

# Modern constitutions



INTRODUCTION In the modern era of development and technological advancements, a constitution is a necessity of every country in order to have an organised institutional authority. The constitution may be written, unwritten, codified or uncoded. The most general classification of a constitution is codification or lack of it. The constitution delves into the very essence of law and its various implications and consequences. It defines the administration and execution of the land. The book MODERN CONSTITUTIONS by K. C.

Wheare talks about the modern constitutions of the various countries of the world and their varied influence on the respective countries. The book ‘Modern Constitution’ by K. C. Wheare is an exhaustive commentary on the nature of Constitution set of legal rules which regulate the system of government of that particular country. The book is a comprehensive, incisive and clear study of modern Constitutions, their classification, the authority they can claim on moral, legal and political grounds and different changes that may take place in such Constitutions as a result of amendments, judicial interpretations or usage and convention.

The book traces the chequered history of the evolution of Constitutions of different nations and how such Constitutions acquired the status of ‘fundamental law’ of the land. It enumerates in detail about what a Constitution should ideally contain so as to evoke the respect due to a supreme law and be eligible for all communities. The book reveals to us how the Constitutions of different nations tend to reflect the dominant beliefs or interests which are characteristic of the society at that time. It describes Constitution as ‘a resultant of a parallelogram of forces-political, economic

and social- which operate at the time of its adoption. The book gives us an overview of how and why some nations attribute the title of ' fundamental law' to their Constitution and other nations treat it at par with ordinary law. It explains the need to have Constitution in a country and its significance. The book, therefore, reveals to us the intricacies of the forming of constitutions across different nations and its impact on the system of governance. Chapter 1: WHAT A CONSTITUTION IS The first chapter deals with basic understanding of the Constitution. The author explains in details the very meaning of the word Constitution, the ambit of the word and its influence over the country.

The word constitution is used to define the whole system of the government of a country. It is an assortment of partly legal rules where the courts would identify and apply them and extra-legal rules in the form of usage, understandings, customs or conventions. In every country other than Britain, the word constitution is used in a narrower sense. It is used to describe a selection of rules which has been embodied in one document or in a few closely related documents and it is a selection of legal rules only. The most famous example of such constitution would be that of United States of America.

The wider meaning of the word " constitution' is the older meaning; It is the meaning which Bolingbroke intended when he wrote in his essay " on Parties. " By constitution we mean whatever we speak with propriety and exactness that assemblage of laws, institutions and customs derived from certain fixed principles of reason. However in this book ' Constituion'will be used in the narrow sense of the term, this doesn't mean we will solely

confine ourselves to the study of that selection of legal rules to regulate government which is found in a country's constitution. This selection doesn't operate in isolation.

Legislatures are not the only source of legal rules. Constitutions are supplemented and modified by rules of law which emerge from the interpretations of the Courts and outside the realms of the legal rules, Constitutions may be supplemented or modified or even be nullified by usages, customs and conventions. In some countries only one of the considerations mentioned above may operate, in others some and in some all. It would seem, therefore that the sort of influences which led other countries to adopt Constitution either did not apply to England, or operated too late or were overborne by stronger contrary influences.

This is not to say that Britain could not have a Constitution. It may come about that public opinion strongly demands that the powers of the parliament be legally limited by a Constitution as those of the parliament of Eire are, and this opinion might prevail. CHAPTER 2: HOW CONSTITUTIONS MAY BE CLASSIFIED. The second chapter in the book deals with topic how Constitutions may be classified. The first classification of the Constitution would be written and unwritten Britain being a part of the latter class. The truth about Britain can be stated by not saying that she has an unwritten Constitution but by saying she has no written Constitution.

But even if we overlook the exceptions to the general equation of rules of law and non-legal rules with written and unwritten rules respectively, we cannot agree that there is any country, least of all the United Kingdom which

has a system of government embodied solely in written rules or solely in unwritten rules. Constitution may be classified according to the method by which they may be amended. One category of those which can be amended by the legislature thought the same process as any other way another category of those which require a special process. The first category has few examples one being New Zealand.

This method of classification is known as rigid and strict method of classification into flexible and rigid constitutions. Where no special process is required, a Constitution is called rigid. The fact that the ease or the frequency with which a Constitution is amended depends not only on the legal provisions which prescribe the method of change but also on the predominant political and social groups in the community and the extent to which they are satisfied with or acquainted in the organization and distribution of political power which the constitution prescribes.

There is another method of classifying, Constitutions are divided into a category of those which are supreme over the legislature that is to say, which cannot be amended by the legislature-and those which are now, This classification involves a sub category of rigid. Some examples are United States, Australia, Switzerland. The classification of Constitutions into federal, unitary and confederate is based upon the principle by which the powers of government fir the whole country and any governments which may be established for its constituent parts.

It is necessary to notice in conclusion a method of classifying Constitutions which was once considered to be of prime importance, merely a

classification into republican and monarchical Constitutions. It will have been seen that few of the methods by which Constitution may be classified expose differences that are significant, and it may be classified expose differences that are significant and it may be wondered whether it is really worthwhile to attempt such classification.

CHAPTER 3: WHAT A CONSTITUTION SHOULD CONTAIN. This chapter tells us about the ingredients of a constitution and what a constitution should contain. The author primarily talks about as to what actually defines a constitution and gives it, its own unique characteristic. The author gives us an overview of the characteristic of an ideally best form of Constitution. For that he has made references to a number of constitutions namely that of the U. S. A. , U. S. S. R. , Ireland, United Kingdom, Denmark and France.

The author is of the view that although constitutions are drafted according to the needs of a particular country, yet there are some basic features which can be found in the constitutions of like countries (either federal government or unitary government) and for this purpose he gives the examples of the lists i. e. the Union List, State List and Concurrent List, then goes on to explain the concept of rights and the approach of the legislatures and the courts to interpret those rights and finally concludes by enlightening on the subject of directive principles of state policy.

The author also talks about the difficulties and the problems which the framers of Constitutions might have faced. The framers of unitary Constitution encounter troubles which the framers of a federal Constitution may have to encounter. The author in detail has explained the insertion of

declaration of rights in Constitutions and the qualification attached to their exercise. He has explained this approach by citing various examples. The author has also enumerated the reasons and objects for inserting a declaration of right namely to reduce or abolish arbitrary power.

The author states that some framers, in order to safeguard the rights inserted, have regarded these rights as a statement of desirable objectives. However the author is of the view that the interpretation of these objects of policy will create conflict between the Constitution, legislature and the Courts. The author concludes by mentioning about the importance and necessity of a preamble to the Constitution and how most of the countries have a preamble to their Constitutions which states the supreme rules of law. Chapter 4: AUTHORITY OF A CONSTITUTION.

This chapter is perhaps the most educative part of the book as it deals with the legislative history of the origins of the various constitutions of different countries. The author has taken a brilliant approach in explaining the authority of a constitution and he has provided reasons both on legal and moral grounds. According to the author the very nature of the Constitution asserts superiority over other institutions. A Constitution should not be construed in the same way and on the basis of similar principles as any other law.

The supremacy of the Constitution is demonstrated by the very fact that it is a product of body which has the authority to make supreme law. Similarly the moral grounds on which a Constitution can claim authority are the same as those which define obedience to ordinary law. Morally the Constitution

can command obligation because it is an expression of the will of the people and what the people have laid down is binding on every individual. Most of the constitutions claim to possess the authority not of law but of supreme law. A constitution must follow that it has superiority over the institutions it creates.

In *Marbury v. Madison* case it was stated that all those who have framed written constitution contemplate them as forming the fundamental and paramount law of the nation and consequently, the theory of every such govt. must be that an act of legislature, repugnant to the constitution is void. On this argument, if a constitution claims by its terms to limit the power of the institution it creates including the legislature, its provision must surely be regarded as of a superior force to any rules or actions issuing from that institution.

It is fundamental law, it provides the basis upon which law is made and enforced it is a prerequisite of law and order. There is indeed a moral argument for saying that a constitution commands obedience because it is by its nature a supreme law. A constitution binds in so far as it is in accordance with natural law. Neither a govt nor a citizen may disregard the authority of a constitution except in so far as the action can be justified by law of nature.

The author concludes by saying that the authority claimed by the Constitution in the moral sphere is more uncertain as compared to that claimed in the legal sphere. He says that the authority that a Constitution can claim depends upon the structure of the community for which it purports



to provide the foundations of law and order. The message which this chapter highlights is that the constitution is the supreme authority, however the interpretation of its provisions should be in accordance with the changing needs of time. CHAPTER 5: HOW CONSTITUTIONS CHANGE.

Constitutions when framed and adopted tend to reflect the dominant beliefs and interests which are characteristics of society at that time, not necessarily reflect political or legal beliefs and interests only but they may embody conclusions or compromises upon economic and social matters which frames of constitutions have wished to guarantee or to proclaim. In this chapter the author talks about how the social and economic opinions of the framers of the constitution influence the drafting of the constitution. The author talks about the relationship between social change and constitutional change.

He then goes on to mention the forces which tend to produce constitutional changes. Constitutional changes may either be brought about by circumstances which cause the constitution to mean something different from it used to mean or it may be brought about directly by formal amendments or judicial interpretations. Change may also be brought about by economic crisis and unemployment or by the development of the concept of 'welfare state' or increase in the power of the executive and also the party and electoral system which strongly influence the working of the Constitution.

The author also thinks that Constitutions are also influenced by what people think of them and their attitude toward the Constitution. There may be some

factors which lead to constitutional change not by bringing about a formal amendment or judicial interpretation but by establishing certain customs which influence the working of the rules of law embodied in the Constitution. The author, therefore, shows how a change in circumstance can cause a change in the Constitution. He has given situations in which the words of the constitution are so construed to meet the demands of the situation effectively.

E. g. in times of war the government tends to be a unitary one rather than a federal one. The author mentions about the various interpretations by the courts of the words of the constitution according to the changing needs of the society. According to him many important changes may occur in the Constitution without any alteration in the rules which regulate a government. The author, therefore, provides an insight into the ways in which Constitutions are changed. CHAPTER 6: HOW CONSTITUTIONS CHANGE

In this chapter the author emphasizes upon how sometimes formal amendments to the constitution becomes inevitable. These formal amendments are essential in order to safeguard community and individual rights and also to enable people to express their view before any change is given effect. The author has then discussed about the general doctrine of sovereignty of the people and ways in which the will of the people can be discovered. To explain this doctrine he has cited the procedures followed in some countries to discover the will of the people.

For instance, in the case of countries like Denmark or Australia, the proposed amendment is referred to the people after it has been passed in the

legislature. In some countries like Switzerland the practice of ‘ the initiative’ is followed wherein the people take initiative themselves and put forward proposals for constitutional amendments. This doctrine of sovereignty also recognises the principle of federalism. The necessities of a federation are safeguarded by ensuring that no change in the Constitution is effected by the central or regional legislatures alone.

The author also gives an insight of the devices adopted in various countries to safeguard individual or community rights. He says that the amendment Constitution of Switzerland safeguards not only the sovereignty of the people and the federal principle but also the certain individual and community rights. The author has also given a brief account of the sustainability of Constitutions. He says that it is difficult to answer the question whether Constitutions are frequently amended because of the fact that very few Constitutions in existence today have had a long enough history upon which an opinion can be based.

He then with examples has explained about the rise and fall of Constitutions. The author is of the view that in case of unitary Constitutions amendments may not easily arise because the source of proposing amendments namely the alteration of the division of powers is lacking. However, with a few examples the author has showed how unitary Constitutions are also subjected to amendments irrespective of the fact that the degree of centralisation and decentralisation is a matter regulated by ordinary law leaving no basis upon which an amendment can be demanded.

In case of federal Constitutions the different communities vary in their willingness to undertake amendment. The author has cited the examples of the Constitutions of the United States and Australia to explain the difference in willingness. The author concludes by saying how the use of the amending process by most of the countries justifies the fact that the process of formal amendments is not cumbersome. He also makes a reference to the existence of abuse of the safeguards embodied in the amending process.

An example of such an abuse would be insertion of articles and amendments which are not consistent with the spirit of the Constitution. Again, that an amendment needs to be made in the constitution depends on the social scenario of any country. In general where communities have lived under constitutional government and where the Constitution has been regarded with respect, the process of formal amendments has seldom proved to be a difficult task. CHAPTER 7: JUDICIAL INTERPRETATION

Judicial interpretation is a theory or mode of thought that explains how the judiciary should interpret the law, particularly constitutional documents and legislation. An interpretation which results in or supports some form of law-making role for the judiciary in interpreting the law is sometimes pejoratively characterized as judicial activism, the opposite of which is judicial lethargy, with judicial restraint somewhere in between. How does judicial interpretation change the Constitution?

The operative word in the question is “interpretation”. That is, the Constitution is a static document in terms of the words that were used by its drafters. There exist those who are often called “strict constructionists”,

who believe that little more should be read into the words of the Constitution than appear. This is particularly true when it comes to the severe limitations that the Constitution places on the encroachment of the Federal government into State authority and into individual freedoms.

This is in contrast to those who believe that the Constitution was intended to be more elastic, creating only a general outline of our government and rights. This group tends to think that the Drafters recognized a need for more of an organic Constitution that would accommodate a changing country and politic. As such, it welcomes an activist judiciary, and often advocates for positions, rights, entitlements, and prohibitions that, although not specifically provided for in the Constitution are thought to come under an elastic “ penumbra”.

CONSERVATIVE AND PROGRESSIVE INTERPRETATION. The conservative interpretation of the constitution is: the conservatives believed all that they worked for was being threatened by the government. The progressive interpretations believed that the constitution held enlightenment ideals (i. e. liberty) and that the document empowered regular people. The substance of the matter is that while it is the duty of every institution established under the authority of a constitution to exercise their powers, it is the duty of the courts to establish the limits of those powers.

In some Constitutions this duty of the courts is explicitly recognized, example Republic of Ireland, while in some constitutions judicial functions are taken to interpret the laws of land, example United States. However, countries not practicing judicial review of legislation or executive action are

not indifferent to the supremacy of their constitution. In some cases the Constitutions themselves impose limitations upon the powers of the legislature and the executive; hence the question of judicial review would not arise.

Judicial Review has played a major role in the growth of centralization in modern constitution. Changes in economic and technological conditions have led to an increase in the power of centralization without causing a change in the words of the constitution. Another effect of centralization due to judicial review can be seen in the aspect of war power or the power to control defence. It has been established in all three federations- Australia, Canada, United States – that the central parliament has the full power to wage war and to provide for defence.

Hence, it seems certain that if the requirements of a Constitution are to be regularly enforced, resort to courts and subsequent judicial decisions are unavoidable and are essential. The success of Judicial Review depends much upon a well-drafted constitution and upon the calibre of the judges themselves. Chapter 8: Dicey defined Constitutional Conventions as “ rules for determining the mode in which the discretionary powers of the Crown (or ministers or servants of the Crown) ought to be exercised. Furthermore, he stated that conventions are constitutional rules, which are not laws in the strict sense which are designed to control the use of discretionary power by the Crown.” This definition concentrates on what conventions are supposed to achieve. Constitutional Conventions are meant to be a means of bringing about change without recourse to formal change by legislation, as reflected by Jennings? comment about “ keeping the constitution in touch with the

growth of ideas”. Constitutional convention is established in the interplay of different, but interrelated factors.

They are constitutive elements of a convention and define its character.

These elements are: consensus iuris and political principle underlying the convention. A precedent supporting the rule should also be added here, as an element of the convention, although it cannot be considered as a factor of its creation. The author in this chapter considers a process of change which certainly affects the law of the Constitution, sometimes by making it a dead letter, sometimes by determining the way in which it will be interpreted.

By usage and convention the law of the Constitution is supplemented by a collection of rules which, though not part of law, are accepted as binding and regulate the system of government of the country. Usage and conventions have a tendency of nullifying a provision in the Constitution. They, however, do not amend or abolish the law but merely make its use impossible. The author has interestingly given examples of different Constitutions to explain the effect of conventions on the provisions. The author, however, makes a point wherein he states that a convention transfers power granted in a Constitution from one person to another.

This means that the powers granted by the Constitution are in law exercised by those to whom they are granted but in practice they are exercised by some other person or body of persons. The author gives the example of countries having a cabinet government where ministers are appointed. In many of these countries the King has the power in law to appoint the ministers; in practice, by convention, he appoints those persons whom the

Prime Minister recommends. The King does exercise his legal power which is not nullified by the convention, but the exercise of such power is governed by the advice of the Prime Minister.

The author further talks about how usage and conventions change the Constitutions by supplementing the law. The law of the Constitution is sometimes supplemented by conventions which give it a new meaning and dimension. The author gives the example of the American House of Representatives wherein by convention the Speaker has been recognised as the principle leader even though very little has been mentioned about the extent of his powers in the Constitution. Convention may also become law due to judicial recognition.

The author concludes by discussing the impact of usage and conventions on the system of government. Usage and conventions provide safeguards for minority rights, they regulate the relationship between the two houses of the legislature, they provide flexibility and change in those cases where recourse to formal amendments is difficult or disastrous, they can bring about changes which law is unable to comprehend. However, usages and convention also have their limitations. They cannot accomplish all those things they purport to accomplish.

They cannot completely obviate the difficulties with which the formal amendments and judicial interpretation are competent to deal with.

Therefore, usages and conventions should be taken recourse to depending on their suitability in the given circumstance. Chapter 9-Prospects for Constitutional Government Constitutional Government means something



more than the government according to the terms of a constitution. It implies a government opposed to the rules of an arbitrary government. The original idea behind the constitution is that of limiting government.

We cannot conclude that a country which has a constitution limiting the government also has a constitutional government. The prevalence of practices and conventions might work to weaken or strengthen constitutional limitations. Also we cannot conclude a country to not have constitutional government just because its constitution does not impose any restrictions on the government. It may have the country's usage and conventional practices apply those checks which the constitution did not.

However, if the State is hurtled into the conditions of crisis and emergency, the suspension of constitutional government is justified. Extreme situation of crisis may be a war and other crisis involve economic distress, famine etc. They lead to the suspension of ordinary limitations upon the government in order to permit swift and effective action. The most difficult problem that confronts the constitutional government in modern times is how to defend itself successfully against its enemies and still survive. The suspension of constitutional government is justified on the grounds that if it is to exist in the future it has to be in abeyance in the present. A BRIEF ANALYSIS. It is natural to ask, in the light of this discussion, why it is that countries have Constitutions, and why most of them make the Constitution superior to the ordinary law. If we investigate the origins of modern Constitutions, we find that, practically without exception, they were drawn up and adopted because people wished to make a fresh start, so far as the statement of their system of government was concerned.

The circumstances in which a break with the past and the need for a fresh start come about vary from country to country, but in almost every case in modern times, countries have a Constitution for the very simple and elementary reason that they wanted, for some reason, to begin again and so they put down in writing the main outline, at least, of their proposed system of government. This has been the practice certainly since 1781 when the American Constitution was drafted, and as the years passed no doubt imitation and the force of example have led all countries to think it necessary to have a Constitution.

In *The Endurance of National Constitutions*, the authors examine the factors behind endurance of a constitution and argue, with the help of statistical and case-study evidence, that certain design and environmental factors can sustain constitutions even in the face of seemingly lethal crises. Design factors refer to the content and drafting process of the constitution and environmental factors imply international and national environments that host the constitution. Both these factors are outside the control of current constitutional factors.

The authors identify three design factors – flexibility, specificity, and inclusion – that can facilitate constitutional endurance. Flexibility is the ability of the constitution to adjust over time, adapt to changing circumstances, and thereby prevent its premature death. Specificity refers to both detail and scope and facilitates agreement as to the contents and meaning of the constitution. Inclusion refers to the involvement of important groups in society in the design and maintenance of the constitution. Broadly

speaking, the more the groups with a stake in the constitution, the more likely it is to endure it.

Conclusion I would hereby conclude that the book “ Modern Constitutions” by K. C. Wheare is excellent read for law students like us. It helps us understand the basic purview of the essentiality of a constitution of a country. The book gives us a general idea about the diverse implications that small changes in the constitution have. The entire structural outlook of a country as well as the inner strength and governance of a country is dependent on its Constitution. The book ‘ Modern Constitution’ has enabled me to understand the in depth detail of the working of Constitutions in different countries.

The book has given an insight on the characteristics that constitute a Constitution highlighting the essentials which form an ideal Constitution. The book makes a valuable contribution and clarifies some of the important aspects of the origins of modern Constitutions and the changes which have taken place. The author has intelligently, rightly and carefully blended the theme and material in the book. In the end he has discussed about constitutional governments and their prospects which reflect the changing dimensions of the Constitution to keep pace with the changes in society.

It is, therefore, a significant addition to the existing enormous literature on the topic. Although the author has done his best in discussing the topics mentioned above, yet there were instances when certain areas which demanded an enhanced explanation. Like while discussing about the issue of the three lists, he could have referred to the principles of interpretation of

the lists in the light of “ harmonious interpretation of entries”, the “ rule of pith and substance” and the “ doctrine of colourable legislation”.

He eloquently explained as to why the fundamental rights should not be absolute but failed to enlighten them in the light of rule of law and the principles of natural justice. He could have also referred to protective discrimination while discussing about the authority of the Constitution to make the subject holistic. However, in spite of such inadequacies the merit of the book lies in that it has been written in very simple language. On the whole, the book stimulates intellectual academic deliberations and effectively enhances ones understanding of modern Constitutions.