

## Constitutionalism In India and USA

Hey Prabhuramteja Janga<sup>1,\*</sup>

V. Prahalad Reddy<sup>2</sup>

### Abstract

*Constitutionalism is sometimes used interchangeably with limited government. According to some, this doctrine is associated with minimal or less government. However, this is only one interpretation, and it is far from the most prominent historically. The most important aspect of constitutionalism is that it seeks to prevent arbitrary government. At its most generic level, arbitrariness consists of rulers' potential to govern wilfully with complete discretion and to serve their interests rather than those of the ruled. Constitutionalism seeks to avoid these dangers by establishing mechanisms that govern who can rule how and for what grounds. However, constitutional traditions are unlike regarding what constitutes an arbitrary act and which mechanisms provide the best defence against it. Arbitrariness is associated with the domination of the ruled by their rulers in the classical neo-republican tradition of political constitutionalism, which seeks to avoid it by establishing a condition of political equality. characterized by the balance of power between all the relevant groups and parties within a policy so that no one can rule without consulting the interests of the ruled. The more modern liberal tradition associates arbitrariness with interference with individual rights and seeks to protect them through the separation of powers and a constitutionally protected constitution. Both traditions exist in most democracies and can be found coexisting in many constitutions.*

**Keywords:** Constitutionalism, Arbitrariness, Mechanism, Separation of powers

**Author for Correspondence\* email id.** vakitireddy99@gmail.com

### Introduction

While 'Constitution' is described as the "supreme law of a country", 'constitutionalism' is governance through which the power of the sovereign is limited by the rule of law. Constitutionalism limits the concentration of power to protect the rights of the people. In such

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<sup>1</sup> Student, School of Law, GITAM University, Vishakhapatnam, Andhra Pradesh, India

<sup>2</sup> Student, School of Law, GITAM University, Vishakhapatnam, Andhra Pradesh, India

a system, the power of the government can be limited by the constitution – not only by the provisions and regulations contained in it – but also by other measures and norms.<sup>3</sup> The idea of the constitution has changed significantly compared to the first examples seen in ancient Greece, while the concept of constitutionalism has grown around the principle that the power and authority of the government are derived from and limited by a set of rules and laws. To understand these concepts – as well as their similarities and differences – it is important to understand their history and evolution.<sup>4</sup>

Constitutionalism is the belief that the authority of a government is determined by a body of laws or a constitution. Although constitutionalism is sometimes thought to be synonymous with limited government, this is only one interpretation, and far from the most prominent historically. Constitutionalism, in broad terms, refers to attempts to prevent arbitrary government.

At its most generic level, arbitrariness consists of the potential of rulers to govern wilfully—that is, with complete discretion—and to serve their interests rather than those of the ruled. Constitutionalism attempts to escape these perils by constituting mechanisms that regulate who can rule, how, and for what purposes. However, constitutional traditions differ on what constitutes an arbitrary act and which mechanisms provide the best defence against arbitrary acts. The classical republican tradition, as related by its new republican interpreters to political constitutionalism, recognizes arbitrariness with the domination of the ruled by their rulers. It attains this by establishing a state of political equality characterized by a balance of power among all 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 associates arbitrariness with interference with individual rights and seeks to protect them through the separation of powers and a constitutionally protected judiciary.<sup>5</sup>

Both traditions exist in most democracies and can be found coexisting in many constitutions. The first tradition is concerned with the design and operation of the democratic process,

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<sup>3</sup> Shah Mohammad Omer Faruque Jubaer, Basic Guidelines to Comparative Constitutional Law: An ideology and, methodical discussion, Novateur Publication, India, (2021) DOI: 10.17605/OSF.IO/X42KC.

<sup>4</sup> Vishal Jain, Comparative Study of the Principles of Constitutionalism in India and the USA, (2021) BW Legal World, <http://bwlegalworld.businessworld.in/article/Comparative-Study-of-the-Principles-OF-Constitutionalism-In-India-and-the-USA/24-03-2021-384727/>

<sup>5</sup> Richard Bellamy, Constitutionalism, Encyclopedia Britannica, (2019) <https://www.britannica.com/topic/constitutionalism>

including the choice of electoral systems and the presidential or parliamentary forms of government, unitary or federal arrangements, and unicameralism or bicameralism. Although the detailing of these procedural mechanisms and the relations between them usually form the bulk of most constitutional documents, their constitutional importance has come to be eclipsed—in legal circles particularly—by the second tradition. This view emphasizes the specification and judicial protection of the different competencies of the political system and constitutionally entrenched rights by a constitutional court. Political theorists and scientists, on the other hand, disagree on whether these two traditions are complementary, mutually exclusive, or incompatible. The second is frequently regarded as necessary to ensure the fairness of the first's procedures and/or outcomes. However, it raises questions about whether courts are, or can ever be, truly bound by constitutions so that law rather than judges rule, and, if so, whether judicial processes for deciding constitutional outcomes are not more arbitrary and prone to error than the democratic procedures and outcomes they are often thought to legitimately limit. In the following sections, this entry traces these two traditions and then turns to explore their respective advantages and disadvantages and any tensions and complementarities that exist between them.<sup>6</sup>

### **Meaning and Scope of Constitution**

The definition of "constitution" is quite complex, and it has evolved significantly over the last two centuries. According to the Western conception, the constitution is the document that contains the basic law of the nation, setting out the organization of government and the principles of society. Yet, although many countries have a written constitution, we continue to see the phenomenon of a 'living constitution' (one that evolves and adapts to new circumstances, without being formally amended) in many parts of the world. As society changes, so do laws and regulations. Furthermore, rather than a single document defining all aspects of the State, the power of the government is defined in some cases by several different documents and agreements that provide a comprehensive legal framework. The Constitution has also been defined as follows:

- Basic norm (or law) of the State;
- System of integration and organization of norms and laws;
- Organization of the government; and
- Supreme law of the State

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<sup>6</sup> Bertrand Badie, *International Encyclopedia of Political Science*, Sage Publications 416.

The constitution is based on the principle of constitutionalism and provides the foundation of government, structuring the political organization and guaranteeing individual and collective rights and freedoms, defining the basic structure of government and its organs.<sup>7</sup>

### **What is Constitutionalism?**

Constitutionalism is a system of governance in which the power of the government is limited by laws that impose checks and balances, to reconcile authority with individual and collective freedoms. It is the form of governance that is instrumental in achieving the goal of the constitution, i.e. misuse of power by the government.

It is a general understanding that a country may have a constitution, but not necessarily constitutionalism. Constitutionalism contemplates checks and balances and puts the power of the legislature and the executive under some restraint, thereby preventing authoritarianism and oppression. Therefore, to preserve individuals' basic freedom and maintain dignity, a constitution should be imbued with constitutionalism.

The idea of constitutionalism (and of the constitution) is precisely linked with the development and spread of democracies. The core idea of constitutionalism is the 'Rule of Law' and the applicability of law up to the highest level. In monarchic and dictatorial systems, there is generally no constitution or, if it exists, it is not respected. Individual and collective rights are often overlooked in dictatorial regimes, and the government cannot be held accountable as there is no legal document that outlines its limits.

Though constitutionalism has evolved over the centuries as a result of political changes and the advancement of democratic ideals, it cannot and should not be confused with legality of the acts of officials in a governmental setup. It is far more crucial than a written constitution. Most countries, with a few exceptions, have written constitutions, but this does not imply that they practice constitutionalism.

### **Principles of Constitutionalism**

- Separation of Powers
- Responsible and Accountable Government
- Popular Sovereignty
- Rule of Law

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<sup>7</sup> Shah Mohammed Supra 1.

- Independent Judiciary
- Individual Rights
- Civilian control over the military
- Police Accountability

Constitutionalism is broadly divided into two parts: political constitutionalism and legal constitutionalism. In political constitutionalism, the government's power is regulated through a governance mechanism i.e., who will rule, how to rule, which objective to be achieved through the rule etc the legislature/parliament creates such a governance structure. The judiciary limits the power of the government under legal constitutionalism, ensuring that individual rights are not jeopardized. This goal is achieved through the judiciary's enforcement of constitutionally guaranteed rights.

### **The Concept of the Indian Constitution and the Constitution of the United States**

In 1945, the British forces finally succumbed to India's wishes to set up a brand-new Constitution through the agency of the Constituent Assembly that was chosen based on the Universal Adult Franchise. Following the acceptance of the Cabinet Mission's recommendations in 1946, elections to the Constitution Assembly were held. The Indian Independence Act of 1947 required the establishment of two independent territories: India and Pakistan and effectively ended British rule in India.

The drafting of a new Constitution was critical following independence. The British forces established the Constituent Assembly in 1946, but it had limited authority. With the attainment of independence, it was thus liberated from constraints. A Drafting Committee was established with Dr. B.R. Ambedkar serving as its chairperson. After much deliberation and proposal over the next two years, the Indian Constitution was adopted on November 26, 1949, and it finally came to force on January 26, 1950.

Constitutionalism and the written Constitution go hand in hand in the United States. In 1786, legal scholar and politician Alexander Hamilton called for a Constitutional Convention. The Convention convened in Philadelphia in 1787, with George Washington serving as President. While the initial goal was to change the Articles of Confederation, the Convention's discussions shifted to the creation of a new Constitution. The final text of the Constitution had been framed and drafted by September 1787. The Bill of Rights, which extended certain

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<sup>8</sup> Vishal Jain Supra 2.

protections to citizens of the country, became a part of the Constitution in 1789. Freedom of expression, protection from unreasonable search and seizure, the right to assemble peacefully, and other rights are among them. The American Constitution has been amended numerous times over the last 200 years.

The American Constitution, conceived over 200 years ago, is the world's first written constitution. It is, however, the world's shortest constitution, with only seven articles. The Indian Constitution, on the other hand, is made up of 448 articles divided into 25 sections and 12 schedules.

### **Constitutionalism in India**

India is a democratic country having a written constitution. The rule of law is the base for the governance of the country and all administrative structures are expected to follow it in both letter and spirit. Constitutionalism is expected to be a natural by-product of Indian governance. The Indian Constitution, with the help of various legislations, has developed a detailed and robust mechanism for putting in place administrative mechanisms for the smooth operation of the country and the machinery of governance. However, India's experience with the governance process over the last six decades has been mixed. On the one hand, we have excellent administrative structures in place to oversee even the most minute details related to welfare maximization, but on the other hand, it has brought about excessive bureaucracy and eventual alienation of the rulers from the ruled. The chasm between the government and the general public is growing larger. Since independence, backward regions have remained the same, the gap between rich and poor has grown, people at the bottom of the proverbial pyramid have remained on the periphery of the developmental process, bureaucracy has retained colonial characteristics, and overall development has fallen far short of people's expectations.

In *Rameshwar Prasad v. Union of India*, the Supreme Court of India stated that "*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.*"

In *Coehlo v. the State of Tamil Nadu*<sup>9</sup>, the Supreme Court held that constitutionalism is a legal principle that requires control over the exercise of governmental power to ensure that

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<sup>9</sup> AIR 2007 SC 861.

the democratic principles according to which the government is established, shall not be shattered.

### **Constitutionalism in the USA**

Except for a few countries, such as England, the majority of the world's countries have a written constitution. However, claiming that all such countries practice constitutionalism may not be correct or justified. As a result, constitutionalism is even more important than a constitution.

In the USA, William Marbury v. James Madison was the first case of its kind in which the United States Supreme Court prominently featured the concept of "judicial review." of the US Constitution given in Article III. This landmark case established the boundaries of the executive and judicial branches of the American government. It also established a strong foundation of constitutionalism in the country, which many countries around the world have followed. Since this case, every judge in the United States has been required to declare any enactment that violates the US Constitution void. It is worth noting that in *Carter v. Carter Coal Co.* (1936), the court held that the courts could not refuse to exercise this power.

The United States incorporated the concept of rule of law from medieval England, which is sometimes expressed as "a government of laws, not of men." This doctrine, which stated that no man is above the law, was applied not only to Kings but also to legislative bodies and judges. The American Constitution is founded on the principles of federalism, separation of powers, and the rule of law. However, there are other fundamental principles of the system that all contribute significantly to the attainment of liberty, order, and justice.

The United States, like India, has three separate organs of state whose respective powers and duties are derived from and enshrined in the first three Articles of the US Constitution. Congress (commonly known as the House of Representatives) and the Senate have sole legislative authority in the United States, according to the US Constitution. The President of the United States has the authority to veto bills passed by Congress. However, Congress has the authority to override the President's veto. After a bill becomes law, courts have the authority to review its constitutionality, and if they find that it violates the US Constitution, they can overturn it can declare the law null and void. As a result, courts in the United States have the power of judicial review. Thus, the constitution includes a system of checks and balances.

## Conclusion

The preceding discussions lend credence to C.H. McElwain's theory of constitutionalism for a variety of reasons, including, but not limited to, McIlwain's own statement that judicial review is the only way for a constitutional system to endure. It ensures that the sovereign's actions do not exceed the legal authority bestowed upon it by the people. As a result, the cardinal principles of constitutionalism are judicial review, the rule of law, and the limitation of the government's powers in order to protect the people's fundamental rights.

One of the key elements of constitutionalism is the rule of law, which ensures that no one is above the law and that everyone is subject to the law of the land. Only an independent judiciary can ensure the supremacy of the rule of law. Notably, the Supreme Courts of both India and the United States have repeatedly upheld the Rule of Law through various judicial precedents.

Though it has long been held that a constitution can exist without constitutionalism but not vice versa, this is not a conclusive statement. In a democratic country like India, the constitution and constitutionalism are inextricably linked. In the absence of the other, neither can survive. The dilemma in any democracy is that the constitution cannot interpret or function on its own and must be interpreted by the person in power, i.e., the sovereign, but not arbitrarily. If constitutionalism dies, the object of the Constitution remains unfulfilled. As a result, in a democratic country, both the constitution and constitutionalism are required to achieve this goal.

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