

# Constitution and constitutionalism : a study perspective in India

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## Introduction

Constitutionalism is a philosophy which is essential for a democratic setup. It ensures that the freedoms of the individual are given primacy and the State does not encroach upon the liberty of the citizen. It ensures that the government is limited and prevents it from turning the democratic setup into dictatorial and authoritative.

## Meaning

Constitutionalism is a philosophy which is evolutionary in nature. But the central point of Constitutionalism is a "Limited Government". Constitutionalism recognises the need for a

government but at the same time also insists upon restraining its (government's) power.

According to [Michel Rosenfeld](#), there is "no accepted definition of constitutionalism but, broadly, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights".

According to [Giovani Sartori](#), constitutionalism calls for restriction on the arbitrary power of the State.

Similarly according to [McIlwain](#), constitutionalism means "legal limitation on government. It is the antithesis of arbitrary rule. Its opposite is a despotic government, the government of will instead of the law.

Thus constitutionalism means the limitation of government by law. [Magna Carta \(1215\)](#) implies Constitutionalism. It placed a restriction on the power of England's King John.

[Carl Friedrich](#) writes in his *Constitutional Government and Democracy* that Constitutionalism is built on a simple idea, that the government is organised by people and operated on behalf of the people, but is 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.



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## Elements of constitutionalism

According to [Louis Henkin](#) Constitutionalism implies,

1. Popular sovereignty
2. The supremacy of the Constitution and Rule of Law
3. Political Democracy
4. Representative Limited Government
5. Separation of Power
6. Civilian Control of the Military force
7. Police governed by Law and Judicial Control
8. An Independent Judiciary

All these elements restrict the power of the State in a particular way.

According to Michel Rosenfield, modern Constitutionalism requires limits on the power of the government along with the adherence to the Rule of Law and protection of Fundamental Rights.

## Negative and positive constitutionalism

### Negative constitutionalism

It is to be noted that the traditional idea of Constitutionalism (as stated above) is a Negative notion of Constitutionalism. Nick Barber calls it "negative Constitutionalism". In law, a negative understanding of an idea means when it prevents an entity from doing a certain act.

The traditional understanding of Constitutionalism fails to explain the positive role that the States play. The common understanding of Constitutionalism is negative in nature because it considers Constitutionalism as only restricting and limiting the power of the state. From the prism of negative Constitutionalism, a State is a danger that needs to be constrained. The role of law is to limit the dangerous capacities of the executive and legislative branches. For instance, the purpose of Separation of power is to protect the liberty of citizens, by restricting the arbitrary action of the state.

Negative Constitutionalism requiring a constitutional structure which prevents the State action is not always desirable. This understanding of Constitutionalism makes it harder for the state to provide health-care and poverty alleviation schemes, which requires government intervention. Thus it is not desirable especially in India which is a welfare state and which aspires to social and economic justice as well along with political justice.

It is because of this that Jeremy Waldron criticises negative Constitutionalism as being anti-democratic. For Waldron, this understanding of Constitutionalism is fundamentally flawed. For him, this understanding of Constitutionalism is against the notion of Egalitarianism which for Waldron is at the core of a Democracy.

### Positive constitutionalism

Positive Constitutionalism challenges the understanding of seeing Constitutionalism entirely in terms of limits upon the State. The positive aspect of Constitutionalism requires the State to be seen in the light of a "Welfare State". The positive version of Constitutionalism requires the creation of effective and competent state institutions to ensure the well being of its citizens.

According to M.P. Singh if a Constitution ignores accommodation and respect for diversity and plurality in a society then it fails to meet the requirement of constitutionalism. Several older constitutions that have ignored this aspect of constitutionalism have introduced it either through judicial interpretations, amendments, appropriate legislation and constitutional application.

# Need for constitutionalism

The requirement of Constitutionalism as a limitation on the power of the state has been explained by Prof. B. O. Nwabueze in his book "[Constitutionalism in the Emergent States, 1973](#). According to him " *the last 30 years (starting from 1973) has demonstrated that the greatest danger to constitutional government in emergent states arises from the human factor in politics*", specifically "*from the capacity of politicians to distort and vitiate whatever governmental forms may be devised*".

According to him, "*a lot depends upon the actual behaviour of these individuals and upon their willingness to observe the rules*."

He says that "*the successful working of a constitution depends upon the 'democratic spirit', that is, a spirit of, fair play, self-restraint and mutual accommodation of differing interests and opinions. There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental powers*".

In [S.R. Chaudhuri v. State of Punjab \(2001\)](#), constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "political expediency". We should not allow the erosion of principles of constitutionalism.

In [New India Assurance Company Ltd. v. Nusli Neville Wadia \(2007\)](#), the Court said that "For proper interpretation of Constitutional provisions not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein."

## A constitution is no guarantee for constitutionalism

A written Constitution is no guarantee for Constitutionalism. Even Nazi Germany had a constitution but that does not mean that it adhered to the philosophy of Constitutionalism be it a negative or positive aspect of it.

As the Supreme Court said in [S.R. Chaudhuri v. State of Punjab \(2001\)](#) "the mere existence of a Constitution, by itself, does not ensure constitutionalism. What is important is the political traditions of the people and its spirit and determination to work out its constitutional salvation through the chosen system of its political organisation."

Unless primacy to democratic policies and individual rights is not given Constitutionalism cannot survive. Subtle assaults to individual rights especially freedom of Speech and Expression and privacy, such as sedition laws, surveillance laws, undermine Constitutionalism.

Agin in [R.C. Poudyal v. Union of India \(1994\)](#) court said that,

"*Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of people that give meaning to a Constitution which otherwise would merely embody the political hopes and ideals*".

For constitutionalism, a constitution needs to have some qualities which would either restrain the government from acting against its citizens or compel it to act for securing a dignified life to each one of them

## Constitutionalism in India

Various Constitutional provisions contain in itself, *inter-alia* the philosophy of Constitutionalism.

### A state by the constitution

The Indian State is a result of the Constitution of India. [Indian Constitution](#) not just provides the rights and immunities to the citizen, but it also delineates the character and structure of the Indian State. Therefore it can also be said that the powers and extent of the Indian State are limited by the Constitution. Its actions are guided by the [Directive Principle of State Policy](#). The Indian State cannot function beyond what the Constitution provides.

### Article 21 and due process of law

[Article 21](#) of the Indian Constitution provides that life and liberty cannot be deprived except by a procedure established by law. This means that there has to be a legal justification for the deprivation of life and liberty of a person. The requirement of law for deprivation acts as a limitation on the arbitrary exercise power of the legislature as well as the executive.

Further such a law should not be just a mere prescription, it must conform to the American Due Process which involves law to have the element of "Fundamental Fairness".

In [Swaran Singh v. State of U. P. \(1998\)](#) the Court observed that public power, including constitutional power, must never be exercised arbitrarily or malafide, and ordinarily guidelines for fair and equal execution are guarantees of valid use of power. The power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.

These requirements of Law and of Due process restrict the power of the state. Any violation of these principles would enable the courts to strike down the law.

### Fundamental rights

Fundamental rights are the most basic bulwark against the arbitrary exercise of the power of the state. Fundamental Rights act as restraints on the states, directing states what not to do. They serve as negative covenants for the state.

In [IR Coelho v. State of Tamil Nadu and Ors \(2007\)](#) court observed that the principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles and

these democratic principles include protection of Fundamental Rights. The principle of constitutionalism is based on the principle of legality which requires the Courts to interpret the legislations on the presumption that the Parliament would not intend to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

For instance, no law can be made by the state which treats two people who are situated in equal circumstance unequally since it will amount to a violation of [Article 14](#) of the Indian Constitution. Similarly, Freedom of Speech and expression under [Article 19\(1\)\(a\)](#) can be restricted only on the ground mentioned in [Article 19\(2\)](#) only i.e. It can be restricted only if the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, or public order, decency or morality is threatened or if the speech is in relation to contempt of court, defamation or incitement to an offence. The freedom of speech cannot be restricted by the state on any other grounds. Thus, these restrictions on speech act as limits on the power of the state in the sense that it delineates the extent to which the state can curb freedom of speech.

## Written constitution

Indian Constitution being written, codified and regarded as supreme law of the land, the Indian State is thus controlled and restricted. Restricted in the sense that it cannot go beyond the limits and mandate of the Indian Constitution. The mandate of the state cannot go beyond the Directive Principles of State Policy, enshrined in Part IV of the Indian Constitution.

Being a written Constitution it firstly provides for a limited government, which is the core of Constitutionalism. The sovereign powers are divided among 3 organs of the government. Powers of each organ are defined by the constitution and no organ or its instrumentalities can transgress its limits.

Further, a written Constitution provides for fundamental law of the land and thus the legislature is bound by the Constitutional principles. The legislature cannot make a law which violates the Constitution. Thus the power of the Constitution is restricted.

In the [State \(NCT of Delhi\) v. Union of India \(2018\)](#), the court said that:

*“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”.*

## Separation of power

Separation of powers means that the powers of the state are divided among the three principal organs of the government, which are “the Executive”, “the Legislature”, and “the Judiciary”. Each of the organs is restricted to transgress its limits and this system

ensures a check on the power of the other, thus restraining them from acting arbitrarily and unreasonably, without due regard to due process.

In the *State (NCT of Delhi) v. Union of India (2018)*, Chief Justice Mishra observed that “*The essence of constitutionalism is the control of power by its distribution among several state organs or offices in such a way that they are each subjected to reciprocal controls and forced to cooperate in formulating the will of the state.*”

## Conclusion

The design and character of the Indian Constitution ensure that the powers of the Executive and the Legislature is limited so that the discretion given to these organs does not turn into arbitrariness, an arbitrary exercise. The Fundamental Rights, the basic structure, federal setup of the administration, the amendment procedure all limit the State in a particular way.

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