
CONSTITUTIONALISM : A REFLECTION OF SOCIETY

Ozasvi Amol & Fariya Sharaf, Amity University, Patna

Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it.

- **Dr B R Ambedkar**

ABSTRACT

The present article holds constitutionalism as a feature or ideology towards nationhood. Constitutionalism must be distinguished from a similar term 'constitution'. Narrowly, constitution is a way or road to political life whereas 'constitutionalism is a normative political theory wherein the will of people, citizen, an elite or a party with an overwhelming majority has limited power'. In brief it imposes restrictions on the government. The constitution of a nation is like an organism which will grow and develop with the evolution in the society. Constitutionalism prohibits arbitrariness and preserves the basic freedom of the individual by maintaining their dignity in this way constitution must be permeated with the term constitutionalism by imposing some inbuilt restrictions. The Indian perspective of the term constitutionalism which makes it distinct is its self - consciously cosmopolitan character. At the core level constitutionalism signifies a politics of restraint. In order to understand the commitment to constitutionalism one has to be well versed with the idea of constitutional morality which acts as an agent to the constitution. Constitutionalism favours the view that a country can have the government which it deserves, therefore any incompetent authority will not be able to serve the subjects. The article begins with an introduction of constitutionalism and give detailed aspect of constitutionalism in India blended with case laws related to it. Further the article also addresses secularism, rule of law, democracy with respect to constitutionalism. The article ends on suggesting that how constitutionalism act as a changing paradigm in the present world and the various cases that depicts the fact of how our constitution works with an essence of constitutionalism attached to it.

Introduction

The term constitution subsists of a set of rules or norms that creates, structures and defines the limits of the government's power and authority. The constitution of India, a unique document, is not only a stilted legal text but also a document that epitomizes human values, cherished principle and metaphysical norms. It also advocates the dignity of an individual. The constitution provides various underlying arrangement which determines the political, social and legal structure by which the society is to be governed. The provisions mentioned in the constitution is considered to be paramount and fundamental. The structure of our nation is shaped with the help of government divided into three parts namely executive, judiciary and legislature. It is an accepted notion that the power of the bodies is separated, mere separation does not adhere to the fact that these bodies are independent but they all function together maintaining their self -rule. From the concept of separation of power emerges constitutionalism which is a doctrine that limits the power of government by law as prescribed in the constitution. It is a system based on the supremacy of the constitution. Sometimes the term constitutionalism is reversed with limited government. In a general sense it is an effort to prevent the arbitrary government. John Locke, a political theorist is of the view that "constitutionalism is an idea which allows the government to be legally limited in their power." It is a balance of power between right of an individual on one hand and the power of government on the other which needs to be at par. The most important and highlighting feature of constitutionalism is that the rule imposed on the limit of government must be in compliance to the constitutional creation or else the dignity, morality and security of individuals will be at stake. The significant element of the term is that government officials are nowhere allowed to be free in pleasing whatever they choose. In John Austin's theory of law, "Law is the command of sovereign". In this theory the central idea revolves around the term sovereign. Sovereign it in is a theme of constitutionalism too even though Austin's theory does not fit into the democratic form of government but the essence of sovereign lies there.

1. Constitutionalism as an instruction for nationhood:

The constitution of India was plotted very consciously as a legal document. The need of the constitution was deeply sorted to expel of the parochial system and the social decay of the Indian society with an aim of forming a new era of Republican Freedom. The framed constitution was treated as revolutionary agent which would transform the society in a better way. The ill practices in the society specially because of the caste system could hardly be denied

in that era. Thus, constitution was a “social revolution” to remove unjust and unfair activities. The term social revolution was framed by Austin. The newly formed constitution was envisioned with a very significant role in sovereign power by making the society free from the immoral acts and Imperial subjection. The structure and evolving dynamic of Indian constitutionalism was designed under the colonial rule, in the colonial rule constitutionalism was held as a liberal idea. This frame embarked the need of transformation and modernisation of Indian society from the colonial rule.

As far as constitutionalism was explained, India articulated the projects related to education and social revolution only. The other aspects of society were not brought into light because at that time education and social transformation was a major concern. Liberal constitutionalism has only flatten and bypass the social intuitions. When the new constituent assembly was formed to draft India’s constitution post-independence it had an inherit model of constitutionally liberal government. The main idea revolves around the social distinctions existing in the society. Commenting on constitutionalism social revolution was framed as an assertion of supremacy of political claim.

2. Constitutionalism in Indian Democracy

Indian constitutionalism is embedded in the culture, geography, history, sociology, economy and politics of the country. Constitutionalism is a system of government which is based on supremacy of law, separation of powers, democratic values, judicial independence and individual rights. Constitution and constitutionalism are two different concept ,a country may have constitution but constitutionalism may not have any room there and there are many countries which do not have a written constitution but constitutionalism has its roots bedded in it. **Philip P. Wiener** says “Even with a formal written document labelled constitution which includes the provision customarily found in such a document, it does not follow that it is committed to constitutionalism”. The structure and evolving dynamic of Indian constitutionalism was designed under conditions of colonialism, when constitutionalisation was conceptualized as a pedagogical project of instructing India in the ways of liberal constitutionalism. It is a feature which limit the government from turning to be an arbitrary or totalitarian state. Constitutionalism recognizes the need for government with powers but at the same time insists that limitations be placed on those powers. Constitutionalism is the antithesis of arbitrary powers. In India we do follow this concept of constitutionalism as the government or rulers of this nation cannot take any decision arbitrarily, they are accountable and answerable

for each and every action of theirs. Constitutionalism envisages checks and balance and put the powers of legislature and executive under some restraints. Our constitution is a living document and is flexible enough to evolve according to the change in the society, we have witnessed the evolution of our constitution in the back years, the judiciary of our nation who is the guardian of our constitution has contributed in strengthening the idea of constitutionalism in our state by pronouncing judgements which have showed a clear way towards the road to constitutionalism in a case *I .R. COELHO* by *LRS* vs *State of Tamil Nadu & Others*¹ the Apex court lays down that constitution being a living document undergoes development and expansion of law. Further “constitutionalism” was held as a legal principle which restricts over the governmental power. This also says that constitutionalism predicates the principle of legality which require a court to legislate in such a manner that the legislation is not contrary to the fundamental rights. This case is also known as the ninth schedule case which upholds the authority of the judiciary to review any law, which destroy or damage the basic structure as indicated in fundamental rights, even if they have been mentioned in ninth schedule. Court described common law constitutionalism in precise manner which may reveal our vehement exigencies. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism.

On 24 April 1973, the apex court made its most significant decision in history with the case of *MINERVA MILLS* v *UNION* of *INDIA*² at heart the case involved the governments nationalization of powers and right to property. As observed by Justice Chandrachud in the case - “The constitution is a precious heritage and therefore you cannot destroy its identity.” The court has emphasised that the parliament or government is not the creator of the constitution rather it is the constitution which acts like a grundnorm and gives sanctity to these bodies thus the government cannot act arbitrarily and can’t amend the constitution according to their whims and fancies, thus this limitation on government’s arbitrary action is constitutionalism.

3. Secularism and rule of law a way to ensure constitutionalism

India is a country of religions. There exist multifarious religious sects in the country, but in spite of this, the constitution stands for secular state of India, which means that the state has no religion and each religion practiced or professed in our country is equal before the state. Secular

¹AIR 2007 SC 861

²AIR 1980 SC 1789

nation is the one in which the government be it of any political party is bound to make policies and laws which are non-discriminatory on religious grounds and are in line with the provisions of the constitution, thus secularism is a means to achieve our goal of a welfare state, a state where each individual grows and flourishes where the government is for the people not against the people, the government in a secular nation is expected to be neutral in matter of religious issues and the laws framed by government should also be unbiased and impartial, secularism is a way to enforce and emphasize constitutionalism as it offers limitations and restriction on government by not discriminating any group or individual on the basis of religion being practices or professed by that group or individual. The Apex court has declared secularism as the basic feature of the Indian constitution. The court has further declared that the secularism is a part of fundamental law and unalienable segment of the basic structure of the country's political system.³

Adherence to rule of law is the necessary condition to the realization of a legitimate constitutionalism. The two ideas are generally equated, the doctrine of rule of law is ascribed to **DICEY** whose writing in 1885 on the **BRITISH CONSTITUTION** included these distinctions, he proclaimed that when there is absence of arbitrary powers, equality before law, and value of individual liberties then only rule of law can exist. Dicey's thesis has been criticised by many from various angles but the basic concept expressed by him is that power is derived and should be exercised in accordance with law. If we describe rule of law in simple terms then it means that every one is equal before the law be it a common man or a governmental staff thus rule of law is meant to check and control both the people and state. The broad emphasis is on absence of any accumulation of unlimited, arbitrary power in the country. Rule of law does not mean rule according to statutory law, because there is a possibility that those statutory, codified laws may be harsh and arbitrary in nature, rule of law connotes laws which are just, fair, non-discriminatory and reasonable. This is the difference in rule of law and rule by law in rule by law the arbitrator is free to make any law according to his whim and caprice and regulate a nation in accordance to those discriminatory and derogatory laws but in rule of law the government is under scrutiny none of their violative and arbitrary action is accepted. The Indian constitution by and large seeks to promote Rule of law through many of its provisions, for example Parliament and state legislature are democratically elected on the basis of adult suffrage. The supreme court has pronounced rule of law in several judgements as

³ *KESHAVNAND BHARTI v STATE OF KERALA*, AIR 1973 SC 1461

in *BACHAN SINGH*⁴ case Justice Bhagwati has emphasized that rule of law exclude arbitrariness and unreasonableness, he suggested that it is necessary to have democratic legislature to make laws but its power should not be unfettered and that there should be an independent judiciary to protect the citizen against the excesses of executive and legislative power. Rule of law has always worked as a tool to establish constitutionalism it is the principle which keeps a check and balance on government, rule of law adds significance to constitutionalism. In *WADHWA*⁵ the apex court has invoked the rule of law concept to decry too frequent use by a state government of its powers to issue ordinances as a substitute for legislation by legislature.

4. Constitutionalism- A changing paradigm

Constitutionalism marks the need of government with power but at the same time limits the power of the government too. The antipode of constitutionalism is autocracy. It maintains a check and balance by limiting the power of government body by not liberating them in their power. Coming from the political philosophy constitutionalism takes the position that if a government has to be, legitimate it must have legal limitation on its power. Thus, one can say that constitution must be permeated with constitutionalism. There must be inbuilt restriction on government's power. Constitutionalism is all about limits and aspiration.

According to Justice Brennan, constitutionalism is a written text with aspirations and fundamental principles.⁶ In an article titled "Challenges to the living constitution" by Herman Belz the author is of the view that constitution embodies aspiration to social justice. Constitution is the harbinger of equality, justice, and freedom it equalizes the indifferences being practices in the society, a constitution with the spirit of constitutionalism is said to be the catalyst which will aid in revolutionizing the society.

As a nation of about one billion people and the largest democracy in the world, democratic clash is a natural outcome of it. The independent judicial system of our country is an extensive engine for social changes, extension, expansion and development. Even though India has a well-developed system of law inherited from the Britishers, for over 50 years, The Supreme Court hovered overexerting complete check on legislative branch as in case of *Golaknath* vs *State* of

⁴ *BACHAN SINGH v STATE OF PUNJAB*, AIR 1982 SC 1325

⁵ *D.C. WADHWA v STATE OF BIHAR*, AIR 1987 SC 579

⁶ Adv. Sandeep Agarwal, "Constitutionalism a changing paradigm", *Legal Services India*

*Punjab*⁷ Where the parliament lacked power in amending the constitution without constitutional convention. But this was overruled in *Kesavananda Bharti vs State of Kerala*⁸.

From the moment the First Amendment was made in Indian constitution and the land reform in the 9th schedule, the long saga continued with the amendments. In *Sajjan Singh vs State of Rajasthan* and *Sankari Prasad Singh DEO vs Union of India* analogised the constitutional amendments arguing that amendments were abridging the fundamental rights. To this the Supreme Court rejected the arguments and held constitutional validity. The supreme court in 1967 said that the amendment were 'laws' within the meaning of article 13.⁹ This is one of the significant decision given by the apex court.

In *NALSA vs Union of India*¹⁰ the supreme court gave a landmark judgement because it was the first to legally recognize non-binary gender identities and uphold the fundamental rights of transgender in India. The court hence directed centre and state to take proactive steps in ensuring the transgender people rights. Thus, in this landmark case the court of justice upheld the principle of constitutionalism while directing government to frame inclusive law and also to refrain from exercising their derogatory and discriminatory laws.

Conclusion

Constitution can flourish only when there exists a culture of respect for constitutionalism and not just constitutionality which is an idea of ensuring that one is legitimately on the right side of the constitution. Constitutionalism is a spirit of democratic constitution. There have also been various episodes where a resilient constitutional democracy will be able to overcome a crisis within one of its institution. But when constitutionalism is under threat from various direction in such a case constitutional watchdog can result in to devastating outcomes. Even though constitution cannot interpret or enforce itself on its own It is therefore to be interpreted by the veterans of the subject. These men are the Supreme Court judges who might with an inevitable tendency continued to place their even broader powers on its own government. Since constitutionalism is about truth and aspiration therefore the aspirations are of the people at local level is increasing in an exponential manner, if these are not fulfilled it might lead to dangerous functioning of the democratic system. The Supreme Court is now more assertive as compared

⁷ AIR1967 SC 1643

⁸ AIR 1973 SC 1461

⁹ *I C Golaknath & ors vs State of Punjab Anr.*, AIR 1967SC1643

¹⁰ AIR 2014 SC 1863

to it was 30 years ago ,we can confer these statements by taking into account the various amendments initiated and a plethora of landmark judgments pronounced . When it held in a landmark Keshavanad Bharti case that there was limited ability to conduct judicial review in the very infamous 9th schedule therefore regarding it for review. In a nutshell the unlimited power jeopardized the freedom of people. To this it is very well said that “Power corrupts but absolute power corrupts absolutely.” Monopoly over power can result into abuse of power. Thus, constitutionalism acts as a permeable wall that allows and welcomes changes and transitions and also imposes restrictions.