



FACULTY OF JURIDICAL SCIENCES

Course : BALLB , 3rd Semester

Subject : CONSTITUTIONAL LAW I

Subject code : BAL304

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Constitutional law - I

OBJECTIVE: The objective of this paper is to provide understanding of basic concepts of Indian Constitution and various organs created by the constitution including their functions.

UNIT – I

- Salient features of the Indian Constitution.
- Preamble
- Definition of State (Art. 12)
- Doctrines of Ultra-vires, severability, eclipse, waiver (Art, 13)

UNIT-II

- Right to equality (Art. 14)
- Prohibition of discrimination, Rights to equality of opportunity (Art. 15-16)
- Right to freedom under Article 19: Freedom of association; Freedom of movement;
- Freedom of residence; Freedom of assembly; Freedom of association; Freedom of
- movement; Freedom of residence; Freedom of occupation, trade and business;
- Right to take out processions; Right of the State to impose reasonable restrictions

UNIT – III

- Protection in respect of Conviction under Article 20,
- Ex-post-facto law; Double jeopardy; Self-incrimination;
- Right of Life and Personal Liberty (Art. 21),
- Protection in respect of arrest and detention
- Right to freedom of religion (Articles 25-28)

UNIT – IV

- Cultural and Education Rights (Articles 29-30)
- Enforcement of Fundamental Right, Writ Jurisdiction of the Supreme Court and
- High Court (Article 32, 226)
- Right to property before and after the Constitution 42nd Amendment Act, 1976

- Abolition of Untouchability, Titles (Articles 17-18)
- Right against exploitation (Articles 23, 24)

Suggested Readings:

1. Austin Granville: Constitution of India: Cornerstone of a Nation; and Working A Democratic constitution
2. NarenderKumar : Constitutional Law of India.
3. Basu D. D : Shorter Constitution of India
4. Jain, M.P.: Constitutional Law of India,
5. Seervai, H.M. : Constitutional Law of India, Vols. I-III
6. Shukla, V.N. : Constitutional of India (ed. M.P.Singh)
7. B.R. Sharma : Constitutional Law and judicial Activism
8. M.C. Jain Kagzi : The constitution of India
9. B. Shiva Rao: The Framing of India's Constitution

LECTURE 2

Directive Principles: Directive Principles of State Policy. A unique aspect of the Constitution is that it comprises of a chapter in the Directive Principles of State Policy. These principles are in the nature of directives to the government to implement them to maintain social and economic democracy in the country.

It exemplifies important philosophies such as adequate means to livelihood, equal pay for both men and women, distribution of wealth so as to serve the common good, free and compulsory primary education, right to work, public assistance in case of old age, unemployment, sickness and disablement, the organisation of village Panchayats, special care to the economically disadvantaged group in country. Most of these principles could help in making India welfare state. These principles have been stated as; "fundamental in the governance of the country".

Parliamentary System and Amendment Procedures:

Parliamentary System: The Constituent Assembly decided to espouse Parliamentary form of government both for the Centre and the states. A parliamentary system is a system of democratic governance of a state where the executive branch derives its democratic legitimacy from the legislature and is also held responsible to that legislature. In a parliamentary system, the head of state is normally a different person from the head of government. In Indian parliamentary system, distinction is made between nominal and real executive head. The Council of Ministers is responsible before the Lok Sabha, The lower house of union parliament. There are close relations between executive and legislature. The tenure of the Council of Ministers is not fixed as it stays in office till it enjoys the confidence (Shashishekar Gopal Deogaonkar, 1997).

Figure: Structure of Indian parliament



There are limited powers of parliament in Indian constitution:

It can pass laws on those subjects which have been entrusted to it by the constitution.

The bills passed by the Parliament need the approval of the President.

The Supreme Court can exercise the powers of judicial review over the laws passed by the parliament and can declare unconstitutional the laws which it considers are against the constitution.

Amending the Constitution of India: Amending the Constitution of India is the procedure of making modifications to the nation's fundamental law or supreme law. The procedure of amendment in the constitution is laid down in Part XX (Article 368) of the Constitution of India. This procedure guarantees the sanctity of the Constitution of India and keeps a check on uninformed power of the Parliament of India.

Though, there is limitation imposed on the amending power of the constitution of India, which developed during conflicts between the Supreme Court and Parliament, where Parliament wants to exercise discretionary use of power to amend the constitution while the Supreme Court wants to restrict that power. This has led to the laying down of various principles or rules in regard to checking the validity/legality of an amendment. The most famous among them is the Basic structure doctrine as laid down by the Supreme Court in the case of *Kesavananda Bharati v. State of Kerala*.

The Constitution of India offers a distinctive amending process when comparing with the Constitutions of other nations. It can be defined as partly flexible and partly rigid. The Constitution provides for a variety in the amending process. This feature has been commended by Australian academic Sir Kenneth Wheare who realized that uniformity in the amending process imposed "quite unnecessary restrictions" upon the amendment of parts of a Constitution. An amendment of the Constitution can be initiated only by the introduction of a Bill in either House of Parliament. The Bill must then be approved in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. There is no provision for a joint sitting in case of disagreement between the two Houses. The Bill, passed by the required majority, is then presented to the President who shall give his assent to the Bill. If the amendment seeks to make any change in any of the provisions mentioned in the proviso to article 368, it must be approved by the Legislatures of not less than one-half of the States. Although, there is no set time limit for ratification, it must be completed before the amending Bill is presented to the President for his assent.

Every constitutional amendment is articulated as a statute. The first amendment is called the "Constitution (First Amendment) Act", the second, the "Constitution (Second Amendment) Act". Each amendment has the long title "An Act further to amend the Constitution of India".

Judicial Review:

The judiciary has significant position in Indian Constitution and it is also made independent of the legislature and the executive. The Supreme Court of India stands at the peak of single integrated judicial system. It operates as defender of fundamental rights of Indian citizens and guardian of the Constitution.

The entire judicial system of India is systematized into a hierarchical order. Supreme Court is at the highest position of judicial administration below that there are high courts at the state level and there are district courts at the district level. All the courts of India are bound to accept the decisions of the Supreme Court.

Figure: structure of the judiciary



The constitution of India makes provisions for the independence of judiciary because only independent judiciary can protect the rights and authorities of the people, can protect the supremacy of the constitution:

In judiciary:

1. - An impartial method has been implemented for the appointment of the judges.
2. - High qualifications have been fixed for the judges.
3. - The judges of the Supreme Court stay in office till 65 years of age and of High courts till 62 years of age.
4. - Difficult method has been espoused for the elimination of the judges as they can be removed only through impeachment by the union parliament.
5. - There is prohibition of practice after the retirement of the judges.

If any law passed by the legislature or action taken by the executive contravenes the provisions of the Constitution, they can be declared as null and void by the Supreme Court. Therefore, it has the power of judicial review. Judicial Review denotes to the power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive void, if it finds them in conflict to the Constitution of India.

In Indian constitution, the judiciary is provided with the power of judicial review through the constitution which means that all the laws passed by the parliament and State Legislatures, constitutional amendments, ordinances and executive orders issued by the executive are reviewed by the judiciary and in case judiciary finds that any one of these is against the constitution, the judiciary has the power to declare it unconstitutional.

After independence, the inclusion of explicit provisions for judicial review were compulsory in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Dr. B.R. Ambedkar, who headed the drafting committee of Indian Constituent Assembly, had described the provision related to the same as the 'heart of the Constitution'. Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.

While judicial review over administrative action has grown on the lines of common law principles such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since Article 246 of the Constitution read with the 7th schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures.

Judicial Review is the power of the Judiciary by which:

The court reviews the laws and rules of the legislature and executive in cases that come before them; in litigation cases.

The court determines the constitutional validity of the laws and rules of the government.

The court rejects that law or any of its part which is found to be unconstitutional or against the Constitution.

But judicial review in India constitutes a middle path between the American judicial supremacy in one hand and British Parliamentary supremacy in the other.

Basic Structure doctrine:

The basic structure doctrine is an Indian judicial norm that the Constitution of India has certain basic features that cannot be changed or destroyed through amendments by the parliament.

The "basic features" principle was first explained in 1964, by Justice J.R. Mudholkar in his disagreement, in the case of *Sajjan Singh v. State of Rajasthan*. He wrote, "It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?"

The basic features of the Constitution have not been openly defined by the Judiciary. At least, 20 features have been described as "basic" or "essential" by the Courts in numerous cases, and have been incorporated in the basic structure. In *Indira Nehru Gandhi v. Raj Narayan* and also in the

Minerva Mills case, it was witnessed that the claim of any particular feature of the Constitution to be a "basic" feature would be determined by the Court in each case that comes before it.

Several aspects of the Constitution termed as "basic" are mentioned below:

1. Supremacy of the Constitution
2. Rule of law
3. The principle of Separation of Powers
4. The objectives specified in the Preamble to the Constitution
5. Judicial Review
6. Articles 32 and 226
7. Federalism (including financial liberty of states under Articles 282 and 293)
8. Secularism
9. The Sovereign, Democratic, Republican structure
10. Freedom and dignity of the individual
11. Unity and integrity of the Nation
12. The principle of equality, not every feature of equality, but the quintessence of equal justice
13. The "essence" of other Fundamental Rights in Part III
14. The concept of social and economic justice - to build a Welfare State: Part IV in toto
15. The balance between Fundamental Rights and Directive Principles
16. The Parliamentary system of government
17. The principle of free and fair elections
18. Limitations upon the amending power conferred by Article 368
19. Independence of the Judiciary
20. Effective access to justice
21. Powers of the Supreme Court under Articles 32, 136, 141, 142
22. Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act

Important elements among these "basic features", are the fundamental rights granted to individuals by the constitution. The policy forms the basis of a limited power of the Supreme Court to review and strike down constitutional amendments passed by the Parliament which conflict with or seek to alter this "basic structure" of the Constitution. The basic structure doctrine applies only to constitutional amendments. The basic structure doctrine does not apply to ordinary Acts of Parliament, which must itself be in conformity with the Constitution.

Initial position of the Supreme Court on constitutional amendments was that no part of the Constitution was unamendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of article 368, amend any provision of the Constitution, including the Fundamental Rights and article 368.

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*. It held that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" and are beyond the reach of Parliament. It also declared any amendment that "takes

away or abridges" a Fundamental Right conferred by Part III as unconstitutional. By 1973, the basic structure doctrine succeeded in Justice Hans Raj Khanna's judgment in the landmark decision of *Kesavananda Bharati v. State of Kerala*. Previously, the Supreme Court had held that the power of Parliament to amend the Constitution was unfettered. However, in this breakthrough ruling, the Court referred that while Parliament has "wide" powers, it did not have the power to destroy or weaken the basic elements or fundamental features of the constitution.

Although Kesavananda was decided by a narrow margin of 7-6, the basic structure doctrine has since gained widespread approval and legality due to subsequent cases and judgments. Primary among these was the imposition of a state of emergency by Indira Gandhi in 1975, and her subsequent attempt to suppress her trial through the 39th Amendment. When the Kesavananda case was decided, the underlying apprehension of the majority bench that elected representatives could not be trusted to act responsibly and was perceived as unparalleled. However, the passage of the 39th Amendment by the Indian National Congress' majority in central and state legislatures, proved that in fact such apprehension was well-founded. In *Indira Nehru Gandhi v. Raj Narain and Minerva Mills v. Union of India*, Constitutional Benches of the Supreme Court used the basic structure doctrine to knock down the 39th Amendment and parts of the 42nd Amendment respectively, and paved the way for restoration of Indian democracy. The Supreme Court's position on constitutional amendments laid out in its judgements is that Parliament can amend the Constitution but cannot destroy its "basic structure".

To summarize, all these features of the Indian Constitution is a constitution suitable to the Indian environment. The Constitution assist India to organise and operate government and administration in an effective way both in the times of peace and war. The basic structure of the Constitution and its most fundamental features are Preamble, Fundamental Rights, and Directive Principles.

Choose the correct option

6. **On which date constitution of India was adopted and enacted by the constituent assembly?**
 - a. august 15, 1947
 - b. January 26, 1950
 - c. November 26, 1949
 - d. January 30, 1948

1. . **Which of the following is called 'Mini Constitution'?**

- (A) Government of India Act, 1935
- (B) 42nd Constitutional Amendment
- (C) 44th constitutional amendment
- (D) Government of India Act, 1919

2. **Which of the following statements is false?**

- (A) Most of the structure of the Indian Constitution has been taken from the Government of India Act, **1935**.
- (B) The original constitution had 10 schedules
- (C) The political part of the Indian Constitution is taken from the British Constitution
- (D) Article 368 is related to the constitutional amendment

3. **Which of the following is not a feature of Indian parliamentary system?**

- (A) majority party power
- (B) Presence of Actual Executive and Nominal Executive
- (C) Appointment of Executive to the Legislature
- (D) All of the above

4. **Which of the following is not matched correctly?**

- (A) Part I: Union and its Territories
- (B) Part II: Citizenship
- (C) Part III: Directive Principle and State Policy
- (D) Part VI: State Governments