

Constitutional jurisprudence

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Jurisprudence is the philosophy of law. In other words it seeks to explain what law is all about in the most general way.

When we discuss and deal with the law, ordinarily we discuss specific subjects in law, for example income tax, labour law, family law, service law, criminal law and the law of torts. In jurisprudence we do not discuss these specific topics and instead we discuss such questions as: What is law? How did it originate? What is its object? What are its basic concepts?

Therefore when we talk of constitutional jurisprudence we will have to ask for example: What is a constitution? What is its purpose? What is its position in the legal system of the country?

A constitution is the social contract by which the people in a country are governed. It is a politico-legal document, unlike ordinary statutes, which are purely legal documents. A constitution is the fundamental law of the land, and therefore it prevails over all the other laws in the legal hierarchy, including statutes made by the legislature. It is the grund norm, as described by the eminent positivist jurist Kelsen.

Why have a constitution at all? In fact there was a strong resistance to setting up a constitution by many feudal regimes, for example in Czarist Russia and in France (before the French revolution). This, however, was really resistance to *written* constitutions by feudal rulers, who thought that it would diminish their authority. Unwritten constitutions (eg in Britain) prevailed everywhere from ancient to modern times, and in fact no society can do without a constitution because there has to be system of governance in every society.

The basic purpose of a constitution, whether written or unwritten, is to set up the organic law of the land. In other words, the first purpose of the constitution is to set up the organs of government in a country and mention their functions and inter-se relation.

In feudal monarchies the king was the supreme legislative, executive and judicial authority. In actual practice, though, he could not possibly perform all these functions, and hence he delegated most of these to delegates, who were described as advisors or councillors or judges. These persons performed the routine day to day state functions, but they were accountable to the king and not to any legislative body. The demand for a written constitution really meant that these functionaries should be

accountable to a legislative body elected by the people, and not to the king.

This was a revolutionary demand of that time, because it meant converting the king into a mere figurehead, a constitutional monarch like the British monarch who has very little powers today. That is why it was fiercely resisted by the feudal Kings, and often there had to be revolutions to accomplish it. (In England there had to be two Revolutions, one in 1645, and the other on 1688).

In modern constitutions, which are almost all written except in Britain and possibly a few other jurisdictions, all state authorities are accountable to the people; the legislators, because they have to face elections, and the ministers because they are accountable to the legislature. The constitutional authorities having a fixed tenure of office, such as the president and judges, can also be removed by the legislature through the process of impeachment, and thus they too are accountable to the people.

Thus we see that the first purpose of the written constitution is to set up state organs which are accountable to the people. In other words, the main aim of a modern written constitution is to set up a democratic form of government.

But that is not its only purpose, there are other purposes too, and to understand them we have to understand some theories in political science.

THEORIES OF HOBBS, LOCKE AND ROUSSEAU

The theories of Hobbes, Locke and Rousseau were all *social contract* theories. Social contract theories were all *secular* theories. In other words there was no place for God in them. They were thus in contrast to the divine right theories (eg the divine right theory of King James I of England) which said that the king should be obeyed because he was the viceroy of God, and hence disobedience to king was disobedience to God.

All the social contract theories had no place for God in them, and they were thus secular in nature. However there were sharp differences between them. We may consider the most important, that is the social contract theories of Hobbes, Locke and Rousseau.

The theory of the British thinker Thomas Hobbes was the theory of the *absolute sovereignty of the king*; that of John Locke was of *limited sovereignty of the king*; that of Rousseau of *no sovereignty* (not even limited sovereignty) of the king.

Hobbes was of the view that people are basically evil by nature. They require some higher authority to check their evil impulses, otherwise they will be in a state of perpetual war with each other, and will steal, kill, rape, etc. Thus peaceful life will be impossible (see his book *Leviathan*). Hence a king is required to maintain law and order, and that is why a king is necessary and he must be obeyed.

Although ostensibly this theory gave absolute power to the king, there was in fact a catch which came to be noticed later on. Since, according to Hobbes, a king was needed as an authority to maintain law, order and peace in society, it follows that if a king by his deeds or omissions fails to maintain law and order the people have a right to remove him. Thus, the right of revolution was inherent in Hobbes' theory, though not expressly mentioned, and that is why the king's supporters, who initially acclaimed the theory, later became critical of it as they realised its revolutionary potential.

The theory of the British thinker John Locke (as set out in 1690 in his *Second Treatise on Civil Government*) is that though the king is sovereign, his sovereignty is limited and not absolute (as Hobbes had proclaimed). Limited by what? The answer is: limited by the *natural rights* which every human being has by the very fact of being a human being. The king cannot encroach on, or interfere with, these natural rights which include freedom of speech, freedom to practice one's religion, freedom to own or acquire property, and liberty.

The theory of the French thinker Rousseau is that all sovereignty belongs to the people, who exercise it through an agent, whether he is called a king, or Parliament, or minister or whatever. All these agents, according to Rousseau, are nothing but the servants of the people and therefore can be removed by them. The will of the people is called the general will, and it is supreme. Thus, according to Rousseau, it is the people, not the king, who are supreme (see Rousseau's *The Social Contract*).

We have mentioned these theories of political science because we have now to come to the second purpose of the constitution, that is, to protect the people from the state authorities when the latter act arbitrarily or in oppressive manner.

Locke had raised the issue of natural rights in the people, which even the king could not validly violate. These natural rights, which were only political slogans at one time (eg the slogan "Liberty, equality, fraternity" in the French revolution or "No taxation without representation" in the American Revolution), were later incorporated as legal rights in the constitutions of several countries. Examples include the Bill of Rights in the US Constitution, or the Fundamental Rights of the Indian Constitution.

It was realised that while ordinarily the elected representatives would (or should) work for the welfare of the people who elected them, there may be occasions where they may not, and may even start oppressing the

people, and hence people must be protected even from them by making their fundamental rights inviolable.

But who would ensure that the fundamental rights of the people were protected against invasion by the executive and even the legislature? This task was given to the judiciary, either expressly vide Article 32 of the Indian constitution, or by necessary implication, as in the US constitution, vide judgment of the US Supreme Court in *Marbury v Madison*. Since the constitution was the highest law of the land, and since these rights were placed in the constitution itself, any law or act which violated these rights became void. But who could declare it void? Obviously the legislature would not declare its own act void. Only the judiciary acting as a neutral umpire could do so. As Chief Justice Marshall of the US Supreme Court observed in *Marbury v Madison*: "It is emphatically the duty of the court to declare what the law is." When there is a conflict between a constitutional provision and a statute, it is the former, being the higher law, which will prevail, and the latter will be declared by the court as *ultra vires*.

The court is thus the guardian of the rights and liberties of the citizen, and it will be falling in its duties if it does not protect them.

THE INDIAN CONSTITUTION

The Indian Constitution is based on western models. Our founding fathers borrowed the Parliamentary form of government and independent judiciary from Britain, the fundamental rights from the US Constitution, the directive principles from the Irish Constitution, etc.

Thus, the basic principles and state institutions set up in our constitution were not of our own creation. We borrowed modern western concepts and modern institutions from western countries and imposed them from above on our backward, semi- feudal society.

In contrast, in countries such as England and France society and the constitutional principles historically grew together. For instance, the rights of freedom of speech and liberty were achieved in England and France after long, arduous, historical struggles by the peoples of those countries against feudal despotism, for example the British revolution of 1645 and 1688 and the French revolution of 1789.

In India, on the other hand these modern rights and these modern state institutions were not the product of our own struggles but were borrowed from the west and transplanted from above on our backward semi- feudal society by the constitution makers. Thus, these rights and these state institutions were not the result of our own struggles, but were the benefits we received from the British and the French people. Thus, while our constitution is modern, our society was (and still is) backward. The constitution, by incorporating modern values and setting up modern institutions is pulling society forward into the modern age, and is thus of great benefit

to India. For instance, the equality provisions (Arts 14 to 18) lay down modern values, whereas the caste system which still largely prevails in India represents backward, feudal values, and provides for inequality.

Similarly, the Parliamentary form of government the principle that the government is responsible to the legislature (not to a king) the principle of universal suffrage (not suffrage restricted to rich people or to males alone), the principle that the king (or the president as in India) acts not of his own sweet will but on the advice of the cabinet, are all principles borrowed from England, where they had been attained after long, arduous historical struggles from the 17th to the 19th centuries.

Similarly, the principle of judicial independence was borrowed by us from England. It was essential to have an independent judiciary if we wished to protect the fundamental and other rights of the citizens, because if the judiciary is not independent it ordinarily cannot have the courage to declare an act of the legislature or executive as void, or to direct the executive to act lawfully.

In England up to 1701, judges were not independent and they held office at the king's pleasure. Theoretically, judges were only the king's agents. The king was the fountain of justice, and the judicial function was the sovereign function, ie the function of the king. In fact kings often used to decide cases themselves, as in the case of the Mughal Emperors. However as the functions of the state expanded, the king became too busy in administrative, military and other matters, and he had no time to decide cases. Hence, he delegated these functions to his delegates, who came to be known as judges.

Up to 1701, judges in England had no job security, and they could be dismissed by the king whenever he chose. Thus King James I dismissed (and even imprisoned) Lord Coke, the Chief Justice of England in 1610 because the latter said that the king could not decide cases personally as he was not learned in the law.

It was the Act of Settlement, 1701 in the reign of Queen Anne that gave independence and job security to the judges. By this Act it was declared:

- (1) A judge could not be removed by the king but by the Parliament by impeachment. This meant it was the legislature, not the executive who could dismiss a judge.
- (2) This impeachment proceeding required framing specific charges against the judge and giving him an opportunity to defend himself in respect of those charges (unlike the previous position where this was not necessary). In England impeachment can be done by a simple majority vote of The House of Commons, whereas under the Indian Constitution it requires two thirds majority of each House of Parliament.

It is this job security which gives independence to our judges, as they know that they cannot be thrown out of

office even if they give a verdict against the government or the legislature. This gives them courage to act independently and fearlessly.

We have borrowed Locke's theory by incorporating fundamental rights in our constitution which even the legislature cannot violate, and we have also borrowed Rousseau's theory by making the people supreme in our country.

Thus, while the Indian Constitution sets up state organs, it also limits their powers, so that they may not become tools of oppression against the people.

The third purpose of the Indian Constitution is to declare ideals which the state should seek to achieve. These are the Directive Principles of State Policy in part IV, which are borrowed from the Irish Constitution, but also having features peculiar to the Indian context, eg special protection to the historically disadvantaged classes such as Scheduled Castes and Scheduled Tribes.

THE INDIAN CONSTITUTION IN ITS HISTORICAL CONTEXT

We may now discuss the Indian Constitution in its historical context. To do so we have to first understand what is India.

As discussed in great detail in the recent judgment of the *Kailas v The State of Maharashtra*, India is broadly a country of immigrants. About 92 per cent of people living in India today are descendants of immigrants. The original inhabitants of India are not the Dravidians (who were also outsiders) but the pre- Dravidian tribals, such as bhils, santhals, gond, todas, etc – the Scheduled Tribes. These comprise only 8 per cent or so of the Indian population today (for details see the above-mentioned judgment on Google).

This explains the tremendous diversity in India – so many races, castes, religions, languages and cultures. China is larger than India, both in population and in land area, but there is broad (though not absolute) homogeneity in China. For example, all Chinese have Mongoloid faces, 95 per cent belong to one ethnic group called the hans, and there is one written script (mandarin). On the other hand India is characterised by its tremendous diversity, which is broadly due to the fact that it is largely a country of immigrants.

Hence to bring the country together it is essential that all the communities and groups be given equal respect and to be treated equally, and this the constitution does through such measures as Articles 14-18 (the equality provisions) and Article 25 (freedom of religion).

When India became independent in 1947 partition riots were taking place, and large parts of the country were engulfed in religious madness. Pakistan had declared itself an Islamic state, and there must have been tremendous

pressure on Pandit Nehru and our leaders to declare India a Hindu state. When passions are inflamed, it is a difficult to keep a cool head. It is the greatness of Pandit Nehru and other leaders that they did keep a cool head and resisted the pressure of declaring India a Hindu state. They declared India a secular state, which was the correct decision in a sub-continent of such tremendous diversity. This becomes evident when we see what is happening in our neighbouring country.

The Indian Constitution sets up a federal form of a government. Federalism caters to regional aspirations. In a country of such tremendous diversity federalism is absolutely essential. Thus, the Naga people have their own government and so do the Tamil people, the people of Punjab, of Orissa, Assam, Bengal etc. There is also a central government which is for all. The jurisdiction of the centre and the states is demarcated by Articles 245-248 and the seventh schedule.

Unity amongst diversity is a basic theme of the Indian constitution. Article 301, which states that trade and commerce shall be free throughout the territory of India, provides for economic unity of India, and political unity depends upon economic unity. Article 301 in effect implies that India is one economic unit, and the various states are not separate units. Thus a manufacturer having his factory in Tamil Nadu can freely sell his goods in North India, West India or East India.

CONSTITUTIONAL INTERPRETATION AND JUDICIAL REVIEW

We may conclude by referring to the principles of interpretation of constitutional provisions and the principles relating to judicial review of statutes.

As observed by Chief Justice Marshall of the US Supreme Court in *Mc Mulloch v Maryland*, a constitution is a

living document, intended to endure for ages to come. Hence, the principles of its interpretation differ to some extent from the principles of ordinary statutes. As observed by the Supreme Court in the *Haj act* case, constitutional principles should not be interpreted too literally. As held by Justice Holmes of the US Supreme Court (referred to in the above decision) the machinery of the government would not work if some play is not allowed at the joints.

Thus the rule of strict interpretation, used in interpreting taxing or criminal statutes, is not applied in interpretation of constitutional provisions. For instance, in interpreting the entries in the seventh schedule, a wide interpretation is given (see recent decision of the Indian Supreme Court upholding the validity of Tamil Nadu act relating to financial establishments which duped innocent investors).

No doubt the court has the right to declare a statute to be unconstitutional, but every effort should be made to uphold its validity, as invalidating a statute is a grave step since it amounts to thwarting the will of a coordinate organ of the state (vide *Government of Andhra Pradesh v P Laxmi dev*). For this purpose the court can read down the language of a statute (see *Sri Indra das v State of Assam* in which the Supreme Court read down the Terrorist and Disruptive Activities Act and the Unlawful Activities Act, and held that mere membership of a banned organisation will not make one a criminal). 

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