

Constitutionalism



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What is Constitutionalism?

- belief in constitutional government.
- governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.

The logo of Galgotias University is a circular emblem with a stylized 'G' in the center, composed of overlapping curved lines in shades of red, yellow, and blue. Below the logo, the text 'GALGOTIAS UNIVERSITY' is displayed in a serif font, with 'GALGOTIAS' in a larger, reddish-pink color and 'UNIVERSITY' in a smaller, grey color.

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What is Constitutionalism?

- According to Barnett, constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances) and responsible and accountable government.
- Henkin identifies popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, police governed by law and judicial control, an independent judiciary, respect for individual rights and the right to self-determination as essential features (characteristics) of constitutionalism

Characteristics/Features of Constitutionalism

1. Popular sovereignty
2. Separation of Powers (checks and balances)
3. Responsible and accountable government
4. Rule of law
5. An independent judiciary
6. Respect for individual rights
7. Respect to self-determination
8. Civilian control of the military
9. Police governed by law and judicial control

Popular sovereignty

- Public is the source or fountain of all governmental authority.
- The legitimacy of any governmental power is derived from the consent of the public.
- The public is involved in the decision making process, which may take different forms.
- The most obvious one is election of representatives.
- The public is entitled to elect representatives who represent it, wherein the election should be free, open (transparent) and fair.

Separation of Powers

- Under constitutionalism, power is not concentrated in any one organ of the state.
- It is diffused (divided) among the three organs of the state i.e., the legislature, the executive and the judiciary.
- If power is monopolized by any one organ of the state there could be abuse of power, tyranny and dictatorship. Nor can there be liberty.

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Responsible and Accountable Government

- The government is there to serve their interest or act as the steward of their interest.
- The governments assume office in the name and on behalf of the public for the benefit of the public.
- As a government assumes office in the name and on behalf of the public, it is directly accountable or responsible to the public.
- When a government (i.e., the agent) fails to act in the best interest of the public (i.e., the principal), the latter revokes authorization through the ballot box.

Rule of Law

- Supremacy of law.
- Rule of law denotes a government of laws and not of men.
- Individuals working within the state machinery are expected to exercise their official duties and responsibilities in accordance with the law.



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Rule of Law

- According to Dicey, 17 rule of law envisages the following:-
- No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land;
- No person is above the law;
- Courts play a vital role in protecting the rights of individuals.

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An Independent Judiciary

- In liberal democracy the individual is at the centre, and “Judicial independence is the hallmark of liberal democracy”.
- The rights of individuals are ensured and respected. Courts play a vital role in ensuring and respecting the rights of individuals. An independent judiciary is the cornerstone of a free society and rule of law.
- As rule of law envisages a government of laws. A government is obliged to act according to laws set by the legislature. However, if there is failure to adhere to the laws, an independent judiciary shall check such events.
- judicial independence helps judges to discharge their judicial functions without fear or favour.
- Thus maintaining the supremacy of the Constitution.

Ensure and Respect Individual Rights

- The incorporation of the rights of individuals in a constitution and other laws is essential.
- Article 1 of the UN Charter included the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

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Ensure and Respect Individual Rights

- Article 2 obligates “Each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognized in the present covenant without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- Article 55 of the UN Charter states that the United nations shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Ensure and Respect Individual Rights

- Non derogation of rights at the time of emergency:
- There are certain basic rights which may not be derogated from even at the time of state of emergency.
- According to Article 4 (2) of the Covenant, the Articles dealing with the right to life, the right not to be subject to torture or cruel or inhuman or degrading treatment or punishment, not to be held in slavery and servitude, not to be imprisoned due to non performance of contractual obligation, not to be held guilty or convicted for any criminal offence which is not criminalized at the time of the commission of the crime and omission or imposing heavier penalty, the right to be recognized as a person and the freedom of thought, conscience and religion may not be derogated in time of public emergency.

Ensure and Respect Individual Rights

- As per Article 4(1) of the Covenant, a state of public emergency must be officially proclaimed.
- Furthermore, pursuant to Article 4(3) of the Covenant, the state exercising state of public emergency is obliged to notify other state parties to the Covenant the provision which is derogated from and the time when such state of emergency is to cease.

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Respect for Self-determination

- Self-determination refers to the right of a people living in a territory to determine the political and legal status of the territory, for example, by setting up a state of their own or by choosing to become part of another state.



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Civilian control of the military

- If full autonomy or sovereignty is granted to the military leaders, they might divert the democratic decision-making process and may use force which may go the extent of coup or military dictatorship.
- The military may also crush democratic political opposition, through intimidation and use of physical force and interfere with domestic elections. Samuel Adams stated that even when there is a necessity of the military power, wise and prudent people will always have a watchful and jealous eye over it

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Police governed by law and judicial control

- The prime responsibility of ensuring peace and order is borne by the police. It shoulders the duty of bringing wrong-doers to justice.
- However, when the police discharge such duties, constitutionalism requires them to honour and respect the rights, dignity and freedoms of individuals including wrong-doers and persons suspected of offences.

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- Reference: Maru Bazezew, Constitutionalism, MIZAN LAW REVIEW Vol. 3 No.2, September 2009, 358-369. Link: [www.ajol.info › index.php › mlr › article › view](http://www.ajol.info/index.php/mlr/article/view)



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