



# The Indian Journal for Research in Law and Management

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Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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## The Role of Constitutional Courts in Shaping Constitutionalism Worldwide

Constitutional courts are the high courts that primarily deal with constitutional law. They are considered fundamental instruments for accomplishing and settling in equitable changes. Judicial and political power are inextricably linked, but at the moment that link seems more important, more pervasive, and more fragile than ever. Courts are now under stress in many, even consolidated, democratic countries. When courts emerge as explicit targets of political forces seeking to undermine democratic institutions, the clash between judicial and political power intensifies. As guardrails that prevent democratic systems from falling out of the democratic genus, courts are tasked with keeping democracies on track, ‘maintaining a well-functioning judicial system and contributing to predictable “rules of the game”’. On the other hand, while Courts are now expected to outline new strategies to resist democratic erosion, they are increasingly subject also to another cause of stress, which has made them increasingly visible and recognisable.

### What is Constitutionalism?

Constitutionalism, doctrine that a government’s authority is determined by a body of laws or constitution. Although constitutionalism is sometimes regarded as a synonym for limited government, that is only one interpretation and by no means the most prominent one historically. More generally constitutionalism refers to efforts to prevent arbitrary government.<sup>1</sup>

Modern political thought draws a distinction between 'Constitutionalism' and 'Constitution'. A country may have the 'Constitution' but not necessarily 'Constitutionalism'. For example, a

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<sup>1</sup> Bellamy, R. (2020) *Political constitutionalism: A genealogy*, SSRN. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3666122](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666122) (Accessed: 24 March 2024).

country with a dictatorship, where the dictator's word is law, can be said to have a 'Constitution' but not 'Constitutionalism'. The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers. Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary.<sup>2</sup>

## **Mechanism of Constitutional Courts**

The constitutional court is a central but not the only instrument of democracy and constitutionalism. There cannot be a constitutional court without a constitution. Therefore, the role of the constitutional court should be viewed in a wider perspective embracing the general issues of democracy, constitution, and constitutionalism. According to Ralf Dahrendorf constitutional democracy is built in three stages:

1. The drafting and establishment of a new constitution laying down the basic values of statehood, fundamental rights, the main paradigms of the rule of law, independent administration of justice, and separation of powers.
2. The creation of a market economy, including amongst other things anti-monopolism, economic rivalry, and free competition with the development of a certain social protection network.
3. Establishment of civil society — the building of substantial sources of power outside the state and, more often than not, against the state. This is a network of autonomous institutions and organisations that have not one centre but hundreds or even thousands of them and that a monopolistic state or party authority cannot liquidate or eliminate.<sup>3</sup>

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<sup>2</sup> Jain, A.M. and Name \* (2022) Lexis nexis Indian constitutional law by M P jain, Bharat Law House. Available at: <https://www.bharatlawhouse.in/shop/constitutional-law-writs-human-rights-history-pil-ios-political-science-sociology/lexis-nexis-indian-constitutional-law-by-m-p-jain/> (Accessed: 24 March 2024)

<sup>3</sup>Juristica International (no date) Juridica International: HOME. Available at: <https://www.juridicainternational.eu/index.php?id=13899> (Accessed: 24 March 2024).

Constitutional courts play an imperative part in forming constitutionalism by acting as gatekeepers and translators of a nation's most elevated law. Here are a few key viewpoints of their impact:

**Judicial Review-** Usually maybe the foremost well-known control of sacred courts. It permits them to survey laws passed by the governing body and activities taken by the official department to guarantee they comply with the constitution. By striking down unlawful measures, courts protect the standards cherished within the record.

**Interpretation of the Constitution-** Constitutions are frequently wide records with standards that got to be connected to real-world circumstances. Constitutional courts play a significant part in translating these standards and characterizing their meaning through their decisions. This progressing interpretation shapes how the structure is caught on and connected over time.

**Securing Rights and Freedom-** Constitutional courts are frequently the gatekeepers of crucial rights and freedoms cherished within the structure. They can strike down laws that encroach on these rights and hold government responsible for maintaining them.

**Promoting Rule of Law-** By guaranteeing that government activities comply with the structure, Constitutional courts support the rule of law, a core principle of constitutionalism. This makes a framework where everybody, counting the government, is subject to the law.

The recent pandemic and ensuing emergency in many states shows that the strength of constitutional courts also relies on the temporal question of when constitutional courts are approached and at which moment they can be expected to deliver a judgment. On the one hand, this concerns legislative processes in which constitutional courts are asked for a pre-legislative scrutiny. Several constitutional courts across the world have such powers, but opinions delivered by constitutional courts may not be binding in all cases. Therefore, these non-binding decisions do not stop lawmakers from enacting the envisaged law, even though they may nevertheless have a strong influence.<sup>4</sup>

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<sup>4</sup> Blog, I.-A. (2020) *Constitutional courts and their powers – the least dangerous branch?* - IACL-IADC blog, IACL. Available at: <https://blog-iacl-aadc.org/100th-anniversary-of-the-austrian-constitutional-court/2020/10/15/constitutional-courts-and-their-powers-the-least-dangerous-branch> (Accessed: 24 March 2024).