

## *Endurance of the Indian Constitution*

India is described as a young democracy whose Constitution is only 75 years old. In contrast, there is also a view that 75 years in the life of Constitution is too a long journey. Why I say so? I say this because Thomas Jefferson in one of his letters to James Madison dated 6<sup>th</sup> September 1789, stated that constitutions should have a sunset clause providing for its expiration after 19 years and that, ***“if it is enforced any longer, it would be an act of force and not of right”***.<sup>1</sup> 220 years later, a study conducted by scholars at the Chicago Law School under its Comparative Constitutions Project came out with a finding—after studying all the constitutions from 1789 to 2005—that the life expectancy of a national constitution was 19 years.<sup>2</sup> This was calculated from a baseline survival model.

Today, we are celebrating 75<sup>th</sup> birthday of Indian Constitution. On this day, seventy five years ago, the people of this great nation gave to themselves a unique document – the Constitution of India and there is not even a whisper or thought in anybody’s mind that it has outlived its life span. The question that arises is: ***What makes constitutions endure or, to be more precise, what has made Indian Constitution endured?*** The poser of this question assumes more significance as we laud our Constitution as a vibrant document which has so far served, in a great measure, its well-defined purposes. Justice V. R. Krishna Iyer labels it as ***“The Nation’s Safety Valve”*** and these four words embrace the entire essence and spirit of our Constitution. Justice Iyer captures this essence in the following words:

“The Indian Constitution is the cornerstone of a liberated nation. It lays the grand foundation of a great people’s political edifice of governance. It spells out the fundamental rights and socialistic aspirations of the vast masses long inhibited by an imperialist ethos. It creates a trinity of democratic instrumentalities with checks and balances, parliamentary in structure, quasi-federal in character.”

But, there are certain factors that prevent constitutional demise at an early stage. Some such factors are mentioned in the above-mentioned statement of Justice Krishna Iyer which lend endurance to the Indian Constitution. Let me enumerate some universally accepted norms, which makes a constitution great and prolong its life:

- (i) First is the inclusion aspect, *i.e.*, to what extent are the divergent groups of a nation consolidated and brought to the table for constitutional negotiations. It must be noted that constitution making in deeply divided societies like ours, has huge transaction costs since it involves bringing together people from divergent groups to agree to a common minimum scheme. A constitution having a transformative agenda makes things more difficult, with each group having its own ideas about what is ideal and each group trying to impose its idea in the constitutional bargain. Our Constitution ensures inclusion at two levels. ***First***, it incorporates provisions to safeguard and protect the rights of minorities, autonomy for religious

---

<sup>1</sup> Letter To James Madison from Thomas Jefferson, 6 September 1789, Available at : <https://founders.archives.gov/documents/Madison/01-12-02-0248>.

<sup>2</sup> Zachary Elkins, Tom Ginsburg, & James Melton, *“The Endurance of National Constitutions”*, 7 (2009).

communities and freedom for linguistic groups. **Secondly**, it also aims at bringing marginalized and backward communities into the mainstream by having the provisions for reservations and other safeguards. All these provisions are in the form of Fundamental Rights.

- (ii) Another factor which makes constitutions endure, is flexibility. Stability does not mean immutability as times change. Social conditions are altered by various factors. Each generation may differ in values from a previous generation. This again is achieved at two levels, *viz.* at the hands of the Parliament as well as the Courts. Realism dictates flexibility which implies amenability and therefore, our Constitution by way of Article 368 vests power in Parliament to amend the Constitution but with a more rigorous procedure than in passing ordinary legislation. Indeed, amendment of the Constitution has been provided for blending pragmatism with special safeguards, avoiding rigidity, but facilitating flexibility. Amendments to constitution act as substitutes for constitutional replacements, which would involve re-negotiation. Courts also, by their pragmatic approach (in contrast to originalism) achieve this purpose, to which I shall allude to separately.
- (iii) Constitutional endurance is also ensured in the spirit of liberal constitutionalism. Familiar perennials in the Lexicon of liberal constitutionalism are democracy, human rights, minority protection. In the same gesture, of another key aspirational vocabulary of the postwar settlement are social welfare, solidarity, economic equality, social justice etc. and there, in the middle, sits the most cherished principle, *viz.*, **‘the rule of law’**. The Indian Supreme Court depicted great wisdom in describing aforesaid features and few others like separation of powers, independence of judiciary etc. as the basic features of the Constitution and taking them out of the reach of amending power of the Parliament. So it is that we have, as settled constitutional law, re-enforced by *Kesavananda Bharathi*, *Minerva Mills*, *Indira Nehru Gandhi*, *Bommai* and other cases, the doctrine of basic structure of the Constitution which is beyond mutation by the plenary power of Parliament. Thus, the great fundamentals are immunized and at the same time variable values can be given validity by appropriate amendments.
- (iv) Then we have the principle of Judicial Review which acts as a great safety valve in the democratic system. This constitutionally inscribed principle gives constitutional courts the power of invalidating executive and legislative excesses by binding writs contained in Articles 32 and 226. Articles 136, 141 and 142 are some of the other vital provisions which grant access to the people to move the court and seek redressal against injustice.

Thus, liberal democracy with limited government professes that it is the constitution of a nation that is supreme, and it ensures the Rule of Law. The constitution, on the other hand, is a document of good governance that recognises that **“We, the people”**, with the adoption of a democratic system of majority rule, have preserved, for ourselves, our basic and natural human rights. And any elected government is supposed to allow the people to enjoy these rights. Constitutional courts step in to ensure that these rights of the citizenry – nay, that humanity – are protected and enforced. That is the essence of a liberal

democracy. Despite the fact that ties between democracy and human rights have existed for quite some time, the role that dignity has played in relation to democracy is relatively recent and predominantly stems back to the conclusion of the Second World War.

All these factors become a part of a robust Constitution and can be described as constitutionalism. Constitutionalism is part of this larger dynamic—and it has played an increasingly dominant role over the past century. Its worldwide rise has profoundly reshaped modern notions of authority. The law governs inter-personal relationships. It represents society's values. The judge's responsibility is to comprehend the goal of law in society and to assist the law in accomplishing that aim. However, a society's law is a living creature.<sup>3</sup> It is founded on an ever-changing factual and social reality.<sup>4</sup> Constitutionalism can be defined as the principle that determines the validity of State action, and it indicates something far more significant than the concept of legality, which demands that official conduct adheres to pre-established legal norms.<sup>5</sup>

Constitutionalism is also necessary not only in order for the state to achieve beneficial goals for its community but most importantly, in order for the state to succeed as a state. Constitutionalism is a doctrine that is morally attractive when having a state is morally attractive, but it is also a doctrine that is derived from the nature of the state, and would still be relevant for the state's success *qua* a state, even if we did not have reason to create the state in our community. Let us expand this co-relation between Constitutional Democracy, Human Rights and Constitutionalism.

Constitutions as national tablets of stone tell us more about their contemporary charisma than the complex histories from which they were wrought. As Linda Colly tells us in her vivid and magisterial book *The Gun, the Ship, and the Pen*<sup>6</sup>, modern civilizations have overturned the conventional interpretation of history at every turn, when we do a riveting study of constitutions drafted all across the world between the middle of the 18th century and the start of World War I.

Every experiment of constitutionalism was unique in the sense that, though the idea that constitutions came into being as a result of democratic aspirations or revolution is dispelled; in reality, they emerged from the ruins of conflict or the danger of invasion. Constitutions may have served as the framework for nations, but they were also flexible writings that could be altered through time and space. Above all, thanks to the growth of print media and the acceleration of long-distance travel and communication, constitutions were "*protean and volatile pieces of technology*" that spread widely.

Usually, this change in history is dramatic and readily apparent. Occasionally, the change is subtle and slow, and hence unnoticeable without the appropriate distance and perspective. The fact that law is connected to this fluid reality suggests that it, too, is constantly evolving.

---

<sup>3</sup> See Brian Dickson, "A Life in the Law: The Process of Judging," 63 Sask. L. Rev. 373, 388 (2000).

<sup>4</sup> See Benjamin N. Cardozo, *The Paradoxes of Legal Science* 10–11 (Greenwood Press 1970) (1928).

<sup>5</sup> Hilaire Barnett, *Constitutional and Administrative Law* 5 (London: Cavendish Publishing Limited, 3<sup>rd</sup> ed., 2000) (1995).

<sup>6</sup> Linda Colley, *The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World*, Liveright, 2021.

Sometimes a change in the law precedes societal change and is even intended to stimulate it. However, in the majority of cases, a change in legislation is the outcome of a shift in social reality. Indeed, as social reality evolves, the law must evolve as well. Just as change in social reality is a rule of life,<sup>7</sup> receptivity to such change is a law of life.

There are different reactions to this change. The originalists argue in simple terms that, constitutional text ought to be given the original public meaning that it would have had at the time that it became law.<sup>8</sup> Scalia J who was most instrumental in taking the originalist movement forward, argued that of the two (originalism and pragmatism), originalism was the lesser evil, and that *“living Constitution is not law but rather clay in the hands of Justices who shape it to mean whatever they believe it ought to mean.”*<sup>9</sup>

Living constitutionalists believe that the meaning of the constitutional text changes over time, as social attitudes change.<sup>10</sup> In other words, the legal framework of the Constitution is to be so operated as to be consistent with the prevailing constitutional values and principles of the time. The idea is associated with views that contemporaneous society should be taken into account when interpreting key constitutional phrases.

Without entering into this debate, we may say that insofar as Indian judiciary is concerned, in order to promote and nurture this spirit of constitutional culture, it has adopted a pragmatic approach of interpretation which has ushered in an era of **“constitutional pragmatism”**.<sup>11</sup> In the process, horizon of fundamental rights is widened within the existing framework in order to ensure that more egalitarian society as well personal autonomy. The Court has also attempted to preserve the values of limited government, constitutional trust and constitutionalism in order to ensure good governance. While interpreting the Constitution, the Courts have ventured into tracing the constitutional silence by emphasizing that the text of the Constitution is only the primary source of understanding it; its silences are equally important. This has led the Apex Court to show dynamism in tracing constitutional culture, *i.e.*, culture that the Constitution seeks to imbibe in its citizens, which makes the citizens adhere to the constitutional norms.

In furtherance to the idea of constitutional culture which ensures that there is regular obedience to constitutional norms, constitutional renaissance stands described as *“a constant awakening as regards the text, context, perspective, purpose, and the rule of law”*, an awakening that makes space for a *“resurgent constitutionalism”* and *“allows no room for absolutism”* nor any *“space for anarchy”*.<sup>12</sup> One may then say that **“constitutionalism”** is the space between **“absolutism”** and **“anarchy”** and its constant repair and renewal is the prime function of adjudication. Further, as Professor Upendra Baxi points out, “Awakening is a constant process; renaissance has a beginning but knows

---

<sup>7</sup> See William H. Rehnquist, “The Changing Role of the Supreme Court” 14 Fla. St. U. L. Rev., 1.

<sup>8</sup> Id.

<sup>9</sup> Antonin Scalia, Originalism: The Lesser Evil, 57 U. CINN. L. REV. 849, 862-63 (1989).

<sup>10</sup> Steven Calabresi, On Originalism in Constitutional Interpretation, *Available at*: <https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation>

<sup>11</sup> Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.

<sup>12</sup> *Ibid.*

no end because everyday fidelity to the vision, spirit and letter of the Constitution is the supreme obligation of all constitutional beings. One ought to witness in daily decisions an “acceptance of constitutional obligations” not just within the text of the Constitution but also its “silences”. Thus, to re-awaken is to be “obeisant to the constitutional conscience with a sense of constitutional vision.”<sup>13</sup>

### ***Constitutional Dismemberments and the Indian Constitution***

Scholars today define “constitutional dismemberments” as a measure which seeks to “achieve a conflicting purpose than what was envisaged in the original constitution. It seeks deliberately to disassemble one or more of a constitution’s elemental parts. Dismemberment alters a core feature of the identity of a constitution, but without destroying the broader structure of the Constitution.”<sup>14</sup> Scholars have also suggested that in the United States, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> amendments (also known as the Civil War amendments) created a new constitution and a new constitutional order.<sup>15</sup> Fortunately, the Indian Constitution has so far been immune from such radical changes. The 42<sup>nd</sup> Constitutional Amendment, one could argue resulted in “dismemberment”, but the judiciary stepped in time and struck down provisions which were not in compliance with the basic structure. Through a constitutional review, the judiciary ensures that the constitutional vision is upheld, and the purpose of the Constitution is not lost.

### ***Conclusion***

Having incorporated all these aspects as early as in 1949, India was surely far ahead of its time. Due to these reasons, Constitution of India is regarded as one of the most advanced, holistic, all-encompassing and ever-growing document in the history of constitutionalism. While most other Constitutions from that era had to be overhauled, ours lived; it endured. Every action, every attack on the Constitution has seen a suitable reaction, a suitable change; a change towards evolution, a change for a solution, a change representing the needs of the time. The Constitution of India, therefore, shall continue to endure.

I conclude this essay with a poem which leads to some introspection as it confronts us with certain stark realities. These lines were beautifully narrated anonymously in the following form:

“He,  
the bonded labourer,  
the pavement dweller sleeping on railway platforms,

---

<sup>13</sup> Upendra Baxi, “A Constitutional Renaissance”  
the Indian Express on July 16, 2018

<sup>14</sup> Richard Albert, “Constitutional Amendment and Dismemberment”, 43 Yale Journal of International Law 4 (2017).

<sup>15</sup> *Id.* (The 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments, known collectively as the Civil War Amendments, were designed to ensure equality for recently emancipated slaves. The 13<sup>th</sup> Amendment banned slavery and all involuntary servitude, except in the case of punishment for a crime. The 14<sup>th</sup> Amendment defined a citizen as any person born in or naturalized in the United States, overturning the Dred Scott v. Sandford (1857) Supreme Court ruling stating that Black people were not eligible for citizenship. The 15<sup>th</sup> Amendment prohibited governments from denying U.S. citizens the right to vote based on race, colour or past servitude.)

*the rickshaw puller,  
landless farmer,  
the homeless wanderer living in hellish cesspools,  
the urban factory worker  
victim of Police torture herded with hundreds of his kind,  
Unholy to touch except for rape, the harijan's daughter  
a farmer toiling without demur and starving to death,  
They, who are pushed by economic growth, further below the poverty line year after year,  
Do they remind us today, that they were amongst WE THE PEOPLE who, on 26<sup>th</sup> Day of  
November 1949, enacted, adopted and gave to themselves, The Constitution."*

**Jai Hind!**