

Constitutionalism in India

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Constitution: Meaning and Evolution

- **Constitution**- a living, integrated organism having a soul and consciousness of its own
- Legal heir of the past & testator of the future of a nation
- The supreme law of the land
- A Political document & dynamic instrument
- A democratic Constitution like ours envisioned ..to adapt to the needs and developments taking place in the society.
- Constitution is “living document” and its “horizons of are ever expanding”
- The duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally

Constitutionalism

- **Constitutionalism** - idea, often associated with political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.
- “...broadly, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights”...[Michel Rosenfeld](#)
- Constitutionalism - a philosophy which is evolutionary in nature and essential for a democratic setup
- It calls for restriction on the arbitrary power of the State.
- It means “legal limitation on government. It is the antithesis of arbitrary rule. Its opposite is a despotic government, the government of will instead of the law”
- means the **limitation of government by law**. Constitutionalism is built on a simple idea, that the government is organised by people and operated on behalf of the people, but is subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused by those who are called upon to do the governing....[Carl Friedrich](#) in his *Constitutional Government and Democracy*
- **Magna Carta (1215)** implies **Constitutionalism** as it placed a restriction on the power of England’s King John.

Elements of Constitutionalism

- Popular sovereignty
- Supremacy of the Constitution
- Rule of Law
- Political Democracy
- Representative Limited Government
- Separation of Power
- Civilian Control of the Military force
- Police governed by Law and Judicial Control
- An Independent Judiciary.....Louis Henkin, and
- Protection of Fundamental Rights

Kinds of Constitutionalism

- **Negative Constitutionalism** - From the prism of negative Constitutionalism, a State is a danger that needs to be constrained E.g., purpose of Separation of power is to protect the liberty of citizens, by restricting the arbitrary action of the state. criticised as being anti-democratic.
- **Positive Constitutionalism** - challenges the notion of seeing Constitutionalism entirely in terms of limits upon the State – expects the State to be seen in the light of a “Welfare State”-
- **Transformative Constitutionalism-** bringing about change in society by infusion of values of equality, liberty, fraternity and dignity. It means to fulfil the basic purpose of the Constitution which is to transform society for the better- most landmark judgements in past few years revolved around concept of transformative constitutionalism and have given great importance to it, using the Constitution as a tool to further improve the existing conditions of human rights, legal rights and other constitutional rights in the country etc
- **Political, Administrative and Judicial Constitutionalism** (no one is above the Constitution)

Constitution and Constitutionalism

- “the successful working of a constitution depends upon the ’democratic spirit’, that is, a spirit of, fair play, self-restraint and mutual accommodation of differing interests and opinions. There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental powers”....
- ..constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit “political expediency”. We should not allow the erosion of principles of constitutionalism.... **“the mere existence of a Constitution, by itself, does not ensure constitutionalism.** What is important is the political traditions of the people and its spirit and determination to work out its constitutional salvation through the chosen system of its political organisation.”...SC in **S.R.Chaudhary v.Union of India** (2001)
- “Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of people that give meaning to a Constitution which otherwise would merely embody the political hopes and ideals”...**R.C. Poudyal v. Union of India (1994)**

India and Constitutionalism

- Powers & extent of Indian State - limited by the Constitution (Preamble, F.Rts, Division of Powers etc)
- Indian State cannot be independent of Constitution
- Constitution- touchstone for testing validity of law, policy, administrative action and even judicial interpretation
- Public power, including constitutional power, must never be exercised arbitrarily or *malafide*
- Power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism
- 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 and these democratic principles include protection of Fundamental Rights..... [From IC Golaknath v.State of Punjab \(1967\) to IR Coelho v. State of Tamil Nadu and Ors \(2007\)](#)
- Principle of constitutionalism is based on the principle of legality which requires the Courts to interpret the legislations on the presumption that the Parliament would not intend to legislate contrary to fundamental rights.

Rule of Law

- “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,” US Declaration of Independence, July, 4, 1776 (in Congress...by 13 States”
- “Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good”.. Article 1 of the Declaration of the Rights of Man and Citizen Approved by the National Assembly of France, August 26, 1789
- “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” ...Article 1 of UDHR 1948

Rule of Law

- Rule of law - the **supreme manifestation of human civilization and culture**
- Derived from ‘**la principe de legalite**’ (French) = ‘**principle of legality**’. Also known as **nomocracy**
- The core idea is that **the government must abide by legal rules declared publicly in advance.**
- **denotes** the legal principle that **law should govern a nation, and not arbitrary decisions by individual government officials.**
- Provides that **decisions should be made by the application of known principles or laws without the intervention of discretion** in their application
- “**Be you ever so high, the law is above you.**” - Lord Denning

- **Of old origin**- discussed by Ancient Greek philosophers such as **Plato** and **Aristotle** around 350 BC.
- **Samuel Rutherford** in *Lex, Rex* (1644) gave **theoretical foundation to the principle**.
- **Lex, Rex**- title in Latin for "the law is king" and reverses the traditional *rex lex* ("the king is the law").
- In UK, **Sir Edward Coke** -the originator of the concept, said **"that the king must be under the god and law"**
- In 1607, **Coke** said in the *Case of Prohibitions* "that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said,**quod Rex non debet esse sub homine, sed sub Deo et lege** (**That the King ought not to be under any man but under God and the law.**)"

Rule of Law

- **“Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant”- John of Salisbury**
- **Rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite**
- **Prof. A.V. Dicey developed the concept - the rule of law contemplated the absence of wide powers in the hands of governmental officials. & wherever there is discretion, there is room for arbitrariness.**
- Reflects notions of a **government of laws**, **the supremacy of the law**, and **equality of all before the law.**

Dicey's formulation of the concept of Rule of law – the three principles

- **1. Absence of discretionary power in the hands of the governmental officials.**

It denotes that justice must be done through known principles. Discretion implies absence of rules, hence in every exercise of discretion there is room for arbitrariness, and

Supremacy of law (Predominance of Legal Spirit)

Rule of law –the three principles (contd..)

- **2. No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary courts of land.**
- In this sense, the **rule of law implies:**
 - a) **Absence of special privileges for a government official or any other person**
 - b) **All the persons irrespective of status must be subjected to the ordinary courts of the land.**
 - c) **Everyone should be governed by the law passed by the ordinary legislative organs of the state.**

(Equality of law)

Rule of law –the three principles (contd..)

3.The rights of the people must flow from the customs and traditions of the people recognized by the courts in the administration of justice

[role of judiciary in enforcing individual rights and personal freedoms irrespective of their inclusion in a written constitution]

(Constitution is the result of the ordinary law of the land)

Attributes of Rule of Law in 21st Century

▶ As regards individual liberty

- State should not pass discriminatory laws
- Should not place undue restrictions on individual freedoms
- Adequate safeguards against abuse of power
- Effective maintenance of law and order

▶ As regards criminal administration

- Due criminal process
- No arrest without the authority of law
- Presumption of innocence
- Legal aid
- Public trial and fair hearing

▶ As regards judicial process

- Independence of judiciary
- Independent legal provision &
- Standards of professional ethics

General Notions of RoL

- State powers ought to be differentiated; no single public authority ought to combine the roles of the judge, jury, and executioner
- Laws/decrees ought to remain in the public domain; that is, laws ought to be general, public, and ought to remain contestable political decisions
- Governance via undeclared emergencies remains violative of RoL values and illegitimate
- Constitutionally declared states of emergency may not constitute indefinite practices of governance and adjudicative power ought not to authorize gross, flagrant, ongoing, and massive violation of human rights and fundamental freedoms during the states of emergency
- The delegation of legislative powers to the executive ought always to respect some limits to arbitrary sovereign discretion

- Governance at all moments ought to remain limited by regard for human rights and fundamental freedoms
- Governance powers may be exercised only within the ambit of legislatively defined intent and purpose
- Towards these ends, the State and law ought not to resist, or to repeal powers of judicial review or engage in practices that adversely affect the independence of the legal profession.

(Source: Prof.Upendra Baxi in The Rule of Law in India)

Rule of Law under Indian Constitution

- Art.14 - **Right to Equality-** Equality Before Law & Equal Protection of Laws (Reasonable Classification, Protection against arbitrariness , Legitimate expectation etc)
- Art.21 - **Fairness, Justice and Reasonbleness**
- **Article 265** - Taxes not to be imposed save by authority of law : No tax shall be levied or collected except by authority of law
- **Exceptions to Rule of Law:** Protective Discrimination and Compensatory Discrimination [Art.15(3),(4),(5)&(6) 16(4),(4A) & (4B)&(6) etc]
- Legislative Privileges and immunities-**Art.105 & 194**
- Immunities of the President etc- **Article 361**

RoL and Judicial Response in India

- *A.D.M Jabalpur v Shivakant Shukla* [AIR 1976 SC 1207] , the question before the apex court was, whether there was any rule of law in India apart from Article 21 of the Indian Constitution. **The court by majority held that there is no rule of law other than the constitutional rule of law.** However, Justice Khanna did not agree and said , “**Even in the absence of Article 21 of the constitution, the State has no power to deprive a person of his life or liberty without the authority of law.**”
- **Common Cause (A Regd. Society) v.Union Of India** [9 March, 2018 - passive euthanasia declared as is lawful and legally permissible in this country.]
- **Shayara Bano v.Union Of India** [22 August, 2017- Triple talaq (‘talaq-e-biddat) -declared unconstitutional and an offence-led to promulgation of the Muslim Women (Protection of Rights on Marriage) Ordinance,2018 issued in Sept.2018]
- **Navtej Singh Johar v.Union of India (06th Sept.2018)- Section 377,IPC substantially decriminalized**

- **Justice K.S.Puttaswamy(Retd) vs Union Of India [4:1 judgment- 26 September, 2018-** The requirement under Aadhaar Act to give one's demographic and biometric information does not violate fundamental right of privacy in all cases]
- **Joseph Shine v. Union Of India** (27 September, 2018 -5 Judges Bench)- declared Section 497,IPC as unconstitutional- being violative of Articles 14, 15 and 21 of the Constitution...(ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.]

RoL limits the Government

- As a practical matter the Rule of Law limits the efficiency of an evil government because the Rule of Law limits any government's freedom of maneuver to act in its own arbitrary self interest.....**John Finnis**
- ROL is always and everywhere a terrain of peoples' struggle incrementally to make power *accountable*, governance *just*, and state *ethical*...**Upendra Baxi**

A Few Landmark Judgments based on Constitutionalism

- **Centre for Public Interest Litigation v. Union of India** [February 02, 2012] (2G Spectrum case)- held that **but for the vigilance of some enlightened citizens** who held important constitutional and other positions and discharge their duties in larger public interest and Non Governmental Organisations who have been constantly fighting for clean governance and accountability of the constitutional institutions, unsuspecting citizens and **the Nation would never have known how scarce natural resource spared by the Army has been grabbed by those who enjoy money power and who have been able to manipulate the system.**
- **Natural Resources Allocation, In re**, Special Reference No. 1 of 2012 (2012) 10 SCC 1 - Arts. 14, 39(b) - Distributive justice -Allocation/dispensation/alienation of natural resources by State - **Public trust doctrine and trusteeship of natural resources by State on behalf of the People**
- **I.R.Coelho V. State of Tamil Nadu** -AIR 2007 SC 861-after 24th April 1973 (the date of the decision in Kesavananda Bharati), **laws placed in the Ninth Schedule would not enjoy blanket immunity** but the court will examine the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 (**IX Schedule Politics still continue !!!!!**) .

- **Raja Ram Pal vs Hon'ble Speaker, Lok Sabha** , (2007) 3 SCC 184-‘cash for query’ - expulsion of MPs upheld
- **Rupa Ashok Hurra v.Ashok Hurra** (2002) 4 SCC 388 - curative petition u/A 142
- Burying the doctrine of sovereign immunity- **N.Nagendra Rao & Co vs State Of A.P** 1994 SCC (6) 205
- Applying speed breakers on Art.356- **S.R.Bommai v.Union of India** AIR 1994 SC 1918 etc
- **Ram Singh v. Union of India (Inclusion of Jats among OBCS – 2015 (3)SCALE 570- 17th March 2015)**- notification bearing No. 63 dated 4.3.2014 including the Jats in the Central List of Other Backward Classes for the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, NCT of Delhi, Bharatpur and Dholpur Districts of Rajasthan, Uttar Pradesh and Uttarakhand was set aside and quashed.

Shreya Singhal vs. Union of India AIR 2015 SC 1523

- **Section 66A of IT Act - struck down** by DB consisting of Chelameswar and R.F. Nariman JJ (March 24, 2015)
- “**S.66-A. Punishment for sending offensive messages through communication service, etc.** — Any person who sends, by means of a computer resource or a communication device,— (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.— For the purposes of this section, terms “electronic mail” and “electronic mail message” means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.”

- **Grounds:** Section 66A of the Information Technology Act, 2000 - struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2).

Common cause vs. Union of India (May 2015)

- No politician's photos in Govt. Ads
- Restrained ruling parties from publishing photographs of political leaders or prominent persons in government-funded advertisements
- The Petitioners had contended that “in the garb of communicating with the people, in many instances, undue political advantage and mileage is sought to be achieved by personifying individuals and crediting such individuals or political leaders (who are either from a political party or government functionaries) as being responsible for various government achievements and progressive plans.”
- Based on the recommendations of the NR Madhava Menon Committee
- The Court approved and adopted the following recommendations of the Madhav Menon Committee with regard to: (1) Publication of photographs of the Government functionaries and political leaders along with the advertisement(s). (2) Appointment of an Ombudsman (3) The recommendation with regard to performance audit by each Ministry. (4) Embargo on advertisements on the eve of the elections.

President's Rule and Political Role by Governor Nabam Rebia vs Deputy Speaker

[13 July, 2016-(2016) 8 SCC 1

- Held- (i) The order of the Governor dated 9.12.2015 preponing the 6th session of the Arunachal Pradesh Legislative Assembly, from 14.1.2016, to 16.12.2015 is violative of Article 163 read with Article 174 of the Constitution of India, and as such, is liable to be quashed. The same is accordingly hereby quashed.
- (ii) The message of the Governor dated 9.12.2015, directing the manner of conducting proceedings during the 6th session of the Arunachal Pradesh Legislative Assembly, from 16.12.2015 to 18.12.2015, is violative of Article 163 read with Article 175 of the Constitution of India, and as such, is liable to be quashed. The same is accordingly hereby quashed.
- (iii) All steps and decisions taken by the Arunachal Pradesh Legislative Assembly, pursuant to the Governor's order and message dated 9.12.2015, are unsustainable in view of the decisions at (i) and (ii) above. The same are accordingly set aside..... the status quo ante as it prevailed on 15.12.2015, was ordered to be restored.
- **Net Result:** The state Government was restored
- **“During political turmoil, but short of constitutional breakdown - no role is envisaged for Governor...”**

- **Devika Biswas v UOI** (2016) 10 SCC 726 – Right to health and reproductive freedom of persons- includes 'right to make choice regarding sterilization on basis of informed consent free from any coercion.. (see also Ramakant Rai v.UoI (2009) 16 SCC 565)
- Continuous promulgation of ordinances without introduction of regular law in the state legislature – not permissible – Krishna Kumar Singh v.State of Bihar (2017) 3 SCC 1 – D.C.Wadhwa v.State of Bihar (1987) 1 SCC 378 followed
- Racial discrimination faced by people of North-eastern States of India-need of systematic approach- **Bezbaruah Committee Report 2014**- Convention on Elimination of Racial Discrimination (CERD) – Sections 153-A and B,IPC- guidelines issued in **Karma Dorjee v.UOI (2017) 1 SCC 799**
- **Shayara Bano & others v. Union of India** (22 August, 2017) - talaq-e-biddat pronounced by Muslim Husband declared as void ab initio &that such a divorce which abruptly, unilaterally and irrevocably terminates the ties of matrimony, purportedly U/S 2 of the Muslim Personal Law (Shariat) Application Act, 1937 - declared unconstitutional (by 3:2)

- **Justice K.S.Puttaswamy (Retd) ... vs Union Of India** And Ors. on 24 August, 2017...(9-judges-Six Reportable Judgments and one common Order)- **Right to privacy is a part of fundamental right of a citizen guaranteed under Part III of the Constitution...** Govt's contention that informational privacy does not exist before compelling state interests and is not an absolute right and reasoned that collection and use of personal data of citizens for *Aadhaar* — now a law under the *Aadhaar* (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 — benefits millions of poor... **not agreed by the Court**
- **Right to Privacy is a fundamental right under Art.21 and not an “elitist construct” as claimed by the central Govt.**
- **Right to Marry a person of Choice: Shakti Vahini v. Union of India and others[(2018) 7 SCC 192] and Shafin Jahan v. Asokan K.M. [AIR 2018 SC 1933]** wherein it has been clearly recognized that **an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected under Articles 19 and 21 of the Constitution.**

Incidents of Mob Lynchings and Cow Vigilantism etc

- Supreme Court in **Tehseen S. Poonawalla v. Union of India** (Interim direction on July 17, 2018) ...**Lynching is an affront to the rule of law and to the exalted values of the Constitution itself.** These extrajudicial attempts under the guise of protection of the law have to be nipped in the bud; **Hate crimes as a product of intolerance, ideological dominance and prejudice ought not to be tolerated;**
- Besides, **bystander apathy, numbness of the mute spectators of the scene of the crime, inertia of the law enforcing machinery to prevent such crimes and nip them in the bud and grandstanding of the incident by the perpetrators of the crimes including in the social media** aggravates the entire problem. One must constantly remind oneself that an attitude of morbid intolerance is absolutely intolerable and agonizingly painful.
- Recommended Preventive, Remedial and Punitive measures
- **Union of India vs M/S Mohit Minerals Pvt. Ltd. on 19 May, 2022**
- X v. The Principal Secretary, Health & Family Welfare Department, Govt. of NCT & others (MTP of even unmarried women-permitted) (September 29, 2022)
- **Janhit Abhiyan v Union of India (9-Nov.22)- EWS Reservations under 103rd Amendment – upheld**

Conclusion

- **Constitutional vision - supremacy of Constitution**
- **Constitutionalism – the saviour of everyone**
- Rule of Law- a basic feature of the Constitution
- Absolutely essential to render justice to the people
- The best shield of protection to government officials
- “whenever there is discretion there is room for arbitrariness”
- The distinctiveness of the Indian ROL lies in providing space for a continuing conversation among four core notions: “rights”, “development”, “governance” and “justice”.
(Jawaharlal Nehru captured this relationship by insisting that the “rule of law” must not be divorced from the “rule of life”)
- A beacon light to all the officials in discharging their duties

THANK YOU