

# CONSTITUTIONALISM & CONSTITUTION

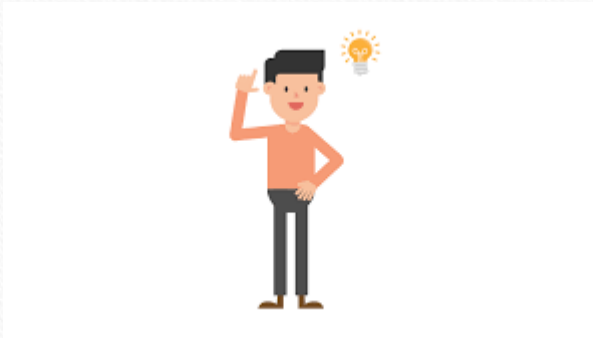
# Constitutionalism



What is it?

*i...*

# Constitutionalism



**Is there a definition of it? What does it mean?  
God, kings, laws, judges, traditions, jurists, political men?**



# Constitutionalism



## Doctrin

**What is doctrine?**

**And what is the duty of doctrine?**

# Constitutionalism



**Doctrin**

**What's the meaning of it?**

# Constitutionalism

## The important question



## Doctrin

What to do

in front of a lot of powers and conflicts?



# Constitutionalism

## The important question



## Doctrin

What to do

in front of a lot of powers and conflicts?

## There's need to put order

# Why?

## Whose are The Origins of the Constitutionalism

1. The opposition of an IDEA brings a Revolution
2. Revolution brings the change
3. The progress of the change brings news IDEA
4. The progress brings also the assessments between the actions (government) done before and after



## Doctrin

➤ Concernes  
the *framework* – written or not written  
And is  
The spirit that breathes in this  
*framework*

Constitution



## Triggering the Constitutional Experience

constitutionalism in the first Modern Age was the main factor of legitimation of the revolution

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Revolutionary constitutions of the Modern Age are the contact point between the ideological and revolutionary push of constitutionalism and the necessity of conservation of the legal order

# Why?

## Whose are The Origins of Constitutionalism

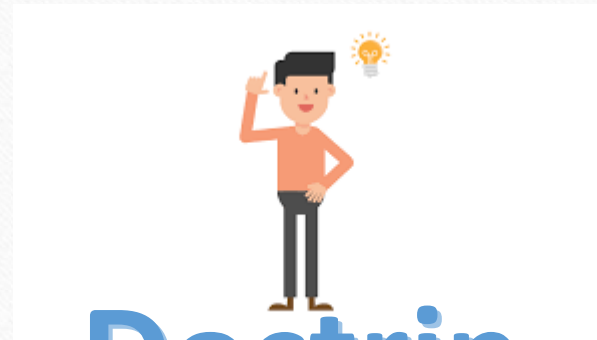


## Doctrin

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The Origins  
What to do in front  
of a lot of powers?  
Constitutionalism



Doctrin  
&?

What to do in front  
of a lot of power?  
Constitutionalism

Absolutism

- A form of gov't in which all power is held by a single ruler
- “Divine Right”  
God has given them the throne & they only answer to him



The contrary is Despotism

Recognizes Government with powers unlimited



Doctrin

# Constitutionalism

It is a work and a moviment, for what?



➤ Concernes  
the *framework* – written or not written  
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Constitution

For creating order

If you want *peace* you have to...

Put in connection

**Right & Value**

What is fondamental important for men and the  
right to obtain that value

I have a dream

M.LUTHER KING

# What to do in front of a lot of power? Constitutionalism

Among Who or what Must be put order?

How can you put order?

Who can put order?



What's the meaning of order ?

What's power?

Who has power?

Only separation of power  
could be usefull?

## Doctrin

violence

order

peace

## Value&right

people

institutions

bourgeoisie

# There's need to put order



# Constitutionalism

Constitution

key elements:

- a) rights provision and
- b) structural provision



## Doctrin

## Value&right

Controls over discretionary powers

- Institutional safeguards against abuse & misuse of powers by authorities
- Checks & balances are put in place in order to ensure the government acts within their powers & not exceed.

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Constitution



# Constitutionalism

Constitution

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## Doctrin

## Value&right

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Constitution

- Respect for human rights
- Respect for liberty & equality
- Guarantees for human freedom & dignity
- A fair balance between conflicting demands of power & liberty, freedom & responsibility & the might of the state & the rights of the citizens.

# Constitutionalism

## Constitution

### Difference:-

- A constitution can be defined as the fundamental laws custom, conventions, rules and regulations, stipulating how a country is governed, while constitutionalism can be defined as a principle a concept, an idea in exercising powers  
The authority over the people is dependent on its observance of the limitations under the law.
- Those limitations are usually enshrined in the constitution.

- A **constitution** is a charter of government deriving its whole authority from the governed. '**Constitutionalism**' means limited government or limitation on government. It is antithesis of arbitrary powers.



# Why to speak about modern Constitutionalism

modern Constitution

Modern constitutions as they emerge after the American and French Revolutions (modern constitutionalism).

- In the past, Constitutions were promulgated by Kings .  
The concept of governing a country on the basis of a constitution, drafted by a special representatives is the product of democratic revolutions.
- Constitutionalism first found its expression in the Philadelphia Convention in the USA. And it was the 1<sup>st</sup> nation to experiment with a written constitution. The american constitution laid the foundation to the art of constitutionalism.
- **American and French Revolutions**
  - To establish a new political system that differs fundamentally from the one they had accused of being unjust
  - They devised a plan of legitimate rule and endowed it with legal force before rulers were called to power and authorized to rule according to the legal framework
  - The constitution has to be distinguished from ordinary law (higher law)
    - Popular instead of monarchical or parliamentary sovereignty
    - Modern idea of 'Representativeness'



# Old idea of Constitutionalism

## Limited Government

- To establish a limited government (Bellamy)
- Catalogues of fundamental rights
- To avoid concentration of power. Instead, to distribute it among various branches of government (checks and balances)
- Only consent of people could legitimize governmental power.

# modern Constitutionalism

## modern Constitution

but

Fundamental question: how a law that emanated from the political process could, at the same time, bind this process



# Old idea

## of Constitutionalism

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# modern Constitutionalism

## modern

## Constitution

# Infact

### Law Became Reflexive

- Hierarchy of norms (Paramount law)
- Division of positive law into two different bodies:
  - one that emanated from or was attributed to the people and bound the government (*pouvoir constituant*)
  - one that emanated from government and bound the people (*pouvoir constitué*)

Fundamental question: how a law that emanated from the political process could, at the same time, bind this process



Constitution thereby turned  
from a descriptive  
into a **prescriptive notion.**



# modern Constitutionalism

modern Constitution

## Law Became Reflexive

Constitution thereby turned  
from a descriptive  
into a **prescriptive notion.**

- Implies loyalty to Constitution by citizens & officials of the State.
- Citizens must accept the limits on their freedom.
- Officials must observe the limits on their powers.
- authorities obtain their powers from the law & must act within the law –  
'Government by law & not by men'.





# modern Constitutionalism

modern Constitution

## Modern Constitutionalism

As «breath» of a long and hard work:

is:

- ❑ **To set** a legal norms, not philosophical structure
- ❑ The purpose of these norms is both:
  - **to regulate** the establishment
  - **and to bind** the exercise of public power
- ❑ To put in a high level the Constitutional law
- ❑ To put in the hands of the people the legitimate source of power

# modern Constitutionalism

modern Constitution

## Modern Constitution

### Supremacy

- **Higher** or **ordinary law**
- All acts of public authority have to conform to the provisions of the constitution
- Supremacy presupposes the legal validity of the constitution
  - Carl Schmitt (super majority for amendments)

Some Doctrin says rigid Other says graduate level  
When the ordinary law cannot modify the  
Constitution and the Constitutional Law

### The Legal Character of the Constitution

- **Effective** and **ineffective**

- Constitutions could remain on paper (symbolic)
- Karl Loewenstein distingues constitutions in three typologies: *normative, nominal, semantic*.

- **Written** or **unwritten** (hard law; codifications)

- Exceptions: British Constitution
- Additional constitutional laws with different life: *loi organiques; leggi costituzionali*
- Do not overestimate this distinction.

- **Rigid** or **flexible**

- There is a relation between the rank of constitutional law and the rules for constitutional amendment
- Some constitutions completely exclude certain provisions from abolition by way of amendment (Italy, France, German Basic Law).
- Distinction between constitution and constitutional law (Carl Schmitt): only the second could be amended.



A constitution **without** constitutionalism

HOW CAN it BE POSSIBLE?  
INACTIVE?

YES/NOT

- to guarantee the instruments to defend the people in front of the courts
- to unforce the power of the judges



# modern Constitutionalism

modern Constitution

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## EXAMPLE

Having a constitution is not the same thing as making it work. Mainland **China** exemplifies this conventional wisdom

Since the economic and legal reforms in 1978, Chinese get a current Chinese Constitution, enacted in 1982

# HOW CAN it BE POSSIBLE?

## INACTIVE?