

Introduction

1 Definition of Constitution “Constitution is the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be.”¹ In other words, Constitution is a basic and fundamental charter that outlines the governmental structure, allocates powers and duties of the Government, establishes basic decision-making procedures, and places limitations upon governmental activities. The Constitution was to Justice Holmes not primarily a text for dialect but a means of ordering the life of a progressive people. While its roots were in the past, it was projected for the unknown future.² Thus, a Constitution is the fundamental organic law by which a state or nation is governed. It may be said that its object is to establish the essential foundation and the general framework of Government and to provide the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.³ It can also be said that a Constitution is the original law by which a system of Government is created and set up, and to which the branches of Government must look for all their power and authority.⁴

2 Constitutional Convention

(i) *U.S.A.* A “Constitutional Convention” is not a co-ordinate branch of the Government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no force as long as they remain propositions.⁵

(ii) *United Kingdom.* At all periods in English constitutional history it has been necessary for the legislature and the executive to act in harmony if the Government is to be carried on efficiently. It is in order to effect this object that constitutional conventions, which have varied from age to age, have been devised. Today, as in the past, much of the practical working of the Constitution depends

1 *India Cement Ltd. v State of Tamil Nadu* AIR 1990 SC 85 (para 16); (1990)1 SCC 12 (21, 22). See also *S.S. Bola v B.D. Sardana* (1997)8 SCC 522 (para 77) (The Constitution is the supreme law; the legislature derives the sovereign will of the people to enact the law subject to the Constitution).

2 Felix Frankfurter: *Mr. Justice Holmes and the Supreme Court*, p. 60.

3 Samuel P. Weaver: *Constitutional Law and Its Administration* (1946 Ed.), pp. 1-2.

4 16 CJS (§ 1a).

5 *State v Doyle* 70 SO 322 (323).

less upon substantive law enforced by the courts than upon conventional usages founded partly upon the precedents and partly upon the needs of the time which may be said for practical purposes of Government to have acquired the force of customary law.⁶

(iii) *India*. The conventions generally grow when the powers of the Government are vested in different persons or bodies or where in the words of Sir William Holdsworth, there is a mixed Constitution. But conventions do presuppose the law and any convention contrary to the written context is of no validity. The conventions are built, in the first instance on the foundation of law but once they are established they tend to form the basis for the law. These rules of law which are conventions are a mere matter of practice and their effect must change with the changing circumstances of national life. Implications arising from the provisions of the Constitution, constitutional conventions and constitutional practice all stand on different footings. A constitutional convention when spread over a long period of immemorial antiquity followed invariably becomes entrenched as a rule of law, but any convention contrary to the written provision of the Constitution is of no validity. A constitutional convention must be founded on some provision of law. Any convention contrary to the provision of the Constitution and basic intendment cannot be given effect to as a convention. Its genesis must be in the provision itself.⁷

3 Constitutional law Constitutional laws are those laws which relate directly to the form of Government that is to exist, and to the allotment of powers to, and the imposition of limitation upon, the several governmental organs and functionaries.⁸ In the context of the British Constitution "Constitutional law is that part of English law which relates to the system of Government of the country. The United Kingdom has no comprehensive document or documents of particular sanctity that might be said to embody the Constitution', but there is a framework of rules defining the functions, composition and interrelationship of the institutions of Government, and the rights and duties of the governed."⁹ The term "constitutional law" is most commonly employed to designate provisions of the character usually found in Constitutions or to designate that branch of jurisprudence which treats of the nature, formation, amendment, operation and interpretation of Constitutions. It is also employed to designate the law which is not violative of the express or implied restrictions on legislative action contained in a Constitution.¹⁰ There can be no clear cut distinction between what could or should and what could not or should not be comprehended within the body of rules called "constitutional law". A Constitution should contain nothing more than the barest possible outlines of the structure of the

6 Halsbury's *Laws of England*, 4th Ed., vol. 8, para 817.

7 *S.P. Gupta v President of India* AIR 1982 SC 149; 1981 (Supp) SCC 87; (1982)2 SCR 365 (per DESAI, J.).

8 W.W. Willoughby: *The Fundamental Concepts of Public Law* (1924 Ed.), p. 84.

9 Halsbury's *Laws of England*, 4th Ed., vol. 8, para 801. See also E.C.S. Wade and Godfrey Phillips: *Constitutional Law*, 8th Ed., p. 4.

10 16 CJS (§ 3).

Government of a country. The rest, whether “constitutional law” or not, could be done by the exercise of ordinary legislative powers.¹¹

*Sir Ivor Jennings*¹² says that in the United States there is a division of powers not only between the public authorities of the United States, but also between the public authorities of the United States on the one hand and of the separate States on the other. In the United States as in Canada and Australia there is a large body of judicial decisions rendered by the courts in dealing with questions as to distribution of powers.

4 Federal and State Constitutions—distinguished The Federal Constitution is distinguishable from State Constitutions in that the former is regarded as primarily a grant of power, whereas State Constitutions are usually regarded not as grants, but as limitations, of power, at least in so far as the State Constitution affects the legislative power.¹³

5 Federalism ‘Federalism’ connotes the co-existence of several individual states and of another state territorially co-terminous with the constituent states collectively, the persons within which constituent states are directly subject as well as to the governmental powers of the Federal State as to those of their own respective constituent states.¹⁴ The essential characteristic of federalism is the distribution of limited executive, legislative and judicial authority among bodies which are co-ordinate with and independent of each other. The supremacy of the Constitution is fundamental to the existence of a Federal State in order to prevent either the legislature of the federal unit or those of the member State from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. The supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of scheme of distribution of powers.¹⁵ It is to be noted that for mitigation of rigidity in Federal Constitution Dr. Ambedkar suggested several measures in his speech on Draft Constitution of India.¹⁶ The federal principle is dominant in the Constitution of India and that is one of the basic features, but that federalism leans in favour of a strong centre.¹⁷ The foundation for a federal set-up for India was laid in the Government of India Act 1935. Though the distribution of legislative power between the Union and States as envisaged in the 1935 Act has not been adopted in every respect in the Constitution of India, yet the basic frame work of federalism is the same in both of them.¹⁸

6 Federation and confederation Federation in the true sense should be distinguished from confederation. Both concepts connote some form of union

11 *State of Karnataka v Union of India* (1977)4 SCC 608; AIR 1978 SC 68 (para 67).

12 *The Law and the Constitution*, 5th Ed., pp. 62–63.

13 16 CJS (*Constitutional Law*), § 99, 104.

14 W.A. Wynes: *Legislative Executive and Judicial Powers in Australia*, 5th Ed., p. 1.

15 *In re, under Art. 143, Constitution of India* AIR 1965 SC 745 (762).

16 *Constituent Assembly Debates*, vol. VII, p. 34.

17 *Kuldip Nayar v Union of India* AIR 2006 SC 3127 (para 58A).

18 *Prof. Yashpal v State of Chhattisgarh* (2005)5 SCC 420 (para 12).

between States differing from a mere alliance in that the former involves some element of permanency while the latter is generally of temporary character or established for a specific purpose. In a confederation each of the constituent States retains its governmental powers, for the central body is not completely organised Government, its decrees being neither enforceable against the states by any executive action, nor binding as such upon the individuals residing within them—the states are the units and not the inhabitants. In a Federal State the central body is a fully organized Government possessing legislative, executive and judicial powers and the Constitution and laws passed by the Central Government in pursuance of it are, as such, binding upon the individuals who reside within the Federal State.¹⁹

7 Federal State “A Federal State is a real state at international law, the essential difference between it and the confederation being that federal organs have direct power not only over the member states, but over the citizens of these states. Examples includes Australia, Canada, Germany, and the United States of America. In most Federal States, external policy is conducted by the federal government, but historically there have been exceptions to this rule. For example, the member states of the pre-1919 Federal Germany were to some extent states at international law; they could conclude treaties, appoint and receive envoys, etc., and questions of law affecting their relations were decided according to international law.”²⁰ An effective federation is to be found in the British North America Act 1867.²¹ A Federal Council of Australasia Act passed in 1885 is now superseded by the federating Commonwealth of Australia Constitution Act 1900.²² There are some common subjects in respect of which the Federal Parliaments under the British North America Act 1867²³ and the Commonwealth of Australia Constitution Act 1900²⁴ may legislate. These matters (ordinarily similar) are: (1) Trade and Commerce; (2) Taxation; (3) Quarantine; (4) Marriage and Divorce; (5) Weights and Measures; (6) Legal Tender; (7) Copyrights and Patents; (8) Naturalisation and Aliens; (9) Bills of Exchange and Promissory Notes; (10) Criminal law; (11) Postal service; (12) Military and Naval service.

8 Flexible and rigid Constitutions—distinction The outstanding characteristic of a flexible Constitution like the British Constitution as contrasted with a rigid one like Indian Constitution is the unlimited authority of the Parliament to which it applies, to pass any law without any restrictions. In a rigid Constitution, there is a limitation upon the power of the legislature by something outside itself. There is a greater law than the law of the ordinary legislature and that is the law of the Constitution which is of superior obligation unknown to a flexible Constitution. It does not follow that because of Constitution is written, it is therefore rigid. There can be a written Constitution which is

19 W.A. Wynes: *Legislative, Executive and Judicial Powers in Australia*, 5th Ed., p. 2.

20 Starke: *International Law*, 11th Ed., p. 104.

21 30 & 31 Vict C 3; and the Constitution Act 1982.

22 63 & 64 Vict C 12.

23 See s. 91.

24 See s. 81.

flexible. The “sole criterion of rigid Constitution is whether the constituent assembly which drew up the Constitution left any special direction as to how it was to be changed.” If a special procedure is prescribed by the Constitution for amending it, different from the procedure for passing ordinary law, then the Constitution is rigid.²⁵

9 Kinds of Constitution Constitutions are broadly classed, with respect to form, as written or unwritten, and with respect to origin and history, as enacted or conventional and evolved or cumulative. Enacted Constitutions may be democratic or monarchical.²⁶

10 Has the United Kingdom a Constitution? Anthony King in the Hamlyn Lectures on “Does the United Kingdom still have a Constitution?”²⁷ has said that all but universal admiration for the British system of Government did not last.²⁸ Understandably though illogically, Britain’s decline in the world seems to have led to a decline in respect for Britain’s Constitution. “Why admire the British Constitution when there was so little else about Britain deserving of admiration?”²⁸ According to Professor Anthony King the various changes brought about in the United Kingdom’s Constitution between 1970 and 2000 and especially between 1997 and 2000 amounted to a constitutional revolution in the United Kingdom. These changes are mainly the following. First change occurred when the U.K. entered into the European Economic Community on 1st January 1973 by the alteration of the U.K.’s Constitution. The second change was adoption of popular referendums as part of the British Constitution. The third is the changing position of local Government. The fourth is the increase in judicial review. The fifth is the changes in country’s party system. The sixth is the handing over of control over interest to the Bank of England. The seventh is the devolution of power to Scotland and Wales. The eighth is the devolution of power to Northern Ireland. The ninth is the creation of a new local authority for London. The tenth is the introduction of new electoral system. The eleventh is the Human Rights Act which came into force in Scotland in July 1999, in Northern Ireland in December 1999 and in England and Wales in October 2000. The twelfth is the less significant role played by the House of Lords in the U.K.’s constitutional system.

A significant change is the composition of the Supreme Court with all the senior Law-Lords of the House of Lords who have vacated their seats in the Upper Chamber of Parliament. The object of such change in the Constitution of the United Kingdom is to separate the judicial power from the legislative power.

25 *Kesavananda v State of Kerala* AIR 1973 SC 1461 (1910, 1911).

26 16 CJS (§ 2).

27 Published under the auspices of the Hamlyn Trust by London Sweet & Maxwell (2001).

28 *Ibid*, p. 52.

one another". Even so until municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter. A.H. Robertson in "Human Rights—in National and International Law" rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law.¹³

6 Doctrine of "act of State", not to apply It is well settled that the doctrine of an "act of State" cannot be pleaded by a State as a defence against its own citizens. An "act of State" is an act done in relation to a foreigner by the sovereign power of a country or its agent either previously authorised or subsequently ratified.¹⁴

7 New York Convention Where Art. V(1)(e) of the New York Convention provides that it is not binding on the parties, the law to be applied is the law of the country governing arbitration proceeding under which award was made.¹⁵

Part IVA

FUNDAMENTAL DUTIES

51A. Fundamental duties. It shall be the duty of every citizen of India—

- (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- (c) to uphold and protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;

13 *Jolly George Vaghese v Bank of Cochin* AIR 1980 SC 470 (para 6); see *C.R.V. Committee v Union of India* AIR 1983 Kant 85 (para 18).

14 *B.K. Mohapatra v State of Orissa* AIR 1988 SC 24 (para 5).

15 *Oil & Natural Gas Commission v Western Co. of N. America* AIR 1987 SC 674 (para 15).

(j) to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement.

¹[(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years].

1 Amendment Article 51A was inserted by the Constitution (Forty-second Amendment) Act 1976 with effect from 3rd January 1977.

2 Constitution (Ninety-third Amendment) Bill 2001 which is called as the Constitution (Eighty-sixth Amendment) Act 2002 By this amendment cl. (k) is to be added, namely, "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years".

3 Analogous Constitution In Switzerland it is the duty of every citizen to undergo four months basic military training followed by at least three weeks a yearly duty stint. "Rights and Duties of the People" of Japan have been included in Chapter III of the Constitution of Japan 1946 (Articles 10 to 40).

4 International Charter This Article corresponds to Art. 29(1) of the Universal Declaration of Human Rights 1948.

5 Fallacy removed It was a fallacy to think prior to the Forty-second Amendment of the Constitution that there were only rights and no duties of citizens of India.²

6 Legal utility The fundamental duties of citizens are duties of individual citizens. They cast no public duties which alone can be enforced by a writ of *mandamus*.³ The fundamental duties enumerated in Art. 51A are addressed to the citizen. He owes this duty to the State, the country and the nation. These duties are not enforceable through a court of law. The legal utility of the fundamental duties is not even similar to the Directive Principles which are addressed to the State. There is no Article with reference to fundamental duties similar to Art. 31C of the Constitution which elevates the status of Directive Principles to higher plane than providing a mere guideline for the State Policy. Thus, there is no fundamental duty on a petitioner to safeguard public property.⁴ Article 51A gives right to the citizen to move the court for the enforcement of the duty cast on the 'State' under the particular law of the State.⁵ Non-appointment of prosecutor for a pretty long period confers a

1 Inserted by the Constitution (Ninety-third Amendment) Bill 2001 which is called as the Constitution (Eighty-sixth Amendment) Act 2002.

2 *C.B. Boarding & Lodging v State of Mysore* AIR 1970 SC 2042 (para 13).

3 *Surya Narain v Union of India* AIR 1982 Raj 1 (para 19); see *Muslim Mission v State* AIR 1980 AP 246.

4 *Grahaka Jagruti v State of Karnataka* AIR 1985 NOC 128 (Kant).

5 *L.K. Koolwal v State* AIR 1988 Raj 2.

constitutional mandate on a citizen under Art. 51A to compel the concerned authority to act.⁶

(i) *National Flag and National Anthem.* Article 51A(a) enjoins a duty on every citizen of India "to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem". Proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing.⁷

(ii) *Ecological imbalance.* Article 51A(g) proclaims it to be the fundamental duty of every citizen of India "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures". When the court is called upon to give effect to the Directive Principle and fundamental duty, the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority.⁸ This is the first case of its kind in the country invoking the issues relating to environment and ecological balance.⁹ The Supreme Court in *R.L. & E. Kendra, Dehra Dun v State of U.P.*,¹⁰ had issued certain directions in respect of limestone quarries in Dehra Dun District. The question which remained to be considered was whether the mine lessees can be allowed to carry on mining operations without in any way adversely affecting environment or ecological balance or causing hazard to individuals, cattle and agricultural lands. It is held that it is for the Government and the Nation and not for the court to decide that question. The Government should take a policy decision and firmly implement the same.

(iii) *Violation of Art. 51A(f).* The violation of Art. 51A(f) cannot be pleaded when there was no evidence evidencing that any attempt had been made to ask the State to protect any monument or any application had been made to the State seeking intervention and action. Besides, the enforcement of the duty under Art. 51A(f) by means of Art. 32, in the facts and circumstances of the case is not warranted.¹¹

7 Enforceability of fundamental duties The fundamental duties as incorporated in Art. 51A of the Constitution should not be treated either appendage or surplusage to the Constitution. The former Chief Justice of India MR. JUSTICE J.S. VERMA has observed that "the Fundamental Duties incorporated in Art. 51A of the Constitution are" not "mere reminder to the citizens with no enforceability to ensure their compliance. These duties are not only sacrosanct but also have the element of compulsion requiring obedience provided the

6 *State of Rajasthan v Pemaram* 1989 Cr LJ 1071 (Raj).

7 *Bijoe Emmanuel v State of Kerala* AIR 1987 SC 748 (para 9).

8 *Shri Sachidanand Pandey v State of West Bengal* AIR 1987 SC 1109 (para 4).

9 *Rural Litigation & Entitlement Kendra v State of U.P.* AIR 1987 SC 359 (para 17).

10 AIR 1985 SC 652.

11 *Ramsharan Autyanuprasi v Union of India* AIR 1989 SC 549 (para 14).

machinery of the State appreciates its true nature and motivates the implementation machinery towards this end.”¹²

8 Fundamental duties in other Constitutions Article 51 of the Constitution of Sri Lanka provides for fundamental duties which are more or less similar to those included in Art. 51A of the Constitution of India. Article 21 of the Constitution of People’s Republic of Bangladesh lays down the duties of citizens and public servants of Bangladesh.

Part V

THE UNION

Chapter I

THE EXECUTIVE

The President and Vice-President

52. The President of India. There shall be a President of India.

Analogous Constitutions This Article corresponds to (i) Article II, s. 1(1) of the Constitution of the United States; (ii) Article 12(1) of the Constitution of Eire 1937.

53. Executive power of the Union. (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this Article shall—

- (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or
- (b) prevent Parliament from conferring by law functions on authorities other than the President.

1 Analogous Constitutions This Article corresponds to (i) Article II, s. 1(1) of the Constitution of the United States; (ii) section 61 of the Commonwealth of Australia Constitution Act 1900; (iii) sections 9 of the British North America Act 1867; (iv) Article 12(1) of the Constitution of Eire 1937; and (v) section 7(1) of the Government of India Act 1935.

¹² See Operationalization of the Suggestions to Teach Fundamental Duties to the Citizens of the Country. Interim Report of the Committee set up by the Government of India, 30th January 1999, at p. 21.