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## Constitutionalism in India: Essentials, Components, and Importance

Ruzela Da Cruz<sup>a</sup>

<sup>a</sup>VM Salgaocar College of Law, Goa, India

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*The governing authority of every state has been conferred with certain powers. These powers need to be limited and restricted. If unlimited and unfettered powers are conferred on the government, it can be detrimental to the people of the state. Conferring unlimited powers increases the chances of these powers being abused. In light of the foregoing, it is essential that certain limitations are imposed on the powers conferred on the government. The concept of constitutionalism does this. Constitutionalism provides for certain mechanisms which ensure that the government does not overstep the boundaries set for it. Constitutionalism is practised and provided for in India by virtue of various components consisting of doctrines, principals, constitutional provisions, etc which aim to limit the powers of the government. This article sheds light on the principle of constitutionalism, its importance, and its essential requirements. Further, this article also discusses constitutionalism in India and the various components that provide for it. The article also highlights the importance and various purposes served by Constitutionalism.*

**Keywords:** *constitutionalism, power, constitution, transformative constitutionalism.*

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### INTRODUCTION

The concept of constitutionalism is of prime importance in any democratic country. Every country has a constitution that may be written or unwritten but that does not mean that every

country has constitutionalism. Sir John Dalberg Action said, “power corrupts and absolute power corrupts absolutely.” Undoubtedly, unlimited powers in the hand of the ruling or governing authority can be dangerous to the freedom of the people. This can lead to a situation of despotism wherein individuals are denied their rights and freedoms and are subjected to oppression. Thus it becomes absolutely essential that certain curbs or limitations are imposed on the powers of the ruling or governing authority. The imposition of limitations and restrictions on the power of the government is envisaged by the concept of constitutionalism.

### MEANING OF CONSTITUTIONALISM

Constitutionalism recognises the need to have a government with power but at the same time, it also stresses that certain limitations need to be placed on that power.<sup>1</sup> Constitutionalism in essence connotes a limited government or a limitation on the government. But this is just one interpretation. A more representative and general interpretation would be that constitutionalism seeks to prevent arbitrary government. If unrestrained powers are conferred on the legislative or the executive, they may become uncontrolled and act arbitrarily, leading to an oppressive and authoritarian government that jeopardises the freedom of the people. Constitutionalism avoids these dangers by deciding who can rule, how they should rule, and also for what purposes they should rule. Hence in order to preserve and protect the basic freedoms and rights of an individual and to maintain his personality, dignity, and integrity, it becomes necessary that the constitution is permeated with constitutionalism. The Constitution needs to contain certain in-built restrictions and limitations on the powers conferred on the organs of the government. Hence a Constitution should not merely confer power on the various organs of the government, but it should seek and attempt to restrict this power. Constitutionalism is the doctrine that checks if a government action is legitimate or not... It checks whether or not the act of a government is legitimate and if officials conduct their public duties according to the laws in place. The principle of Constitutionalism enshrines that a government must be legally limited in its powers and that its authority must be dependent on

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<sup>1</sup> MP Jain, *Indian Constitutional Law* (6<sup>th</sup> Edition, Lexis Nexis 2010) 6

it observing these limitations. Constitutionalism is said to be the antithesis of arbitrariness. Thus constitutionalism lays down a network to prevent the unstable exercise of power by institutions and individuals who have the duty to manage and govern the State.

## **ESSENTIALS/REQUIREMENTS OF CONSTITUTIONALISM**

### *Popular Sovereignty*

Popular Sovereignty means that the people are the main and prime source of the authority of the government. The government gets its mandate from the people and so the legitimacy of the power and authority of the government is derived from public consent. The source of all sovereignty is the nation which consists of the public. This implies that the public is in some way or the other involved in the decision-making process. The most common method is the election of representatives, wherein the public elect representatives who will represent them. However, constitutionalism requires such elections to be free and fair. Another method by which the public can show their sovereignty and get involved in the decision-making process is by referendum. In the case of referendums, constitutionalism requires the government to consult the public and listen to what they have to say before the government makes any decision or takes any action which affects the public interest.

### *Separation of Powers*

Separation of powers as propounded by Montesquieu refers to the division of government responsibilities among the different organs of the government. It provides for checks and balances.<sup>2</sup> The intention behind this is to prevent the concentration of power in the hands of just one authority. Constitutionalism requires that power is not concentrated in only any one organ of the state. It requires that power must be divided across all the three organs of the state namely the legislature, executive, and judiciary. If power is concentrated in only one organ of the State, then this may lead to abuse of power, tyranny, and even dictatorship.

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<sup>2</sup> Prof. GS Pande, *Constitutional Law of India* (13th Edition, University Book House Pvt. Ltd. 2018) 41

Thus constitutionalism requires separation of power as a measure for providing checks and balances.

### *Rule of Law*

Rule of Law is an important requirement of constitutionalism. The concept of rule of law as propounded by Prof. A.V. Dicey signifies the supremacy of law. It denotes the rule and government of laws and not men. Thus the government should rule in accordance with the law and not in accordance with their whims and fancies.<sup>3</sup> All the officials working under the State must discharge their responsibilities and duties in accordance with the law.

Prof. A.V. Dicey formulated 3 postulates regarding the concept of rule of law. They are as follows:

- No person can be punished except for a distinct breach of law that has been established in the ordinary legal manner before the ordinary courts of the land.
- No person is above the law.

This signifies the supremacy of law. The government cannot act arbitrarily while using its discretionary powers. Rule of law requires that all persons should be treated equally before the law. Courts play an important role in protecting the rights of an individual.

According to Prof. A.V. Dicey, rights can be said to be conferred on individuals only when they are enforceable in a court of law. This means that the principles and rights enshrined in the constitution are a result of the various judgements pronounced by the judiciary. Constitutionalism requires that the principle of rule of law must be followed in the state and law should always be supreme.

### *Democracy*

One of the most important requirements of constitutionalism is that there must be democracy in a state. Constitutionalism can be realised only in a democracy. In a democratic setup, the

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<sup>3</sup> *Ibid*, 43

government is responsible and accountable to the public. As said by President Abraham Lincoln, democracy is of the people, for the people, and by the people. In a democracy, the government serves the interest of the people. It acts on behalf of the people and for the benefit of the people. Thus constitutionalism provides various mechanisms to ensure that the people have a say in the matters of the state and that the government is made accountable to the people. In a democracy, the relationship between the public and the government is that of a principal and agent wherein the public assumes the role of the principal and the government who acts on behalf and in the interest of the public is the agent.

### **Independent Judiciary**

The hallmark of liberal democracy is an independent judiciary. The Judiciary plays an important role in protecting and enforcing the rights of individuals. For the furtherance of constitutionalism, an independent judiciary is indispensable as it upholds the rule of law. If a government does not adhere to the law of the land, then the judiciary can check the same. Independence of the judiciary also enables the judges to act without fear or favour. Besides, an independent judiciary is needed to maintain constitutional supremacy. This is done through the principle of **Judicial Review**. An independent judiciary can review a particular law and declare it to be null and void as far as it violates the constitution. In India Article 13 provides for the principle of judicial review wherein any law can be declared null and void by the court, as far as it violates Part III of the constitution.

### **Civil Society**

Constitutionalism thrives in a state where the civil society is active and strong as democracies flourish when the civil society is strong. Civil society includes all the organised groups and institutions which are voluntary, law-abiding, pluralistic, and independent of the state such as non-governmental organisations, mass media, social and religious groups, universities, think tanks, etc. The groups which form a part of civil society respect the law of the land, the right of other individuals, and also the right of other groups to express their opinions. When the civil

society is strong, the government has to be cautious to ensure that they are adhering to the principle of constitutionalism.

### **Subsidiarity**

The principle of subsidiarity deals with the allocation and use of authority between the central and various subunits in a particular political order. Constitutionalism requires the decentralisation of power. It requires that the central government performs certain subsidiary functions. The central governments should try to perform only those functions which are difficult or not possible to perform at the local levels. There should be different independent centres of decision making. By ensuring decentralisation of power, the scope for arbitrariness and abuse of discretion and power in the hands of the central government is reduced. This is in conformity with the idea of constitutionalism.

### **Police governed by Law**

In every State, the responsibility of maintaining law and order is borne by the police. While discharging their duty, constitutionalism requires that the police respect the rights, dignity, and freedom of all individuals including the offenders and accused. The police are expected to act in accordance with the law. If the police uphold the law at all times, the government will not be able to become tyrannical.

### **NEED FOR CONSTITUTIONALISM**

In any democratic state, the principle of constitutionalism is indispensable. Constitutionalism ensures that the government does not abuse its powers by acting in an arbitrary manner. It ensures that the democratic character of the state is maintained and prevents the government from becoming tyrannical and despotic. Prof B.O. Nwabueze in his book titled 'Constitutionalism in the Emergent States' has explained the need for Constitutionalism as a limitation on the power conferred to the state and said "the greatest danger that a constitutional government in an emergent state can have is from the human factor as politicians can vitiate and distort any governmental forms or measures which may be devised.

There cannot be a constitutional government unless the wielders of power are ready to observe and follow the limits placed upon governmental powers.”

Thomas Jefferson once said, “*when people fear the government, there is tyranny; When the government fears the people, there is liberty.*” Liberty is a very important value of democracy. Elucidating the same Patrick Henry had said “Give me liberty or give me death”. Former Chief Justice of India Dipak Misra also stated “*when you lose liberty without the proper procedure of law, then you are half dead.*” Constitutionalism is vital to ensure that the liberty of every person is guaranteed and protected. In the case of *Indira Nehru Gandhi v Raj Narain*,<sup>4</sup> Justice Matthew had said that the correct proportion of law needs to be mixed with the correct proportion of liberty. If the law is more it will lead to tyranny and if liberty is more it will lead to license. The importance of constitutionalism was explained by the Supreme Court of India in the case of *S.R. Chaudhuri v State of Punjab*<sup>5</sup> where it was said that the constitutional restraints must not be bypassed or ignored even if they are found to be inconvenient. They must also not be bent to suit political expediency. The principles of constitutionalism must not be allowed to be eroded. In *New India Assurance Company Ltd. v Nusli Neville Wadia*<sup>6</sup>, the court again reiterated the importance of constitutionalism by stating that for the proper interpretation of the constitutional provisions, not only the principles of natural justice but also the principles of constitutionalism must be kept in mind.

## DOES HAVING A CONSTITUTION GUARANTEE CONSTITUTIONALISM?

Almost every political system has a constitution, which may be written or unwritten and which lays down the structure, composition, and functioning of the political structures and organs of the state. It also outlines the actions and interactions between these entities. However, having a written constitution alone does not guarantee constitutionalism. There are a number of examples seen in history which reiterate the fact that the presence of a constitution alone does not guarantee constitutionalism. Even Nazi Germany had the Weimar constitution but it did not have constitutionalism. The power exercised by Hitler and his

<sup>4</sup> *Indira Nehru Gandhi v Raj Narain* (1975) Appeal (Civil) No. 887/1975

<sup>5</sup> *S.R. Chaudhuri v State of Punjab* (2001) Appeal (Civil) No. 244/2001

<sup>6</sup> *New India Assurance Company Ltd. v Nusli Neville Wadia* (2008) Appeal (Civil) No. 5879/2007

government was not limited. Similarly, the apartheid regime of South Africa too had a constitution but there was no constitutionalism. The United Kingdom is said to have an unwritten or uncodified constitution yet it adheres to the principles of constitutionalism. Hence it can be inferred that a written constitution is not a prerequisite for constitutionalism and nor does having a constitution guarantee constitutionalism. In *R.C. Poudyal v Union of India*,<sup>7</sup> the Supreme Court stated that the mere existence of a constitution does not guarantee constitutionalism. It is the political maturity and traditions of the people which gives meaning to a constitution that would otherwise just embody the political hopes and ideals.

In the case of *S.R. Chaudhuri v the State of Punjab*,<sup>8</sup> the Supreme Court again reiterated that the mere existence of a constitution alone does not ensure constitutionalism by itself. Hence a constitution needs to have certain principles and qualities which impose limitations on the power of the government.

## COMPONENTS OF CONSTITUTIONALISM IN INDIA

The Indian constitution embodies the spirit of constitutionalism through various components such as statutory provisions, principles, etc. Through these components, certain limitations have been imposed on the powers of the government and the legitimacy of the government depends on its adherence to these limits. Constitutionalism in India is mainly contained in the following components:

### *Written constitution*

Even though having a written constitution is not an essential prerequisite for the existence of constitutionalism as is seen in the case of England, having a written constitution is an added advantage. India has a written constitution and this allows for the clear communication of the various constitutional principles and values across generations. A written constitution dispels the doubt of any ambiguities regarding the constitution. It ensures that successive

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<sup>7</sup> *R.C. Poudyal v Union of India* (1993), AIR 1804

<sup>8</sup> *S.R. Chaudhuri* (n 5)



governments understand the constitutional provisions clearly and adhere to them. Thus the Indian Constitution being written helps in strengthening the principle of Constitutionalism.

### *Separation of Power*

In the case of *P.Kannadasan v State of Tamil Nadu*,<sup>9</sup> the Supreme Court held that the Indian constitution recognizes and incorporates the doctrine of separation of powers. This doctrine provides for checks and balances to prevent tyranny and abuse of power. In India, separation of power is not followed strictly but it adheres to a great extent. In *State (NCT of Delhi) v Union of India*,<sup>10</sup> the supreme court observed that the essence of constitutionalism is the control of power by its distribution among several state organs in a way that each of them is subjected to reciprocal controls and forced to cooperate in formulating the will of the state. Article 50 of the Indian constitution which is a directive principle of state policy, states that steps must be taken by the state to separate the judiciary from the executive in the public services of the State.<sup>11</sup>

### *Judicial Review*

Judicial review is a part of the basic structure of the Indian constitution. Judicial review is the power conferred on the judiciary to examine and review any legislative and executive action. The court can strike down any law as unconstitutional if it is violative of Part III of the constitution or the basic structure.

### *Rule of Law*

The Indian constitution embodies the principle of rule of law. In *Kesavananda Bharati v the State of Kerala*,<sup>12</sup> the Supreme Court held that the rule of law forms a part of the basic structure of the constitution. Thus in India, the law is supreme and no person is above the law.

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<sup>9</sup> *P. Kannadasan v State of Tamil Nadu* (1996) 5 SCC 670

<sup>10</sup> *State (NCT of Delhi) v Union of India* (2018) 8 SCC 501

<sup>11</sup> Mahendra Pal Singh, *V.N. Shukla's Constitution of India* (11<sup>th</sup> Edition, Eastern Book Company 2008) 360

<sup>12</sup> *Kesavananda Bharati v State of Kerala* (1973) Writ Petition (Civil) No. 135/1970

### *Fundamental Rights*

Part III of the Indian constitution, which is also referred to as the Magna Carta of the Indian constitution contains Fundamental Rights. They are restraints imposed on the state as they prevent the state from doing certain things. They form the bulwark against the arbitrary exercise of power by the state. In *I.R. Coelho v State of Tamil Nadu & Ors*,<sup>13</sup> the Supreme Court observed that the principle of constitutionalism is a legal principle that requires the exercise of control over governmental power to ensure that it does not destroy the democratic principles which include the protection of Fundamental Rights.

### *Independence of Judiciary*

The constitutional framers have made various provisions to ensure the independence of the judiciary. An impartial judiciary is of prime importance in order to adjudicate disputes in a free and fair manner. Thus an independent judiciary is important to uphold the principle of constitutionalism.

### *Writ Jurisdiction*

The Supreme Court and High Courts have been granted writ jurisdiction under Articles 32 and 226<sup>14</sup> respectively. There are 5 writs, i.e., Habeus Corpus, Mandamus, Certiorari, Quo Warranto, and Prohibition. The writ jurisdiction gives aggrieved citizens a mechanism to approach the court in case of certain violations which again helps in upholding the principle of constitutionalism.

### *Amending powers*

The Indian constitution provides for the mechanism of amending the constitution. The process prescribed is neither very rigid nor very flexible. This ensures that the governments cannot amend the constitution very easily so as to fulfill their whims and fancies. Nor is the amending

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<sup>13</sup> *I.R. Coelho v State of Tamil Nadu & Ors*. (2007) Appeal (Civil) No. 1344-45/1976

<sup>14</sup> Constitution of India, 1950, art. 32 and art. 226

procedure too rigid which ensures that the constitution can be changed in order to adapt to the changing times.

## ENTRENCHMENT

The Indian constitution contains certain entrenched rights. Entrenched rights are those rights that are explicitly protected by the constitution and are immune from being changed by successive governments according to their own whims. These rights are given a special status and are kept beyond the reach of the political majority. Thus they cannot be changed or curtailed by the ordinary process of law. These rights form the basis of democracy and are essential for a democracy to survive. Some examples of entrenched rights are the right to life, right to equality, right to freedom of speech, etc.

## TRANSFORMATIVE CONSTITUTIONALISM

The Indian Constitution is a dynamic and organic document and likewise, the concept of constitutionalism is an evolving concept. Transformative constitutionalism envisages a mechanism to bring about social change by using the constitution as a tool to achieve the same. Thus the constitution is not just a document that guarantees against state excesses but it also embodies a vision of a more fair, inclusive, and progressive society. Transformative constitutionalism operates within the limits laid out in the constitution as it permits a broader reading of the fundamental rights only to the extent to which it is consistent with the text of the constitution. Transformative constitutionalism is an instrument used by the court to ensure a more equitable society. It aims to fulfill the basic goal of the constitution which is to ensure that the society is transformed for the better.

In *Anuj Garg v Hotel Association of India & Ors.*,<sup>15a</sup> a provision of the Punjab Excise Act was challenged as it prohibited women from being employed in any establishment where liquor or any intoxicating drug was being consumed. The Supreme Court struck down this provision as being unconstitutional and violative of the right to equality. The court rejected the idea of

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<sup>15</sup> *Anuj Garg v Hotel Association of India & Ors.* (2008) Appeal (Civil) No. 5657/2007

romantic paternalism. This became an important precedent for the transformative constitutional vision regarding gender equality.

In *Navtej Singh Johar v Union of India*,<sup>16</sup> the Supreme Court declared Section 377 of IPC to be unconstitutional to the extent to which it criminalised consensual sexual conduct between adults of the same sex. The impugned provision was held to be violative of the right to equality, right to privacy, and right to life. In this case, Justice A.M. Khanwilkar said “the whole idea of having a constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.”

In *Joseph Shine v Union of India*,<sup>17</sup> the Supreme Court struck down Section 497 of IPC which criminalised adultery on the ground that it was arbitrary and discriminatory against women as the provision was silent on the consent of the married woman. In all these cases we can see the important role played by the judiciary in transforming the state and the society through transformative constitutionalism.

## **PURPOSES/IMPORTANCE OF CONSTITUTIONALISM**

Adhering to the principle of constitutionalism serves many purposes. The various purposes/importance of constitutionalism are as follows:

### ***Enforcement of Principal-Agent relationship***

In a democracy, the people are sovereign as the government derives its power from the people. The government in a state can function as long as it is mandated by the people. The people are supreme and the government acts on behalf of the people and for the betterment of the people. Thus in a democracy, people play the role of the principal and the government takes up the role of the agent. Constitutionalism ensures that this principal-agent relationship is enforced as it imposes certain limitations on the government’s power which ensures that the government is subordinate to the people and their power.

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<sup>16</sup> *Navtej Singh Johar v Union of India* (2018) Writ Petition (Criminal) No. 76/2016

<sup>17</sup> *Joseph Shine v Union of India* (2018) Writ Petition (Criminal) No. 194/2017

***Provides a mechanism for checks and balances***

Constitutionalism provides for various ways by which the power of the government can be kept under checks and its functioning can be monitored. It provides for various mechanisms to ensure that the governments do not abuse and exceed their power thereby preventing tyranny and despotism. Various mechanisms such as separation of powers, judicial review, etc provide for checks and balances.

***Enforcement of societal pre-commitments***

Constitutionalism, by imposing certain limitations ensures that constitutional pre-commitments are safeguarded. The long term goals and vision that the constitutional framers envisioned for India need to be protected from the short term passions of succeeding governments. Pre-commitments are aimed at restraining future passions, protecting future self-interests, and preventing future changes of preference. Constitutionalism ensures that these societal pre-commitments are enforced.

***Protection of minority rights***

Constitutionalism also plays an important part in protecting the rights of minorities. Through the concept of entrenchment, certain rights are kept out of the reach of the political majority. They cannot amend or change those rights. This is important in order to prevent the state from becoming a majoritarian state.

***Maintaining continuity or tradition***

Constitutionalism helps in maintaining constitutional traditions. It helps in keeping the continuity between the past, the present, and the future with regard to constitutional values. It prevents a complete overhaul by successive governments which can completely change the constitutional character of a state.

*Symbolizes national unity*

India is a heterogeneous country and it comprises people of various castes, creeds, religions, and cultures. The Constitution is the highest law of the land and all people are subject to it. Constitutionalism furthers a spirit of national unity and oneness among the people.

*Serves an educational purpose*

Constitutionalism helps shape public opinion. It helps generations over the years to understand the essence of the constitution and the various constitutional values and goals envisaged in it by the constitutional framers. It forms a part of the constitutional morality and spirit that is to be imbibed in all the actions of the state.

**CONCLUSION**

Constitutionalism is an indispensable concept in a democracy. It prevents the state from turning into a despotic state as it advocates the imposition of certain limits on the state. The Indian state is a result of the Indian constitution. The constitution does not merely enumerate the various rights granted to the people but also delineates the structure of the Indian state. It limits the powers granted to the State and this helps in the continuance of the democratic and constitutional values.