

CONSTITUTION, CONSTITUTIONALISM AND CONSTITUTIONAL DEVELOPMENT IN MODERN INDIA

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ABSTRACT

This paper provides detailed discussion on the definitions of and relationship between law, constitution and constitutionalism. This is followed by tracing the historical evolution of the concept through its development from the ancient Greek scholars to modern Europe to contemporary democratic World order. Also paper deals with emergence of constitutionalism in the Indian subcontinent with significant focus on political and legal development in India.

Key words – constitutionalism, constitution of India

Introduction

Constitutionalism has emerged as the major theme around which the contemporary debates pertaining to law, democracy, human rights, international relations, justice, freedom, etc. take place. However, amid these debates, the core meaning of the term constitutionalism has been lost to some extent. There is a blurring of meaning and confusion over what exactly the term refers to. The lack of conceptual clarity with respect to such a fundamental concept is concerning enough to merit serious scholarly attention. Not only in the public debates, but within the academic circles as well, the confusion reigns to the extent that discussions of constitutionalism slip into that of the constitution(s), and that of the constitution slip into that of the law(s). While it is true that law, constitution, and constitutionalism are intricately connected, and the discussion of one would have to entail that of the others, it is equally true that the existence of linkages do not justify the blurring of boundaries and lack of conceptual clarity. The need for conceptual clarity can not be highlighted enough. Starting from providing a discussion of the various definitions of constitutionalism, this paper

explores and outlines its historical antecedents, its past developments, its contemporary forms and the avenues for its future growth.

In the first part, the paper provides detailed discussion on the definitions of and relationships between law, constitution, and constitutionalism. This is followed by tracing the historical evolution of the concept through its development from the ancient Greek scholars to modern Europe to contemporary democratic world order. The second part of the paper deals with the emergence of constitutionalism in the Indian subcontinent with significant focus on political and legal developments in India. Finally, there is a discussion of the contemporary relevance of constitutionalism in a polity characterised by nations, multinational corporations, global institutions, and other non-state actors. The newer developments and trajectories of constitutionalism are explored and outlined to provide a survey of the current state of research on the topic as well as to suggest pathways to future political engagements at both global and local levels.

Law, Constitution, and Constitutionalism

In political science and in general terms, law

refers to binding rules, customs as approved and/or enacted by the legislative authorities and which are recognised by the judiciary and citizenry alike. Law is an important concept in polity as the democratic world order is dependent on the recognition of law as supreme and everyone under the polity equally subject to the law of the land.

When it comes to defining constitution, the term has its roots in the biological analogy of organism and the arrangement of various organs within and with interlinkages and dependencies among these. The term derives from the idea of constituting something which refers to the structural features or the form that institutions take. In this sense, in the context of polity and the state, constitution refers to the organization of the body politic and various institutional arrangements within it. In the context of political theory, the constitution is a set of laws which form the base of all other laws to follow. The question however is, what is it that separates the constitution from ordinary laws. The constitution is the fundamental law which outlines basic tenets of the principles guiding the polity and its establishment. It is this fundamental law which is the guiding beacon and the philosophical standard for the ordinary laws to follow. In the modern usage, however, it has to be noted that "the term 'constitution' thus signals both that which constitutes a specific polity and that which is constituted" (Werner 2010: 268).

In the literal sense, being an -ism, constitutionalism can be understood as an ideology and/or a philosophical belief that government should be limited by the constitutional principles and that the laws should be in accordance with the constitution. In the context of modern democratic polities with a constitution (be it written or not), constitutionalism has emerged as a leading philosophical ideal to follow in the public debates as well as judicial functioning. Given the widely popular appeal of constitutionalism, it is necessary to be extremely careful while defining it so as not to distort its meaning.

However, the uncritical adherence to the appeal of constitutionalism has elevated it from the status of an ideology among many to that of a given imperative to be followed to enable just and democratic institutions for political engagement. In this context, there is a need to step back from its prescriptive appeal and to examine the concept and the philosophy of constitutionalism for what it is rather than what it offers.

Constitutionalism is "a compound of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law" (Fehrenbacher 1989: 1). The fundamental law Fehrenbacher is referring to is the constitution, and hence constitutionalism accordingly, is the principle which envisions a government limited by the provisions of the constitution. Just as the contents of the constitution vary, so would the nature of constitutionalism, but the core idea of limited government would remain as the mainstay of constitutionalism. Limit on arbitrariness is the ultimate aim of constitutionalism. "Political constitutionalism identifies arbitrariness with domination of the rules by their rulers...liberal tradition identifies arbitrariness with interference with individual rights" (Bellamy 2011). Bellamy asserts that "whereas political constitutionalism responds to majority views for enhanced and more equal public goods, legal constitutionalism has invariably inhibited such reforms on grounds of their interfering with individual property and other rights".

Historical Evolution

According to Gerhard Casper (1987), the historical roots of constitutionalism are pretty uncertain and very diverse. The development of constitutionalism can be traced from sixteenth through eighteenth centuries with one of the earliest expression found in the XXVth chapter of the third edition of Francois Hotman's *Francogallia* in 1586: "The king of France does not have unlimited domain in his kingdom but is circumscribed by settled and

specific law" (ibid: 7). Intellectually, the questions of limits on popular and state sovereignty found place of privilege in the discussions of social contract theory during the Enlightenment period by the likes of Hugo Grotius, Johannes Althusius, John Locke, and Jean-Jacques Rousseau. The diverse trajectories of the development of constitutionalism can be traced through its workings in America, France, Britain, etc.

In America, constitutionalism has come to stand for the constitutional thought that was present at the time of the founding of the United States of America. In Britain, an unwritten constitution and the constitutional monarchy deal with the question of sovereignty of the British crown or that of the people. In France, the legacy of constitutionalism is traced back to the time of French Revolution of 1789 and the ideas that came out of the political churning at that time. Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789 states that, "A society in which the guarantee of rights is not assured nor the separation of powers established has no constitution at all." However, France also did not have a smooth experience with the processes of constitutionalism. In total France has had fifteen constitutions since the French Revolution inspired constitution of 1791. Germany's constitution of the Weimar republic was conveniently sidestepped by the Nazi party and the events that followed.

Political theorists trace the most ancient forms of constitutionalism to Aristotle's *politeia* which has been translated as "constitution". In this, Aristotle has referred to the organisation of the body politic in the sense that it regulated the political offices in the *polis*. The modern meaning of constitution has been attributed to Cicero's use of the Latin term *constitutio* to refer to the framework through which the people could have some control over law making. In the Holy Roman Empire, the term *constitutio* came to refer to the law which preceded all other laws to come. In Europe, such a perception was current in the Middle ages as Magna Carta (1215), the Petition of Right (1628),

and the Habeas Corpus Act (1679) were thought as more fundamental than other laws. In the English kingdom, The Declaration of Rights of 1689 was accorded the same place of primacy using which the sovereign, James II was removed from the throne on account of violation and abdication of the above mentioned law.

It was this foundational law that has been discussed above that America was referring to during the American War of Independence to justify its demand for independence from British colonisation. The written constitution which took shape in America has been called by F. A. Hayek as America's contribution to political theory along with the establishment of the rule of law (ibid: 4). During the daunting and novel exercise of writing down the constitution for the newly independent American nation, not only colonial charters and treaties, but other written documents were also extensively referred to. The process however was not free from the difficulties, as various bills and charters from various states were revised and repealed again and again before consensus on a constitution could be arrived at. The 1629 Charter of Massachusetts Bay, William Penn's 1682 frame of government, Pennsylvania Charter of Privileges of 1701, Virginia Declaration of Rights of June 12, 1776, the federal Constitutional Convention of 1787, and a multitude of other such charters and deliberations were involved in the making of the written constitution of the United States of America. In sum, American constitutionalism stands on three core foundational pillars, that is, "countermajoritarian constraint of majoritarian power structures", a written constitution, along with a "prophylactic, insulated judiciary" which retains the power to interpret the constitution (Redish&Heins 2016: 1825).

In the modern era, constitutionalism has come to be defined in "opposition to absolutism, as a guarantee of limited (by law) government" (Walker 2010: 209). In contemporary times, the concerns of constitutionalism are intricately bound up with those of liberal democracy and its functioning. The tension between ordinary

laws and the constitution arises from the fact that adherence to the principles outlined in the constitution are not only subject to legislative and judicial interpretation, but at the same time, these principles put a limit on the exercise of popular sovereignty. In a democracy, however, how can such limits on popular sovereignty be justified? The answer is simple. Constitution and constitutionalism are propped up as the barriers to unbridled majoritarianism of mass democracy where the possibility exists that the newly incumbent majority would do away with all safeguards for the minority(ies). Constitution and constitutionalism, in such a scenario, place reasonable restrictions on the elected legislature so that basic principles, values, ideas on which basis the polity is constituted is not compromised. If the majority has unlimited powers of legislation, then laws would be a joke and would change according to the whims of those in power. Democracy would then be the rule of the majority, and not the government of the people which seeks to be inclusive of all the citizens of the state.

The debate over interpretation of constitution and its conservative or transformational potential is represented in the debates over "originalism" and "living constitutionalism", or "[U]surpation of past lawmaking by present-day interpreters, or the tyranny of the dead over the living" (Grewal 2018: 666). This is due to "inherent tension" within constitutionalism "as it simultaneously aims to constitute political power (and a political society) and tries to limit this power through legal means" (Werner 2010: 269).

Constitutionalism in the Indian subcontinent

Today, in the Indian subcontinent, Nepal, Pakistan, Bhutan, India, Bangladesh, Sri Lanka, all these countries have had experience with constitution making and working within the precincts of that constitution. Successes and failures apart, the belief in the constitution has stood firm in South Asia. The colonial legacy of British occupation marks the polity in the subcontinent whose constitutions also bear the

marks of common law system. This is especially true for India, Pakistan, Bangladesh, Sri Lanka. This colonial hangover is evident in the discourse surrounding constitution and constitutionalism when it borrows heavily from the Western world. Not only did colonial legacy have an impact on the constitution making process, but the aftereffects continue to be felt when it comes to the question of interpretation of the constitutional provisions. Case law examples from Britain and America are frequently cited in the courts in the subcontinent. The form that constitutionalism has assumed in the subcontinent is largely that of the modern, liberal constitutionalism of the West (Davis 2017).

The idea of constitutionalism was brought to the Indian subcontinent through its engagement with the West through colonial expansion by the Dutch, the Portuguese, and the British. The British justified colonial rule through claims to better, organised administration and governance structures. This was sought to be achieved through a series of legislative and executive decrees, Acts, laws involving the British crown and the Viceroy in British India. Beginning with the Government of India Act, 1858, the process of British sovereign engagement in India truly started. Not only did the series of Acts to follow provided the framework to govern the territory, but it also constituted the politico-administrative structure of what it sought to govern. The influx of modern Western European ideas and the influence of French Revolution, attempts at constitution making in Europe, American constitutionalism guided the direction taken by Indian freedom fighters, especially prominent lawyers. The formation of Indian National Congress in 1885 and its focus on petitions and legalese favoured its engagement with the British when it came to envisage the form Indian polity would assume.

Antecedents to Indian Constitution of 1950 lay in the Government of India Act of 1858, Indian Council Acts of 1861, 1909, 1919, Simon Commission Report, the reports from Round Table Conferences, Nehru Report 1928,

Government of India Act 1935, and many more. The INC passed various resolutions dealing with the question of Swaraj and constitution, in which prominent issues such as those of fundamental rights, women's rights, workers' rights etc. were taken up. The election of INC and Muslim League members to the provincial and national legislatures in pre-independence era led to demands from reform from within the structure. These demands led to written petitions which culminated in deliberations over the nature of Indian polity and transfer of power from the British to Indians. Socialists such as M. N. Roy also raised the demand for a constitution for India. Bombay Plan, Sarvodaya Plan, Hind Swaraj all served as the guiding documents leading up to Constituent Assembly debates which lasted for more than two years.

The main concern of the Constituent Assembly was that it should be a representative body with Nehru stating in the Objective Resolution, "We should have liked to associate with ourselves as many people, as many representatives from the different parts of India and different groups as possible" (Constituent Assembly Debates, Vol. 1). The other concern the constitution makers were preoccupied with was the revolutionary potential of the document. The values and principles enshrined within it were meant to bring about comprehensive social and economic change in Indian society without requiring any violent overthrow of the dominant powers. The Constitution of India was thus envisioned to be the political instrument of social reform. It envisioned not only a new way of organising the polity but constituting a new society suited for that polity. Shefali Jha has argued that "the constitution was attempting to 'constitute the demos and provide a framework for its establishment and evolution.' The constitution was an attempt to guide the evolution of Indians into willing themselves to be equal members of a wider public" (Jha 2013: 7). Recognising that democracy is not to be equated with majoritarianism, the Constitution provided enough safeguards for the minority in the form of religious, cultural, educational and

such other rights. It balanced political rights along with social and economic rights. It recognised the rights of the individuals and those of the communities.

Along with aspiring to be inclusive and representative, the constitution enshrined the values and ideals of secularism, sovereignty, liberty, equality, fraternity, justice, along with stress on unity of the nation-state. The imperatives of stabilising the post colonial, post partition polity divided along religious, regional, caste, class lines were pursued along with ensuring justifiable limits on arbitrariness of the majority governments in the future. Fundamental Rights, Directive Principles of State Policy, strong yet flexible Constitution, separation of powers, federalism, independent and integrated judiciary are some of the provisions which played a key role in ensuring that the Indian Constitution has been able to walk the tightrope between individual rights and state power. The accommodation of wide ranging diversity of the population through adequate recognition of various cultures, customs, practices, personal laws, etc., has enabled the success of the Indian Constitution over the past seven decades long period including wars, emergency, economic and food crises.

The vitality of the Indian Constitution is aptly noted by Granville Austin, "The Indian Constitution is a live document in a society rapidly changing and almost frenetically political. The touchstone for public and many private affairs, the Constitution is employed daily, if not hourly, by citizens in pursuit of their personal interests or in their desire to serve the public good" (Austin 1999: 10). In contemporary times, the key role of the constitution is highlighted by the frequency with which the judiciary is approached over some alleged breach of the constitution or the other. Vrinda Narain expresses the view held by many when she argues that the role of judiciary vis-a-vis the executive and the legislature has expanded as the democratic institutions lose public trust and the judiciary is seen as the last

bastion standing for guarding the constitutional guarantees. Judicial review as well as Public Interest Litigations form key instruments for ensuring accountability within the state polity. Narain highlights the potential of the courts to "democratize the constitution, and to craft a subaltern constitutionalism that challenges the structures of power" (Narain 2016: 132).

Contemporary trends

Following the establishment of liberal democracies in the majority of postcolonial states, the task of constitution making was completed in the latter half of the twentieth century itself. In contemporary world, what needs to be addressed is the evaluation of the functioning of these constitutions and the way judicial and public interpretations clash or coincide. Is it time to change the constitutions or do the values enshrined in those still hold fast? The concerns of the twenty first century primarily deal with questions of the tension between popular sovereignty and decades old constitutions. The question of interpretation of these constitutions poses novel challenges amidst changing understanding of gender, human rights, choice, dignity, equity, etc. The revolutionary as well as conservative currents of constitutionalism are studied under the broad field of transformative constitutionalism.

The interplay of free markets, globalisation, and supranational codes imposed by multinational corporations challenge the sovereignty of nation states while posing new problems for the applicability of constitutional provisions. The dynamics of 'constitutional economics' have been explored in depth by Upendra Baxi wherein he deals with the relationship between the market and the state (Prasad 2013: 382). The looming crises brought about by climate change have opened up new fields of environmental policy, advocacy, activism, as well as environmental constitutionalism. Growing recognition of the need for a concerted global effort to deal with contemporary risks and vulnerabilities such as climate change,

global warming, pandemic, frailty of world food systems, loss of biodiversity, energy transition, etc. have put renewed focus on the need for a strong governance at the global level. This cannot be achieved unless the pending questions related to international constitutionalism are addressed. Global institutions, global civil society, global corporations, state governments, and local citizenry, all are required to be brought to a common understanding of a fundamental law which can provide the outlines and guiding principles for a shared world order.

Concerning the network society and the permeation of everyday aspect of life by the internet, digital constitutionalism has emerged as an ideology that "adapts the values of contemporary constitutionalism to the digital society" (Celeste 2019: 76). Celeste maintains that digital constitutionalism deals with the alterations in constitutional equilibrium, produces normative counteractions to evolve a new equilibrium in which fundamental rights are protected and limits to arbitrary power are maintained. This is done through instruments such as internet bill of rights which work by "translating and adapting existing constitutional values and principles to the peculiarities of the contemporary digital society" (ibid: 81).

The climate crises have precipitated a new subfield of constitutionalism whose contours, concerns and contribution have been discussed in detail by various scholars (May 2015). Global environmental constitutionalism seeks to not only apply constitutional provisions to the problem of the environment, it also simultaneously seeks to change the constitutional provisions to make them more responsive towards the environmental crises. Hence, global environmental constitutionalism operates at the levels of both constitution making as well as interpretation of the constitutions through public debates and judicial engagements. At the policy, activism, and petition levels, global environmental constitutionalism seeks to modify and use constitutionalism for environmental problems at

local, national as well as international levels.

Conclusion

The philosophy of constitutionalism has a rich legacy rooted in the debates around statehood, law, citizenship, social contract, polity, state institutions, popular sovereignty, and other allied concepts. Emerging primarily from America and Europe, constitutionalism has had antecedents in the fundamental concerns of polity, state, and government across the world; even though non-Western antecedents of constitutionalism are yet to be thoroughly explored. In the context of India, the subcontinent was introduced to constitutionalism and other related modern ideas through its engagement with European colonial powers. British attempts to govern India as a colony started a series of legislations which laid the foundation for constitutionalism in India and ultimately led to the emergence of India as a liberal constitutional democratic republic. In the contemporary world, constitutionalism is concerned with interpretation of the constitutions and international constitutionalism at the global level. Even as the concerns of constitutionalism have shifted over time, it remains relevant the world over both at the international as well as local levels. At the practical level, constitutionalism works to prevent the arbitrary excesses to allow democratic governments to maintain minimum standards even though it alone is unable to ensure safeguarding of human rights and securing justice for all. Walker sums it up as follows: constitutionalism "remains contingent upon other normative and practical considerations" (Walker 2010: 206).

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