

# CONSTITUTIONALISM IN INDIA: A CONCEPTUAL AUDIT

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## Abstract

The telos of any normative constitution in the ontological sense must be appreciated in incorporation and functioning of devices which control the political power. An attempt to institutionalize such a political and social condition was characterised as constitutionalism, the concept of limited government. From a historical perspective, constitutionalism has been the search for the most efficient means of restricting the power initially of the government but eventually of all power holders. The essence of constitutionalism was appreciated in more accurate sense with the evolution of the American Constitution. Several functional devices such as representative government, separation of powers, checks and balances, federalism and judicial review were discovered to limit the power of the government. Framers of Indian Constitution while envisaging a framework for liberal democratic order too integrated these institutional devices. These power controlling devices not only limited the powers of three main constituents of State *i.e.*, legislature, executive and judiciary but also provided mutually controlled mechanism in the performance of their assigned functions. This paper critically examines the functioning of these power controlling devices in the current neo political regime of India.

## I The Constitution: An introduction

THE STIFFNESS between the need for order in the society and desire for individual liberty has been an enduring problem of political philosophy. Alexander Hamilton stated the problem in his famous lines in *The federalist*:<sup>2</sup>

In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

It took political man many centuries to realize that the good society, in which he possessed rights and in which these rights were secure, was conditioned on the containment of the power holders, whatever the legitimation-factual, religious, or legal-of their social control. In time this purpose appeared to be served best by articulating the restraints society wished to place on the power holders in the form of a set fixed rule—the ‘Constitution’—limiting their exercise of political power.<sup>1</sup>

What is the Constitution? A Constitution is perceived as a document that sought to strike a delicate balance between, on the one hand, governmental power to accomplish the great ends of civil society and,

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1 Karl Lowenstein, “Political Power And The Governmental Process,” The University Of Chicago Press, London 123 (1965).

2 Laurence H. Tribe, “On Reading the Constitution” Harvard University Press 6 (1993).

on the other, individual liberty. As James Madison put it in The Federalist Papers, “if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. The constitution, thus, became the basic instrumentality of the control of the power process.

The desire to articulate and formalize the basic ordering of the state society in a written document, a constitution, has been a driving force in the development of modern political systems. The desire for a written constitution emerged in the context of the enlightenment, a philosophical movement that placed a high value on reason, individual freedom, and the rule of law. The enlightenment thinkers believed that government power must be limited and that individual rights must be protected. They saw written constitution as a means of constraining the arbitrary exercise of power by government and securing individual liberties. However, credit goes to Americans who experimented and drafted a written constitution first. The American constitution, adopted in 1787 was the first modern written constitution and remains a model for many other countries to this day.

Based on *principles of differentiation of state functions* and *principle of functional autonomy*, the American Constitution designed the structure and powers of the three branches of government, as well as the rights and liberties of citizens. It also outlined the process for amending the Constitution, which requires a high degree of consensus among different political actors. These functional principles evolved gradually by trial and error. After vast experimentation of English, French and American revolutions, a consensus on the minimum requirements of a constitutional order was reached:<sup>3</sup> These minimum principles were:

- (i) Differentiation of the various state functions and their assignment to specific state organs *i.e.*, doctrine of separation of powers and functions.
- (ii) A mechanism for collaborative functioning of state organs along with checks and balances acquainted to French and American model.
- (iii) A mechanism to avoid deadlock between several instituted autonomous power holders by establishing clear communication channels, setting boundaries and protocols for decision-making, and conflict resolution. Under liberal constitutionalism the doctrine of popular sovereignty evolved to assign the sovereign electorate the final role of ultimate arbiter of conflict between instituted power holders. Popular sovereignty emerged as the principle that the ultimate source of political power lies with the people, who have the right to govern themselves through their elected representatives.

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3 *Supra* note 1.

(iv) A planned device which allows the government and citizens to correct any error or outdated provisions in the constitution, while preserving the basic principles and values of the constitution. The power of amendment of a constitution was justified on the grounds that a constitution is a living document that must adapt to changing circumstances and societal values.

(v) The fundamental law of superior obligation should also contain in itself explicitly certain fundamental rights and liberties including mechanism for their protection against infringement by any power holder.

## **II Classifications of constitutions**

Written constitutions are classified based on various criteria, including their origin, scope, and mode of amendment. Based on origin, constitutions can be classified as enacted or imposed, depending on whether it is drafted by a constituent assembly or imposed by a foreign power or a dictator. Constitutions are also classified as rigid or flexible, depending on their ease of amendment. Additionally, constitutions are classified as federal or unitary, depending on the distribution of power between central and regional governments. Another classification is between codified and uncoded constitutions, with the former being a single document that outlines the fundamental principles of government and the latter being a collection of laws and conventions that serve as the Constitution. However, this traditional classification may not be very useful from the perspective of constitutionalism. Author therefore explores some other classifications such as original and derivative, ideologically pragmatic and utilitarian and ontological classification of the Constitution.

### **Original and derivative constitutions**

A constitution is termed as original when it is drafted for the first time in order to make a significant break from the past. It personifies truly original, ingenious, and new functional principles of governance. The Constitutions of United States and United Kingdom are classified and kept under this category. The “derivative constitution” on the other hand symbolises a constitutional pattern which largely borrows from existing constitutions adjusting them to the national climate. Indian Constitution is the classic example of derivative constitution as it is derived mainly from the existing Government of India Act, 1935 and various other constitutions of world viz., US, UK, Canada, Australia, and Germany.

### **Ideologically pragmatic and utilitarian constitution**

With the emergence of liberal constitutionalism which emphasized the importance of individual liberty, limited power, and the rule of law, all the constitutions of 18<sup>th</sup> and 19<sup>th</sup> Centuries were influenced by liberal ideology. Once liberal constitution became the practice in western world the utilitarian constitution was given less prominence which offered a functional constitutional framework with existing institutions and

without any ideological preferences. The Constitution of French Fourth Republic of 1946 was one of the recent examples of utilitarian constitution which has given only a passing reference to liberal ideology in its preamble. However, Mexican Constitution of 1917 and Soviet Constitution of 1936 are still ideologically-conscious with its unequivocal alignment toward a socialist society.

### **Ontological classification of constitution**

However, with the significantly changed role of the written constitution in modern times a need to adopt a new approach to classify constitutions based on functional existence was felt relevant. The new approach termed as “ontological classification”<sup>4</sup> focused more on functional reality of the power process instead of analyzing substance and content. This classification proposes constitutions as normative, nominal and semantic.

#### *The normative constitution*

Normative constitution provides two broad parameters: one; the actual norms and principles that govern a political system, as embodied in a written constitution and two the conducive socio-political conditions which makes people to accept the norms laid down by the Constitution. It defines the norms, values, and standards that guide the behaviour of power holders and citizens. It will not be sufficient that a constitution be valid in the legal sense. To be an effective instrumentality of governance it must be dutifully accepted and followed by all stakeholders. When both parameters are complied, a constitution is termed as normative constitution.<sup>5</sup>

#### *The nominal constitution*

Normativity cannot be assumed. It needs corroboration by practice in every single case. A Constitution is legally valid because it provides norms but it cannot fulfil the aspirations because society and political process have not yet accepted the norms laid down by the Constitution. What lacks in the nominal constitution is the prevailing socioeconomic conditions such as lack of political education and training, absence of an independent middle class, and other factors which does not allow complete adoption and integration of constitutional norms. The adoption of constitution in the country is perhaps early. However, it is adopted with this hope that in near future the society and political process will accept it. Thus, a nominal Constitution is futuristic in nature with a hope to become normative.<sup>6</sup>

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4 According to dictionary meaning ontology refers to a part of philosophy that studies what it means to exist. A branch of metaphysics dealing with the nature of being. See *supra* note 1, at 147.

5 *Supra* note 1 at 148.

6 *Ibid.*

*The semantic constitution*

As an instrumentality of power control, the true purpose of a written Constitution is to avoid concentration and misappropriation of governmental power. But when power configuration of constitution is frozen in the hands of few or one power holder, Constitution is termed as semantic constitution. The Constitution instead of limiting the governmental power has become a device to stabilize and perpetuate the grip of one or few on power process. Semantic constitutions pretend to be normative but in reality, it is not. There are some inimitable criteria for recognizing a semantic constitution: a state president can perpetuate himself in office, he is empowered to veto the actions of the legislature without ultimate recourse to the electorate, the representative assembly is wholly or in its majority nominated, the confirmation of policy decisions is left to plebiscites instead of to a freely elected parliament to name a few.<sup>7</sup>

A Constitution is normative, nominal or semantic depends on the fact how is it actually working in the society? It cannot be decided, as a rule, from text alone, particularly since constitutions are usually silent on some of the most essential aspects of the power process, such as electoral system, political parties, and plural groups. Comprehension of ground realities of the power process will be the determining factor to decide whether a constitution is normative, nominal or semantic. Constitution of India is characterized as normative, nominal and semantic at different points of time by different scholars depending on the reality of political process at that point of time.

**III Constitutionalism: The idea of limited governmental power**

Constitutionalism is a political and legal theory that emphasizes the importance of limiting the power of government through the establishment of a Constitution. The idea of constitutionalism is based on the belief that the government should be restrained by a set of fundamental principles and laws that protect individual rights and prevent the abuse of power. According to F.A. Hayek:<sup>8</sup>

constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey.

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7 *Supra* note 1 at 149.

8 F. A. Hayek, *The Constitution of Liberty*, 181 (1960).

Thus, the concept of limited government is central to constitutionalism. Charles McIlwain says that “*constitutionalism has one essential quality; it is a legal limitation on government.*”<sup>9</sup> The constitutionalism in its fullest sense must be seen sociologically and according to Walter F. Murphy the social purpose the constitutionalism serves is to protect human dignity.<sup>10</sup> Murphy while distinguishing ‘democracy’ from ‘constitutionalism,’ explained that democratic genes stress on popular rule and processes and the constitutional genes highlight individual liberty and limitation on governmental power.<sup>11</sup>

The idea of constitutionalism has its roots in the enlightenment era, which saw the rise of individualism and a rejection of the absolute authority of monarchs and rulers. In this context, the idea of limiting governmental power was seen as essential for safeguarding individual rights and promoting the general welfare. The Greeks were the first perhaps to develop the idea of constitutionalism. Aristotle advocated the rule of law:

It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.

Another strongest Greek statement on the fundamental relations of government to law is seen in the *Politicus* or Statesman of Plato, a dialogue the central theme of which was the problem of ‘constitutionalism’.<sup>12</sup> Roman statesman Cicero also wrote that “*We are all servants of the laws in order that we may be free.*” However, Greeks failed to develop the standard where the government may be held accountable for failing to discharge its duty properly.

The concept of constitutionalism continued to develop during the medieval period, although the forms of government and the nature of political power were vastly different from those of ancient Greece. In medieval Europe, the feudal system, which was characterized by a complex system of social and economic relationships, served as the primary means of political organization. Despite the dominance of the feudal system, several important developments occurred during the medieval period that contributed to the growth of constitutionalism. One of the most significant was the emergence of representative assemblies, which provided a forum for the articulation of political grievances and the negotiation of power between the nobility and the

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9 Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, Cornell University Press 21 (1st edn. 1947), available at: <http://www.constitution.org/cmt/mcilw/mcilw.htm>. (last visited on Sep.12, 2023).

10 Walter F. Murphy, “An Ordering of Constitutional Values” *S. California Law Review* 53.703, 758 (1980).

11 *Ibid.*

12 *Supra* note 8.

monarch. The emergence of the *Magna Carta* in 1215 was characterized as a momentous step in the development of constitutionalism.<sup>13</sup> The *Magna Carta*, which was forced upon King John by a group of rebellious barons, established the principle that even the King was subject to the law and that his powers were not absolute. It also established the principle of due process of law and the right to a fair trial, which became fundamental principles of constitutional law. The *Magna Carta* also established the principle of representation, as the barons who forced its creation were representatives of the wider nobility.<sup>14</sup> This principle was further developed in the later medieval period, as representative assemblies became more common throughout Europe. Another important development in medieval constitutionalism was the emergence of common law. Common law was a system of legal principles and precedents that emerged through the decisions of judges, rather than through legislation. This system helped to establish the principle of rule of law and the idea that the law was a means of protecting individual rights against the arbitrary actions of the monarch. Though principles of constitutionalism that emerged during the medieval period helped to establish the foundations of modern constitutional democracy, however, despite these important developments, the medieval period was characterized by a complex and often contradictory mix of political and legal systems. The feudal system, with its hierarchical structure and obligations of loyalty and service, often conflicted with the emerging principles of constitutionalism. Similarly, the power of the Church, which was often in conflict with the secular rulers, contributed to a fragmented and sometimes chaotic political landscape.

The concept of constitutionalism has evolved over time and has become an integral part of modern political systems. In modern times, constitutionalism has played a vital role in promoting democracy, protecting individual rights, and ensuring the rule of law. The constitution as the supreme law of the land outlines the basic structure of the government, the rights and freedoms of citizens, and the limits of state power. It also provides a framework for the separation of powers along with checks and balances to prevent any one branch of government from becoming too powerful. Constitutionalism promotes rule of law, which highlight the principle that everyone, including government officials, is subject to the law. This principle is critical in ensuring that the government is held accountable for its actions and that citizens have access to justice. The rule of law helps to prevent corruption and ensures that individuals are treated fairly and equally under the law.

Constitutionalism in modern times is also closely linked to the concept of international law. International law provides a framework for the relationship between states and

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13 Arthur Sutherland, *Constitutionalism in America*, Blaisdell Publishing Co. 13 (1965).

14 Arthur S. Miller, *Politics, Democracy, and the Supreme Court: Essays on the Frontier of Constitutional Theory*, Greenwood Press, 27 (1985).

promotes global cooperation on issues such as human rights and the environment. Many constitutions in modern times incorporate international law into their domestic legal systems, reflecting the growing interconnectedness of the world.

#### IV Articulation of power controlling devices in modern constitution

The Constitution of United States was certainly the first modern constitution which integrated the ideals of constitutionalism in true sense.<sup>15</sup> American constitutionalism upholds the principles of limited government, separation of powers, and individual rights. The Constitution, written in 1787 is the supreme law of the United States and outlines the basic framework of government, the powers of the branches of government, and the rights and liberties of American citizens. The arrangements made by American Constitution to limit the political power became the model for other countries. The drafters of the Indian constitution were influenced by the American constitutionalism which was reflected in the power controlling devices incorporated under Indian Constitution by which the three primary power holders *i.e.*, legislature, executive and judiciary are limited and reciprocally controlled in the performance of the assigned functions. The power controlling devices under the constitution are substantially classified in two broad categories: *Vertical power controlling devices* and *horizontal power controlling devices*.

##### Vertical control devices

Vertical power sharing in any constitutional democracy works between society as a whole and the state (totality of all three principal power holders *i.e.*, legislature, executive and judiciary). Vertical power controlling device structurally function at the level where state directly confronts with the people. There are two important vertical power controlling mechanism in the Indian constitution: *Federalism* and *fundamental rights*.<sup>16</sup>

##### *Federalism*

Federalism as a vertical control on power of state is a key principle that outlines the division of powers between the federal government and the states. In terms of restraint on the state power federalism is defined as:<sup>17</sup>

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15 See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, The American Political Science Review, 88.2, 356 (June 1994), available at <http://www.jstor.org/stable/2944709>. (The first written state constitution was drafted in 1776 in the State of New Jersey in the United States of America).

16 *Supra* note 1 at 285.

17 Karl Lowenstein in his book "Political Power and the Governmental Process" has given a systematic analysis of the process of political power proceeds from the discussion of the horizontal control that operates either within one and the same power holder (inter-organ controls) or between several power holders (inter-organ controls) to a different type of control instrumentality, here called "vertical controls." Federalism works according to author as one of the vertical controls in a political set up.



the juxtaposition and counter balance of two territorially differentiated sets of state sovereignties. The existence of inter-federal barriers restricts the power of the Central State towards the member States and vice-versa.<sup>18</sup>

This division of power between the federal government and the states is intended to ensure that power is not concentrated in a single institution or level of government. It allows for greater local control and diversity in policy-making, while also ensuring that the federal government is capable of addressing national issues. The Constitution of United States was the first federal constitution which granted specific powers to the federal government, including the power to regulate commerce, declare war, and levy taxes. However, it also reserves certain powers to the states, including the power to regulate commerce within their borders, establish their own criminal justice systems, and oversee education.

The drafters of Indian Constitution too conceived a federal constitution which provides a comprehensive scheme of distribution of legislative,<sup>19</sup> administrative<sup>20</sup> and financial powers<sup>21</sup> between the Union and the state governments. Division of powers was based on the principle that neither union government is subordinate to states nor state government is subordinate to Union. The constitutional framework in India barring few exceptional emergency provisions<sup>22</sup> testifies the existence of cooperative federalism. The notion of cooperative federalism is incorporated through mechanisms like full faith and credit clause,<sup>23</sup> the inter-state council,<sup>24</sup> Zonal council,<sup>25</sup> seventh schedule<sup>26</sup> and all India services.<sup>27</sup> While powers are divided between the Union and the states, the former does not have exclusive administrative machinery for executing its own laws.<sup>28</sup> Constitution entrusts power on the states to enforce laws passed by the Union as applicable in that state.<sup>29</sup> The Union executive has the power to give directions to

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18 *Supra note 1* at 124.

19 *See* Part XI, Chapter I (Art. 245-Art. 255) of Constitution of India, 1950. *See* also Schedule VII of the Constitution.

20 *See* Part XI Ch. II (Arts. 256-263) of Constitution of India, 1950.

21 *See* Part XII Ch. I (Arts. 264-291) of Constitution of India, 1950

22 *See* Arts. 249, 250, 252, 352 and 356 of the Constitution of India 1950.

23 Constitution of India 1950, art. 261.

24 Constitution of India 1950, art. 263.

25 Constituted under States Reorganisation Act of 1956.

26 Schedule VII, Constitution of India makes division of subjects between Union and the States.

27 Constitution of India, 1950, art. 312.

28 State enforcement of Union laws usually gives rise to difficult questions concerning the sustainability of co-operative federalism, which we have accepted as our core constitutional ethos observed Supreme Court in *Swaraj Abhiyan v. Union of India*, Writ Petition (C) NO. 857 OF 2015, decided on 21 July 2017.

29 Constitution of India of India, 1950, art. 256.

the state governments to ensure due compliance with the above duty. Similarly, Union government employs state administrative machinery to employ its usually bigger centrally sponsored schemes of development and social policies. The Sarkaria Commission<sup>30</sup> and Punchhi Commission<sup>31</sup> on centre-state relations have made several recommendations to nurture further the idea of cooperative federalism. A nine-judge bench of the Supreme Court in *Jindal Stainless Steel v. State of Haryana*<sup>32</sup> reiterated the principles of co-operative federalism in India. In *Delhi NCT Case*,<sup>33</sup> the then Chief Justice Dipak Misra once again restated the essence of collaborative federalism in Indian constitutional scheme.

#### *Fundamental rights*

Fundamental rights are a set of basic rights and freedoms that every individual is entitled to, regardless of their race, religion, gender, or any other factor. These rights are considered fundamental because they are essential to the dignity and well-being of every person. One of the most significant aspects of fundamental rights is that they act as a vertical control on the power of the state. This means that the state cannot violate or infringe upon these rights, as they are considered inherent and inalienable. The existence of fundamental rights ensures that individuals have a certain degree of protection and autonomy from the state, promoting democracy, human rights, and social justice.

In India, fundamental rights are enshrined in part III of the constitution and act as a dominant control on the power of the state. The constitution guarantees fundamental rights such as the right to equality, right to freedom, right to life, right to profess religion and right to education, among others. These rights serve as a check on the power of the state and ensure that the government does not violate the basic rights and freedoms of citizens.<sup>34</sup> A citizen and in some cases even non-citizen<sup>35</sup> can approach the courts to enforce their fundamental rights, and the courts have the power to strike down any legislation or executive action that violates these rights.<sup>36</sup>

#### **Horizontal control devices**

Horizontal power control mechanism which is also known as the system of checks and balances was a key feature of the United States Constitution that ensured that no single branch of government becomes too powerful. The Constitution outlines three

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30 The Report of the Sarkaria Commission (1988).

31 The Report of the Commission on Centre-State Relations (2010).

32 AIR 2016 SC 5617 W.P. (C) No. 857 of 2015

33 (2018) 8 SCC 501.

34 See Art. 13 of the Constitution of India 1950.

35 Some fundamental rights under part III of the constitution such as Article 14, 21 and 25 are given to every person which includes even non-citizens.

36 See Constitution of India, 1950, art. 32,

co-equal branches of government: the legislative branch, responsible for making laws; the executive branch, responsible for enforcing laws; and the judicial branch, responsible for interpreting laws. To prevent any one branch from becoming too powerful, the constitution incorporates several mechanisms which control the power of state organs horizontally. It operates either within the institution or between the institutions and classified as *Intra-organ* and *Inter-organ* control devices:<sup>37</sup>

#### *Intra-organ control devices*

Intra-organ power control mechanism refers to the system of checks and balances that exist and function within the institution to regulate the power of that institution. This mechanism ensures that no individual or institution becomes too powerful, which can lead to the abuse of power. The power control mechanism can take various forms, such as hierarchical structures, codes of conduct, and accountability measures. It promotes transparency and accountability and helps to prevent conflicts of interest, ensuring that decisions are made in the best interest of the organization. Effective intra-organ power control mechanisms are essential for the smooth functioning of an organization and its ability to achieve its objectives. Intra-organ controls pertain to the legislature, executive and judiciary.

#### **(i) Intra-organ control within the legislature**

In a parliamentary democracy, the legislature plays a crucial role in the functioning of the state. The legislature is responsible for making laws, holding the government accountable, and representing the interests of the people. Specifically, the functions of the legislature include: law making, oversight, representation and budgeting. The devices which operate and control the power of legislature from within are functional autonomy, qualified majority, bicameralism, strong opposition and rules and procedures.

#### **Functional autonomy**

In a parliamentary democracy, the legislature, which consists of elected representatives, has functional autonomy to perform its duties without interference. This means that the legislature can function independently and make decisions based on its own judgment and assessment of the needs and interests of the people it represents. The Legislature's autonomy to regulate its own business has been integral part of any parliamentary democracy. Constitution of India has granted functional autonomy to both Union Parliament and Legislatures of State.<sup>38</sup> Conduct of business of house,<sup>39</sup> privileges of house<sup>40</sup> and its members and disqualification of members<sup>41</sup> comes within

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37 *Supra* note 1.

38 *See* Constitution of India, 1950, article 208.

39 *See* Constitution of India, 1950, article 118.

40 *See* of the Constitution, 1950, article 105 and 194

41 *See* The of Constitution, 1950, article 105 and 194

the jurisdiction of the respective houses and even courts are not allowed to interfere in the proceedings of the house.<sup>42</sup>

### Qualified majority

The concept of qualified majority is an important device in a parliamentary democracy, especially in decision-making processes that require a high level of consensus or agreement. It refers to the minimum number of votes needed to pass a decision or make a change in legislation. In parliamentary democracies, a qualified majority usually requires a higher percentage of votes than a simple majority. This is to ensure that decisions are made with the support of a significant majority of lawmakers, rather than a slim majority that could be easily swayed or manipulated. The Constitution of India mandates the requirement of different types of majorities such as simple majority,<sup>43</sup> special majority<sup>44</sup> and super-special majority<sup>45</sup> in the House depending upon the gravity and significance of matter. The underlying principle is that more important the issue more deliberate will be the process.

### Bicameralism

The bicameral system of legislature is viewed as an effective intra-organ control mechanism. This is because the two chambers, despite being part of the same legislative branch, operate independently of each other and serve as checks on each other's power.<sup>46</sup> The bicameral system can prevent one chamber from becoming too dominant or exerting too much influence over the legislative process. The second chamber especially if it has a different composition to the first and chosen on a different electoral cycle and has a similar democratic legitimacy can provide a necessary counterbalance to the first chamber's power and ensure that legislation is thoroughly reviewed and debated before being passed into law.<sup>47</sup> The bicameral system can also provide a forum for different voices and interests within the legislative branch to be heard. By having two separate chambers with different compositions and functions, the system can ensure

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42 See Constitution of India, 1950, art.122 and 212,

43 A simple majority is a majority of more than 50% of the members present and voting in the house.

44 A special majority has different specification in different cases. For instance, special majority under article 249 requires a majority of 2/3rd members present and voting, special majority as per article 368 needs a majority of 2/3rd members present and voting supported by more than 50% of the total strength of the house and special majority in article 61 necessitates a majority of 2/3rd members of the total strength of the house.

45 A super special majority is required under article 368 which requires a majority of 2/3rd members present and voting supported by more than 50% of the total strength of the house and ratification by at least half of the states.

46 Elliot Bulmer, Bicameralism, International IDEA Constitution-Building Primer 2, 7 International Institute for Democracy and Electoral Assistance (International IDEA) 2nd edn., at 17.

47 *Ibid.*

that a broad range of perspectives and ideas are considered while making laws. The bicameral system of legislature has proven to be an effective control mechanism in many countries around the world, promoting stability. Under constitution of India, the two houses of the Parliament *i.e.*, the Council of States and the House of People are empowered to pass each bill separately reciprocally check and restrain the power of each other.<sup>48</sup> Constitution also provides bicameral system of legislature for six states with two houses namely legislative council and legislative assembly.<sup>49</sup>

### **Strong opposition in legislature**

A strong opposition in parliament is considered a significant control mechanism that ensures transparency, accountability, and effectiveness in the legislative process. Sir Gilbert Campion while explaining the parliamentary opposition stated:<sup>50</sup>

the opposition is the party for time being in the minority organized as a unit and officially recognized, which has had the experience of office and is prepared to form government when the existing ministry has lost the confidence in the country. It must have a positive policy of its own and not merely oppose destructively to ruin the game for the sake of power.

The opposition provides a critical check on the power of the ruling party or government by scrutinizing their policies, decisions, and actions.<sup>51</sup> Ivor Jennings while describing the importance of opposition wrote that if there is no opposition, there is no democracy. An effective opposition can challenge and question the government's decisions, hold it accountable for its actions, and offer alternative policies and solutions. Through debates, discussions, and criticism, the opposition can help to prevent the government from making unilateral and arbitrary decisions that may not reflect the interests and needs of the people. Furthermore, a strong opposition can also promote transparency and openness in the legislative process. It can demand access to information and push for greater public disclosure of government activities and decisions. By doing so, it can help to prevent corruption, nepotism, and other forms of malpractice that undermine the integrity of the government and erode public trust in the political system. Overall, a strong opposition in parliament is a vital intra-organ control mechanism that plays a critical role in ensuring the effectiveness and legitimacy of the legislative process. It can serve as a powerful voice for the people and ensure that their interests and needs are well-represented in the government's decision-making.

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48 See Constitution of India, 1950, art. 79.

49 Five states in India have bicameral legislature viz. Uttar Pradesh, Bihar, Maharashtra, Karnataka, Andhra Pradesh and Telangana.

50 Remi Saksena. *The Role of Opposition in Indian Politics*, Anmol Publications, Delhi, 1986, p. 4.

51 Devendra Kumar, *Role of Opposition in a Parliamentary Democracy*, 75(1) *The Indian Journal of Political Science* 165 (January - March, 2014), available at: <https://www.jstor.org/stable/24701093> (last visited on May 30, 2023).

### Rules of procedure

Rules of procedure of legislature act as a control mechanism by providing a framework for the functioning of the legislative body. These rules of procedure are designed to ensure fairness, transparency, and accountability in the legislative process and prevent any abuse of power. It serves following purposes: first; rules of procedures ensure that every member of the legislature has equal opportunity to participate in the decision-making process. For instance, parliamentary debates are usually governed by strict rules that regulate speaking time, turn-taking, and relevance of contributions. By doing so, these rules ensure that every member's voice is heard and that no one dominates the discussion. Second; rules of procedure also promote transparency and accountability in the legislative process. For instance, the procedure for introducing and passing a bill requires that all members of the legislature have access to the text of the bill and are given ample time to study and debate its provisions. This ensures that decisions are made in an open and transparent manner, and that every member of the legislature has an equal opportunity to express their views. Finally; rules of procedure help to ensure that legislation is thoroughly reviewed and debated before being passed into law. They may require that bills be reviewed by multiple committees of the legislature, or that there be several readings of a bill before it can be voted on. These procedural requirements prevent hasty or poorly-considered legislation from being passed into law. It may require that proceedings be recorded and made available to the public, or that certain information must be disclosed before a vote is taken. These rules also prevent corruption and promote trust in the legislative process.

#### (ii) Intra-organ control within the executive

In an autocratic state where political power is concentrated monolithically in the hands of a singly power holder, intra-organ control cannot and do not exist. The policy decision of the Egyptian pharaoh, of the Roman emperor of the Dominate, of the absolute monarch of the European nation-state in the 16<sup>th</sup> Century, and of a Hitler or a Stalin was not restricted in itself by intra-organ control.<sup>52</sup> The intra-organ control mechanisms within the most powerful branch of the State *i.e.* executive are essential to ensure that the branch operates fairly, efficiently, and effectively, and that power is not abused. These mechanisms promote transparency, accountability, and fairness in government decision-making. The Constitution of India, which was founded on the ideology of constitutionalism, incorporated several such devices which control the power of the executive. These devices are collegiate institution, dual executive and structure of council of ministers etc.

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52 Karl Lowenstein, *Political Power and the Governmental Process*, The University of Chicago Press, London 123 (1965).

### Collegiate institution

Of all constituted power –holders, the executive is potentially the most powerful and therefore most dangerous for the freedom of community. One of the technical device to obviate this danger is the collegiate organization. Psychological reasons have always induced constitutional government to favour the collective organization of the executive. For example, the kingship in Sparta and other pretechnological states was dual; nine archons with equal powers held the highest administrative office in Athens. All Roman magistrates were collegiately organized. In Indian constitutional scheme, the executive power of the Union is vested in the President, who exercise this power only on the aid and advice of a multi-member collegiate institution *i.e.*, Council of Ministers.<sup>53</sup>

### Dual executive

The dual executive is a characteristic of many constitutional democracies of modern time. The dualism between the crown and the government stems from the constitutionally limited monarchy of the early nineteenth century.<sup>54</sup> It was carried over into the parliamentary monarchy and imitated in the establishment of the parliamentary republic. While in the past the crown and the government actually had to cooperate in the formation of the will of the state, now a days a real sharing of political responsibility and, with it, of political power no longer exists.<sup>55</sup> Power has shifted from the nominal head of the state to the real executive power holder *i.e.*, cabinet. And participation of head of state in the political process is confined strictly to ceremonial, symbolic and representative functions. However, drafters of the constitution of India gave President of India significant powers (undoubtedly more than mere ceremonial functions) to keep a check within the executive branch.<sup>56</sup>

### The structure of council of ministers

The structure of cabinet under parliamentarianism fails to present a uniform pattern. The ideal type is that of a closely integrated team of ministers in which the Prime Minister assumes leadership as *primus inter pares* without dominating his colleagues. This structure was designed to prevent any one member of the cabinet from becoming too powerful and exerting undue influence over government decisions. It also promotes transparency and accountability in decision-making, as each member of the cabinet is responsible for their own portfolio of policies. However, the centre of gravity inevitably has shifted to the prime minister, the cabinet being hierarchically subordinated to him. This relationship is reflected by his prerogative, now unchallenged in most parliamentary

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53 See Constitution of India, 1950, art.74.

54 Karl Lowenstein, *Political Power and the Governmental Process*, The University of Chicago Press, London 123 (1965).

55 *Ibid.*

56 See, Constitution of India, 1950, art. 111.

states, of freely selecting the individual ministers. The British prime minister, by convention, actually operates the cabinet according to his will; some do so more authoritatively than others, but every prime minister directs the cabinet and the ministry and gives them the stamp of his personality. In general, collective responsibility has become a fiction of parliamentary theory. The Constitution of India vests power in council of ministers consisting prime minister as head, cabinet ministers, state ministers and ministers with independent charge.<sup>57</sup> The council of minister is collectively responsible to the house of people.<sup>58</sup> However, in India too, the centre of gravity lies with the prime minister and some time with the chairperson of the ruling political party.<sup>59</sup>

### **(iii) Intra-organ control within the judiciary**

Intra-organ control within the judiciary refers to the mechanisms and processes through which judges and courts regulate and oversee their own behaviour and decision-making. The purpose of intra-organ control is to promote transparency, fairness, and consistency in judicial decision-making, while also guarding against corruption and misconduct. It also holds judges accountable for their actions and decisions, and to ensure that the principles of due process and the rule of law are upheld. The current trend demonstrates that judges are more tempted to unlimited power and that is why intra-organ control become essential component of a functioning judiciary and vital for maintaining public trust and confidence in the judicial system. These mechanisms include hierarchal review processes and principle of *stare decisis*, decision based on law and facts, reasoned decision, adversarial justice delivery system, multi-member benches, practice of dissent in bench, judiciary not a super legislature and ethical guidelines and codes of conduct.

#### **Hierarchy of courts and principle of *stare decisis*:**

Hierarchical court structure and principle of *stare decisis* are significant intra-organ control devices within the judiciary. Hierarchical court structure refers to the organization of courts into different levels, with higher courts having appellate jurisdiction over lower courts. This allows for internal review and oversight, with decisions being reviewed and potentially overturned by higher courts. *Stare decisis* based on Latin principle "*stare decisis et non quieta movere*" mandates that courts should follow precedent and previous decisions made by higher courts. This indeed limits the discretion of a judge in the judicial process. Being a member of common law family Indian judicial system is based on hierarchy of courts and follows principle of *stare decisis*. Article 141 of the Constitution incorporated this principle which provides that

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57 See, Constitution of India, 1950 art. 74.

58 See Constitution of India, 1950 art. 75(3).

59 However, contrary to the constitutional provision, decisions are being now taken by the Cabinet and not the Council of Ministers, which in the opinion of the researcher is against the spirit of the Constitution.



*“law declared by the Supreme Court is binding on all courts within the territory of India.”*<sup>60</sup> It is pertinent to mention here that all courts under article 141 do not include the Supreme Court. Meaning thereby, the Supreme Court can change its own decisions in compelling circumstances. However, while doing so the Supreme Court has to ensure the internal hierarchical decorum *viz.* a decision of five-judge bench can be changed only by a five-judge bench or larger bench. This principle promotes consistency and predictability in judicial decision-making, as well as providing a means for correcting errors or inconsistencies in previous decisions.

### **Decision based on law and facts**

The decision of courts based on law and facts is an important device of intra-organ control within the judiciary. This means that judges must base their decisions on legal principles and factual evidence, rather than personal biases or preferences. By ensuring that decisions are based on objective criteria, the legal system can promote transparency, fairness, and consistency in judicial decision-making. It also helps to guard against corruption and misconduct, and ensures that the principles of due process and the rule of law are upheld. Overall, the use of law and facts as the basis for judicial decision-making is an essential component of a functioning judiciary, and is vital for maintaining public trust and confidence in the legal system.

### **Reasoned decision**

A reasoned decision is a decision-making process that involves critical thinking and logical reasoning. It requires decision-makers to provide clear, cogent and transparent justifications for their decisions, based on evidence and relevant legal principles. This process functions as an intra-organ control mechanism, ensuring that decisions are fair, objective, and consistent with legal requirements. By requiring decision-makers to provide reasoned decisions, the decision-making process becomes more transparent and accountable. This transparency allows for greater scrutiny and review, making it more difficult for individual decision-makers to act arbitrarily or unfairly. Right to reason therefore is an indispensable part of a sound judicial system and there should be reasons at least sufficient, to indicate an application of mind to the matter before court. Judges in Indian courts give reasons for the decisions they make.

### **Adversarial justice delivery system**

Adversarial justice delivery system is a legal process where two opposing sides, prosecution and defense, present their arguments and evidence in front of a neutral judge or jury. This system ensures fairness and impartiality in resolving legal disputes, but it can also function as an intra-organ control mechanism. In an adversarial system, each side has to challenge and scrutinize the other's claims, which can reveal inconsistencies or errors in the arguments presented. In adversarial system, the civil

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60 See Constitution of India, 1950, art. 141.

justice functions on the “*balance of probabilities*” while the criminal justice system is founded on principle “*proven beyond reasonable doubt*.” This process can help to identify weaknesses or biases in the legal system and prompt corrective action.

### **Multi-member benches**

This mechanism of multi-member bench function as an intra-organ control mechanism, ensuring that decisions are made collaboratively and with greater diversity of perspectives. By having multiple judges to hear a case, the decision-making becomes more transparent and accountable, as each judge is required to provide their own reasoning for the decision. More judges sitting in a bench to take decision are less apt to commit judicial error than a single judge. This process also ensures that decisions are not based on the biases or preferences of a single judge, but are instead the result of a collective and impartial decision-making process. Taking into account this aspect, the constitution of India makes provision for constituting multi-member benches in the appellate courts. A case involving substantial question of law as to the interpretation of the Constitution is to be decided by a five-judge bench only.<sup>61</sup> Depending on the importance of the constitutional question involved, the Chief Justice of India has been given power to constitute larger benches. Therefore, multi-member benches can help to prevent the concentration of power in the hands of a single judge, ensuring that decision-making is fair and consistent with legal principles.

### **Practice of dissent in the bench**

The practice of dissent in the bench refers to the act of a judge expressing disagreement with the majority decision in a case. This device acts as an intra-organ control mechanism, ensuring that decisions are subject to critical scrutiny and that the decision-making process remains transparent and accountable. By allowing judges to express dissenting opinions or concurring opinions, the legal system promotes a culture of debate and critical thinking, encouraging judges to consider alternative perspectives and indicates potential flaw in the reasoning of the majority. This process can help to prevent errors or biases from going unchecked and promote a greater understanding of legal principles. Constitution of India empower its judges to express concurring and dissenting opinions.<sup>62</sup>

### **Judiciary not a super legislature**

The judiciary is an important branch of state responsible for interpreting and enforcing laws. However, it is not meant to function as a super legislature or create laws on its own. The role of the judiciary is to apply the law as it is written and to ensure that it is consistent with the constitution. However, it has been proved beyond any shadow of doubt that judges do make law but this should be done only in extraordinary cases and

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61 See of the Constitution of India 1950, art.145(3).

62 See Constitution of India, 1950, art. 145.

in the interest of justice. But, in the name of judicial activism or craftivism, judges sometime cross the *Lakshmana Rekha* and indulge in judicial adventurism. This judicial arrogance has received criticism from various sections of legal circle.

### ***Inter-organ control devices***

The second category of horizontal control mechanism is inter-organ control devices which are also known as checks and balances. The doctrine of checks and balances are integrated and allied with doctrine of separation of powers and ensure that the powers of state are allocated to the legislative, executive, and judicial branches, each with its own distinct powers and responsibilities and each having the ability to check the power of the others. The following inter-organ control mechanisms have been incorporated under constitution of India:

*First;* The Constitution gives legislature the power to impeach and remove the President for the violation of constitution.<sup>63</sup> The Legislature keep government accountable for every work it. This is a powerful device to exercise oversight and control over the executive branch. Similarly, legislature is empowered to remove judges of the High court and the Supreme Court for their proved misbehaviour and incapacity to act.<sup>64</sup>

*Second;* The Constitution gives executive power to keep a check on the legislature by declining to sign any bill,<sup>65</sup> which is not in accordance with the constitution and ask the executive to reconsider it once more. Executive is also empowered to appoint judges in the High Court and Supreme Court which was designed as a check on judiciary by the executive.<sup>66</sup>

*Third;* judicial review is an inter-organ control device that allows the judiciary to review the actions of the legislative and executive branches to ensure that they are consistent with the constitution. This mechanism ensures that the government is accountable to the people and that the constitution remains the supreme law of the land. Constitutionalism cannot be taken for granted. It must be examined empirically. A country may have a constitution but not constitutionalism. The recent years are witnessing a trend of democratic deconsolidating across the world. Countries viz. Poland, Hungary, Turkey, Brazil, South Africa, and Israel are experiencing a rise in authoritarianism and a weakening of democratic norms.

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63 Constitution of India, 1950, art. 56 (1) (b).

64 Constitution of India 1950, art. 124(4).

65 See Constitution of India, 1950, art. 111.

66 See Constitution of India, 1950 art. 124(2) and art. 217, which provides that Judges of the Supreme Court and the high courts will be appointed by the President through a consultative process. However, in the famous *Supreme Court Advocates on Record Association v. Union of India* AIR 1994 SC 268, it was held that in the matters of appointment the recommendations made by the Collegium (which consist of the Chief Justice of Indian and four senior most judges of the Supreme Court) will be binding on the President. See also *In Re Presidential Reference* AIR 1999 SC 1.

Federalism in terms of vertical restraint on the political power is going through a phase of decline. Over the last decade there has been a shift in political and economic power from the States to centre once again. The idea of cooperative federalism fairly aligned with the constitutional vision appeared in the BJP's 2014 election manifesto and it assured to place "centre-State relations on an even keel through the process of consultation and strive for harmonious Centre-state relations."<sup>67</sup> Later, after coming to power, PM Modi while giving his inaugural speech in upper house of the Parliament restated his belief in "cooperative federalism," and emphasized on the need to work with the states.<sup>68</sup>

### V Conclusion

This paper outlined the essence of constitutionalism in a constitutional democracy. It examined various devices which have been fused in the constitution to control the political power. However, decline of constitutionalism has become a global phenomenon. The rise of populist regimes across the world has posed challenges to not only the established democratic norms but also to the independence of vital institutions. They tend to exhibit a habitual tendency of dismantling the system of checks and balances undermining democratic accountability. It clearly manifests the excessive use of executive authority wherein the will of the populist leader become supreme over the will of the people. This unconstrained power weakens democratic institutions through parliamentary majorities and executive order. The empirical evidence is available which exhibits the excessive executive interference in the working of vital institutions. Constitutional critics in fact argue that there has been sharp decline in the functioning of all power controlling devices be it vertical or horizontal.

Revival of constitutionalism requires a concerted effort to reinforce the principles and values enshrined in the Constitution, strengthen democratic institutions, and uphold the rule of law. In a Westminster model of government where executive has dominant role, judiciary as a guardian of freedom and liberty can revive the constitutionalism and save constitutional democracy. The Supreme Court of India, recognizing the worth of this philosophy has observed that the principle of constitutionalism is a legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. 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.<sup>69</sup> Supreme Court not only in our country but in other

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67. Yogesh Pratap Singh, Ashirbad Nayak, Coronavirus: Test of Collaborative Federalism, *Deccan Herald*, Apr 1, 2020.

68. *Ibid.*

69. *I. R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

jurisdictions have decisively fought for its constitutionally guaranteed independence and tightened the constitutional grip over delinquent power holders and subjected them to the rule of law.

Reviving and revitalizing constitutionalism is an ongoing process that requires the commitment of all stakeholders, including citizens, government, judiciary, civil society, and the media. It involves fostering a culture of respect for the constitution and its principles, while also addressing contemporary challenges and adapting to changing circumstances.