

INDIAN JOURNAL OF LEGAL REVIEW



VOLUME 3 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION



Indian Journal of Legal Review [ISSN - 2583-2344]

(Free and Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 3 and Issue 1 of 2022 (Access Full Issue on – <https://ijlr.iledu.in/volume-3-and-issue-1-of-2023/>)

Publisher

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Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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LIVING CONSTITUTION AND CONSTITUTIONALISM

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Best Citation - PRIYANSHI JAIN, LIVING
CONSTITUTION AND CONSTITUTIONALISM, Indian
Journal of Legal Review (IJLR), 3 (1) of 2023, Pg.
401-408, ISSN - 2583-2344.

ABSTRACT

This research paper is an analysis of the idea of 'living constitution', as a common feature of the constitutional practice in democratic countries. The main finding of this research is whether our constitution of India is a static or a living document. There seems to be different arguments in favour of as well as in against of this idea. So this research will come up with conclusion based on this.

India has a Constitution which is living, adapting, and changing, simultaneously invincibly stable and impervious to human manipulation. This research will find out whether our constitution of India is static or living document. And this research will analyse the different elements and aspects related to living constitution of India.

Constitutionalism is a concept based on the idea of restraining the power of Government through law of land and to promote the concept of limited government. This research will throw the light on this concept and will explain how constitutionalism has been achieved through constitution.

Now since this practice of constitutionalism is being challenged by various huddles and is being continuously declining. So this research will analyse those factors behind this.

This research will also work upon the relation between living constitution and constitutionalism, whether they are interrelated

and interdependent or not. Hence this research will come up with few findings on the basis of all these.

RESEARCH OBJECTIVES

1. To understand and analyse the concept of living constitution.
2. To understand and analyse the concept of constitutionalism.
3. Finding the relevance of these two concepts with respect to constitution of India.
4. Analysing the relation between living constitution and constitutionalism.
5. Understanding the contemporary discourses on these two concepts.

RESEARCH QUESTIONS

1. Whether concepts of living constitution and constitutionalism are interrelated to each other or not
2. Whether Constitution of India is static or living document
3. How is constitutionalism achieved through different mechanisms in India?

RESEARCH METHODOLOGY

The research methodology used in this research paper is doctrinal and basic research. This paper will analyse the existing literature on concept of living constitution and constitutionalism and will come up with the conclusion. Also this research paper will analyse the different aspects and facets of these two concepts. Also through analytical and descriptive approach, this paper will find the answers of questions related to research.

SCOPE AND SIGNIFICANCE OF THE RESEARCH

This research will throw light on understanding the two dynamic concepts – living constitution and constitutionalism in context of Constitution of India along with their relation.

Also this research will find out whether our constitution of India is static or living document and how constitutionalism is achieved through various mechanisms in constitution. Along with

these, this research will study the contemporary status and discourses on these concepts.

HYPOTHESIS

1. India has a Constitution which is living, adapting, and changing, simultaneously invincibly stable and impervious to human manipulation.
2. Living constitution and Constitutionalism has kept the soul of constitution of India alive.
3. Constitutionalism as a practice in India is degrading.
4. Living constitution and practice of constitutionalism is interrelated and interdependent.

LITREATURE REVIEW

1. I have taken an extract about the concept of constitutionalism from the article written by Sandeep Agarwal – “Constitutionalism – changing paradigm”
2. I have taken an extract from the blog published in UNO Reads about how our Indian Constitution is a living constitution.

CHAPTER II – LIVING CONSTITUTION

CONSTITUTION OF INDIA- A LIVING DOCUMENT

The people's will is expressed in the Constitution. It is a tool developed by societies for themselves. In essence, it is a declaration of the nation's philosophy. It represents the hopes and aspirations of the affected society. It has guidelines and rules that give a nation's democratic government a framework.

The Constitution is a charter of values and ideals, essentially the hope for a free, equitable, and equal society. It is neither a static text nor merely a lengthy legal document. A dream that is always being renewed as each generation learns its new guiding principles rather than being stagnant or unchanging. The constitution constantly reacts to various situations, circumstances, and experiences that occasionally arise, almost like a living being.

Constitution is also thought to change over time due to social requirements. That is a pretty clear justification for the constitution's inclusion of an amending process. Furthermore, as no document can ever be fully perfected, it is certain that problems will arise for future generations. In order to address these issues, it will be necessary to amend the appropriate constitutional provision. As a result, the Constitution is referred to as the "living law of the land" because it must be updated as necessary to meet current needs.¹¹⁰⁶

Origin:

In his book Constitutional Government in the United States, Wilson first refers to the Constitution as a "living instrument," writing that "living political constitutions must be Darwinian in structure and in practise." The Constitution should therefore be regarded as a source of fundamental ideas for societal governance in addition to being a body of law.¹¹⁰⁷

On the auspicious day of January 26, 1950, India proclaimed itself a Republic and the Indian Constitution went into effect. To commemorate the day when our Constituent Assembly formally ratified the Constitution of India, however, November 26 is now known as Samvidhan Divas or Constitution Day of India. The same constitution has governed our country for more than 72 years and remains the framework for how our government is organized.

The Indian Constitution is regarded as a living text since it recognises the need for changes in response to shifting societal demands. The implementation and interpretation of the Constitution have been done with maturity and flexibility in both political practise and judicial decisions. Due to these reasons, our Constitution is a living document rather than a set of rigid rules.

¹¹⁰⁶ Sunanda Singh, The Constitution of India; A Living Document, Reader's Blog <https://timesofindia.indiatimes.com/readersblog/advocateofmountains/the-constitution-of-india-a-living-document-39156/>
¹¹⁰⁷ Waluchow Wilson, "Constitutionalism", Sep 11, 2012, plato.stanford.edu

The arguments for the Living Constitution can generally be broken into two categories:

- I. Pragmatist view contends interpreting the Constitution in accordance with its original meaning.¹¹⁰⁸
- II. The second view, relating to intent, contends that the constitutional framers specifically framed the Constitution in broader and flexible terms so as to create a dynamic, "living document"¹¹⁰⁹

In order for future generations to revere the Indian Constitution, its authors elevated it above other forms of legislation. They also realised that changes to the constitutional provisions would be required in the future anytime any society veered toward a particular opinion. As a result, the Indian Constitution is a perfect synthesis of both viewpoints, in that it is both a sacred document and, at the same time, a living document that is subject to change.

The Constitution must, without a doubt, be changed if necessary. However, it must also be safeguarded from frequent and pointless alterations. In other words, our constitution's creators intended for it to be both "flexible" and "rigid" at the same time. A constitution that is easily amendable is frequently referred to as flexible, while those that are extremely difficult to change are referred to as rigid.

Both of these qualities are combined in the Indian Constitution. The Constitution's drafters were mindful that it might have certain flaws because no document can be completely error-free. They wanted the Constitution to be easily amendable in the event that such flaws were discovered.

Because of this, the constituent assembly decided to leave some of our constitution's provisions as provisional so that they might be

changed after the next Parliament was elected. However, several other characteristics were so essential to the Constitution's spirit that its authors were eager to guard against modification. That clauses needed to be made unchangeable.

Finally, it can be said that the Constitution is a living document. It must be stiff enough in certain places but flexible enough to be changed in others. This combination prevents abuse and preserves the spirit of the Constitution through the amendment feature.

The basic structural theory has further consolidated the equilibrium between rigidity and flexibility by stating that some components cannot be modified, underscoring the rigid nature of the process, and by enabling alterations to all other sections.

Beyond bringing legal disputes before the courts and choosing representatives every five years, "the people's" role in upholding the constitution is incredibly important. The constitution becomes more enduring and worthy of respect from the populace when it permits the evolution of new practices. The hallmark of our constitution is this.

FEATURES AND FUNDAMENTALS OF LIVING CONSTITUTION

Constitutions are categorised into basic (fundamental) and living forms in the same way that laws are divided into formal and living forms. Every constitution serves as the fundamental law of the land; in a hierarchy of laws, it is at the top, and all other types of laws (statutes, ordinances, regulations, and executive orders) must follow it.

A living constitution is one that adapts to new situations, changes through time, and evolves without being formally modified. The idea of the living Constitution should be seen in light of a relatively straightforward feature of our constitutional system

These passages and all judicial interpretations of the constitution are included in the living

¹¹⁰⁸ Money Narula, *Is Constitution A living Document*, Legal Services India Journal
<https://www.legalserviceindia.com/legal/legal/legal/article-8184-is-constitution-a-living-document-.html>

¹¹⁰⁹ Money Narula, *Is Constitution A living Document*, Legal Services India Journal
<https://www.legalserviceindia.com/legal/legal/legal/article-8184-is-constitution-a-living-document-.html>

constitution. The living constitution would take up numerous books if printed. because a constitution establishes the framework for enacting laws. A constitution must be interpreted broadly in order to give it the most power; it is a well-established principle that one should not interpret it narrowly or meticulously. As a result, the court must view the constitution as a living, biological entity that must adapt to the shifting circumstances and patterns in which it must be interpreted.

CHAPTER III- CONSTITUTIONALISM

UNDERSTANDING THE CONCEPT

Constitutionalism can signify many different things. In the broadest sense, it can be described as "a set of ideas, attitudes, and patterns of conduct elaborating the notion that the authority of government derives from and is constrained by a body of fundamental law." Insofar as it "contain[s] institutionalised mechanisms of power control for the preservation of the interests and rights of the population, including those that may be in the minority," a political organisation is constitutional. According to political scientist and constitutional historian David Fellman, the idea of limited government under a higher law might be considered the cornerstone of constitutionalism.¹¹¹⁰

Constitutionalism refers to limited or constrained government. It stands in opposition to arbitrary power. Constitutionalism insists on limiting the use of those powers while acknowledging the need for a government with authority.¹¹¹¹ Despotism is the opposite of constitutionalism. A government loses credibility and authority if it oversteps its bounds. Therefore, the Constitution should be infused with "Constitutionalism," and it should contain some built-in constraints on the powers it grants to governmental institutions, in order to

preserve the fundamental liberties of the man and to maintain his dignity and personality.¹¹¹²

A comparison between Thomas Hobbes and John Locke, who are thought to have defended, respectively, the idea of constitutionally unlimited sovereignty (such as Rex) and that of sovereignty limited by the terms of a social contract containing substantive limitations, is frequently made when discussing the history and nature of constitutionalism (e.g., Regina).¹¹¹³ However, the English legal thinker John Austin, who shared Hobbes' view that the concept of limited sovereignty is illogical, makes for an equally compelling focus point. Austin believes that all law is the command of a sovereign individual or group of individuals, hence the idea that the sovereign might be constrained by law necessitates a sovereign who is self-binding and orders themselves. But nobody can "command" themselves, unless in a metaphorical sense.

Therefore, limited sovereignty is as illogical to Austin (and Hobbes) as the concept of a square circle. According to Austin, sovereignty may be held by the people or by another entity or person with unrestricted power. Constitutional law can impose restrictions on certain government entities, such as the Parliament or the judiciary, but the sovereign, or "the people," is unconstrained. However, if we associate "the people" with the commanders, we arrive at the paradoxical conclusion noted by H.L.A. Hart: the commanders are in charge of the commanders.

However, the written limitations in the constitution are not sufficient to impose restrictions. Tyrants won't change into kind leaders just because the constitution says so. There must be a set of institutional measures to prevent violations of the letter and spirit of the constitution.

¹¹¹⁰ UNO Reads, <https://www.unoreads.com/blog/how-is-indian-constitution-a-living-document>

¹¹¹¹ M.P. Jain, "Indian Constitutional Law", 5th Ed, Wadhwa and Company Nagpur, 2006, p.4.

¹¹¹² M.P. Jain, "Indian Constitutional Law", 5th Ed, Wadhwa and Company Nagpur, 2006, p.5.

¹¹¹³ M.P. Jain, "Indian Constitutional Law", 5th Ed, Wadhwa and Company Nagpur, 2006, p.6.

According to Louis Henkin, constitutionalism includes the following components: (1) government governed by the constitution;

(2) separation of powers;

(3) people's sovereignty and democratic government;

(4) constitutional review;

(5) independent judiciary;

(6) limited government subject to a bill of rights;

(7) control over the police;

(8) civilian control over the military; and

(9) no state power, or very limited and strictly circumscribed state power, to sue.

CONSTITUTIONALISM IN INDIA

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

A state by the constitution

The Indian Constitution gave rise to the Indian State. The Indian Constitution not only outlines the nature and organisational principles of the Indian State, but it also grants citizens certain rights and privileges. Therefore, it can also be claimed that the Constitution places restrictions on the Indian State's authority and reach. The Directive Principle of State Policy serves as its compass. Beyond what the Constitution allows, the Indian State cannot function.

Article 21 and due process of law

According to Article 21 of the Indian Constitution, only a legal process can take away someone's life or liberty. This means that a person's life and freedom cannot be taken away without a valid legal reason. The necessity of law for deprivation serves as a check on the legislature's and the executive's arbitrary use of power. Additionally, such a legislation shouldn't

just be a set of rules; rather, it ought to adhere to American Due Process, which calls for laws to contain an element of "Fundamental Fairness."

Fundamental rights

The most fundamental defence against the state's arbitrary use of power is provided by fundamental rights. Fundamental Rights serve as limitations on the states, telling them what they cannot do. For the state, they act as negative covenants.

In *IR Coelho v. State of Tamil Nadu and Ors.* (2007),¹¹¹⁴ the court noted that the principle of constitutionalism is now a legal principle that necessitates control over the government's use of power in order to ensure that it does not undermine democratic principles, among which the protection of Fundamental Rights is included. The foundation of constitutionalism is the legality principle, which calls for courts to interpret laws under the assumption that the legislature did not intend to pass laws that violate basic rights. Fundamental rights legislation cannot be impliedly repealed by subsequent statutes; the legislature may impose restrictions on them.

Written constitution

The Indian State is thus governed and constrained by the written, codified, and recognised Indian Constitution as the ultimate law of the land. Restricted in that it is constrained by the mandate and bounds of the Indian Constitution. The Directive Principles of State Policy, which are incorporated in Part IV of the Indian Constitution, are the limit of the state's authority.

First and foremost, a written constitution guarantees a limited government, which is the foundation of constitutionalism. Three

¹¹¹⁴ In *IR Coelho v. State of Tamil Nadu and Ors.* (2007)

government bodies each hold a portion of the sovereign authority. Each organ's authority is set down in the constitution, and neither the organ nor any of its agents may exceed these restrictions.

Separation of power

Separation of powers refers to the division of the state's authority among the Executive, the Legislature, and the Judiciary, the three main branches of the government. The system ensures a check on each organ's power, preventing it from acting arbitrarily and unreasonable without appropriate consideration for due process. Each organ is constrained to act beyond its boundaries.

CONSTITUTIONALISM IN INDIAN CONSTITUTION

In order to balance state power with individual and communal rights, constitutionalism centres on a political process that overlaps with democracy. It also draws on certain cultural and historical settings from which it originated and exists in the public consciousness.

It is now time to determine if constitutionalism exists in India or not. The following constitutional provisions can be used to assess it:

1. Preamble

Preamble may be a point to check the presence of constitutionalism. Two techniques are used in the preamble to illustrate the goals of the constitution: one is about the make-up of the governing bodies, and the other is about the goals that independent India hoped to attain. The following objectives are listed in the preamble:

To establish a democratic, socialist, socialist, and sovereign India (words Socialist and Secular inserted by 42nd constitutional

Amendment,1976) Other preamble clauses may be used to define the scope of fundamental rights and guiding principles of state policy, including: justice (social, economic, and political); liberty (of thought, expression, belief, and worship); equality of status and opportunity; and fraternity (word unity added by the 42nd constitutional amendment, 1976).

2. Judicial review

Judicial Review is the process of the judiciary monitoring how other government coordinating bodies execute their authority in order to make sure they stay within the bounds of the Constitution. The court has the authority to examine legislative, executive, and even judicial activities. It is the authority to investigate whether a piece of legislation or any conduct is lawful. The rule of law and the concept of the separation of powers are the cornerstones of judicial review doctrine. The separation of powers is tested and balanced through judicial review.

3. Separation of powers

In India, functions are separated from powers rather than the other way around. The idea of the separation of powers is not strictly followed in India, unlike in the US. The judiciary has the authority to overturn any unlawful laws that the legislature passes thanks to a system of checks and balances that has been put in place. Because it is unworkable, the majority of constitutional systems today do not have a tight division of powers among the various organs in the traditional sense.¹¹¹⁵ The current system in India, the relationship between each organ, and its constitutional provisions are discussed in the sections that follow.

4. Rule of law

¹¹¹⁵ Richa Goel and Tejaswini Kaushal, Separation of Power, IPLeaders (3 October, 2022) <https://blog.ipleaders.in/separation-of-powers/?amp=1>

The judiciary in India has greatly enlarged the definition of the rule of law and interpreted it differently in various situations. Since it is recognised as the foundation of the constitution, not even parliament can change or eliminate it. The fundamental corollary of the rule of law is also thought to be the principle of natural justice. The Preamble of the Indian Constitution, which upholds the ideals of justice, liberty, and equality, has endorsed the Rule of Law. All other legislation must now comply with the Constitution, which has been declared the nation's guiding document. However, it is the responsibility of the courts to declare any statute unlawful if it is discovered to be in contravention of any Constitutional provision.

5. Checks and balances and other concepts.

Although it is no longer possible to have a tight division of powers as it was in the classical sense, the theory behind this doctrine is still sound. This doctrine's logic relies more on polarity than it does rigid classification, which means that the centre of authority needs to be diffused to prevent absolutism. In light of this, the doctrine is best understood as a doctrine of checks and balances.

CHAPTER IV- LIVING CONSTITUTION AND CONSTITUTIONALISM

RELATION BETWEEN LIVING CONSTITUTION AND CONSTITUTIONALISM

Living constitution is the adaptable and changing constitution which makes the constitution adaptable to contemporary issues. Since being Living constitution, it is the concept which complements constitutionalism. By reasonable amending the constitution which address the current issues, it promotes constitutionalism in India.

So the concept of living constitution and constitutionalism are interrelated and interdependent on each other. Because it is the living constitution which promotes constitutionalism in India. Constitutionalism is a ever evolving concept, it changes with time, person and situations, so a static constitution cannot provide constitutionalism as efficient as a living constitution.

For ex – amendments which are made in constitution of India make it a living constitution, so these amendments are made to address the issue faced by us which promotes constitutionalism because now executive have to abide by it and work according to that amendment.

CONTEMPORARY DISCOURSES ON CONSTITUTIONALISM AND LIVING CONSTITUTION

The conventional understanding of constitutionalism is that it is an overarching system of laws and values that is distinct from and stands above social and political life. As a result, the constitution is seen as the system's cornerstone and the tool that sets the bounds of political and administrative action. This is frequently how the rule of law is interpreted in everyday speech.

What may conveniently be referred to as "process-based" approaches have questioned this understanding of constitutionalism. The alternative model focuses on constitutionalism as an ongoing and unfinished conversation. According to this idea, constitutionalism can exist without a formal constitution and is not only applicable to states. As a result, the constitution is re-envisioned within the context of ongoing political and legal engagement. The argument is that this model respects the dynamics of political life and ensures that each generation can engage usefully in political and legal debate, rather than viewing this as problematic because it does not respect the value of legal certainty. People have

abandoned modern constitutionalism, claims James Tully and remove it from its "imperial throne to its rightful place." Constitutional texts may serve as the framework for this discussion, but they do not alone determine how things will actually work out. The idea of a constitutional settlement as something impersonal and imposed is given some encouragement by this paradigm. Instead, the constitution should function to encourage ongoing conversation and should be the result of actual, not hypothetical, debate. Even though inclusive negotiations can occur and written agreements can result, the agreement is not always the final word. Future constitutional discussions can take place in the context of this, giving room for the development of forms of accommodation that are suitable for, for instance, respecting cultural differences.

CHAPTER V – CONCLUSION

We draw conclusions about the Life of the Indian Constitution in the Light of the Topics and Snippets of Cases provided Above: - We did inherit a highly "strong" Constitution, that much is true. The Constitution's fundamental structure is ideally suited to our nation. The Constitution is more than just a piece of paper; it represents the beliefs and ambitions of the populace.

As the Constitution becomes more active due to characteristics like the Federal System, Parliamentary Form of Government, Independent Judiciary, Bicameral Legislation, Less Rigid and Less Flexible Nature, etc., we must recognise that the Indian Constitution is more than just a legal document; it is also a "Charter of Values and Principles."

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