
CONSTITUTION AND CONSTITUTIONALISM: CONCEPT, DISTINCTION, AND SALIENT FEATURES

Shaurya Saxena & Raneeta Pal, Assistant Professor Of Law, Manipal University Jaipur

ABSTRACT

In the 19th century what was meant by the term “constitution” was reasonably definite and clear. Paradoxically enough, if the word retained some ambiguity, this was because of the British constitution; that is, because the mother country of modern constitutionalism appeared to have an obscure constitution, or even—according to some of the standards that seemed very important elsewhere—no constitution at all. Constitutional provisions are fundamental law. Constitutional law is supreme law in our country. If the constitutional law itself is inadequate, then the rule of law and democracy of the country will be affected. The modern structure of India is divided into three organs i.e., Legislation, Executive & Judiciary. Constitutionalism is the idea of limiting the powers of the government and its authority depends upon its observations of these limitations. A constitution is a written document in which a legal and moral framework is done for setting out the powers and limitations of the government. In literal terms ‘Constitutionalism’ means ‘limiting the government or limitation on the government’. Thus, to preserve the basic freedoms of the individual and to maintain the dignity and personality, the constitution must have constitutionalism.

CONCEPT

The concept of constitutionalism, like almost all other social sciences concepts, has always been subject to or part of an evolutionary process. Therefore, we cannot point out any specific time or event that led to its creation or emergence, though a succession of such events may have led to shaping and acquisition of an image as an outcome of the totality of those events or processes. Generally, they are shaped in the context of paradigm shifts in social and political structures. It was some such shift that took place in the form of Russian Revolution of 1917 and its impact on other societies and political formations that the need to closely examine this vision of society and counter it for its weaknesses and drawbacks arose. It is as part of that process that two professors at the Harvard Law School individually engaged themselves in investigating and presenting a different version of the social and political vision of society through constitutional structures that prevailed in the United States and most other parts of the West. Between the two, while one was confined specifically to exploring the concept of constitutionalism, the other one discussed constitutionalism as part of a bigger constitutional and political design of society. Constitution consists of arrangements that determine the political, legal, and social structures by which the society is to be governed. Constitutional provisions are fundamental law. Constitutional law is supreme law in our country. If the constitutional law itself is inadequate, then the rule of law and democracy of the country will be affected. The modern structure of India is divided into three organs i.e., Legislation, Executive & Judiciary.

There should be Independence of Judiciary in the democratic country. Judiciary should not be answerable to the Parliament as there is a separation of powers. In India, if any law comes in the path to maintain constitutionalism, it will be declared invalid and unconstitutional. The intention behind this division of the bodies is to separate their powers, here separation of powers means working independently by maintaining their autonomy. Together, this is termed as the concept of constitutionalism. In India, there is a parliamentary form of governance, the efforts have been made to make the powers separate in the constitution, but a lot of overlapping power has been granted to each of the organs. All three organs maintain a check and balance system to work with co-ordination and co-operation. The Supreme Court and the High Courts have the power of *judicial review* which empowers them to declare the law invalid and unconstitutional which is passed by the Parliament.

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Constitutionalism recognizes the need of the government but also takes care that the power should be limited. If any government goes beyond its limit and jurisdiction it loses its authority and legitimacy. A scholar David Fellman describes that the touch of constitutionalism is the concept of limited government under the higher law.

Thus, to preserve the basic freedoms of the individual and to maintain the dignity and personality, the constitution must have constitutionalism. It must have the inbuilt restrictions on the powers conferred by the constitution to the organs of the government. Constitutionalism is a modern concept which stands only for supremacy of law but not for the individuals.

The presence of Constitutionalism can be analysed with the help of various provisions of the constitution that are:

- Preamble
- Judicial Review
- Rule of Law
- Separation of Power
- Check and Balance System etc.

There is no list which shows the presence of constitutionalism but every feature which limits the government and establish a position of sovereignty under fundamental principles of constitutional jurisprudence may be the notable points for constitutionalism.

According to Justice Subba Rao, Preamble is the soul of the constitution without which a body in the form of states cannot survive. In 1973 in *Kesavananda Bharati case*,¹ It was held that Parliament cannot amend the basic structure of the constitution by the power granted under

¹ (1983) 4 SCC 225; AIR 1973 SC 146

Article 368 of the constitution and “Preamble is a part of Constitution”. The separation of power doctrine was included in the basic structure.

In A.K. Gopalan case,² It was held that the “Procedure established by Law” is not the same as the “Due Process of Law”, the Legislature has the power to determine the law. Thus, the reasonableness cannot be questioned on substantive grounds by the Supreme Court. It was also held that it is difficult to restrict the legislative power with judicial interference except the provisions are expressed in the constitution. It shows that in the absence of power of judicial review in the hands of Judiciary, judiciary is merely a puppet of legislators.

In India there is a “Procedure established by Law” doctrine prevails which is adopted from the Constitution of Japan. It is enshrined in Article 21 of the constitution. It shows the sovereignty of Parliament because the law is made by Legislature in India. It restricts the Judicial Supremacy and right to do Literal Interpretation not statutory construction of laws. Constitutionalism is that character which controls the misuse of powers by an authority of the state. Judiciary plays an important role to maintain the balance between the organs of the government. The organs of the government can exercise their powers within their boundaries results in that they were unable to entertain arbitrary powers. The main aim is to protect the individuals of the country. Constitutionalism is present in India but in the form of natural justice principle to govern the administrative functions.

If there will be Rule of Law and Judicial review in the same system, then the conflict between the Parliament and the Judiciary (Guardian of the Constitution) arises. Every provision has its importance but if it is implicitly present in a constitution, but its reflection is found in some clauses of the laws, then it will be sufficient to promote the spirit of constitutionalism. constitutionalism has a variety of meanings. Most generally, it is "a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law". A political organization is constitutional to the extent that it "contains institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority". As

² AIR 1950 SC 27

described by political scientist and constitutional scholar David Fellman: It may be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

Constitutionalism' means limited government or limitation on government. It is antithesis of arbitrary powers. Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. A government which goes beyond its limits loses its authority and legitimacy. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some inbuilt restrictions on the powers conferred by it on governmental organs.

Constitutionalism-In Minimal and In Richer Sense

In some minimal sense of the term, a "constitution" consists of a set of rules or norms creating, structuring, and defining the limits of, government power or authority. Take the extreme case of an absolute monarchy, Rex, who combines unlimited power in all three domains. If it is widely acknowledged that Rex has these powers, as well as the authority to exercise them at his pleasure, then the constitution of this state could be said to contain only one rule, which grants unlimited power to Rex. Whatever he decrees is constitutionally valid. When scholars talk of constitutionalism, however, they normally mean something that rules out Rex's case³. They mean not only that there are rules creating legislative, executive, and judicial powers, but that these rules impose limits on those powers. Constitutionalism in this richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on it observing these limitations. In this richer sense of the term, Rex's society has not embraced constitutionalism because the rules defining his authority impose no constitutional limits.

Usage of Constitutionalism

Constitutionalism has prescriptive and descriptive uses. Law professor Gerhard Casper captured this aspect of the term. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to 'consent' and certain other rights,

³ Rex vs Matoley And Ors, 1949 CriLJ 59

freedoms, and privileges Used prescriptively its meaning incorporates those features of government seen as the essential elements of the Constitution.

Descriptive use

One example of constitutionalism's descriptive use is law professor Bernard Schwartz's seeks to trace the origins of the U.S. Bill of Rights. While hardly presenting a "straight-line," the account illustrates the historical struggle to recognize and enshrine constitutional rights and principles in a constitutional order.

Prescriptive use

In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by Canadian philosopher Wil Waluchow, constitutionalism embodies "the idea ... that government can and should be legally limited in its powers, and that its authority depends on it observing these limitations"

Important Features of Constitutionalism

Entrenchment:

According to most theorists, one of the important features of constitutionalism is that the norms imposing limits upon government power must be in some way be entrenched, either by law or by way of constitutional convention. Entrenchment not only facilitates a degree of stability over time, but it is also arguably a requirement of the very possibility of constitutionally limited government. Were a government institution entitled, at its pleasure, to change the very terms of its constitutional limitations, we might begin to question whether there would be any such limitations.

Writtenness:

Some scholars believe that constitutional rules do not exist unless they are in some way enshrined in a written document. Others argue that constitutions can be unwritten, and cite, as an obvious example of this possibility, the constitution of the United Kingdom. Though the

UK has nothing resembling the American Constitution and its Bill of Rights, it nevertheless contains several written instruments which arguably form a central element of its constitution. Magna Carta⁴ is perhaps the earliest document of the British constitution, while others include The Petition of Right (1628) and the Bill of Rights (1689).

Elements of Constitutionalism

Written constraints in the constitution, however, are not constraining by themselves. Tyrants will not become benevolent rulers simply because the constitution tells them to. To guard against violations against the letter and spirit of the constitution, there needs to be a set of institutional arrangements. Louis Henkin defines constitutionalism as constituting the following elements: (1) *government according to the constitution*; (2) *separation of power*; (3) *sovereignty of the people and democratic government*; (4) *constitutional review*; (5) *independent judiciary*; (6) *limited government subject to a bill of individual rights*; (7) *controlling the police*; (8) *civilian control of the military*; and (9) *no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution*. Broadly speaking, Henkin's nine elements of constitutionalism can be divided into two groups, one concerns power construction and power lodging; and the other deals with rights protection. These two groups of institutional arrangements work together to ensure the supremacy of the constitution, the existence of limited yet strong government, and the protection of basic freedom.

Constitutionalism and Democracy

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law, and therefore see no necessity for the separation of powers or representative governance. Constitutionalism, however, is primarily based on the notion of people's sovereignty, which is to be exercised--in a limited manner--by a representative government. The only consensual and representative form of governance in existence today, is democratic government. In this way, there is an especially important and basic link between democracy and constitutionalism. Just as mere constitutions do not make countries constitutional, political parties and elections do not make governments democratic. Genuine

⁴ (1215 A.D.)

democracies rest on the sovereignty of the people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy, there can be no constitutionalism.

Constitutionalism and Rule of Law

Rule of law refers to the supremacy of law: that society is governed by law and this law applies equally to all persons, including government and state officials. Following basic principles of constitutionalism, common institutional provisions used to maintain the rule of law include the separation of powers, judicial review, the prohibition of retroactive legislation and habeas corpus. Genuine constitutionalism therefore provides a minimal guarantee of the justice of both the content and the form of law. On the other hand, constitutionalism is safeguarded by the rule of law. Only when the supremacy of the rule of law is established, can supremacy of the constitution exist. Constitutionalism additionally requires effective laws and their enforcement to provide structure to its framework.

Constitutionalism and Constitutional Convention

The idea of constitutionalism is usually thought to require legal limitation on government power and authority. But according to most constitutional scholars, there is more to a constitution than constitutional law. But there is a long-standing tradition of conceiving of constitutions as containing much more than constitutional law. Dicey is famous for proposing that, in addition to constitutional law, the British constitutional system contains a number of "constitutional conventions" which effectively limit government in the absence of legal limitation. These are, in effect, social rules arising within the practices of the political community and which impose important, but non-legal, limits on government powers.

Constitutionalism in Different Countries

United States

American constitutionalism has been defined as a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from the people and is limited by a body of fundamental law. These ideas, attitudes, and patterns of behaviour,

according to one analyst, derive from "a dynamic political and historical process rather than from a static body of thought laid down in the eighteenth century". In U.S. history, constitutionalism—in both its descriptive and prescriptive sense—has traditionally focused on the federal Constitution. Indeed, a routine assumption of many scholars has been that understanding "American constitutionalism" necessarily entails the thought that went into the drafting of the federal Constitution and the American experience with that constitution since its ratification in 1789. There is a rich tradition of state constitutionalism that offers broader insight into constitutionalism in the United States.

United Kingdom

The United Kingdom is perhaps the best instance of constitutionalism in a country that has an uncodified constitution. A variety of developments in seventeenth-century England, including "the protracted struggle for power between king and Parliament was accompanied by an efflorescence of political ideas in which the concept of countervailing powers was clearly defined," led to a well-developed polity with multiple governmental and private institutions that counter the power of the state.

Polish–Lithuanian Commonwealth

From the mid-sixteenth to the late eighteenth century, the Polish–Lithuanian Commonwealth utilized the liberum veto, a form of unanimity voting rule, in its parliamentary deliberations. The "principle of liberum veto played an important role in the emergence of the unique Polish form of constitutionalism." This constraint on the powers of the monarch were significant in making the "rule of law, religious tolerance and limited constitutional government the norm in Poland in times when the rest of Europe was being devastated by religious hatred and despotism." The constitution of n

Constitutionalism in India

India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a

mixed one. On the one hand, we have excellent administrative structures put in place to oversee even the minutest of details related to welfare maximization but crucially on the other it has only resulted in excessive bureaucratization and eventual alienation of the rulers from the ruled. Since independence, those regions which were backward remained the same, the gap between the rich and poor has widened, people at the bottom level of the pyramid remained at the periphery of developmental process, bureaucracy retained colonial characters and overall development remained much below the expectations of the people.

Case Laws where principle of ‘Constitutionalism’ is legally recognized by Supreme Court

In *I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors*⁵ view taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centres of decision making. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

In ***Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr.***⁶ “The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself.” Constitutionalism is about limits and aspirations.

As observed by Chandrachud, CJ, in ***Minerva Mills Ltd.***⁷ – “The Constitution is a precious heritage and, therefore, you cannot destroy its identity”

On one hand, our judiciary elicit such intellectual responses that “Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and

⁵ 1999 7 SCC 580

⁶ 24 January, 2006

⁷ AIR 1980 SC 1789

cooperation for the value of democracy and survival of constitutionalism” said in *Indra Sawhney and Ors. vs. Union of India (UOI) and Ors.*

CRITICISMS

Constitutionalism has been the subject of criticism by numerous anarchist thinkers. For example, Murray Rothbard, who coined the term "anarcho-capitalism", attacked constitutionalism, arguing that constitutions are incapable of restraining governments and do not protect the rights of citizens from their governments. Legal scholar Jeremy Waldron contends that constitutionalism is often undemocratic: Constitutions are not just about restraining and limiting power; they are about the empowerment of ordinary people in a democracy and allowing them to control the sources of law and harness the apparatus of government to their aspirations. Of course, it is always possible to present an alternative to constitutionalism as an alternative form of constitutionalism: scholars talk of "popular constitutionalism" or "democratic constitutionalism." But I think it is worth setting out a stark version of the antipathy between constitutionalism and democratic or popular self-government, if only because that will help us to measure more clearly the extent to which a new and mature theory of constitutional law takes proper account of the constitutional burden of ensuring that the people are not disenfranchised by the very document that is supposed to give them their power.

CONSTITUTIONALISM, INDIAN PERSPECTIVE

What made Indian constitutionalism distinctive was its self-consciously cosmopolitan character. Secondly, we turn to some of the major substantive tensions that have defined the contours of constitutionalism in India, Constitutional Morality: Constitutionalism at its core signifies a politics of restraints. To understand the nature of the commitment to constitutionalism, one might turn to Ambedkar's discussion of the idea of **constitutional morality**, a set of adverbial conditions to which agents in a constitutional setting must subscribe.

Ambedkar invoked the phrase constitutional morality in a famous speech delivered on 4 November 1948. In the context of defending the decision to include the structure of the administration in the Constitution, he quoted at great length the classicist, George Grote. For Grote, the prevalence of constitutional morality was ‘the indispensable condition of a

government at once free and peaceable'. For Grote, 'constitutional morality' was not simply the substantive morality of a constitution, a meaning that is often attributed' to the phrase today.

It also did not imply the familiar nineteenth-century usage, where constitutional morality refers to the conventions and protocols that govern decision making where the constitution vests discretionary power or is silent. The most important goal of constitutional morality was to avoid revolution, to turn to constitutional methods for the resolution of claims. The forms of political action that had become so famous during the nationalist movement satyagraha, non-cooperation, civil disobedience were all at odds with the idea of constitutional morality. The turn to process meant that constitutional morality recognised pluralism in the deepest possible way.

A related element of constitutional morality is the suspicion of dispositive singular claims to represent the will of the people. Any claim to hero worship or personification was a claim to embody popular sovereignty; it was to reject the argumentative sensibility that constitutional morality demanded. For the Constituent Assembly, any claim to speak on behalf of popular sovereignty, to represent sovereignty, was a claim to usurp it. No such claim could be permissible, for the chief aim of constitutional morality was to prevent any branch of government from declaring that it could uniquely represent the people. In any constitutional tradition there is a tension between the backward- and forward- looking aspects of constitutional law. The backward-looking aspects refer to constitutional texts, founders, and intentions. The forward-looking aspects refer to an ongoing conversation on the nature of social contract and the nature of social justice.

CONSTITUTIONAL TENSIONS

In its very design, many of the major tensions that have characterised Indian politics and the formation of the Indian State have actually been codified into law. Some of these tensions are familiar in constitutional law, such as the tension posed by the separation of powers. The formal amendment process, by which Parliament was empowered to amend the text in most instances, coupled with the recognition of judicial review, meant that the Constitution pulled itself in both the direction of written constitutionalism and parliamentary sovereignty. The recognition of the right to property but also the States responsibility for land redistribution, for example, placed the tension between means and ends in law. The debate between

centralisation and decentralisation was another source of friction. Several constitutional devices, from regional emergency powers to the concurrent list, meant that the tensions between functionalism and participation found constitutional manifestation. Constitution was a charter of individual liberty. It promised freedom for individuals, but it also recognised the salience of community identities, both to redress historical injustices and to protect minorities. This inherently set up a tension in the constitutional project, on matters ranging from affirmative action and reservations to minority education institutions.

The Character of Indian Constitutionalism may be discussed under following cases:

1. State Failure:

The expanding scope of constitutionalism merits some reflection and provides an interesting window on to the setting of Indian constitutional law. For one thing, the Indian Constitution is itself one of the longest constitutions in the world. A striking feature of the founding imagination was a penchant for codification. The Constitution itself was not just concerned with the rights of citizens, the limits of government power, democracy, or social justice.

It was also very much part of a State building project, where the framers wanted to protect many institutions of the State from the vagaries of ordinary politics. This attempt to use constitutional law to compensate for massive State failure is not without its costs. Some argue that it is somewhat paradoxical that an already overburdened Supreme Court would choose to take on greater burdens by stretching constitutional law in this way.

2. Design and Structure:

The coherence and stability of a body of constitutional law also depends on the character of the institution from which it emanates. In countries like India, with a written constitution that provides for judicial review, that institution is the judiciary. We can expect political cleavages or political philosophies to be very clearly expressed. We can also expect them to be articulated in strikingly consistent terms over the lifetime of decisions.

3. Law and Democracy:

One standard way of describing the evolution of Indian constitutional law is as a transition from black letter law to a more structural reading of legal material. A second way has been to see it as a product of political compromise and negotiation. In such a context, one aspect that shapes constitutional doctrine is the idea of compromise. A constitutional culture can be subject to two kinds of compromises. The first is a compromise between norms and social forces. The second kind of compromise can be a compromise between competing and sometimes incommensurable values.

INDIAN CONSTITUTION FEDERAL OR UNITARY?

The constitution of country may be federal or unitary in nature. In a federal constitution there is a central Government having certain powers which it exercises over the entire country. Then there are regional governments and each of such governments has jurisdiction within a region. All kinds of relations arise between the Central government and the Regional Government. India is an example of a federal Constitution. Some other federal Constitutions are: U.S.A. Canada, Australia Malaysia, Germany, etc. A federal Constitution is a much more complicated and legalistic document than a unitary constitution which has one Central Government in which all powers of government are concentrated, and which can delegate such of its powers to such of its agencies as it likes. A federal constitution must settle many details (like distribution of powers between the Central government and the regional governments) which a unitary Constitution is not concerned with. Britain, Sri-Lanka, Singapore have unitary Constitutions. The Emergency and its aftermath have brought the question of Federalism into prominence.

During the Emergency, Congress Ministries abdicated their duties to the Centre responsible State Ministries could never have advised ratification of the 39th Amendment at one- or two-days' notice. The existence of the Congress governments at the Centre and in a large number of States for over 25 years prevented problems of Federal Government from coming to the fore. However, when the Janata Party came to power at the Centre and in a large number of States, after the Parliamentary and State elections held in 1977, the few States in which Congress Ministries continued to function suddenly became aware that our Constitution was a federal one; that the States had rights of their own which could be enforced against the Centre. Recent decisions of the Supreme Court have brought to the fore the question whether our Constitution

is federal. Ever- since the decision in **W.B. v. Union of India**⁸ it has been the doctrine of our Supreme Court that the unitary features in our Constitution are so many that the Federal features almost disappear. In **Rajasthan v. Union**⁹, Beg C.J. said: In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically co-ordinated, and socially, intellectually, and spiritually uplifted. It is submitted that this view is based on an imperfect study of our own and other Federal constitutions. It will be shown in this Chapter that almost all the features on which the Supreme Court has relied to support its doctrine, will be found on examination to be features present in constitutions which are indisputably federal. In **W.B. v. Union of India** the majority judgment of the Supreme Court held that the Union was entitled to the coal mines vested in the State of West Bengal. The discussion on Federalism and Sovereignty in the majority judgment is very unsatisfactory, and instead of considering it in detail, it would lead to a briefer and clearer discussion of Federalism if the so-called **unitary** features are considered independently and shown to be present in admittedly federal constitutions. This observation also applies to the views expressed by Beg. C.J. in **Rajasthan v. Union** set out above. A theoretical discussion of Federalism is not necessary. The test laid down by Prof. Wheare in his classic work has been generally applied to our Constitution and, broadly speaking, that test can be accepted, subject to its being supplemented by the illuminating discussion of Prof. Sawyer in which he rightly said that it is necessary to inquire whether a federal situation existed in a country before it adopted a federal constitution. Writing of India, he said: The sub-continent of India was another area which by reason of size, population, regional (including linguistic) differences and communication problems presented an obvious federal situation, if not the possibility of several distinct Nations. The following historical account of how our Constitution adopted the federal solution amply supports Prof. Sawyer's conclusion that a federal situation clearly existed in India.

⁸ 1964 SCR (1) 371

⁹ 1977 INSC 145