

SEPARATION OF POWER: A MEANS TO CONSTITUTIONALISM

PRABHAT SHANKAR

PRIYA RANJAN

RASTRIYA RAKSHA UNIVERSITY, GUJARAT

ABSTRACT

For genuine democracies, constitutions consist of overarching preparations that determine the political, legal and social structures by which society is to be governed. Apart from this constitution also serves the function of laying down the area of functions of three organs of the state viz. legislature, executive and judiciary. Constitutional provisions are therefore considered to be supreme or fundamental law because they guide all the three organs of state to work within their domain. If the constitution is itself not sufficient for the need of the people, it will affect the rule of law and harm the democracy. In our country, we have four pillars in the name of the legislative, executive, judiciary and the fourth one is media. All these have their separate power. Apart from the power given to all these bodies, it doesn't mean that they will work independently absolutely. They are interdependent and the law will be supreme. Constitution deal with the power and limitations of these bodies. To maintain a check and balance between the authorities and the government is constitutionalism. The idea of constitutionalism is based on the notion that there should be minimum government and maximum governance; this can only be done if the powers and functions of government are properly defined and also the limitations on the power of government are duly described. There is not a single self-sufficient means to achieve this goal of minimum government rather various tenets of constitutionalism helps to keep the government within its defined limits, the idea of separation of power is one of them. The present study focuses on the concept of constitutionalism, its various tenets and also attempts to describe how the Doctrine of separation of power endeavours to achieve this goal of constitutionalism. This paper also critically examines whether there can be constitutionalism without separation of power or not?

LITERATURE REVIEW

PRIMARY SOURCE

Statutes

1. **Constitution of India, 1950-** Constitution of India is a living document animating the inspirations of people residing in India. Various provisions of this Constitution strive to minimize the arbitrary power of government. Part III of the constitution provides certain fundamental rights to its subjects which is available against the state so that the state can't interfere with the rights of people. Article 50 of this Constitution further puts a positive obligation on the state to separate the executive from Judiciary. By extensive review of the Constitution of India, the researcher has found that it aims to achieve the goal of constitutionalism i.e. minimum government maximum governance.
2. **Constitution of United States of America, 1789-** The constitution of the USA is a living example of achieving the goals of constitutionalism through Separation of Power. This constitution explicitly separates the power of three organs of the state. Article 1 of this constitution vests all Legislative power in Congress, Article 2 vests executive powers in the president while Article 3 gives all judicial power to Federal Supreme Court. By investigative review of this constitution, the researcher has found that Separation of Power is very crucial for the existence of constitutionalism.

SECONDARY SOURCES

For this research paper, a researcher has gone through various online articles as well as e-books.

Books:

1. **J. N. Pandey, *Constitutional Law of India* (Central Law Agency, Allahabad, 55th edn., 2018)**
This is one of the popular books on the constitutional law of India. It deals with the various provision of constitution, its interpretation and various case laws. From this book the researched gained knowledge about A- 50 of Indian Constitution dealing with Separation of Executive from Judiciary.

2. Mahindrapal Singh (ed.), *V. N. Shukla's Constitution of India* (Eastern Book Company, Lucknow, 12th edn. 2015)

This is also one of the prominent book dealing with various provisions of Constitution of India. From this book, the researcher got able to connect the concept of fundamental rights and its effect on the arbitrary power of the state. This book has also helped the researcher in having a detailed knowledge of various provisions of Constitution dealing with Constitutionalism.

3. I.P. Massey, *Administrative Law* (Eastern Book Company, Lucknow, 9th edn., 2017)

This is one of the masterpiece book on administrative law. After reading this book the researcher got a comprehensive idea about the doctrine of separation of power and its importance in governance in any democratic setup.

4. N.V. Paranjape, *Studies in Jurisprudence and Legal Theory* (Central Law Agency, Allahabad, 8th edn., 2016)

This is a leading text dealing with Jurisprudence and Legal theory. This book has helped the researcher in getting a detailed knowledge of the Creation of state and theories of state and sovereignty.

E-books

1. M. J. C. Vile, *Constitutionalism and separation of power*, (Liberty Fund Inc., Indianapolis, 2nd edn. 1998).
2. A. John, *Constitutional and administrative law* 43 (Palgrave Macmilan, London, 8th edn., 2011)

Journals :Maru Bazezew, "Constitutionalism" 3 *Mirzan Law Review* 358 (2009)

Other sources

1. Constituent Assembly debates.
2. Articles
3. Websites

RESEARCH HYPOTHESIS

1. Separation of Power is a means to achieve the goals of Constitutionalism.
2. Constitutionalism can't exist without separation of power.

RESEARCH METHODOLOGY

The research methodology adopted throughout the study is mainly doctrinal. The researcher has relied largely on secondary sources. The research method adopted throughout the study can be broadly categorised as analytical and descriptive research.

(a) **Research tools-** The data has been collected from the following sources:-

1. Primary source
2. Secondary source

Primary source: the primary source being relied upon in the present context includes

- Constitution of India, 1950
- Constitution of USA, 1789

Secondary source: The secondary source is relied upon for the study includes various Books, Articles, Websites, Law journals etc. Most of the documents being analysed for the study are available online.

(b) **The general method of analysis-** The deductive approach is being used in the present study to analyse the research question at hand and hence to accomplish various research objectives.

(c) **Mode of Citation-** Throughout the research paper, the researcher has used a uniform mode of citation. The citation preferred for the present study is the **Indian Law Institute (ILI)**

RESEARCH OBJECTIVE

1. To know the concept of constitutionalism.
2. To know the historical development of Constitutionalism.
3. To find out essential elements of Constitutionalism.
4. To analyse the relationship between separation of power and constitutionalism.
5. To find out the differences between Constitutionalism and separation of power.

RESEARCH QUESTION OR PROBLEM

1. What is meaning Constitutionalism?
2. What is a need for Constitutionalism in any democratic setup?
3. What is a separation of power?

4. How the separation of power helps to achieve the goals of Constitutionalism?

CHAPTER- I

Introduction

Every sovereign state adopts a constitution of its own which describes the composition, powers and functions of three vital organs of state, namely, Executive, Legislature and Judiciary. The sole reason for having a constitution is not just to demarcate the functions of organs of state rather there had been thousands of years of struggle among the people of society to battle for what we call today a constitution. The journey of the formation of the constitution starts with the formation of the state in the ancient time when people had a very limited understanding of government and governmental powers.

1.1.Theories of Formation of State

Tracing the origin of state, Hobbes observed that originally man lived in a state of nature united by social bound but without any political organisation. According to Hobbes, a life of a man is poor, nasty, and not proper, even the life of a man is very short, they lived in fear of death, there is no facility. People lived in violence and without law. This leads to the winning of the higher class people of the society i.e., the stronger is the winner. After some time, people realise that now it's time to elect someone who will protect them as a leader. This is how authority comes into existence.

Later, this political authority came to be known as the state. A sovereign was chosen by the people to whom they surrounded their rights to be governed and controlled. The authority of the state was thus vested in the sovereign so chosen by the people themselves.¹ According to this theory, the power of the sovereign was absolute and his will was the law which the subjects were bound to obey.²

Soon after Hobbes propounded his social contract theory, critics started criticizing it on the ground that this theory is supposed to give uncontrolled power in the hands of the sovereign which can encroach on the very basic rights of people at large. Therefore, people started thinking

¹ N.V Paranjape, *Studies in Jurisprudence and Legal Theory* 182 (Central Law Agency, Allahabad, 8th edn., 2016)

² *Ibid*

of minimum government so that the sovereign is not free to decide the fate of individuals of its own will. Sovereign has obtained its powers only by the will of people and therefore it should not encroach upon the general will of people and must afford a minimum standard of freedom and liberty. John Locke said that man lives in nature without any fear and war, they are very social. There is no superior force over them and no one can judge him. The development in the society leads to allow people to remain under a sovereign. Locke disagree with Hobe's view by saying that man has never given their natural right, they just have done a contract and a sovereign can not breach a contract. If he does so, people are not bound by the sovereign to obey them.³ In other words, Locke's social contract was not unilateral like that of Hobbes but was bilateral because the sovereign too was bound by the terms of the social contract. Locke repudiated the theory of the divine right of king or the absolute state of Hobbes and defended limited monarchy which was the creation of a special contract between the people and the sovereign. On critically examining Locke's theory of the creation of state we can undoubtedly say that he supported limited constitutional monarchy. He came out to be an advocate of people's right because he believed that conferment of uncontrolled and unprecedented power in the hands of the sovereign will create tyranny and would amount to gross violation of the rights of people by the Sovereign itself. It is mostly said that *power corrupts and absolute power corrupts*, therefore it is of paramount importance that power in a democratic setup must not be concentrated in one single hand but should be diffracted. Jean Rousseau observed that people enjoy more when they live according to nature, but due to change in need, they have to surrender their rights for their protection and for the benefit of society.⁴ He observed that state, as well as law both are the result of General, *will* of people and the sovereign was to rule only as per the law by using only his legislative powers. Thus the emergence of the state and its sovereign power was the result of people relinquishing their natural rights and in return, received civil liberties of freedom of expression, Press, assembly and equality etc.

1.2 Quest for constitution

On critically investigating the above three theories of the creation of a state, it is pertinent to note that people at the time of Hobbes were less concerned about their civil rights and were reluctant to renounce their rights only for the protection of their natural rights. But gradually people

³ *Supra note 1 at 183*

⁴ *Id at 184*

started thinking in terms of limited government soon after they realized that the state itself can be the violator of their rights. Therefore people started their quest for limited government where there shall be respect for everyone's rights and state would come into the picture not to rule anyone but only for administrative efficiency. This shifting of a mindset of people from absolutism to liberalism is the result of the search for minimum government and maximum governance. This concept of minimum interference of government in the private activities of people is a quest for constitutionalism. Since the power of government can't be limited without properly defining it, therefore there was a requirement of a fundamental document that specifically defines the power and functions of all the wings of a government. This fundamental document which demarcates the functions of three organs of state was later known to be called as the constitution.

Therefore since the constitution is a result of people's quest for a limited government we can say that the **Constitution itself is not an end but only a means to an end**. Constitution performs the functions of limiting the powers of government so that individuals can exercise their rights without any undue interference. This helps the people to maintain their civil rights without being reluctant to renounce their rights to the sovereign as depicted by Hobbes. The constitution apart from defining the powers and functions of government also provides certain fundamental rights to its subjects, though the constitution *prima facie* seems to provide positive rights to individuals in reality it is aimed to put a negative obligation on the state so that it can't interfere with some basic rights of individuals.

According to B.R. Ambedkar, Constitution ensure justice to the people, it is not a piece of a book to read. It also deals with those sections of the down trodden society. Constitutionalism is a very broad term and it is not only related to the constitution aspects. It is also about right, duty, justice and development.⁵ So, it can be said that the traditional notion of constitutionalism which focused merely on limited government has now dynamically expanded its horizon in the present time and today the function of constitutionalism is also to promote justice. Therefore constitutionalism can't be constrained into a stagnant thesis form but it is a dynamic concept that expands its horizons with change in time.

⁵ *Constitutionalism in India*, available at: <http://www.iosrjournals.org/iosr-jhss/papers/Vol19-issue3/Version-4/F019342936.pdf> (Last visited on February 14, 2021)

In the coming chapters, we will have a detailed study of the concept of Constitutionalism and its various tenets. Further, we will see one of the crucial tenets of constitutionalism that is a separation of power and will have a detailed discussion on the concept of separation of power. We will also examine that how separation of power promotes constitutionalism.

CHAPTER-2

Constitutionalism

2.1 Meaning of Constitutionalism

There is no accepted definition of Constitutionalism but it is accepted as an idea or a thought according to which a government should be limited in its powers, and that its authority depends on it observing these limitations. Constitutionalism is thus the limitations put on a government, which is prescribed by a Constitution. These limitations are imposed either by giving rights to the subjects of the constitution (citizen) or by expressly placing restrictions on the authority of the State i.e. to specify the scope of power of the State. Constitutionalism refers to the concept of sovereign and political order with the help of laws. It talks about the supremacy of law. It follows the principle of democracy. It may be identified with the system of divided power. As Friedrich says Constitutionalism by dividing power provides a system of effective restraints upon governmental action. In studying it, one has to explore the methods and techniques by which such restraints are established and maintained. It is a body of rules ensuring fair play, thus rendering the government responsible. It emphasises the rule of constitution in the state at any cost, it also talks about the limits of the powers of the sovereign. It defines the limit and jurisdiction of sovereign power.⁶ To make constitutionalism a reality, one has to take help from constitution, without taking help from constitution it is not possible to make it a ground reality. A limited state is necessary for the welfare of a state, here a limited state means those states which have limited power. John Locke also supports this theory of the limited state. This concept is an antithesis for all dictators. (Eg. Nazi govt and Indra Gandhi governance).⁷

⁶ Constitutionalism, available at: <http://www.ancpatna.ac.in/departments/polsc/lectures/UG%20Part-I/Constitutionalism%20%20Meaning%20%20Development%20&%20Prospects%20of%20Constitutionalism%20B-A-I%20drtanujasingh.pdf> (Last Visited on February 17, 2021)

⁷ Positives of Constitutionalism, available at: <https://blog.ipleaders.in/positives-constitutionalism-india> (Last visited on February 17, 2021)

Example: the legislation has the power to legislate the new laws for the people but there is a limitation that the legislation cannot violate the fundamental right according to Article 13 of the constitution and if the parliament is amending the fundamental right then also he cannot amend in that sense that it affects the basic structure. There is a certain limitation which is given under the Indian Constitution such as 'check and balance, 'rule of law', 'due process of law', and amending procedure given in Article 368 of the constitution. There are two popular States where constitutionalism is a part of the constitution as the limitations are already mentioned in their constitution, these countries are U.S.A and Germany.

2.3 Development of idea of constitutionalism

The rise of a constitutional state is essentially a historical process whose chief material is contained in the history of political institutions coupled with the history of western political ideas right from ancient to modern times. The history of the development of constitutionalism is thus a history of the growth of political institutions that had their first important manifestation in the soils of ancient Greece.

2.3.1 Greek Constitutionalism

They had a city-state system in which the benefits of citizenship were open to the freemen only. Most of the city-states had a direct democratic system, though Sparta was under the rule of a military junta. The Greeks, however, had a peculiar notion about the state and the role of the people (citizens) therein. As Strong says A Greek citizen was actually and in person a soldier, a judge and a member of the governing assembly. The state to the Greek was his whole scheme of association, a city wherein all his needs, material and spiritual, were satisfied.⁸

The Greek philosophers like Plato and Aristotle, however, studied the case of political institutions from an ethical point of view with the result that the political constitutionalism became a handmaid of normative and moral notions.

2.3.2 Roman Constitutionalism

A great change occurred after the eclipse of the city-state system and the establishment of a great empire under the Romans. The intellectual life became more diffuse and driven into different

⁸ *Supra note 6*

channels. Men retreated with themselves; ethics became independent of politics; society and state ceased to be equivalent terms and the individual, apart from the state, became the chief object of contemplation.⁹

2.3.3 Medieval Constitutionalism

A great change took place after the disintegration of the Roman Empire in the fifth century A.D. and its substitution by the establishment of several feudal states. The Teutons brought with them certain new ideas as the personality of law based on the force of folk customs that bound the authority of the king.¹⁰

2.3.4 Constitutionalism during Renaissance Period

The medieval world came to an end with the pestilence of the Black Death of the Fourteenth century. The renaissance marked the re-emergence of a humanistic and scientific outlook. It indicated that the European people had developed a new consciousness of life and a new sense of liberty. In this era people started developing a sense of respect for their rights and the famous theory of John Locke was also propounded during this time only.

2.3.5 Constitutionalism after the First World War

The period following the first Great War came as an era of great surprise since, instead of bringing about a rich harvest of constitutionalism after the termination of hostilities in a world that could be made safe for democracy, it witnessed serious authoritarian reactions against the process of constitutionalism hitherto set in the direction of representative and responsible government. The emergence of communism in Russia, Fascism in Italy and Nazism in Germany can be cited as concrete instances in this regard. The new constitutional devices adopted in these countries contained two elements that distinguished them from a constitutional state is hitherto known as political dictatorship through the dominance of a single party to the exclusion of all others and a totalitarian system that used the political machine to control and direct every aspect of economic, social and even religious life. However, one remarkable aspect of the post-First War period was the establishment of the first international organisation called the League of Nations that aimed, by constitutional means, at preventing or peacefully settling conflicts

⁹ *Supra note 6*

¹⁰ *Ibid*

between the sovereign states. It marked a new and unprecedented stage in the development of constitutionalism. Constitutionalism, thus, came to have one more attribute called internationalism.¹¹

Chapter III

Components of Constitutionalism

According to Barnett, components are¹²:

- a) Limited Govt.
- b) Separation of power
- c) Accountability of the govt.

According to Henkins, Components are¹³:

- a) Rule of law
- b) Limited govt.
- c) Separation of power
- d) Policing
- e) Independent Judiciary
- f) Individual right

I shall thus focus on the following basic elements

- Constitution.
- Limited State.
- Judicial Setup.
- Rule of Law.
- Separation of Power.
- Popular Sovereignty.

This is not the complete list as there are several more elements and components of constitutionalism.

¹¹ *Supra note 6*

¹² Maru Bazezew, "Constitutionalism" 3 *Mirzan Law Review* 358 (2009)

¹³ M. J. C. Vile, *Constitutionalism and separation of power*, (Liberty Fund Inc., Indianapolis, 2nd edn. 1998).

3.1 Constitution

The constitution is one of the most important elements and a component of constitutionalism because it constitution defines the scope of limitation and power of the state. Therefore, constitutionalism is entrenched in the constitution itself¹⁴, Prof. Faizan Mustafa, stated that there can be constitutionalism even without a constitution. He gave the example of Britain where there is no constitution but they follow the path of liberalism. Article 21 of the constitution, which talks about the limitations by which a state can not make a law that does not conform to “due process of Law”. This article prohibits the legislation to enact certain arbitrary laws. The powers in list I and List II is divided and the only concerned authority can make laws in that particular list. This show the restricted power of the legislation.

3.2. Limited state:

A limited government ensures individual liberty and freedom. As this paper earlier talked about the concept of limited state, the limited state has certain reasonable restrictions on the part of power given to the state. The constitution of India talks about the limits of the legislation and violation of such limit deemed to ultra-vires.

3.3 Judicial Setup

*Kesavananda Bharati v. State Of Kerala and anr*¹⁵, this is the leading case that emphasises the limits of the legislation. The doctrine of basic structure is laid down in this case. It has been laid down in the case that parliament has the power to amend the constitution but cannot amend the basic structure of the constitution. There are certain limits to amending. This show that the judiciary is playing a very important role in guar anting constitutionalism.

3.4 Rule of Law

The state cannot behave as it wants or as per the choice of the sovereign. There is a concept of rule of law, which is to be followed. No State is free to do according to his wishes. Every State has to look after the limitations that are imposed by law itself. No one is above the law. Thereby, rule of law makes sure of constitutionalism.

Rule of law and its elements:

¹⁴ I. P. Massey, *Administrative law* 37 (Eastern Book Company, New Delhi, 9th edn. 2017).

¹⁵ AIR 1973 SC 1461

- a) Equality of law.
- b) The Primacy of the right of the individual.
- c) Absence of arbitrary power.

A.V Dicey says that no one is above the law. This rule is taken from England. It simply means that the only law is supreme and no man is above the law. According to Dicey, every official whether he is prime minister, a constable, or a collector of taxes, all are under the same umbrella if they violate the law.¹⁶ Therefore it can be said that the main function of rule of law is to limit the government from acting arbitrarily hence Rule of Law is also focused on the promotion of constitutionalism.

3.5 Separation of Power

Constitutionalism is defined by the separation of power not by the concentration of it. Separation of power means the distribution of power among legislative, executive and judiciary. These organs work separately but this is not absolute. They work interdependently because, in India, the separation is not in the stricter sense. This division can be understood as the judiciary can not enact a law, it is the duty of the legislature.¹⁷ whereas, legislative cannot do the work of the judiciary. So, it is the beauty of separation of power, that one enact it and the other protects it.

3.6 Popular Sovereignty

Popular sovereignty is related to the public, it means the public is the prime source of all government authority. The legitimization of governmental power is retained from public consent. The source of all sovereignty lies essentially in the nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it. Even though there is a certain sovereign entity that is empowered to govern, ultimate sovereignty resides in the nation. The power of such sovereign entity emanates from the public.¹⁸ The people are directly or indirectly involve themselves in the decision-making process as we have seen in the election. People decide his representative and vote for the same. The election process in our country is free, fair and in peaceful manner. India is the largest democracy in the

¹⁶ J. N PANDEY, *Constitutional Law of India* 84 (Central Law Agency, Allahabad, 55th edn., 2018).

¹⁷ *Supra* note 15 at 43

¹⁸ *Supra* note 13

world. We have the provision of re-election before the expiry of terms in case of the representative fails to fulfil the interest of the people.

Apart from the above six components of constitutionalism, various components promote the idea of constitutionalism but to make this project more concise it is not worth having a detailed discussion of all.

Chapter IV Separation of Power

4.1 Meaning and Concept of Separation of Power

The doctrine of separation of power governs the mutual relations among the three organs of the government i.e., legislature, executive and judiciary. Aristotle for the first time differentiated the functions of Government into three categories viz.¹⁹,

- a) Deliberative
- b) Magisterial and
- c) Judicial

Similarly, Locke²⁰ gave three-fold classification of power of the government namely:

- a) Continuous executive power,
- b) Discontinuous legislative power; and
- c) Federative power.

“continuous executive power” refers to the executive and judicial power, “discontinuous legislative power” implies the rulemaking power and “federative powers” signifies the power regulating foreign affairs.²¹

The term separation of power or *trias politica* was coined by a French scholar Montesquieu in 1748 in his book ‘*Espirit des Louis*’ (The spirit of the Laws). According to him no one person or body should exercise all the three functions of the government namely, the legislative, executive and judiciary. This doctrine stipulates that limits should be laid on the functions and powers of every branch of government so that each branch functions within its sphere without transgressing

¹⁹ *Supra* note 15 at 38

²⁰ *Ibid*

²¹ *Id.* at 39

into the domain of others. This doctrine seeks to prevent separation of power by providing checks and balance. According to Montesquieu:

“when he legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again there is no liberty if judicial power is not separated from Legislative and Executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body would exercise these three powers.”²²

Thus the theory of separation of powers can be explained in the following way²³:

- a) That one person cannot become a part of all three organs.
- b) That no organ is allowed to interfere in the working of others.
- c) That each organ is assigned his work and no one is allowed to do to work of others.

4.2 Separation of power in India

In the Constitution Article 50 specifically state that *“the State should take steps to separate the judiciary from the executive in the public services of the State”*. However, this Directive Principle does not embody any formalistic or dogmatic division of powers.²⁴ There is no as such separation of power is mention in the constitution, Article 50 comes under the Directive principle which says *“the State should”*. In India, there is a parallelism of power and hierarchies in all the organs.²⁵

In the Constituent Assembly Debates suggestion was made by Prof. K.T. Shah a member of Constituent Assembly to insert by amendment a new Article 40-A concerned with the doctrine of separation of powers. This amendment was supported by Kazi Syed Karimuddin. This suggested Article read as follows:

²² Charles de Secondat, available at:<http://www.ucs.louisiana.edu/~ras2777/conlaw/montesq.html> (Last visited on January 29, 2021)

²³ A. John, *Constitutional and administrative law* 43 (Palgrave Macmilan, London, 8th edn., 2011)

²⁴ *Supra* note 23

²⁵ Mahendra Pal Singh (ed.), *V. N. Shukla's Constitution of India A-55* (Eastern Book Company, Lucknow, 12th edn., 2013)

“There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial.”²⁶

K.T. Shah remarked :

“If you maintain the complete independence of all the three, you will secure a measure of independence between the Judiciary, for example, and the Executive, or between the Judiciary and the Legislature. This, in my view, is of the highest importance in maintaining the liberty of the subject, the Civil Liberties and the rule of law. If there was contract between the Judiciary and the Legislature, for instance, if it was possible to interchange between the highest judicial officers and the membership of the legislature, then, I am afraid, the interpretation of the law will be guided much more by party influence than by the intrinsic merits of each case. The legislature in a democratic assembly is bound to be influenced by party reasons rather than by reasons of principle.”²⁷

However, Shri K. Hanumanthiya, a member of the Constituent Assembly dissented with the proposal of Prof. K.T. Shah as he considered this article to sponsor a Presidential form of Government whereas the Drafting Committee had approved Parliamentary system of Government to be suitable to this country. He remarked that:

“Instead of having a conflicting trinity, it is better to have a harmonious governmental structure. If we completely separate the executive, judiciary and the legislature conflicts are bound to arise between these three departments of Government. In any country or any government, conflicts are suicidal to the peace and progress of the country. Therefore in a governmental structure, it is necessary to have what is called “harmony” and not this three-fold conflict.”²⁸

Dr. B.R. Ambedkar, also disagreed with the suggestion forwarded by K.T. Shah. He opined that:

“There is no dispute whatsoever that the executive should be separated from the judiciary. Concerning the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of the United States; but many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution between the executive and legislature... There is not slightest doubt in my mind and the minds of many students of Political Science, that the work of Parliament is so complicated, so vast that unless and until the members of the Legislature receive direct guidance and initiative from the members

²⁶ VII, Constituent Assembly Debates, 959

²⁷ VII, Constituent Assembly Debates, 960

²⁸ VII, Constituent Assembly Debates, 962

of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature. I personally, therefore, do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature.”²⁹

Consequently, the motion for a new Article 40-A dealing with the separation of powers was dismissed by the Constituent Assembly. This discussion signifies that the framers of the Constitution never wanted to adopt the doctrine of separation of powers in its rigid form. They foresaw that the functioning of the government was a complex process and such a rigorous adoption would impede the smooth functioning of the government.

4.3 Separation of Power and Constitutionalism

Constitutionalism, Rule of Law and Separation of power are parallel concepts, all these three doctrines have a common goal that is minimum government and maximum governance. The concept of constitutionalism and separation of power is so inextricably fused that sometimes scholars feel that separation of power and constitutionalism are synonyms because these two concepts focus on a common goal i.e. absence of arbitrary power in hands of the government. But they are not synonyms but are the two corners of the same boat whose destination is the same i.e. minimum government maximum governance.

This separation of power is not only discussed in constitutionalism but it has already been discussed in the natural law theory as natural law also talks about the end of arbitrariness for the protection of life and liberty of the people. Constitutionalism and natural law both simultaneously emphasise on progressive reduction in arbitrary power.³⁰

According to the Brandeis. J explanation of the separation of power, he says that it is not to promote the efficiency and the working of an administration but it is more for reducing the arbitrary power of the authority and also to protect peoples right from authority. That is why the separation of power talks about giving the power to all the organs separately and in a limited manner. All the power, on one hand, will lead to complete arbitrariness. Therefore separation of power is not an end in itself but a means to an end i.e. constitutionalism.

²⁹ VII, Constituent Assembly Debates, 967, 968

³⁰ Supra note 15 at 38

To achieve the goals of constitutionalism, the separation of power performs the very pivotal function of separating or distributing the powers among three heads of the state i.e. Legislative, Executive and Judiciary. If the power is mutually distributed among certain branches it would amount to lesser chances of arbitrariness because there will be effective checks and balance between these organs.

Further, it can be said that Constitutionalism is the bigger umbrella under which the separation of power finds its place. Constitutionalism talks about limited government and Separation of Power is only a method to achieve this goal. This also does not necessarily mean that constitutionalism can't exist without the separation of Power. If the Separation of power is available in any democratic setup then we can say that reaching the goals of constitutionalism will be a very convenient task but never an impossible task. The best example in this regard is UK and India. In India, there is a parliamentary form of government i.e. the members of government are also the members of parliament (not vice-versa). This shows that there is no separation of power between legislature and executive in India, but we can't infer from this very fact that the Indian constitution does not have constitutionalism. Also, there is not watertight compartmentalization of power between Executive and Judiciary and the Constitution of India under Article 50 puts a positive obligation on the state to endeavour for separation of the executive from judiciary. Various steps have been taking in this regard but still, there is no complete separation of power between these two. This does not imply that there can't be constitutionalism in India, though achieving the goal of constitutionalism will become difficult without separation of power but never an impossible task.

Chapter V

CONCLUSION

Constitutionalism means limited government or limitation on the government. It is the antithesis to those who are in power and exercising it arbitrarily Constitutionalism speak to have a government with sovereign power and these sovereign powers must be limited. The law must be supreme. The government exercising its power beyond the limit prescribed to it will ultimately lose the authority. Its legitimacy can be challenged if he does so. To upliftment of the people or

to protect the people with the arbitrariness and to make a happy State, constitutionalism is the only key.³¹

In some minimal senses of the term, constitutionalism consists of a set of norms creating obligation, duty, limitation and the powers of the authority.³² Apart from various other norms, the separation of power is of paramount importance. No significant deprivation of life, liberty and dignity of any person can take place unless all the organs of the government combine. If a person is to be put in jail then the legislature will have to pass a law making his action illegal, the executive will have to execute the law and the judiciary must find him guilty. If all these functions are not divided between these entities then the result can be the worst example of tyranny and no constitutionalism would be there. To avoid this worst example of tyranny constitutionalism through its popular norm i.e. separation of power diminishes the concentration of power and helps the people from being victimized by arbitrary powers of government.

Again at last it is pertinent to note that Separation of power is not an end but only a means to an end i.e. Constitutionalism. Also, it can't be said that no constitutionalism can exist without separation of power because it is only a means to constitutionalism. Undoubtedly, reaching the goals of constitutionalism would be a convenient task in a country with effective separation of power but it also can't be said that constitutionalism can't exist without separation of power.

Therefore from the above discussion, the researcher is on the point that the first hypothesis i.e., separation of power is one of the means to achieve the ends of constitutionalism is proved positively. The second hypothesis i.e. constitutionalism can't exist without separation of power is not true and hence proved to be negative.

³¹ *Constitutionalism*, available at:[http://legalserviceindia.com/article/1699/constitutionalism.html#:~:text=\(Last visited on February 18, 2021\)](http://legalserviceindia.com/article/1699/constitutionalism.html#:~:text=(Last%20visited%20on%20February%2018%2C%202021))

³² *ibid*

