

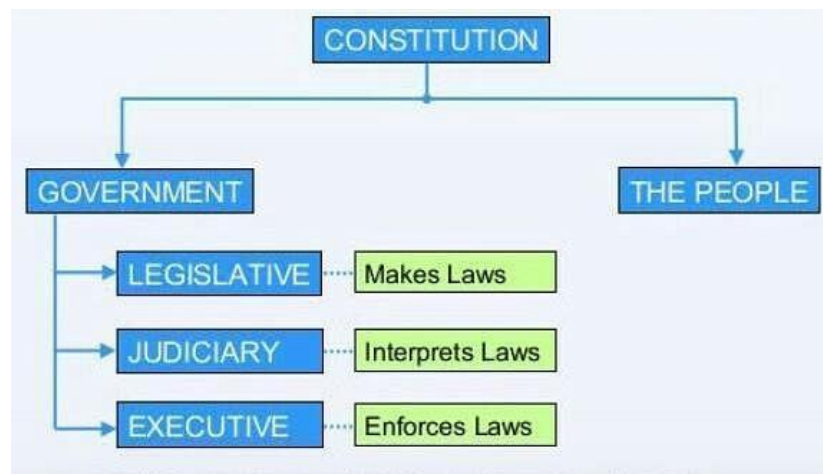
UPSC
NCERT Summary
Why do we need a Constitution – 1

Introduction:

What is a constitution? What are its functions? What role does it perform in society? How does a constitution relate to our daily existence?

The first function of a constitution is to provide a set of basic rules allow for minimal coordination amongst members of society.

Specification of Decision-Making Powers:



A constitution is a body of fundamental principles according to which a state is constituted or governed.

But what should these fundamental rules be? And what makes them fundamental?

Well, the first question you will have to decide is:

➤ **Who gets to decide what the laws governing the society should be?**

- You may want to rule X, but others may want to rule Y.

➤ How do we decide whose rules or preferences should govern us?

- You may think the rules you want everyone to live by are the best but others think that their rules are the best.

➤ How do we resolve this dispute?

So, even before you decide what rules should govern this group you have to decide: **Who gets to decide?**

The constitution has provided an answer to this question. It specifies the basic allocation of power in a society. It decides who gets to decide what the laws will be.

In principle, this question, who gets to decide, can be answered in many ways:

- In a **monarchical constitution**, a monarch decides, in some constitutions like the old Soviet Union, one single party was given the power to decide.



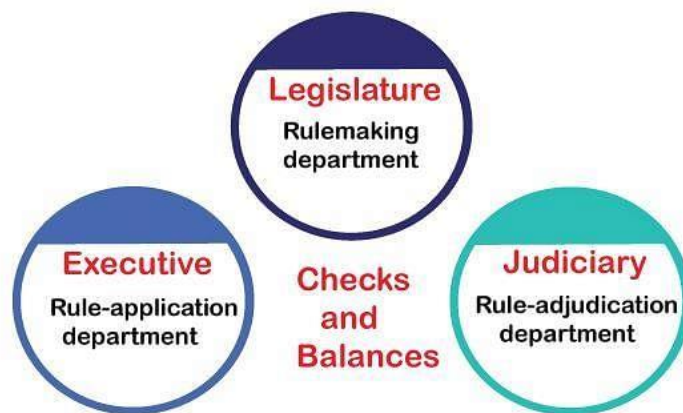
- But in **democratic constitutions**, broadly speaking, the people get to decide.
But this matter is not so simple, Because even if you answer that the people should decide, it will not answer the question: how should the people decide? For something to be law, should everyone agree to it? Should the people directly vote on each matter as the ancient Greeks did? Or should the people express their preferences by electing representatives? But if the people act through their representatives be elected? How many should there be?
- **This is the function of the constitution. It is an authority that constitutes government in the first place.**
- In the Indian Constitution, for example, it is specified that in most instances, **Parliament gets to decide laws and policies** and that Parliament itself be organised in a particular manner before identifying what the law in any given society is, you have to identify who has the authority to enact

it. If Parliament has the authority to enact laws, there must be a law that bestows this authority on Parliament in the first place.

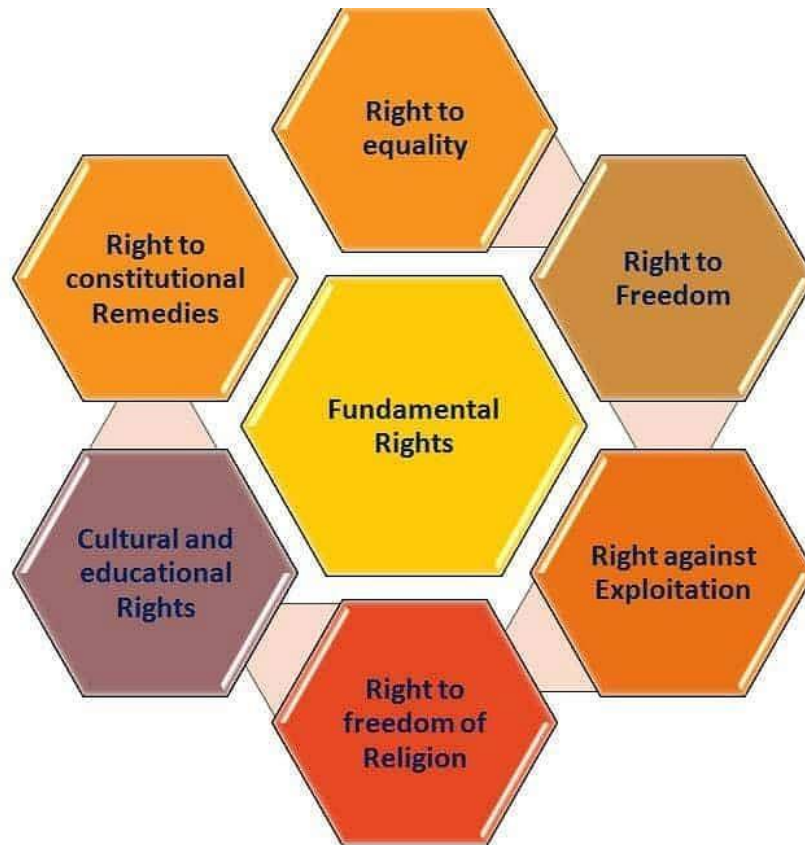
Limitations on the Powers of Government:

- But this is not enough. Suppose you decided who had the authority to make decisions. But then this authority passed laws that you thought were patently unfair. It prohibited you from practising your religion for instance. Or it enjoined that clothes of certain colour were prohibited, or that you were not free to sing certain songs or that people who belonged to a particular group (caste or religion) would always have to serve others and would not be allowed to retain any property. Or that government could arbitrarily arrest someone, or that only people of certain skin colour would be allowed to draw water from wells.

Separation of Powers- Checks and Balances



- You would think these laws were unjust and unfair. And even though they were passed by a government that had come into existence **based on certain procedures** there would be something not just about that government acting these laws.
- Constitution limits the power of government in many ways. The most common way of limiting the power of government is to specify certain **fundamental rights** that all of us possess as citizens and which no government can ever be allowed to violate. The exact content and interpretation of these rights vary from the constitution to constitution. But most Constitutions will protect a basic cluster of rights. Citizens will be protected from being arrested arbitrarily and for no reason.



- This is one basic limitation upon the power of government. Citizens will normally have the right to some basic liberties: to **freedom of speech, freedom of conscience, freedom of association, freedom to conduct a trade or business** etc. and practice, these rights can be limited during times of national emergency and the constitution specifies the circumstances under which these rights may be withdrawn.

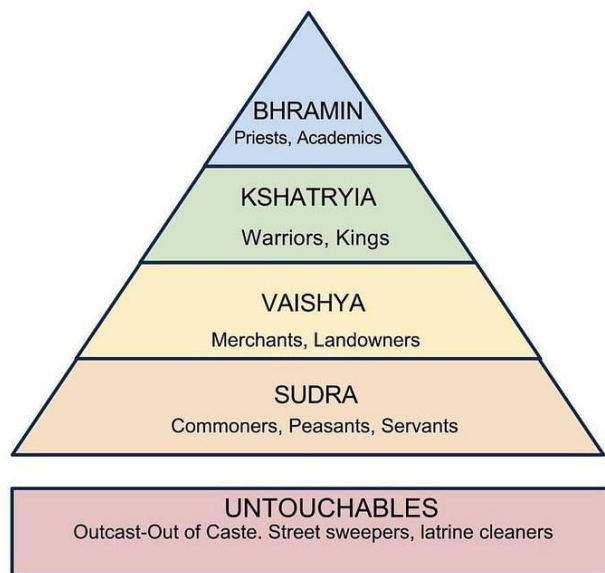
So, the third function of a constitution is to set some limits on what a government can impose on its citizens. These limits are fundamental in the sense that government may never trespass them.

Aspirations and Goals of Society:

- Most of the older constitutions limited themselves largely to **allocating decision making power and setting some limits to government power**. But many twentieth-century constitutions, of which the Indian Constitution is the finest example, also provide an enabling framework for the government to do certain positive things, to express the aspirations and goals of society. The Indian Constitution was particularly innovative in this respect.

- Societies with deeply entrenched inequalities of various kinds, will not only have to set limits on the power of government, but they will also have to **enable and empower the government** to take positive measures to overcome forms of inequality or deprivation.

Example: India **aspires** to be a society that is **free of caste discrimination**. If this is our society's aspiration, the government will have to be enabled or empowered to take all the necessary steps to achieve this goal. In a country like South Africa, which had a deep history of racial discrimination, its new constitution had to **enable the government to end racial discrimination**.



Indian cast system

- More positively, a **constitution may enshrine the aspiration of a society**. The framers of the Indian Constitution, for example, thought that each individual in the society should have all that is necessary for them to lead a life of minimal dignity and social self-respect — minimum material well-being, education etc.
- **The Indian Constitution enables the government to take positive welfare measures some of which are legally enforceable**. As we go on studying the Indian Constitution, we shall find that such enabling provisions have the support of the Preamble to our Constitution, and these provisions are found in the section on Fundamental Rights. The Directive Principles of State of Policy also enjoin the government to fulfil certain aspirations of the people.

The Fundamental Identity of a People:

- Finally, and perhaps even most importantly, a constitution expresses the fundamental identity of a people.
- **The fourth function of a constitution is to enable the government to fulfil the aspirations of a society and create conditions for a just society.**
- This means the people as a collective entity comes into being only through the basic constitution. It is by agreeing to a basic set of norms about how one should be governed, and who should be governed that one forms a collective identity. One has many sets of identities that exist before a constitution. But by agreeing to certain basic norms and principles one constitutes one's basic political identity.
- **Second**, constitutional norms are the overarching framework within which one pursues individual aspirations, goals and freedoms. The constitution sets authoritative constraints upon what one may or may not do. It defines the fundamental values that we may not trespass. So the constitution also gives one a moral identity. Third and finally, it may be the case that many basic political and moral values are now shared across different constitutional traditions.
- If one looks at constitutions around the world, they differ in many respects — in the form of government they enjoy in many procedural details. But they also share a **good deal**. Most modern constitutions create a form of government that is **democratic** in some respects, most claim to protect certain basic rights. But constitutions are different in the way they embody conceptions of natural identity.
- Most nations are an **amalgamation of a complex set of historical traditions**; they weave together the diverse groups that reside within the nation in different ways. For example, German identity was constituted by being ethnically German. The constitution gave expression to this identity. The Indian Constitution, on the other hand, does not make ethnic identity a criterion for citizenship.
- Different nations embody different conceptions of what the relationship between the different regions of a nation and the central government should be. This relationship constitutes the national identity of a country.

The Authority of a Constitution:

- We have outlined some of the function a constitution perform. These functions explain why most societies have a constitution.

- But there are three further questions we can ask about the constitution:
 - (i) What is a constitution?
 - (ii) How effective is a constitution?
 - (iii) Is a constitution just?
- In most countries, 'Constitution' is a compact document that comprises several articles about the state, specifying how the state is to be constituted and what norms it should follow. When we ask for the constitution of a country we are usually referring to this document. But some countries, the United Kingdom, for instance, do not have one single document that can be called the Constitution. Rather they have a **series of documents and decisions that, taken collectively**, are referred to the constitution.
- So, we can say that constitution is the document or set of documents that seek to perform the functions that we mentioned above.
- But many constitutions around the world exist only on paper, they are mere words existing on a parchment. The crucial question is: how effective is a constitution? What makes it effective? What ensures that it has a real impact on the lives of people? Making a constitution effective depends upon many factors.

Mode of Promulgation:

- This refers to **how a constitution comes into being**. Who crafted the constitution and how much authority did they have? In many countries, the Constitution remains defunct because they are crafted by military leaders or leaders who are not popular and do not have the ability to carry the people with them.
- The most successful constitutions, like India, South Africa and the United States, are constitutions which were created in the aftermath of popular national movements.
- Although India's Constitution was formally created by a Constituent Assembly between December 1946 and November 1949, it drew upon a long history of the nationalist movement that had a remarkable ability to take along different sections of Indian society together. **The Constitution drew enormous legitimacy from the fact that it was drawn up by people who enjoyed immense public credibility**, who could negotiate and command the respect of a wide cross-section of society, and who were able to convince the people that the constitution was not an instrument for the aggrandisement of their power.

- The final document reflected the broad national consensus at the time. Some countries have subjected their constitution to a full-fledged referendum, where all the people vote on the desirability of a constitution. The Indian Constitution was never subject to such a referendum but carried enormous public authority because it had the **consensus and backing of leaders** who were themselves popular. Although the **Constitution itself was not subjected to a referendum**, the people adopted it as their own by abiding by its provisions. Therefore, the authority of people who enact the constitution helps determine in part its prospects for success.

The Substantive Provisions of a Constitution:

- It is the hallmark of a successful Constitution that it gives everyone in society some reason to go along with its provisions.
 - (i) A Constitution that, for instance, allowed permanent majorities to oppress minority groups with society would give minorities no reason to go along with the provision of the Constitution.
 - (ii) Or a constitution that systematically privileged some members at the expense of others, or that systematically entrenched the power of small groups in society, would cease to command allegiance.
- If any group feels their identity is being stifled, they will have no reason to abide by the constitution. **No constitution by itself achieves perfect justice.** But it has to convince -people that it provides the framework for pursuing basic justice.
- Do this thought experiment. Ask yourself this question: What would be the content of some basic rules in society, such that they gave everyone a reason to go along with them?
- The more a constitution preserves the freedom and equality of all its members, the more likely it is to succeed. Does the Indian Constitution, broadly speaking, give everyone a reason to go along with its broad outlines?