

## Reflection on Indian and Australian Constitutionalism

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### ABSTRACT

Every country has its own Constitution but it does not imply that Constitutionalism is also flourishing there. The term constitution and constitutionalism reflects two different meaning. As per the scholars, Constitution entrusted with it the written and unwritten principles, which regulate the administration within a nation. On the other hand, 'Constitutionalism' refers to those values, ideas and principles that govern the government organs while performing their function and exercising their powers. These values are so inherent, that without which the spirit of constitution cannot be follows. In the general sense constitutionalism refers a government with limited power and it is antithesis of arbitrariness. Professor Gerhard Casper recognized the descriptive and prescriptive usage of constitutionalism. In descriptive sense it often associated with struggle by historians for acknowledgment of common people's "right to consent" in constitution and establishment of state institutions as crucial aspect of constitution, and In prescriptive approach it concern with functioning of state functionaries in such a manner that it is ensure compliance with constitutional spirit. Therefore, constitutionalism describes both source of power and limitation on that power. Once both India and Australia were British colonies, but after the independence, they adopted their own constitution, which has started to work in its own way. India has a unique experience with regard to constitutionalism. It has excellent administrative structure but excessive bureaucratization, pluralistic society and local politics, which often raise a question on constitutionalism. On the other hand Australian constitution emphasis on institutional arrangements for the purpose of protection of rights and it incorporates sufficient safeguards, which ensure collective decision making by politician. The object of the paper is to provide a comparative analysis of Indian and Australian constitutionalism that will be useful to utilize the experiences of one country to promote the constitutionalism. In this paper, firstly researcher discusses the concept of constitutionalism in India and Australia. Researcher attempted to explore that how the concept of constitutionalism is work and at what extent this concept is undermined in both the countries.

### Introduction

The idea of constitutionalism has emerged through an evolutionary process. If we traces from the time of Aristotle, Plato, Roman Empire we found that constitutionalism was existed at that time also. Roman Legal System recognized it by making difference between the term *lex* and *jus* where *lex* means rule made by state within the boundary of law and just means state made law should be just, reasonable and fair.<sup>1</sup>

India, which has world largest written constitution, embodied the seeds of constitutionalism since ancient era. The Vedas, two epics The Ramayana and The Mahabharata, Manusmriti, Kautilya, Arthashastra deals with a variety of system and provisions which explicitly contained in our present constitution such as the Vedas states that all human beings have right to equality in every aspect. In ancient time King (Raja) was considered as arbiter or judge who should be impartial and unbiased to resolve the differences arising out between its people (praja). Therefore at that time also the concept of independence of judiciary was existed. King has larger responsibility towards its kingdom for welfare of the common people and the citizens also have some duties and rights. In Mahabharata, it is mentioned that king should work for the welfare of aged, helpless, widows, lunatics, orphans, blinds, pregnant women and for those suffering from any calamities and disease, by fulfilling their necessities. Kautilaya stated that a man can be arrested if there is reasonable suspicion that he may commit serious crime but right from self-incrimination was also fundamental principle at that time also.<sup>2</sup> At present time, our Constitution provides a mechanism for state functionaries to act in accordance with constitutional spirit.

In Common, law of England, the idea of constitutionalism has been taking its shape since the incorporation of Magnacarta, in which King John gave assurance to its citizens for their civil liberties.<sup>3</sup> On later stage, it grew continued through the eminent jurist such as Bracton who drew a line between law and government. King is the supreme in government but he had to act in accordance with law. After that, it emerged further by incorporating a document 'Bills of Rights' in 1689, which acceded fundamental liberties of citizens in England.<sup>4</sup>

In United States of America, constitutionalism emerged in the form of constitutional guarantee of fundamental rights by making Bills of Rights, a part of Constitution. By its incorporation it puts emphasis on government to act in such a manner that no rights of citizens violated. In Australia there is also civil liberties guaranteed by its constitution although its constitution does not have a separate chapter on it but its constitution guides government functionaries while performing their function.

From above all illustrations, we can draw an idea that the phenomenon Constitutionalism is emerged in many countries through its constitution. Nevertheless, by this we cannot say that if a country has its constitution, constitutionalism is also flourishing there.

### Meaning of Constitutionalism

As per modern political views, there is difference between constitution and constitutionalism. A country may have constitution but it cannot be guaranteed that constitutionalism is also thriving there. For instance:-in a nation where absolute rule of dictator is prevalent, there may be constitution but it may be possible that constitutionalism is not followed

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there.<sup>5</sup> The term constitutionalism is made by combination of two words constitutional +ism which means philosophy of constitution. It regulates the function of state functionaries as per constitutional spirit.

According to law professor Schwartz in U.S.A. constitution can be defines as “a written organic instrument under which government powers are both conferred and circumscribed, he stated that this stress upon grant and limitation of authority is fundamental”.<sup>6</sup> To explain the term ‘constitutionalism’ Professor Vile stressed upon that the “western institutional theorists have concerned themselves with the problems of ensuring the exercise of governmental power, which is essential to the realization of values of their societies should be controlled in order that it should not itself be destructive of the values it was intended to promote”.<sup>7</sup>

Professor C.H. McILWAIN during his lectures delivered at Cornell University in 1938-39 has defined the term Constitutionalism in following words:-

“Constitutionalism has one essential quality; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”<sup>8</sup>

He admitted the discretionary power of government in policy matters, he alliterated-

“but the most ancient and most constant, and most eternal of the fundamental of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.”<sup>9</sup>

Another Professor Carl J. Friedrich defined constitutionalism in the sense of ‘limited government’ in following manner-

“Constitutionalism is built on the simple proposition that the government is a set of activities organized by and operated on behalf of the people but subject to a series of restraints which attempts to ensure that power which is needed for such governance is not abused by those who are called upon to do the governing.”<sup>10</sup>

As per N.W Barber constitutionalism is considered in positive and negative dimensions. In negative aspects it sets limits on state but in positive sphere it also lays prominence on competent and efficient set of state institutions ; able to serve the wellbeing of common people.<sup>11</sup>

The concept of constitutionalism has not its limited application. In a democratic country it applies in every sphere of Government functionaries. Even Constitutionalism imposes a duty on individual also to follow the guiding principles of constitution. In restrict sense constitutionalism is often associated with ‘limited government’, but in wider sense it enshrined all the ideas, patterns ,principles, values which can inferred from constitution. Constitutionalism is regarded as a synonym to legal enforcement of constitutional limits or perhaps a subset of those limits. It is considered as necessary, desirable and a feature of constitutional order.<sup>12</sup>

#### Usage of constitutionalism

The concept of Constitutionalism has both narrow and broad approaches. Prof. Gerhard Casper summarized this aspect in terms that “Constitutionalism has both descriptive and prescriptive connotations, when used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people’s right to consent and certain other rights, freedom and privileges. When used prescriptively, its meaning incorporates those features of government with the essential elements of Constitution”<sup>13</sup>

In broad sense it often associated with struggle by historians for acknowledgment of common people’s “right to consent” in constitution and establishment of state institutions as crucial aspect of constitution. For e.g. Law Professor Bernard Schwartz’s seeks to outline the origins of the U.S.A. Bills of Rights.<sup>14</sup> In narrow approach it concern with functioning of state functionaries in such a manner that it is ensure compliance with constitutional spirit. Therefore, constitutionalism describes source of power and limitation on that power also.

#### Fundamental Principles of Constitutionalism:

As per Hilaire Barnett constitutionalism governs the authority of

government actions i.e. act in accordance with wide philosophical ideals. He suggested that constitutionalism enshrined separation of power, limited government, accountable and responsible government.<sup>15</sup> Louis Henkin stated that rule of law, popular sovereignty, restricted government, separation of powers, resident control of military powers, independent judiciary are the essential pillars of Constitutionalism.<sup>16</sup>

Therefore, we can conclude that following are the essentials of constitutionalism-

1. Common Sovereignty (limited Government),
2. Separation of powers (Check and Balance),
3. Judicial Review,
4. Independence of Judiciary,
5. Rule of Law,
6. Federalism,
7. Civil Liberties,

#### Popular sovereignty

It means that government derives their power from public. In other words state cannot perform its functions until the public give their legitimate consent. The ultimate sovereignty lies in the nation. Popular sovereignty can be exercised either by way of free and fair election where public elect their representatives who performs functions as per will of the people. The other mechanism is the Referendum where a proposal having public importance referred to public for their views and suggestions. The term constitutionalism associated with the phenomena ‘limited government’, so the legitimacy of government act can be checked by popular sovereignty.

In India election are conducted in-between the specific intervals on the basis of universal adult franchise where common people choose their representatives as per their own will and candidates who won the election exercise their power keeping in mind the interest of common public. Therefore, from this we can infer that in India popular sovereignty exist in the form of free and fair election.

In Australia also elections are conducted in between specific interval on the basis of adult franchise.

#### Separation of powers

French philosopher Baron de Montesquieu described the concept ‘Separation of Powers’ in his book ‘The Spirit of the Law’ published in 1748. According to him, three organs of the government i.e. legislative, executive and judiciary exercise different powers. Legislature has been entrusted with the function of making legislation for the well-being of citizens , executive has power to execute the enactment enacted by legislature and judiciary interpret the legislation if any ambiguity arises.<sup>17</sup>

Montesquieu gave this model after observing the British Constitutional system where there is separation of powers between monarch, judiciary and parliament.

In India, the power is distributed between the executive, judiciary and legislative. Although it is not expressly mentioned in Constitution of India but from Article 50 of Constitution, which states that ‘the state shall take steps to keep separate judiciary from executive in the public services of the state’.<sup>18</sup> Article 53(1) and 154 (1) states that the executive power of union is vested in President and executive power of state is vested in governor of concerned state respectively. But in India absolute separation of powers is not existed as judiciary can encroach in the powers exercised by legislative by way of judicial review if the legislation does not meet the constitutional requirements. In some exceptional situations such as in case of Article 123 the President has legislative power to promulgate ordinance if situation mentioned in abovementioned article is fulfilled; same power is given to governor under article 213 of Constitution. The absolute application of doctrine of separation of power is not possible in Indian context because there is need to maintain check and balance.

Our Indian Constitution differs from Australian and American constitution in so far as in it there is no express provision, which

introduced the doctrine of separation of power by vesting the Legislative, Judicial and Executive powers in different organs.<sup>19</sup>

In Australia: The Commonwealth of Australia Constitution Act 1900 introduced the concept of separation of powers by vesting three different powers in three different government organs. As per section 1 Parliament is authorized to exercise legislative powers of commonwealth. Sec. 61 states that the queen through her representative i.e. governor general are authorized to exercise the executive powers of commonwealth of Australia. According to sec. 71, the federal Supreme Court is entrusted to exercise judicial powers. Therefore unlike India, Australian Constitution firmly recognizes the doctrine of separation of power. The doctrine is applicable between executive legislative powers but here is one exception that executive has power to make subordinate legislation but it always remains under the control of legislature.<sup>20</sup>

### Judicial Review

The constitution of any country is considered as living document which adapt itself as per changing needs and requirements of people. This statement is also equally applicable in Indian constitution because when constitution adopted there were different situation existed and today's era the needs of society has been completely changed. Judiciary has nurtured the provisions of constitution by exercising their power in the form of judicial review.

### Origin

The American Supreme court gave the concept of Judicial review in the famous case **Marbury vs. Madison**<sup>21</sup> Chief Justice Marshall observed that "The Constitution is either larger dominant law fixed by regular means or it is on a level with regular statutory acts, and like other acts is alterable when the legislature shall please to alter it...Certainly, all those who framed written constitution contemplate them as forming the fundamental and paramount law of the nation and, consequently, the theory of every such government must be that an act of legislature repugnant to the constitution is void. And further, "it is emphatically the province and duty of the judicial department to say what the law is".<sup>22</sup>

Later it was enacted in American Constitution and later on it adopted in India as basic feature constitution. According to Black Law Dictionary Judicial review means "a court's power to review the action of other branches and levels of government especially the power to declare immediate legislative and executive actions as being unconstitutional". Therefore it simply suggests that judiciary has power to declare any law as being unconstitutional if it does not at par with constitutional parameters.

In India: there are many provisions in Indian Constitution which deals with power of judicial review. Article 13(1) and 13(2) states that if any law whether pre constitutional and post constitutional is in consistent with Part III i.e. Fundamental Rights can be declared as void. Judicial review is weapon in the hands of judiciary to maintain check and balance on the legislative and administrative action. The word law has wider connotations under article 13 of Indian Constitution.

In Australia: the Australian legal system can be described as "government under the constitution". In Australia there is federalism which put stress on that the Australian parliament have power to legislate on the subjects which are listed such as trade and commerce, defense, taxation etc. and on residual matters state parliament have power to legislate. By this, we can infer that The Constitution of Commonwealth of Australia put limits on government's organs and binds them to comply with the limits. The Commonwealth of Australian Constitution Act 1900, clause 5 states that all laws enacted by Australian Parliament shall be binding on courts, common people and every part of commonwealth.<sup>23</sup> The power to check that whether the laws are in accordance with Australian Constitution is vested with High Courts of Australia.

The power of judicial review is not expressly set out in Australian Constitution but we can infer it from a case that is **Australian Communist Party v. Commonwealth**<sup>24</sup> where it is stated that the high

court of Australia is the final arbiter of the constitution and general laws not the executive or Australian parliament.

### Independence of Judiciary

It is universally accepted that independent judiciary is one of the important pillar of the democratic country. Three features lies in a truly independent judiciary "first, judiciary always remain impartial. Its decisions are not influenced by a judge's own personal interest. Second, judicial decisions are binding on all i.e. once it rendered are respected. Third, Judiciary always remains free from interferences."<sup>25</sup> The principle of independent judiciary is also recognized in international law such as The Universal Declaration of Human Rights, 1948, The International Covenant on civil and Political Rights 1966 all states that everyone is entitled for free and public hearing by an impartial and independent judicial tribunal established by law for determination of their civil rights, obligations or if there is any criminal charge against them. Judiciary play vital role in protecting rights of civilians in a nation. The term 'independence of judiciary' is not defined in any constitution but by different provisions of constitution we can infer it.

In India: at the time of framing of Constitution, constitutional framers were worried about the kind of judiciary, which our country should have. Dr. B.R. Ambedkar responded this concern in the following words: 'There can be no difference of opinion in the house that our judiciary must be both independent of the executive and must also is competent in it. And the question is how these two objects can be secured'.<sup>26</sup> There is a maxim "ubi jus ibi remedium" which means where there is a right, there is remedy also. The fundamental rights have no importance if there is no mechanism to enforce that, and independent judiciary is the mechanism. In India judiciary is considered as guardian for protecting fundamental rights conferred by part III of the Constitution. Many provisions are inserted in Indian Constitution, which reflects that Indian judiciary is independent which are as follows:

1. **Security of tenure:** Supreme Court and high court judges once appointed remains in office until they attain the age of retirement. In the case of judges of Supreme Court, the age of retirement is 65 years<sup>27</sup> and in the case of high court judges the age of retirement is 62 years.<sup>28</sup> Therefore, they cannot remove from office until they reach to the age of retirement or on order of president on the ground of incapacity and proved misbehavior.<sup>29</sup>
2. **Salaries and Allowances of Judges:** the salaries and allowances are fixed by Parliament by law until provisions are not made on that behalf given as per second schedule of Constitution. Therefore, this also suggest the fact that our judiciary independent.
3. **Jurisdictional powers of the court:** The Parliament can enhance the jurisdiction of the court by amendment in constitution but cannot curtail the jurisdictional powers of the court.
4. **No discussion on the conduct of a judge in Parliament and state legislature:** there shall be any discussion on the conduct in Parliament or in State Legislature on the conduct of a Judge.<sup>30</sup>
5. **Court of record:** "Supreme Court and high court have power to punish for their contempt as well as contempt of subordinate courts".<sup>31</sup>
6. **The separation of judiciary from executive:** Article 50 of the Constitution state that "state shall ensure to take steps to keep separate judiciary from executive".

From above all features mentioned in constitution, we can conclude that Indian judiciary is independent.

**In Australia:** Chapter III of the commonwealth Constitution deals with the courts generally. In Australia, each state has their own constitution but they do not provide protection to territory or state judiciary to the same extent. Judicial independence is preserved in Australia as much as by conventions, agreements as by written law.

- i) **Term of office:** The judge holds office till lifetime and cannot be removed except on order of Governor –General in council on the grounds of proved misbehavior and incapacity.<sup>32</sup>

- ii) Salaries and Allowances: The remuneration is fixed; it cannot be diminished during their term as judicial officer except in cases of any economic crises occur in the country.
- iii) Immunity from suit: The judges are immune from suit because it affects their ability to deal with matter in effective and impartial manner. From abovementioned features we can infer that judiciary is also independent in Australia.

#### Rule of law

Rule of Law is one of the important mechanisms to protect the democratic values of a country. This term coined by the professor A.V Dicey. According to him Rule of Law embodied three principles in itself which are following:

- i) Supremacy of law: it provided the absolute supremacy of law which is opposed to arbitrary power of government. It can understand as that a human being can be punished for breach of law not for anything else.
- ii) Equality before law: It states that all are subject to ordinary jurisdiction of courts. Another meaning of it is that no one is above the law except the king who can do wrong. Every individual whether he is ordinary person or an official are subjects of rules of ordinary courts.<sup>33</sup>
- iii) Constitution is the outcome of ordinary law of land: It states that in England, the source of rights of an individual is not the written Constitution but the rules imposed by the Judiciary i.e. it focuses on the laws made by Judges.<sup>34</sup>

The first two principles are also applicable in India but the third principle is not applicable because source of individual rights are written constitution in India.

**In India:** The Indian constitution embodied the principle of rule of law in its constitution by several provisions. According to Professor M.P Jain, in modern democracies there are two derivatives of rule of law i.e. judicial review and individual liberties.<sup>35</sup> In India Prof. Dicey concept of rule of law has been accepted except his third principle that states the judge made laws are source of individual rights. Rule of law envisages 'the concept of government of law not of men'. In many landmark judgments, Supreme Court underlined the importance of rule of law by featuring it as basic feature of constitution.

**In Indira Nehru Gandhi v. Union of India**<sup>36</sup>, the Supreme Court held that Rule of law is the basic feature of constitution.

**In People Democratic Rights v. Union of India**<sup>37</sup>, The Supreme court state that rule of law does not implies that law protection should only available to some fortunate ones rather than it implies that law protection should be available to all for protection of their civil and political rights. Prof A.V. Dicey termed the concept of equality before under Article 14 of Constitution of India as Rule of law. 'Which states that' the state shall not deny to any person equality before law or the equal protection of the laws within the territory of India'.

In Australia: there is federal form of government. State has their own constitution along with the constitution of Commonwealth of Australia Constitution Act, 1900. Australian Constitution does not specifically holds the provision of Rule of law but in the case of **Australian Communist Party v. Commonwealth**,<sup>38</sup> Justice Dixon of the Australian High Court interpreted the rule of law as unwritten 'assumption ; as bedrock of the Constitution of Australia.

#### Federalism:

A country constitution can be divided either into federal or unitary feature. As unitary feature of Constitution, the power is vested with sole government, i.e. central government while on the other hand the federal feature of constitution implies on division of power between state and central government. Federalism is necessary for cooperation between state and Centre, which is known as cooperative federalism.

In India: there is division of power between states and Centre in India which specifically provided under constitution of India. Seventh Schedule of constitution provides three list Union List, State List and

concurrent list.<sup>39</sup> Parliament have exclusive power to make laws with respect to matters listed in union list, State legislature have power to make laws with respect to matters enumerated in state list and Parliament and State legislature both have powers to make laws in respect of matters listed in concurrent list. If there is difference in laws enacted by state legislature and parliament with respect to matters enumerated in concurrent list, laws enacted by parliament shall prevail.<sup>40</sup>

In India true federalism is not existed because sometimes such as in emergency provisions Union govt. acquired the whole power. Due to this reason Prof. Wheare considered Indian Constitution as "Quasi federal in nature" and Prof Jennings calls it as "a federation with strong centralizing tendencies". The concept of concurrent list has been borrowed from Australian Constitution.

In Australia: there is federal constitution as well as state constitutions of every state in Australia. The Commonwealth of Australia Act 1900 prescribes 40 heads where federal government have power to make laws but this power is not exclusive as state government also have the powers to legislate in this heads concurrently.<sup>41</sup> But some heads are of such nature due to other provisions of Constitution where central government have exclusive power to make laws for example defense, external affairs etc. except union exclusive heads and concurrent state have exclusive power to legislate for example in the head of health, education, railways and other development associated activities. In case if any inconsistency is arises that state made law is invalid to the extent of inconsistency.<sup>42</sup>

#### Civil liberties

Civil liberties mean those basic freedoms, which are available to all citizens due to his birth as human being, and protected by Nation's Constitution. Civil liberties play an important role in overall development of an individual i.e. spiritual, moral and intellectual development. For the growth of any country civil liberties of its citizens must be protected by any legal instrument. These are recognized as human rights at international level and Fundamental rights at nation level.

**In India:** Civil liberties are incorporated in Indian constitution in the form of Part III (Art. 12-35) as fundamental rights. Indian adopted the American model of fundamental rights. These rights are essentials for preserving the individual identity as well as for overall personality development of an individual. These rights are basic to maintain a democratic order of a country. One essential feature of these rights is that they are not absolute but can be restricted by reasonable restrictions imposed by valid law. Reasonable restrictions are necessary to maintain balance between social interest and individual liberty. While emphasizing on importance of fundamental rights Justice Bhagwati in **Maneka Gandhi v Union of India**<sup>43</sup> remarked that "These fundamental rights represent the basic values cherished by the people of India since Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his or her personality to the fullest extent. They weave a pattern of guarantee on the basic structure of human rights and impose negative obligations on the state not to encroach on individual liberty in his various dimensions".<sup>44</sup> In India there is remedy also for enforcement of fundamental rights by Supreme Court and High Court.<sup>45</sup> The concept of freedom of trade and commerce has been adopted from Australian Constitution.

**In Australia:** The Australian Constitution does not contain an explicit provision for civil liberties like in India Part III of the Constitution contain the provision of fundamental rights. However, there are some rights are protected under its Constitution such as acquisition of property, right to trial by jury, trade and commerce etc. There was proposal on which discussion held to adopt American model for Australian bills of rights. But it was considered England inherited legal system adequately protects the rights and separate bills of rights is not necessary.<sup>46</sup>

#### Role of Judiciary in Promoting Constitutionalism



Judiciary plays a very important role in preserving constitutional values through its power of judicial review. Through various landmark judgments, Supreme Court underlined the importance of constitutionalism.

In **I.R. Coelho v. State of Tamil Nadu**,<sup>47</sup> the Supreme Court recognized the constitution as living document, which adapt itself as per changing requirements of society. Concept of constitutionalism is principle, which is legally, recognized by law describe the notion of limited government so it does not destroy the spirit of constitution upon which a democratic society has been built. The term constitutionalism includes the separation of power with necessary check and balance, an independent decision making body i.e. judiciary .the basic element of the principle of constitution is to protect basic civil liberties that is in the form of fundamental rights.

In **Rameshwar Prasad and others v. Union of India**,<sup>48</sup> the Supreme Court observed that the principle of constitutionalism is antithesis of absolutism. The constitutionalism lays its foundation on rule of law, which ensures the supremacy of law. Constitutionalism is about aspirations and limits.

In **Government of NCT Delhi v. Union of India**,<sup>49</sup> the Supreme Court observed that the constitutional functionaries gave a greater sense of responsibility to preserve this credible instrument from which they derive their powers and authority as a natural corollary. They must nurture and cultivate a spirit of constitutionalism in which every action performed by them is governed by law and in accordance with the spirit of constitution.

In **Navtej Singh Johar v. Union of India**,<sup>50</sup> The Supreme Court again enlightened the transformative constitutionalism, which is summarized In following words: "Constitutionalism is the modern political equivalent to Raj dharma, The ancient Hindu concept that integrated law, religion, duty and sense of responsibilities. The verdict is 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".

Justice Deepak Mishra stated that "The notion of transformative constitutionalism has at its kernel a promise, oath and thirst to transform the society of India so as to hold therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set outline of the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a realistic lens which will help in recognizing the realities of the current day. Transformations a singular term is totally opposed to something which is static and dormant, rather it signifies transformation, 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>51</sup>

#### He further in continuation of that stated that

"Transformative constitutionalism not only includes within its wide border the recognition of the rights and dignity of individuals but also propagates the nurturing and growth of an environment in which every human being is bestowed with plenty of opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very foundation 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 glorious future."<sup>52</sup>

The Supreme Court viewed the constitutionalism in the form of transformative constitutionalism where they emphasis on non-discriminatory social ,political and economic development of county and protecting civil and political rights of common people as basic tenets of constitutionalism.

#### Challenges to Constitutionalism in Modern Era

#### 1) Stroke on civil liberties:

Civil liberties are fundamentals in any thriving democracy and considered as essential principle of constitutionalism. Many countries in the world-embodied civil liberties in their written constitution .The countries that do not have written constitution also protect civil liberties such as United Kingdom where Bills of Rights contain list of liberties and rights of common people of England.<sup>53</sup>

**In India:** Since last some months, we witnessed decline in civil liberties. In Democracy Index of 2019 released by Economic Intelligence Unit India dropped 10 places and reached at rank of 51.India witnessed the second highest decline in civil liberties among 167 countries of the world. Economic Intelligence Unit measures five parameters for preparing annual Democracy Index, which are followings:

- 1) Electoral pluralism which include universal adult franchise, free and fair election and equality in campaigning opportunities etc.;
- 2) Governance, which includes government effective policy for welfare of citizens;
- 3) Political Participation (participation of women in election and their representation in parliament and state legislature, voters representation);
- 4) Political culture (Popular support for democracy) and;
- 5) The civil liberties, which includes (freedom of press and no restriction on internet use, freedom of peaceful protest etc.<sup>54</sup>

The primary reason for declination in Democracy Index is restriction imposed in Jammu and Kashmir after scrapping of article 370 and ongoing protest against amended Citizenship Law.<sup>55</sup>

Repeatedly and vibrant invocation of Section 144 of Code of Criminal Procedure,1973 which authorizes the executive magistrate to issue prohibitory orders in case of danger is apprehended or nuisance is created is also another blow on civil liberties.<sup>56</sup> In recent times section 144 imposed in many areas of the country such as in Uttar Pradesh, in Bangalore, Delhi. Restrictions on internet access, on freedom of speech and expression, freedom of press, and on free movement in Jammu and Kashmir in the awake of government move of removing special status under Article 370 of Indian Constitution is masterstroke on civil liberties.

The Supreme Court also in case of **Anuradha Bhasin vs. Union of India**<sup>57</sup> ordered the government to review its order of restrictions in J&K and said that government cannot make blanket use of section 144 to curb liberties it should in proportionate to requirement of security of state and maintenance of public order however the court orders falls of its expectations at this point that it did not give order to the government for immediate restoration of civil liberties, neither it declared right to access internet as fundamental right. However, decision has a great impact for enforcement of civil liberties, which are essential for any vibrant democracy.<sup>58</sup>

Indian Constitution protects expression of individual opinion, legitimate expression and reasonable dissent But here question is arise whether on expression of reasonable dissent invocation of Section 144 is justifiable. Therefore, the biggest responsibility of government is arising to maintain social balance and individual liberty so that both can prosperous simultaneously.

The Ex Raw (Research and Analysis Wing) Hormis Tharakan while delivering his speech in Seminar on international legal norms put stressed on three measures which a government of country should take to protect its citizens which are as follows –

- Justification of restrictions publicly;
- Putting restrictions in judicial review zone;
- Putting sunset clause, which means that temporary, should not become permanent.

**In Australia:** Australian Constitution does not contain a separate chapter for civil liberties except few provisions like Fundamental rights in Indian Constitution. Therefore there is lack of constitution protection to civil liberties and in case of violation the civil liberties cannot

enforced through judiciary as they are not specified in constitution. As per 2019 CIVICUS Monitor, which is global research collaboration works to track civil liberties among various nations of the world observed that Australia has been become from 'open country' to 'narrowed' for civil space.<sup>59</sup> It also observed that the erosion of civil liberties especially the freedom of press is in stress in Australia. Australian Government conducted raids in media organization, journalist's homes and the whistle blowers who are seeking to ex-pose the public interest issues. They are booked and face prosecution under the Intelligence Service Act on the ground of security of the state. New laws have a very alarming effect on civil liberties especially on freedom of press and whistleblowers. Campaigns Director Tom Clarke of Human Rights Law Centre put stressed on the need of a Human Rights Charter in Australia for protection of Civil liberties or fundamental rights from the oppression of government actions by limiting their action. Therefore this is a serious concern in Australia.<sup>60</sup>

Therefore, for successful implementation of principles of constitutionalism it is necessary to assure the civil liberties of citizens.

### 2) Dubious Cooperative Federalism

Federalism is a core principle of constitutionalism, which means division of powers between state, and Centre. Another phenomenon is emerged from this i.e. cooperative federalism which means the government at central level and state level work cooperatively and collectively to maximize the benefit of its policy for wellbeing of common people.

Indian government is considered as quasi federal in nature where division of powers between state and Centre with strong centralizing tendency. However, in recent times our country witnessed conflict between central and state government due to ideologies of different political parties. The most recent example of this is passing of resolution against Amended Citizenship Law by many state assemblies such as Punjab, Rajasthan and Kerala state Assembly etc.

As per Article 256 of Indian Constitution the State is bound to ensure the compliance with the enacted laws of the Parliament. Here the important issue is raises concerns that can the state legislature make reasonable dissent against union government enacted law. Kerala government challenges the constitutionality of CAA under article 131 in Supreme Court based on violation of Fundamental rights and destroying the values of secularism, which is essential feature of pluralistic society.<sup>61</sup> Therefore, it also raises the most vivacious issue before Supreme Court that if a state government has a legitimate expression of dissent, can it challenge the constitutionality of Centre enacted law or it will be considered as stroke on cooperative federalism. Decision of Supreme Court on this issue will be core impact on federalism that is indispensable principle of constitutionalism.

### 3) Failure of Legislature to legislate

Doctrine of separation of power is well-established principle of constitutionalism. It states that there is division of powers between three organs of government. In India there is no absolute separation of power but partial separation of power is exercised here so that principle of check and balance can be ensured. As per doctrine of separation of power legislature is entrusted with the task of enactment of law. Indian Parliament is continuously failing to legislate in some areas where enactment of an effective legislation is need of the hour. The most prominent example of this is lack of efficient law to regulate incidents of mob lynching where people take law in their hands and killed a person sometimes based on suspicion that they are child lifters or cow smugglers. In spite of Supreme Court, comprehensive guidelines in a landmark case of **Tehseen S. Poonawala v. Union of India**<sup>62</sup> the legislature had failed to perform its function.

In the case Justice **K.S. Puttaswamy v. Union of India**<sup>63</sup> The Supreme recognized right to privacy as fundamental right but legislature failed to enact a effective legislation to meet the requirement of protection of data in digital era. Cyber security is an important concern, which requires

amendment in Information Technology Law as per increasing growth in the field of technology. Recently, Supreme Court gave the Judgment relating to electoral reforms in which it direct the candidate contesting election to publish in national and regional newspaper about their criminal records so public can be aware about the candidate background. The Supreme Court also directed the political party to give the justification that, why they gave ticket to a candidate who have criminal background leaving those who does not have so that public faith in responsible and accountable government can be maintained. Earlier also Supreme Court gave direction in various cases and requires amendment in The People of Representation Act 1951, but legislature also failed in this regard.

### Blow on independent Judiciary

Independent judiciary is considered as an important pillar of any democratic country. In above-mentioned discussions we witnessed various provisions in Australia and Indian Constitution, which secure the independency of judiciary, but there is one lacuna in appointment of judges in Australia where Governor-General in Council appoints the judges. This provision shows that executive have complete discretion to appoint judges which is not vigorous for independent judicial system.

### Conclusion

Constitutionalism is a philosophy that ensures that constitution does not only provide powers to various organs of government but also put limits on the power of government so misuse of power can be restricted. Constitutionalism implies the ideas, behavioral patterns, attitude, constitutional values that explicitly are not mentioned in constitution but impliedly guides the government organs while performing their functions. Thus, the constitutionalism does not have limited application but it incorporates in every sphere where functions are performed and state functionaries exercise powers. Constitutionalism has both prescriptive and descriptive usages. Rule of law, popular sovereignty, limited government, separation of power, judicial review, independent judiciary are some important principle tenets of constitutionalism. As British Government ruled India and Australia both in past, therefore both nations Constitutions have many similarities. In fact Australian Constitution derived from Commonwealth of Australian Act 1900, which is enacted by British Parliament in 1900 and came into force in 1901. Judiciary played a very important role in shaping the notion of constitutionalism. The Indian Judiciary termed Indian Constitutionalism as 'transformative Constitutionalism'. Nevertheless, in modern era there are burgeoning challenges to constitutionalism due to excess of government power that required healthy discussions to resolve these challenges.

<sup>1</sup> Mahendra Pal Singh, Constitutionalism in the Indian Comparative Perspective, NUJS LAW REVIEW (Feb 1, 2020, 5.30 PM), <http://nujlawreview.org/2019/07/25/constitutionalism-in-the-indian-comparative-perspective/>.

<sup>2</sup> [https://shodhganga.inflibnet.ac.in/bitstream/10603/45856/1/11\\_11\\_chapter%20.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/45856/1/11_11_chapter%20.pdf) (Feb 15, 2020, 4.45 PM)

<sup>3</sup> DR. J.N. Pandey: Constitutional Law Of India, 60(56th ed. Central Law Agency 2019)

<sup>4</sup> Ibid.

<sup>5</sup> Mp Jain, Indian Constitutional law, 6(7th ed. Lexis Nexis 2016).

<sup>6</sup> Bernard Schwartz, Constitutional Law: A Text Book, 1(1972).

<sup>7</sup> Mp Jain, Indian Constitutional law, 6(7th ed. Lexis Nexis 2016).

<sup>8</sup> C.H. McIlwain, Constitutionism, Ancient And Modern 21-22 (Cornell University Press 1987)

<sup>9</sup> Ibid, 22.

<sup>10</sup> Mahendra Pal Singh, Constitutionalism in the Indian Comparative Perspective , NUJS Law Review (Feb 1, 2020, 5.35 PM) <http://nujlawreview.org/2019/07/25/constitutionalism-in-the-indian-comparative-perspective/>.

<sup>11</sup> N.W Barber, The Principles Of Constitutionalism 2-3( 1st ed. Oxford University Press 2018).

<sup>12</sup> N.W Barber, the Principles of Constitutionalism 1( 1st ed. Oxford University Press 2018)

<sup>13</sup> Prof. (Dr.) Nuzhat Parveen Khan, Comparative Constitutional Law 64(2nd ed. Satyam Law International 2019).

<sup>14</sup> Dr. Vijay Pal Singh, Constitutionalism (Feb 15, 2020, 5.10PM), [https://www.academia.edu/40415135/Research\\_Paper\\_on\\_Constitutionalism](https://www.academia.edu/40415135/Research_Paper_on_Constitutionalism).

- <sup>15</sup> Hilaire Barnett, *Constitutional And Administrative Law* (4th ed. Cavendish Publishing Limited 2002).
- <sup>16</sup> Michel Rosenfeld, *Constitutionalism Identity, Difference And Legitimacy: Theoretical Perspective* 4042 (Duke University Press, 1994).
- <sup>17</sup> Dr. J.J.R Upadhaya, *Administrative Law* 45-46 (11<sup>th</sup> ed. Central Law Agency, 2019).
- <sup>18</sup> Indian Constitution, art.50.
- <sup>19</sup> Prof. Dr. Nuzhat Parveen Khan, *Comparative Constitutional Law* 291(2<sup>nd</sup> ed. Satyam Law International, 2019).
- <sup>20</sup> *Ibid*, 283-284.
- <sup>21</sup> 2 L Ed 60: 5 US (1 Cranch) 137 (1803).
- <sup>22</sup> Dr. J.N. Pandey, *Constitutional Law Of India* 29(56<sup>th</sup> ed. Central Law Agency 2019).
- <sup>23</sup> Prof. Dr. Nuzhat Parveen Khan, *Comparative Constitutional Law* 303 (2<sup>nd</sup> ed. Satyam Law International, 2019).
- <sup>24</sup> (1951) 83 CLR 1.
- <sup>25</sup> Prof. Dr. Nuzhat Parveen Khan, *Comparative Constitutional Law* 254 (2<sup>nd</sup> ed. Satyam Law International, 2019).
- <sup>26</sup> *Ibid* 270.
- <sup>27</sup> Indian Constitution art.124 cl.2.
- <sup>28</sup> *Ibid*, art. 217 cl.1.
- <sup>29</sup> *Ibid*, art. 124 cl. 4.
- <sup>30</sup> *Ibid*, art.211 & art. 121.
- <sup>31</sup> *Ibid*, art 129 & art 215.
- <sup>32</sup> Commonwealth of Australia Constitution Act 1900, S. 72 Cl. (ii).
- <sup>33</sup> Commonwealth of Australia Constitution Act 1900, S.72 Cl.(iii).
- <sup>34</sup> DR. J.N. Pandey, *Constitutional Law Of India* (56<sup>th</sup> ed. Central Law Agency 2019).
- <sup>35</sup> MP JAIN, *The Indian Constitutional Law* (7<sup>th</sup> ed. Lexis Nexis, 2016).
- <sup>36</sup> AIR 1975 SC 2299.
- <sup>37</sup> AIR 1982 SC 1476.
- <sup>38</sup> (1950) 83 CLR 1 at 193.
- <sup>39</sup> Indian Constitution art. 245.
- <sup>40</sup> *Ibid*.art.254 cl.1.
- <sup>41</sup> The Commonwealth of Australia Act 1900 Sec. 51.

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- <sup>42</sup> *Ibid* Sec. 109.
- <sup>43</sup> AIR 1987 SC 619.
- <sup>44</sup> Dr. J.N Pandey, *Constitutional Law Of India* 61(56<sup>th</sup> ed. Central Law Agency, 2019).
- <sup>45</sup> Indian Constitution art.32 & art 226.
- <sup>46</sup> Prof (Dr.) Nuzhat Praveen Khan, *Comparative Constitutional Law* 375 (2<sup>nd</sup> ed. Satyam Law Agency, 2019).
- <sup>47</sup> AIR 2007 SC 861.
- <sup>48</sup> (2006) 2 SCC 1.
- <sup>49</sup> (2018) 8 SCC 501.
- <sup>50</sup> AIR 2018 SC 4321.
- <sup>51</sup> Mahendra Pal Singh, *Constitutionalism In the Indian Comparative Perspective*, NUJS Law Review (Feb 18, 2020, 3.30PM), <http://nujlawreview.org/2019/07/25/constitutionalism-in-the-indian-comparative-perspective/>.
- <sup>52</sup> *Ibid*.
- <sup>53</sup> DR J.N. Pandey, *Constitutional Law Of India* 60 (56<sup>th</sup> ed. Central Law Agency, 2019).
- <sup>54</sup> Report of *Economic Intelligence Unit* (Feb 18, 2020, 4.00 PM) <http://www.eiu.com/>.
- <sup>55</sup> Vignesh Radhakrishnan and Sravya C., *How has The State of Democracy in India changed since 2008?*, THE HINDU, January 23, 2020 at 9.
- <sup>56</sup> Code of Criminal Procedure 1973, S. 144.
- <sup>57</sup> Decided by Supreme Court on 09.01.2020 (Feb 18, 2020, 4.09 PM) <https://www.thehindu.com/opinion/lead/a-net-verdict-that-falls-short-of-expectations/article30601655.ece>.
- <sup>58</sup> Suhrith Parthasarathy, *A Net Verdict that falls short of Expectations*, THE HINDU, January 20, 2020, at 8.
- <sup>59</sup> <https://www.theguardian.com/world/2019/dec/07/australias-civil-rights-rating-downgraded-as-report-finds-world-becoming-less-free> (Feb 18, 2020, 6.15 PM).
- <sup>60</sup> *Ibid*.
- <sup>61</sup> K Venkataramanan, *Can States Challenge the Validity of Central Law?*, The Hindu, January 19, 2020 at 12.
- <sup>62</sup> AIR 2018 SC 3354.
- <sup>63</sup> AIR 2017 SC 4161.