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# BASIC CONCEPTS FOR UNDERSTANDING THE LEGAL SYSTEM

*A state without justice is no better than a gang of robbers.*

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Saint Augustine

## 3.1 The Nature of the State and its Functions

### 3.1.1 Definition of the State

According to Salmond, *"A state or political society is an association of human beings established for the attainment of certain ends by certain means."*

It is the most important of all the various kinds of society in which men unite, being indeed the necessary basis and condition of peace, order, and civilization. Focusing on territory, Salmond defines the state *"as a society of men established for the maintenance of peace and justice within a determined territory by way of force."*

A complete analysis of the nature of law involves an inquiry into the nature of the state, *for it is in and through the state alone that law exists.* Kelsen said that *"the state is law and law is the state."* It is to be noted that jurisprudence is concerned only with the elements and first principles of this matter. An exhaustive theory of political government pertains not to jurisprudence, but to the allied science of politics. In law, the purpose is to establish a sound juridical theory.

### 3.1.2 Essential Elements of the State

What then is the essential difference between this and other forms of association? In what does the state essentially differ from such other societies as a church, a university, a joint-stock company, or a trade-union? Salmond says that the difference is clearly one of func-

tion. These functions require some additional elements and these are discussed by Salmond in detail.

For the lawyer, according to Salmond, the following essential elements are important:

1. **The state is a legal person:** The state is a legal person, a legal entity. This personality is recognized under international law. Having a legal personality grants perpetual existence to a the state and enables it to own territory in its own name. There are a number of other benefits that flow from the personality of the state.

2. **The state performs certain primary and secondary functions:** According to Salmond, the state has two primary functions. These are *administration of justice* and *waging war*. Administration of justice is the internal function of the state, while waging war is the external function of the state. In reality both functions are the two faces of the same coin. Today, waging war may be termed the maintenance of peaceful relations with other states for purposes of peaceful co-existence.

3. **A state has territory:** The territory of a state is that portion of the earth's surface which is in its exclusive possession and control. It is that region throughout which the state makes its will permanently supreme, and from which it permanently excludes all alien interference. This exclusive possession of a defined territory is a characteristic feature of all civilized and normal states. It is found to be a necessary condition of the efficient exercise of governmental functions. It is theoretically possible for a state to exist without territory, but it cannot last long and will lack other elements essential for a state.

4. **A state consists of members:** Members of the body politic are of two types: citizens and residents. The former is a personal, the latter merely a territorial bond between the state and the individual. The former is a title of permanent, the latter one of temporary membership of the political community. Both classes are equally members of the body politic, and are entitled to the protection of the laws and government of the state,

and to such laws and government both alike owe obedience and fidelity.

5. **A state is governed by a constitution:** As soon as a society acquires some permanence it needs clearly defined rules that lay down its structure and direct the performance of its functions. This is a document that is agreed upon by the citizens. It lays down in detail the powers and functions of the different organs of government, and specifies how the state is to be governed. A constitution may be written or unwritten as long as the rules are reasonably clear.

6. **A state has a government:** The aggregate of all the persons or groups of persons who possess any share of civil power constitutes the Government of the state. They are the agents through whom the state, as a corporate entity, acts and moves and fulfills its end. Civil power is usually shared by dividing the organs of the government into three: legislature; executive; and judiciary. This is based upon the theory of separation of powers.

7. **A state may be independent or dependent and unitary or composite:** States may be classified in two different ways: (1) with respect to their external relations to other states, and (2) with respect to their internal composition. The former mode has regard to their international, the latter to their constitutional position and structure. Classified internationally or externally, states are of two kinds, being either independent or dependent. Classified constitutionally or internally, they are also of two kinds, being either unitary or composite. The other classifications like imperial, federal and so on flow from these main classifications.

### 3.1.3 The Primary and Secondary Functions of a State.

The modern state does many things, and different things at different times and places. Its functions are, however, divided into two: primary functions and secondary functions.

### 3.1.3.1 The Primary Functions of the State

The primary and secondary functions of the state are discussed below.

**3.1.3.1.1 Two functions: administration of justice and war** According to Salmond, the primary functions of a state are two: war and the administration of justice. The fundamental purpose and end of political society is defence against external enemies, and the maintenance of peaceable and orderly relations within the community itself. These two functions can be traced in history from the earliest times. Thus, the Bible says that the Israelites demanded a king, that he "*may judge us, and go out before us, and fight our battles.*" Leviathan,<sup>31</sup> as Hobbes tells us, carries two swords, the sword of war and that of justice. This is the irreducible minimum of governmental action. Every society which performs these two functions is a political society or state, and none is such which does not perform them.

These two primary functions are simply the two different ways in which a political society uses its power in the defence of itself and its members against external and internal enemies. They are the two methods in which a state fulfills its appointed purpose of establishing right and justice by physical force.

**3.1.3.1.2 Relations Between the two Essential Functions** We first point out the similarity and the difference.

**Similarity between the two** It is not difficult to show that war and the administration of justice, however diverse in appearance, are merely two different species of a single genus. The essential purpose of each is the same, though the methods are different. Each consists in the exercise of the organized physical force of the community, and in each case this force is made use of to the same end, namely, the maintenance of the just rights of the community and its members.

**Difference between the two** The essential difference between these two functions may be summarized as follows:

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<sup>31</sup>Leviathan mean mortal god. It is the title of Hobbes' book.

1. Administration of justice is the "judicial," while war is the "extrajudicial" use of the force of the state in the maintenance of right.

a) Force is judicial, when it is applied by or through a tribunal, whose business it is to judge or arbitrate between the parties who are at issue. It is extrajudicial, when it is applied by the state directly, without the aid or intervention of any such judge or arbitrator.

b) Judicial force involves trial and adjudication, as a condition precedent to its application; extrajudicial force does not: Judicial force does not move to the maintenance of rights or the suppression of wrongs, until these rights and wrongs have been authoritatively declared and ascertained by the formal judgment of a court. But extrajudicial force strikes directly at the offender. It recognizes no trial or adjudication as a condition of its exercise.

2. Judicial force is regulated by law, while the force of arms is usually exempt from such control.

3. Judicial force is commonly exercised against private persons, extrajudicial force against states.

4. Administration of justice is generally the internal, while war is generally the external exercise of the power of the state.

5. In the administration of justice the element of force is commonly latent or dormant, whereas in war it is seen in actual use.

### 3.1.3.2 Secondary Functions the State

The secondary functions of the state may be divided into two classes.

#### 3.1.3.2.1 Functions that serve and secure the primary functions

The first consists of those which serve to secure the efficient fulfillment of the primary functions, and the chief of these are two in number, namely *legislation* and *taxation*. Legislation is the formulation of the principles in accordance with which the state intends to fulfill

its function of administering justice. Taxation is the instrument by which the state obtains that revenue which is the essential condition of all its activities.

**3.1.3.2.2 Functions that serve and secure other activities** The remaining class of secondary functions comprises all other forms of activity which are for any reason deemed specially fit to be undertaken by the state. This special fitness may proceed from various sources. It is derived partly from the fact that the state represents the whole population of an extensive territory; partly from the fact that it possesses, through the organized physical force at its command, powers of coercion which are non-existent elsewhere; and partly from the fact that its financial resources (due to the exercise of its coercive powers by way of taxation) are immensely beyond those of all other persons and societies. Considerations such as these have, especially in modern times, induced the state to assume a great number of secondary and inessential functions which in a peaceful and law-abiding community tend even to overshadow and conceal from view those primary functions in which the essential nature of the state is to be found. These functions are obvious like providing food, shelter, health facilities and so on.

## **3.2 Constitutional Law: Necessity and Nature of a Constitution**

Constitutional law in a state is the law that relates to its constitution, whether the constitution is written (codified) or unwritten. To understand the meaning of constitutional law, therefore, the meaning of the term "constitution" needs to be understood. In this context, the term "constitutionalism" is also important for understanding the meaning of constitutional law, and we will state its meaning briefly. Finally, the scope of constitutional law will be taken up to list the various legal concepts and issues that are the content of constitutional law.

### 3.2.1 What is a constitution?

A modern state is expected to deal with a mass of social problems. To carry out these functions, the state must have agents or organs through which to operate.<sup>32</sup> The constitution is a document that deals with the appointment of these agents or organs, lays down their functions and powers, describes the relations of these organs among themselves along with their relations with the citizens.<sup>33</sup>

#### 3.2.1.1 A neutral or generic definition

The term constitution may be defined in an abstract way to mean:

The set of the most important rules and common understandings in any given country that regulate the relations among that country's governing institutions and also the relations between that country's governing institutions and the people of that country.<sup>34</sup>

The definition has the following features:

- The definition says that the constitution is simply the set of rules and common understandings that currently exists. In this sense, almost every country has a constitution.
- This definition is wholly neutral in moral and political terms, that is, it does not say whether a given country's constitution is good or bad or whether the country is run as a dictatorship or democracy or whether it is communist, socialist or a theocracy.
- It does not say whether the constitution is written, that is, codified or is unwritten.

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<sup>32</sup>Paul Jackson and Patricia Leopold, *O. Hood Phillips and Jackson: Constitutional and Administrative Law*, 8th ed. (London: Sweet & Maxwell, 2001), 5.

<sup>33</sup>Ibid.

<sup>34</sup>Anthony King, *The British Constitution* (Oxford: Oxford University Press, 2009), 3.

- It also does not say which rules are the "most important" or the core part of the constitution and which are merely conventions or traditions so that changing of the important rules will constitute a constitutional change.<sup>35</sup>

Nevertheless, the definition does explain in neutral terms what we mean by a constitution.

### 3.2.1.2 Two meanings on the basis of the form of the constitution (unwritten and written)

The word "constitution" is used in two different meanings: an abstract meaning and a concrete meaning.<sup>36</sup> In the abstract sense the constitution is "the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen."<sup>37</sup> In the concrete sense, "it is the document in which the most important laws of the constitution are authoritatively ordained."<sup>38</sup> The abstract sense applies to countries where there is no written constitution. These countries up until some time were the U.K., New Zealand and Israel. The New Zealand Parliament enacted a Constitution Act in 1966.<sup>39</sup>

The second or the concrete sense applies to countries that have written constitutions.

### 3.2.1.3 The constitution as a "social contract" representing the moral and political values of the people

In reality, the constitution is a "social contract" that makes it possible to understand the complex relationship between the "sovereign power" and the "power of the people" to determine who holds that

<sup>35</sup> King, *The British Constitution*, 4.

<sup>36</sup> Jackson and Leopold, O. Hood Phillips and Jackson: *Constitutional and Administrative Law*, 5.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.



power and the manner in which such power may or may not be exercised.<sup>40</sup> The constitution is, therefore, not only a legal document, but it is also an institution: "a charter for government, a framework for building a nation, an aspect of the ...civic culture."<sup>41</sup> It is with this idea in mind that the constitution may be defined as "a living, dynamic organism which at any point in time will reflect the moral and political values of the people it governs."<sup>42</sup> In short, the constitution is a document that shows how a people wish to be governed, what values and rights are dear to them, and what is their idea of justice that they wish to implement. The idea of constitutionalism discussed below is related to this meaning.

### 3.2.1.4 The constitution as a standard for judging the legality of all governmental acts

Where defined the constitution as: "[T]he whole system of government of a country, the collection of rules that regulate or govern the government."<sup>43</sup> Paine defined it as:

A constitution is not the act of a government, but of a people constituting a government; and a government without a constitution is power without right. A constitution is a thing antecedent [prior] to government; and a government is only the creature of a constitution.<sup>44</sup>

These definitions show that a constitution sets limits on the power that governments can exercise according to the wishes of the people, and it also lays down the manner in which such power is to be exercised.<sup>45</sup> Each act of the government will be judged according

<sup>40</sup>Hilaire Barnett, *Constitutional & Administrative Law*, 3rd ed. (London: Cavendish Publishing Limited, 2000), 4.

<sup>41</sup>*Encyclopedia of the American Constitution*, 2nd ed., ed. Leonard W. Levy and Kenneth L. Karst (New York: MacMillan Reference, 2000), s.v. "Preface."

<sup>42</sup>Barnett, *Constitutional & Administrative Law*, 3.

<sup>43</sup>K.C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966), 1, as quoted in *ibid.*, 7

<sup>44</sup>T. Paine, *Rights of Man* (New York: Penguin, 1792, rep. 1998), 93, quoted in *ibid.*, 8

<sup>45</sup>*Ibid.*

to the constitution, and if it is "unconstitutional" it will be unlawful. The constitution then is a standard or a benchmark against which all actions of the government are to be performed and measured.

### 3.2.1.5 The constitution in reality is the history of a people

A constitution, however, is not born in a day; it represents the history of a people, their politics and their values as they have grown over time. It is the struggle of a people to achieve what is dear to them. Accordingly, "[T]oday's Constitution is the product of the whole political system and the whole history of the many peoples who have become a nation."<sup>46</sup>

In the case of the United Kingdom, this historical aspect is especially true. The British constitution was not created by a group of men in a particular period, as is the case with many written constitutions, but was conceived, developed and crafted over centuries. This aspect is described by Dicey in his now famous words as follows:

The constitution was to them ... "the most perfect of human formations"; it was to them not a mere polity to be compared with the government of any other state, but so to speak a sacred mystery of statesmanship; it had (as we have all heard from our youth up) not been made but had grown; it was the fruit not of abstract theory but of that instinct which (it is supposed) has enabled Englishmen, and especially uncivilised Englishmen, to build up sound and lasting institutions, much as bees construct a honeycomb, without undergoing the degradation of understanding the principles on which they raise a fabric more subtly wrought than any work of conscious art.<sup>47</sup>

<sup>46</sup> *Encyclopedia of the American Constitution*, s.v. "Preface." "Constitutional law is history," wrote Professor Felix Frankfurter in 1937, "But equally true is it that American history is constitutional law." As quoted in *ibid.*

<sup>47</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Company, 1915), 3-4.

## 3.2.2 What is constitutional law?

We will state the meaning first and then highlight what the study of this field requires.

### 3.2.2.1 Meaning of constitutional law

John Austin writing in 1832 was not willing to grant constitutional law the status of "positive law" proper. He considered it, in most cases, to be positive morality.<sup>48</sup> To foreigners, this meant that there was no constitution at all. Thus, Tocqueville said, "elle n'existe point," that is, "the English constitution has no real existence."<sup>49</sup> Austin's view was based upon his concept of the sovereign, which changed over time and constitutional law gradually become a very important field of study. Dicey traces the various ideas about constitutional law, which was by then an established field of law proper, and defines it as follows:

Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.<sup>50</sup>

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<sup>48</sup>John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), 282. "Where, then, the supreme government is a monarchy or government of one, constitutional law, against that government, is inevitably nothing more than positive morality. Where the supreme government is an aristocracy or government of a number constitutional law, as against the members of that government, may either consist of positive morality or of a compound of positive morality and positive law. Against the sovereign body in its corporate and sovereign character, it is inevitably nothing more than positive morality. But against the members considered severally, be they individuals or be they aggregates of individuals, it may be guarded by legal or political, as well as by moral sanctions."

<sup>49</sup>Tocqueville, *Œuvres Complètes*, vol. I, 166, 167 as quoted in Dicey, *Law of the Constitution*, 21.

<sup>50</sup>Ibid.

The term "rules" in this definition includes laws proper and conventions.<sup>51</sup> The definition is rephrased today to read as follows:

Constitutional law is concerned with the role and powers of the institutions within the State and with the relationship between the citizen and the State.<sup>52</sup>

### 3.2.2.2 The study of constitutional law

The study of constitutional law has become very complex in modern times. Laurence H. Tribe, the leading authority on constitutional law in the U.S., says, "An embarrassment of riches confronts anyone interested in constitutional law."<sup>53</sup> The core of constitutional law consists of the constitution along with the judgments of the court (usually the Supreme Court).<sup>54</sup> Studying all this is in itself a huge task, but there are others who feel that the task is even more difficult. Many students, it is said, "come to constitutional law without a background in history, politics or political philosophy,"<sup>55</sup> but these too are an essential component of constitutional study without which the structure, law and policies of the state cannot be understood.<sup>56</sup>

The reason is that like jurisprudence, the study of constitutional law involves far more than the study of "legal rules," which is what is

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<sup>51</sup> Dicey, *Law of the Constitution*, 23, "Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority. Its rules prescribe the order of succession to the throne, regulate the prerogatives of the chief magistrate, determine the form of the legislature and its mode of election. These rules also deal with Ministers, with their responsibility, with their spheres of action, define the territory over which the sovereignty of the state extends and settle who are to be deemed subjects or citizens."

<sup>52</sup> Barnett, *Constitutional & Administrative Law*, 3.

<sup>53</sup> Laurence H. Tribe, *American Constitutional Law*, vol. 1 (New York: Foundation Press, 2000), 2.

<sup>54</sup> *Ibid.*, 3.

<sup>55</sup> Barnett, *Constitutional & Administrative Law*, 4.

<sup>56</sup> *Ibid.*

done in most other subjects.<sup>57</sup> Thus, all things that may be directly or indirectly related to the constitution form the subject-matter of constitutional law.

To understand the nature of constitutional law further we need to understand the meaning of the term constitutionalism and thereafter the scope of constitutional law.

### 3.2.3 What is constitutionalism?

Barnett says that "constitutionalism" is a doctrine that implies something "far more important than the idea of legality."<sup>58</sup> Constitutionalism means conformity with the broad philosophical values within a state.<sup>59</sup> An act exercised on legal authority may be perfectly legal according to the letter of the law (constitution), but that does not mean that it is "constitutional," because it may not conform to the "higher philosophical values" within the state. Thus, for the British constitution the following points are indicated by the doctrine of constitutionalism:

- power must be exercised within the limits prescribed keeping in view the fact that those exercising such power are accountable to law;
- the exercise of power must respect the individual and the rights of the individual;
- power must be dispersed between institutions and organs so as to avoid abuse of power; and
- the executive in formulating policy and the legislature in legitimating policy are accountable to the people on whose trust power is held.<sup>60</sup>

This doctrine, therefore, suggests limitation of power, separation of powers, and the doctrine of responsible accountable government.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid., 5.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid., 6.

### 3.2.4 The scope of constitutional law

As stated, the constitutional law of a state is the law relating to its constitution, and the constitution is "the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen."<sup>61</sup> If the constitution is written, it is fairly easy to make a distinction between the constitutional law of the state from the rest of the law. In case the constitution is unwritten, as in the United Kingdom, it becomes a little difficult to distinguish constitutional law from the rest of the law, and it is upto the writer to include the topics that he considers to be important as constitutional law. In general, the following are the most important subjects and issues of constitutional law:

#### 3.2.4.1 The subjects considered most important for constitutional law

Some of the important subjects listed by scholars<sup>62</sup> are as follows:

1. Fundamental rights, civil liberties and limitations.
2. Principles of policy to be pursued by governments.
3. Method of amending the constitution.
4. The method of choosing the head of state, whether king or president.
5. The powers and prerogatives of the head of state.
6. The constitution and composition of the legislature.
7. The powers of the members of the legislature and their privileges.
8. Where there are two chambers, the relations between them.

<sup>61</sup>Jackson and Leopold, O. Hood Phillips and Jackson: *Constitutional and Administrative Law*, 5.

<sup>62</sup>*Ibid.*, 9.

9. The status of ministers and the position of the civil servants who act under them.
10. The armed forces and the power to control them.
11. The relations between the central government, provincial governments and local authorities.
12. Treaty making powers.
13. Citizenship.
14. The raising and spending of public money (budget).
15. The general system of courts and the tenure and immunity of the judges.

### 3.2.4.2 Issues considered most important for constitutional law

Constitutional issues are so numerous that it is difficult to provide a complete list or any list for that matter. Well known writers like Dicey and others have considered the following to be important issues that a student of law must understand:

1. Parliamentary sovereignty.
2. Rule of law.
3. Amendment of the constitution (rigid and flexible constitutions).
4. Judicial review.
5. Separation of powers.
6. Ministerial responsibility and powers of government.
7. Fundamental rights.

Most of these issues will be discussed in the questions to follow.