

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

---

**Volume 4 | Issue 2**

**2021**

---

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

---

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Role of Judiciary for Upholding Constitutionalism

---

SAKET<sup>1</sup>

## ABSTRACT

*Besides, the concept of the Constitution, there's also the all-important concept of 'Constitutionalism'. Modern political thought draws a distinction between 'Constitutionalism' and 'Constitution' a country may have the 'Constitution' but not necessarily 'Constitutionalism'. The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the numerous organs of the govt., but also seek to restrain those powers. Constitutionalism recognizes the need for state but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and thus the chief under some restraints and not making them uncontrolled and arbitrary.*

*Unlimited powers jeopardize freedom of the people. As has been well said: power corrupts and absolute power corrupts absolutely. If the Constitution confers unrestrained power on either the legislature or the chief, it'd cause an authoritarian, oppressive government. Therefore, to preserve the essential freedoms of the individual, and to require care of his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some In-built restrictions on the powers conferred by it on governmental organs. This paper analyzes role of judiciary in upholding constitutionalism. The study shows vital role played by the Indian judiciary in upholding the rule of law in the country. The Constitution of India helps in over all shaping of political, economic and social development of India. The Constitution assert & ensure the fulfillment of diverse nationwide goals.*

## I. CONSTITUTION

The Constitution of India provides a shape for social, political, economic and development. It provides the dedication to the citizens of India for assert, ensure and achieve nationwide goals without violence and democratic and socio-equivalent manner. The constitution is based upon the ideals of liberalism, welfare state, federal government. These ideals are enshrined in our

---

<sup>1</sup> Author is a student at Sharda University, India.

Preamble, Fundamental Rights and Directive Principles of State Policy/

The Indian Constitution is the lengthiest and the most detailed of all the written constitutions of the world. While the American Constitution originally consisted of only 7 Articles, the Australian Constitution 128 Articles, the Canadian Constitution 147 Articles, the Indian Constitution originally consisted of 395 Articles divided into 22 Parts and 8 Schedules. Since 1951, several Articles and Parts have been omitted and several Articles have been added in the constitution. The last numbered Article is still 448 Articles and the last numbered Parts is 25 and there are 12 Schedules in the Constitution.

The Constitution of India has incorporated a formal declaration of Fundamental Rights in Part III of the constitution is deemed to be a distinguishing feature of a democratic state . These rights are prohibitions against the state. The State cannot make a law which take away or abridge any of the rights of the citizens guaranteed in the Part III of the constitution. If it passes such a law it may be declared unconstitutional by the courts, but merely declaration of certain Fundamental Rights will be of no use if there no machinery for their enforcement. Our constitution has therefore, conferred on the Supreme Courts the power to grant effective remedies in the nature of Writs HABEAS CORPUS, MANDAMUS, PROHIBITION and CERTIORARI.

## **II. CONSTITUTIONALISM**

'Constitutionalism' connotes in essence limited government or a limitation on government. Constitutionalism is that the antithesis of arbitrary powers.<sup>2</sup> 'Constitutionalism' recognizes the need for state with powers but at the same time insists that limitations be placed on those powers. The antithesis of Constitutionalism is despotism. Unlimited power may cause an authoritarian, oppressive, government which jeopardizes the freedoms of the people. only the Constitution of a country seeks to decentralize power instead of concentrating it at one point, and also imposes other restraints and limitations thereon, does a country haven't only 'constitution' but also 'constitutionalism'.

'Constitutions spring from a belief in limited government', according to SCHWARTZ, in the U.S.A., the word Constitution means "a written organic instrument, under which governmental powers are both conferred and circumscribed". He emphasizes that "this stress upon grant and

---

<sup>2</sup> CHARLES H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN, 21; S.A. DE SMITH, CONSTITUTIONALISM AND ADMINISTRATIVE LAW, 34 (1977); GIOVANNI SARTORI, Constitutionalism: A Preliminary Discussion, (1962) 56 Am Pol. SC Rev., 853

limitation of authority is fundamental"<sup>3</sup>. As PROFESSOR VILE has remarked:<sup>4</sup> "Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power, which is vital to the realisation of the values of their societies, should be controlled so as that it shouldn't itself be destructive of the values it had been intended to plug." the thought of Constitutionalism isn't new. it's embedded deeply in human thought. Many law philosophers have promoted this idea through their writings. variety of those philosophers are: ACQUINAS, PAINE, LOCKE, GROTIUS AND ROUSSEAU<sup>5</sup>. Magna Carta (1215) strengthened the traditional view that law is supreme. As observed by ARTHUR SUTHERLAND, "The Great Charter was obviously a cherished standard, a welcome assurance that people could set some limitation on the arbitrary power of the king."

A written Constitution, independent judiciary with powers of review , the doctrine of rule of law and separation of powers, free elections to legislature, accountable and transparent democratic government, Fundamental Rights of the people, federalism, decentralization of power are variety of the principles and norms which promote Constitutionalism during a rustic .

### **III. RULE OF LAW BY THE JUDICIARY FOR UPHOLDING CONSTITUTIONALISM**

The object is to determine Rule of Law and it might not be wrong to mention that the Indian Constitution during this respect goes much ahead than the other Constitutions of the planet the thing isn't merely to supply security and equality of citizenship of the people living during this land and thereby helping the method of nation building, but also and not smaller to supply certain standards of conduct, citizenship, justice and fair play. They were intended to form all citizens and persons appreciate that the paramount law of the land has caught in a frenzy privileges and has laid down the paramount perfect equality between one section of the community and another within the matter of all those rights which are essential for the fabric and more perfection of man.

The guarantee of equality before the law may be a aspect of what Dicey calls the rule of law in England. It means no man is above the law which every one, whatever be his rank or conditions, is subject to the jurisdiction of ordinary courts. "With us", Dicey wrote "every official from the Prime Minister right down to constable or a Collector of taxes is under an

---

<sup>3</sup> SCHWARTZ, CONSTITUTIONALISM LAW: A TEXTBOOK, 1 (1972).

<sup>4</sup> M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWER, 1

<sup>5</sup> FRIEDMANN, LEGAL THEORY; Dias and Hughes, JURISPRUDENCE: Lloyd, INTRODUCTION TO JURISPRUDENCE.

equivalent responsibility for each act avoided legal justification as the other citizen". Rule of law requires .that nobody shall be subjected to harsh, uncivilised or discriminatory treatment even when the thing is that the securing of the paramount exigencies of law and order. The doctrine of Rule of Law is ascribed to DICEY whose writing in 1885 on British Constitution included the subsequent three distinct though kindred ideas in Rule of Law:<sup>6</sup>

- (i) Absence of Arbitrary Power: No man is above law. No man is punishable apart from a definite breach of law established in a standard legal manner before ordinary courts. the govt cannot punish anybody merely by its own fiat. Persons in authority in Britain don't enjoy wide, arbitrary or discretionary powers. Dicey asserted that wherever there's discretion there's room for arbitrariness.
- (ii) Equality before Law: Every man, whatever his rank or condition, is subject to the standard law and jurisdiction of the standard courts. No man is above law.
- (iii) Individual Liberties: the overall principles of British Constitution, and particularly the liberties of the individual, are judge-made, i.e., these are the results of judicial decisions determining the rights of personal persons especially cases brought before the courts from time to time.

DICEY asserted that the above-mentioned features existed within the British Constitution. The British Constitution is judge-made and therefore the rights of the individual form a part of , and pervade, the Constitution. The rights of the individuals are a part of the Constitution because these are secured by the courts. British Constitutional Law isn't the source, but the consequence, of the rights of the individuals as defined by the courts.

DICEY was thinking of the common law freedoms, such as, personal liberty, freedom of speech, public meeting, etc. What DICEY was saying was that certain Constitutions proclaim rights but don't provide adequate means to enforce those rights. within the British Constitution, on the opposite hand, there's inseparable connection between the means of enforcing a right and therefore the right to be enforced.

Referring especially to the Habeas Corpus Act, DICEY said that it had been "worth 100 Constitutional articles guaranteeing individual liberty." DICEY however accepted that there was rule of law within the U.S.A., because there the rights declared within the Constitution might be enforced, and therefore the Constitution gave legal security to the

---

<sup>6</sup> DICEY, A.V., INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, Ch. 4 (X ed.).

rights declared.

The third principle is peculiar to Britain. In many modern written Constitutions, the essential rights of the people are guaranteed within the Constitution itself. This is often considered a far better guarantee for these rights and even in Britain there exists at the present strong opinion that basic rights should be guaranteed.

DICEY's thesis has been criticised by many from various angles but, the essential tenet expressed by him is that power springs from, and is to be exercised consistent with law. In substance, DICEY's emphasis, on the entire, in his enunciation of Rule of Law is on the absence of arbitrary power, and discretionary power, equality before Law, and legal protection to certain basic human rights, and these ideas remain relevant and significant in every democratic country event-to-day.

It is also true that dictated by the requirements of practical government, variety of exceptions are engrafted on these ideas in modern democratic countries, e.g., there's a universal growth of broad discretionary powers of the administration; administrative tribunals have grown; the institution of preventive detention has become the traditional feature in many democratic countries. Nevertheless, the essential ideas are worth preserving and promoting.

The concept of Rule of Law has been discussed in several international forums. The trouble being made is to offer it a socio-legal-economic content and a supranational complexion. Rule of Law has no fixed or articulate connotation though the Indian courts ask this phrase time and again. The broad emphasis of Rule of Law is on absence of any centre of unlimited or arbitrary power within the country, on proper structuring and control of power, absence of arbitrariness within the government. Government intervention in many daily activities of the citizens is on the rise creating an opportunity of arbitrariness in State action. Rule of Law is beneficial as a counter to the present situation, because the essential emphasis of Rule of Law is on exclusion of arbitrariness, lawlessness and unreasonableness on the part of the govt.

Rule of Law doesn't mean rule consistent with law pure and straightforward, because such a law may itself be harsh, inequitable, discriminatory or unjust. Rule of law connotes some higher quite law which is cheap just and non-discriminatory. Rule of Law to-day envisages not arbitrary power but controlled power. Constitutional values, like constitutionalism, absence of arbitrary power within the government, liberty of the people, an independent judiciary etc. are imbibed within the concept of Rule of Law. The Indian Constitution by and enormous seeks to market Rule of Law through many of its provisions for instance, Parliament and State Legislatures are democratically elected on the idea of adult suffrage. The Constitution makes

adequate provisions guaranteeing independence of the judiciary review has been guaranteed through several constitutional provisions. The Supreme Court has characterised review as a "basic feature of the Constitution"<sup>7</sup> Art. 14 of the Constitution guarantees right to equality before law. This Constitutional provision has now assumed great significance because it is employed to regulate administrative powers lest they ought to become arbitrary<sup>8</sup>.

The Supreme Court has invoked the Rule of Law several times in its pronouncements to stress upon certain Constitutional values and principles for instance, in *Bachan Singh*<sup>9</sup>, Justice BHAGWATI has emphasized that Rule of Law excludes arbitrariness and unreasonableness. to make sure this, he has suggested that it's necessary to possess a democratic legislature to form laws, but its power shouldn't be unfettered, which there should be an independent judiciary to guard the citizen against the excesses of executive and legislative power.

In *P. Sambamurthy v. State of Andhra Pradesh*<sup>10</sup>, the Supreme Court has declared a provision authorising the chief to interfere with tribunal justice as unconstitutional characterising it as "violative of the rule of law which is clearly a basic and essential feature of the Constitution."

In *Wadhwa*<sup>11</sup>, the Supreme Court has again invoked the Rule of Law concept to decry too frequent use by a government of its power to issue ordinances as a substitute for legislation by the Legislature.

In *Yusuf Khan v. Manohar Joshi*, the Supreme Court has laid down the proposition that it's the duty of the state to preserve and protect the law and therefore the Constitution which it cannot permit any violent act which can negate the rule of law.

The two great values which emanate from the concept of Rule of law in times are:

- (i) no arbitrary government; and
- (ii) Upholding individual liberty.

Emphasizing upon these values, KHANNA, J., observed during *aD.M. Jabalpur v. S. Shukla*.<sup>12</sup> "Rule of law is that the antithesis of arbitrariness...Rule of law is now the accepted norm of all civilised societies...Everywhere it's identified with the freedom of the individual. It seeks to take care of a balance between the opposing notions of individual liberty and public order. In

---

<sup>7</sup> *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789; (1980) 2 SCC 591.

<sup>8</sup> M.P. JAIN, *A TREATIES OF ADMINISTRATIVE LAW*, I, Ch. XVIII; M.P. JAIN, *INDIAN ADM. LAW - CASES & MATERIALS*, II Ch. XV.

<sup>9</sup> *Bachan Singh v. State of Punjab*, AIR 1982 SC 1325; (1982) 3 SCC 24; *infra*, Ch. XXVI.

<sup>10</sup> AIR 1987 SC 663 : (1987) 1 SCC 362.

<sup>11</sup> *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579 : (1987) 1 SCC 378;

AIR 1976 SC 1207, at 1254, 1263 : (1976) 2 SCC 521;

*D.M. Jabalpur v. S. Shukla*, AIR 1990 SC 456; (1990) 5 SCC 334

every state the matter arises of reconciling human rights with the wants of public interest. Such harmonizing can only be attained by the existence of independent courts which may hold the balance between citizen and therefore the state and compel governments to evolve to the law"

A significant derivative from 'Rule of Law' is review is an important a part of Rule of Law review involves determination not only of the constitutionality of the law but also of the validity of administrative action. The actions of the state public authorities and bureaucracy are all subject to judicial review; they're thus all accountable to the courts for the legality of their actions. In India, such a lot importance is given to review that it's been characterised because the 'basic feature' of the Constitution which can't be done away with even by the exercise of the constituent power.<sup>13</sup>

#### **IV. ROLE OF LAW BY THE JUDICIARY FOR UPHOLDING CONSTITUTIONALISM**

The Preamble enshrines that the Indian Constitution begins with the words “WE THE PEOPLE OF INDIA” who adopted, enacted and abides by the people of India from 26th January 1950. The People “resolved to constitute India into a ‘SOVERIGN, SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC’. Thus, India is a sovereign country with a socialist, secular, democratic and republican policy. The word “socialist” and “secular” were introduced by an Amendment in 1976. India ‘s sovereignty, secularism, democracy and recognized as basic features of the Indian Constitution.<sup>14</sup>

The Supreme Court of India is the authority of the judiciary. But first of all, we need to understand the role of the judiciary. But first of all, we need to understand the role of judiciary system. Courts in India are responsible for handling and passing decisions on multiple issues-how a school should treats the students, or if two states can share each other’s resources etc . The Courts have the right to punish people for the crimes they commit. Almost every social situation which needs a rule is managed by the judiciary, like

- **Dispute Resolution:** Whenever there is a dispute ,the courts intervene in providing solution. Whether it’s a dispute between citizens, citizens and government, or between two state governments or even the central and state governments, the court is responsible for dispute resolution.
- **Judicial Review:** The judiciary has the final hold on the Constitution of India. As such if there is any violation of the fundamentals of the constitution, the court can even

---

<sup>13</sup> State of Bihar v. Subhash Singh, AIR 1997 SC 1390 : (1997) 4 SCC 430.

<sup>14</sup> 4 LRI 647, M.P.Singh “Constitutionality of Market Economy (1996)” 18 Delhi Law Review 272 .

overwrite laws passed by the Parliament of India. This process is called Judicial Review.

## **V. ROLE OF DOCTRINE OF CHECK AND BALANCE IN CONSTITUTIONALISM**

The Constitution divided the Government into three branches: legislative, executive and judicial. That was an important decision because it gave specific powers to each branch and set up something called as check and balance. The point of check and balance was to make sure no one branch would be able to control too much power, and it created a separation of powers. Here are some example of how the different branches work together.

- The Legislatives make law but the president in the executive can veto those laws with a Presidential Veto.
- The Executive branch through the administrative agencies has responsibility for day-to-day enforcement and administration of the law. The executive and the administrative agencies have missions that are very wide from environmental protection to protecting national boundaries.
- The President in the Executive can veto a law but the Legislature can over ride that veto with enough votes. The legislature has the power to approve presidential nominations, control the national budget and can impeach the President from his or her office.
- The Executive can declare executive orders which are like proclamations that carry force of law but the judiciary can declare those orders or acts unconstitutional.
- The judiciary interprets laws and statues but the president nominates and appoints Supreme Court judges.
- The judiciary interprets laws and statues but the Raj sabha in the legislature confirms the president's nominations for judicial positions.
- In Indira Nehru Gandhi's case, Chandrachud J. observed – No Constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought not to enter into problems intertwined in the political thicket, Parliament must also respect the preserve of the courts.

## **VI. CONCLUSION**

The judicial system have the at most responsibility for decisions regarding constitutional freedom, fundamental rights and duties of natural person and legal entity within the jurisdiction

for upholding constitutionalism. The independence of judges being a District Court judge to a Supreme Court judge safeguards every legal entity's right to have their case solely decided on the basis of laws made by the legislature and on the basis of evidence and fact of the case without undue influence or coercion. For a fair consistent and administration of justice a well functional judicial system plays a vital role.

Secondly, independence of judicial system is an essential element of right to due process of law, the supremacy of law of the land, constitution and democracy as a whole. As mentioned in my previous statement judiciary holds the upmost position in the country. History is the witness that independent judiciary system faces many obstacles in context to appointment of judges and transfer of case from one court to another court. Judicial system has always vouched for the independent judiciary. An independent judiciary is a vital and one of the essential feature of our Indian Constitution.

Many legal jurists, legal researchers and court judges has vouched for an independent judiciary which a basic need for smooth functioning of constitutionalism and persistence of rule of law. The interpretation of law and statues during the proceedings of court case by the advocates and judges giving primacy to the executive. From the above discussion we can conclude that for the smooth running of the car titled as constitutionalism, Independent judiciary must act as the fuel.

\*\*\*\*\*