

THE IDEA OF CONSTITUTIONALISM AND ITS VALUES: INDIAN LEGAL SYSTEM AN ASSESSMENT

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Abstract

It has been maintained and seen through the years in the light of the Constitution that absolute concepts of liberty and equality are very difficult to achieve in a modern welfare state. Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The idea of constitutionalism is part of the basic idea of liberalism based on the notion of individual's right to liberty. India is a democratic country with a written Constitution. The article moreover enshrines the significance of values and has captured this dual aspect by noting that constitutionalism "is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order. The research paper is embodied with the analysis and conclusion of the thesis.

Keywords: Constitutionalism, Democratic, Republic, Social, Equity, Significance of Values.

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1. Introduction

*A constitution is not based on a norm, whose justness would be the foundation of its validity. It is based on a political decision concerning the type and form of its own being, which stems from its political being... The people, the nation remain the origin of all political action.*³

Constitutionalism has a variety of meanings. Most generally, it is "a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law". A political organization is constitutional to the extent that it "contain institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority". As described by political scientist and constitutional scholar David Fellman: It may be said that the touchstone of constitutionalism is the concept of limited government under a higher law. Constitutionalism means limited government or limitation on government. It is antithesis of arbitrary powers. Constitutionalism recognizes the need for government with powers but at the same time insists that limitation be placed on those powers. The antithesis of constitutionalism is despotism. A government which goes beyond its limits loses its authority and legitimacy. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some inbuilt restrictions on the powers conferred by it on governmental organs.

2. Elements of Constitutionalism

Written constraints in the constitution, however, are not constraining by themselves. Tyrants will not become benevolent rulers simply because the constitution tells them to. In order to guard against violations against the letter and spirit of the constitution, there needs to be a set of institutional arrangements. Louis Henkin defines constitutionalism as constituting the following elements:

- (1) government according to the constitution
- (2) separation of power

³ CARL SCHMITT, CONSTITUTIONAL THEORY 125, 128 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928)

- (3) sovereignty of the people and democratic government
- (4) constitutional review
- (5) independent judiciary
- (6) limited government subject to a bill of individual rights
- (7) controlling the police
- (8) civilian control of the military
- (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.

Broadly speaking, Henkin's nine elements of constitutionalism can be divided into two groups, one concerns power construction and power lodging; and the other deals with rights protection. These two groups of institutional arrangements work together to ensure the supremacy of the constitution, the existence of limited yet strong government, and the protection of basic freedom.

3. Constitutionalism and Democracy

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law, and therefore see no necessity for the separation of powers or representative governance. Constitutionalism however, is primarily based on the notion of people's sovereignty, which is to be exercised--in a limited manner--by a representative government. The only consensual and representative form of governance in existence today, is democratic government. In this way, there is a very important and basic link between democracy and constitutionalism. Just as mere constitutions do not make countries constitutional, political parties and elections do not make governments democratic. Genuine democracies rest on the sovereignty of the people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy, there can be no constitutionalism.

4. Constitutionalism and Rule of Law

Rule of law refers to the supremacy of law: that society is governed by law and this law applies equally to all persons, including government and state officials. Following basic principles of constitutionalism, common institutional provisions used to maintain the rule of law include the separation of powers, judicial review, the prohibition of retroactive legislation and habeas corpus. Genuine constitutionalism therefore provides a minimal guarantee of the justice of both the content and the form of law. On the other hand, constitutionalism is safeguarded by the rule of law. Only when the supremacy of the rule of law is established, can supremacy of the constitution exist. Constitutionalism additionally requires effective laws and their enforcement to provide structure to its framework.

5. Constitutionalism and Constitutional Convention

The idea of constitutionalism is usually thought to require legal limitation on government power and authority. But according to most constitutional scholars, there is more to a constitution than constitutional law. But there is a long-standing tradition of conceiving of constitutions as containing much more than constitutional law. Dicey is famous for proposing that, in addition to constitutional law, the British constitutional system contains a number of "constitutional conventions" which effectively limit government in the absence of legal limitation. These are, in effect, social rules arising within the practices of the political community and which impose important, but non-legal, limits on government powers.

6. Research Problem

If we look into closely, Constitution of India is not a another structure of textual law but it is also a structure with a soul labelled as Constitutionalism. Now the question which arises is, what are the tests which defines that a textual structure of Constitution is breathing Constitutionalism? And it needs to be noted that these tests cannot give result in a laboratory or in a monitored environment. Human Society within the geography of the nation is the play field here. The concept of the Constitutionalism can be tested on following parameters like:

- 1) Rights granted by the Constitution to its subjects in order to maintain dignity of a human life
- 2) Rule of law, which is how much fairness, justice and equality is visible and adapted.
- 3) Democracy, Secularism

4) Duties undertaken by the state to protect life of its subjects.

Considering the time limitations we narrowed down the scope of the test of constitutionalism to Category 1 only for this paper and begins the work with a presumption that principle of constitutionalism is working within the structure of Indian Constitution and the legal system to ensure dignified life to the subjects of the State as guaranteed by Part III of the Constitution under the heading of Fundamental Rights.

Fundamental Rights in Indian Constitution

Article 12 to 35 under Part III of the Constitution titled as “Fundamental Rights” sketch out provisions which are in required to have a dignified life of human by the subjects of the Country.

Fundamental Rights as an expression of Constitutionalism in India

The intention of the researchers behind this exercise of listing fundamental rights was to see whether traces of Constitutionalism can be seen in them or not. And after the analysis following links to constitutionalism are located within the framework of Fundamental Rights drafted in the Constitution of India, 1950:-

- 1) Equality assurance (Art. 14- 16)
- 2) Freedom of speech (Art. 19)
- 3) Protection to individual’s life and liberty(Art.21)
- 4) Justice system to be just , fair and reasonable(Art. 20-22)
- 5) Curbing arbitrariness in the Criminal proceedings of law(Art. 20-22)
- 6) Secularism(Art. 25)
- 7) Judicial Remedies(Art.32)

This analysis leads our way to the notion that text of Constitution of India is not dry. The framers of the Constitution without utilizing the word constitutionalism, made sure that its principles are very well mixed in the provisions drafted. However when the principles of constitutionalism were implanted by the Constituent Assembly, it was said that Constitution of

India will not survive for long as it is thriving on the borrowed principle of alien lands. And this proclamation succeeded in the every first year of the adoption of Constitution, when the Apex court in *A.K. Gopalan v. State of Madras*⁴ declared that procedure formulated by the legislature is more than sufficient to deprive the person of his liberty.

7. Existing Legal Situation

Constitutionalism is present in India or not. It can be analysed with the help of various provisions of constitution that are:

- Preamble
- Judicial Review
- Rule of law
- Separation of Power
- Checks and balances

Preamble

There is no exhaustive list of features by which the validity or existence of constitutionalism can be tested; but the every feature which limits the government and proves helpful to establish a position of sovereignty under fundamental principles of constitutional jurisprudence may be a considerable point for constitutionalism. In Indian context, Preamble may be a point to check the presence of constitutionalism. Our Constitution enacted on 26th November, 1949, since then, a question always a matter of great concern that whether preamble is a part of Indian constitution or not. However, in 1960, In *Re Beru Beri case*⁵, it was held that preamble is not a part of constitution but after a long time, In case of [*Keshavanand Bharti v State of Kerala*](#),⁶ declared that “Preamble is a part of Indian Constitution”. Preamble explains the objectives of constitution in two ways, one about the composition of bodies of governance and other about the objectives sought to be achieved in independent India. Objectives explained in preamble are- To constitute

⁴A.K. Gopalan v. State of Madras, AIR 1950 SC 27

⁵ Re Beru Beri, AIR 1960 SC 845

⁶[Keshavanand Bharti v State of Kerala](#), AIR 1973 SC 1461

India into Sovereign, Socialist, Secular, Democratic Republic (words Socialist and Secular inserted by 42nd constitutional Amendment, 1976). Thus, to summarize preamble hold the spirit of constitutionalism.

Judicial Review

Second feature is Judicial Review, however, this doctrine is not clearly stated in Indian constitution but its reflection is somewhere found in Article 13(2), Actually, this doctrine was firstly introduced in 1803 by Justice Marshall in *Marbury v Madison*⁷ case, In USA where he clearly said that ‘It is the duty of judge to annul the law made by the legislature which violated the constitution or contrary to it.

The similar spirit found in Article 13(2) of Indian Constitution that the laws “which are inconsistent to part III of constitution shall be declared null and void”, but it is not clearly defined that if any contrary law made, then who will check its validity, then an answer comes into light in reference to Justice Marshall that Judiciary can check such contrary acts of legislature and also can review the laws made by legislature. In *Gopalan V State of Madras*⁸ has upheld that it is difficult to restrict the sovereign legislative power by judicial interference except so far as the express provision of written constitution. It is only the written provisions of constitution which may restrain legislative power, but where there is no written constitution, then, who restrain legislative power, and then its answer is judiciary by following various principles, precedents, customs, usages, and different statutes can check the consistency.

Rule of Law

Third provision is “Rule of Law”, on its basis spirit of constitutionalism can be present in a state. This doctrine is given by Dicey (a well known constitutionalist of England) in 1865 wrote a book titled “An Introduction to the law of the constitution” in which the term “Rule of Law” was given a comprehensive amplitude. This doctrine shows that whatever law is present in our state, must be ruled over everyone, meaning thereby the law is supreme in all respect and in

⁷ *Marbury v Madison*, 5 [U.S. 137](#)

⁸ *Gopalan V State of Madras*, (1950) SCR 88(100)

every sphere. It clarifies that “No one above the law”. Now a question arises, what the law is? The answer of this question resides in the principle that is- Procedure established by law. In India, there is a “Procedure established by law” doctrine prevails, adopted from Constitution of Japan and clearly enshrined in Article 21 of Indian Constitution. It shows parliamentary sovereignty because in India, law is made by the legislature, it restricts the judicial supremacy and only infers right to do literal interpretation not statutory construction of laws. But to promote the spirit of constitutionalism, the shadow of this doctrine reflects in various provisions of Indian Constitution in the form of fundamental principles of natural justice.

Separation of Power

Next provision is Separation of Power among organs of government. In India, under Article 245,246 and Schedule VII there is a clear demarcation of legislative power among union and state government, under Articles 256-263 administrative relations are also clearly defined, and under Article 254 if there is any inconsistency between centre and state laws, then central law prevails, under Article 264-291 fiscal relation between centre and state is given, meaning thereby there is a rare chance of clash between union and states, so that public policies can be properly implemented as per the requirements of the people. As the powers of centre and state clearly divided, so there is no space to use arbitrary powers over any subject. Generally, subjects which have national importance vests in Union list and those have regional importance vests in State list and for the establishment of unity and integrity in the nation, Concurrent list is made in which for universalization of laws, central government made law but according to the requirements of a particular region, state legislature may make any amendment in the provision.

System of Checks and Balances

And other provisions as Fundamental rights defined in Articles 12-35, provide some rights to the citizens and to every person for whose infringement people may approach towards Courts of Justice under Articles 32 and 226 respectively of Indian Constitution, which shows that citizens also have some rights to protect themselves from the arbitrariness of government. And Directive Principles of state policy under Articles 36-51 connotes that these principles should be in consideration of government while framing of its policies, because its trend helps to provide or flourish social, economic equality among people. As the aim of government cannot touch their

destination without the contribution of public at large. That's why the Fundamental duties of citizens also explained in Article-51A which should be obeyed by every citizen of nation.

In this way, these provisions shows the checks and balances among the actions of governmental organs and the public. The Emergency provisions under Articles 352, 356 and 360 also shows the spirit of constitutionalism by restraining the exclusive powers of state organs at the time of external aggression, armed rebellion, failure of constitutional machinery in particular state, financial crisis etc. It signifies the curtailment of powers of state functionaries in favour of public interest and all powers vests in union government to deal with such sort of situations. To uplift weaker sections of society, concept of reservation is also present in Indian constitution under Articles 330-342, in these provisions Doctrine of Appeasement is present by providing some reserved seats to lower society people in every functionary organ of government. Such as- under Articles 330 & 332, Reservation of seats for SC and ST in House of People and legislative assembly of states. With the help of this clause, the problems related to SC and ST comes in front of legislature and proves helpful to protect the interest of particular community.

8. Literature Review

Democracy and Constitutionalism, Sudhir Krishnaswamy

This book presents a completely reconfigured understanding of the judicial role in Indian constitutional law. The author presents a completely reconfigured understanding of the judicial role in Indian constitutional law. He lucidly and critically examines the significance and status of the basic structure doctrine today. He addresses the question whether basic structure review is an appropriate exercise of judicial power or an abuse of it. He argues that much of the criticism against the doctrine emerges from a failure to adequately map the contours of constitutional judicial review. He assesses the legitimacy of basic structure review under three categories-legal, moral, and sociological. It critiques the views of major scholars including Seervai, Sathe, Austin, and Baxi. It also analyses the post Kesavananda Bharti cases⁹ and studies how the scope of the basic structure doctrine has been expanded by the court. He tries to develop an essential benchmark against which judicial performance may be assessed and the confusions currently inherent in the Indian debate on judicial activism finally eliminated. The basic structure doctrine

⁹ *Supra* Note 4.

was announced by the Supreme Court in *Kesavananda Bharati v. State of Kerala*¹⁰ in 1973. This book argues that basic structure review in India is an independent and distinct type of constitutional judicial review which applies to all forms of state action to ensure that such action does not ‘damage or destroy’ the ‘basic features of the Constitution’. These basic features of the constitution are identified through a common law technique and are general constitutional rules which are supported by several provisions of the Constitution. The book argues that the basic structure doctrine like other types of constitutional judicial review possesses a sound constitutional basis and rests on a sound and justifiable interpretation of the Constitution. The legitimacy of basic structure review may be assessed under three categories: legal, moral, and sociological. The legal legitimacy of such review is established by defending a structuralism interpretation as a coherent and justifiable model of constitutional interpretation. The moral legitimacy of basic structure review rests on a rejection of majoritarian versions of democracy and the adoption of a dualist model of deliberative decision-making in a constitutional democracy. The sociological legitimacy of the doctrine is, to a large extent, contingent on the success of the moral and legal legitimacy arguments.

9. Scope and Objective

Constitutionalism flows from the idea of liberal and limited government. Originally idea of John Locke giving the liberal space within state to citizens against the state excesses. But as a broader concept this refers to the quintessential objectives of a constitution. Constitutions are the scripts in which people inscribe their professed collective destiny, and the subjective destiny is called constitutionalism. Broader contours of Indian constitutionalism are traced by the unique conception of rule of law. Although rule of law as a concept was brought from British model but was brought only in parts. We do have equality before law as Britain but given the Pre British tradition of cumulative inequalities in caste and community divided Indian society prompted makers of the constitution to import the bits of American constitutionality, entrenched system of fundamental rights and the quasi federal system. One of the fundamental differences in Indian constitutionalism was the little scope for conventions of Constitution, making it perhaps the longest written legal document. This entire gamut of properly mentioned conventions leads to the

¹⁰ *Id.*

desired goal of limited government. Although Indian constitution is generally seen as quintessentially a liberal document trying to balance the tripartite goals of national unity, democracy and social revolution as distinct strands of seamless web(Austin Granville). A polemical view however exists although not widespread. Although democratic constitutions like Indian constitution expressly eschew the absolutism (authoritarian government) But given the goals of social revolution and national unity , it requires state to heavily intervene in society. The power allowing for such heavy interventions is far beyond liberal concept of limited Government. The goal of poverty as was seen by easy leaders and vision by constitution itself, requires an active presence as well as intervention of state in market. This gives authoritarian character to Indian constitutionalism. Courts have played a key role in defining the contours of Indian constitutionalism from protecting key tenets and sometimes reaching up to policy meddling, so dialectical relation between popular will (legislature) and general will(courts) have refined our conception of constitutionalism.

10. Constitutionalism: Define

Constitutionalism refers to an overarching frame of authoritative values according to which a society should be governed. It is a set of rules of a higher order with reference to which law is identified. A constitution consists of set of rules defining the limits of governmental power and authority as it maps the contours within which government and its organs need to function. The implication of this view entails prefiguration of how the society ought to be governed where the reference point stands to be the binding constitution. Hence constitutionalism means governance as per the constitution. Governance as per the constitution is one of the ways in which the idea of a limited government can be ensured. Constitutionalism is a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law. Constitutionalism is sometimes regarded as a synonym for limited government. Constitutionalism seeks to prevent arbitrary government. Constitutionalism attempts to avoid the dangers of arbitration by designing mechanisms that determine who can rule, how and for what purposes.

Constitutionalism is a complicated concept, deeply embedded in historical experience. It proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere

fiat of public officials. Throughout the literature dealing with modern public law and the foundations of statecraft, the central element of the concept of constitutionalism is that in political society, government officials are not free to do anything they please in any manner they choose- they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

Political Constitutionalism

The classical, neo-republican tradition of political constitutionalism identifies arbitrariness with domination of the ruled by their rulers, and seeks to avoid it by establishing a condition of political equality characterised by a balance of power between all the relevant groups and parties within a polity, so that no one can rule without consulting the interests of the ruled. The more modern, liberal tradition identifies arbitrariness with interference with individual rights, and seeks to establish protections for them via the separation of powers and a judicially protected constitution. Both traditions are present within most democracies and can be found side by side in many constitutions.

The first tradition focuses on the design and functioning of the democratic process, including the selection of electoral systems and the choice between presidential or parliamentary forms of government, of unitary or federal arrangements, and of unicameralism or bicameralism. Although the detailing of these procedural mechanisms and the relations between them usually forms the bulk of most constitutional documents, their constitutional importance has come to be eclipsed – in legal circles particularly – by the second tradition. This view emphasises the specification and judicial protection of the different competences of the political system and of constitutionally entrenched rights by a constitutional court. However, political theorists and scientists disagree on whether these two traditions are complementary, mutually entailed or incompatible. The second tradition is often seen as necessary to ensure the fairness of the procedures and the outcomes of the first tradition.

11. History of Constitutionalism

In discussing the history and nature of constitutionalism, a comparison is often drawn between Thomas Hobbes and John Locke who are thought to have defended, respectively, the notion of constitutionally unlimited sovereignty versus that of sovereignty limited by the terms of a social contract containing substantive limitations. But an equally good focal point is the English legal theorist John Austin who, like Hobbes, thought that the very notion of limited sovereignty is incoherent. For Austin, all law is the command of a sovereign person or body of persons, and so the notion that the sovereign could be limited by law requires a sovereign who is self-binding, who commands him/her/itself. But no one can "command" himself, except in some figurative sense, so the notion of limited sovereignty is, for Austin, as incoherent as the idea of a square circle. Austin says that sovereignty may lie with the people, or some other person or body whose authority is unlimited. Government bodies - e.g. Parliament or the judiciary - can be limited by constitutional law, but the sovereign - i.e., "the people" - remains unlimited. But if we identify the commanders with "the people", then we have the paradoxical result identified by H.L.A. Hart - the commanders are commanding the commanders.

12. The journey from Mixed Government to Representative Democracy

Mixed Government

The theory of mixed government originated with ancient thought and the classification of political systems on the basis of whether one, a few or many are ruled. According to this theory, the three basic types of polity - monarchy, aristocracy and democracy - were liable to degenerate into tyranny, oligarchy and anarchy respectively. This corruption stemmed from the concentration of power in the hands of a single person or group, which created a temptation to its abuse through allowing arbitrary rule. The solution was to ensure moderation and proportion by combining or mixing various types. As a result, the virtues of each form of government, namely a strong executive, the involvement of the better elements of society, and popular legitimacy, could be obtained without the corresponding vices.

Theory of Mixed Government

Three elements underlie this classic theory of mixed government-

First, arbitrary power was defined as the capacity of one individual or group to dominate another – that is, to possess the ability to rule them without consulting their interests. To be dominated in such an arbitrary way was to be reduced to the condition of a slave who must act as his or her master wills. Overcoming arbitrariness so conceived requires that a condition of political equality exists among all free citizens. Only then will no one person or group be able to think or act as the masters of others.

Second, the means to minimise such domination was to ensure none could rule without the support of at least one other individual or body. The aim was to mix social classes and factions in decision-making, so that their interests were given equal consideration, with each being forced to ‘hear the other side’ . To quote another republican motto, ‘the price of liberty is eternal vigilance’, with each group watching over the others to ensure none dominated them by ignoring their concerns.

Third, the balance to be achieved was one that aspired to harmonise different social interests and maintain the stability of the polity, preventing so far as was possible the inevitable degeneration into one of the corrupt forms of government. Thus, mixed government provides a model of constitutionalism as consisting in the institutions that structure the way decisions are taken.

13. Evolution of constitutionalism

Constitutionalism is a political philosophy based on the idea that government authority is derived from the people and should be limited by a constitution that clearly expresses 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 limited its authority. The roots of constitutionalism go way back- it didn't spring up abruptly, but rather evolved into what it is now. Way back in 1215, King John of England was forced by a group of wealthy nobles to sign a document called the Magna Carta¹¹. The Magna Carta set certain limits on the king's power. The practical importance of the Magna Carta has been exaggerated over the years, but nevertheless, it did set a precedent for limited government.

¹¹ Magna Carta Libertatum, also called Magna Carta is a charter created in 1215, by John, the then king of England. It is located in the British Library , and the main purpose of this charter was peace treaty.

In the year 1689, the English Bill of Rights was signed by King William III of England. King William III, who had previously been known as William of Orange, came to power in what is called the Glorious Revolution¹². The people of England were tired of King James II's pro-Catholic policies and invited William, who was a Protestant, to come invade their country and become their new king. The English Bill of Rights outlined what rights English citizens possessed, and placed limits on the monarch and Parliament. The English Bill of Rights is a foundational constitutional document that helped inspire the American Bill of Rights. Political theorist John Locke played a huge role in cementing the philosophy of constitutionalism. Locke was an English intellectual who helped develop the concept of social contract theory. According to this theory, government itself is a sort of contract between the people and the state, and if the state abuses its power or doesn't hold up its end of the bargain, the people have the right to make the contract null and void.

Idea of Constitutionalism

The idea of constitutionalism is part of the basic idea of liberalism based on the notion of individual's right to liberty. Along with other liberal notions, constitutionalism also travelled to India through British colonialism. However, on the one hand, the ideology of liberalism guaranteed the liberal rights, but on the other hand it denied the same basic right to the colony. The justification to why an advanced liberal nation like England must colonize the 'not yet' liberal nation like India was also found within the ideology of liberalism itself. The rationale was that British colonialism in India was like a 'civilization mission' to train the colony how to tread the path of liberty.

However, soon the English educated Indian intellectual class realised the gap between the claim that British Rule made and the oppressive and exploitative reality of colonialism. Consequently, there started the movement towards autonomy and self-governance by Indians too. It is within the discourse of this movement that the idea of constitutionalism got shaped and started realizing itself in form of various constitutional reform measures under British rule. These measures were a consequence of demands made by the nationalists ultimately resulting in the Indian Independence Act and transfer of power.

¹² It dated from 1688-1689 in British Isles. It is also known as the war of English Succession or The Bloodless Revolution. It led to the drafting of Bill of Rights 1689.

Constitution, in a generic sense would mean a set of rules and regulations that would prefigure how a society ought to be governed. In that sense, constitutions are binding, they bind the people but they also bind the governments and the states. The state and the government are also bound to act in accordance with the constitution. Hence, the general accepted understanding of having a constitution is that it restricts the exercise of power. They provide for those basic rules that would prevent the state from being tyrannical. This is what is meant by the doctrine of constitutionalism.

14. Constitutionalism in India

India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a mixed one. On the one hand, we have excellent administrative structures put in place to oversee even the minutest of details related to welfare maximization but crucially on the other it has only resulted in excessive bureaucratization and eventual alienation of the rulers from the ruled. Since independence, those regions which were backward remained the same, the gap between the rich and poor has widened, people at the bottom level of the pyramid remained at the periphery of developmental process, bureaucracy retained colonial characters and overall development remained much below the expectations of the people.

Case Laws where principle of 'Constitutionalism' is legally recognized by Supreme Court

In *I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors.*¹³ view taken by the Supreme Court - The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

¹³ *I.R. Coelho (Dead) By LRs. vs. State of Tamil Nadu and Ors.* AIR 2007 SC 861

In *Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr.*¹⁴ “The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself.” Constitutionalism is about limits and aspirations. As observed by Chandrachud, CJ, in *Minerva Mills Ltd.*¹⁵ – “The Constitution is a precious heritage and, therefore, you cannot destroy its identity”

On one hand, our judiciary elicit such intellectual responses that “Faith in the judiciary is of prime importance. Ours is a free nation. Among such people respect for law and belief in its constitutional interpretation by courts require an extraordinary degree of tolerance and cooperation for the value of democracy and survival of constitutionalism” said in *Indra Sawhney and Ors. vs. Union of India (UOI) and Ors.*¹⁶

15. Values or Principles of Constitutionalism

The Indian Constitution consists of various values that are discussed under different provisions and articles. Values are principles or standards of behaviour; one's judgement of what is important in life and ultimate values is govern to life of Individual. Similarly, Indian Constitution also contains some values that govern the working of a government and help the people uphold their rights and ideals. In any case, the system of constitutional values are built on two vital points: the substantive value of human rights and the procedural value of democracy. “Without a system of constitutional values, the constitutional praxis would run the risk of favouring one particular value and right in a biased manner and pervert them to something totally opposite, into legitimization of injustice in the name of constitutional law. Such would be the case if the value of democracy justifies a dictatorship grounded on one-way popular election (as Hitler's regime was defended to be democratic), or if the values of equality are realised by state planning which guarantees perfect equality of result, rejecting human freedom.”¹⁷

Any Preamble conveys to the reader of The Constitution a brief introductory insight over the guiding principles of the document. The constitutional values are reflected in the entire

¹⁴ Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr. ,[2005] Insc 557

¹⁵ Minerva Mills Ltd v UOI, AIR 1980 SC 1789

¹⁶ Indra Sawhney and Ors. vs. Union of India (UOI) and Ors., AIR 1993 SC 477

¹⁷ Prof Hiroshi Nishihara LLD, THE SIGNIFICANCE OF CONSTITUTIONAL VALUES

Constitution of India, but its Preamble embodies the fundamental values and the philosophy on which the Constitution is based. The values expressed in the Preamble are the objectives of the constitution. The Preamble describes the constitution to be Sovereign, Socialist, Secular, Democratic, Republic.

Democracy

In a democratic system, derives its power and authority from the will of the people and government runs according to rule of law. The Constitution establishes a society based on democratic values, social justice and fundamental rights. People elect their representatives through the process of Universal Adult Franchise¹⁸ (one man one vote¹⁹) to rule the country so people run the country and its public institutions. People hold equal political rights to choose to elect, to change their representative and to hold them responsible.

Social, Justice and Equity

Just by India being a democratic country does not ensure social justice to its citizens. So the constitutional makers have added social, political and economic justice as a constitutional value in the preamble of the Constitution. Without correction of injustices of the past, reconciliation will be impossible to achieve. Directive principles of state policy²⁰ aims to achieve socio-economic justice in the country. Principle of equity is applied to ensure impartiality and fairness in the administration of justice. “There is but one law for all namely that law which governs all law, the law of our creator, the law of humanity, justice, equity- the law of nature and of all nations”.

Equality

The Constitution states that ‘everyone is equal in the eyes of law’²¹ and there shall not be any discrimination on the basis of language, race, religion, caste, creed or sex. The constitution ensures equality of status and opportunity all its citizens. There shall be equal application of laws throughout the territory of India. Right to equality is enshrined in the articles, 14 to 18 of the Indian Constitution which prohibits any kind of discrimination.

Liberty

¹⁸ INDIA CONST. art 326

¹⁹ INDIA CONST. art 170(2)

²⁰ INDIA CONST. art 38

²¹ INDIA CONST. art 14

The preamble of our constitution provides liberty of thought, expression, belief, faith and worship²². The idea of democracy can not be achieved if the people do not have some minimal rights which are essential for a human being in a civilized society. Liberty is a right to do what the law permits.²³ Liberty is the essence of democracy, it is not the mere absence of restraints but the provision of rights and opportunities to achieve all round development. Liberty is a constitutionally guaranteed ideal enjoyed by citizens in all democratic nations. *Fraternity*

All the Indians are members of a family, no one is inferior or superior, all are equal and have same rights and duties. A multi lingual and multi religious country like India can maintain unity only when the idea of Fraternity is promoted. Preamble of the Indian constitution highlights the idea of fraternity along with liberty and equality in order to make political democracy a reality. Fraternity stands for common brotherhood and a feeling of belonging with the country among all the people of India.

Secularism

The state is not guided by any religion but does not prohibit any religion. Secularism implies non-interference in religious matters of the people and provision of freedom to preach, profess, propagate and practice any religion of their choice. Religious freedom is provided to Indian citizens as a fundamental right²⁴. No person can be compelled to follow any religion. Constitution strictly prohibits any discrimination on the ground of religion. Religion is neither a qualification nor a disqualification for education or employment.

Socialism

Constitution of India is committed to realize a social order based on ideology of socialism and securing economic justice. This was highlighted in the Directive Principles of state policy²⁵ which were intended to realize the goals of socialism to achieve a welfare state. The social inequalities have brought the need to make socialism a constitutional value. Constitution intended to eliminate injustice and inequalities by incorporating socialistic ideas to create a just and humane society in which adequate means of lively hood and basic amenities of life are satisfied.

Republic

²² INDIA CONST. art 19

²³ Charles De Montesquieu, The spirit of laws

²⁴ INDIA CONST. art 25 to 28

²⁵ INDIA CONST. art 39

Preamble declares India as a sovereign republic state which is internally supreme and externally independent. It is a republic in which the power is held by people through their elected representatives. This value strengthens and substantiates democracy where every citizen of India is equally eligible to be elected as the Head of the State.

16. Significance of Values

One of the most salient features of constitutionalism is that it describes and prescribes both the source and the limits of government power. William H. Hamilton has captured this dual aspect by noting that constitutionalism "is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order." Lack of Constitutional values will give rise to total chaos and gradual fall of the law giving bodies. If these constitutional values aren't given utmost importance it will bring about instability in the system. Constitutionalism infuses accountability in functioning of the government institutions and growth and development of human rights. Constitutionalism recognizes the need government but insists upon limitation being placed upon governmental powers. Limited government is the central point of constitutionalism. A good and virtuous constitutionalism having moral foundation protects not only fundamental freedoms but also creates a bridge between conflicting interests and becomes a harbinger to the social needs and produced good legislators and good citizens.²⁶

The modern nation-state on the one hand claimed monopoly over coercion on the other hand; its development alongside the social system of capitalism was paved way through a struggle for liberal ideas protecting rights and liberties of people against the arbitrary use of power by state. Constitutionalism as a doctrine owes its development to the notion of individual rights as a distinguishing feature of modern world as oppose to pre-modern. In this notion of check, constitution was to act as fixed frame in accordance with which the state power had to be exercised.

17. Conclusion

²⁶ Dr. L.M. Singhvi, "Constitution of India", 2nd Ed., Vol. 1, Modern Law Publications, New Delhi, p. 24.

With the discussion carried above and with the analysis extracted, there is no doubt about the fact that there is Constitution in India, that is a textual body which in the language of HLA Hart can be called as set of primary rules is present in India. It is this ascertainment of the spirit of Constitution that is, Constitutionalism which is a problem. Point to be noted here is that it is the judiciary which has occupied itself predominantly to safeguard the concept of constitutionalism in India. The configuration of the word “Constitutionalism” seems to be an extension of word ‘Constitution’. The suffix ‘-ism’ seems to add substance in word “Constitution”. This interpretation in terms of English language lays out that Constitutionalism is that spirit of Constitution which makes a halo above the text of the constitution due to which this text seems to have a life, a sensitivity which is required to have a Legal system based on the principle of justice, equity and fairness. Going by the primary and secondary rules laid down by H.L.A Hart, Constitution can be said as primary rules of the society laying down the rule of conduct while secondary rules are laying down the means in which the primary rules can be altered as per the needs of the society rising over-time. In words of Koen Lenaerts, judge on the European Court of First Instance, constitutionalism is "limited government operating under the rule of law"²⁷. The brief discussion of provision of constitution provides us a vision to see the process going on in the political system of country, in which we find that there are very detailed description of powers of organs of government so that they can exercise their powers within the boundaries of constitution i.e. Higher law in India, owing to which governmental organs become unable to entertain arbitrary powers and also these provisions provide a paramount place to laws whose main aim is to protect the interest of individuals in the country. In this way, In India constitutionalism is undoubtedly present but there is only one exception that the doctrine of Rule of Law does not prevail in India as in England (regarding parliamentary sovereignty). It exists in India in form of natural justice principles to govern administrative functions, since the rule of law and judicial review in a single system cannot be realized easily. It would create a conflict between parliament and constitution (The Guardian of constitution i.e. judiciary).Judges are to promote the value of constitutionalism emanating from a legal draft, drafted by constituent assembly constituted of representatives expressing their public opinion. Although, Secondary public opinion cannot overrule primary public opinion, But every provision has its own

²⁷ Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 AM. J. COMP. L. 205

importance and if any provision is not explicitly present in a constitution but its reflection is found in some clauses, then it will be sufficient to promote the spirit of constitutionalism.

Indian Constitution has that set of written law which is the most prized possession to sustain human life, titled as Fundamental Rights. It is said that Constitution of any country is also a mirror image of the society of people living in it and though the concept of fundamental rights might be borrowed, it demonstrates the fact that Indian Society values life of a Human and believe in concept of humanity. Hence, Constitution of India is not a mere another structure of textual law but it is also a structure with a soul labelled as Constitutionalism.

Ideally all the three pillars of the Constitution shall be zealously protecting these rights of the individuals bestowed by the Constitution but the personal interest of the persons running them cast a spell on functioning of Constitutionalism in India. However the Constitution of India still stands strong and is successfully safeguarding interest of its subjects due to the doctrine of basic structure drafted by the Judiciary but what is question of concern here is till when this doctrine can save the concept of Constitutionalism alone if its subjects themselves are not willing to abide by it. To brief the things up, it is correct to say that fundamental rights are the source of constitutionalism in India because they are not only preaching the mandates of the life but by presence of Article 32 and 226 have given a structure also a mode of execution of the State machinery may be through judiciary which till date swung into action whenever a life in any way and by anyone gets violated within the boundaries of the nation.