CONSTITUTIONALISM THROUGH THE LENS OF DOCTRINES AND PRECEDENTS

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ABSTRACT

This article starts with defining constitutionalism. Then we take a look at the liberal and the Marxist understanding of it. The article then delves into two doctrines namely- the doctrine of separation of powers and the doctrine of checks and balances and analyses how their interplay is important in maintaining constitutionalism. The analysis will be done through two scenarios- the first being, by observing the procedure of the impeachment of the president of India and of the United States and the second being the independence of the Judiciary in India. After that, the author digs into the question of - Constitutionalism, how much is in the letter and how much is in the spirit? Finally, the article concludes with the two quotes on Constitutionalism that the author most believes in.

Keywords: 'constitutionalism', 'impeachment', 'separation of powers', 'checks and balances', 'spirit of the law', 'letter of the law'.

Introduction

What is constitutionalism?

There is a difference between "Constitutionalism" and "Constitution" in modern political theory. A nation may possess a "Constitution" yet "Constitutionalism" is not always present. One may say that a nation under dictatorship, for instance, has a "Constitution" but not "Constitutionalism", as the dictator's word is supreme.

The fundamental distinction between the two ideas is that a constitution should aim to limit as well as grant authority to the different branches of government. Constitutionalism acknowledges the necessity of government but insists on limiting its authority.

Constitutionalism posits a system of checks and balances, limiting the authority of the executive and legislative branches to prevent them from becoming unfettered and unjust.

Unlimited authority puts people's freedom in danger. Power corrupts, and absolute power corrupts absolutely, as has been aptly remarked. An authoritarian, repressive regime might result if the Constitution grants the legislative or executive branch unchecked authority. Therefore, the Constitution should be infused with constitutionalism and have certain built-in limitations on the powers granted to governmental bodies in order to protect the fundamental liberties of the individual as well as his or her dignity and identity.

A nation has neither "constitution" nor "constitutionalism" unless its Constitution aims to distribute power rather than concentrate it in one place and places additional restrictions and constraints on such power too.[1]

Different understandings of Constitutionalism

Liberal understanding of Constitutionalism

According to the liberal interpretation of constitutionalism, each state ought to have its own set of laws that codify the principles of justice, equality, liberty, and fraternity into the nation's foundational documents. There might be written or unwritten regulations, whose creation either

[1] J. Chelameswar and J. Naidu, *Indian Constitutional Law*, Chapter I Pg.8

formed during an extended historical development period or at a certain moment in time, readily amendable, or very tough to amend. Many Western authors have embraced the thought of constitutionalism as a means and an end in itself. It has no worth and yet has value. Its aspects are empirical and normative. Overall, it aspires to be a constitutional state with a recognized set of laws and customs for the workings of "limited government". If a shift occurs, it needs to be organized so as to prevent violent tensions and pulls on the political system. The presence of the 'rule of law', guarantees everyone's liberty and equality, and there is press freedom, which serves as the fourth pillar of democracy. A system exists that aims to advance global justice, security, and peace.

Marxist understanding of Constitutionalism

Marxist understanding of Constitutionalism is a bit different from the liberal understanding of it. A constitution is not an end in itself in a socialist nation. It is just a way of putting 'scientific socialism' into practice. It is an instrument in the control of the 'dictatorship of the proletariat' that desires to construct a society without classes that would finally become a stateless condition of the State. The objective of having a constitution is not to restrict the powers of the government but to make them more accountable. They are so wide as to be comprehensive that the goal of a worker's state is realized, and a new sort of State emerges. In such a society, the true goal of the constitution is not to provide liberty and equality, rights and justice for everyone, but to ensure that the opponents of socialism are crushed and an entirely novel structure is securely established. In this approach, the true goal of the constitution is to solidify a fresh socialist discipline among the working class. The entirety of power sits in the grip of the communist party, whose leaders devise and implement policies based on their finest judgment, without regard for the requirements of a 'limited government'. The communist party becomes the State, and its leaders take on the role as keeper of the newfound socialist order.

However, some other nations have constitutions that blend both liberal and Marxist ideas. The rationale is that these nations, having experienced colonial control and having experimented with master countries' political structures, have a connection to the Western constitutional framework. Some of the features of the British Constitution that are borrowed by India are- Parliamentary government, legislative procedure, prerogative writs, cabinet system, single citizenship, 'rule of law', parliamentary privileges and bicameralism. In addition, because they are drawn to the socialist ideal, they support portions of the key socialist tenets in order to

realize the concept of social and economic justice in their nations.[2] In India too, there is a rough categorization of the Directive Principles of State Policy into Gandhian, Liberal and Socialist.

Doctrine of Separation of Powers

The doctrine of separation of powers has been incorporated into the constitutions of both India and the United States of America. This doctrine was fully incorporated into the United States Constitution, which means that the three branches of government—the legislative, executive, and judicial branches—each effectively carry out their respective roles within their respective domains without infringing upon or interfering with those of the other branches.

On the other hand, although the authorities are divided under Indian law, they are not completely or uniformly so. The other State organs are totally within their constitutional rights to interfere with an organ's ability to carry out its tasks if there is ever a circumstance where an organ abuses its authority or fails to operate effectively within its purview.

There are significant variances in the functioning and operation of system organs in both nations:

1. Judicial powers are granted to courts in the United States, and only courts can exercise such powers; however, in India, judicial powers are granted to courts as well as tribunals (essentially quasi-judicial authority), the executive (pardoning power of the President and the governor), and the legislature (to determine on issues of removing executive and judicial officers by law).

2. In the United States of America, the legislative branch is limited to the Senate and the House of Representatives. Similarly, in India, the State Legislature and Parliament both have the authority to enact laws. Still, the executive branch—which includes the President and the Governor—and the judiciary may also exercise legislative authority in certain situations. Like the President and the Governor have ordinance-making power.[3]

[2] Sri. C.M. James, *World Constitution: Comparative Analysis*, pg. 17-18.
[3] Sneha, *Doctrine of Separation of Power in India and USA: A Comparative Study*

Doctrine of Checks and Balances

Checks and balances are a principle of governance that allows different branches to prevent acts by other branches and induces them to share power. Checks and balances are most commonly used in constitutional regimes. They are critical in tripartite authorities, such as the United States, where powers are divided among the legislative, executive, and judicial branches.

The U.S. Constitution's framers, who drew inspiration from a variety of sources, including William Blackstone and Montesquieu, believed that checks and balances were necessary to ensure the security of liberty under the Constitution: "It is only by balancing each of these powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution." (John Adams).

Judicial review—the ability of the courts to assess the activities of the legislative, executive, and administrative branches of government to make sure they are constitutional—became a crucial aspect of American governance even though it is not specifically mentioned in the Constitution.[4]

This is not the case in India. A lot of similar functions are mentioned in the Constitution and if not, then set through precedents (Kesavananda Bharti case that established Basic Structure Doctrine). Some examples of such functions are:

Legislature control on Executive

- Article 61: Provision for the Impeachment of the President by the Parliament.
- Article 75: Calls for a responsible government where the council of ministers shall be collectively responsible to the House of People.

Executive control on Legislature

- Article 111: Veto Power of the President of India where he/she can exercise an absolute

[4] Britannica, T. Editors of Encyclopaedia (2023, July 24). *checks and balances. Encyclopedia Britannica.* https://www.britannica.com/topic/checks-and-balances

veto, suspensive veto or pocket veto with regard to legislative bills.

- Article 118: President makes rules for the procedure with respect to the joint sitting of the Parliament after consultation with the Chairman and the Speaker.

- Article 123: The President may promulgate ordinances when the Parliament is not in session.'[5]

Let's look at the first scenario in order to analyse the above-mentioned doctrines effectively.

Procedure of Impeachment of the President in India and in the United States

The impeachment procedure of the President of India is given in Article 61 of the Indian Constitution. He is impeached when there is a "violation of the constitution" done by him. But what is the scope of the term "violation of the constitution"? The Constitution can be violated in many ways- for example, under Article 60 the words that are used are "to preserve, protect and defend the Constitution", now these terms are in itself very vague. Pandit Bhargava also pointed this out.

There was also a suggestion to insert the words "treason, bribery or other high crimes and misdemeanours" by Kazi Syed Karimuddin because this was the case in U.S. Constitution. But Dr. B.R. Ambedkar opined that the "violation of the constitution" term is wide enough to include within its meaning treason, bribery, high crimes, and misdemeanours too. Article II section 4 is as follows:

"The President, Vice President and all civil Officers of the United States, shall be removed from Office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

The charge can be preferred by either House of Parliament and after the resolution has been passed by not less than two-thirds of the total membership of the House, the other House shall investigate the charge or cause the charge to be investigated. Similarly, in the U.S., by political question doctrine, the Senate only has the power to remove the President and the Courts can't

[5] Vajiram & Ravi, *Doctrine of checks and balances*

review it. This also ensures the separation of powers [Nixon v. United States].

The President is not answerable to any Court as given in Article 361 but that does not bar challenge that may be made to their action [***Rameshwar Prasad (VI) v. Union of India*** [6]]. No criminal and civil proceedings will be instituted upon him.

So, by the absence of the words- treason, bribery, high crimes, and misdemeanours as well as the immunity under Article 361, the President of India seems to get a lot of immunity when compared with the President of the United States. Amidst all this, how is the constitutionalism of India preserved? What is the spirit of law here? And how as a country we strike a balance between sovereignty and democracy?

Let's look at the judgment in the ***Nixon vs. United States***[7] case:

"The language and structure of Art. I, § 3, cl. 6, demonstrate a textual commitment of impeachment to the Senate. Nixon's argument that the use of the word "try" in the Clause's first sentence impliedly requires a judicial-style trial by the full Senate that is subject to judicial review is rejected. The conclusion that "try" lacks sufficient precision to afford any judicially manageable standard of review is compelled by older and modern dictionary definitions, and is fortified by the existence of the three very specific requirements that the Clause's second and third sentences do impose—that the Senate's Members must be under oath or affirmation, that a two-thirds vote is required to convict, and that the Chief Justice presides when the President is tried—the precise nature of which suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings. The Clause's first sentence must instead be read as a grant of authority to the Senate to determine whether an individual should be acquitted or convicted, and the commonsense and dictionary meanings of the word "sole" indicate that this authority is reposed in the Senate alone. Nixon's attempts to negate the significance of "sole" are unavailing, while his alternative reading of the word as requiring impeachment only by the full Senate is unnatural and would impose on the Senate additional procedural requirements that would be inconsistent with the three express limitations that the Clause sets out. A review of the Constitutional Convention's history and the contemporary commentary supports a reading of the constitutional language as deliberately placing the

[6] (2006) 2 SCC 1
[7]506 U.S. 224 (1993)

impeachment power in the Legislature, with no judicial involvement, even for the limited purpose of judicial review."

Here we see the importance of the word "sole" in the impeachment procedure. Even though the Chief Justice is called upon, his views won't limit the decision of the Senate. This is to ensure that the President, who is both the head of the State and the head of the government in the USA, is on his best and responsible behavior and maintains so throughout his term too. This is because Senate elections are held every two years and therefore the President (with a tenure of 4 years) if not being on his best behavior within the span of two Senate tenures can be impeached. This way both doctrines namely- the doctrine of separation of powers and the doctrine of checks and balances are kept intact in the USA.

In India, the President is just the head of the State unlike that in the USA where the President is also the head of the government. Also, the President makes decisions on the "act and advice" of the Council of Ministers. Mostly, the members of the Council of Ministers are also a part of the legislative organ. So, the President of India has much lesser responsibilities than the President of the USA. So, his impeachment procedure is comparatively not as strict, and therefore he/ she is also not answerable to the Court. However, there is no bar to challenge their actions in the Court. Here, even though there is no strict separation of power but there are checks and balances in the form of the President deciding on the act and advice of the Council of Ministers.

Let's see the second scenario which is regarding the independence of the Judiciary.

Independence of Judiciary

The question of the appointment of judges has been in controversy since the time of independence till today. There have been many ways formulated to ensure fairness. But we can say that the constitution makers were sure of one thing- not to give absolute power of appointment of judges to the executive. It should also be noted that neither the President nor the Chief Justice had the absolute power to decide because, at the end of the day, even the Chief Justice is a human being with their own personal biases. These are not my words; I am just reiterating Dr. B.R. Ambedkar's words.

In the Judges Case, the interpretation led to the executive having the primacy which further

resulted in the appointment of some judges for which the Chief Justice didn't agree upon. After receiving a lot of criticism as this decision was a threat to the independence of the Judiciary, the Second and Third Judges Cases followed. Both these judgments did a wonderful job of re-establishing the primacy of the judiciary. In the Second Judges case the word "consultation" is interpreted as "concurrence" with the opinion of the CJI. In the Third Judges case, collegium was formed where for the Supreme Court's appointment of a Judge, CJI and 4 senior most judges of the Supreme Court are to be consulted while in the High Court's appointment of a Judge, CJI and 2 senior-most judges of the Supreme Court are to be consulted. But then, by the 99th constitutional amendment came the NJAC (National Judicial Appointments Commission) which replaced the collegium thus violating the basic structure doctrine.[8]

The independence of the judiciary is the basic structure of the Indian Constitution. Separation of powers exclusively of the Judiciary is essential to meet the end goals of the Constitution. One of the end goals is a democratic nation, the independence of the judiciary also ensures that. How? one may ask- by being free from the influence of the government of the day. This will make the citizens of the democratic nation go freely to the Court even when they have grievances from the State (like when their Fundamental rights are being violated). This was also the constitution maker's intention. To add to it there is a global trend towards enshrining the primacy of the Judiciary in the appointment of Judges. So, after the Third Judges Case came the Fourth Judges Case which gave us the Collegium System we follow today. There have been discussions regarding the current system too but whatever happens, the constitutional intention should always be kept in mind in order to ensure welfare of the society.

Constitutionalism: How much is in the letter and how much is in the spirit?

Apart from the doctrines and cases mentioned above that in some sense reflect upon constitutionalism, here are some more discussions on constitutionalism. First, let's look at Part III of the Constitution which deals with fundamental rights. Within that comes Article 21 which states- "No person shall be deprived of his life or personal liberty except according to a procedure established by law." Now if constitutionalism had only meant following what's written in the Constitution then, this Article would be of very little use. Therefore, it should be interpreted broadly. This will ensure that there's no injustice towards the citizens living in a democratic nation. Therefore, the right to life encompasses lots of rights within itself like the

[8]M.P. Singh, *Securing the Independence of the Judiciary*

right to live with human dignity which was interpreted by J. Bhagwati in the case of ***Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi & Ors.***[9] stated:

"The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Therefore, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruelty, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Article 14 and 21."

Why was this broad interpretation required? Because protecting the rights of citizens is also an essential feature of constitutionalism. Only when such rights are protected, it shows the accountability of all the organs of our country towards citizens. It is also important that we not only have a democratic government but also an accountable one. And as citizens are the voters who form the government, it increases their responsibility to protect them.

Another case where Article 21 was in question was in ***Gurbaksh Singh Sibbia v. State of Punjab***[10]

The Full Bench's decision to restrict the use of section 438 to exceptional circumstances exclusively in light of its unusual nature was impeding the delivery of justice and equality under the law. If such a constraint or restriction was placed on the use of discretionary powers

[9]1981 AIR 746, 1981 SCR (2) 516
[10](1980) 2 SCC 565

under Section 438, a person falsely accused of a non-bailable offense would not be granted any relief. Additionally, the term "exceptional cases" was ambiguous because the entire bench did not clarify under which exceptions it was permissible to employ the powers granted by Section 438. In light of this, the Constitutional Bench's rational and equitable decision is to reject this argument.

Additionally, the Constitutional Bench's decision to place limitations on anticipatory bail in order to facilitate effective investigations is a better precedent than the High Court's Full Bench's judgment, which suggested that the power under 438 should never be used. This infringed on the person's right to personal liberty and the ability to obtain a bail warrant in accordance with Article 21 of the Fundamental Rights. The criteria for interim bail and the restrictions on the application of anticipatory bail offer the courts complete discretion in their decision-making and prevent the generality of laws that impedes the functioning of the criminal justice system. The constitutional bench's position that learned judges of High courts and Sessions courts can make wise decisions due to their extensive experience in the subject is logical, and even if they make a decision that violates Article 21, it can still be subjected to judicial review and revision.

However, Anticipatory bail differs significantly from regular bail in its approach. There is uncertainty in this case because the applicant for anticipatory bail is not being held in any type of custody, either state or private. A case involving anticipatory bail is brought before the court based only on the assumption that an arrest is imminent. The situation is not now criminal in any way. This negates the point of giving these agencies or officers investigation jurisdiction because it denies the investigating officers and/or agency the ability to work on the case. As a result, the court will meddle with the police's authority and operations.

In this case, Article 21 was also acknowledged by the court in order to safeguard a citizen from any arbitrary procedure during a trial.

From these two examples, we see how an article that is of only a few words can have such a broad interpretation. Therefore, sometimes the Articles in the Constitution need to be read as it is and interpreted in the strict sense whereas, at other times to achieve the goals given in our Preamble, the interpretation has to be broad. So, in my personal opinion, I believe that constitutionalism is more in spirit than in the letter.

Conclusion

Throughout this article, we have seen the definition of constitutionalism and different understandings of it. I also analyzed the doctrine of separation and the doctrine of checks and balances in the first scenario regarding the procedure of impeachment of the President in India and in the United States and came to the conclusion that every nation has its own way of maintaining a balance between both these doctrines and henceforth maintaining constitutionalism.

In the second scenario, we saw how the executive encroached upon the Judiciary's function in the appointment and transfer of Judges. Firstly, during the Judges Case, and secondly by the formation of NJAC, the primacy of the Judiciary was threatened. But the Second Judges case and the Third Judges case helped remove the wrongful interpretation of the Judges case by interpreting the word "consultation" of the CJI as "concurrence". Finally, the Fourth Judges case facilitated in reestablishment of the collegium system which was dissolved by the formation of NJAC.

Observing and acknowledging the discussions above the author believes in two quotes as given below:

1. First, that was given by Jeremy Waldron. This one's a bit pessimistic but worth thinking about. The quote is:

   "[S]ometimes 'constitutionalism' is a pompous word for various aspects of con law or the study of the constitutions. Still the last two syllables – the "-ism" – should alert us to an additional meaning that seems to denote a theory or set of theoretical claims. Constitutionalism is like liberalism or socialism or scientism. It is perhaps worth asking what that theory is and, whether the claims it comprises are true or valid."

2. The second quote I believe in is given by Justice Mishra in Navtej Singh Johar's[11] case. It talks about transformative constitutionalism. He states:

   "The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the

[11]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times."