

Constitutionalism in Goa (1822-2000)¹

Dr. Carmo D'Souza

The writer has authored Legal System in Goa, Vol I and II.

Introduction

Goa has a very interesting history of Constitutionalism, which started in post 1822 era and continued throughout the nineteenth and twentieth centuries till the present day. The Constitutional history with its ups and downs, is partly recorded in constitutional documents, books, newspaper articles, other prominent writings, and can partly be inferred from the social and political conditions of those days. This material supplemented with the knowledge of problems and issues facing the society is a valuable study data for understanding constitutional movement in Goa.

There are several reasons why Goa can serve as a model for research on understanding constitutional development in other countries too. Some of the reasons are: (1) The Constitutional history in Goa from 1822 onwards till present day is well recorded in constitutional documents, (2) There are several writings on constitutional jurisprudence by Goan writers to support the study, (3) Several newspaper articles while advocating certain measures in favour of Goan community referred to the Constitutional philosophy, ideology or content, (4) Constitutionalism deeply affected the psyche of Goan intellectuals, (5) Though Constitutional values were propounded early in Goa, they could not often penetrate through the rigid caste, creed, and other social barriers, (6) While the population were vociferous in demanding equality with the colonizers, they failed to apply the doctrines within their own society for a long time, (7) The fact that Constitutionalism took place both during the Portuguese and post Liberation period can be very helpful for a comparative study, (8) As Constitutionalism in Goa was prevalent both in liberal as well as dictatorial period, it makes it more valuable as a research subject, and (8) The small size of Goa makes the study complete and easy to handle.

Constitutionalism in Goa is discussed in the present paper under two heads mainly: (1) Constitutionalism during the Portuguese Regime and (2) Constitutionalism in Post Liberation Period.

¹ See for the various constitutions, D'Souza, Carmo, Legal System in Goa (Vol. II) Laws and Legal Trends (1510-1969), publisher Agnelo D'Souza, 1995, pgs. 130- 155.

Constitutionalism During the Portuguese Regime

It is possible to discuss the constitutional development in Goa through the history of the documents enacted during the course of time. Such an historical journey through the documents may not give the correct picture of the movement in practice. Firstly, these Constitutions were enacted for all the Portuguese territories, of which Goa was a part. Secondly sometimes paper constitutions are enacted or become so in course of time. Besides, the Constitutional documents by themselves are not a guarantee that governance is carried as per the document. Yet constitutional history of documents too is interesting and often reveals a special facet of the movement. Such information can be carefully used when supplemented by other historical evidence.

The history on Constitutionalism in Goa can be traced through the following documents: (a) Constitution of 1822, (b) Charter (Carta) of 1826, (c) Constitution of 1838, (d) Constitution of 1911, (e) Colonial Act of 1930, (f) Constitution of 1933, and (g) Alterations to Constitution of 1951. Though some of the pieces were in force for a very brief period such as the Constitution of 1822, or the Constitution of 1838, they are useful as to the value orientation propounded in them, which influenced social relationships in those days. The Carta of 1826 had a very long period of enforcement though it faced modifications.

Constitution of 1822²

The Constitution of 1822, based on the Constitution of Cadiz was voted by the Cortes in Lisbon in 1821 and the King swore by it on 23 December 1822. It was in force for a very short period of hardly a year and was enforced again in post 1836 events as an interim measure. The Constitution in the first title dealt with individual rights and duties of the Portuguese and enumerated a number of them similar to those found in the present day constitutional pieces. As regards the Portuguese Nation, it regarded it as a Union of the Portuguese of both the hemispheres. It is noteworthy that there was to be a Council of State consisting of thirteen citizens, six hailing from the Provinces of Europe and six from the Overseas, the thirteenth being either from Europe or Overseas depending on lot. The Constitution was hardly in force but it is interesting that it was a result of deliberations of Cortes.

² Serrao, Joel, *Diccionario de Historia de Portugal*, Vol. II, pp. 159-163, and Schaefer Henrique, *Historia de Portugal*, Vol. VI, pp.528-531

Constitutional Charter of 1826 (Carta)³

The Constitutional Charter was sent from Rio de Janeiro in 1826. Article 2 enumerated the territories that formed the Kingdom of Portugal and Algarves , having areas in Europe , Africa and Asia, and enumerated them in that order, thus propounding that all the territories formed one Portuguese Nation. Title eight incorporated civil and political rights for the citizens in almost absolute terms, similar to most of the individual rights found in modern constitutions. Citizenship had a place in the Carta with citizenship by birth being given top priority. It was granted to all those who were born in Portugal or its dominions, who were not Brazilian citizens, even though born of foreign father residing in Portugal, but who was not residing in the service of his own nation. The Charter was in force with modifications for most of the period till 1910.

Constitution of 1838⁴

It had a very short span and interrupted the Constitutional Charter for brief periods. Roman Catholic Religion was placed on pedestal of State religion. Title 10 dealt specifically with the Overseas Provinces. Article 137 stated that Overseas Provinces could be governed by special law as per the convenience of each of them .

Constitution of 1911⁵

On the overthrow of monarchy in October 1910 and the establishment of Republic, it became necessary to give the people a new Constitution. Title II, Article 3 and 4 dealt with individual freedoms. Article 3 was subdivided into 38 subdivisions guaranteeing various specific freedoms to the individual. The freedoms were not absolute but subject to reasonable restrictions. Article 4 expressly stated that the specific rights and guarantees enumerated did not exclude other rights and guarantees not enumerated, but which were implied from the institution of government established as well as those resulting from principles found in other laws. Article 67 propounded that decentralization in the administration of Overseas Provinces was to be prominent. As a principle it was stated that the special laws meant for the Overseas territories, were to be adequate to the stage of civilization of each of them.

³ *Carta Constitucional de Monarchia Portuguesa* , Nova Goa , Imprensa Nacional , 1880, pp.1-19. Constitution was proclaimed in Rio de Janeiro in Brasil , on 29 April , 1826 . Saldanha , M.J. G. *Historia de Goa*, Vol I , *Historia Politica* , mentions swearing by Carta Constitucional in Goa on 18 October 1827, pg. 252

⁴ *Constituicao Politica de Monarchia Portuguesa* , Imprensa Nacional , 1839, pp.1-37

⁵ Decree of 21 August 1911 of the Constituent Assembly.

Colonial Act 1930⁶

The Colonial Act was a product of dictatorship period and later was incorporated in the Constitution of 1933. It presented the Portuguese Nation as a Colonial Empire, stressing and emphasizing on the historical mission of civilising and colonialising the territories under it. The mission civilisatrice of the Portuguese nation was the foundation of Colonial Act. It described the essential object of the Portuguese nation, being to fulfill its historical mission of possessing and colonialising the Overseas territories, and of civilizing the native population. Hence Title two of Colonial Act dealt with natives, guaranteeing protection to them according to the principles of humanity and sovereignty, and with due regard to International Conventions. The Colonial Act hurt the sentiments of Goan intellectuals, as they consider the label of Colony as degrading with respect to Goa, and hence did not want the application of the act to the territory.

Constitution of 1933⁷

This Constitution enacted during the dictatorial regime of Dr. Salazar, was approved by a national plebiscite of 19 March 1933. Though a product of dictatorial period it continued to guarantee to citizens a number of individual rights. Interestingly Article 20 held that public opinion was a basic ingredient in the policy and administration of the country and that the State had a duty to protect public opinion against the influences of distorted truth. Article 21 stated that the duty of the press was of a public nature and as part of its public duty, the press could not refuse to insert official notices of national importance sent by the government. The Constitution viewed the family as a special unit to the life of the country. Article 11 stated that the State ensured the formation and protection of the family, treating it as the source and development of the race, as the first basis for education, discipline and social harmony and as the foundation of all political and administrative order⁸. The Constitution of 1933 incorporated in it the controversial Colonial Act.

Alteration to Constitution, 1951⁹

With the end of World War II there was a polarisation of anti-colonial and anti-imperial forces. To counter these clamouring voices, the Portuguese Constitution was revised in 1951 and did a volte face on its previous stand of the thirties as regards the term colonies. Article 133 stated that it was an organic essence of the

⁶ Decree No. 18570 of 8 July 1930, Legislaçao do Estado da India, appendice pgs. 229-241.

⁷ See Legislaçao do Estado da India, 1933, pgs. 205-230

⁸ "Nothing could be published or broadcast without careful and costly scrutiny", writes David Birmingham in Concise History of Portugal", Cambridge University Press, 1993, pg. 162 referring to Salazar's period.

⁹ Law no. 2048 of 11 June 1951, Legislaçao do Estado da India, 1951, pgs. 430-444.

Portuguese Nation to fulfill its historic functions of colonialising the lands of its discoveries , and to spread the benefits of its civilisation. From the above it appears that Portugal intended to carry on as in the past its colonial policy. However the next Article designated Portuguese possessions as “ Overseas Provinces” . Article 135 emphatically stated the Portuguese Overseas territories, were an integral part of the Portuguese State, maintained solidarity among themselves and with Portugal.

Post Liberation Period -The Indian Constitution

On 19 December 1961, Goa was liberated from the Portuguese rule and the Constitution (Twelfth Amendment) Act, 1962 was passed and deemed to have come into force on 20 December 1961. It amended the First Schedule of the Constitution to include Goa, Daman and Diu in the list of Union territories under entry 8. It also amended article 240 clause (1) and inserted an entry i.e. (d) Goa, Daman and Diu. Article 240(1) empowered the President to make Regulation for the peace, progress and good government of the Union Territory. Later the Constitution (Fourteenth Amendment) Act, 1962 permitted under Art. 239-A the creation of Legislature or Council of Ministers for certain Union territories including Goa, Daman and Diu. Also Article 240 was amended so that from the first meeting of the Legislature, the President was not to make Regulation for Goa, Daman , Diu or Pondicherry.

The Indian Constitution has Fundamental Rights in Part III (Articles 12-35) and Directive Principles of State Policy in Part IV (Articles 36-51) . The Indian courts have enlarged the ambit of these rights by interpretation over the last fifty years more so specially in the later quarter of this century. In Goa too such interpretations have been used in deciding cases. Today many concepts floated globally too are influencing Constitutionalism in India and so in Goa. Some of the factors that were responsible for this growth on Indian Constitutionalism were: (1) The Writ jurisdiction for obtaining constitutional remedies available under the Indian Constitution exercised often positively by the courts, (2) Judicial interpretation of the Constitution which enlarged specially the sphere of fundamental rights, (3) Judicial activism to a certain extent which helped to supplement the lethargy in the executive, (4) The electoral system implemented with a mass base which brought about social transformation .

The rise of growth of democratic institutions and upward mobility within the society, values such as equality , freedom of speech and so on became more meaningful . Also the changing society and national and international influences saw the growth of many social development in line of Constitutional spirit. The

rise and growth of NGOs also helped the spread of Constitutionalism in Goa in a more meaningful way.

On the opposite side many unwanted practices too are developing in the Goan society endangering Constitutionalism. Politics in Goa is a grim reminder of the post 1910 events, which led to dictatorship. Defections and counter defections, cases of disqualifications, etc , are strangulating the democratic institutions. Undue political interference in administration and police are a blot on Constitutionalism. New forms of violations of Human Rights are raising their ugly form in Goa . Child abuse, female infanticide, dowry harassment, bride burning, domestic violence murders and other of violations are on the rise. The changes in the Goan society, criminilisation of politics etc. may destroy Constitutionalism in Goa.

Constitutionalism in Goa –An Introspection

Though Constitutionalism started as early as 1820's it is surprising that the society did not take full advantage of it and even suffered a period of dictatorship. The question that arises is about the explanation for such a phenomena. Here are some reflections on the point .

1. Constitutionalism was confined for most of the time during the Portuguese period to the intellectual classes. They wrote about their rights in journals and articles and often clamoured for justice when their rights were violated by any discriminatory measure taken by the Portuguese.
2. Goan society as a rule failed to apply the principles of Constitutionalism among themselves . For instance equality was clamoured with respect to the Portuguese , but the society seldom applied equality within their own society .
3. Caste , creed , feudal , sex barriers existed in the society . For instance as regards the role of women, they were not conceded political rights as men enjoyed.. This was a world wide phenomena. Few visionaries could go beyond these barriers of caste ,creed, sex etc. prevalent in Goan society . These were the hurdles for the growth of Constitutionalism in Goa.
4. Though Goa started with the electoral system as early as the first half of ninetieth century , it failed to grow , but rather was stunted at the fag end of the first half of twentieth century, thus defeating the process of Constitutionalism in the place.
5. The disillusionment with democracy in Portugal as well as political events in Goa, ushered in the era of dictatorship. This is a painful lesson to remember.
6. New forms of violation of Constitutionalism spirit are raising their ugly head in Goa .

Concluding Remarks

Here are some concluding remarks

1. A journey through constitutional documents may be misleading as sometimes the ground realities do not reflect what is written in the constitutions. However they serve to understand the aspirations and the values that were enshrined in the documents.
2. It is difficult to analyse whether the Constitution of 1933 can be termed as a paper constitution with respect to Individual rights , as sometimes many rights can be enjoyed also meaningfully in a dictatorship period . However freedom of speech, etc are usually axed during such period.
3. It is noteworthy to analyse article 20 and 21 of the Constitution of 1933 and supplementing it with other information on censorship etc to gauge the impact of freedom of speech and freedom of press.
4. There are many NGOs working on various dimensions to promote constitutional values in Goa today which is a redeeming feature .
5. The society must seriously analyze the alarming trends such as violation of children and women rights, the abuse of the electoral system etc. which can destroy the growth of Constitutionalism in Goa.
6. Any society must keep a constant vigil on the development of concepts, which may violate the constitutional spirit, as machinery of exploitation will constantly devise new forms to sabotage Constitutionalism.