



CONCEPT OF CONSTITUTIONALISM

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INTRODUCTION

The humankind has always strived to establish an organised society with security of life and property and preservation of liberty and equality. In this search, he has discovered several tools and methods to accomplish these goals. Constitutionalism is one such device that helps in protecting the rights of the individuals. It is the underlying principle that forms the basis of any civilized society. It prevents tyranny of a single ruler and places the power to govern in the hands of the people who are to be governed. Constitutionalism can, therefore, be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules¹.

The spirit of constitutionalism is manifested through a living document called the Constitution. This document enables the people to establish and organize the government in such a form that it would safeguard their life and liberty. In fact, constitutionalism paves the way for the development of a system where people can limit the powers of the very government in whom they placed the trust to administer the affairs of the State. To explain this idea in the words of James Madison, "In framing a government which is to be administered by men over men," it is necessary to "oblidge it to control itself."²

The socio-political dynamic of the world took a drastic turn post the second world war. People of different States began exercising their right to self-determination. They demanded absolute sovereignty and rejected the colonial rule. This was the time that saw the rise of establishment of Government through the various forms of Constitution. One thing that remained common to all the States were the elements of Constitutionalism that became the founding stone for their Constitution as well as the Government. Further, in the past few decades, there has been a growing emphasis on Constitutionalism, especially after the advent of globalisation. With a constant remodelling of the rights of the people around the globe, the ideals of Constitutionalism have emerged as a yardstick of securing those rights.

The judicial decisions have played one of the most crucial roles in the development of Constitutionalism. In India, the Constitution has taken the status of an organic document and has

¹ HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 5 (London: Cavendish Publishing Limited, 3rd ed., 2000(1995)).

² The Federalist (Bourne ed.), No. LI, 354.



withstood the test of time because the judges have, time and again, reinforced the principles of Constitutionalism as an intrinsic part of the Constitution itself.

On a close examination of the Indian legal system, it is found that the doctrine of basic structure, as propounded in the case of *Kesavananda Bharti v. State of Kerala* includes, by and large, the elements of Constitutionalism as the basic structure. For instance, Rule of Law³, Separation of Powers⁴, equality⁵ and due process⁶ are some of the elements of both the basic structure as well as Constitutionalism.

In *I.R. Coelho v. State of Tamil Nadu*⁷, the Supreme Court, while dealing with question of power of judicial review of the Court in relation to the IXth Schedule, held that “*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.*” Laying emphasis on the check and balance model of the separation of powers, the Court made it clear that the principle of legality is nothing but a postulation of the principle of Constitutionalism. Recently, in the case of *Joseph Shine v. Union of India*⁸, the Court dwelled into the aspect of transformative Constitutionalism. It was observed that as the human society grows and evolves, so does the Constitution and Constitutionalism.

In light of this dynamic evolution of the concept of Constitutionalism, this research tends to first analyse the origin and meaning of Constitutionalism. Thereafter, it tries to discern each element of Constitutionalism and determine its relation with the different forms of Constitutional set up. Finally, it analyses the possible challenges in the development of Constitutionalism. The research will majorly deal with the challenges of interference through political majority, situation of war and emergency, socio-economic development, widening ambit of existing rights and amplification of the term Constitutionalism.

CONSTITUTIONALISM – CONCEPTUAL AND HISTORICAL BACKGROUND

The roots of constitutionalism were sown at the dawn of Greek civilizations, and the Roman civilizations carried them forward in the shape of natural law. Philosophers from various schools of thought have contributed to the idea of restricting government authority to prevent it from being usurped throughout time. The Constitution in Greece was, in the most basic sense, an extension of the state. Constitutional administration did not relate to a limited government to the Greeks; rather, it referred to the rule of any state having a constitution, whether monarchical, oligarchical, aristocratic, or democratic.⁹ With the change in the state, the constitution also changed¹⁰.

³ *Indira Nehru Gandhi v. Raj Narain & Anr.* 1975 SCC (2) 159.

⁴ *Kesavananda Bharti v. State of Kerala* AIR 1973 SC 1461.

⁵ *supra*, note 3.

⁶ *Maneka Gandhi v. Union of India & Anr.* AIR 1978 SC 597.

⁷ *I. R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

⁸ *Joseph Shine v. Union of India*, 2018 SCC Online SC 1676.

⁹ WILLIAM A. DUNNING, *POLITICAL THEORIES, ANCIENT AND MODERN* 64-65 (1913).

¹⁰ *ibid.*



During this time, Constitutionalism arose from a higher natural rule that was both just and universal. As a result, any law enacted by the state may be unjust or harmful, but it will not be unconstitutional because there is no codified, basic law to decide this. On the basis of a divine law, the law was valid. The stoic philosophers eventually prepared the path for Roman Civilization, which was mainly based on natural law doctrine.

The principle of checks and balances together with the doctrine of popular sovereignty, and the principle of a higher law or the doctrine of natural law, or the philosophy of limited government, were all contributions of Rome to constitutionalism.¹¹ This idea was further developed and expounded upon by philosophers such as Justinian, Gratian, St. Paul, St. Aquinas, Ambrose and Jerome.

It was the Natural school of thought who for the first time, emphasised that a government's power might be limited, and that laws enacted by it would have no force unless they followed the everlasting principles of nature.

The English philosopher Austin, who proposed the idea of positive law in which only the Sovereign's command could be law, had a paradigm shift. The question of how the Sovereign could be limited if it was the one making the laws arose. As a result, a differentiation between the two notions, namely the sovereign and the government, became necessary. It was later realised that in a democratic society, the people who give the government powers by their will are the true sovereigns, not the government.

Constitutionalism is an ideology that is based on evolution. However, a "Limited Government" is at the heart of Constitutionalism. Constitutionalism acknowledges the need for a government while also insisting on limits on the government's power. There is no universally agreed definition of constitutionalism, but in general, modern constitutionalism entails limiting government power, upholding the rule of law, and safeguarding fundamental rights. Constitutionalism demands that the state's arbitrary power be limited.¹²

According to McIlwain¹³, constitutionalism means “*legal limitation on government. It is the antithesis of arbitrary rule. Its opposite is a despotic government, the government of will instead of the law*”. As a result, constitutionalism refers to the legal limitations on government. Constitutionalism is implied by the Magna Carta (1215). The power of England's King John was curtailed as a result of it. Constitutionalism is built on a simple idea, Carl Friedrich in his book *Constitutional Government and Democracy*, states that the government is organised by people and operated on behalf of the people, but is subject to a series of restraints that attempt to ensure that the power necessary for such governance is not abused by those who are called upon to govern.

¹¹ Patterson, C.Perry, *The Evolution of Constitutionalism* (1948). Minnesota Law Review. 934.

¹² Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, The American Political Science Review, Vol. 56, No. 4, Dec. 1962.

¹³ CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN [1947].



Negative constitutionalism

It is important to highlight that the traditional concept of constitutionalism is a negative one. "Negative Constitutionalism" is the name for this. A negative understanding of a concept in law refers to when it hinders an entity from performing a specific action. It refers to the fact that the government is prohibited from doing certain things, such as interfering with citizens' rights. The constructive function that the states perform is not explained by this standard conception of constitutionalism. Constitutionalism has a bad connotation because it is viewed as only confining and limiting the state's power. A state, via the lens of negative Constitutionalism, is a threat that must be restrained. The role of law is to restrain the executive and legislative branches' hazardous powers. For example, the objective of separation of powers is to defend citizens' liberty by limiting the state's arbitrary actions.

Negative constitutionalism, which calls for a constitutional structure that prohibits the government from acting, isn't always ideal. This interpretation of Constitutionalism makes it more difficult for the government to provide health-care and poverty-relief programmes, which necessitate government action. As a result, it is undesirable, particularly in India, which is a welfare state that aims to social and economic justice in addition to political justice.

Negative Constitutionalism has been accused of being anti-democratic as a result of this. This concept of Constitutionalism, according to Waldren, is essentially incorrect. For him, this concept of Constitutionalism goes against the idea of equality, which is, in some ways, at the heart of a Democracy, as it may be said to be any polity's ultimate purpose.

Positive constitutionalism

Positive constitutionalism challenges the notion of viewing constitutionalism solely in terms of state limits. The positive aspect of Constitutionalism necessitates viewing the state through the lens of a "Welfare State." To ensure the well-being of its citizens, the positive version of constitutionalism necessitates the establishment of effective and competent state institutions.

According to this concept, a Constitution fails to meet the requirement of constitutionalism if it disregards accommodation and respect for diversity and plurality in a society. Several older constitutions that had ignored this aspect of constitutionalism have now incorporated it through judicial interpretations, amendments, appropriate legislation, and constitutional application.

ELEMENTS OF CONSTITUTIONALISM

The elements of Constitutionalism as given by Louis Henkin are as follows:

1. Government according to the Constitution
2. Separation of Powers
3. Popular sovereignty and Democratic Government



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4. Constitutional Review
 5. An Independent Judiciary
 6. Civilian Control of the Military force
 7. Police governed by Law and Judicial Control
 8. Individual Rights
 9. Limited State Power

All these elements restrict the power of the State in a particular way.

1. Government according to the Constitution

Constitutionalism implies that only the Constitution may be used to properly exert governmental power. There can be no extra-constitutional government, no exercise of public power by anyone or anything that isn't named in the Constitution. There is no way for officials to stay in office beyond the term for which they were elected or appointed. A constitution may call for the suspension of specific institutions or processes in the event of a public emergency, but such suspensions are fundamentally unconstitutional and must be carefully scrutinised.

2. Separation of Powers

Power is not concentrated in any one organ of the state under constitutionalism. It is distributed among the state's three organs: the legislature, the executive, and the judiciary. When power is monopolised by a single governmental organ, there is a risk of abuse of power, tyranny, and dictatorship. There can't be any freedom either. For example, in addition to its legislative power, the legislature is not permitted to undertake executive functions, and the judiciary is not permitted to carry out the laws it interprets. These two powers are reserved for the executive and judicial branches of government, respectively.

3. Popular Sovereignty and Democratic Government

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¹⁴ Article 3, 1789 French Declaration of Human Rights.



authority to govern, ultimate sovereignty rests with the nation. The public wields power over such a sovereign entity.

The public is involved in the decision-making process of a democratic government in several ways. The people have the right to elect representatives to represent them. Such an election, however, should be free, transparent, and fair. Representatives may be recalled before the end of their term of office if the public loses faith in them and they fail to represent the public's interests.

4. Constitutional Review

Constitutionalism emphasises the need for an institution and a procedure to check governmental authority for compliance with the constitutional blueprint and constitutional constraints. Some constitutional systems, such as India and the United States, have assigned the power of constitutional review to the judiciary in general, while others, such as Germany, have given it to a special constitutional court, and others, such as France, have given it to a non-judicial authority.

5. An Independent Judiciary

The person is at the centre of liberal democracy, and "judicial independence is the hallmark of liberal democracy." Individual rights are protected and maintained. Individual rights are protected and respected in part by the courts. The foundation of a free society and the rule of law is an independent judiciary. As previously stated, the rule of law envisions a government based on laws. A government is required to follow the laws enacted by the legislature. However, if there is a violation of the law, an impartial judiciary will investigate the situation. Maintaining the supremacy of a constitution also necessitates the existence of an independent judiciary. If the legislature passes a law that is unconstitutional, an independent judiciary has the right to declare it null and void under the principle of judicial or constitutional review.

Furthermore, judicial independence enables judges to carry out their duties without fear or favour. Only institutional immunity and autonomy, according to Bhagwati, can allow Justice to become fearless and free. Bhagwati emphasised the judiciary's autonomy as an institution; yet, the institution's independence is inextricably linked to the independence of individual judges. Furthermore, a court's ruling or judgement must be carried out. The judiciary's independence would be jeopardised if judgements were overturned by other state agencies. It jeopardises the judiciary's very independence.

6. Police Governed by Law and Judicial Control

The police have primary duty for maintaining peace and order. It is responsible for bringing wrongdoers to justice. When the police perform these functions, however, constitutionalism demands them to honour and respect the rights, dignity, and liberties of all individuals, including wrongdoers and suspects. It is important to remember that a suspect is deemed innocent until proven guilty by a competent court. Torture, cruel, brutal, and degrading treatment, and arbitrary arrest and detention are all prohibited by the Universal Declaration of Human Rights and the



International Covenant on Civil and Political Rights. Courts should keep an eye on the police to see if they adhere to and respect the aforementioned essential principles and rights of arrested people. If any evidence is collected through torture, for example, the evidence is considered illegal, and the evidence is rejected by the courts. In general, police officers are supposed to follow the law.¹⁵ When police officers instead break the laws they are sworn to enforce, the result is not only an assault on human dignity and the rule of law, but also the construction of impediments to successful policing.

7. Civilian control of the military

Although technical matters are entrusted to military personnel in democratic countries, democratically elected officials are authorised to govern or regulate the military. Instead, granting full autonomy or sovereignty to military leaders risks distorting democratic decision-making and allowing them to employ force, potentially leading to a coup or military dictatorship. The military may also employ intimidation and physical force to suppress democratic political opposition and meddle with domestic elections. Even when military power is required, intelligent and prudent people will keep a cautious and jealous eye on it, according to Samuel Adams. According to Elbridge Gerry, a delegate to the American Convention, Standing armies in times of peace are incompatible with Republican ideas, hazardous to the rights of a free people, and frequently converted into destructive engines for creating despotism.¹⁶

8. Limited State Power

Constitutionalism assumes that the government cannot infringe on people's rights and has limited authority in carrying out its duties. The functions of the organs of the governmental machinery are usually written down in most constitutions, which effectively restricts them because they cannot operate beyond the scope of power set forth in the document. Administrative decisions in India are now subject to judicial review, which prevents the government from wielding arbitrary authority and the country from devolving into an autocrat.¹⁷

9. Individual Rights

Constitutionalism entails the government's commitment to respect and protect individual rights for all citizens. Bills of rights are usually included in constitutions, and they are frequently complemented by civil rights legislation and other laws intended to prohibit, punish, or deter. The Universal Declaration of Human Rights, established by the United Nations General Assembly in 1948, contains an acknowledged list of individual rights, known as human rights; the Declaration includes what have come to be known as economic-social rights as well as civil-political rights. Many countries have referenced the Declaration in their constitutions or legislation, or have taken

¹⁵ Sturm, Douglas, *Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C.H. McIlwain* (1969), Minnesota Law Review 1159.

¹⁶ Maru Bazezew, *Constitutionalism*, Mizan Law Review, Vol.3 No. 2, Sep. 2009.

¹⁷ Elliot Bulmer, *What is Constitution? Principles and Concepts*, International IDEA Constitution – Building Primer 1, 2014.



specific provisions from the Declaration or related international covenants and conventions. India's constitutional jurisprudence, which was formed in response to international accords by international institutions, has had a global impact. Individual Rights in India

The Fundamental Rights of the People are included in Part III of the Constitution. No law passed in India can take away or limit the rights granted by Part III, and if it does, it is null and void to the extent that it does.¹⁸ This part embodies the ideals of Constitutionalism in essence. The various rights are discussed here in brief.

1. Right to Equality

Article 14 states that the state shall not refuse any individual within India's territory equality before the law or equal protection under the law. Article 15(1) forbids the state from discriminating against citizens solely on the basis of religion, race, caste, sex, or place of birth, or any combination of these factors. Article 15(2) broadens the principle by stating that no citizen shall be subjected to any disability, liability, restriction, or condition based solely on religion, race, caste, sex, or place of birth, or any combination of these factors, with respect to (i) access to shops, public restaurants, hotels, and places of public entertainment, or (ii) the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly with state funds

Article 16 of the constitution guarantees equality in public employment, stating that the state cannot discriminate against anybody in terms of employment. All citizens are eligible to apply for government positions. There are a few exceptions to this rule. The Parliament may pass legislation requiring that particular positions be filled solely by those who live in the area. Article 16 intends to provide persons with equal opportunities for public work.

The practise of untouchability is prohibited by Article 17 of the constitution in any way, shape, or form. The state is prohibited from awarding any titles under Article 18 of the constitution. Indian citizens, on the other hand, can get military and academic honours.

2. Right to Freedom(Article 19 to 22)

All people have the right to (i)freedom of speech and expression; (ii) practise any profession or carry on any occupation, trade, or business; (iii) move freely or reside in any part of India; (iv) organise associations or unions; and (v) congregate peacefully without armaments, under Article 19. These liberties, however, are not unrestricted, as they are subject to reasonable limitations under Articles 19(2) to 19(6).

The right to life and personal liberty provides protection from criminal convictions. According to Article 20, no punishment can be imposed that is more than what the law of the land allows at the moment. This legal axiom is based on the concept that no criminal legislation can be enacted retroactively, which means that in order for an act to become an offence, it must have been a crime

¹⁸ INDIA CONST. Art. 13(2).



legally at the time it was committed.¹⁹ Furthermore, no one accused of a crime may be forced to testify against himself. In this article, "compulsion" refers to what is known as "duress" in legal terms (injury, beating or unlawful imprisonment to make a person do something that he does not want to do). This article serves as a deterrent to self-incrimination. It also prevents an individual from being punished twice for the same offence.

Article 21 states that no citizen's life or liberty can be taken away unless it is by law. This means that a person's life and liberty can only be called into question if they have committed a crime. However, because the right to live does not include the right to die, suicide or attempts to commit suicide are illegal. "Personal liberty" refers to all freedoms not covered by Article 19 of the Constitution (that is, the six freedoms). The right to go abroad is likewise protected under Article 21's "personal liberty" clause.

3. Right Against Exploitation

Articles 23 and 24 of the Convention on the Rights of the Child provide for the prohibition of human trafficking and *Begar*, as well as the abolition of the employment of children under the age of 14 in dangerous industries such as factories and mines. Child labour is deemed a flagrant violation of the constitution's spirit and regulations. *Begar* has been declared a felony and is punishable by law, as it was previously practised by landlords. Human trafficking for the purpose of slave trade or prostitution is also illegal. Employment without pay for mandatory services for public objectives is an exception. This provision covers mandatory military conscription.

4. Right to freedom of Religion

The right to freely profess, practise, and propagate any religion is guaranteed by Article 25 of India's Constitution. All citizens of India, as well as nationals of any other country currently residing in India, have access to these rights. Article 26 of India's Constitution declares everyone's rights to religious denominations, or in other words, Article 26 guarantees collective religious freedom.

Article 27 of the Indian Constitution specifies that no one will be forced to pay any taxes for the promotion or maintenance of any religion or religious sect; in other words, the state should not use public money acquired through taxes for the promotion or support of any religion. According to the Indian Constitution, no religious instruction shall be provided in any educational institution supported entirely by public monies. However, this clause does not apply to state-run institutions that are created under a trust or endowment and require religious instruction to be imparted.

5. Cultural and Educational Rights

Article 29 of India's Constitution stipulates that every group of individuals residing anywhere on the country's territory who have their own distinct language and culture has the right to preserve it. It states that no citizen of India shall be denied admission to any state-run or state-funded

¹⁹ INDIA CONST. Art. 20.



educational institution or receive state funds on the basis of race, religion, caste, or language. It also provides security to religious and linguistic minorities. Article 30 of the Indian Constitution gives minorities, whether linguistic or religious, the right to create and run educational institutions of their choosing. This right also includes the ability to educate its children in their native tongue.

6. Right to Constitutional Remedies

Citizens with the right to constitutional remedies can file a lawsuit in a court of law if their fundamental rights are violated. For example, if a citizen is imprisoned, he or she might ask the court to review the situation to check if it is in accordance with the country's laws. If the court determines that it is not, the person must be released. The process of petitioning the courts to protect or defend citizens' fundamental rights can be done in a variety of ways. Various types of writs can be issued by the courts. Habeas corpus, mandamus, prohibition, quo warranto, and certiorari are some of the writs available. The central government suspends this right when a national or state emergency is declared.

CONSTITUTIONALISM VIS-A-VIS CONSTITUTION

Over the years, it was observed that Constitutionalism is the ideology behind the Constitution of a State. Therefore, in order to grasp the true essence of Constitutionalism, one must be aware of the meaning and nature of a 'Constitution' and a 'Constitutional Government'²⁰. The content and nature of a constitution, as well as how it interacts with the rest of the legal and political order, differ significantly between countries, and there is no uniform and undisputed definition of a constitution. Nonetheless, any widely agreed-upon operational definition of a constitution would most likely describe it as a set of fundamental legal-political laws that:

1. are binding on everyone in the state, including ordinary law-making institutions;
2. concern the structure and operation of the institutions of government, political principles and the rights of citizens;
3. are based on widespread public legitimacy;
4. are harder to change than ordinary laws; and
5. as a minimum, meet the internationally recognized criteria for a democratic system in terms of representation and human rights.

²⁰ Prof. (Dr.) Tanuja Singh, Ex .Head, Dept. of Pol. Sc., A.N. College, Patna, *Constitutionalism: Meaning, Development & Prospects of Constitutionalism*.



The functions of a constitution

1. Constitutions can declare and define the boundaries of the political community.

These limits might be physical, i.e. a state's actual borders, as well as claims to any other territory or extraterritorial rights, and personal, i.e. the concept of citizenship. As a result, a constitution frequently distinguishes between individuals who are part of the polity and those who are not.

2. Constitutions can declare and define the nature and authority of the political community.

They frequently express the state's core ideas and assumptions, as well as the position of the state's sovereignty. The French Constitution, for example, states that “France is an indivisible, secular, democratic, and social Republic,” and that “National sovereignty belongs to the people, who exercise it through their representatives and through referendums.”

3. Constitutions can express the identity and values of a national community.

Constitutions, as nation-building instruments, can define the national flag, anthem, and other symbols, as well as make proclamations about the nation's ideas, history, and identity.

4. Constitutions can declare and define the rights and duties of citizens.

The majority of constitutions include a proclamation of citizens' fundamental rights. At a bare minimum, these will contain the fundamental civil liberties required for a free and democratic society (e.g., the freedoms of thought, speech, association and assembly; due process of law and freedom from arbitrary arrest or unlawful punishment). Many constitutions go beyond this bare minimum to include social, economic, and cultural rights, as well as minority community-specific collective rights. Some rights, such as the right to be free of torture or physical abuse, may apply to both citizens and non-citizens.

5. Constitutions can establish and regulate the political institutions of the community.

Constitutions define the various government institutions, as well as their structure, powers, and functions, and the relationships between them. The legislative, executive, and judicial branches of government are established in almost all constitutions. There may also be a symbolic head of state, authorities to ensure the political process' integrity, and institutions to assure people in power's accountability and transparency. Institutional provisions usually include means for democratically allocating and peacefully transferring authority, as well as restraint and removal of individuals who misuse power or lose the people's trust.



6. Constitutions can divide or share power between different layers of government or sub-state communities.

For the distribution of power between provinces, regions, and other sub-state entities, many constitutions establish federal, quasi-federal, or decentralised processes. These can be geographically delimited, or cultural or linguistic communities can define them.

7. Constitutions can declare the official religious identity of the state and demarcate relationships between sacred and secular authorities.

This is especially significant in nations where religious and national identities are intertwined, or where religious law has traditionally governed personal status and the resolution of citizen conflicts.

8. Constitutions can commit states to particular social, economic or developmental goals.

This could take the shape of judicially enforceable socioeconomic rights, politically binding directive principles, or other declarations of commitment or intent.

CONSTITUTIONALISM IN CONSTITUTION OF INDIA

As discussed above, the Constitution of any country manifests the spirit of Constitutionalism within itself. The same stands true for India. The Indian Constitution incorporates the Constitutionalism in its very spirit²¹. A study of Constitutionalism, therefore, must begin with the Constitution of India.²² At the outset, the Preamble to the Constitution sets out the peoples' aspirations, hopes, ideals and the results they desire. It declares that India has been constituted by its people into a sovereign socialist secular democratic republic.²³ It further states that people have resolved to secure for all of India's citizens,

- i. social, economic and political justice,
- ii. liberty of thought, expression, belief, faith and worship;
- iii. equality of status and of opportunity, and to promote among them all;
- iv. fraternity, assuring dignity of the individual, and the unity and integrity of the nation.

A perusal of the Preamble alone confirms that the Constitution incorporates a thick form of Constitutionalism, as it does not discuss justice, equality, or brotherhood in general, but rather

²¹ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, WADHWA AND COMPANY:8th Ed. 2020.

²² S. Sorabjee, *Rule of Law: Its Ambit and Dimesnion*, in N.R.M. Menon (ed.), *Rule of Law in a free society* (New Delhi, Oxford university press, 2008), pp 3-9

²³ INDIA CONST. Preamble



specific notions under each of those headings.²⁴ The Constitution's several substantive sections strive to give meaning to the social, economic, and political fairness that is directly referenced in Articles 38 and 39. The substantive provisions for the ideas of equality, liberty, and fraternity must be reviewed. This chapter examines some of these clauses in order to have a better understanding of the Indian Constitution's social, economic, and political decisions. For the purpose of brevity, the concepts of equality, liberty, and judicial review are explained in order to better comprehend how the enumeration of these rights has aided in restricting the government's intrusion and power in the socio-economic and political realm.

Equality

The fundamental principle of equality is contained in Article 14 of the Constitution. Article 14 has been defined as a necessary corollary to the high notion of rule of law²⁵ and as the essential principle of republicanism.²⁶ Article 14 contains two phrases – 'equality before the law' and 'equal protection of the laws'. The first phrase is a traditional rule of law requirement that everyone is treated equally in the eyes of the law. The second criterion appears to be a repeat of the first, namely, equality before the law. Scholars and judges, on the other hand, have differing opinions on the two phrases. The first statement has a negative connotation, meaning that everyone is subject to the law equally and that there are no advantages. The second phrase, on the other hand, has a positive connotation and suggests equitable treatment.²⁷

Subba Rao, J.'s statements in *State of UP v. Deoman Upadhya*²⁸ and *Lachman Das v. State of Punjab*²⁹ reaffirm this viewpoint. In *Sri Sreenivasa Theatre v. Govt. of Tamil Nadu*³⁰, Jeevan Reddy, J. pointed out that the word 'law' in the phrase 'equality before the law' refers to general laws, whereas the same word in the phrase 'equality before the laws' refers to specific laws. He said, "Equality before the law is a dynamic notion with many facets: one expressing the absence of any privileged class or individual above the law, and the other denoting the state's role to bring about a more equal society as foreseen in the Constitution's preamble and part IV."

The application of the interpretation of Article 14 yields two distinct principles. The first is the concept of non-discrimination, which is founded on the classification doctrine, and the second is the principle of reasonableness. The court decided in *E P Royappa v. State of Tamil Nadu*³¹ that Article 14 requires the state to act rationally, and that any arbitrary action is a violation of the equality principle.

²⁴ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, Vol. 1 (New Delhi: Universal Book Traders, 4th edn., 2002), pp. 280-2

²⁵ Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi, AIR 1967 SC 1836.

²⁶ Basheshar Nath v. Commissioner of Income Tax, Delhi & Rajasthan, AIR 1959 SC 149.

²⁷ D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, Vol. B 4-8 (Calcutta: R.N. Sarkar, 7th ed. 1993).

²⁸ State of UP v. Deoman Upadhya, AIR 1960 SC 1125.

²⁹ Lachman Das v. State of Punjab, AIR 1963 SC 222.

³⁰ Sri Sreenivasa Theatre v. Govt. of Tamil Nadu, AIR 1992 SC 999.

³¹ E P Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.



Right to Life and Personal Liberty

Article 21 was interpreted by the Supreme Court in two parts. The initial assumption was that a person's life and personal liberty might be taken away following the 'process established by law,' that is, if the law was passed in line with the Constitution³². After Maneka Gandhi³³, the phrase "procedure established by law" implied that the law should be just, fair, and reasonable. The Maneka Gandhi and Ajay Hasia rulings provided for a combined reading of Articles 14 and 21, allowing for judicial review of legislation and government actions based on substantive reasonableness. Since the 1980s, Article 21 has been used by the Supreme Court to insert many more people's rights into the Constitution. Some of the important propositions of Article 21 can be summarized as follows:

1. The term 'personal liberty' is of the widest amplitude, including a variety of rights that constitute the personal liberty of a man. Some of these rights are mentioned under Article 19.
2. The procedure established by law that takes away the life and personal liberty of any person cannot be arbitrary, unfair or unreasonable.
3. The right to life includes the right to live with human dignity and all that goes along with it – the bare necessities of life, adequate shelter, food and clothing.³⁴
4. The right to life includes the right to privacy³⁵, food, water and decent environment³⁶, education³⁷, livelihood³⁸ and medical care³⁹.
5. Sexual harassment of women or abuse of women at the workplace is a violation of Articles 14, 15 and 21.⁴⁰
6. Article 21 includes the right to a healthy environment. The principles of environmental law jurisprudence are incorporated within this provision.⁴¹
7. Article 21 can be used to grant compensation to rape victims⁴² and damages to victims of police violence.⁴³

³² A.K. Gopalan v. State of Madras, AIR 1950 SC 597.

³³ Maneka Gandhi v. Union of India, AIR 1978 SC 597.

³⁴ Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608.

³⁵ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

³⁶ Chameli Singh v. State of UP (1996) 2 SCC 549.

³⁷ Unnikrishnan v. State of Andhra Pradesh (1993) 1 SCC 645.

³⁸ Olga Tellis v. Bombay Municipal Corporation (1985) 3 SCC 545.

³⁹ Paramanand Katara v. Union of India (1989) 4 SCC 248.

⁴⁰ Vishakha v. State of Rajasthan (1997) 6 SCC 241.

⁴¹ M. C. Mehta v. Union of India, 1987 SCR (1) 819; AIR 1987 965.

⁴² Bodhisattwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490.

⁴³ Khatri v. State of Bihar (1981) 1 SCC 627.



8. The rights of prisoners are protected under the ambit of Article 21.⁴⁴
9. The right to a fair and speedy trial is a facet of a democratic polity and is governed by the rule of law by bringing it into the domain of Article 21.⁴⁵
10. The right to legal aid has been read into Article 21 so as to ensure that the procedure taking away the personal liberty of an individual is fair.⁴⁶

Liberties under Article 19.

The purpose of Article 19 is to promote liberty. It gives Indian citizens the freedom to act, move, and express themselves. They have the ability to form assemblies, peaceful associations, and engage in any occupation they like. The judicial trend in Article 19 can be summarized as follows:

1. The rights in Article 19(1) are not absolute but subject to the restrictions in Article 19(2) to Article 19(6).
2. The restrictions are exhaustive and cannot be implied.⁴⁷
3. The restrictions can be imposed only by law, either by legislation, by-laws, rules or regulations.
4. The restrictions have to be reasonable, both substantively and procedurally, and are subject to judicial review. Reasonableness is to be decided from case-to-case basis.⁴⁸
5. There must be a direct and proximate nexus between the restriction imposed and the object sought to be achieved.⁴⁹
6. The imposition of the restriction should not be productive of more evil than it seeks to remedy.⁵⁰
7. The court will judge the effect of a restriction and not just the subject-matter in determining if a right has been infringed.⁵¹

Judicial Independence

A thriving democratic government requires judicial independence. The Supreme Court has ruled that judicial review is an integral feature of the Constitution's basic structure and that it cannot be repealed even by a constitutional amendment. The Court's approach to judicial review of constitutional, legislative, and executive action, which are all subject to judicial review, has

⁴⁴ Sunil Batra (II) v. Delhi Administration (1980) 3 SCC 488.

⁴⁵ Vakil Prasad Singh v. State of Bihar (2009) 3 SCC 355.

⁴⁶ Hussainara Khatun v. State of Bihar (1980) 1 SCC 98.

⁴⁷ Bennett Coleman & Co. v. Union of India (1972) 2 SCC 788.

⁴⁸ State of Madras v. V G Row AIR 1952 SC196.

⁴⁹ Shreya Singhal v. Union of India AIR 2015 SC 1523.

⁵⁰ Chintaman Rao v. State of MP AIR 1951 SC 118.

⁵¹ supra, note 50.



changed as a result of the emphasis placed on judicial independence. In pure policy matters, the court does defer to executive and legislative wisdom, but this has become the exception rather than the rule. If a basic right is violated, the court uses its judicial review power to determine whether the action is constitutional. The decision in this regard can be summarized as follows:

1. Independence of judiciary is a basic feature of the Constitution and cannot be taken away even by way of a constitutional amendment.⁵²
2. Judicial review is an integral part of the rule of law and the constitutional system.⁵³
3. It is the duty of the judiciary to ensure that fundamental rights are protected and the rule of law is upheld.
4. The powers of Supreme Court and the High Courts cannot be taken away by any law even if special tribunals or courts are set up. The power of judicial review under Articles 32 and 226 are inviolable.⁵⁴
5. For efficacy of judicial adjudication and people's faith in the rule of law, people must have faith and confidence in the honesty, integrity, impartiality, courage and independence of the judges.⁵⁵

CONCLUSION

Modern democratic constitutionalism is based on two principles, according to the analysis of the concept of constitutionalism: (a) representative government, which allows citizens to participate in public affairs and hold their government accountable; and (b) the protection of rights, particularly due process of law, freedom of speech, and religious tolerance, which protect citizens from power abuses.

These ideals of representative government and rights protection can be stated in terms of inclusivity and contestation⁵⁶, two concepts that have evolved over time. During the 19th and early 20th centuries, all men, and eventually women, were granted the right to participate in public affairs, usually after long and often violent conflicts.

During the twentieth century, new kinds of public engagement, such as proportional election systems and direct democracy procedures, were invented or popularised. Similarly, new constitutions' rights provisions typically became: (a) more expansive, with economic, social, cultural, and environmental rights increasingly recognised in addition to the basic civil and legal rights of earlier texts; and (b) more directly enforceable, with independent judiciaries playing a larger role in upholding them.

⁵² Kesavananda Bharti v. State of Kerala AIR 1973 SC 1461.

⁵³ S P Sampath Kumar v. Union of India (1987) 1 SCC 124.

⁵⁴ L Chandrakumar v. Union of India (1997) 3 SCC 261.

⁵⁵ Krishna Swami v. Union of India (1992) 4 SCC 605.

⁵⁶ CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (Boston: Ginn and Company, 1950), 6.



In successive waves of democracy, the concept of constitutionalism extended over the world. It effectively established itself in many parts of the world beyond its traditional North Atlantic and Western European core throughout the second half of the twentieth century. The most generally recognised international declarations and agreements, such as the United Nations Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights, now include democratic constitutionalism (1966). Countries from all continents and regions of the world are now included in the list of states that may claim to have a stable and sustainable democratic constitutional order. As a result, constitutionalism has become a universal principle, and its benefits can be shared by all of mankind, at least in theory⁵⁷.

The interpretation and implementation of the idea of constitutionalism in India has been shaped through court rulings over the years. This is because the judiciary is responsible for safeguarding the people's rights and ensuring that the other branches of the government do not overstep their bounds or infringe on citizens' rights. As a result, the court contributes to the preservation of constitutionalism by restricting government intrusion into people's lives. The concept of constitutionalism encompasses numerous notions, including liberty, equality, accountability, transparency, natural justice principles, and freedom.

In *S.R. Chaudhuri v. State of Punjab*⁵⁸, the Court held that constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit “political expediency”. We should not allow the erosion of principles of constitutionalism.

In *New India Assurance Company Ltd. v. Nusli Neville Wadia*⁵⁹, the Court said that “*For proper interpretation of Constitutional provisions not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein.*”

In *Swaran Singh v. State of U. P.*⁶⁰ the Court observed that public power, including constitutional power, must never be exercised arbitrarily or malafide, and ordinarily guidelines for fair and equal execution are guarantees of valid use of power. The power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.

In the *State (NCT of Delhi) v. Union of India*⁶¹, Chief Justice Mishra observed that the essence of constitutionalism is the control of power by its distribution among several state organs or offices in such a way that they are each subjected to reciprocal controls and forced to cooperate in formulating the will of the state. The court further observed that:

“The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural

⁵⁷ CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN (Ithaca, NY: Cornell University Press, 1940), 3.

⁵⁸ *S.R. Chaudhuri v. State of Punjab*, (2001) 7 SCC 126.

⁵⁹ *New India Assurance Company Ltd. v. Nusli Neville Wadia*, Appeal (civil) 5879 of 2007.

⁶⁰ *Swaran Singh v. State of U. P.* 1998 (4) SCC 75.

⁶¹ *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501.



corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution”.

The Court has often clarified that a written Constitution is no guarantee for Constitutionalism. Even Nazi Germany had a constitution but that does not mean that it adhered to the philosophy of Constitutionalism be it a negative or positive aspect of it. As the Supreme Court has clearly stated⁶²

“the mere existence of a Constitution, by itself, does not ensure constitutionalism. What is important is the political traditions of the people and its spirit and determination to work out its constitutional salvation through the chosen system of its political organisation.”

Unless primacy to democratic policies and individual rights is not given, Constitutionalism cannot survive. Subtle assaults to individual rights especially freedom of Speech and Expression and privacy, such as sedition laws, surveillance laws, undermine Constitutionalism. As in *R.C. Poudyal v. Union of India (1994)* court said that,

“Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of people that give meaning to a Constitution which otherwise would merely embody the political hopes and ideals”.

The dynamics of Constitutionalism was well explained in *I.R. Coelho vs. State of Tamil Nadu and Ors.*⁶³ in the 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.*,⁶⁴ it was observed that “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. In the words of Chandrachud, CJ, in *Minerva Mills case*⁶⁵ – “The Constitution is a precious heritage and, therefore, you cannot destroy its identity'. Thus, for constitutionalism, a constitution needs to have some qualities which would either restrain the government from acting against its citizens or compel it to act for securing a dignified life to each one of them.

⁶² supra, note 56

⁶³ *I.R. Coelho vs. State of Tamil Nadu and Ors.* AIR 2007 SC 861.

⁶⁴ *Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr.*, (2006) 2 SCC 1.

⁶⁵ *Minerva Mills Ltd. v. Union Of India*, AIR 1980 SC 1789.



In essence, one can say that the design and character of the Indian Constitution ensure that the powers of the Executive and the Legislature is limited so that the discretion given to these organs does not turn into arbitrariness, an arbitrary exercise. The Fundamental Rights, the basic structure, federal setup of the administration, the amendment procedure all limit the State in a particular way.

