

# CONSTITUTIONALISM IN INDIA IN COMPARATIVE PERSPECTIVE\*

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## I. ABOUT DR. D.D. BASU

I am grateful to the Vice Chancellor of the West Bengal National Law University of Juridical Sciences for conferring upon me the honour of delivering its annual lecture in the memory of Late Dr. Durga Das Basu. Dr. Basu was an illustrious son of Bengal and a legal scholar of universal eminence. Starting his career as *Munsif* during the British regime, having to constantly shift from place to place in small and big towns and with a family to be looked after, not only did he rise to be an Hon'ble judge of the High Court of Calcutta, but he also earned international recognition and fame for his monumental writings, especially, but not exclusively, on the Constitution of India which he started producing soon after the commencement of our Constitution in 1950.

Besides his multi-volume commentary on the Constitution of India, which has a worldwide readership, he published as many as twenty seven titles on diverse subjects including the Indian Penal Code, Equity, Trusts & Specific Relief, the Law of Torts, Criminal Procedure Code, Law of the Press, Comparative Constitutional Law, Administrative Law, Comparative Federalism, Human Rights in Constitutional Law and Constitutional Remedies and Writs. He produced some of his works in Bengali and Hindi and also wrote on non-law subjects such as Essence of Hinduism, both in Bengali and Hindi. Dr. Basu had delivered the famous Tagore Law Lectures on Limited Government and Judicial Review, a subject akin to the subject matter of this lecture.

For his monumental works he was awarded numerous academic degrees and honours. It appears unbelievable that one person with multiple obligations of work, who was posted in multiple places within the State of West Bengal during his tenure as a judge and one who acted as the supporter of a fairly large family, could accomplish so much in the span of one life.

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\* This is a revised and enlarged version of the lecture delivered in the memory of Dr. D.D. Basu at National University of Juridical Sciences, Kolkata in February 2018. The initial lecture was for hearing while the current version is structured for reading.

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## II. THEME OF THE LECTURE

In view of Dr. Basu's vast universe of law and life, I had difficulty in deciding the theme of my lecture which could be anything different from what he had covered in all details within the legal domain dearest to him viz. constitutional law. In the process of deciding the theme of my lecture, I realised that even though the concept of constitutionalism as an aspect of the Constitution of India, as is noted below, could not escape Dr. Basu's attention, it had not been discussed in all its details that have partly developed since his departure from the scene. I will not be surprised if any keen reader of Dr. Basu's writings proves me wrong in my thinking that there are any details or conceptual understandings on the concept of constitutionalism that had escaped his attention. Yet we could reasonably agree that Dr. Basu could not predict every minute detail of constitutionalism that could emerge in the future, though as we will notice from his description of constitutionalism in the Constitution of India, he was not very far from the developments that have taken place since his departure from the scene.

## III. CONSTITUTIONALISM AS EVOLUTIONARY CONCEPT

The concept of constitutionalism, like almost all other social sciences concepts, has always been subject to or part of an evolutionary process. Therefore, we cannot point out any specific time or event that led to its creation or emergence, though a succession of such events may have led to shaping and acquisition of an image as an outcome of the totality of those events or processes. Generally, they are shaped in the context of paradigm shifts in social and political structures.

It was some such shift that took place in the form of Russian Revolution of 1917 and its impact on other societies and political formations that the need to closely examine this vision of society and counter it for its weaknesses and drawbacks arose. It is as part of that process that two professors at the Harvard Law School individually engaged themselves in investigating and presenting a different version of the social and political vision of society through constitutional structures that prevailed in the United States and most other parts of the West. Between the two, while one was confined specifically to exploring the concept of constitutionalism, the other one discussed constitutionalism as part of a bigger constitutional and political design of society.

As such Professor McIlwain is credited with introducing the concept of constitutionalism by devoting his six lectures at Cornell University in 1938-39 exclusively to its understanding supported by its history of evolution in the West. He defined it in the following words,

“[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”<sup>1</sup>

Admitting the exercise of some discretion of the government in policy matters, he reiterated,

“[B]ut the most ancient and most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.”<sup>2</sup>

Tracing the evolution of the concept since Plato and Aristotle<sup>3</sup> and Roman Empire, he states that while the Greeks did not make any seminal contribution to the idea of constitutionalism, the Roman legal system did by recognising the distinction between *lex* and *jus*. While the former covered any state made rule within the concept of law, the latter required it to inhere the quality of being just or fair.

Common law which is claimed to have been part of England and its inhabitants prior to the Norman Conquest in 1066 started acquiring its modern shape since then and took the lead in establishing the concept of constitutionalism. Starting with Magna Carta in 1215 which compelled the King to recognise and be bound by certain rights or claims of the people, it continued to grow through the jurists like Bracton who drew a distinction between the government and the law. While in the government nobody was above the King, the King had to govern according to law. Bracton also drew a distinction between the legal procedures which the government could prescribe and the rights of the people which were customary and could not be changed by the King.

Later in seventeenth century, Edward Coke pursued this process by claiming primacy of common law over state made law. Whatever differences existed on the nature of law and authority to lay it down conclusively between the rulers and the people were removed by the Glorious or Bloodless Revolution of 1688-89 by establishing the constitutional norm that in all matters, the King will be answerable not only to God but also to the people through their representatives in Parliament, not personally but through his ministers who were made answerable in law for all their acts.

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<sup>1</sup> C.H. McILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN, 21-22 (1987).

<sup>2</sup> *Id.*, 22.

<sup>3</sup> See generally ARISTOTLE, THE ATHENIAN CONSTITUTION (translated by P.J. Rhodes, 2002) (Aristotle’s engagement with constitution).

The Act of Settlement, 1701 brought another major push by ensuring independence of judges from the King by making them irremovable during their good behaviour. Simultaneously, the tradition set by Bracton and Coke was also continued in the eighteenth and the nineteenth centuries by constitutional scholars like Blackstone, Bagehot and Dicey who continued to adjust growing powers and responsibilities of the state with traditions of common law, ensuring the exercise of power in consonance with the rights of the people. In the light of these developments, McIlwain concluded that constitutionalism must be based on two fundamental correlative elements, namely legal limits to arbitrary powers and complete political responsibility of government to the governed.<sup>4</sup>

Tracing a similar but very brief history of almost the same societies, Carl Friedrich also defined constitutionalism on similar lines in the following words,

“Constitutionalism is built on the simple proposition that the government is a set of activities organised by and operated on behalf of the people, but 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.”<sup>5</sup>

In defence of that kind of state, the United States of America (‘US’) also restricted the liberties of those who were critical of the kind of state that the US was and sympathised with the ideology on which USSR was based. However, as more and more states and societies in Europe also started establishing social states in the light of the social and economic changes that had taken place in their societies, the US too relaxed its attitude towards that ideology but without ever abandoning its stand on the understanding of constitutionalism as restraint on the powers of the state to protect the civil and political rights of the individual against the state. Thus, for example, Michel Rosenfeld’s statement that there is “no accepted definition of constitutionalism but, in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.”<sup>6</sup>

In the same collection of essays, admitting that constitutionalism is not defined anywhere, Louis Henkin explains it in terms of its demands which

<sup>4</sup> McIlwain does not refer to the impact of the US Constitution and its Bill of Rights and the French Declaration of Rights of Men and Citizens on the concept of constitutionalism even though both of them had completed over one hundred fifty years of their existence at the time of his writing.

<sup>5</sup> CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 36 (1974). The first US edition of the book was published in 1937 in which the concept of constitutionalism was also discussed. Thus, Professors Friedrich and McIlwain seem to have been working on the concept almost simultaneously.

<sup>6</sup> Michel Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY* 3 (Michel Rosenfeld ed., 1994).

include its basis in popular sovereignty, supremacy of the constitution, political democracy and representative limited government, separation of powers or other checks and balances, civilian control of the military, police governed by law and judicial control, and an independent judiciary which requires that government respects and ensures individual rights which generally are the same as recognised by the Universal Declaration of Human Rights, determination of any derogation of rights by constitutional bodies, existence of institutions to monitor and assure respect for the constitutional blueprint, for limitations on government, and for individual rights, and respect for self-determination of the people.<sup>7</sup>

Professor Harding, a political scientist, also explains constitutionalism on the same lines,

“Arguably the most important aspect of constitutionalism for modern nations, especially those that have had histories of autocracy, is in the placing of limits on the power of government. In the view of many this is the central point of constitutionalism: the limited government.”<sup>8</sup>

This kind of thinking could perhaps not be questioned in light of expansion and existence of communism under the influence and support of the Soviet Union. However, as the decline and final break-up of the Soviet Union and its control over the East European countries started in 1989 which discarded communism, and started establishing new constitutions, Andras Sojo, a Hungarian scholar, wrote the book titled “Limiting Government: An Introduction to Constitutionalism” initially in Hungarian in 1995 and later in English in 1999 for the guidance of the new regimes in East Europe. As Sojo’s primary concern was to limit the powers of the governments to be created after the dissolution of communism, he deals with constitutionalism in a scattered form and not at one place.

After noting that “Constitutionalism is the restriction of State power in the preservation of public peace”,<sup>9</sup> he admits that “[t]here is no satisfactory definition of constitutionalism, but one does not only feel when it has been violated, one can prove it.”<sup>10</sup> Admitting that the reasons for this antipathy towards the government and its acts differs from country to country and age to age, he adds,

“The doctrine of constitutionalism was the answer given to oppression during and after the French Revolution, and it was related to concrete forms of abuse and usurpation. Constitutional

<sup>7</sup> L. Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY* 39, 41-42 (M. Rosenfeld ed., 1994).

<sup>8</sup> Russel Hardin, *Constitutionalism* in *THE OXFORD HANDBOOK OF POLITICAL ECONOMY* 289 (Donald A. Wittman & Barry R. Weingast ed., 2008).

<sup>9</sup> ANDREAS SAJO, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 12 (1999).

<sup>10</sup> *Id.*, 9.

ideas and constitutionalism in all ages refer to abuses of power because they exist in collective memory.”<sup>11</sup>

This, according to him, is generally the traditional understanding of constitutionalism. It is not clear when exactly the term “constitutionalism” was initially coined or used, but in his view its origin is generally attributed to the French Revolution that led to its use by the beginning of the nineteenth century.<sup>12</sup> With these introductory remarks, he lays down the detailed outlines for the formation of a constitution and what it must contain. Primarily, Sojo was addressing the new regimes in Europe to be careful not to fall in the same trap of authoritarianism which they had just replaced.

Coinciding with Sojo’s English version, Scott Gordon also wrote that though “the term ‘constitutionalism’ is fairly recent in origin, the idea could be traced back to classical antiquity”. Briefly, he takes “‘constitutionalism’ to denote that the coercive power of the state is constrained.”<sup>13</sup> Expressing agreement with McIlwain’s definition of constitutionalism, he questions the use of word “legal” in his definition because a constitution like that of Britain may be unwritten and yet may satisfy the requirement of constitutionalism which McIlwain also considers as the best example of constitutionalism.

Analysing all the major constitutional systems from ancient Athens until the end of the last millennium in the West, he concludes “that the continuous development of constitutionalism is a comparatively recent phenomenon, traceable no further than to seventeenth-century England.”<sup>14</sup> Nevertheless, he also admits that “efficient government and constrained government are not incompatible and ... that both objectives have been realized, in practice, in numerous states dating back as far as ancient Athens.” Finally, he further admits that

“Constitutional democracies have not succeeded in constructing a perfect system for controlling the state, and like other dimensions of social perfection, such an ideal is unlikely to come within our grasp. But while perfection is impossible, improvement is not, and the next step in the journey that I have pursued

<sup>11</sup> *Id.*, 12.

<sup>12</sup> *Id.*, 9. “According to the Oxford English Dictionary the word “constitutionalism” was first used in 1832. Berman (1983, 9) asserts that the word was coined in America during the Revolution. Chrimes (1949, 475f) notes that the adjective “constitutional” was a novelty even in the mid-eighteenth century, but the noun “constitution” with a political meaning, came into use during the English debates that led to the outbreak of Civil War in 1642. The OED reports’ uses of that word sense as early as the twelfth century, but it was the English debates during the Civil War period and after the ‘Glorious Revolution’ of 1688, that firmly established “constitution” and its cognates as elements of the modern political vocabulary.” (Footnote 3, SCOTT GORDON, *infra* note 13, 5.)

<sup>13</sup> SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* 5 (1999).

<sup>14</sup> *Id.*, 358.

in this book would seem to be an investigation of “constitutional failure”—the lacunae that are evident in the systems of power control of constitutional democracies.”<sup>15</sup>

Though the foregoing descriptions of constitutionalism since the political change in East Europe have not moved far beyond what it had been so far, the change has led to rethinking the concept of constitutionalism. The beginning in this regard seems to have been made by Jeremy Waldron at the start of the present millennium by expressing doubts on the negative connotation of constitutionalism prevalent until then. He says,

“[S]ometimes ‘constitutionalism’ is a pompous word for various aspects of con law or the study of the constitutions. Still the last two syllables – the “-ism” – should alert us to an additional meaning that seems to denote a theory or set of theoretical claims. Constitutionalism is like liberalism or socialism or scientism. It is perhaps worth asking what that theory is and, whether the claims it comprises are true or valid.”

Invoking the second meaning of constitutionalism in the Oxford English Dictionary “[a]dherence to constitutional principles”, he adds that “a constitutionalist must take constitution seriously and not allow any deviation even in the face of other values.” Therefore, “Constitutionalism”, according to him “refers to the sort of ideology that makes this attitude seem sensible. So”, he supposes “this includes the claim that a society’s constitution matters, that it is not just decoration, that it has an importance that may justify making sacrifices of other important values for its sake.” Following this approach and discussing various existing views on constitutionalism, he concludes,

“I have argued that constitutionalism is not just an interest in constitutions, nor is it simply a recommendation that a country’s constitutional arrangements should be put in written form. I have argued that it comprises a commitment to fundamental self-determination (in some versions a commitment to popular sovereignty) along with an ideology of restrained and limited government which in many ways is quite uneasy with and hostile to the idea of popular government and quite willing to neglect and sideline important tasks such as democratic empowerment.”

It seems that in this version of constitutionalism, Waldron has slightly watered down his previous antipathy between constitutionalism and democracy where he noted “the ideological antipathy between constitutionalism and many of democracy’s characteristic aims” and ended by stating that

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<sup>15</sup> *Id.*, 361.

“I think it is worth setting stark version of antipathy between constitutionalism and democracy or popular self-government, if only because that will help us to measure more clearly the extent to which a new and mature theory of constitutional law takes proper account of constitutional burden of ensuring that the people are not disenfranchised by the very document that is supposed to give them their power.”<sup>16</sup>

Thus, Waldron seems to be telling that constitutionalism should not completely ignore democratic decisions.

Following Waldron’s democratic argument regarding constitutionalism, Richard Bellamy draws a distinction between legal and political constitutionalism, which he also finds supported by Joseph Raz and Juegen Habermas, and sums up that “a democratic society in the inclusive, rights and equality respecting sense desired by legal constitutionalists comes from the political constitution embodied in democracy itself.”<sup>17</sup> Similarly, Colon-Rios develops a concept of weak constitutionalism to reconcile it with democracy which he considers as a more fundamental and pervasive value with which constitutionalism must be reconciled and in case of impossibility of such reconciliation democracy must supersede constitutionalism, which is obvious from the exercise of constituent power which lies ingrained in every constitution to engage in future episodes of democratic reconstruction.<sup>18</sup>

In line with the foregoing scholars, especially Waldron, Nick Barber gives a new account of constitutionalism. Designating the existing account of constitutionalism as negative, based on Max Weber’s description of the state as “a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory”, Barber states that constitutionalism has so far been understood in terms of regulating or controlling the use of that force by recognising certain negative rights of the individual against the state. Relying on Waldron’s view that “maybe we are better off without the term” constitutionalism, he propounds the idea of positive constitutionalism according to which the state is expected to have the capacity to advance the well-being of its members.<sup>19</sup>

Such a state must be based on certain principles such as state sovereignty, the separation of powers, the rule of law, civil society, democracy and subsidiarity. Only such a state may fulfil its obligation of ensuring well-being of its citizens, which is the primary justification for the existence of the state. The principles of constitutionalism are obtainable ideals based not in authority but in

<sup>16</sup> J. Waldron, *Constitutionalism – A skeptical View* in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 267, 279 (T. Christiano & J. Christman ed., 2009).

<sup>17</sup> R. BELLAMY, POLITICAL CONSTITUTIONALISM 7 (2007).

<sup>18</sup> JOEL I. COLON-RIOS, WEAK CONSTITUTIONALISM (2012).

<sup>19</sup> Nicholas W. Barber, *Introduction: Constitutionalism*, 3 OXFORD LEGAL STUDIES RESEARCH PAPER No. 7/2015 (2015).



political theory, which may also be found within the law of the state. “All the principles of constitutionalism”, says Barber “ultimately find their origins in the characteristic purpose of the state: the advancement of the people’s well-being” and “[a] good state, a state that is successful state, will possess an institutional structure that is characterised by constitutionalism.”<sup>20</sup>

Terming the existing models of constitutionalism as negative model, having its origin in an impoverished understanding of the state, he advances a richer account of the state “that recognises its role in advancing the well-being of its people, generates a richer account of constitutionalism.”<sup>21</sup> Discussing in detail all the principles on which a state ensures well-being of its citizens, mentioned above, Barber admits that exceptions may be made in their implementation and in fact “[a]ll real-world states fall short of the demands of constitutionalism” and in the process of making changes in the constitution to meet such demands, care must be taken of the costs and risks involved in such change.<sup>22</sup>

As is evident from the preceding discussion, constantly increasing engagement of scholars with constitutionalism world over is leading to its refinement and reinforcement day by day. In the background of early realisation and application of social liberalism in theory as well as practice, nations began claiming and declaring social state as one of the basic features of their constitutions as, for example, in case of Germany and France.

Professor Dieter Grimm, a widely known German scholar and a former judge of the Federal Constitutional Court of Germany, explains this phenomenon by tracing the evolution of constitutionalism in the United Kingdom and the United States on the one hand and on the continent on the other hand. According to him, while the model of constitutionalism in the United States strictly developed on the concept of the individual rights *vis-à-vis* the powers of the State and the concept of representation in and control of parliament in the United Kingdom as protector of rights of the individual, on the continent it developed by drawing a distinction or creating a separation between the State and the society which

“...stripped society of all means of political power and set [it] free while the State was equipped with the monopoly of power and then restricted. It is this difference that enabled rational binding of state power by law. Although it regulated the relationship between state and society, the latter held the entitled position as a matter of principle and the former the obligated position.”<sup>23</sup>

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<sup>20</sup> *Id.*, 18.

<sup>21</sup> *Id.*, 19.

<sup>22</sup> *Id.*, 237.

<sup>23</sup> DIETER GRIMM, CONSTITUTIONALISM, PAST PRESENT AND FUTURE 63 (2016).

However, he finds this position also changing for two reasons. One, because the state functions on the basis of adult franchise while the political parties remain unregulated by the constitution, and two, because of the vast economic power in private hands. While the former enters into all organs of the state and controls it according to its policies, the latter compels the state to act in line with its (society's) interests.<sup>24</sup>

That may be one of the reasons for social state being one of the basic features of most of the constitutions on the continent, which is also reflected in the Lisbon Treaty of 2007 that holds somewhat similar status as constitution for the member States. The Treaty also assigns the same status to social and economic rights incorporated in it as to the civil and political rights. This understanding of constitutionalism among the continental countries seems to have become internalised in many countries in Europe, Asia, Africa and Latin America.

Without in any way derogating from the concept of constitutionalism as propounded by the US or British scholars, it has added an additional dimension to it by also requiring the state to fulfil certain obligations towards its people. The Constitution of India and many other constitutions since World War II, including the most recent ones like that of South Africa, Kenya among several other countries, already made or in the process of being made in Africa, Asia and Latin America also incorporate similar or even more positive versions of constitutionalism.

Further, drawing attention to the historically existing and currently increasing diversity and plurality based on race, religion, language, culture and several others in all societies around the globe, James Tully has argued and justified, on philosophical and political grounds, the accommodation of these diversities as an aspect of constitutionalism with a view to learning to respect each other and to respect and honour each other's differences.<sup>25</sup>

A constitution that ignores such accommodation and respect for diversity and plurality in a society fails to meet the requirement of constitutionalism. Several older constitutions which ignored this aspect of constitutionalism have introduced it either through amendments or judicial interpretation or appropriate legislation and constitutional application. The ones which have failed to do so lack in an important aspect of constitutionalism, even if they guarantee equality of treatment to all individuals. Instances of such failure may be found even in the constitutions of very advanced societies while attention must be drawn to increasing diversity in modern times in the process of increasing globalisation.<sup>26</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> J. TULLY, *STRANGE MULTIPLICITY CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (2007).

<sup>26</sup> *Id.*, Chapter 6 (in general and its conclusion in particular).

A very different concept, almost at the verge of negation of all the foregoing concepts and understandings of constitutionalism has very recently been introduced by Professor Guenther Frankenberg as authoritarian constitutionalism which according to him is “an important phenomenon in its own right” and “not merely a deficient or deviant version of liberal constitutionalism.”<sup>27</sup> To quote the author,

“In clinical terms, it can be described as a syndrome – a pattern of governance resulting from the co-occurrence of diverse, distinctive symptoms. Common symptoms are rigged elections or votes with highly implausible outcomes; detention without trial; little if any protection for minorities and little if any tolerance of opposition; gender inequality that suggests an intimate connection with patriarchy; extensions of constitutional tenure of office thinly legitimating sclerotic regimes’ clinging to power; recourse to a quasi-dynastic principle by leaders grooming family members or cronies for succession; top-down administration of public arenas, and manipulation of rules of accountability virtually excluding political authorities from significant popular or judicial control, which is frequently replaced by appeals to symbolic support; as well as promulgation of emergency law implemented by an exorbitant security apparatus of secret services, police, military.”<sup>28</sup>

Fascist regimes in Germany, Italy and Spain and statist regimes in Brazil and Portugal as well as numerous examples of recent or current regimes such as of emergency measures and dynastic rule in India, Jim Crow laws in some of the Southern States of US, Trump’s presidency, Xi Ping’s life term presidency and multiple past and present regimes in Latin America, Apartheid in South Africa and several autocratic regimes in East and South East Asia, point towards instances of such regimes relying upon their constitutions.

They have found justifications in constitutional theory such as of Locke, Hobbes and Machiavelli in their plea respectively for the power to act according to discretion for the public good without the support of law or sometimes even against it in case of Locke.<sup>29</sup> Justifications for the acquisition of authoritarian power by the latter two have been based on rulers following Hobbesian logic for acquisition of power for public good including for the implementation of neo-liberal policies,<sup>30</sup> and abiding by the Machiavellian maxim “Always do what circumstances demand for the procurement, maintenance and protection of your assets

<sup>27</sup> G. Frankenberg, *Abstract in Authoritarian Constitutionalism—Coming to Terms with Modernity’s Dreams and Demons*, 3 RESEARCH PAPER OF THE FACULTY OF LAW OF THE GOETHE UNIVERSITY, FRANKFURT (2018).

<sup>28</sup> *Id.*, ¶ 5.

<sup>29</sup> *Id.*, ¶ 11.

<sup>30</sup> *Id.*, ¶¶ 19, 25.

and utilize all strategic options and tactical skills you deem opportune”.<sup>31</sup> Power is used as property to be perpetuated in generations of the same family, urgency is utilised as justification for authoritarian measures and several other tactics are employed to justify authoritarian constitutionalism, subjecting the liberties of the people to the actions based on these multiple justifications. Thus, the author concludes,

“While one may very well criticize AC’s [authoritarian constitutionalism’s] main features – power as (private) property, participation as complicity, and the cult of immediacy – they should not be dismissed as theatrics because they may very well account for the appeal of the authoritarian temptation.”<sup>32</sup>

Thus, like many other concepts in law and political theory that continue to grow with time, the concept of constitutionalism too starting from the later part of the eighteenth century and getting formulated since the late thirties of the twentieth century has moved from restraints on the state in the interest of the individual to his welfare and positive support, but in some cases, also given birth to authoritarian constitutionalism which is a negation of its original understanding and use. Whether this latter development is acknowledged as part of constitutionalism or its negation is yet to be determined from the scholarly engagement with this issue in due course.

#### IV. DR BASU’S CONCEPT OF CONSTITUTIONALISM

Among the foregoing progression and conceptions of constitutionalism, some of which have developed much after Dr. Basu’s departure from the scene, whatever little I could find in his writings on constitutionalism sum up almost all that I have discussed above, including what Professor Waldron impliedly and Professor Barber expressly and clearly said only recently in their writings cited above. Let me quote the statement on constitutionalism that I could find in Dr. Basu’s writings. It runs as follows,

“The principle of constitutionalism requires control over the exercise of governmental power to ensure that it does not destroy

<sup>31</sup> *Id.*, ¶ 19.

<sup>32</sup> *Id.*, ¶ 61; See M. TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW*, 129 (2nd ed., 2018).

*See generally From Comparative Constitutional Law to Comparative Constitutional Studies* in RAN HIRSCHL, *COMPARATIVE MATTERS*, 163 (2014). (In the perspective of comparative constitutional legal studies on constitutionalism, where among other issues, he devotes considerable amount of discussion on comparative constitutionalism beginning with the following remark,

“The proliferation of constitutional courts, judicial review and constitutional rights jurisprudence worldwide, indeed the rise of human rights discourse more generally, has turned the comparative study of constitutionalism into a predominantly legalistic enterprise that is heavily influenced by the prevalent case law method of instruction.”)

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 separation of power; it requires a diffusion of powers, necessitating different independent centres of decision-making. ... The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights.... Constitutionalism or constitutional system of government abhors absolutism <sup>34</sup> it is premised on the rule of law in which subjective satisfaction is substituted by objectivity provided for by provisions of the Constitution itself. Constitutionalism is about limits and aspirations. The Constitution embodies aspiration to social justice, brotherhood, and human dignity. It is a text which contains fundamental principles. ...The tradition of written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution. The Constitution is a living heritage and, therefore, you cannot destroy its identity.<sup>33</sup>

The foregoing description of constitutionalism in India covers almost every aspect of constitutionalism that we have discussed above, starting from Professors McIlwain and Friedrich until Barber and beyond. It is natural in light of the kind of nature and role of the state in the later part of the eighteenth century of primarily maintaining law and order and the role it has progressively started undertaking since the closer of the nineteenth century, particularly since the making of the post WW II constitutions that expressly provide for the establishment of social state in place of *laissez faire* state. The position of the colonised societies may have been different, but so far as India is concerned there is enough evidence in available history that during Mughal Empire, even in the times of Aurangzeb, the kings cared for the welfare of their people and listened and conceded to their demands.<sup>34</sup>

To begin with, colonisers also cared for these Moghul traditions but slowly to strengthen and expand their rule they started ignoring these traditions. This change was noticed by the enlightened natives among whom Raja Ram Mohan Roy played the most prominent and successful role in restoring pre-British traditions as well as getting some social reforms done such as abolition of the Sati system. The initiation of social reforms as well as social awareness among the people created by Ram Mohan Roy followed by others, continued to gain support and strength even after the replacement of company's rule by the British Crown.

<sup>33</sup> D.D. BASU, SHORTER CONSTITUTION OF INDIA, Vol. 1 15-16 (Justice A.R. Lakshamanan, Justice Bhagabati Prasad Banerjee & V.R. Manohar, 14th ed., 2009).

<sup>34</sup> See Rohit De, *Constitutional Antecedents* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 20-23 (S. Choudhry, M. Khosla & P.B. Mehta ed., 2016).

More and more people under the banner of All India Congress or independent of it started making formal demands from the rulers in the form of some kind of constitutional documents, which in course of time through Annie Besant's Bill of Right 1925, Moti Lal Nehru Report of 1928, Karachi Resolution of 1931 and similar continued movements started conceiving the kind of constitution India must have. Some lessons were also learnt in the working of the Government of India Acts of 1919 and 1935 and the decisions given by the Federal Court under the latter. Thus, much of the framework of the future constitution of India had been already conceived by the time India formally started the process of making its current constitution towards the end of 1946, which was continued after obtaining independence in 1947.

Thus, it is not that India conceived and made its constitution only after obtaining independence from the foreign rule. On the contrary, in the light of its past history and precedents in pre-British and British India, a blueprint for the future constitution of India had already been drawn.<sup>35</sup> "But perhaps most striking was belief", says De "shared by politicians, bureaucrats, and judges across the ideological divide that constitutions would continually evolve and that constitutionalism meant a commitment to principles ... rather than to a strict interpretation of the text."<sup>36</sup>

Therefore, India could conceive and frame a constitution which in spite of India's partition, diversity and immense problems of merging over five hundred Indian states into the Union of India has been working so far with some major and minor amendments. Professor Ackerman and many others have expressed surprise as to how in a country of immense diversity, poverty, ignorance and many other negative factors, the Constitution has been working reasonably well since January 1950.<sup>37</sup> Credit is given to the kind of constitutionalism its makers had learnt, practiced and incorporated in the Constitution and according to

<sup>35</sup> *Id.*, 23-26.

<sup>36</sup> *Id.*, 37.

<sup>37</sup> See B. Ackerman, *The Rise of World Constitutionalism*, 83 VIRGINIA LAW REVIEW 781-82 (1997). He states,

"Consider India. Here is a country that, by the standard criteria of political science, should never have been able to sustain constitutional democracy-mass impoverishment and illiteracy, linguistic diversity and bloody religious strife, all seem to be inauspicious auguries. And yet, for half a century now, it has managed to confound expectations. Even if its Constitution falls apart in the next generation, how do we account for this success in sustaining a liberal democracy?"

He goes on to add that this happened for the following reasons.

"One may discern a five-stage dynamic. First, there was the long and successful struggle of the Congress Party to mobilize a trans-ethnic political movement with a mass base. This led, second, to a situation at the time of independence in which the Congress Party was a credible vehicle of popular sovereignty. Third, and crucially, Gandhi and Nehru rejected the hegemonic party model, and supported a serious effort to write a constitution to memorialize the fundamental commitments of the Indian people's breakthrough into independence. Fourth, the energies of the revolutionary Congress Party slowly ebbed as it became a haven for political opportunists interested in government jobs. This led, fifth, to an increasing prominence of the Constitution, and its judicial institutions, as the guardians of the nation's fundamental constitutional commitments."

which they and their successors as well as the people of this land have worked with the keen desire that it must work indefinitely with such adjustments and improvements as are required from time to time. Yet at the same time they have also agreed and internalised that the basic structure or the essential features of the Constitution shall be kept intact.<sup>38</sup>

## V. CONSTITUTIONALISM IN OPERATION

With all efforts on my command, I could not find any engagement with constitutionalism of my academic colleagues in the discipline of law, except our well-known senior colleague Professor Upendra Baxi, who is well-known internationally for his engagement on almost all aspects of law and related disciplines. Other than him, whatever I could find comes basically from scholars of other connected disciplines such as political science or history. They are all renowned scholars not only in their primary disciplines but also with connected disciplines. Luckily I could find their writings directly relevant to me at one place even though they and many others may have written about the subject elsewhere too.

Primarily, they have written from the point of view of letting the readers know as to what are or have been the factors legally, politically or historically including the history of the Indian Constitution making that count for the success of incorporation and working of constitutionalism in India. Briefly, according to them historical background, the making of the Constituent Assembly, selection of the right persons for the various committees including the drafting committee and the social, political and economic vision of the makers and operators of the Constitution in its initial years are some of the major factors that have assured the success of constitutionalism in our country.

Finally, let me also remind the distinction drawn between the political and legal constitutionalism discussed above. In spite of all difficulties and drawbacks, including promulgation of Emergency from mid-1975 to early 1977, when parliamentary elections were delayed for some time, democratic elections for Parliament as well as State Legislatures have regularly taken place and the elected governments even at the village and municipal levels since mid-1990s have regularly taken charge that have constantly and progressively strengthened the democratic aspect of constitutionalism, without which legal aspect i.e. protection of the constitutional rights by courts could not be able to sustain constitutionalism.

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<sup>38</sup> See S. Choudhry, M. Khosla, & P.B. Mehta, *Locating Indian Constitutionalism* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 1 (S. Choudhry, M. Khosla & P.B. Mehta ed., 2016); Uday S. Mehta, *Indian Constitutionalism Crisis, Unity and History* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 38 (S. Choudhry, M. Khosla & P.B. Mehta ed., 2016).



## VI. COURTS' CONTRIBUTION TO CONSTITUTIONALISM

Even though there have been immense difficulties from the very beginning in the perception of the goals of the constitution in the eyes of the judges and representatives of people in the legislature and the executive, by and large the courts and the other two branches of the state have not indulged in head on collision, except in a few rare instances where both the sides had commitment to constitutionalism, without talking much about it, had difference in its perception and application. Without having undertaken any methodical study of all the cases, I just looked at some of the recent cases decided by the Supreme Court during the Chief Justiceship of Justice Deepak Mishra. Speaking initially in *State (NCT of Delhi) v. Union of India*<sup>39</sup> at one place he stated,

“The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution.”<sup>40</sup>

This statement does not tell us anything about constitutionalism as it has been understood and explained by constitutional scholars summarised in the foregoing pages. The Chief Justice repeats almost the same statement a few pages later in the following words,

“Thus, the word ‘governance’ when qualified by the term ‘constitutional’ conveys a form of governance/government which adheres to the concept of constitutionalism. The said form of governance is sanctioned by the Constitution itself, its functions are consistent with the Constitution and it operates under the aegis of the Constitution.”<sup>41</sup>

In continuation, he cites from the *Encyclopaedia Britannica*, the last sentence of which has some resemblance with the concept of constitutionalism as discussed above. It states,

“The essence of constitutionalism is the control of power by its distribution among several state organs or offices in such a way

<sup>39</sup> *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501, ¶58.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, ¶ 65.



that they are each subjected to reciprocal controls and forced to cooperate in formulating the will of the state...<sup>242</sup>

At another place, he cites from an earlier case a statement that refers to constitutionalism, where the court said,

“Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise merely embodies political hopes and ideals.”<sup>243</sup>

There is some hint or idea in this statement to this extent that mere existence of a constitution is no guarantee of constitutionalism. For constitutionalism, a constitution has to have some qualities which either restrain the government from acting against its citizens or compel it to act in their interest for ensuring a dignified life to each one of them. The Preamble of the Constitution, fundamental rights, directive principles, special provisions in Part XVI, Fifth and Sixth Schedules and the guarantee of free and fair regular elections from the national to village level governance are some of the aspects of the constitution that ensure observance of constitutionalism in our country. Democracy, which is one of the major pillars, rather the most important pillar of constitutionalism, which has been relied upon heavily in the above case, could have been very well utilised for the purpose of supporting constitutionalism as an aspect of our polity.

Among the other cases in which Justice Mishra refers to constitutionalism is *Navtej Singh Johar v. Union of India*<sup>44</sup> about which Justice Michael Kirby and Ramesh Thakur in their comment titled ‘The 2018 decision merits a rich tribute for its transformative constitutionalism’ state,

“Constitutionalism is the modern political equivalent of Rajdharma, the ancient Hindu concept that integrates religion, duty, responsibility and law. ... The verdict is a cornucopia of textual analysis, ancient and modern history, India’s political history, philosophical reasoning, and doctrinal application. It deserves a rich tribute for its transformative constitutionalism.”<sup>245</sup>

Justice Mishra, of course deserves rich tribute for converting the concept of transformative constitution developed in respect of the South African Constitution of 1996 into transformative constitutionalism and utilising it for a

<sup>42</sup> *Id.*, ¶ 66.

<sup>43</sup> *Id.*, ¶160. The earlier case from which the relevant words are cited is R.C. Poudyal v. Union of India, 1994 Supp (1) SCC 324 : AIR 1993 SC 1804.

<sup>44</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>45</sup> Michael Kirby & Ramesh Thakur, *Navtej Johar, a verdict for all times*, THE HINDU, December 31, 2018.

desired social cause without any offence either to the constitution or to the text of the Penal Code.<sup>46</sup> His words in this respect are worth quoting extensively. He writes,

“The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression ‘transformative constitutionalism’ can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times.”<sup>47</sup>

Again in the summary of his conclusion, in a further reiteration of the same concept with additional clarifications he says,

“Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.”<sup>48</sup>

The understanding of the transformative constitution which Justice Mishra has converted into transformative constitutionalism may not exactly be the same as conceived and explained by South African scholars, especially by

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<sup>46</sup> The Court has outlawed the offence of homosexuality without invalidating any provision of section 377 of the Penal Code. This what I had suggested in my comment on the Delhi High Court decision in the *Naz Foundation case* that in view of the Supreme Court decisions to the contrary on the constitutionality of the provisions of the Penal Code, the High Court could have reached the same decision without invalidating any provision of the Code. M.P. Singh, *Decriminalisation of Homosexuality and the Constitution* 2 NUJS L. REV. 361 (2009).

<sup>47</sup> *Id.*, ¶ 96.

<sup>48</sup> *Id.*, ¶ 253(iv).

Professor Klare,<sup>49</sup> but it takes us in the same direction that the Indian constitution has been made for social, economic, cultural and several other kinds of transformations that are required to establish a fair and just society in this country, removing multiple drawbacks from which it suffers. This kind of understanding and application of the constitution was deemed by its makers not only necessary but also urgent to remove multiple social evils in this country.

A methodological study of a reasonably longer time in the functioning of the Supreme Court produces reliable data of the court's contribution or otherwise in the promotion of constitutionalism, which helps in the forward march of the constitution in terms of constitutional vision of its makers as its efficient adjustment to changing needs of the society is in consonance with constitutional goals.

## VII. LEGAL SCHOLARSHIP AND CONSTITUTIONALISM

A lecture in appreciation of scholarship of Dr. Basu could most appropriately be concluded with the contribution of legal scholars more than of the judges because as a judge of Calcutta High Court for a short period, he did not get enough opportunity to apply his skills in the promotion of constitutionalism. However, as a constitutional scholar he contributed immensely by the production of his works that promoted a culture of constitutionalism in this country. Except a few like Seervai, M.P. Jain, P.K. Tripathi, V.N. Shukla, T.K. Tope and few others not many could follow the lead given by him in the promotion of constitutionalism. Apparently from the point of view of scholarship more and better work on constitutionalism has been done by scholars in other sister disciplines such as political science and history, a few of whom have been mentioned above. Among the legal scholars, I am unaware of anyone, except Professor Baxi, of having engaged specifically in the concept of constitutionalism in general or in India.<sup>50</sup> Dr. Basu's observations quoted above appear to have comprehended it both in positive and negative dimensions of requiring the state to discharge certain constitutional obligations as well as to refrain from engaging in activities that are inimical to the rights and liberties of the people.

<sup>49</sup> Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 150 (1998).

<sup>50</sup> Professor Baxi's three major writings on constitutionalism are: U. Baxi, *The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism* in INDIA'S LIVING CONSTITUTION (Zoya Hasan et al ed., 2002); U. Baxi, *Outline of a 'Theory of Practice' of Indian Constitutionalism* in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 92-118 (Rajeev Bhargava ed., 2008); U. Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183 (1999).

For an analysis of Prof. Baxi's writings on constitutionalism see Mathew John, *Reading Upendra Baxi as a Guide to the Study Indian Constitutionalism: A Comment*, 9 JINDAL GLOBAL L. REV. 330 (2018).

It is in this way that our Constitution draws a decent balance in political and legal constitutionalism by commanding the state to refrain from certain acts or exercise of powers affecting the basic rights and liberties of the people and requiring it to extend positive support to those who have been left behind through deliberate action or neglect of the state or the dominant sections of the society. Thus, not only negative refrains of the state in terms of legal constitutionalism but also the positive participation of all sections of the society in the making and running the state on democratic lines has been ensured in our Constitution. Hence, the Constitution of India ensures equal participation in democratic process of all sections of the society which is considered a better guarantee of constitutionalism than mere enumeration of certain rights to the people in the constitution. Even Professor McIlwain, who defined constitutionalism in terms of restraints on the powers of the state admits that without a written constitution or without having written a constitution, England continues to be the first and the best example of constitutionalism.<sup>51</sup>

Therefore, more than writing a constitution its sound democratic aspects ensuring equal inclusion and participation of all individuals and their groups or sections as equal citizens is the best assurance of constitutionalism in any country.<sup>52</sup> We in India may claim with some pride that our Constitution makers had that vision for us which they implemented with great care and fortitude in the formative years of constitutionalism which is generally recognised world over. Let us ensure not to ever deviate from that path of an inclusive and equal society that we have laid out in our founding document.

This essay is concluded with my sincere tribute to late Dr. D.D. Basu for his immense contribution to the understanding and success of constitutionalism in our country of vast verities of issues and contradictions.

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<sup>51</sup> Constitutionalism was established in England in 1669 and has continued to be stronger successively day by day until today because of strong constitutional traditions of individual rights and equally strong parliamentary democracy. The last sentence at the end of the book at page 180 consisting of Appendix reads (McILWAIN, *supra* note 1, 180),

“Yet it was the reformation Parliament, impelled by pressure from the King that brought about the greatest break with medieval ideas of law and government and initiated the intellectual movement which culminated later in the constitutional doctrine of the omnipotence of Parliament and the modern theory of legislative sovereignty.”

<sup>52</sup> Z. ELKINS, T. GINSBERG & J. MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 78 (2009) (enumerate three factors that ensure endurance of a constitution. They are: inclusion or inclusiveness, flexibility, and specificity. While, according to the authors, the Constitution of India contains all the three features, its inclusiveness is directly relevant for the purpose of constitutionalism which ensures equal participation of all sections of the society in the enjoyment of rights as well as participation in all aspects of political, social and economic life of the country. It is this factor which is directly relevant for the purpose of constitutionalism in India.)