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CONSTITUTIONALISM VIS-À-VIS CONSTITUTION: EVOLUTION AND UTILITY IN MODERN DEMOCRATIC INDIA

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ABSTRACT

Constitutionalism has emerged as the major theme around which the contemporary debates pertaining to law, democracy, human rights, international relations, justice, freedom, etc. take place. However, amid these debates, the core meaning of the term constitutionalism has been lost to some extent. There is a blurring of meaning and confusion over what exactly the term refers to. The lack of conceptual clarity with respect to such a fundamental concept is concerning enough to merit serious scholarly attention. The need for conceptual clarity cannot be highlighted enough. Starting from providing a discussion of the various definitions of constitutionalism, this paper explores and outlines its historical antecedents, its past developments, its contemporary forms and the avenues for its future growth.

The paper provides detailed discussion on the definitions of and relationships between law, constitution, and constitutionalism. This is followed by tracing the historical evolution of the concept through its development from the ancient Greek scholars to modern Europe to contemporary democratic world order. Also, paper deals with the emergence of constitutionalism in the Indian subcontinent with significant focus on political and legal developments in modern democratic India. The paper also aims to shed light on the working of constitution in popular democracies such as that of India, where a government with absolute majority poses a threat to the constitutional values, principles and ethics and how the concept of constitutionalism becomes the last beacon of hope in such testing times.

Keywords: Constitutionalism, Constitution, Democracy, Law, India.

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Introduction

In order to ensure the efficient operation of a state, it is essential to implement measures that restrict the authority of the government, safeguarding certain fundamental human rights for the people. These restrictions are commonly termed as 'constitutionalism.' This essay delves into the character of constitutionalism within the context of India, particularly focusing on its evolution through judicial interpretation. This process involves judicial decisions that impart significance and substance to the written constitution. Through this approach, the judiciary has effectively harmonized government power with the rights of the people. Constitutionalism emerges as a vital element for effective governance, striking a balance between power and rights.

A recurring question for a nation, regardless of whether it has a written or unwritten constitution, revolves around the form of government that emerges within the boundaries of that framework. Often termed 'constitutionalism,' the essence of a nation's government is undoubtedly shaped by its constitution. However, the mere presence of a constitution does not guarantee the adherence to constitutionalism. It is entirely conceivable for a nation to possess a constitution without embodying constitutionalism in the sense of a government with defined limitations. For example, a dictatorship may operate within the confines of a constitution but rely more on the decrees of the dictator than on the constitutional structure for its legal framework. While there may be alternative ways to establish the relationship between the state and its citizens, constitutionalism, essentially characterized by limited government or the imposition of legal constraints on government, stands in stark contrast to the arbitrary powers wielded by a dictator³.

Comprehending the essence of constitutionalism begins by examining the nature of the state itself. A society endeavors to centralize its principles within its political framework, often viewing a government with accompanying powers as crucial for achieving this goal. However, the presence of a government can just as easily jeopardize those principles. Hence, a dilemma arises between the orderly application of the law and situations in which the state, ostensibly to ensure the systematic development of values within the legal structure, might engage in an unwarranted use of force. Consequently, there is a recognition that governmental power, crucial for realizing societal values, must be regulated to prevent it from becoming destructive to the very values it aims to foster⁴. This paradoxical need for governmental power to actualize societal

³ C.H. McIlwain, *Constitutionalism: Ancient and Modern* 21 (McIlwain [1940] 2008); S.A. De Smith, *Constitutional and Administrative Law* 34 (De Smith 1977).

⁴ M.J.C. Vile, *Constitutionalism and The Separation Powers* 2 (2nd ed., Vile 1967).

values, coupled with its potential to undermine those values, has been a part of political discourse since at least the time of Hobbes, if not implicitly for much longer. The question then arises: How can a state limit such power to ensure that its exercise serves the well-being of the people⁵? This is the concern of the constitutionalism. In a broader context, natural law philosophers such as Aquinas, Paine, Locke, Grotius, and Rousseau have explored how to enhance the common welfare⁶. The significant milestones in the history of liberty, like the Magna Carta (1215), can be viewed as efforts to reinforce constraints on governmental power, eventually becoming a focal point in the development of constitutionalism.

Constitutionalism, as embraced by polities adopting it, shares a fundamental characteristic: the legal restriction of government power. It stands as the direct contrast to arbitrary rule, serving as the antidote to despotic governance rooted in the unchecked will of an individual or a select group, rather than adherence to the rule of law. The essence of constitutionalism lies in the governance's limitation by legal principles. Whether in the case of the unwritten British constitution or the written American one, all modern constitutions incorporate the essentials of constitutionalism. In fact, the very existence of these constitutions is a deliberate effort to confine governmental authority. However, even though the fundamental aspects of constitutionalism can be pinpointed, it remains in a continual state of evolution, characterized by dynamism and progress, reinforcing the constraints on government power within the framework of a constitution⁷.

The Indian Constitution, which matured during the era of modern written constitutions, establishes constitutionalism as a prerequisite for limited government in India, emphasizing governance based on law. In addition to outlining the explicit provisions for the establishment and functioning of the government, the written Indian Constitution also encompasses well-established principles of constitutionalism that reinforce the concept of limited government. These principles include federalism, secularism, reasonableness, an independent judiciary endowed with powers of judicial review, the doctrine of the rule of law, separation of powers, free and fair elections, decentralized, accountable, and transparent democratic governance, fundamental rights, a welfare state, and less-known but equally valid principles, notably socialism. These systematic and structural principles underlie and interconnect various sections

⁵ See *State of Karnataka v. Dr. Praveen Bhai Thogadia*, A.I.R. 2004 S.C. 2081.

⁶ M.P. Jain, *Indian Constitutional Law* 6 (5th ed., Jain 2007).

⁷ See generally, Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and The Rule Of Law* (Ackerman 2019).

of the written constitution, providing cohesion and rendering it an organic whole. While not explicitly articulated in written provisions, these principles nevertheless constitute an integral part of the government established by the Indian constitution⁸.

The Indian constitution serves as a noteworthy illustration of the dynamic nature of constitutionalism principles. While our narrative doesn't claim novelty, the Indian narrative in this essay serves two essential purposes. Firstly, it furnishes an introductory overview of the Indian approach, catering to those unfamiliar with its history. Secondly, and more importantly, by methodologically drawing on the judicial branch's work, this essay delves into the predominant themes of constitutionalism within the Indian polity, providing a distinctive example for many readers. The essay is structured into three parts. The first part delves into the authority vested in the federal government, constrained by a comprehension of rights and duties. The second part scrutinizes the shift in constitutionalism from duties to fundamental rights. The final part offers concise concluding reflections on the dynamic nature of constitutionalism as evident in the Indian constitution.

Conference of Power with Rights

After a protracted struggle for independence, India formulated its constitution, placing a strong emphasis on a systematic legal process. The framers articulated the goals of the government in the Preamble, and the constitution itself laid down a structured legal framework that the state must follow in the execution of governance.

Constitutionalism interprets the constitutional text to guarantee that the government is 'legally constrained' and that the authority of the government relies on enforcing these limitations against itself. Consequently, the state is obligated to apply restrictions on its own authority.

The Indian constitution achieves this by safeguarding fundamental rights outlined in Part Three, reflecting the conventional civil and political rights articulated in Articles 2 to 21 of the Universal Declaration of Human Rights. Additionally, non-justiciable directive principles of State policy, found in Part Four, contribute to this framework. Both these elements draw strength from the Preamble and collectively articulate the fundamental values, forming the essential principles of

⁸ D.D. Basu, *Shorter Constitution of India* 17 (14th ed., 2011); see also *M. Nagraj v. Union of India*, A.I.R. 2007 S.C. 71.

the Indian constitution. This affirmation was underscored by the Supreme Court of India in the case of *Maneka Gandhi*, where Justice Bhagwati articulated this perspective as, “These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a “pattern of guarantees on the basic-structure of human rights” and impose negative obligations on the State not to encroach on individual liberty in its various dimensions”⁹.

Part Three encompasses the fundamental rights safeguarded by the written constitution, with two pivotal provisions forming the cornerstone of this protection. Article 13 stipulates that any laws or executive orders inconsistent with the rights outlined in Part Three are void. Complementing this, Article 32 bestows remedial power upon the Supreme Court, which can be invoked to counter government attempts to violate Article 13. This remedial power, with the potential to enforce fundamental rights in Part Three, essentially constitutes an additional dimension of those rights held by the people. Although not a representative body in itself, the Supreme Court possesses the authority to act, enabling citizens whose rights have been infringed to seek redress. Part Four concludes the safeguarding of fundamental rights through a collection of non-justiciable directive principles or affirmative duties (Articles 36–51) imposed on the government. These principles are derived from the concept of a welfare state and the ideal of socio-economic justice, outlining the duties of the state in the formulation and administration of laws¹⁰. The Supreme Court has affirmed that Part Four complements the fundamental rights of Part Three, aiming to advance the objective of a welfare state and align with the goals outlined in the Preamble¹¹. Article 37¹² explicitly declares the non-justiciability of these affirmative duties, emphasizing that the judiciary cannot compel the state to fulfill these directives. Nevertheless, these directive principles play a crucial role in governance; as Dr. Ambedkar noted, they guide the state in determining the order, timing, location, and manner of fulfilling these duties. These affirmative duties are not mere moral guidelines but constitutional obligations, serving as a set of instructions that must be honored by the state. They should not be merely paid lip service by the legislature or executive; instead, they should form the foundation of all executive and legislative actions.

⁹ *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

¹⁰ *Keshavananda Bharti v. State of Kerala* A.I.R. 1973 S.C. 146; *BASU*, supra note 10, at 629. See also *Union of India v. Hindustan Development Cooperation*, A.I.R. 1994 S.C. 988.

¹¹ *State of Kerala v. Thomas*, A.I.R. 1976 S.C. 496; *Mehta v. Union of India*, (1992) Supp. (2) S.C.C. 85.

¹² Constitution of India, Article 37, provides: “The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in governance of the Country and it shall be the duty of the State to apply these principles in making the laws”.

Article 38 serves as the linchpin of the directive principles, emphasizing that the state should endeavor to promote the welfare of the people by establishing a social order in which justice—social, economic, and political—underlies all aspects of national life.

Certainly, as mentioned earlier, the directive principles are non-justiciable. Nevertheless, there are three ways in which some enforceability can be achieved. First, if the state deviates from the directive principles, the safeguard of free speech outlined in Article 19 provides a means for the people to oppose the objectionable government action. Second, a form of constructive constitutionalism has evolved through amendment. For instance, Articles 41¹³, 45¹⁴, and 46¹⁵ of the constitution establish a positive obligation of the state towards citizens for education. This obligation has been transformed into a negative right in Part Three, taking on a new guise as a positive right under Article 21-A¹⁶ (the right to education). The Supreme Court, in the case of *Unni Krishnan, J.P. v. State of Andhra Pradesh*, delineated the process through which the judicial shift of education to Part Three occurred. The court asserted that education is an inherent right implied in the fundamental right to life under Article 21, when read in conjunction with the directive principle on education and the directives in Article 45 that stipulate the state's endeavor to provide free education. This shift has altered the state's positive duty to a negative right enjoyed by the people—in the sense defined by Isaiah Berlin as 'liberty from; absence of interference beyond the shifting, but always recognizable, frontier [between positive and negative liberty]'. Finally, the genuine enforceability of these positive duties imposed on the government is realized at the ballot box, where the ultimate sanction is held by the voters, the people. A disliked government can be rejected in the next election¹⁷.

¹³ Constitution of India, Article 41, provides: “The State shall, within the limits of its economic capacity and development, make effective provision for securing the . . . right to education”.

¹⁴ Constitution of India, Article 45, provides: “The State shall endeavor to provide early childhood care and education for children until they complete the age of six”.

¹⁵ Constitution of India, Article 46, provides: “The State shall promote with special care the educational and economic interests of the weaker sections of the people . . .”.

¹⁶ Constitution of India, Article 21-A, provides: “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine”

¹⁷ On the important role played by judicial interpretation in the development of constitutionalism, see Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (Cover 1983); John V. Orth, John Gava, Arvind P. Bhanu, and Paul T. Babie, *No Amendment? No Problem: Judges, “Informal Amendment,” and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States*, 48 PEPP. L. REV. 341 (Orth et al. 2021).

Constitutionalism and Constitution – the Judicial Approach

In 1950, the case of A.K. Gopalan¹⁸ provided the Supreme Court an opportunity to assess the insufficiency of procedural fairness concerning the phrase 'procedure established by law' in Article 21¹⁹ of the constitution. The Court was tasked with comparing this expression to 'due process of law,' as seen in American constitutional jurisprudence. The challenge was to determine whether criteria such as reasonableness, fairness, and justice were essential to fulfill the requirements of Article 21. Instead of broadening the scope of Article 21, the court interpreted it narrowly, considering it solely as a safeguard against executive actions lacking legal support. This conclusion was reached through an analysis of Articles 14²⁰, 19²¹, 20, and 21, asserting that each should be treated as distinct from the others. Consequently, the framers' choice of 'procedure established by law' over 'due process of law'—a doctrine of British origin—precluded the support for the broader, substantive interpretation sought by the court.

These pivotal decisions set the stage for a significant transformation, marked by the 1973 Keshavanada Bharati ruling. In this landmark judgment authored by Justice Matthew, the Supreme Court articulated that the fundamental rights outlined in Part Three are akin to 'empty vessels,' awaiting each generation to imbue them with meaning based on its experiences. This dynamic has unfolded in collaboration with Parliament, acting as an amending body, actively modifying the constitution to give substance to the positive duties (referred to as moral claims) enshrined in Part Four. Effectively, these duties have been transformed into rights enjoyed by the populace.

This symbiotic process, particularly evident in the realm of education following a judicial shift, led to the incorporation of Article 21-A into the constitution. In response, Parliament enacted the Right to Education Act²² and the Right to Information Act. This dual approach underscores the trend toward embedding authority within the framework of rights as an integral component of the foundational structure of the written constitution. Consequently, over its 73-year journey, the

¹⁸ A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27

¹⁹ Constitution of India, Article 21, provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law"

²⁰ Constitution of India, Article 14, provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

²¹ Constitution of India, Article 19, provides: "(1) All citizens shall have the right—(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions 2 [or co-operative societies]; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; 3 [and] (g) to practise any profession, or to carry on any occupation, trade or business."

²² Right of Children to Free and Compulsory Education Act, 2009.

Indian constitution has witnessed the filling of these metaphorical empty vessels through a combination of judicial and legislative actions, especially concerning the treatment of Part Four. Rejecting the notion of a strict dichotomy between the Third and Fourth Parts, the court has asserted that the directives found in Part Four serve as a complement to fundamental rights. This synergy aims at instigating a social revolution and the establishment of a welfare state, aligning with the aspirations articulated in the Preamble²³. The court regards these two parts as analogous to the wheels of a chariot, working in tandem to foster social and economic democracy. By addressing moral claims or positive duties, as interpreted by the court, the fundamental rights outlined in Part Three create a space for their implementation, contributing to the realization of constitutional objectives. This trajectory of constructive constitutionalism thus becomes an integral aspect of the structural foundation of the Indian constitution, aligning with the vision envisioned by its framers.

The court has effectively implemented this approach to constructive constitutionalism, and a notable illustration occurred in 1973 during the Keshavanada case. In this landmark decision, the court introduced the 'basic structure theory.' This theory, building upon the amending power of Article 368, imposes a restriction on the government's amending authority, safeguarding the integrity of the written Indian constitution from destruction. Employing the 'identity test theory,' through which the court evaluates and accommodates the evolution of various limitations, it ensured that Parliament cannot modify the fundamental structure or core framework of the constitution. The court emphasized that using the Constitution to undermine itself is not legally permissible and underscored the imperative that the Constitution's personality must remain unaltered.

The approach adopted after Keshavanada can be denoted as judicial constitutionalism. Leveraging its authority in construction and judicial review, and assuming the role of the constitution's guardian, the court has formulated several principles that currently constitute the constitutionalism inherent in the Indian constitution. These principles encompass the supremacy of the constitution, the rule of law, the principle of separation of powers, the guiding principles underlying enumerated fundamental rights, objectives outlined in the Preamble, judicial review, federalism, secularism, individual freedom and dignity, the principle of equality, the essence of

²³ Constitution of India, Preamble, establishes justice, liberty, equality, and fraternity, including social, economic and political justice, as the goals of the Constitution. See P.A. Inamdar v. State of Maharashtra, A.I.R. 2005 S.C. 3226

unenumerated fundamental rights, the concept of social and economic justice for the establishment of a welfare state, the equilibrium between fundamental rights and directive principles, the independence of the judiciary, and parliamentary democracy.

Acknowledging each facet of constitutionalism, the written Indian constitution, embraced by 'We the People of India,' has progressed toward a more nuanced equilibrium between power and rights. This reflects the understanding that 'a constitution is not the act of a government.' This ongoing evolution represents a protracted journey, encapsulated in Professor Faizan Mustafa's observation about the Indian Constitution: 'India requires constitutionalism, not just a constitution.'

Conclusion

The Preamble of the Indian constitution aims "to secure to all its citizens: JUSTICE, social, economic, and political; LIBERTY of thought, expression, belief, faith, and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation." In pursuit of these goals, the Constitution explicitly and implicitly incorporates various provisions supporting an independent judiciary, judicial review, the rule of law, the separation of powers, free elections, accountability, transparency, fundamental rights, federalism, and the decentralization of power. Collectively, these principles contribute to the promotion of constitutionalism.

The judiciary holds a central and indeed indispensable role in this process. While the elected and representative branches of government bear the primary responsibility for implementing constitutionalism through self-restraint, the unelected judiciary plays a crucial role in ensuring that these elected branches, in their purported efforts to advance the values of their constituents, do not violate the fundamental rights of those belonging to the otherwise unrepresented minority. Judicial constitutionalism facilitates swift adaptations that respond to the will and aspirations of both the majority and minority populations. Most crucially, the judiciary ensures a government that is both limited and effective, and, above all, upholds the equality of all citizens enshrined in Article 14. Rather than being a negative development, constitutionalism in general, and judicial constitutionalism in particular, allows the Preamble to acquire concrete meaning in the lives of the Indian people.