

**International Conference «Constitution and Constitutional Supervision:  
Developing the Doctrine and Advancing the Case-Law»**

11 May 2023, Saint Petersburg

**Session II « Constitutional Evolution and Constitutional Supervision:  
experiences around the world»**

*Ajay RASTOGI, Judge of the Supreme Court of India*

“The Constitution is not a mere lawyer's document, it is a vehicle of Life, and its spirit is always the spirit of Age.”

-Dr. B.R. Ambedkar

1) Today, we all are here to discuss the broad topic of “*Constitutional Evolution and Constitutional Supervision - Experiences around the world*”. In my address, I will provide insights into the evolution of Constitutional principles and philosophies across the globe that have stood the test of time, with more emphasis on the role of the judiciary in interpreting, enforcing, and upholding the supremacy of the text as well as the spirit of the Constitution.

2) Aristotle once suggested in his work "The Politics" that the best form of government is one, “in which every individual can act to the best of their abilities and live happily”<sup>1</sup>. Such individuals are destined to achieve a state of eudaimonia, which goes beyond any individually enumerated pleasures. Today, nations around the world have developed different forms of government, most of which are supported by written or traditional constitutions. While a well-crafted constitution may provide a foundation

---

<sup>1</sup> CONSTITUTIONAL RIGHTS FOUNDATION “*Bill of Rights in Action*” FALL 2010 (Volume 26, No. 1)  
<https://www.crf-usa.org/bill-of-rights-in-action/bria-26-1-plato-and-aristotle-on-tyranny-and-the-rule-of-law.html#:~:text=Aristotle%20concluded%20that%20%E2%80%99Cit%20is,trying%20to%20write%20a%20constitutio>  
[n.](#)

for efficient and just governance, it alone cannot ensure political stability or enforcement of human rights. For a constitution to be effective, each country requires a proper mix of traditional and democratic institutions, education, economic stability, internal and external security, and, perhaps most importantly, the ability and motivation of key political leaders.

3) From the inception of democratic government in ancient Greece, history has made it abundantly clear that democracy is not the "default" form of political organization; it requires a high degree of citizen understanding and participation to work well even under the best conditions.

4) By coming to know the differences and similarities in these Constitutions that represent the aspirations of people, we can better understand them. All constitutions contain some common elements, with a few exceptions. From the Magna Carta of 1215<sup>2</sup> to today, constitutional documents and traditions take the general form of a contract or agreement between the ruled and the rulers. Other key conceptual features commonly found in constitutions include a purposeful division or separation of the three basic powers or functions of government—the executive, legislative, and judicial—with an emphasis on the "rule of law." This means that all citizens, including those chosen to govern, are equally subject to the laws of the land, and the supremacy of the constitution or constitutional documents over ordinary law.

5) Almost all constitutions contain a preamble or introductory clauses or articles; recite a set of fundamental rights and guarantees, and sometimes duties, for those under a nation's jurisdiction; describe executive, legislative, and judicial officials and bodies and their powers and duties; and provide a procedure for amending the constitution. Many written documents contain extensive additional material, especially the dirigiste types of constitutions, that describe details of social and political goals in addition to rules for governing the country and a list of individual rights. Despite these

---

<sup>2</sup> <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/#:~:text=Magna%20Carta%20was%20issued%20in,as%20a%20power%20in%20itself.>

variations, the formats of the constitutions of the major countries of the world seem remarkably alike.

6) Now as we go deeper into understanding the constitution and its inception we get to know that the Constitution is not only supreme and sovereign but also the legal document of the country. Further the function of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state. However, today the importance of constitutions stretches beyond these basic functions. Now, the constitution is not merely a legal document but is seen as a social document that aims to bring a social change and required revolution in society. It is the reflection of the ideals, and the socio-economic conditions of the country. It seeks to aspire to ideals of social justice, equality, and fraternity assuring the dignity and liberty of the individual.

7) If we talk about the purpose of the Constitution, we can come to a consensus that it is to **transform** each different society by the process of social engineering, i.e. it does a balancing of interest between the individuals and the state—akin to their traditions and cultures. With changing times, every society grows and evolves and with the evolving times the societal issues become more and more complex and the constitution therefore is required to match the pace of such evolving society. Therefore, it is imperative that a constitution has a vitality of its own, a pulse of its own. It should be an organic document like a living entity which can feel the pulse of the nation and evolve.

### **Constitutional evolution**

8) Today, the disputes are more complex and interconnected. Constitutional courts are burdened with the responsibility to develop new and different practices which would pave the path for not only a country but its effect would be far reaching across jurisdictions. Today, the constitutional courts should look not only to the text of the constitution rather the overarching principles of the constitution that are always a guiding factor for constitutional machinery.

9) As Cassam Uteem, former President of Mauritius had once said and I quote, “*Constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle*”. Constitutions are made at the time of crisis. However, constitutional building is a continuous process. Constitutions are continuously altered to adjust to the changing needs of time. So that the constitution remains a living document and ensures its vitality.

10) On one hand a rigid constitution may stop the growth of the nation, on the other hand a flexible constitution could easily be misused as per the whims and fancies of the rulers of each time. Therefore, what makes a Constitution powerful is a unique blend of flexibility and rigidity just like gold, which is both malleable and ductile. Therefore, the Constitution should not be so flexible that it can be easily abrogated at the hands of the government and not so rigid that it cannot be adjusted in line with the changing needs of society. To tackle such problems, the framers of the Indian constitution inculcated this unique blend of rigidity and flexibility.

11) It was the first Indian Prime Minister, Pandit Jawaharlal Nehru, who once said in the constituent assembly that, “... *while we want this Constitution to be solid and as permanent as a structure we can make it, nevertheless there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the Nation's growth, the growth of a living, vital organic people. ...*”<sup>3</sup>

12) As we gather here to discuss such an important aspect of a State and judiciary, we must address the issue of changes needed or required in an already existing constitution. One of the initial choices countries face is whether to engage in incremental constitutional change (**Revision**) or to replace an existing constitution with a wholly new document that reflects a new order (**Constitutions de novo**). In the incremental approach, the drafters confront outstanding problems, address glaring

omissions, and generate momentum for continuing revision. As we are aware that countries like **Chile and Indonesia** have pursued this strategy.<sup>4</sup> Similarly, the constitution of India also uses a revisional approach.

13) Another choice that countries face is whether to involve the public in amending the constitution or not. Some countries demand a referendum for all constitutional amendments, no matter how small, inconsequential or uncontroversial (**e.g. Australia, Denmark, Ireland and Japan**). However, some countries require a referendum only if the most fundamental provisions are amended or if the amendment entails a total revision (**e.g. Austria, Jamaica, Latvia and Spain**). But when we look at the Indian approach, the Constitution of India could be amended without any referendum. Some articles of the constitution can be amended by a simple majority, while some provisions can be amended by special majority whereas others can be amended by a special majority with ratification.

14) This in itself, has ensured that the Constitution of India does not remain static but is ever-evolving through judicial and legislative amendments. Today, the Constitution of India has gone through 105 constitutional amendments and currently consists of 448 articles divided into 25 parts, and 12 schedules when the original constitution consisted of 395 Articles, 22 Parts, and 8 Schedules.

15) Focussing on the Judiciary, I can say that it has and continues to play a vital role in evolving the Constitution, through various judgments and orders. It is the ultimate interpreter of the Constitution while being the guarantor and upholder of its basic structure. Judiciary in India has been catering to the needs of the changing society, and such changes or amendments in the constitution are termed as **Judicial Amendments**. I would also like to shed some light on the important role of the Supreme Court of India. This Apex institution through its robust working, *sou motu* cognizance and various decisions has not only tried to interpret the constitution but has on various occasions molded it according to the changing times and needs of the

---

4 <https://pcwcr.princeton.edu/papers/Proceedings2008.pdf>

society. For eg. Article 21 of the Constitution of India guarantees to every person (and not just citizens of India), Right to life and personal liberty. It was in the landmark case of *Justice K.S.Puttaswamy(Retd) v. Union Of India*,<sup>5</sup> that the Supreme Court had held “Right to privacy as a facet of Right to life.” Thus, making the Right to privacy as the Fundamental Right of every person.

16) Similarly,<sup>6</sup> the Constitutional Court of Korea in 1996 recognized the right to life as an unenumerated constitutional right, even though Korea’s constitutional text does not contain an explicit provision on the same.<sup>7</sup>

17) Now let’s examine the extent of the legislative power of a parliament. That, whether a legislature of a country should be allowed to amend, alter any part of the constitution to the extent of abrogating its essence. The Supreme Court of India has held in negative and ensured that In the process of evolution, the basic essence/**basic structure** of the Constitution does not change. Even if the constitution evolves and changes with time, these changes will be only peripheral and it will not change its basic core. The Supreme Court of India in *Kesavananda Bharati v. The State Of Kerala*<sup>8</sup> has developed the doctrine of basic structure as a guardrail against the amendment to the essence of the constitution. The Doctrine of Basic Structure is a legal principle in the Indian Constitution that holds that certain fundamental features of the Constitution cannot be altered or abolished by any amendment.

18) The Basic Structure doctrine has been further evolved by various judgments of the Supreme Court. In 2007, Supreme court of India in *IR Coelho (Dead) by LRs v. State of Tamil Nadu*,<sup>9</sup> observed that the various important and inalienable rights and features of the Constitution cannot be seen in isolation. They are all interwoven and intertwined. The real test of basic structure is not just a test of one

---

5 AIR 2017 SC 4161, (2017) 10 SCC 1, [2017] 10 SCR 569

6 Right to Life, [Original Source] AACC SRD - Research reports

7 Decision 95Hun-Ba1 (1996).

8 AIR 1973 SC 1461

9 AIR 2007 SC 861, [2007] 1 SCR 706, (2007) 2 SCC 1

provision rather the various provisions have to be seen together. All these rights form one **synoptic whole** and the test has to be done comprehensively.<sup>10</sup>

19) The interconnectivity of the constitutional courts has helped to evolve best practices and convention in other Jurisdictions. Indian constitutional courts developed the idea of basic structure of the constitution against arbitrary power of amendment. In the recent Kenyan case of David Ndii v. The Attorney General (2020), the High Court of Kenya applied the Basic Structure Doctrine to save the Constitution from excessive amendments.

20) Constitutional supervision refers to the process of monitoring and ensuring compliance with a country's constitution. This may involve reviewing the actions of government officials, such as elected representatives or executive officials, to ensure that they are acting within the bounds of the Constitution. The goal of constitutional supervision is to maintain the integrity of the Constitution and ensure that government actions are consistent with the fundamental principles and values enshrined in it. This helps to safeguard individual rights and liberties, promote the rule of law, and prevent abuses of power by government officials. Constitutional democracy provides for a robust system of constitutional supervision that affirms the principle of separation of powers wherein the role of the judiciary is that of a guardian and conscience keeper of the Constitution.

21) The Constitution of India provides for three branches of **government**, namely the legislature, the executive, and the judiciary, who operate within their respective spheres and do not exceed their constitutional mandate. There is a broad separation of power among them. Each organ acts as a *check and balance* for the other. The Constitution of India also provides for the **separation of powers**, the **federal system**, and the system of **parliamentary democracy**. The federal system ensures that power is shared between the central government and the state governments. The system

---

<sup>10</sup> IR Coelho (Dead) by LRs v. State of Tamil Nadu (2007) SC

of parliamentary democracy ensures that the government is accountable to the legislature, which represents the will of the people.

22) Former Chief Justice of India P.N. Bhagwati said, *"The judiciary in India has been given the role of a sentinel on the qui vive to protect the fundamental rights of the people and to ensure that the democratic institutions function within the constitutional framework."* In India, the **judiciary plays a critical role in ensuring constitutional supervision**. The Constitution provides for an independent judiciary, which acts as a check on the other branches of **government** and ensures that they are functioning within their constitutional limits. Similarly, South Africa's Constitution includes a Bill of Rights that protects a wide range of individual rights, and the Constitutional Court has been instrumental in ensuring that these rights are upheld.

23) The judiciary in India has also been provided with the power of **judicial review**, which enables it to review the constitutionality of laws, executive actions, and decisions of the government, and strike down any law or action of the government that violates the fundamental rights of individuals or is inconsistent with the Constitution. Article 13 of the Constitution of India declares that any law made in contravention of Fundamental rights can be declared null and void. Judicial review has implicit sanction under Articles 13, 32, and 226. The judiciary, therefore, plays a vital role in ensuring that the government does not overstep its bounds and adheres to the principles of the Constitution.

24) Similarly in Germany, the Federal Constitutional Court plays a central role in constitutional supervision. It has the power to review and strike down laws that violate the constitution, and its decisions are binding on all government bodies. The court is seen as a critical check on government power and an important defender of individual rights.

25) In addition to judicial review, there are other mechanisms in place to ensure constitutional supervision. For example, the **President of India can refer any matter to the Supreme Court for its opinion**. Similarly, the Governor of a state can



refer any matter to the High Court for its opinion. Another important mechanism for constitutional supervision is the system of **writs**, which includes *habeas corpus*, *mandamus*, *certiorari*, *prohibition*, and *quo warranto*. These writs are issued by the courts to ensure that the government and its officials act in accordance with the law and do not violate the rights of citizens.

26) The Supreme Court is the guardian of the Constitution and takes steps to do complete justice. **Article 142** of the Indian Constitution empowers the Supreme Court to pass any order necessary for doing complete justice in any matter pending before it. This Article gives the Supreme Court wide powers to ensure that justice is done in a particular case, even if it means going beyond the strict limits of the law. The Supreme Court has used this power in several cases to pass orders that go beyond the strict limits of the law to ensure justice is done. For example, in the case of *MC Mehta v. Union of India*, the Supreme Court ordered the closure of polluting industries in Delhi until they met certain pollution control standards. The court did this under Article 142, despite the fact that there was no specific provision in the law for such an order.

27) Apart from the Supreme Court, other bodies such as the **Election Commission of India** and the **Comptroller and Auditor General of India** also play a crucial role in constitutional supervision. The Election Commission is responsible for conducting free and fair elections in the country, while the Comptroller and Auditor General of India audits government accounts and ensures that public funds are used efficiently and effectively.

28) **To conclude**, The Constitution of India is the supreme law of the land, ensuring that all laws and policies conform to its provisions. The Constitution's supremacy is a cornerstone of the Indian democratic system, guaranteeing the rule of law and the protection of fundamental rights. Constitutional supervision is essential to maintain the integrity of constitutional democracy. Overall, the Indian Constitution has evolved over time, reflecting the changing needs and aspirations of the Indian people. The system of checks and balances, combined with the role of the judiciary in

supervising the implementation of the Constitution, has helped to ensure that India remains a vibrant and functioning democracy.

29) Thank you.