

# Constitutionalism: Philosophy that Abhors Absolutism

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*Constitutional Law is a necessity for any modern state to carry out various functions and activities because there are certain basic organs and agents which act on its behalf for proper functioning and operation. A constitution is a basic document of governance, which administers and functions as a regulator of the society and government. Besides the concept of the constitution, an important concept is “constitutionalism”. The idea of constitutionalism is not new as it is deeply embedded in human thoughts. Constitutionalism is a political philosophy based on the idea that the state is not free to do anything it wants, but is bound by laws limiting its authority. The underlying difference between the two concepts is that a constitution confers power on the various organs of the government and also seeks to restrain those powers whereas constitutionalism envisages checks and balances by putting the powers of the legislature and the executive under some restraints thereby not making them uncontrolled and arbitrary. Even the judiciary is independent only in its domain, and is not free to act arbitrarily, unjust or unfair; it is also bound to follow the principles enshrined in the constitution and cannot go beyond it. The protection of fundamental constitutional rights through common law is its main attribute. Constitution along with constitutionalism lays down the establishment, functions, powers, and relation of these organs along with checking, balancing and putting the powers of these organs under some restraints and not making them uncontrolled and arbitrary. This paper will analyze the constitutional provisions and judicial interpretations to examine the features of constitutionalism and conclude whether the Indian constitution abhors absolutism or not.*

## Introduction

Modern states have to carry out various functions and activities, concerning its members, so it becomes necessary for any state to establish certain basic organs or agents which act on its behalf through which the state can function and operate. All the people in the state cannot combine and operate all together to achieve the desired goal of the State, thus certain fundamental organs become necessary to establish. There arises the need for Constitutional law.

A constitution is a basic document of governance, administrating, and functioning that regulates the behavior of society and government. It is the Supreme Law of the Land. As defined by the Supreme Court;

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*“A Constitution is the documentation of the rounding faiths of a nation and the fundamental directions for their fulfillment.”<sup>1</sup>*

In the contemporary world, almost all the States have a constitution and hence are constitutional States. No state can exist without a constitution as it sets rules that seek to establish the duties, powers, and functions of the various institutions of government. The constitution can be present in written form as is prevalent amongst 98% countries of the world or it may be in an unwritten form such as in the United Kingdom Israel and New Zealand. The countries that are having unwritten constitution are governed through the uncodified constitution in the form of conventions, judgments of the court, acts of their respective parliaments, etc. It regulates the relationship between and among the states and defines the relationship between the state and the individual. Studying the constitutions of different states; one will learn the distinct names owned by the constitutions. Vatican City named its constitution as “Fundamental Law of Vatican City State”, Germany mentioned it as “Basic Law for the Federal Republic of Germany” and Oman use “Basic Statute of Oman” for its Constitution, so it is not wrong to consider the Constitution as **“the grundnorm”** or the fundamental law of the land.

The structure of modern nations has been designed with the government being divided into executive, legislative and judicial bodies, with the commonly accepted notion that these bodies along with their powers must be separated. The separation of powers does not mean these bodies to function alone; rather work interdependently, but maintain their autonomy in their field. Other precepts include the idea of limited government and the supremacy of law that can together be termed the concept of constitutionalism.

## **Constitutionalism**

The idea of constitutionalism is not new as it is deeply embedded in human thought. Constitutionalism is a political thought based on the notion that government authority is derived from the people and should be restricted by a constitution that clearly states what the government can and can't do. It's the idea that the state is not free to do anything it wants, but is bound by laws limiting its authority.

Professor Gerhard Casper observed that constitutionalism has both descriptive and prescriptive connotations. Descriptive refers to the historical struggle for constitutional recognition of the people's right to 'consent' and certain other rights, freedoms, and privileges.<sup>2</sup> Prescriptively refers to the idea that government

<sup>1</sup> *Fateh Chand v. the State of Maharashtra*, AIR, 1977, SC, p. 1824.

<sup>2</sup> Gerhard Casper, 'Constitutionalism', University of Chicago Law Occasional Paper no. 22, 1987 available at [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1007&context=occasional\\_papers](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1007&context=occasional_papers), accessed on 28 March 2018.

should be legally limited in its powers.

Constitutionalism is almost identical to the limited power of the state; more specifically it is concerned with the efforts to prevent arbitrary government. Anything recognizable as a state must have some acknowledged means of constituting and specifying the limits placed upon the three wings of the state: legislative, executive and judiciary. No people should give government power over them, without first setting conditions on the use of that power. The constitutionalism abhors absolutism.

### **Important Features of Constitutionalism**

Constitutionalism exhibits a number of features and the two most important are discussed below.

#### **I. Entrenchment**

An inherent feature in every constitution, entrenchment refers to the norms that impose a limitation upon the power of the state, either by law or by way of constitutional convention. It is difficult to amend an entrenched constitution as it facilitates a degree of stability over time and requires a wider acceptance, more than the approval of the national legislature. Accordingly, government bodies are not privileged to amend the very terms of its constitutional limitations as if it is permissible then there would not be any such limitations. In constitutions that are not entrenched, no special procedure is required for modification. Hence entrenchment is considered as one of the most important features of constitutionalism.

#### **II. Codification**

Many scholars view that constitutional rules do not exist unless they are in some way enshrined in a written document, though the idea of constitutionalism is older than the existence of written constitutions. United Kingdom, New Zealand and Israel are the three countries with the unwritten constitution. Though the UK has nothing resembling a written constitution, it nevertheless contains a number of written instruments which arguably form a central element of its constitution. Magna Carta (1215) being the first, while The Petition of Right (1628) and the Bill of Rights (1689) constitute the other document of the British constitution. It is difficult to conclude whether or not something is “unconstitutional” in an unwritten constitution, wherein a written one reference can be made to determine the same. Codified grundnorm is transparent and accessible to all and guarantees accountability.

An independent judiciary with power of judicial review, the doctrine of rule and law, separation of powers, free elections to legislature, accountable and transparent

democratic government, fundamental rights of the people, and decentralization of powers are other principles and norms that promote constitutionalism in any state, and that to be studied in the context of India in the next part.

### III. Indian Constitutionalism

India is a democratic country with a codified constitution where Rule of Law is the foundation for governance of the country. All the administrative bodies are supposed to follow it in both letter and spirit. But the experience with the process of governance in India in the last seven decades is a mixed one. On one hand, it has an excellent administrative structure to calibrate and monitor even the minutest of details related to welfare maximization but crucially, on the other hand, it has only resulted in excessive bureaucratization. No better progression was observed into those regions which were backward since independence. The gap between the rich and poor has widened, people at the bottom level of the pyramid continued at the edge of the developmental affair, and overall development remained much below the expectations of the people. It is believed that constitutionalism is the end result of governance in India.

In *R. Coelho v. State of Tamil Nadu* case, the Supreme Court viewed:

*“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 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.”*<sup>3</sup>

The constitutional system of Government in India abhors absolutism. Indian constitutionalism is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the constitution itself.<sup>4</sup> Since the judiciary is the sole protector of the constitution, it declared federalism, free and fair elections, separation of power, Rule of Law, and independence of the judiciary as an inclusive feature of the basic structure doctrine. The Indian constitutionalism can be witnessed through the expressed provisions of in the constitution and in the judicial interpretations.

<sup>3</sup> *R. Coelho v. State of Tamil Nadu*, AIR, 2007, SC, p. 861.

<sup>4</sup> *Rameshwar Prasad v. Union of India*, SCC, 2006, p.1.

#### IV. Judicial Review

Pandit Jawaharlal Nehru was not in the favor of separate power of Judicial Review, he viewed that *“No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament. If we go wrong here and there, it can point it out, but in the ultimate analysis, where the future of the [country] is concerned; no judiciary can come in the way. And if it comes in the way, ultimately, the whole constitution is a creature of Parliament”*.<sup>5</sup>

Framers of the Indian constitution were aware of the doctrine of judicial review which was recognized by the Supreme Court of the United States for the first time in the famous case of *Marbury v. Madison*.<sup>6</sup> This doctrine has been propounded under Article 13, 32, 136, 226 and 227 of the Indian Constitution. In order to guarantee, the special provisions fortifying the fundamental rights, the Rule of Law has been ensured by providing for judicial review which itself is one of the basic characteristics of the Indian Constitution.<sup>7</sup> Justifying Judicial Review, Ramaswami, J., has observed in *S.S. Bola v. B.D. Sharma*,

*“The founding fathers very wisely, therefore incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to its citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and fundamental freedoms and to help to create a healthy nationalism.”*<sup>8</sup>

It acts as a tool in the hands of the judiciary to control the actions of the government. As rightly observed by the Supreme Court in *Minerva Mills v. Union of India*;

*“It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled..... The power of Judicial Review is an integral part of our constitutional system and without it, there will be no government of laws and rule of law would become a teasing illusion and a promise of unreality.”*<sup>9</sup>

<sup>5</sup> Speech by Jawaharlal Nehru, Constituent Assembly Debates, Delhi, 9 September 1949.

<sup>6</sup> *Marbury v. Madison*, U.S., vol. 5, p. 137, p. 353 (SC 1803).

<sup>7</sup> His Holiness Kesavananda Bharati v. State of Kerala, AIR, 1973, SC, p.1461.

<sup>8</sup> *S.S. Bola v. B.D. Sharma*, AIR, 1997, SC, p. 3127.

<sup>9</sup> *Minerva Mills v. Union of India*, AIR, 1980, SC, p.1789.

If the power of judicial review is abrogated or taken away, the constitution will cease to be what it is.<sup>10</sup>

## V. Independence of Judiciary

The efficiency of any country is determined by its efficiency in the administration of justice. There lies the need for independence of judiciary for it to work fearlessly. England recognized this principle early in the year 1701 after passing of Act of Settlement<sup>11</sup>. Indian constitution also preserves this principle. Article 50 of Indian constitution directs the government to maintain separation of judiciary from executive i.e. it in a way directs towards independence of the judiciary. It is one of the basic features of our constitution.<sup>12</sup> There are several other provisions promising independence of the judiciary.

Security of tenure is given to judges, and the salary and privileges of judges cannot be varied during the course of their tenure to his disadvantage. Parliament can only extend the power and jurisdiction of Supreme Court but cannot curtail it, and accordingly, no discussion in parliament or State legislature with respect to the conduct of judges is permitted except the motion introduced for their removal under Article 121. The Supreme Court and High Courts of the states have been given the power to punish for its contempt under Article 129 and 215, respectively.

### The threat to Independence of Judiciary

Article 124(7) prohibits the practice by the persons who have been a Supreme Court judge. It is submitted that appointment to pure and executive post like the governor of the state, attacks on the independence of the judiciary. Judiciary deals with many cases in which the government is a party. Later on, if that government is providing a post to judicial officers after their retirement, it may happen that judges begin to please the government. Law Commission has also criticized this prevailing practice of re-employing the retired judges. The judiciary has itself criticized this aspect in *Nixon M. Joseph v. Union of India*.<sup>13</sup> There is a dispute between judiciary and government regarding the appointment of judges in the Supreme Court and High court. In the case of *Supreme Court Advocate-on-record Association v. Union of India*, Supreme Court has invalidated National Judicial Appointment Commission Act and Amendment of Article 124A of the

<sup>10</sup> *S.P. Sampath Kumar v. Union of India*, SCC, 1987, SC, p.124.

<sup>11</sup> The Act of Settlement, U.K, 1701, art 3.

<sup>12</sup> *Brij Mohan Lal v. Union of India*, SCC, 2012, SC, p.502.

<sup>13</sup> *Nixon M. Joseph v. Union of India*, AIR, 1998, p. 385.

Indian Constitution as being contrary to the independence of the judiciary.<sup>14</sup> Unprecedented conference held by four senior judges of Supreme Court has also highlighted the need for having independent judiciary for the survival of democracy. For a nation to work on the principles of constitutionalism, the foremost thing should be that it has an independent and efficient judiciary.

### **Provisions of Writs**

Part III of the Indian Constitution guarantees certain fundamental rights which cannot be violated at any cost by any of the three wings of the State. For an instance, assume what would have happened if our constitution only provided us the fundamental rights but not the mechanism to safeguard it. Constitutional makers were aware of this fact that the purpose of ensuring fundamental rights would be defeated if there would be no provision for its protection. Consequently, as per Article 32 and 226, the responsibility is given in the hands of the Supreme Court and High Courts to enforce the rights conferred. The framers might not want to leave fundamental rights to the vote politics of government. Article 32 and 226 are silent on how the proceedings of the courts may be moved for the enforcement of fundamental rights. The constitutional makers didn't deliberately lay down any particular form of proceedings for enforcement of fundamental rights nor did they stipulate that such proceedings should conform to any rigid pattern or straight jacket formula.<sup>15</sup> The reason might be that they realized that the people were poor and illiterate and insistence on any rigid formula would be self-defeating.

### **Rule of Law**

Dicey's principle of rule of Law has been very well recognized in our constitution. Rule of Law emphasizes the absence of arbitrary power of government, equality before the law and legal protection to certain basic human rights. Rule of law has been held to be a basic feature of the Constitution<sup>16</sup>. It is submitted that the principle of constitutionalism is very well embodied in the principle of rule of Law. It is an antithesis on the arbitrary exercise of power by government.<sup>17</sup> Article 13, 14, 32, 226, 227, etc. of our Indian constitution preserve this principle.

### **Free and Fair Election**

India has been characterized as the biggest democracy in the world. A free and fair election is a sign of true democracy. In order to ensure free, fair and

<sup>14</sup> *Supreme Court Advocate-on-record Association v. Union of India*, SCC, 2016, p.1.

<sup>15</sup> *S. Nagaraj v. State of Karnataka*, SCC, 1993, p. 595.

<sup>16</sup> *Renu v. District and Session Judge, Tis Hazari*, Civil Appeal No. 979, 2014.

<sup>17</sup> *A.D.M. Jabalpur v. S. Shukla*, AIR, 1976, SC, p.1207.

impartial election, Indian constitution under Article 324 establishes the Election Commission, a body autonomous in character and insulated from political pressures or executives influence. Care has been taken while drafting the constitution that the election commission should function as an independent agency free from external pressures from the party in power. Parliament can change the structure of the commission but it cannot abrogate the power of the commission. Election after regular interval of time acts a check on the functioning of government. Holding periodic, free and fair elections by Election Commission are considered as a part of the basic structure of the constitution.<sup>18</sup>

### **The Basic Structure Doctrine**

The constitution makers drafted the world's lengthiest constitution and still how forgot to incorporate 'basic structure doctrine'. It was only in the landmark judgment of *Keshavananda Bharati* where the longtime dispute between judiciary and government so as to whether Spirit of Constitution is supreme or amendment power of government was discussed broadly. It was resolved after almost 25 years of independence when the court not only accepted the amendment power of government but also preserved the spirit of the constitution by evolving the doctrine of basic structure. The Supreme Court has made a very great contribution to the cause of constitutionalism in India by enunciating the doctrine of inviolability of basic features of the constitution.

### **Interpretation of clause 'Procedure established by law'**

The last four words of Article 21, i.e. "the procedure established by law", were also in the discussion since after its enactment. The interpretation of this clause came into consideration before the Supreme Court for the first time in *A.K. Gopalan v. State of Madras*.<sup>19</sup> The issue was whether this clause means same as that of 'Due Process clause' under U.S. Constitution i.e. whether the court has the power to look into the reasonability, fairness of law passed by parliament or parliament has absolute power to deprive a person of his life by making a law. The court gave a very restrictive and narrow interpretation of the clause and in a way upheld the absolute power of parliament. Since this interpretation was against the spirit of the constitution and which was shortly realized by the court in the case of *Maneka Gandhi v. Union of India*<sup>20</sup>, it clarified that law passed by parliament under Article 21 should be just, fair and reasonable. The reincarnation of Article 21 which Maneka Gandhi brought about has exerted a deep impact on contemporary constitutional jurisprudence.

<sup>18</sup> *Indira Nehru Gandhi v. Raj Narain*, AIR, 1975, SC, p. 2299.

<sup>19</sup> *A.K. Gopalan v. State of Madras*, AIR, 1950, SC, p. 27.

<sup>20</sup> *Maneka Gandhi v. Union of India*, AIR, 1978, SC, p.597.

## Non-applicability of the doctrine of waiver on Indian Constitution

Another safeguard to protect constitutionalism is non- application of the doctrine of waiver on the Indian constitution. This means that fundamental rights cannot be waived i.e. neither state nor an individual himself cannot say, either under a mistake of law or otherwise, that he would not enforce any particular fundamental right. The court observed in *Basheshar Nath v. I.T. Commissioner*;

*“None of the fundamental rights can be waived by a person. These rights are mandatory on state and no citizen can by his act or conduct, relieve the state of the solemn obligation imposed on it.”*<sup>21</sup>

The Supreme Court has asserted that there can be no estoppels against fundamental rights. Such a concession if imposed would defeat the purpose of the constitution.<sup>22</sup> The doctrine of non-waiver developed by court denotes the manifestation of its role to protect fundamental rights and acts as a limitation on the power of the state.

## Comparative Analysis

Reading the American constitution, one will analyze that how smartly the fathers of the American Constitution have written: “WE, THE PEOPLE” in the largest text size expressing that the authority of government derives from the people and is limited by the fundamental law of the land. Elaborating the said principle it can be learned that the American constitutionalism is a complex of ideas, attitudes, and patterns of behavior derived from a dynamic political and historical process rather than the thoughts laid down in 1789. The first ten amendments of U.S. Constitution to ensure the fundamental rights, collectively known as the Bill of Rights (1791) and evolvement of judicial review doctrine are the instances that prove constitutionalism deeply embedded in the legal system of America.

The United Kingdom being one of the countries having an unwritten constitution is a monism state. Though the fundamental law of the land is not codified in a single document but are scattered into various documents. Magna Carta (1215) is supposed to be the earliest most influential document that led to the rule of constitutional law today. Furthermore, the Petition of Rights (1628) ensured the civil liberties asserting the principle of habeas corpus and guaranteed that no tax may be levied without the consent of the parliament and martial law not to be used in the time of peace. Other documents include the Bill of Rights (1689).

<sup>21</sup> *Basheshar Nath v. I.T. Commissioner*, AIR, 1959, SC, p.149.

<sup>22</sup> *Olga Tellis v. Bombay Municipal Corporation*, AIR, 1986, SC, p.180.

Being a monism state, the British constitutional system is highly affected by the “Constitutional Conventions” that limit the government in the absence of legal limitation.

### **International Perspective**

The study of constitutionalism in the 21<sup>st</sup> century cannot be said to be completed unless we give due consideration to its international perspective also. Constitutional conventions play a significant role in limiting the power of the government. Though it does not have a direct impact in the commonwealth states like India since these states follow dualism theory, monism following countries such as U.S., U.K. is directly binding by these conventions if signed. Mere signatory to these international documents has no binding effect on monism states, the conventions have to be ratified by the parliament to make it as the law of the land. As per Article 51(c) of the Indian constitution, the State shall endeavor to foster respect for international law and accordingly Article 253 empowers the parliament to ratify any convention to make it binding in the state.<sup>23</sup>

United Nations in 1945 provided an international platform for the states to resolve their problems. And in 1948, the members of the United Nations for the first time pledged to work together to promote the thirty articles of human rights, that had been assembled and codified in a single document. The founding fathers of the Indian constitution were well aware of the fact that India’s freedom struggle had taken in the context of the demand for basic human rights. Concerning the economic condition of the state, certain rights were enumerated as fundamental right and others as fundamental duties.

On 10th April 1979, India acceded the International Covenant on Civil and Political Rights (ICCPR), 1966 and International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 that promotes the civil, political, economic, social and cultural rights which are enshrined in Part III of the Indian Constitution.

The Rule of law, as per the United Nations Secretary-General, is “a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures

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<sup>23</sup> Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other bodies.

to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>24</sup>

## Conclusion

Jawaharlal Nehru on 10<sup>th</sup> September 1949 viewed that No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament and if it comes in the way, ultimately the whole constitution is a creature of Parliament.<sup>25</sup> This behavior shows the government was not in favor of separation of power and judicial review. But it is inherent constitutionalism feature in our Indian constitution that protects the interest of the citizens and abhors absolutism. It's better to have no constitution than a constitution lacking constitutionalism. The development process is slow as only 60-65% population elects their leader even when the state has the option of NOTA. Though the country had faced the era of emergency it's the same 68 years old constitution that can resolve any issue.

Dr. B.R. Ambedkar in the constituent assembly debates specifically mentioned the Indian constitution merely a mechanism for the purpose of regulating work of the various organs of the state. It is not a mechanism whereby particular members or particular parties are installed in office.<sup>26</sup> What should be the policy of the State, how the Society should be organized in its social and economic side are matters which must be decided by the people themselves according to time and circumstances.<sup>27</sup>

Indian constitution exhibits the provisions of judicial review, fundamental rights, writs, and the principles of basic structure doctrine, and the prevailing rule of law in the state is the output of the hard and smart work of the draftsmen. Parliament cannot amend any Fundamental Right as far as it is connected with the basic features of the Indian constitution. That is why we can say that how smartly our constitutional fathers framed our Indian constitution impliedly installing the features of constitutionalism impeding autocratic marks.

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<sup>24</sup> United Nations Security Council, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 23 August 2004 available at <https://www.un.org/ruleoflaw/files/2004%20report.pdf>, accessed on 28 March 2018.

<sup>25</sup> Speech by Jawaharlal Nehru (n 5).

<sup>26</sup> Speech by B.R. Ambedkar, Constituent Assembly Debates, Delhi, 15 November 1948.

<sup>27</sup> Ibid.