

3. CONSTITUTION AND CONSTITUTIONALISM

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What is Constitution?

- Constitution, generally speaking, a codified texts in which a people chart out their collective destiny. It is foregrounded and anchored by the collective wisdom and the principles that would realize all these aspirations and goals visualized.
- Every country has a constitution in one or other form.

Historical Background

- Most of the constitutional values and goals that attire Indian Constitution has been crystallized and institutionalized during the national movements.
- Though there are many who believe that a good and stable constitutions has always been historically a product and an outcome of revolution.
- If you recall what Aristotle has exhorted while classifying the framework of the government that the primary duty of the constitution is to deter any revolution but he failed to support what many constitutional writers have ordained regarding the French, American or Spanish Constitution.

- India was lucky and fortunate, to put it more aptly in the words of Dr. Ambedkar, that it has lived up to the aspirations of the Nationalist movements and it is indeed an uncharitable remark that India did not have tumult while attaining the goals of Constitution.
- There are many historical moments that have thrown up the basic principles and visions for the future constitution for this Country.

Historical Continuity and Indian Constitution

There are at least three ways, as prof. Uday Mehta outlines, the contextuality of themes that later became the cornerstone and ***Promissory note*** of India's Constitution and they are:

- Overriding concern with the Unity;
- Occupations with the social issues such as poverty, illiteracy and economic development etc.; and
- India's standing in the world

Types of Constitution

- A Constitution can either be 'rigid' or can be 'flexible'. It can further be either 'Unitary or federal'. It may also have character either as "Presidential or Parliamentary".
- These features are an outcome of the specific context in which the Constitution was adapted.
- It is equally true to say that none of the Constitution exhibit only single of the above mention character. Most of the Constitutions, as the belief held by Aristotle, are the mixed Constitution.

Meaning of Constitutionalism

- Constitutionalism implies a limitation on state power by having check and balances so that basic right and dignities of an individual can be protects.
- It is a doctrine that imposes limitations on ordinary political power; it revolves around a political process and draws on particular cultural and historical context from which it emanates; and it resides in public consciousness.

Constitutionalism defined

- “Constitutionalism is a complex of ideas elaborating the principle that the authority of the government derives from and is limited by a body of fundamental law.
- A political organization is constitutional to the extent that it contains institutionalized mechanism of power control for the protection of the interests and liberties of citizenry, including those that of minority”.
- Thus the right mix of politics and power defines the exigencies of Constitutionalism.

Aspects of Constitutionalism

There are two aspects attached with the idea of Constitutionalism subserves, and they are:

- Normative framework founded on the substantive principles of morality that transcended positions and disagreements on major particular issues and consequently to provide a framework for common institutional life; and
- It would align with the global values and laws without slighting the local needs

Constitutional Morality

- Coming back to the first aspect of Constitutionalism, we have to understand the Constitutional Morality, i.e. Does a Constitution reflect any moral principle underlying it?
- The second aspect is more equivocal in terms of the understanding of suffering and compassion has adequately been addressed in the Indian Constitution as Martha Nussbaum puts it sharply to the question of whether the suffering was adequately appraised and fully shared

Difference between Constitution and constitutionalism

- A constitution is a charter of government deriving its authority and purpose from the governed(i.e. Public) whereas Constitutionalism is a limited power and constrains the arbitrary use of power by the govt. Over the governed.
- A constitution can be defined as the fundamental laws,customs,conventions, rules and regulations, stipulating how a country is governed, while Constitutionalism can be defined as which puts limitation on the activities of both individual and the governments.

Evolution of Constitutionalism

- For the first time, the Philadelphia Convention in USA, an idea of having a written constitution clearly demarcating the spheres of power promulgated. Later on French revolution glorified these principles while getting institutionalized.
- Constitutionalism informed a reconciliation of powers of the state with the liberty and rights of the individual. The Constitution of USA, UK, India, France has embed a separate chapters on fundamental freedom and rights granting to the citizens in no uncertain terms.

Elements of Constitutionalism

- **Democracy** or the representative government obligates the responsibility upon the government to safeguard the rights and freedom of the individuals.
- **Separation of Power**-i.e. All the organs have the defined and designated power and no one ,otherwise, interferes or encroach upon other
- **Rule of law**,i.e. The supremacy of law. country which follows its basic principle would be one where the laws derive its authority from the basic laws, and the state is the supreme authority and thus restricting the arbitrarily use of the power by the organs of the government. It is done so as to prevent the misuse of power by the person or the authority with the power.

Constitutionalism and Indian Judiciary

In *Rameshwar Prasad and Ors. Vs Union of India (UOI) and Anr.* It was observed :

“ ...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...”

Homework

- How do constitutionalism and the rule of law determine the relation between legislative intention and content of the constitution?
- What is the role of various actors in a political community in 'shaping' the meaning or content of constitutional principles?
- I expect you to go through the book on Constitution of India and find out how the balance has been struck without compromising with the promise of Constitution and ethics of Constitutionalism and submit an assignment on it

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