

**WE, THE PEOPLE.....**

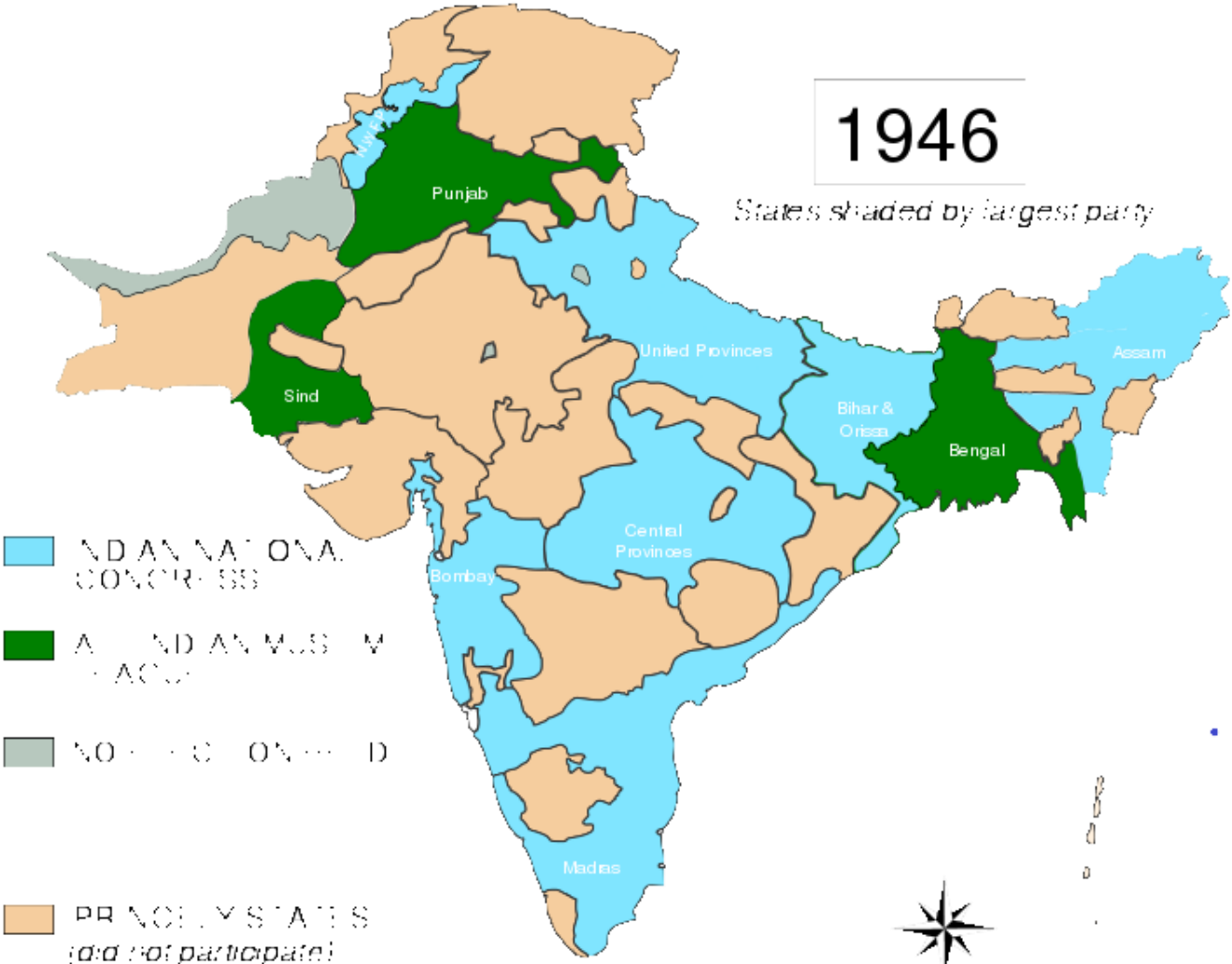
# Government of India Act, 1935

The total electorate in the 1946 Provincial Assembly Elections was **41 million which was 14% of the total estimated population** of 300 million. Adjusting for age, **the electorate was 28% of the total population of voting age (+21 years)** .

While the British ruled Provincial Assemblies elected **292 members** of the Indian Legislative Assembly, the Princely States sent **93** selected representatives, **4 members** represented the Chief Commissioners' Provinces.

# 1946

States shaded by largest party

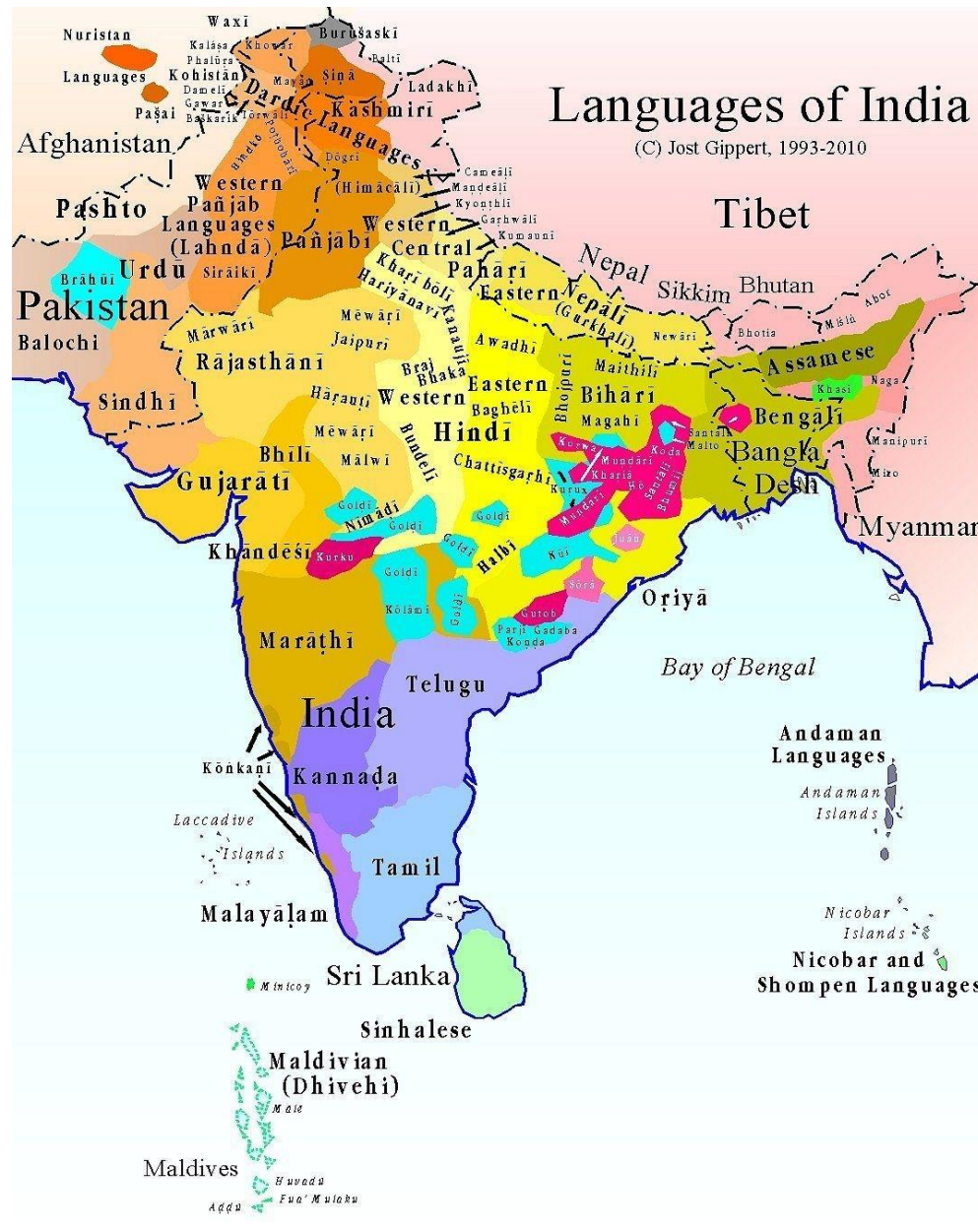


- Indian National Congress
- All India Muslim League
- Non-participated
- Princely States (did not participate)

Scale bar: 0 100 200 miles



0  
100  
200  
300  
400  
500  
600  
700  
800  
900  
1000



# Union of (unequal) States

Constitution divided States into

Part A – former British Provinces

Part B - former Princely States

Part C - former Chief Commissioner's Provinces  
and some smaller Princely States

Part D – Andaman and Nicobar

# Rajendra Prasad

"We can adopt for ourselves any Constitution we like. **But the Constitution which we have drafted is a copy of the constitutions of Western countries. There is nothing new in it !** For example, we believe in democracy. We feel it necessary to have adult franchise, which means, and therefore, our Constitution provides, that whether a person is illiterate or learned, a saint or a thief, a man of good character or a wicked man - the value of his vote is the same.

# Character and Integrity

"Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. **That will depend upon the men who administer it. ....**If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. **If they are lacking in these, the Constitution cannot help the country.** After all, a Constitution, like a machine, is a lifeless thing. **It acquires life because of the men who control it and operate it and India needs today nothing more than a set of honest men who will have the interest of the country before them."**

# High Qualifications

"I would have liked to have some qualifications laid down for members of the Legislatures. It is anomalous that we should insist upon high qualifications for those who administer or help in administering the law but none for those who make it except that they are elected. A law-giver requires intellectual equipment but even more than that, capacity to take a balanced view of things to act independently and, above all, to be true to those fundamental things of life – in one word – to have character



# Character and Ability

Not only this; but even those who will be elected to our legislatures and on whom will devolve the responsibility of running the administration - they need not have any true or special qualifications. Every man, however unworthy he may be - whether that unworthiness arises out of lack of education, culture or want of character - is entitled to be elected and to represent the people. We desire the good of the country. We desire that all its nationals should prosper. But does not this require both character and ability? If that is so, we are making no specific provision for these in our Constitution because we do not find it in any constitution in the West.

# Character and Knowledge,

If we could devise some method by which knowledge and character, and character even more than knowledge, would be required of those who would be called upon to run the administration of the country, we should make an original contribution to constitution making. But we have not been able to do so; for our minds have been so influenced and molded by Western thought that we cannot see or grasp a non-Western idea or concept. This is not our fault, but the fault of the kind of education we have had. "

# Regrets

- It is not possible to devise any yardstick for measuring the moral qualities of a man and so long as that is not possible, our Constitution will remain defective.
- The other regret is that we have not been able to draw up our first Constitution of a free Bharat in **an Indian language**. The difficulties in both cases were practical and proved insurmountable. But that does not make the regret any the less poignant.

# First Breach

High Courts of Bombay, Allahabad and Patna in 19 January- 8 February 1950 declared British period laws allowing detention of citizens under “public security” clause as unconstitutional

**On 25 February 1950, Preventive Detention Act enacted by Provisional Parliament**

# Second Breach

- Communist and RSS publications censored and banned
- Bombay and Madras High Courts strike down orders. Supreme Court on 25<sup>th</sup> May 1950 upholds the High Court and says only cause for denying free speech was as per proviso (2) to Article 19

# More Breaches

- Madras High Court strike down Communal GO giving preference in state educational institutions to some citizens and discriminating against others
- Bombay High Court strikes down nationalisation of bus routes
- Punjab High Court strikes down Sections 124A and 153A of IPC – sedition and spreading enmity clauses

# Last Straw

- High Courts of Patna and Allahabad strike down Zamindari Abolishment Acts as unconstitutional
- (Congress -governed) Provinces appeal to Supreme Court

# General Elections

- To be elected by full adult franchise – first time in history.
- Postponed as promises made now been declared unconstitutional
- General Elections postponed
- Constituent Assembly (selected by Provincial Assemblies) continues after it drafted and ratified the Constitution as a Provisional Parliament



# Solution ?

- Nehru introduces Constitution (First Amendment) Bill on 12<sup>th</sup> May 1951 to the Provisional Parliament
- 15 months after the Constitution was promulgated, the battle to protect it began in the same body that enacted and ratified it

# Constitution Protects Itself

- Fundamental Rights (Part III)
- Article 13 (2): “The State shall not make **any law** which takes away or abridges the rights conferred by this Part and **any law** made in contravention of this clause shall, to the extent of contravention, be void”.
- So only an Constitutional Amendment will serve the purpose – later Supreme Court in *Golaknath* says amendment is also a “**law**” as per Article 13 (2)

# Article 19 (1)(a) Freedom of Speech & Expression

- *Original Proviso (2) :*
- “libel, slander, defamation, contempt of court, or any matter that offends against decency, or morality or which undermines the security of , or tends to overthrow the State”
- *Proviso (2 ) substituted with:*
- “**Reasonable restrictions** in the interests of the security of the State, **friendly relations with foreign states, public order**, decency or morality or in relation to contempt of court, defamation or incitement to an offence”

# Article 19 (1)(g) Freedom to Practice any Profession, Occupation or Business

- *Additional Proviso 19(6)(ii) added:*
- “the carrying of by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise”

# Article 15 (Non-Discrimination)

## *Original Proviso:*

- 15(3) Nothing in the article shall prevent the State from making any general provisions for women and children
- *Additional Proviso:*
- **15(4)...special provision for the advancement of any socially and educationally backward classes or for the Scheduled Castes or Scheduled Tribes**

# Article 31 ( right to property and compensation for loss)

- *Two new Article added*
- 31A: Acquisition by the State or any estate or of any rights therein or the extinguishment or modification of any such rights.....etc
- 31B: Validation of specified in the **Ninth Schedule**...notwithstanding any judgement, decree or order of any court or tribunal to the contrary

# Golak Nath 1967

- Since according to Article 13(2), Parliament could not make **any law** that abridges the Fundamental Rights contained in Part III of the Constitution, a **constitutional amendment, also being an ordinary law** within the meaning of Article 13, could not be in violation of the Fundamental Rights.

# Judicial Restraint ?

- Court declared that the decision will not affect the validity of the existing constitution amendments in taking away or abridging the fundamental rights. It declared, however, that in future Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights.



# Indira/ India Triumphs

- 10<sup>th</sup> March 1971 Indira Congress sweeps the Parliamentary General Elections
- 25<sup>th</sup> March 1971 Pakistan Army represses East Pakistanis. 10 million Hindus seek refugee in India
- Major Crisis develops
- 3 December 1971 Indian Armed Forces proceed to liberate Bangladesh

# Domestic Counter- Strike

- On 5 November **1971** Parliament passes the 24th Amendment in 1971 to abrogate the Supreme Court judgement. It amended the Constitution to provide expressly that Parliament has the power to **amend any part of the Constitution including the provisions relating to Fundamental Rights.**

# Kesavananda Bharati 1973

- The Supreme Court held that the Parliament under the Indian Constitution is not supreme, in that it cannot change the **basic structure** of the Constitution. It also declared that in certain circumstances, the amendment of fundamental rights would affect the **basic structure** and therefore, would be void.

What is the “Basic Structure” of the Constitution ?

Whatever the Supreme Court says it is?

# Justice Jaganmohan Reddy

- preferred to look to the Preamble
- A sovereign democratic republic.
- The provision of social, economic and political justice.
- Liberty of thought, expression, belief, faith and worship.
- Equality of status and opportunity.

# Conceptual Problems

- Lack of similar concepts on Indic traditions and, therefore, languages.
  - Religion (profession, practice and propagation)
  - Conscience
  - Race
  - Secularism
  - Democracy
  - Socialist
  - Fraternity
  - Equality

Which is why it took 40 years to draft a Hindi version –  
inventing terms in Hindi for European concepts

Is there an Indic constitutional approach that can be  
expressed in any Indic language?

# Size of Constitutions

<b>Country</b>	<b>Ratified on</b>	<b>Words</b>
• Japan	May 3, 1947	4,998
• US	June 21, 1788	7,762
• China	December 4, 1982	10,960
• Russia	December 12, 1993	12,908
• Czech	December 16, 1992	14,580
• Swiss	April 18, 1999	16,484
• Australia	January 1, 1901	17,318
• Singapore	August 9, 1965	40,076
• Pakistan	August 14, 1973	56,240
• India	November 26, 1949	146,385

# Constitutional Options

- Continue with the Constitutional amendment process (105 amendments and counting) as determined by majorities in Parliament.
- Go back to the original Constitution of 1950
- New Constitution
  - Short one containing only fundamental rights and state's rights (“basic Structure”)
  - Leave all the rest to general legislation
  - Judiciary to act as protector of constitutional rights