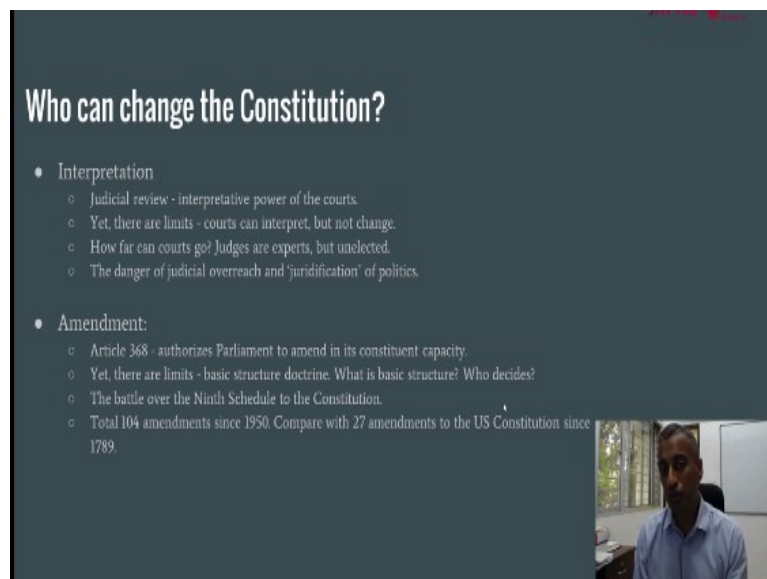
So, there are 12 schedules of the constitution, we have 395 articles and then 12 schedules. So parts, chapters, articles. The individual provision is called a article the sub provisions are called clauses and as if these were not long enough we added 103 amendments to the constitution and accounting. So, you have a long constitution made longer by amendments and that was the final output of the constituent assembly.

We must not romanticize or trivialized the kinds of hard choices that constitution making in the 1940s demanded. It was clearly a time when there was a high degrees of political consensus and goodwill among the political class while there were deep disagreements about many issues. The people who came together to make the constitution could agree on this common understanding of the standard rules of the game that they could all agree with.

How did they do this? They did this by arguing, deliberating in the assembly and no doubt they did this by bargaining. Bargaining both in the assembly and outside the assembly in the subcommittees elsewhere in the Congress Assembly Parties and then other corridors and homes, but this is the nature of all political documents and the Indian constitution has no exception.

By some combination of arguing and bargaining we have the artifact that we now call the constitution of India 1950. So, I trust at this point you have a fair idea of this this constitution making process. We will share some basic documents with you, reading with you that you can use to understand this at greater length.

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Who can change the Constitution?

- Interpretation
 - Judicial review - interpretative power of the courts.
 - Yet, there are limits - courts can interpret, but not change.
 - How far can courts go? Judges are experts, but unelected.
 - The danger of judicial overreach and 'juridification' of politics.
- Amendment:
 - Article 368 - authorizes Parliament to amend in its constituent capacity.
 - Yet, there are limits - basic structure doctrine. What is basic structure? Who decides?
 - The battle over the Ninth Schedule to the Constitution.
 - Total 104 amendments since 1950. Compare with 27 amendments to the US Constitution since 1789.

I now turn to the third of the 4 questions in week 2 of the course. I ask the question now that we have gone through painstaking process in making the constitution, is it unchangeable and for all times. I already referred to the 103 amendments. So, you know that there is a structure political process by which the constitution can be changed, but let us focus on the ways in which a constitution can change.

It is useful for us to understand the nature of the constitution as a living document. The first of these is through the process of interpretation. An interpretation related changes are occurring all the time. We look at the constitutional text and we take a word like say what is the right to life in article 21 of the constitution and that right to life meant in 1950 may be quite different from what the right to life means in 2020?

Just to give you two quick examples that was no claim in the 1950s that privacy and dignity were ingredients of the Right to Know. This is a relatively new recognition by the Supreme Court. So, courts through their power of interpretation allowed constitution to change, but notice that courts do not change the text of the constitution, they they change very slowly the interpretation the meaning of the constitution, but not change the text.

How far can courts go while interpreting the constitution? It is not there is no bright line test we understand that judges are experts and especially trained to conduct constitutional interpretation, but we aware that judges are not elected officials. They are they are occupy their positions by virtue of their expertise. So, they may interpret and move the constitution, but not alter it in a in a in a dramatic sense.

They also are aware that judges overstep these boundaries we raise concerns about what is the proper limits of judicial powers and whether by intervening in other political questions they are making a contribution or they are actually adjudifying politics or they are making politics to lead with politics to actually be more open ended. Now, these are more abstract and theoretical questions.

But I suppose for this session it is important for us to recognize that as a question of interpretation the constitution may change it is changing all the time. To be clear it is not only judges who interpret the constitution, parliament interprets the constitution while making laws and other policy. Key members of the executive branch interpret the constitution, lawyers are interpreting the constitution all the time.

Common citizens are interpreting the constitution and law teaches in legal academics are trying to write about how the constitution should be interpreted. So, interpretation is this widespread social exercise by which constitutional meaning may change and that is one important way in which the constitution is updated and changes. The second way is through the process of amendment. I have not yet taken you into provisions of the constitution, but I will mention one today article 368.

Article 368 allows parliament to amend the constitution, but when we say amend we may change the text of the constitution. Are these changes of the text of the constitution limited or unlimited? Can parliament change anything and everything and replace the constitution or are there some limit to this change? In Indian constitutional history we have a we have a developed a judicial doctrine that limits the extent to which a constitution can be changed by parliament which we call the basic structure doctrine.

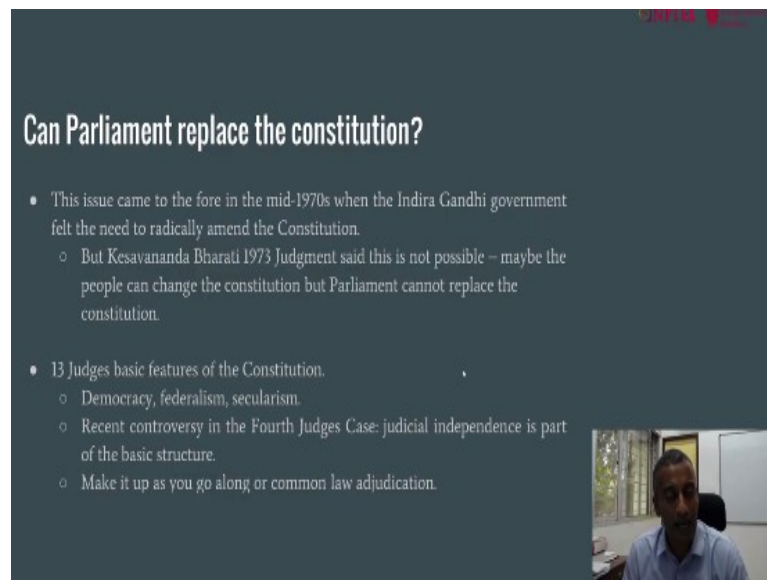
In my next slide and my next 3-4 minutes I am going to spend a little bit of time talking about the basic structure doctrine to give you a broad idea to what the nature of that limit would be. There are other instances here around the 9 schedule of the constitution that you might want to pay attention to if you are very interested in the question of constitutional limits.

Many people think that if we give the power to the judiciary to determine constitution the scope of constitutional amendment, then the judiciary will not be able to amend the constitution I mean will not allow the amendment of the constitution. And the constitution will freeze. There is no such fear because as we know we have 104 amendments since 1950 and I notice in my earlier slide as 103. It is not like an amendment is taking place in the last 4

minutes I clearly counter it wrong in the earlier slides. So, let us correct that to 104. 104 amendments since 1950 and other constitutions have been amended far less frequently.

And you will notice that since 1973 it is not like the amending powers of parliament have been unduly constrained.

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The slide is titled "Can Parliament replace the constitution?" and contains the following text:

- This issue came to the fore in the mid-1970s when the Indira Gandhi government felt the need to radically amend the Constitution.
 - But Kesavananda Bharati 1973 Judgment said this is not possible – maybe the people can change the constitution but Parliament cannot replace the constitution.
- 13 Judges basic features of the Constitution.
 - Democracy, federalism, secularism.
 - Recent controversy in the Fourth Judges Case: judicial independence is part of the basic structure.
 - Make it up as you go along or common law adjudication.

In the bottom right corner of the slide, there is a small video inset showing a man in a light blue shirt speaking.

Now can parliament replace the constitution? So, we so we are now trying to distinguish between two kinds of change. Ordinary piecemeal change and radical change of the constitution where the entire constitution may be replaced or a substantial part of the constitution may be replaced. This is both legally and politically a very different question from smaller changes of the constitution.

This issue has come to the fore in the 1970s when the Indira Gandhi government which felt that it was under a kind of political siege. A siege not just from the opposition, but from the court and from external forces and so on political history of the period gives us a rich idea of what is the key actors at that time might felt, but what it promoted the government to do was to make large amendments of the of the constitution.

And some of those amendments dealt with the election of the Prime Minister, other amendments dealt with property rights and so on and so forth. It was in this phase when large scale amendments of the constitution will be carried out that this was challenged in the Kesavananda Bharati case and the Kesavananda Bharati case which was decided in 1973 said this kind of radical amendments, radical constitutional change is not possible for parliament.

The court's judgment and the hearing related to court are very complicated, deserve close reading not something that I am going to do in this in this course, but what is important is that the court never said that nobody can change the constitution just the parliament cannot change the constitution maybe we can imagine whether that there are some other some other ways in which that can happen.

But the court has not clearly laid out what are these other ways in which a constitution may be changed in this radical fashion. So, it placed a very strong fetter on parliament, but this is a strong fetter on radical amendment, but not a strong fetter on everyday amendment which is carried on in the relatively underway. Now in Kesavananda, 13 judges sat on of the bench. One of the largest ventures that have ever been constituted in the Supreme Court and they outlined some basic features of the constitution.

They mentioned democracy, federalism, secularism. The idea that India is a sovereign republic among others and these issues this is not a fixed list the court may interpret and add basic features. For example, in the recent litigation around the national judicial (appoints) appointment commissions and what is known as the court judge case. The Supreme Court held that judicial independence is a principal that is part of the basic structure.

And any attempt to amend the constitution that affected this judicial independence would be struck down as constitutionally invalid. This power to declare constitutional amendments invalid as an exceptional power, it is not a power that one finds in many other common law jurisdictions or for that matter many other jurisdictions, but significantly there seems to be greater acceptance that this is a important and useful power in in in the comparative constitutional law academic discussion as well as court decision.

No, when you, many people loosely say of that if if indeed the Supreme Court says that the basic features at the constitution, they should tell us what they are and if they cannot tell us what they are they are just making it up. Tomorrow they will declare something else as a basic feature whatever catches the fancy of the venture of the day that this is the nature of the basic structure document and this does not seem to be the case.

For starters, the court has not enlarged the body of basic features in the constitution to a significantly. It has developed an incremental model or common law model of making decision one case at a time which is an acknowledged way of adjudication for a supreme

court on all other issues and the basic structure doctrine and the basic features of the constitution are not different.

So, let me stop here for lecture 2 of week 2 and broadly summarize. We began the four questions how should constitution be made? How did India make its constitution? Once you make a constitution can a constitution change? And can parliament replace the constitution? These are the 4 questions for week 2. We will come back with a few more resources and an assignment for you to do and look forward to having you back for week 3 next week. Thank you.