

## Prolegomena

The Constitution of India has been in effect since 26 January 1950, and may hence celebrate 75 years of life in 2025. For this reason, the present work aims at contributing to the respective scientific discussion.

The analysed topics are mirroring my permanent interest in Indian Law, intending further to be a helpful compendium.

On 1 November 2023, I was named a Distinguished Visiting International Professor for Symbiosis Law School Pune. This great honour followed a long history of legal lectures, which I had the opportunity and joy to deliver for the benefit of my beloved Symbiosis law students, in previous years; this long history of legal lectures continued the international tradition of my University of Hannover mentors, Professor Hilmar Fenge and Professor Bernd H. Oppermann.

The great honour of this professorship has created a life-long bond between Symbiosis and me; I will wholeheartedly continue to serve this very fine School of Law.

The present work is therefore dedicated to the highly respected Symbiosis Law School Director, Professor Shashikala Gurpur, and through her to all my equally beloved, esteemed Symbiosis colleagues.

Once more, a very cordial thank you goes to Logos Verlag Berlin and its head, Dr. Volkhard Buchholtz.

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## A Short Historical Background

The Constitution of India (henceforth: IC) is, so to say, the natural successor to a line of acts of public law which had been introduced by the British from the midst of the 19th century on. For starters, the 1858 Government of India Act emphasised that absolute control and power were located in hands of the British Crown; it further laid the groundwork for the following decades of British administration, including the post of a Secretary of State of India, a Governor General as well as the institutions of a Council of India and an Executive Council.<sup>1</sup>

The aforementioned was followed by a slight revisional act, the 1861 Indian Councils Act, which shed further light on the Council structures as depicted

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<sup>1</sup> Cf. *Savla, Devang / Sadb, Tanmay*, The Constitution of India – An Indepth Analysis, 2019 (independently published), pp. 8–10; *Kashyap, Subhash C.*, Our Constitution. An Introduction to India's Constitution and Constitutional Law, 5th ed. New Delhi (National Book Trust India) 2011, p. 14.

The present analysis will, for the sake of a more constitutional legal focus, not take into account the considerable wealth of Charters issued by consecutive British monarchs, e.g. to companies being in trade relations with India, cf. *De, Robit*, Constitutional Antecedents, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford (Oxford University Press) 2016, pp. 17 et seqq. (19 et seq.); *Kashyap* (Fn. 1), pp. 10 et seqq., also further with a brilliant analysis also of constitutional elements of Ancient India, pp. 8 et seqq.

by the 1858 Government of India Act.<sup>2</sup> The 1861 Indian Councils Act saw two legal successors, the Indian Councils Acts of 1892<sup>3</sup> and 1909<sup>4</sup>, respectively.

Three further Government of India Acts, of 1915,<sup>5</sup> 1919<sup>6</sup> and 1935,<sup>7</sup> laid further groundwork for consolidation of the Indian Constitutional status and, almost inevitably, made way for the 1947 Indian Independence Act<sup>8</sup>.

From said Act on, commencing on 15 August 1947, India became the autonomous as well as independent Dominion of India;<sup>9</sup> after the IC was adopted by the Indian Constituent Assembly on 26 November 1949,

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<sup>2</sup> Cf. *Wolpert, Stanley*, *A New History of India*, 8th ed. Oxford (Oxford University Press) 2008, pp. 239 et seq.; further *De* (Fn. 1), p. 24; *Savla / Sadb* (Fn. 1), p. 10–11; *Kashyap* (Fn. 1), pp. 15 et seq.

<sup>3</sup> Cf. *De* (Fn. 1), p. 25; *Savla / Sadb* (Fn. 1), p. 11; *Kashyap* (Fn. 1), pp. 16 et seqq.

<sup>4</sup> Cf. *Ilbert, Courtenay Peregrine*, *The Indian Councils Act, 1909*, in: *Journal of the Society of Comparative Legislation*, 11 (1909) (2), pp. 243 et seqq.; further *De* (Fn. 1), p. 25; *Savla / Sadb* (Fn. 1), pp. 11–12; *Kashyap* (Fn. 1), pp. 18 et seq.

<sup>5</sup> Cf. *Ilbert, Courtenay Peregrine*, *The Government of India: A Brief Historical Survey of Parliamentary Legislation Relating to India*, 3rd ed. Oxford (Clarendon Press) 1922, pp. 122 et seq.; further *De* (Fn. 1), p. 26; *Savla / Sadb* (Fn. 1), p. 12.

<sup>6</sup> Cf. *Ilbert* (Fn. 5), p. 125; *De* (Fn. 1), pp. 26 et seq.; *Savla / Sadb* (Fn. 1), pp. 12–13; *Kashyap* (Fn. 1), pp. 19 et seqq.

<sup>7</sup> Cf. *Mehta, Uday S*, *Indian Constitutionalism. Crisis, Unity and History*, in: *Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta* (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford (Oxford University Press) 2016, pp. 38 et seqq. (42); cf. also *De* (Fn. 1), pp. 28 et seq.; *Savla / Sadb* (Fn. 1), pp. 13–14; *Kashyap* (Fn. 1), pp. 22 et seqq.

<sup>8</sup> Cf. *Savla / Sadb* (Fn. 1), p. 14–15; *Kashyap* (Fn. 1), pp. 29 et seqq.

<sup>9</sup> Accompanied by the Dominion of Pakistan. Cf. *Savla / Sadb* (Fn. 1), p. 17. *Kashyap* (Fn. 1), pp. 29 et seq.

it came to effect on 26 January 1950, forming the beginning of the Indian Republic.<sup>10</sup>

This Assembly of 389 members (296 from British India and a minority of 93 from the Indian princely states) was elected indirectly within the Provincial Legislative Assembly.<sup>11</sup> It met first on the morning (11 am) of 9 December 1946,<sup>12</sup> and, as mentioned above, almost three years later, the IC became legal reality by being adopted by the Assembly.

Impressive about the IC are the facts that it is obviously the largest Constitution worldwide, including a total of 467 articles as well as a considerable wealth

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<sup>10</sup> Cf. *Savla / Sadb* (Fn. 1), p. 17/18; *Kashyap* (Fn. 1), already p. 3.

<sup>11</sup> Cf. *Savla / Sadb* (Fn. 1), p. 17/20; *Kashyap* (Fn. 1), pp. 36 et seqq. Cf. also *Austin, Granville*, *The Indian Constitution: Cornerstone of a Nation*, Oxford (Oxford University Press) 1999, pp. 1 et seqq.

<sup>12</sup> Cf. *Savla / Sadb* (Fn. 1), p. 20; *Kashyap* (Fn. 1), p. 37; *Mehta* (Fn. 7), p. 45. In order to understand the IC development better, cf. *Prasad, Bimal*, *The Ideas and Men Behind the Indian Constitution; Selections from the Constituent Assembly Debates – 1946–1949*, Shahpur Jat, New Delhi (Konark Publishers Pvt. Ltd) 2001 (*passim*); *Guba, Ramachandra*, *India After Gandhi: The History of the World's Largest Democracy*, London (Picador, Macmillan) 2007, pp. 1 et seqq.; *Krishnaswamy, Sudhir*, *Democracy and constitutionalism in India: a study of the basic structure doctrine*, New Delhi/Oxford (New Delhi Oxford University Press) 2009, pp. 1 et seqq.; *Seth, Leila*, *We, the children of India: the preamble to our constitution*, New Delhi (New Delhi Puffin Books) 2010, pp. 1 et seqq.; *Rathore, Aakash Singh*, *Ambedkar's preamble: a secret history of the constitution of India*, Gurgaon (Gurgaon Vintage Books) 2020, pp. 1 et seqq.; *Khosla, Madhav*, *India's founding moment: the constitution of a most surprising democracy*, Cambridge, Massachusetts (Cambridge Harvard University Press) 2020 (*passim*).

of Schedules and Appendixes;<sup>13</sup> further, that it was based on largely different sources, e.g. the US Constitution (in the areas of Judicial Review and Fundamental Rights, to name some examples) and the Australian Constitution (regarding elements of Parliament Joint Sittings and Freedom of inter-state trade).<sup>14</sup>

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<sup>13</sup> Cf. *Savla / Sadb* (Fn. 1), p. 23.

<sup>14</sup> Cf. *Savla / Sadb* (Fn. 1), p. 18 et seq. / 22; *Kashyap* (Fn. 1), pp. 4 et seqq.

Cf. also, especially in the Indian-Canadian context, *Krishnamurthi, Vivek*, Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles, in: *Yale Journal of International Law* 34 (1) (2009): pp. 207 et seqq. Cf. more generally *Lerner, Hanna*, The Indian Founding: a Comparative Perspective, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford (Oxford University Press) 2016, pp. 55 et seqq.

## B Introductory Constitutional Matters

### B.1 Preamble and General State Structure

The Preamble to the IC states expressly that India is a *Sovereign Socialist Secular Democratic Republic*<sup>15</sup> aiming at the core society goals of *Justice, Liberty, Equality and Fraternity*. Therefore, not only its general political basis is prescribed, but also any umbilical cord to the former British Raj is efficiently cut (1947 marked the end of the Indian Empire, which used to be a prominent part of the British crown for many decades) and an interesting parallelism to basic elements of the French Revolution of 1792 (*Liberté, Égalité, Fraternité!*) might be visible.<sup>16</sup> The Preamble underlines the sovereignty of Indian citizens for their electoral decisions,<sup>17</sup> as well as India's character as a welfare state<sup>18</sup> and its respect

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<sup>15</sup> This is further concretised in Part IV of the IC, Art. 38. To understand these characteristics better, cf. *Austin, Granville*, Working a Democratic Constitution: The Indian Experience, Oxford (Oxford University Press) 2000 (*passim*). Especially also “Socialism”, as analysed by *Kashyap* (Fn. 1), pp. 62 et seq., and “The Social Question” as analysed by *Mehta* (Fn. 7), pp. 51 et seqq. The IC text in its current (2024) form is accessible through the official website <https://legislative.gov.in/constitution-of-india/>.

<sup>16</sup> Cf. *Savla / Sadb* (Fn. 1), p. 34–35; *Kashyap* (Fn. 1), p. 76.

<sup>17</sup> Cf. *Savla / Sadb* (Fn. 1), p. 32; *Kashyap* (Fn. 1), pp. 59 et seqq.

<sup>18</sup> Cf. *Savla / Sadb* (Fn. 1), p. 34; *Kashyap* (Fn. 1), p. 74.

to religions but lack of a state religion.<sup>19</sup> That respect has been described as the IC's "living ideology"<sup>20</sup> and was, in its contemporary form, a product of the 42nd amendment to the IC.<sup>21</sup>

Accordingly, Art. 1 IC emphasises the federal organisation of India, which thus contains a number of States,<sup>22</sup> as defined by the First Schedule:<sup>23</sup> Belonging to it are therefore a total of 28 States<sup>24</sup> and eight Union territories<sup>25</sup>. Matters of possible further admission/establishment of new States – as well as consecu-

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<sup>19</sup> Cf. *Savla / Sadb* (Fn. 1), p. 39; *Kashyap* (Fn. 1), pp. 63 et seqq.

Cf. also *Jacobsohn, Gary Jeffrey*, *The Wheel of law: India's secularism in comparative constitutional context*, New Delhi/Oxford (New Delhi Oxford University Press) 2003, pp. 1 et seqq. Further *Sen, Ronojoy*, *Secularism and Religious Freedom*, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford (Oxford University Press) 2016, pp. 885 et seqq.

<sup>20</sup> *Savla / Sadb* (Fn. 1), p. 30.

<sup>21</sup> Cf. *ibid.*

<sup>22</sup> Cf. Art. 1 (1) IC.

<sup>23</sup> Cf. Art. 1 (2) IC.

<sup>24</sup> Andhra Pradesh, Assam, Bihar, Gujarat, Kerala, Madhya Pradesh, Tamil Nadu, Maharashtra, Karnataka, Odisha, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Nagaland, Haryana, Himachal Pradesh, Manipur, Tripura, Meghalaya, Sikkim, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh, Uttarakhand, Jharkhand, and Telangana.

<sup>25</sup> Delhi, The Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli and Daman and Diu, Puducherry, Chandigarh, Jammu and Kashmir, and Ladakh.

tive legislative needs and focuses<sup>26</sup> – are left in hands of Parliament.<sup>27</sup>

## B.2 Matters of Indian Citizenship

The delicate matter of citizenship is taken care of in Art. 5 et seqq. IC. As it happens commonly in contemporary legal and political systems, it is again in the hands of Parliament to determine any relevant details regarding the matter via law.<sup>28</sup>

Generally, the main constitutional rule in this context would be that people born in Indian territory, as well as children of people born in Indian territory or people that have been ordinarily resident in the territory of India for a minimum of five years (in immediate precedence of any relevant request/application) are considered to be Indian citizens.<sup>29</sup>

<sup>26</sup> Cf. Art. 3–4 IC. See *Mangal Singh vs Union of India*, AIR 1967 SC 944; cf. *Savla / Sadb* (Fn. 1), p. 170.

<sup>27</sup> Cf. Art. 2 IC. See *R. C. Poudyal vs Union of India*, AIR 1993 SC 1804; cf. *Savla / Sadb* (Fn. 1), p. 170.

<sup>28</sup> Cf. Art. 11 IC. See especially the Citizenship Act (No. 57 of) 1955 and the Citizenship (Amendment) Act 2019 as well as the Citizenship (Amendment) Rules 2024, cf. *Gogoi, Koustov*, Koustov Gogoi's Law on Citizenship, Foreigners & Passports, 2nd ed. Meerapur, Allahabad (Sodhi Publications) 2021, pp. 1 et seqq. Cf. for the topic in general *Kashyap* (Fn. 1), pp. 85 et seqq.; *Jayal, Niraja Gopal*, Citizenship, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford (Oxford University Press) 2016, pp. 163 et seqq.

<sup>29</sup> Cf. Art. 5 litt. a–c IC. See also *D. P. Joshi vs State of Madhya Bharat*, AIR 1955 SC 334 as well as *Pradeep Jain vs Union of India*, AIR 1984 SC 1420; cf. *Savla / Sadb* (Fn. 1), p. 172; *Kashyap* (Fn. 1), pp. 87/107.



Due to the necessary legal security, such right is under expressly legal continuance,<sup>30</sup> stopped especially by voluntary acquisition of citizenship of a foreign State.<sup>31</sup> Therefore, it is clear that dual citizenships are not recognised.<sup>32</sup>

But, further due to political and historical reasons, special rules in this context apply for migrants from<sup>33</sup> and to<sup>34</sup> Pakistan, as well as for people of Indian origin residing abroad<sup>35</sup>.

### B.3 Fundamental Rights<sup>36</sup>

The IC enjoys a very rich and thorough catalogue of fundamental rights, addressed at both Government and Parliament at the federal level of India as well as at the Governments and Legislatures of each State and

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<sup>30</sup> Cf. Art. 10 IC.

<sup>31</sup> Cf. Art. 9 IC. See *State of Madhya Pradesh vs Peer Mohammad*, AIR 1963 SC 645; cf. *Savla / Sadb* (Fn. 1), p. 173; *Kashyap* (Fn. 1), p. 90.

<sup>32</sup> Cf. *Savla / Sadb* (Fn. 1), p. 43.

<sup>33</sup> Cf. Art. 6 IC.

<sup>34</sup> Cf. Art. 7 IC. See *State of Bihar vs Amar Singh*, AIR 1955 SC 282; cf. *Savla / Sadb* (Fn. 1), p. 173.

<sup>35</sup> Cf. Art. 8 IC. For the specificity of “overseas citizens” cf. *Kashyap* (Fn. 1), pp. 92 et seq.

<sup>36</sup> Cf. generally *Padmanabhan, Ananth*, Rights: Breadth, Scope, and Applicability, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford (Oxford University Press) 2016, pp. 581 et seqq.; also *Gardbaum, Stephen*, Horizontal Effect, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford (Oxford University Press) 2016, pp. 600 et seqq.

respective local authorities.<sup>37</sup> This part has been denominated as “the conscience of the Constitution”<sup>38</sup> and serves mainly both the development of the individuals’ personality and the core necessity of human dignity.<sup>39</sup>

The constitutional text takes care of the necessary, respective compliance of laws in force before the IC commencement:<sup>40</sup> Anything that would be deemed to be inconsistent with or in derogation of IC fundamental rights is to be considered as legally void.<sup>41</sup>

Further, wherever laws providing for acquisition of estates are – in the same context – necessary, they are not deemed to be void.<sup>42</sup> Same for legal provisions necessary for emphasising certain directive principles.<sup>43</sup>

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<sup>37</sup> Cf. Art. 12 IC. See *Sukhdev Singh vs Bhagat Ram*, AIR 1975 SC 1331; cf. *Savla / Sadb* (Fn. 1), p. 174; *Kashyap* (Fn. 1), p. 100.

<sup>38</sup> *Savla / Sadb* (Fn. 1), p. 55.

<sup>39</sup> Cf. *ibid.*

<sup>40</sup> Cf. Art. 13 IC.

<sup>41</sup> Cf. *ibid.* See the case *Keshwa Madhava Menon vs State of Bombay*, AIR 1951 SC 128, in respect to the Indian Press Emergency Powers Act (1934); cf. *Savla / Sadb* (Fn. 1), p. 176.

<sup>42</sup> Cf. Art. 31A IC. Cf. here generally *Kashyap* (Fn. 1), p. 97; *Deva, Surya*, Savings Clauses: The Ninth Schedule and Articles 31A–C, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford (Oxford University Press) 2016, pp. 627 et seqq.

<sup>43</sup> Cf. Art. 31C IC; *Kashyap* (Fn. 1), p. 97; *Deva* (Fn. 42), pp. 627 et seqq.