

# INCREMENTALIST MAKING OF INDIAN CONSTITUTION: A 'BEHIND THE SCENES' STUDY

PRAYAGRAJ  
LAW REVIEW

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## INTRODUCTION: APPROACH TO MAKING CONSTITUTION IN A DIVIDED SOCIETY

*"Behind the scenes, lie the struggles of a having a flawless onstage"*

The making of the Constitution within a period of three years after establishment of the Constituent Assembly is perhaps one of the greatest achievements of India post-independence. However, the making of the Constitution was in itself a humongous and challenging task taking into account the size, diversity, and the complex problems that this newly formed nation presented. In fact, it is quite often said that what is done by the political leaders behind the scenes has more significance than what comes out in front of the public. This is true for the process of making of the Constitution of India as well. While the making of the Indian Constitution can and has been studied from many perspectives, including the rationale of different philosophies, the developed Jurisprudential aspects of societies inculcated in the different Constitutions or the presence of diverse portfolios in the Constituent Assembly and its impact on the final draft etc. Such studies are even conducted today. For example, a recent study<sup>1</sup> tried to decipher as the process of the making of the Constitution by analysing the assembly debate from various data heads such as which member spoke the most or which spoke the least and if the person who spoke the least, were its ideas presented in the Constitution. Also, what was the frequency of usage of certain words such as 'religion', 'education', 'health', 'language' etc. The purpose of such studies is to understand the frame of mind of the Constitution makers and how it was dealt with.

One of the major challenges before the Constituent Assembly was also to form a unified nation which presented its own difficulties. The draft of the Constitution was being prepared at a time when the nation had gained independence recently after centuries of colonial rule which was in fact preceded by autocracy. Furthermore, there was the issue of partition of the country which had seeds of communal disharmony and society divided on the factors such as religion, language, caste etc. Naturally, given the uncertainty, no one group was willing to compromise and had its own set of fears. It is quite apparent that even in the 21<sup>st</sup> century, the issues of religion or caste or language still trouble the Indian society. The examples of the Constitutional Amendment Act, 2019

(CAA)<sup>i</sup> and protest or the division of the State of Andhra Pradesh into Telangana substantiate this argument. Therefore, at such times where the emotions were at an all-time high, even the Constitution makers understood that an attempt to promote a homogenous national identity could be a very fragile and risky business.<sup>2</sup>In such a situation, what approach would have been the best to overcome such difficulties and still lay the foundations of a democratic and unified nation that stands the tests of time?

Historically speaking, constitution makers in many multi-ethnic and multi-cultural societies have tackled the challenge of fostering constitutional unity amidst religious, linguistic or ethnic differences<sup>1</sup> via varied alternative means such as different forms of federalism, power sharing, special group rights etc<sup>3</sup> and in fact been proved useful. However, such solutions are also applicable and successful based on a particular facts and circumstances, either geographical or societal circumstances and is primarily based on the idea of equal distribution of resources. Herein, also lies a drawback that such solutions fail to address divisions over the shared vision of a State as a whole.<sup>2</sup> Thus, it can be seen as a temporary effective tool but there no lies no guarantee that it would promote unity in the long run. The conflict in the Indian society lied in the fundamental norms and values that were to guide State policies for the entire population as a whole. The conditions in India at that time were so unstable that rigid decisions<sup>3</sup> could even have led to violent conflicts. The effects of partition of India substantiate this claim.

Based on the above premise, the author intends to explore the incrementalist approach of the Constitution makers based on creative usage of constitutional language which was adopted by the Constitution makers in light of the deep disagreements that existed over the vision of a unified States and in various debates related to ideology, the framers refrained from making unequivocal choices.

#### CONSTITUTIONAL INCREMENTALISM: A STUDY THROUGH THE ASSEMBLY DEBATES

Incrementalism can be defined as an approach wherein the amendments made are gradual and transitional instead of revolutionary given the needs and demands of the society. Leaders who adopt such an approach do not consider the enactment of the Constitution as revolutionary but as a transitional process that would gradually change the dynamics of the society as whole.<sup>4</sup> It is a beginning of a long journey and not the entire journey itself. In the Indian scenario, the constitutional incrementalism allowed the Assembly to circumvent potential explosive conflicts and shifted the burden of resolution of such debates to the future. The purpose of the approach was to allow a greater flexibility for future decisions about controversial questions accommodation of competing views of the people, which is the premise of this approach promotes a consensual democracy.

This part will now discuss three incrementalist strategies adopted by the Constitutional makers concerning

<sup>1</sup> Hari P. Bhattarai and Jhalak Subedi, *Democratic Constitution Making*, (1<sup>st</sup> edn, Nepal South Asia Centre, 2007)

<sup>2</sup> Hanna Lerner, 'Constitution-writing in deeply divided societies: the incrementalist approach', (2010) 16(1) *Nations and Nationalism* 68

<sup>3</sup> *Ibid* 77

India's religious and linguistic identity as well as State's economic policy.

## 1. DEFERRAL OF CONTROVERSIAL DECISIONS ABOUT NATIONAL LANGUAGE

One of the most controversial issues before the Constitution makers was *vis-à-vis* the national language of the Union. As later history tells us, many of the Indian states such as Punjab, Haryana, Gujarat, Tamil Nadu etc. have been formed on a linguistic basis<sup>4</sup>. Thus, there is no denial of the fact that language was an issue close to the hearts of the public. This complexity also stems from the fact that at the time of independence nearly twenty major languages were spoken in India.<sup>5</sup> In fact, Hindi which was the widest spread language amongst the public was spoken by less than 40 percent of the entire population. While the official language of the State had been English which was not acceptable by the Constitution makers.<sup>6</sup>

### a) Constitutional Assembly Debates

#### *i. In favour of Hindi:*

The Hindi speaking representative demanded the declaration of Hindi as a national language as replacement of the English Language and that a nation with one language and one script should be formed and there should not be a multiplicity of cultures.<sup>7</sup> It was argued that the adoption of Hindi language could be decided by the vote of majority.<sup>8</sup>

#### *ii. Against Hindi:*

The other faction contested the necessity of linguistic homogeneity and propagated the idea of unity in diversity.<sup>9</sup> This faction also opposed the adoption of the national language through majority vote as it would effectively be coercion.<sup>10</sup>

#### *iii. English as the de facto official language:*

While the Constitutional makers understand the practical difficulties of implementing Hindi as the national language of the Union, the role of English as the de facto language of law and government was stressed upon. This is due to the fact that it was already in usage<sup>5</sup> and a national language can be adopted by the entire nation only when it evolves into the society and accepted by all. Thus, it was argued that national language evolution should follow its own course.<sup>11</sup>

### b) Final Draft

The final solution that was arrived by the Assembly was the adoption of Hindi as an official language and a

<sup>4</sup> Mridula Chari, 'How the map of India was redrawn on the lines of language' (*Scroll.in*, 1 Nov 2016) <<https://scroll.in/article/820359/how-the-map-india-was-redrawn-on-the-lines-of-language>> accessed 24 June 2023

<sup>5</sup> Jason Baldridge, 'Reconciling Linguistic Diversity: The History and the Future of Language Policy in India' (August 1996) <<https://www.ling.upenn.edu/~jason2/papers/natlang.htm>> accessed 24 June 2023



national language. Further, English was to continue to be used for all official purposes. It was initially decided that such an arrangement would be for a period of 15 years and a parliamentary committee would be responsible for future course of action on the same.<sup>12</sup> Further, Schedule VIII of the Constitution recognized 14 other languages (at present 22) for official use. In this manner, the Assembly sustained the balance between its nationalist aspirations and their pragmatic realization.<sup>13</sup> It was realized that a fundamental choice regarding the identity of the State cannot be made through a constitutional provision but has to evolve over a period of time. In fact, English de facto remains the formal language of India till date.<sup>14</sup>

## 2. USE OF AMBIGUOUS AND VAGUE CONSTITUTIONAL FORMULATIONS CONCERNING PERSONAL LAWS

One of the most intense debates in the Indian history i.e., the religious debate was settled by formulating provisions relating to the same which were apparently vague. The debates ranged from the fact whether India has a religious identity and whether State can interfere in religious matters. Personal laws also became a focal point in this debate and so was the application of the Uniform Civil Code (UCC).

### a) Constitutional Assembly Debates

#### *i. In favour of UCC:*

One faction of the assembly argued to use legal power and status of the Constitution to modify religious customs and advance secularization<sup>15</sup> while also calling for restriction of religion to the private sphere and the promotion of unity and societal integration on the basis of civic national identity.<sup>16</sup>

#### *ii. Against UCC:*

The other faction vehemently opposed the secularization of personal laws<sup>17</sup> and propagated the idea that the constitution should reflect the spirit of the nation and should not impose deep cultural and social changes.<sup>18</sup>

#### *iii. Gradual changes*

Some of the members of the Assembly expressed the view that over-night changes in religious beliefs will not be possible as it is an inherent characteristic of the society that existed at that time and while the goal should be towards a Uniform Civil Code, it should be gradual and with the consent of the people.<sup>19</sup>

### b) Final Draft

The final solution that was arrived by the Assembly was that instead of dealing with personal laws in the Constitution, it was transferred to be a statutory legislation<sup>20</sup>. With regards to the Uniform Civil Code, it was included as a Directive Principles of State Policy (DPSP) which are non-justiciable.<sup>21</sup> Once again, the decision made was not a clear-cut decision but left at the whims of the future leader and to decide upon the same when

the time was ripe.

### 3. NON-JUSTICIABLE DIRECTIVE PRINCIPLES OF STATE POLICY

This feature is one of the most innovative aspects of the Constitution which has been borrowed from the Irish Constitution.

#### c) Constitutional Assembly Debates

##### iv. Against DPSPs:

One faction of the Assemble vehemently criticized the Directive Principles of State Policy as mere pious expressions<sup>22</sup> and were too vague<sup>23</sup> and abstract<sup>24</sup> and being inoperative<sup>25</sup>, meaningless due to the unbinding character<sup>26</sup>.

##### v. In favour of DPSPs:

The other faction of the Assembly believed such provisions to be the essence of the Constitution<sup>27</sup> and as guide for governance.<sup>28</sup> It was argued that it was adopted because it has value to the State.<sup>29</sup> It was also propagated that the Constitution also wishes to lay down an

ideal before those who would be forming the government and hence, the directives are a necessary inclusion.<sup>30</sup>

#### C. AUTHOR'S COMMENTS ON THE INCREMENTALIST APPROACH: TOO LITTLE, TOO LATE?

Author Amish Tripathi in his fictional Shiva trilogy has propagated an idea that anything in this universe has its utility for good for a limited time span and when it passes that time span, it then turns into bad. As discussed above through the concepts of incrementalist approach and the constitutional assemble debates, the purpose of adopting such an approach was to delay societal imbalance at the time of independence and move toward forming a cohesive society in a gradual manner which had to be worked out by future governments. Incremental constitutional change is better for deeply divided nations such as India as it seeks to protect the interests of contrasting ideologies and gradually seek to promote oneness among the citizens. It minimizes friction by focusing on evolution rather than a revolution. It deems Constitution as a start of a long journey and rather than its end. That even after approximately seventy years of independence, the Indian society still remains intact is a testament to the fact that the incrementalist approach has worked to keep the nation together as one democratic one.

Constitutional arrangements have been adopted even at an international scale. The Constitution of Indonesia, included a religious permissive formula which defined the religious identity of the State in vague terms. Ambiguous constitutional arrangements were adopted concerning issues of religious identity and gender equality in the new Constitution of Tunisia. For deeply divided societies, incrementalist approach serves as an

alternative towards the liberal constitutional mechanisms.

However, the purpose that one sought to achieve through this approach is to avoid intense conflicts based on factors such as religion, language, caste etc. This approach made sense at that time but has it finally outdone its utility. The CAA protests in recent times have shown that factors such as religion still haunt the Indian society. Even after so many years, the leaders have just delayed the implementation of fundamental policies and efforts to bring about a change have not been very effective. In the age of social media, where one tweet can create havoc in the entire society, it seems unlikely that any fundamental ideology change or the gradual change or evolution of thoughts as the Constitution makers sought to achieve, can now be done. This is where the fundamental fallacy of the incrementalist approach lies. This approach has a tendency to perpetuate rather than mitigate. Conflicts over issues of religion and secularism, or a uniform language or caste still exist and look unlikely to be resolved unless a fundamental change in policy is brought about. It has ultimately resulted in overburdening India's political and judicial institutions and serves no other purpose. While the conflict may have been avoided then, the Constitution and the society still remains at a standstill as there not have been may efforts for a resolution. But it is also a fact that such an arrangement has worked as Indian still remains the world's largest democracy. But can it sustain or is it too little, too late to avoid the inevitable?

*(Views expressed are personal and do not represent views of any organization)*

<sup>1</sup> Shivkumar Jolad and Yugank Goyal, 'What our Constituent Assembly debates reveal of a vital process' (Mint, 25 Nov 2021) <<https://www.livemint.com/opinion/online-views/what-our-constituent-assembly-debates-reveal-of-a-vital-process-11637857451306.html>> accessed 24 June 2023

<sup>2</sup> Hannah Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011)

<sup>3</sup> John McGarry, Brendan O'Leary, and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' (eds) *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008) 41–88

<sup>4</sup> Christine Bell, 'Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison' (2014) 3 Public law 446

<sup>5</sup> Ugo M Amoretti and Nancy Bermeo, *Federalism and Territorial Cleavages* (Johns Hopkins University Press, 2004)

<sup>6</sup> Constituent Assembly Deb 13 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1410

<sup>7</sup> Constituent Assembly Deb 12 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1328

<sup>8</sup> Constituent Assembly Deb 12 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1327

<sup>9</sup> Constituent Assembly Deb 14 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1433

<sup>10</sup> Constituent Assembly Deb 13 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1389

<sup>11</sup> Constituent Assembly Deb 14 September 1949, vol 9 (Lok Sabha Secretariat 1986) 1457

<sup>12</sup> Constitution of India 1950, art 343

<sup>13</sup> Sunil Khilnani, *The Idea of India* (Farrar, Straus and Giroux, 1999)



- <sup>14</sup> Paul R Brass, *Language, Religion and Politics in North India* (Cambridge University Press, 1974)
- <sup>15</sup> Constituent Assembly Deb 23 November 1948, vol 7 (Lok Sabha Secretariat 1986) 548–49
- <sup>16</sup> Constituent Assembly Deb 23 November 1948, vol 7 (Lok Sabha Secretariat 1986) 548
- <sup>17</sup> Reba Som, 'Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?' (1994) 28 *Modern Asian Studies* 165
- <sup>18</sup> Constituent Assembly Deb 23 November 1948, vol 7 (Lok Sabha Secretariat 1986) 542–43
- <sup>19</sup> Constituent Assembly Deb 23 November 1948, vol 7 (Lok Sabha Secretariat 1986) 542
- <sup>20</sup> Reba Som, 'Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?' (1994) 28 *Modern Asian Studies* 165
- <sup>21</sup> Constitution of India 1950, art 44: 'The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.'
- <sup>22</sup> Constituent Assembly Deb 5 November 1948, vol 7 (Lok Sabha Secretariat 1986) 225 (Naziruddin Ahmad); Constituent Assembly Deb 19 November 1948, vol 7 (Lok Sabha Secretariat 1986) 473 (Kazi Syed Karimuddin); Constituent Assembly Deb 19 November 1948, vol 7 (Lok Sabha Secretariat 1986) 478, (KT Shah); Constituent Assembly Deb 23 November 1948, vol 7 (Lok Sabha Secretariat 1986) 539 (B Das)
- <sup>23</sup> Constituent Assembly Deb 5 November 1948, vol 7 (Lok Sabha Secretariat 1986) 244 (Kazi Syed Karimuddin)
- <sup>24</sup> Constituent Assembly Deb 5 November 1948, vol 7 (Lok Sabha Secretariat 1986) 25 (PS Deshmukh)
- <sup>25</sup> Constituent Assembly Deb 19 November 1948, vol 7 (Lok Sabha Secretariat 1986) 491 (Hussain Imam)
- <sup>26</sup> Constituent Assembly Deb 19 November 1948, vol 7 (Lok Sabha Secretariat 1986) 473 (Kazi Syed Karimuddin)
- <sup>27</sup> Constituent Assembly Deb 6 November 1948, vol 7 (Lok Sabha Secretariat 1986) 277 (Thakur Das Bhargava).
- <sup>28</sup> Constituent Assembly Deb 6 November 1948, vol 7 (Lok Sabha Secretariat 1986) 277 (Thakur Das Bhargava)
- <sup>29</sup> Constituent Assembly Deb 19 November 1948, vol 7 (Lok Sabha Secretariat 1986) 475
- <sup>30</sup> Constituent Assembly Deb 19 November 1948, vol 7 (Lok Sabha Secretariat 1986) 494