



CONSTITUTION AND CONSTITUTIONALISM: A POLITICAL VIEW

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The ideas of constitution and constitutionalism visit the legal framework of a rustic. While the constitution is usually outlined because it is the “supreme law of,” constitutionalism may be a system of governance below that the ability of the govt. is restricted by the rule of law. Constitutionalism acknowledges the requirement of limiting concentration of power so as to safeguard the rights of teams and people. In such a system, the power of the government can be limited by the constitution and by the provisions and regulations contained in it but also by other measures and norms. In order to grasp the ideas furthermore understanding their similarities and variations is a must. It is necessary to grasp their history and evolution. The idea of the constitution has modified considerably compared to the primary examples seen in ancient Greek country, whereas the construct of constitutionalism has fully grown around the principle that the authority of the government springs from and restricted by a group of rules and laws.

Constitution has various meanings and each definition tries to interpret its meaning in different ways. The philosopher Aristotle (384–322 bc.), in his work *Politics*, analyzed

over 150 Greek constitutions. He delineated a constitution as making the frame upon that the government and laws of a society are built.

A constitution may be defined as an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members are prescribed. Laws, as distinct from the frame of the constitution, are the rules by which the magistrates should exercise their powers, and should watch and check transgressors.

Duhain's law dictionary defines the constitution as:-

The basic, fundamental law of a state which sets out how that state will be organized and the powers, authorities of the government between different political units and citizens.

Well, constitutionalism carries its own meaning. It can be interpreted as follows¹A governments authority is determined by a body of laws or constitution. Generally, this refers to prevent arbitrary government. Basically, the idea of this is linked to the development of the democracies. Important elements of the constitution are

²(1) government as indicated by the constitution; (2) detachment of intensity; (3) sway of the general population and popularity based government; (4) constitutional review; (5) free legal; (6) constrained government subject to a bill of individual rights; (7) controlling the police; (8) regular citizen control of the military; and

¹ www.britannica.com/topic/constituionalism

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www.legalservicesindia.com/article1699/constitutionism.html



(9) no state control, or exceptionally restricted and entirely delineated state control, to suspend the task of a few sections of, or the whole, constitution.

³In *I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors.* the view was taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of the 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 centers of decision making. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism.

In *Rameshwar Prasad and Ors. Versus Association of India (UOI) and Anr.* "The constitutionalism or protected arrangement of Government detests absolutism - it is started on the Rule of Law in which emotional fulfilment is substituted by objectivity given by the arrangements of the Constitution itself." Constitutionalism is about cut-off points and desires. As seen by Chandrachud, CJ, in *Minerva Mills Ltd. - "The Constitution is a valuable legacy and, in this way, you can't crush its character'. On one hand, our lawful move such learned responses that "Trust in the legitimate is of prime hugeness. Our very own is a free nation. Among such people respect for law and trust in its sacrosanct comprehension by*

courts require an amazing dimension of strength and coordinated effort for the estimation of dominant part rule government and survival of constitutionalism" said in *Indra Sawhney and Ors. Versus Union of India (UOI) and Ors.* The constitution of India was embraced by the Constituent Assembly of India on 26 November 1949 and wound up successful on 26 January 1950. Constitution and constitutionalism are covering thoughts, in spite of the way that the essential suggest a made gathering out of laws and order and the second is a multifaceted standard and plan of organization. A segment of the similitudes between the two include: Both insinuate quite far and features of the course of action of organization of a country. Constitutionalism would not exist without a constitution, and a set up system for coordinating a nation requires cut-off points and purposes of restriction to the central master. Both impact the activities of both government and masses. Other than giving a system to political and institutional structure, the constitution sets out the focal picks that all local people should seek after. Moreover, controlling sacredly recommends that the get together applies the controls spread out in the constitution to keep and deal with the subjects' presentations - always concerning individual and total rights; Both guarantee and ensure individual and total rights, shielding the focal government from misusing of its powers and infringing on the locals' fundamental chances; and Both have created and in a general sense changed in the midst of the latest couple of many years, benefitting from the spread of fame based convictions and getting the opportunity

³ Milan Dalal, "India 's New Constitutionalism: Two Cases That Have Reshaped Indian Law", *Boston*

College International and Comparative Law Review", volume no 31, issue no 2, article 4, 2005



to be key features of the predominant piece of Western countries.

Distinction among Constitution and Constitutionalism

The essential complexity among constitution and constitutionalism lies in how the constitution is, generally, a created record, made by the governing body (consistently with the collaboration of the basic culture), while constitutionalism is a standard and a course of action of organization that respects the standard of law and limits the power of the organization. Most present-day constitutions were made a very long time back, yet laws and norms had quite recently been creating and changing for a significant period of time, and continue doing in that capacity. The constitution (and laws with everything taken into account) is a living component that should conform to the changing features of the front line world and of current social requests. Fail to change the constitution – without losing its middle benchmarks and characteristics – may provoke an obsolete organization system. Distinctive differences between the two thoughts include:

Constitutionalism relies upon the measures plot in the constitution – or in other focus legitimate chronicles – be that as it may, it is similarly its own one of a kind standard. The likelihood of constitutionalism is against the possibility of a despot and tyrannical rule and relies upon the conviction that the power of the lawmaking body should be compelled with the ultimate objective to balance abuses and bounties;

The constitution is routinely a formed chronicle, while the models of constitutionalism are all around unwritten. Both constitution and constitutionalism

advance with the decree of fair objectives – regardless of the way that they don't for the most part proceed at a comparable speed. There can be a built up kind of organization – that respects the benefits of the inhabitants and advances dominant part rule regards – in spite of the way that the national constitution is outdated. Meanwhile, an inefficient just government will probably be not able to oversee normally, despite the nearness of a constitution.

The constitution of India was framed on a philosophy of liberalism and democracy was its functional manifestation. As Professor K Lowenstein says, the constitution is either a suit made to measure or to be actually worn or a readymade suit which is not worn but hangs in the closet or it is not a suit at all but a fancy dress or a mere cloak. Constitution of India is highly influenced by religion and India. On the other side the constitution and constitutionalism, both go hand in hand. So religion affects constitutionalism also. The following inquiry to examine is the thing that sort of state-religion relationship and religious frameworks are perfect with liberal majority rule government, and what is most certainly not. National sacred controls about religion and the arbitration of religious rights can be thought about from both an individual rights point of view and an aggregate rights point of view. The individual rights point of view sees religious opportunity as an issue of singular decision and the aggregate rights viewpoint sees religious opportunity as a question of the proceeded with reasonability of religious gatherings. To evaluate these unique procedures for the state control of religion, diverse models of chapel state relations, must be analyzed, for instance, how extraordinary governments formally perceive religious gatherings, empower (or not) their practices and manage religious protesters.



One has likewise taken a gander at universal human rights bargains together with the statute of global bargain bodies since settlement duties impact how states comprehend their legitimate commitments around there too. Nationally protected methodologies change even in liberal sacred popular governments due to verifiable contrasts and the diverse religious syntheses of the various national populace. This assortment is generous. Despite the fact that the constitutions of most Western majority rule nations don't require a solitary state church, greater part places of worship can be singled out as national houses of worship, as in Italy (1947), Spain (1977) or Poland (1997). In multi-confessional commonwealths, similar to Germany, uncommon state acknowledgment for numerous holy places can prompt the accumulation of chapel imposes by the state, offered back to the places of worship once in a while with an extra state appropriation. This establishes a more altruistic sort of secularism, with a cooperationist' mentality of the state towards houses of worship. This sort of methodology some of the time agrees with open law status to holy places or formalizes concordats with the Holy See, as a legitimate substance, not the same as the Vatican, for instance. State neutrality in other liberal constitutions can likewise be related with more secularist approaches, similar to the French laicite or the American non-foundation framework. In the strict separation frameworks, as in France, and Turkey religion is to a great extent privatized. This does not imply that all liberal, non-religious states are consequently common. Be that as it may, in every single liberal constitution, the religious opportunity has turned out to be acknowledged as a person ideal from the nineteenth century onwards.

The disestablishment of religion guaranteed by the First Amendment³⁴ of the US Constitution went for freeing of religious establishments from the state. The inspiration driving this disestablishment was less to make a more typical open culture, be that as it may, to free religious enunciation, and empower the free blessed spots to thrive. In this model, religion is free of government support and free of government control. The structure of American opportunity concerning religion relied upon pluralism and grouped assortment since as Rawls raised, the purpose of the organization was to decay to use state ability to constrain a particular cognizance of the extraordinary life upon one's individual citizens.³⁵ According to this liberal conflict, empowering the organization to set up religion with specific advantages would not invigorate, yet rather weaken religion. The American sort of separation of the state and church inferred from one point of view the protection of individuals from obliged help for religions they didn't place stock in. Also, protection of religious relationship from legislative obstruction on the other. The possibility of constitutionalism is an incredible transition in the UK because of the law and legislative issues in the UK.

These present advancements must, notwithstanding, be seen against the background of the quickly going before time of supported and profound level sacred change, as administrative measures concerning the security of human rights (the Human Rights Act 1998), the devolution of intensity (the Scotland Act 1998, Government of Wales Acts 1998 and 2006, and Northern Ireland Act 1998), opportunity of data (the Freedom of Information Act 2000), and change of the legal (the Constitutional Reform Act 2005) ordered while the previous Labour government was



in office somewhere in the range of 1997 and 2010. The United Kingdom's enrollment of the European Union has additionally had proceeding with profound level noteworthiness for discussion about the continuous feasibility of Parliamentary power as the bedrock established guideline or rule of the local constitution. Moreover, the courts have kept on creating for themselves the intensity of legal survey of official activity, and a couple of senior judges have even recommended that Parliamentary power, as a custom-based law rule, is available to legal reinterpretation or abandonment.⁴ At a more everyday level, worries about national security have saturated the political condition since the psychological militant assaults of September 11, 2001, and July 7, 2005, and supported the section of progressive antiterrorism resolutions, promoting here and there obvious strains among lawmakers and the legal, as the body accused of upholding the Human Rights Act 1998. Worries about national security have, in their turn, had a generous effect on the progressing regularizing banter about the job of sorted out religions (regardless of whether Christian, Muslim, or Jewish) in law and national life, and about the privileges of contending religious gatherings.

Well every almost every constitution makes some reference to religion. On the other side, there is only one religion where the constitution is not relevant that is the Czech republic's constitution. Dealing with religion for the constitution is not so tough, rights are given in the form of freedom for such causes.

There are no neat divisions or classifications to describe the relationship between constitutional law and religion in the region, nor of legal traditions increasingly broadly.

The worldwide law animates the legal systems of Pakistan, Bangladesh, Malaysia, Singapore, Myanmar, and India, while starchy law systems typify Thailand and Indonesia; and mixed systems exist in Afghanistan. Structuring these legal systems are vastly variegated ramble systems and multiple ways of recognizing, or relegating, religion in public and private life. Some constitutions recognize a religion, others acknowledge several religions, and others prefer secularism as a cadre principle. Yet, there are core themes and ideas that run through and unite these jurisdictions, regardless of differences in constitutional form or religious make-up.

It follows from these tendencies that liberalism and democracy do not necessarily go hand in hand. It follows from these tendencies that liberalism and democracy do not necessarily go hand in hand. As the case of the Muslim Brotherhood in Egypt after 2011 shows in the Middle East democratization is likely to push Islamist parties towards greater illiberalism. In religiously conservative societies there is in general widespread support for more mixing of religion and politics, not less. For example in Egypt even after the overthrow of President Morsi – overwhelming majorities support Shari'a, as a primary or only source of law, including the role of religious leaders in drafting legislation, religiously derived criminal punishment, and gender inequality. This means that if democratic elections are provided Arabs would rather decide not to be liberal, as even the most moderate Islamist want the state to promote religious and moral values through the soft power of the state machinery, the educational system, and the media. But as many examples in the secular Europe show, Islamist cannot fully express their Islamism in a strictly secular state, since



the notion that liberalism is neutral can be accepted only within a liberal framework. Therefore for democracy to flourish in the Middle East it will have to find a way to incorporate Islamist parties and it will have to be at least somewhat illiberal.⁴

Due to the liberal American disestablishment, there have been no proceeded with requires the area, state or government to deny religious pictures from open spots or schools. Be that as it may, with respect to court appearances, court confinement, drivers' allow issuance, and air travel, U.S. policymakers and courts have affirmed laws and practice that intrude with Muslim women's free exercise of their religion, to be particular, the wearing of hijab, niqab or burqa that conceals the hair or face from view. For instance, the Michigan District Court ousted a Muslim woman's case against a vehicle rental association when she declined to reveal. The Supreme Court of Michigan has concurred with zone Court by getting a change to Michigan Rule of Evidence, which gives that: "The court will rehearse sensible control over the nearness of social events and observers with the end goal to (1) ensure that the manner of such individuals may be watched and studied by the truth pioneer, and (2) to ensure the exact ID of such individuals." Other states of the US have extra laws giving settles on a choice about capacity to control apparel. The US Supreme Court has not particularly watched out for restrictions on Muslim headscarves or then again facial shroud. In the point of reference Cohen v. California (1971), the Court hurled out the turbulent lead conviction of a California man who wore a coat bearing the antagonistic words "Screw the Draft" in a

courthouse corridor.³⁷ The Cohen decision laid on the requirements of the chance of verbalization guaranteed by the First Revision. The First Amendment likewise secures the free exercise of religion. On the off chance that the first Amendment secures coats worn for political purposes, it could be relied upon to ensure humility clothing worn for religious purposes. In contrast to the American progressives, their French partners declined to isolate church from state, rather expected much more noteworthy political power over religion.

Moved by the Republican conviction arrangement of Rousseau they attempted to a state in which the particular wills of the subjects and the general will were in central congruity. As shown by the French beginning of citizenship, the national does not have a character free from the state. Specialist over religion is essential in this thought, likewise, religious pluralism is a threat to such a component of the state. The segment of chapel and state would be a mistake in this structure since it would provoke isolated loyalties. The state anticipated that would direction over simple guidance, and superseded religious rules in the schools with what was known as the central of „universal significant quality". In November 1793, the Commune of Paris declared: „that all of the sanctuaries and places of petition of every religion and association which exist in Paris will be closed forthwith".

This argument may seem politically unfeasible. That, however, would be a quick conclusion. To begin with, judgments concerning feasibility or practicality or realism are not merely factual judgments

⁴ This is the argument Shadi Hamid uses against the ban of the Muslim Brotherhood in Egypt. S. Hamid,

'The Brotherhood Will Be Back', The New York Times, May 25, 2014.



devoid of normative judgments and goals. The Article contested the facts that underlie the realist argument either by presenting new facts or by showing how these facts necessitate a normative judgment regarding how one arrives at these facts (e.g., how we should measure popular will). If the realist concedes that a sharia clause is not an ideal arrangement, then there is a need to identify a desirable alternative arrangement. Once this goal is identified, it can become a regulative idea towards which political action can be oriented. The answer cannot be: "accept the existing bad arrangement and hope it will change in the future" because, as previously indicated, choices made at the present influence the availability of options in the future. If one disagrees normatively with a sharia clause then one undermines her own position, at least over the long-term, when she agrees to it under the banner of realpolitik. Ultimately, this realpolitik is no more than an apology to the status quo.

In *I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors.* 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 centers 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.** "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.** - "The Constitution is a precious heritage and, therefore, you cannot destroy its identity"⁵

By and by enactment including correction of the constitution and land change laws was tested in the courts. In what wound up known as the *Kesavananda Bharati* case,⁴⁷ a thirteen-judge board of the incomparable court issued an original sentiment traversing almost 800 pages⁴⁸ and a whole volume of the Supreme Court Cases Reporter.⁴⁹ The court proficiently issued a progression of instrumental decisions.⁵⁰ First, the court toppled the *Golak Nath* case, which had held that Parliament come up short on the ability to change central rights in the constitution without a protected convention.⁵¹ Second, by an edge of thirteen-to-zero, the court maintained the Twenty-fourth Amendment, which stipulated that the "Parliament had the ability to correct any or all arrangements of the Constitution."⁵² Ruling seven-to-six, in any case, the court included one admonition: albeit no piece of the constitution was beyond alteration, Parliament couldn't revoke

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<http://www.legalservicesindia.com/article/1699/Constitutionalism.html>



the "fundamental structure" of the constitution through straightforward amendments.⁵³ Additionally, the court maintained the Twenty-ninth Amendment, holding the Kerala land change laws were past legal survey, as they were contained in the Ninth Schedule.⁵⁴ Hence, the court, while maintaining the revisions gone by Parliament, embedded the intensity of legal audit for itself by decision that revisions, modifying the "essential structure" of the constitution couldn't withstand legal scrutiny. Although the legislature scrutinized the essential structure principle enunciated in Kesavananda Bharati, the decision was re-asserted in subsequent decisions.⁵⁷ Thus, for more than thirty years, Parliament had the option to work by changing the constitution insofar as it didn't dissolve the essential structure of the constitution.

The two recent decisions of the Indian Supreme Court, in Coelho and Raja Ram Pal, can be heralded as significant victories for Indian constitutional law and democratic government.¹³¹ The court's decisions were seminal because they re-evaluated the conduct of Parliament and the scope of judicial review in which the court could engage with respect to Parliament's legislative and non-legislative functions.¹³² The Coelho case held that laws and constitutional amendments that altered the basic structure of the constitution, by violating fundamental rights, could be invalidated.¹³³ This decision is significant for a variety of reasons.⁶

To start with, the consistent conclusion in Coelho can be seen as a triumph for central rights.¹³⁵ Given the earlier activity of Parliament in dumping several laws into the

Ninth Schedule, it was vague whether the basic rights progressed by the constitution would be liable to straightforward correction or disintegration by Parliament.¹³⁶ In light of the court's choice, be that as it may, it is currently certain that rights, for example, "balance," "opportunity," and "life" are considered "key" and in this manner "are not bamboos that will curve to suit passing political winds."¹³⁷ Related to the main point is the idea of political accountability.¹³⁸ before, lawmakers have been enticed to mishandle the structure of article 31B and the Ninth Schedule to incorporate laws irrelevant to land change or completion feudalism as a methods for scoring political focuses with constituents; they will now never again have the option to dodge the scrumodest of an attentive judiciary.¹³⁹ Third, this choice re-establishes a perceived leverage between the legislative and legal branches.¹⁴⁰ At the center of any vote based system is a free, flourishing judiciary.¹⁴¹ Part-and-package of such a framework is the capacity of courts to take part in legal survey and strike down laws that don't acclimate with the fundamental contract of legislative power.¹⁴² By deciding that the court could strike down any law that adjusted the basic structure of the constitution, the court protected the constitution and put a basic beware of Parliament.¹⁴³ At a similar time, the Coelho supposition can't be seen as just having a positive impact.¹⁴⁴ It has opened the court to significant roads of criticism.¹⁴⁵ For instance, one could contend the choice gives the legal executive an over the top measure of intensity, countering the "reestablishing harmony" contention offered previously.

⁶ India's new constitutionalism law review.



The Supreme Court of India is clearly more assertive today than it was just thirty years ago, when it held in the Kesavananda Bharati case that it had limited ability to conduct judicial review of laws placed in the infamous Ninth Schedule, thus shielding them from review. Recent decisions in the Coelho and Raja Ram Pal cases show the court is more willing to undertake judicial review, by permitting examination of both Parliament's legislative and non-legislative roles. Such action has allowed the court to tackle issues ranging from invalidating laws that have nothing to do with land reform, to stemming political corruption. The court's decisions are not without controversy, as various sides see them as expanding accountability, and others see them as usurping the role of the legislature. Given the seminal nature of these Indian Supreme Court decisions, however, the cases are likely to have a lasting impact on not only Indian constitutional law, but also the way Parliament crafts laws and constitutional amendments in the future.

