

CHAPTER - I

INTRODUCTION – THE PROBLEM – CONCEPTUAL FRAMEWORK

I

It has been very correctly observed by William G. Andrews that the basic instinct which acts as the driving force is his quest for his own freedom – freedom which is secured by the rule of the law and which no authority can destroy without any sanction of law. It is true that a man accepts some kind of modest restrictions in this respect but he accepts those limitations only to see that others also accept those and that for the purpose of having an ordered and disciplined society. In the words of Andrews:

“Man’s unending search for the widest freedom to pursue his own ends within ordered society explains his acceptance of government.”¹

Such acceptance by man can be taken as the basic foundation of a political system in general and that of the state in particular. To quote Andrews further:

“He (i.e. man) tolerates gentle fetters from the State to escape the heavy chains of anarchic chaos and to gain the opportunities for collective action and division of labour that, in the modern world, area available only within the state.”²

This is the actual relationship between a man and the state. Both these components should be dependent on one another and a proper balance is to be maintained between them.

That is why it is universally believed that consensus is among the people is essential for the maintenance of this balanced relationship between the man and the state. In case of any failure on the court, serious consequences leading to the breakdown of the state machinery might follow. History has provided a number of such instances in

France in 1789, in America in 1776 and in Russia in 1917. It has been seen that attempts have been made to retain the old system through the application of physical force also. What is important to note is the fact that for the survival of the system, substantial support is necessary from the larger part of the community.

It is true that “in most of political communities consensus covers much more than the bare minimum of agreement that the State should survive.”³ It covers both formal institutional structure and informal psychological factors. It may include issues like policy-goals, distribution of wealth, national unity and freedom of the individuals in socio-economic and political spheres. It has been very correctly observed: “The greater the number of questions on which there is accord and the broader its popular base, the more quickly and efficiently government can move to resolve the questions on which there is no consensus.”⁴

Such a position also includes the role and importance of qualitative factors in providing support for the survival of the political system. Agreement on procedure and agreement on the possible outcome of a policy adopted are equally important in this regard. If there is a common goal, people may support that without even caring for the procedure for the implementation of the policy.

Thus, it is held that the issue of consensus is an important foundation of constitutionalism. It is true that discipline or order in a society may be established through the use of force, violence or arbitrary action. But such a condition can be long lasting as it lacks popular support behind it. Agreement or consensus must exist as a precondition for the stability of the political system. In other words, support mobilization for the ordered social order becomes necessary if the system is to maintain itself without any threat to it.

Again, consensus should be achieved for reaching the goals set by the political system. There should be element of general acceptance of the philosophy on which the political system is built. It has been correctly observed: “.....as long as consensus prevails on procedure and on the acceptance of constitutionalism, adjustment and accommodation of goals can be negotiated. On the other hand, the absence of agreement on goals produces strains and tensions that may endanger the concord in other areas. A final element is concurrence in lesser goals and on specific policy questions.”⁵

Constitutionalism in its broader sense denotes two types of limitations which have been described as: Power is prescribed and procedure prescribed.⁶ It suggests that there are two types of limitations – libertarian and procedural. The state reserves certain areas for individual freedom where infringement is not allowed. The first ten amendments to the Constitution of the United States provide one such example. The chapter on Fundamental Rights (Part III) of the Indian Constitution has also outlined this idea. In such a situation, freedom of the individual is protected and its enjoyment guaranteed, subject to certain restrictions for the greater interest of the society.

Thus conceived, constitutionalism is concerned with two types of inter related relationship: the relationship between the state and the individual and relationship of one government authority with another type of authority. There two types of relationship are not mutually exclusive but interdependent in nature.

In this connection, a brief reference to the concept of natural law appears to be relevant for this present discussion; the relationship between natural law and constitutionalism. It is admitted that the theory of natural law has provided a solid foundation of individual liberty in different schools of thought. The notion of natural law has served as the mechanism for restricting the arbitrary power of the state and also for protecting individual freedom to the greatest extent

possible. Key concept so natural law, as George H. Sabine has very aptly observed “were built solidly into moral consciousness of European peoples”⁷ He has further observed that both natural law and natural rights served in the initial phase as the major source of creating sound consciousness of constitutionalism in a big way. It is held that “natural law became increasingly just a platform on which natural rights and ultimately, the libertarian aspects of modern constitutionalism were rested.”⁸

A brief reference to the evolution and growth of constitutionalism may be made here to substantiate the points. Although the procedural aspect of constitutionalism was developed by the Greeks, its subsequent developments demonstrate that through democratic practices, attempts were made towards its institutionalization.⁹

Thus it is seen that the concept of constitutionalism has been viewed by scholars from a number of perspectives. Constitutionalism can be viewed as the philosophical/ideological foundations of the constitution. It sets the goals and provides the direction through which these goals are to be achieved.

It is admitted that the nature and extent of federal governance of a political system is closely connected with the changing perspectives of political dynamics. In other words, the manner in which the governing process is institutionalized in the basic document, i.e., the Constitution of a country may not be at all consistent with the changes that take place over some periods. Changes are bound to occur as there might be changes in the nature, working and direction of the political system. Such changes take place as the political system encounters new situations, new demands, new compulsions and consequently, the political system has to find new ways of responding to those outward changes.

Such a problem becomes very important in view of the fact that only structural adjustments may not be sufficient to deal with these situations. Structural adjustments or better readjustments may be one of the ways to keep the political mechanism working for a particular period of time. But it cannot be taken as the only method for such dynamism. Several other non-formal forces do take place in this process which may be both political and non-political in nature. It is a complex phenomenon which demands thorough investigation of the changes and consequences of such dynamics and its impact of the governing process in a general way.

The proposed work seeks to examine the issue both from its theoretical and operational perspectives. So far as the concept of constitutional dynamics is concerned, the study should begin with the understanding of the nature of constitutional response to the changing of socio-economic and political environment. The very nature of “setting” determines, to a large extent, the course of political dynamics of a country. In a word, the primary task of such a study calls for proper contextualizing the problem in a given perspective.

It is believed that the Constitution of a country should not be viewed from a strict formal or legal perspective as the Constitution is ‘a living document’ which not only regulates the power relations among various political organs but establishes inter-connectivities among them. It reflects the ideals and aspirations of the nation concerned and that is why, a constitution is regarded as a vehicle for social advancement which Austin described in the Indian context, as ‘a vehicle for social revolution’.

The elements of dynamism in human society calls for a responsible and responsive constitution. The fundamental rules in a constitution serve, in the first place, as the fountain-head of authority for the exercise of state-powers. Secondly, they provide the state with

an institutional framework, 'a container within which the dynamic process of government and politics can operate'.

Thus, the constitution of a country must adjust itself with the ongoing political process reflecting the aspirations of the country to produce optimum results. Given this general background, attempts will be made to examine the theoretical perspective of constitutional change in a general way and its relevance in the study of federal governance in the Indian context.

It has been observed: "A continuous erosion of the federal process in India in the name of national unity and development imperatives has been discernible after the mid-sixties."¹⁰ Side by side, there have been growing demands for greater autonomy and more decentralization of powers. It has further been held: "Dynamic interaction between these two opposite tendencies resulted in a shifting equilibrium which has been extremely unstable, depending upon the unpredictable variables of the balance of power in the political system."¹¹

According to some observers, the strength of the centre was expected not to sub-vert the federal equation in the normal functioning of the constitutional framework but to work in the line of the spirit and aspirations as expressed through the provisions of the constitution. By an elaborate distribution of legislative, administrative and financial powers and a systematic institutionalization of inter governmental cooperation, sufficient ground has been provided by the Constitution for a smooth working of the federal system.

But a look into the working of the constitutional mechanism and the federal governance, one may notice that there have been cases where the nature and course of federal process in India, at any points, assumed new character which called for substantial constitutional adjustments. Such changes are the results of changing perspectives of

the political dynamics in India. This is an area where there are instances of interactions between constitutional dynamics and federal process which demands proper understanding of the nature of the political process, the reasons behind such changes and their resultant consequences.

II. Objectives of the Proposed Study

The proposed study seeks to examine the theoretical foundations of constitutionalism as a principle as well as a philosophy and the notion of constitutional dynamics as a functional mechanism. It seeks to go beyond this theoretical aspect to find the areas of interactions between these two concepts and the nature and trend of federal governance in India. It may not be out of place here to mention that the ideals on which a Constitution is built, gets sometimes challenged by a set of newer forces which emerge out of the interactions between the constitutional practice and the political process. This is a very important area which not such study can ignore. The stability of the political system depends, to a large extent, upon the ability of the system to respond to and adopt itself with, the changing circumstances. So far as India's position is concerned, one may notice the nature of surprising degree of flexibility of the constitutional arrangement which enables itself to accommodate various kinds of demands within it. One may also argue that in India, the political system has so far confronted many non-systemic issue conflicts which have their impact on the peripheral region. Had there been any systemic conflict, the political system would have to confront the real danger. It may be equally true to suggest that the foundation of the constitutional norms and values are so deeply rooted in the minds of the people of India that even a slightest change at the central point might be rejected by the people at large. The developments that followed after the proclamation of national emergency justifies this.

Given this perspective, the proposed study would highlight the nature of basic philosophy of the constitution, reflect upon the course of its dynamics and examine their impact on India's federal process. It may be submitted that the proposed study, first of its nature, would open up new areas for further investigation which would provide the researcher a wider scope to view the operational dynamics of the political system in a much more comprehensive manner.

III. Overview of the Existing Literature

Many important works have been done by scholars of eminence on the philosophy of the Indian Constitution on the one hand and the nature of federal governance on the other. But no specific work has been done specifying the nature of interactions between constitutional philosophy, its dynamics and their relationship with the nature, trend and perspective of federal dynamics in India. So from that perspective, the proposed work, a modest one, would throw sufficient light on this vital but not so discussed subject. The present section will, thus examine some of the leading works on these aspects in an illustrative manner. The section dealing with the Select Bibliography would contain a detailed reference on such discussion.

So far as theoretical aspect of the proposed study is concerned, the work by Granville Austin under the title *The Indian Constitution: Cornerstone of a Nation* deserves special mentioning. Needless to mention, for any study relating to the making of the Indian Constitution, its nature, basic philosophy, this work serves the purpose of a source book.

An Economic Interpretation of the Constitution of the United States by Charles A Beard is another work which has set the method of studying the economic foundation of the Constitution. The work helps a researcher to identify the economic parameters for analyzing the

economic aspect of the Constitution. The reference point is, of course, the American Constitution.

On the nature of Constitutional dynamics, D. George Kousoulas's 'On Government and Politics' appears to be of enormous help from theoretical and operational perspectives.

Modern Constitutions is a classic one which provides many insights into the nature and working of constitutions and the basic philosophy on which constitutions are based.

Peter Merkl in his *Modern Comparative Politics* has dealt with different aspect of constitutional process on a cross national basis.

In a similar way, Jean Blondel (ed.) *Comparative Government: A Reader* provides the researcher with sufficient ideas about the working of the constitutional systems on a comparative basis.

M.S. Rajan in his edited volume 'Studies in Politics' has dealt with the Indian perspective of constitutional and political dimensions of India's democratic practices.

In 'The Crisis of India' Renold Segal has discussed the multi dimensional nature of crises that the Indian political system has been facing over these decades.

Alan Gledhill's book, 'The Republic of India: The Development of its Law and Constitution' is also considered to be a basic book for understanding the nature of the Constitution of India.

Political Development and Constitutional Change by Amal Ray et.al., discusses the nature and impact of Constitutional change on the political process in India.

S.N. Ray's *Judicial Review and Fundamental Rights* is one of the leading works dealing with the nature of judicial process in protecting the basic rights as guaranteed by the Constitution. This works deals

with both the Constitutional arrangements and the nature and extent of the scope of enjoyment of these rights by the individuals.

On federal governance, some illustrative examples may be cited.

Ashok Chanda's *Federalism in India: A study of Union-State Relations* is an authoritative discussion on the nature of federalism in India with a focus on constitutional arrangements relating to centre-state relations.

It may be stated that initially the study on federalism centred round formal/Constitutional aspect and an analysis of the Constitutional arrangements as provided for in the Constitution. But over the year, there has been shift from mere constitutional/legal discussion to move on the discussion of the actual working of the federal process and a new multi-dimensional analysis has appeared making such studies for functional both in content and structure.

Broadly, studies on federal governance in India have sought to highlight the following aspects:

- a) Political process and the Centre-State Relations.
- b) Changing Dimensions of the Party system.
- c) Language Politics and its impact on the federal governance.
- d) President's Rule and the balance between the Centre and States.
- e) Coalition-Politics and Centre-State Relations.
- f) Inter-State and Centre-State Disputes.

Amal Ray in his *Tension Areas in India's Federal System* has highlighted the changing political process and the interplay of various forces. He has rightly pointed out that the breakdown of one party dominances has substantially altered the political setting of federal governance in India.

'State Politics in India', as edited volume by Iqbal Narain is considered to be the very first attempt on a comprehensive basis to understand the nature and trend of state politics in India covering issues like course of state politics in the light of changing party position and federal dynamics in India.

'India's Static Power Structure' by J.D. Sethi, *The Politics of Defection: A Study of State Politics in India* by S.C. Kashyap, *Party Politics in an Indian State* by K.L. Kamal set the trend of discussing the nature and dimension of federal politics from the perspective of party structure and party positions.

Another significant contribution in this area is by Saez Lawrence under the title "*Federalism without a Centre: Impact of Political and Economic Reforms on India's Federal system*". It touches upon the working of federal governance in India in the post-globalization scenario.

Tarun Chandra Bose is his edited volume "*Indian Federalism: Problems and Issues*" seeks to identify the problems and issues of India's federation.

The New Federalism by Michael D. Reagan is a significant contribution in the field of federal studies. It highlights and identifies different forces that have emerged in controlling and directing the course of federal governance in the contemporary world.

M.C.J. Vile's two works deal with constitutionalism and federal process in the light of the American experience. These are: *The Structure of American Federalism and Constitutionalism and the Separation of Powers*.

Mention should be made of K.C. Wheare's two books which are still regarded as the classics in the study of federalism. These are, *Federal Government and Modern Constitution*.

On the Study of amending process, K.C. Markandan's book under the title *The Amending Process and Constitutional Amendments in the Indian Constitution* deserves special mentioning. It is a comprehensive study of the amending mechanism of the Indian Constitution with a comparative focus.

Another work by Paras Diwan and Peeyush Diwan, *Amending Powers and Constitutional Amendment* deals with the legal Constitutional aspect of the amending mechanism in India. Though essentially a formal constitutional study, the book provides insights into the nature and scope of amending provision of the Indian Constitution as contained in Art.368.

In *Politics and Government: How People Decide Their Fate*, Karl W. Deutsch has analysed the inter-relationship between the individual and the political system both from theoretical and functional perspectives.

M.G. Andrews in *Constitutions and Constitutionalism* provides a theoretical perspective of the concept of constitutionalism in the making and sustaining the constitutional system. The book serves as the source book for theory – building in any study of this nature.

The foregoing review of literature is by no means, an exhaustive one. It is merely representative in its essence. Only those works have been identified which might serve as the basic source for the proposed study. The section on Select Bibliography contains the detailed list of books and other sources that will be needed for the present study. Since a work of this nature would call for an analysis of theoretical and functional aspects of constitutional systems, reference will be made to other related works as and when it will be necessary.

IV. Methodology

The proposed study will be essentially based on historical analytical method. The study would examine the notion of constitutionalism and constitutional dynamics from the theoretical

perspective and would try to examine these phenomena in the context of India's federal governance. Needless to mention, the theoretical part would call for detailed discussion of these phenomena on a cross-cultural basis taking into account the process of emergence and development of these concepts in the western constitutional practices. References will be made to the practices that developed in the west, both in parliamentary systems and non-parliamentary systems. This cross-national perspective would call for a method of comparative analysis. So on the whole, besides being a historical analytical one, the study would be based on the method of comparative political analysis.

V. Research Questions

The proposed study would seek to answer the following questions:

- a) What are the theoretical/conceptual issues involved in the concepts of constitutionalism? Can there be any grand theorization on the notion?
- b) What are basic tenets of constitutional dynamics? In which way, can the study of constitutional dynamics be a pre-condition for the study of constitutionalism? What are the areas of their mutual interactions?
- c) Can constitutionalism and constitutional dynamics be used to unfold the nature and dynamics of federal governance in a study of Indian situation? If so, what are the theoretical postulates in this regard?
- d) What are the basic forces that have been at work in influencing the nature and trend of federal governance in India since 1967?
- e) What will be the nature of federal governance in the era of coalition politics? Can there be any equation in the relationship between constitutional practices and federal governance in India?

Notes and References

1. William G. Andrews, *Constitutions and Constitutionalism*, D. Van Nostrand Co. Princeton, 1963, p.9.
2. Ibid.
3. Ibid., p.10
4. Ibid., p.11
5. Ibid., p.13
6. Ibid.
7. George H. Sabine, *A History of Political Theory*, Heking Holt & Co., New York, 1955, p.144
8. William G. Andrews, *Constitutions and Constitutionalism*, op.cit., p.17.
9. Further details of this aspect can be had from the following works:

Francis D. Warmouth, *The Origins of Modern Constitutionalism*, Harper, New York, 1949.

Andrew C. Mc Langlin, *The Foundations of American Cosntitutionalism*, New York University Press, 1932.

Mary Moris, *The Growth of Philosophic Radicalism*, Boston, 1955.
10. M. Yasin and P.K. Sengupta, *Indian Politics, Processes, Issues and Trends*, Kanishka Publishers, New Delhi, 2004, p.47
11. Ibid