



Modern Constitutionalism in the Globalizing World: A Case for Theoretical Re-Orientation

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Abstract

Modern constitutionalism as emerged with the American experience, spreading across the world, is now facing challenges from globalizing forces. Given the increasing anachronism of the state-centric constitutionalism and the absence of any explicit global constitutionalism, we are left with two choices. Either we negotiate the terms of an explicit global constitutionalism or we must review and enlarge the existing modern idea of constitutionalism (based in states) in a way that it can address the loss of popular sovereignty in the contemporary globalized world on the one hand, and do not end up as a global constitutionalism on the other hand. In this Paper, I shall unpack the idea of modern constitutionalism to underscore the fundamental significance of the “sovereignty of the people” that distinguishes it from the ancient constitutionalism. First, I shall explicate how the integrating forces of globalization (proliferation of multiple international organizations like WTO, IMF and MNCs/TNCs,) conjures conceptual questions in the rubric of modern constitutionalism vis-a-vis its state-centric origins, in the sense of how the ‘sovereignty of the people’ symbolized by “we the people” is increasingly eaten up by the globalizing forces operating today. As a case study, I shall brief upon the way the welfare provisions of the Indian constitution are caught in the cobweb of globalization. As an empirical supplement to the conceptual analysis, I briefly discuss the recent Indian stand in the WTO with respect to the subsidies given to the farmers.

Keywords: Constitutionalism, globalization, popular sovereignty, WTO.

Introduction

The whole of corpus of constitutionalism is one of the remarkable aspect of human collective life wherein while recognizing the possibility of conflicts in human societies, have attempted to regulate collective human affairs according to well defined and entrenched set of laws and rules. Though some form of constitutions have almost always existed roughly, but the modern constitutionalism stands out to unique in several respects for it is well defined, entrenched and enjoys wider acceptability in majority of the states in the world. At the outset, it must be clear that this idea of a set of laws constraining governmental power and governing the collective or political life emerged and evolved along with the emergence of modern nation-states. From the last quarter of the 20th century onwards, we have witnessed unprecedented forces of globalization in political, social and economic arenas. The most affected arenas among them have obviously been the political aspect. With the increasing integration of the world, the laws and rules governing the nation-states have come to be challenged by globalizing forces, thereby forcing or have already forced the nation-states to review and adapt the laws according to the changing situation. While some aspects are easier to be adapted, other are thorny requiring a thorough reshuffling because their origin and development was based in nation-states. The aim of this article is to highlight the incompatibility between the state constitutionalism and global constitutionalism and to identify the possible channels through which this compatibility is

addressed. Though there are a number of contemporary issues marked by this incompatibility, I have chosen India's recent negotiations within WTO as micro case study to flush out the gist of the problem.

Idea of Modern constitutionalism: State-Centric Origin

The Idea of constitutionalism, in simpler words, is a stratagem that both describes and confines the government. This idea is certainly modern and as a modern idea, constitutionalism is said to be a derivative from the social contract tradition especially from the Lockean rubric of ‘limited government’ or ‘government based on consent’. We see the maiden verbalization of this idea in the Federalist Papers numbering fifty one in which James Madison highlights the greatest difficulty pertaining to the constitutional government. He argues that it is essential first to facilitate the government to control the people or the governed and the then there is imperative task for it to regulate itself. Notwithstanding the people being the primary control, but experience has taught mankind the necessity of auxiliary precautions¹.

This recognition that supplementary safety measures, arising out of experience are needed to keep the government in check is a pioneering idea behind the idea of modern constitutionalism. Charles McIlwain holds that the idea of ancient constitutionalism is at best articulated by Lord Bolingbroke who

defined it as an collection of laws, institutions and customs” agreed by the people in their governance². This, however, was not an ‘explicit agreement’ but simply that customary laws had a wider acceptability in the past (a kind of a tacit agreement)³. On the other hand, the “explicit agreement” of the people to the laws finds resonance in Thomas Paine’s “Rights of Man”, who rooted the idea of modern constitutionalism in the tradition of social contract theories. Paine famously argued that the Constitution of a Country is not the product of its Government, rather of the People who ultimately constitute a Government⁴.

This idea is inextricably linked up with the concept of state. After the Westphalia, the state was endowed with sovereignty over its territory and constitutionalism emerged as an idea that sought to define that sovereignty and establish its contours and boundaries. At this juncture, it is important to underline the difference between the sovereignty and the government. Sovereignty is defined as the supreme (possibly unlimited) power or authority over some realm in the normative sense while as the government is the individual or a group of individuals or an institution through which that sovereignty is exercised⁵. This distinction unravels our illusion in the sense that it is the sovereignty of the people, who constitute a state, that is unlimited and it is government that is limited. So when we speak of state sovereignty as an internal and external control, it is essentially the extension of the sovereignty of the people who constitute that state.

It has been aptly said that some states have constitutions but not constitutionalism which essentially means that mere written-ness or unwritten-ness is not the only requirement of constitutionalism, rather it is the procedural checks and balances that are established and maintained. If we look at the modern constitutions of the world, they begin with an affirmation “We the people”. This affirmation is indeed to remind the government and its organs that the people, who constitute it, are supreme and sovereign and any transcendence on their parts beyond permissible limits is unacceptable. It is this basic sense of modern constitutionalism that seems to be losing resonance under the integrative potential of globalization.

Rise of Globalization as a challenge to State Constitutionalism

The conventional approach to constitutionalism has historically been state-centric. We have been specifically talking about the state constitutions, their comparative study despite the emerging international norms and trends such as international law. However, in the latter half of the 20th century, we have witnessed an unprecedented proliferation of MNCs/TNCs, international norms, economic and environmental organizations, the increasing integration of the world market, free flow of international trade. This emerging phenomenon is known as globalization, defined as a multi-pronged process of the political, economic, cultural and technological integration of the world arising out of increasing interdependence of the states⁶.

Having conceptualized globalization, now a question pops up; how does globalization contribute toward the loss of sovereignty held as the central axiom of the modern constitutionalism? This question is trenchantly contested by the globalists and anti-globalists in the great globalization debate⁷.

There is a third strand to this debate that contends that both the views are extreme and is called as ‘transformationalists’⁸. They argue that globalization has inaugurated a “shake-up” in political, economic, cultural and technological domains and hence states have undergone transformation, if not withered completely⁹. My argument falls within this third view. I argue that globalization has not made the modern idea of constitutionalism completely anachronous but it has indeed transformed its nature and character. Constitutionalism, as pointed out earlier, has been confined to statist view because constitutions in the modern times have emerged within the nation-state often reflecting the contextual social, economic and political conditions of states. But with the increasing interdependence between the states, the sovereignty, that hitherto had its epicenter in the states, is found to be dependent on the agencies of globalization that are located outside the contours of these states.

Dani Rodrick has unraveled a remarkable paradox related to globalization that explicates this increasing complexity. He has propounded what has been called as “globalization trilemma”, a situation in which states can attain only two things out of the three- economic globalization, political democracy, and national determination. We can have Democracy along with national sovereignty only when globalization is jettisoned; likewise, we can have economic globalization with national sovereignty but will have to give up political democracy and lastly if we want globalization along with democracy, the nation-state will have to be forgotten¹⁰. Therefore, the idea of modern constitutionalism apparently gets caught in this ‘trilemma’. Nation-states are not going away anytime sooner. Today, even in heat of globalization, states have often been reported to indulge in overt and covert protectionism or what has been termed as neo-mercantilism¹¹. In such contingencies, sovereignty of the people as enshrined in modern constitutionalism is likely to become the quarry.

Case of India at WTO: Manifestation of the Crisis

In order to substantiate my argument, I shall take up the story of how is India’s increasing integration with the world economy eating up the ‘sovereignty of people’ crystallized in the Indian constitution. In 1991, apart from overlooking the domestic alternatives, it was the proliferation of the Indian capitalist class that had no fertile field to invest their accumulated profits during dirigisme state that eventually led to India’s accession to the orbit of Globalization, liberalization and privatization¹². The Indian constitution begins with an affirmation “We the people of India give ourselves this constitution” (preamble) as a prelude to the most comprehensive constitution of the world.

The rights of the people of Indian have been organized into three categories- civil and political rights or the fundamental rights that are legally enforceable (Articles 12-35) , Socio-economic and cultural rights contained in the Part III of Indian constitution (Article 36-51) , not legally enforceable, but have been called as 'fundamental in the governance of the country' (Act.37)¹³. The DPSP underscores the welfare orientation of the state by ensuring the adequate livelihood, operation of the economic system, ownership and the control of the material resources of the state, to ensure health of the workers, children, women and so on¹⁴.

The globalization has made it difficult for Indian state to ensure what the constitution has called 'fundamental' to the people of India due to the compulsions of global political and economic commitments. India's decline to accept an embargo of ten percent subsidy on agricultural products is justified by its determination to translate the 2013 'Right to Food' into a reality. With the discontinuity of the 1995 Peace Clause that established special rules regarding legal actions to subsidies for agricultural products, the developing countries were left to nothing. Moreover, the developed nations give subsidies to farmers many more times than India does. On the one hand India is a signatory to WTO and its Agreement on Trade Facilitation meant to do way with the barriers to free trade (ATF) and Public Stockholding for Food Security Purposes regarding the procurement of food supplies. According to NSS data, a substantial population in India, mostly children, is undernourished. India has been arguing that the ATF be postponed until the problem of her food security be resolved effectively or until a long term solution to subsidies is instituted¹⁵.

In nutshell, there is considerable pressure from the developed countries on India's stand. The fact of the matter is that, India has commitments with the WTO and similar other multilateral organizations and it cannot simply override them. As Upendra Baxi points out that globalization is characterized by discursive practices where the collective interdependence of South on North and consumption needs of industrialized societies have a priority over the minimum basic needs of the poor in the third world. So here the consumption needs of the developed states dominating the scene at WTO are certainly enjoy that priority over the basic minimum consumption needs of India's undernourished population which seems grim as per the newest NSS data¹⁶.

Conclusion

As one rights activist (Kiran Jain as given in the references) in India has aptly argued that 'We the people of India' have been caught in cobweb of globalization. In general, doesn't this point to the transforming nature of the states and therefore constitutionalism? The states have not withered away, nor their constitutions. Inversely, states have not either merged to become a world government, neither government nor have constitutions

catapulted to become the global constitution. If everything is same, where is the transformation occurring? The answer lies in the changing epicenter of the popular sovereignty which is now shared between the state and the agencies of globalization. The edifice of my argument here is to show how this idea of globalization, that integrates the world into a coherent whole, plays out to blur and bury the very foundation of modern constitutionalism called as the 'sovereignty of the people'.

In other words, it can arguably be said that globalization has transgressed and transcended, considerably if not entirely, the very assumption of the sovereignty of people as the punch line of modern constitutionalism. So if the very assumption of popular sovereignty seems to be blurring within the rubric of modern constitutionalism, how can it be said that constitutionalism still defines that sovereignty and the extent of that sovereignty? States are continuously finding it difficult to do all that which is defined by their respective constitutions. Given the increasing anachronism of the state-centric constitutionalism and the absence of any explicit global constitutionalism, we are left with two choices. Either we negotiate the terms of an explicit global constitutionalism or we must review and enlarge the existing modern idea of constitutionalism in a way that it can address the loss of popular sovereignty in the contemporary globalized world on the one hand, and do not end up as a global constitutionalism on the other hand.

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