Exploring Constitutional Complexity

Mr. Sreenidhi K. R.*
Dr. Chanjana Elsa Philip**

Introduction

Complexity theory or the study of complex adaptive systems, seeks to enable us in gaining a better understanding of systems which are difficult to study, owing to the fact that they are made up of multiple components interacting with each other through a complex network of evolving structures that display distinct adaptive behaviour[1]. Typically, a complex system displays emergent and adaptive behaviour originating from the interaction between the individual components. It is this theory which unfolds at the forefront of science that has been borrowed to analyse law and its relationship with society's systemic behaviour. Law as an emergent, self-organising system is made up of an interactive network consisting of numerous sub-systems operating independently, resulting in complex collective behaviour[2]. The same may be observed specifically in areas like International Law, Public Law and Governance. Constitutionalism on the other hand is an area evolved from ideas and experiences in politics, law and governance[3]. It is an organized system

*Faculty, School of Legal Studies, CMR University, Bengaluru
**Faculty, School of Legal Studies, CMR University, Bengaluru

[1]J.H. Holland, *Studying Complex Adaptive Systems,* 19(1) JOURNAL OF SYSTEMS SCIENCE AND COMPLEXITY, 1-8 (2006).

[2]J. MURRAY, T. WEBB, S. WHEATLEY, COMPLEXITY THEORY AND LAW: MAPPING AN EMERGENT JURISPRUDENCE (Routledge, 2018)

[3]Wil Waluchow, *Constitutionalism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2018 Edition); *see also,* Edward N. Zalta (ed.), (6th June, 2021) https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/

consisting of many different sub-systems interacting with one another, resulting in the emergence of a complex constitutional paradigm, infinitely more different than any of the component parts. It further reflects the unpredictable outcomes related to path dependence.

This article attempts to study constitutional systems as complex systems and therefore seeks to establish that these systems exhibit several features that have been associated with the same. However, the primary challenge to such a study emerges from the fact that there exists no unified theory of complexity and therefore no readily available set of common features with which one may compare constitutional systems. Incidentally, a similar lack of commonality is typical amongst the various iterations of Constitutional systems too, which makes the attempt even more challenging. Our attempt herein is to primarily observe the precious few commonly accepted features underlying complex systems in their manifestation as features of Constitutional systems. Primarily, we explore and make a humble attempt at summarising the theoretical aspects of the concept of complexity. Subsequently we attempt to present the growth and development of constitutionalism as a self-organizing, adaptive system that thrives upon the interaction of its various subsystems while being path dependent and unpredictable.

Of Complex Systems

The concept of complexity is certainly not a new one. The original premise that surfaced in the middle of the 20th century, emerges from the idea that attempting to understand various systems through the concepts of purpose, feedback, information, communication and control[4] rather than focusing on the concepts of physics, would yield a better understanding of the science underlying such systems[5]. The extension of

---

[4]M. MITCHELL, COMPLEXITY: A GUIDED TOUR. (Oxford University Press 2009)

[5]A. Rosenblueth, N. Wiener, and J. Bigelow, *Behavior, Purpose and Teleology* 10(1) PHILOSOPHY OF SCIENCE 18,24 (1943).

the same to complex systems was not far behind. However, the real question that needs answering is, what we perceive as complex systems and what it means, to study a system as a complex system.

At the outset it is pertinent to observe that the one thing almost all stakeholders might readily agree upon, is probably that there is no unified theory of complexity and the notion of fundamental principles of complexity would certainly differ from each other based on what perspective it is viewed from. Identifying the same as, 'theories of complexity' as opposed to 'a theory of complexity' would probably be the best way to move forward as almost all attempts at a unified theory of complexity have by far fallen short of the mark and the idea of unification has remained elusive[6].

However, it must also be noted that the study of complex systems has spanned a variety of domains. The reason for the same may be due to the fact that the science of complexity is one that lends itself readily to certain kinds of observable phenomenon common to many disciplines. Furthermore, it may also be noticed that the philosophical construct of complex systems science is such that it may be perceived not as a method, but rather as a unique form of observation and analysis.

It may also be pertinent to take note of the article by Thomas Earl Gen[7], where he tries to introduce the readers to the possible importance of Complex Adaptive Systems (CAS) and convey to them the best of postmodern theory, thereby suggesting an intersection between art and science which he feels will help them to make their own novel connections and to engage in the creative process of discovery or criticism[8].

---

[6] *See Generally*, J. MURRAY, T.E. WEBB, and S. WHEATLEY, ENCOUNTERING LAW'S COMPLEXITY. IN COMPLEXITY THEORY AND LAW, 3-22 (Routledge 2018).

[7]Thomas Earl Gen, *Chaos, Complexity and Co Evolution, the Web of Law, Management Theory and Law Related Servicesat the Millenium*, 65 Tenn.L.Rev. 925 (1997-98)

[8] *Id* at 933.

Of Constitutional Systems

Self-organization and Adaptation

The idea of a constitutional system is an idea that can only be defined looking backwards, with each individual component having its own distinctive origin, only to later find significance as an essential part of modern constitutional governance, which when seen as a whole, aggregates into a complex system that promises a heretofore unseen stability which may not have been present in the individual component.

The development of democratic systems may be seen as one of the striking examples of this phenomenon. The idea of a constitutional system, as we have come to recognize it today, is quite modern, emerging only during the late 18th century and gradually taking shape into a comprehensive system, encompassing all aspects of governance and polity, only very recently. However, the great many of its sub-systems appear much earlier in history, albeit in completely different forms and structures. For instance, ancient Greek and Roman political thought have played a significant role in determining many important constitutional concepts. Indeed, one cannot ignore the continuous influence that these ancient cultures have had over much of Europe and the western world over the past two millennia. Of all the pre-modern Greek poleis that attempted to establish a popular government, Athenian democracy, was the one that endured, hailed even to this day as an inspiration to many modern democracies[9]. However, purely democratic systems find themselves struggling with a variety of issues emerging within and without, while their core purpose stands unfulfilled[10].

---

[9] D.M. PRITCHARD, WAR, DEMOCRACY AND CULTURE IN CLASSICAL ATHENS. (Cambridge University Press, 2010)

[10] P. Gowder, *Democracy, solidarity, and the rule of law: lessons from Athens* 62 Buff. L. Rev. 1. (2014)

Similarly, the republican order of ancient Rome, which established the concept of a Roman Constitution, continued to be recognised as a republic in spite of its relapse into monarchical traditions after Julius Caesar. However, the established construct itself endured a systemic failure of sorts, which led to a civil war resulting in the restoration of the Monarchy[11]. The original Greek notion of 'Politeia' meant, a system of laws and principles that governed a civil community making it a 'form of life' of a polis. But in the modern sense the word carries a secondary meaning connoting specific 'forms of rule' or 'government under the constitution'[12]. The most important question that needed an answer was whether people could participate in government and make their own laws- i.e., *rule themselves.*[13]

Here, it is pertinent that we mention the Social Contract which solidified the important principle that governmental power comes from the people and rests on the consent of the governed. This helped reach the normative conclusion that people consented to the existence and powers of the government and reciprocated by obeying the rules put forth by the public power, but to give up all their rights was too much of a bargain. Thus, Locke argued that people possess a natural right to rebel against a tyrannical government and that the government may use force only in achieving what is right and just in society. Thereby turning the social contract into a means of legitimizing the government[14]. This is clearly reflected in the development of Constitutional Law in England - *the motherland of Constitutionalism.* The development of the Constitution

---

[11] T. R. MARTIN, ANCIENT ROME: FROM ROMULUS TO JUSTINIAN. (Yale University Press 2012)

[12] VERITY HARTE AND MELISSE LANE, POLITEIA IN GREEK AND ROMAN PHILOSOPHY (Cambridge University Press, 2013)

[13] David Sing Grewal and Jedeiah Purdy, *Original Theory of Constitutionalism*, 127 YLJ 664 (2018)

[14] Paul Lermack, *The constitution is the social contract so it must be a contract - Right? A critique of Originalism as interpretive method* 33(4) William Mitchell Law Review 1403, 1414 (2007)

from the 'basic rules concerning the government' to 'a plan of legitimate rule endowed with legal force and legal framework' which authorized the authority to rule, took too long because of the complexities that existed in society. Achieving supremacy of the constitution remained a big challenge. The answer finally came in the form of 'Constitutionalism' which in common parlance is understood as the rules prescribing limitations on public power. For this to work, Constitutions had to gain a status much above ordinary law paving way for a 'positive constitutionalism'[15]. Even the American Constitution, the oldest of all written constitutions, realized its central purpose was to create a new powerful, effective system of governance at the national level. After four years of the original Constitution coming into force did the Bill of Rights by way of Amendments become part of the Constitution with the indication that public powers are limited thereby bringing an end to legislative omnipotence placing all departments and agencies of government under one supreme law- **the Constitution[16].**

The gradual evolution of the constitutional systems observed herein depicts the emergence of a pattern wherein self-organization and adaptation is evident from the unending number of frequent alterations each one of these constitutional sub-systems undergoes, rapidly modifying not only their essential characteristics, but also the common perception held by each succeeding generation of thinkers and scholars. Consequently, we also witness an ever-evolving conception of 'Constitutional Systems', constantly adapting to suit the needs, not only of different periods, but also of different regions.

---

[15] *See Generally,* O. Gerstenberg, *Negative/Positive Constitutionalism, "fair balance," and The Problem of Justiciability* 10(4) International Journal of Constitutional Law, 904,925 (2012)

[16] *See Generally,* 213 K.C. WHEARE, MODERN CONSTITUTIONS (Oxford University Press, 1951)

Emergence, Unpredictability and Path Dependence

A close analysis on the study of 'the science of complexity' reflects the ways that interactions cause actors to adapt and how even minor adaptations can echo recursively throughout a system leading to outcomes that might not have been predicted, or predictable, by linear mathematical methodologies.[17] As far as science is concerned the unpredictable outcomes can happen through system generators such as Chaos, Emergence and Catastrophe[18]. This part of the article will be a humble attempt to look in through ***emergence*** as a system generator in the development of ***due process law*** as a non-linear dynamic system, evolving from the ***law of the land*** concept. According to the Black's Law Dictionary[19], the term emergence means *'sudden presentation or result of a system's processing. A combination of the properties of its components or parts triggers an unpredictable manifestation'*. The authors would be looking through the unpredicted development of the concept of due process as it stands today in every democratic country and its emergence from the self-organized pattern of the concept of 'law of the land' under English law and much later from 'procedure established by law' under the Indian Constitution.

The Magna Carta otherwise known as the 'Charter of Liberties' was supposed to be an answer to the persisting political unrest in 1215. Though the document per se does not receive much attention here, the fact that it stands as a symbolic document reflects the fact that the power of the King is not absolute and is subject to certain legitimate rules which are looked upon as the bedrock of the system. Though the document was reissued several times by different kings, it was always a statement on the

---

[17] J.B Ruhl, *Complexity Theory as a paradigm for the dynamical Law- and - Society System: A wake-up call for legal Reductionism and the Modern Administrative State,* 45 Duke L.J.849, 916-26 (1996)

[18] *See Generally,* STUART A KAUFFMAN, THE ORIGINS OF ORDER: SELF ORGANIZATION AND SELECTION IN EVOLUTION, (1993)

[19] B.A. Garner, Black's law dictionary (2004)

limit of the Crown's power. But if the king was reluctant, then no one could force him to comply with the law. Though attempts were made to bring the King under control through the creation of the Council of 24, it has to be admitted that it did not yield much[20]. Now a perusal of the 39th Chapter of the document becomes important. It states that "no free man shall be taken, imprisoned, disseised...except by the lawful judgement of his peers [or/and] by the *law of the land"*[21]. As already mentioned, this clause did not guarantee absolute rights but instead was intended to subject the crown to the power of law of the land both procedurally and substantially. Though this was the standing law it remained part of the unwritten conventions and were subject to causal mechanisms that remained poorly understood when looked upon as a sub-system. But when the '*due process of law*' phrase was introduced, none could explain how it differed from the phrase of 'law of the land'. But an analogy drawn would throw light on the fact that both terms were two different ways of telling the same thing. But when the Magna Carta as it stood along with the 'law of the land' phrase which was a development of the political crisis that existed then, we believe that, the legal arena never predicted that it would turn out to be a bedrock of legitimate principles governing any modern constitution findings its path through the development of 'due process'.

During the early Stuart-Era the common law lawyers especially Edward Coke vehemently argued the need for due process to limit the prerogative powers of the Crown in a scenario where Parliament was emerging as supreme. Coke had also defended the supremacy of the Common law which had developed through various adjudications and customary laws since time immemorial. Thus, the law of the land became a substantive and institutional check on the power of the Crown and its

---

[20] J.C. HOLT, G. GARNETT, and J. HUDSON, MAGNA CARTA (Cambridge University Press 2015)

[21] A.D. HOWARD, MAGNA CARTA: TEXT AND COMMENTARY (University of Virginia Press 1998)

prerogative to deprive persons of their life and liberty could not be arbitrary but subject to the Act of the Parliament and common law principles. This is where the first time the concept of Separation of Powers creeped in which influenced America to make it an important aspect of their Constitution[22].

The Case of Proclamations[23] stands as the best example wherein it was asserted that any decision that the government took was prohibited unless and until it was coordinated through a legislation passed by the Parliament. This theory was further endorsed through the Petition of Right, 1628.[24] Thus, the substantive law separated the law-making power from the king and the Courts separated the adjudicatory powers. But the irony was that when the Parliament emerged as supreme by becoming the law-making body, it also started hearing appeals from British Common law Courts and adjudicated matters as the sole judge of the law and customs of Parliament. The shameful episode of '*The Expulsion and Disqualification of John Wilkes*'[25] reflected the fact that there was no institutional check on the common's power to control members and could proceed however it liked.[26] Thereafter, there were many such instances[27] which reflected the fact that the Parliament was not bound by the *due process clause.* These legislations were more so arbitrary and depriving as they were enforced on British Colonies. It may be noted that at this time America remained to be one of the British Colonies. They had already started revolting against the Crown, particularly after the

---

[22] Nathan S. Chapman and Michael W. MC Connel, *Due Process as Separation of Powers*,121 Y.L.J 1672, 1694 (2012)

[23] (1610) 77 Eng. Rep. 1352 (K.B)

[24] *Id.*

[25] *Supra* note 22

[26] *Id* at 1697

[27] Passing of the Regulating Act of 1773; Boston Port Act, 1774; Coercive Acts of 1774 etc.

Coercive Acts of 1774 was passed which asserted parliamentary sovereignty over American colonies. At this juncture, it is important to quote John Lilburne when he advocated for an '*Agreement of the People*' to save his countrymen from the legislative mockeries of fair trials[28]. He pointed out: "that which is done by one parliament, as a Parliament, may be undone by the next Parliament: but an Agreement of the People began and ended amongst the people can never come justly within the Parliament's cognizance to destroy...Agreement of the People could be changed only by the people and would bind Parliament as the supreme law of the land"[29].

Later on, the American Bill of Rights, it is said, contained most of the provisions of the "Agreement of the People"[30]. Being a colony of England, negatively impacted by the omnipotence of the Parliament and an arbitrary government, were the reasons why the framers of the American Constitution were very determined to have a written Constitution which made it Supreme over the three branches of the government. As an inherent aspect of modern American constitutionalism, due process was incorporated through the Fifth Amendment to the American Constitution wherein it famously declares that no person shall be "deprived of life, liberty, or property without due process of law". Therefore, under the due process regime in the American legal system, any law depriving a person of his life, liberty, or property must stand the test of reasonableness wherein any deprivation of property would require a just compensation to be paid and wherein the deprivation of all liberties must stand the test to strict demands of reasonableness.

Constitutional historian Granville Austin provides us with a veritable account of the 'incorporation' of due process in the Constitution of India. In his distinguished book, 'The Indian Constitution -

---

[28] Hugo L. Black, *The Bill of Rights*.L.Rev.865 (1960)

[29] *Id* at 868

[30] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

Cornerstone of a Nation'[31], he discusses at length the assembly's efforts at limiting the influence of due process in the new Constitution. Due process in the constituent assembly was the subject matter of intense debate on two grounds, firstly with the acquisition of property and the consequent determination of compensation and secondly, preventive detention. Primarily the issue of property was sought to be resolved by excluding the term property from Article 21. Corrections made to Article 31 also ensured that the determination of compensation would be left to the legislature and the power of the court to review the same was severely restricted. Key members of the assembly had at the time been greatly influenced by the works of a great American lawyer named James Bradley Thayer, who insisted that there must exist a distinction between legislation and adjudication in terms of preventing the judiciary from usurping the power by replacing the democratic value choices with that of their own. He believed that any absolute reliance on due process as a tool to safeguard against legislative oversight and executive fiat would weaken the democratic process[32]. This view was supplemented by Justice Felix Frankfurter who suggested to Sir BN Rau, that an absolute incorporation of due process could not only be undemocratic but also be burdensome on the judiciary[33].

Due process was therefore intentionally omitted in favour 'procedure established by law', which largely ensured that social reform legislation would not be subject to the 'excesses' of due process and the demands of draft Article 15 (now Article 21), would be confined to procedure established by law, where law would be construed to mean legislation alone.

---

[31] G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Oxford University Press 1999)

[32] J. O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY. (JHU Press, 2005)

[33] *Id.*

Owing to trenchant criticism on these grounds however the assembly adopted much later, a draft Article 15A (now Article 22), which provided further safeguards against arbitrary arrest and detention with preventive detention being the exception rather than the norm.

The concept of substantive due process was, therefore, given up in the interests of a young developing nation seeking to achieve socio-economic reform. A shadow of due process however remained in the incorporation of the specific freedoms under Article 19 (1), the deprivation of which would be subject to just, fair and reasonable grounds only or the reluctant inclusion of Article 22. These minor deviations from the preferred course, would prove decisive in ensuring subsequent unpredictable outcomes.

An enormously different approach to due process than the one envisioned, was acknowledged as appropriate in the landmark judgment of Maneka Gandhi's Case[34] wherein it was held that Article 19 and Article 21 must be read in light of each other. This further strengthened the applicability of due process by appreciating the existence of a procedural due process within Article 21. The Supreme Court further acknowledged the existence of due process by declaring that Article 21 and 19 must be read in conjunction with Article 14 and as such it is now an accepted standard rule that any law depriving any person of his life or personal liberty would have to stand the test of reasonable restriction evolved by the Supreme Court under Article 19 and similarly any classification so depriving any class of people; any such right must stand the test of reasonableness of classification under Article 14. However, the true extent of this form of an evolved due process can only be appreciated upon an understanding of the interpretation of the terms, liberty and life as discussed in this judgment.

The illustrious bench decided to agree with the statement made by Justice Stephen J Field on the interpretation of the term life (By the term

---

[34] Maneka Gandhi v. Union of India, AIR 1978 SC 597

'life' as here used, something more is meant than mere animal existence) in his dissenting opinion in Munn v. Illinois[35]. As to the interpretation of the term liberty, though qualified by the term personal prefixed to it, the court held that, the term brought within its ambit, a variety of rights that contributed to the development of an individual's personality such as 'freedom to travel abroad'. This view turned out to be of great significance inasmuch as the applicability of due process is concerned. Such a wide interpretation of the terms 'life' and 'personal liberty' under Article 21 when read in conjunction with the concept of reasonableness underlying Article 19, paved the way for interpreting into Article 21 the existence of a subtle and indirect applicability of substantive due process.

The same has from then onwards been reflected in the various decisions of the Supreme Court; reading into Article 21(a provision obviously worded to be a procedural right), innumerable substantive rights like, right to privacy[36], right to livelihood[37], right to a clean and healthy environment[38] and such other rights as being eligible for seeking protection against deprivation through the applicability of due process.

Therefore, the emergence of an effective 'due process' regime under both the English and Indian Constitutional Systems and consequently as a sub-system of constitutional systems generally, seemingly accidental, may be attributed to the idea of a complex system showing path dependence and unpredictability. Most complex systems are path dependent, which means that future events are dependent on both the current state of affairs as well as past events in the most minute of ways which is indicative of an inherent unpredictability and chaos.

---

[35] 94 U.S. 113

[36] Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors., AIR 2017 SC 4161

[37] Olga Tellis and ors Vs. Bombay Municipal Corporation and ors, 1985 SCC (3) 545

[38] Municipal Council, Ratlam vs Shri Vardhichand & Ors, AIR 1980 SC 1622; Rural Litigation And Entitlement Kendra vs State Of U.P. & Ors, AIR 1985 SC 652

Interdependence

One of the distinguishing features of complex systems is the notion of interdependence or interconnectedness. In complex systems, many component sub-systems coexist and actively interact with each other and with their immediate environment. This often results in the creation of a network of interactions in which a few components engage in a great many interactions. A great amount of new information is generated through such interactions which ensures that studying individual components in isolation becomes very difficult indeed, while at the same time it also becomes difficult to predict their future. Individual components of a complex system can also be, by themselves, a whole new system, thereby creating system of systems which remain interdependent on each other. A thorough study of the various parts of such systems and the nature and extent of their connections can indicate how these independent systems give rise to the whole.

The founding fathers of the American Constitution inspired in part by the writings of Baron de Montesquieu[39] advocated a unique interconnected system of constitutional governance called checks and balances. Although the original reason for this inclusion was the apparent notion of securing liberty, the same, displaying typical emergent characteristics have led to the development of an overarching system of constitutional governance. One of the most striking features of this system may be observed in the interactions between the legislative, executive and judicial sub-systems.[40]

Chief amongst these is the judiciary's power to assert its control over the constitutional interpretation by way of determining the validity of congressional statutes which stand in contradiction to the constitution.

---

[39]C. DE SECONDAT and B. DE MONTESQUIEU, THE SPIRIT OF THE LAWS (e-artnow, 2019)

[40] Madison, J., 1788. The Federalist Papers: No. 51. February, 8, p.1788.

Asserting the said power for the first time, Chief Justice Marshall explained that the Constitution being of paramount importance and thereby unamendable through ordinary legislative power, it naturally follows that any legislative provision contrary to the mandates of the constitution cannot be a valid law.[41] The Congress itself paved the way for the express assertion of this power through the Judiciary Act of 1789, by way of empowering the federal courts as the relevant constitutional provisions were not self-executing.[42]

Where the Supreme Court asserts itself as the sole interpreter of the Constitution, the power to bring about organized change rests with the congress alone. Constitutional Amendments may only be initiated by the Congress, although the process can only be concluded after further ratification by the states.[43] It needs to be observed that these amendments may even reverse the judgements of the Supreme Court, although frequent recourse to such means would not be advisable, not only because it involves a tedious and cumbersome process, but would also result in a somewhat undesirable consequence of undermining the sanctity and exclusivity of the Constitution.[44] Furthermore it is also noteworthy to mention at this juncture that it is only the Congress that can appropriate funds, 'a foundational value choice'[45], made to ensure a stable constitutional structure.

The executive, on the other hand, is empowered with a veto, a rare power in any constitutional system; it needs to be noted however that the same may be overcome by the congress by a two-thirds vote. Nonetheless, the power arms the presidency with a bargaining chip when

---

[41] Marbury v. Madison, 5 U.S. 137

[42] Wallace Mendelson, *The Judiciary Act of 1789: The Formal Origin of Federal Judicial Review*, 76 JUDICATURE 133 (1992).

[43] U.S. Const. art. V

[44] C.E.Rice, *Congress and the Supreme Court's Jurisdiction*. 27 Vill. L. Rev 959 (1981)

[45] Kate Stith, *Congress' Power of the Purse,* 97 YALE L.J. 1343 (1988).

faced with a hostile majority[46]. The President also holds the power to make appointments, notably the justices of the Supreme Court amongst a host of other executive posts. However, Senate participation in the proceedings makes it a somewhat shared power.[47] The congressional power over executive and judicial impeachment further attempts to ensure an institutional balance of power[48].

It is said that the growth of the English Constitution is the result of three forces i.e., the natural character, the external history and the institutions of the people.[49] An appropriate beginning to an examination of the same would be to start with the famous words of Sir Ivor Jennings in his book Cabinet Government, "The Cabinet is the core of the British Constitutional System...the supreme directing authority...provides unity to the British system of Government."[50] Furthermore, Baghot opines, "According to the traditional theory ... the goodness of our Constitution consists in the entire separation of the legislative and executive authorities... but in truth its merit consists in their singular approximation. The connecting link is the *cabinet*".[51] The greatest of the legislative committees was the cabinet which consisted of the most

---

[46] C.M.CAMERON, THE PRESIDENTIAL VETO. THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY, 362, 382 (2009)

[47] J.C.Roberts, *The Struggle over Executive Appointments*, 4 Utah L. Rev.725 (2014)

[48] J.C. BAUMGARTNER, AND N.KADA, CHECKING EXECUTIVE POWER: PRESIDENTIAL IMPEACHMENT IN COMPARATIVE PERSPECTIVE. (Greenwood Publishing Group, 2003)

[49] Virgil J.Pritchett, *Origin and Growth of Parliamentary Growth*, 6 Ky. L.J. 360 (1918)

[50] W.I JENNINGS, CABINET GOVERNMENT (Cambridge University Press 3rd Ed. 1959)1.

[51] See BAGEHOT, THE ENGLISH CONSTITUTION (by Paul Smith, Cambridge University Press 2001)

trustworthy men that the legislature had confidence in.[52]But we do know as a matter of fact that the three organs of the government need to coordinate for a well-balanced system avoiding any kind of confusion or contradictions.

In understanding the dynamics of power sharing in English Constitutional History, three milestones stand out- The Human Rights Act, 1998 (HRA), The Constitutional Reforms Act, 2005 and the creation of the Ministry of Justice which came into effect in 2007. But this does not mean that changes happened only due to the legislation and new arrangement pattern of governance but it is also due to the changing attitudes and perceptions. The revocation of the Kilmuir Rules of 1987, which protected judicial independence- a cardinal principle of constitutional principles stands as another good example. Now judges have become more open and the executive have grabbed opportunities in criticising the judiciary[53]. Although the HRA tries to uphold Parliamentary Sovereignty, Sec. 3 of the Act imposes a duty on the Court to keep in mind the convention rights while interpreting Legislations. If a plain interpretation goes against the purpose of the Convention, the judiciary can claim it as incompatible under Sec. 4 of the Act thereby giving a strong signal to the legislature and the executive to rethink and reframe the provisions of the legislations[54].

Under the Constitutional Reforms Act, 2005 (CRA), it is pertinent that we also mention the *Concordat,* a document which set out the basic principles on which the judges and the executive would relate to each

---

[52] Christopher Foster, *Cabinet Government in the Twentieth Century*, 67 Mod. L.Rev. 753 (2004). *See also* , Morris S. Arnold, Statutes as Judgments: *The Natural Law Theory of Parliamentary Activity In Medieval England* , 126 U. PA. L. REV. 329 (1977).

[53] ALEXANDER HORNE: THE CHANGING CONSTITUTION: A CASE FOR JUDICIAL HEARINGS?, A Study of Parliament Group (2010)

[54] Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament,6th Report of Session 2006–07, Published by the Authority of the House of Lords London

other in the future.[55] The CRA fundamentally altered the historic office of the Lord Chancellor and paved the way for the removal of the law Lords from the House of Lords and the creation of a Supreme Court. But this decision of the government was abrupt, without proper discussions, which forced the lords to come up with the Concordat. But later many aspects of it were given statutory footing through the CRA. However, believing that the Constitution and its principles are organic in nature, England does look forward to a change in these documents if required. These documents have made an attempt to change the leaders of the organs with special emphasis on the judiciary where the Lord Chancellor has been replaced by the Lord Chief Justice. It is argued that the judges felt it was better to take pressure from the head of the professions and not head of politicians.

Since 2004, there had been speculation about the government planning to split the Home Office by creating a Ministry of Justice[56]. The new Ministry came into being in 2007, thereby taking up the responsibilities regarding Prison, Probation, Criminal law and sentencing and reducing reoffending which was before taken care of by the Home Office. These developments that have happened most recently reflect the evolution of the *Independence of the Judiciary* as well as the principle of *Rule of Law* incorporated as an article in the CRA. It can be concluded that the present judicial system has altogether a separate identity from that of the executive. Moreover, the HRA has also given powers to the judiciary to deal with cases for which it never had jurisdiction before. It requires a minister to give a declaration at the time of presentation of a bill that it is not against the principles of the Convention and in cases of

---

[55] Select Committee on the Constitution,5th Report of Session 2005–06, Constitutional Reform Act, 2005, Published by the Authority of the House of Lords London

[56] *Id.*

doubt they are free to get the advice of the law officers at the stage of policy making and legislative drafting.[57]

Having examined the inter-relationship between the executive and judiciary, we turn to the relationship between Parliament and the Judiciary. To start with, we would like to throw light on Sec. 137 of the CRA which disqualifies all senior judges from sitting and voting in the House of Lords. Also Sec. 5 gives power to the Lord Chief Justice to lay before Parliament any written representation on matters relating to judiciary or administration of justice.[58] There have also been many recommendations regarding changes to bring in accountability of the Judiciary, but not many have happened. However, it is understood that the judges are not to be held *sacrificially accountable* but only *explanatorily accountable* which facilitates transparency and scrutiny by other branches of the state and public. To sum up, judicial accountability as far as the UK is concerned can be read from Sec. 11(3) of the CRA (accountability to the executive) and the Act of Settlement, 1701 (Accountability to the Legislature).

The concept of impeachment as a form of 'legislative trial', emerged in 15th Century England as Parliament's attempt to gain an upper hand over the crown by way of impeaching public officials for various misdeeds. Officials of the Crown are held accountable by the parliament by way of conducting a 'judicial' proceeding, wherein the House of Commons first votes to impeach and then turns prosecutor in a trial before the House of Lords[59].

Inter-relationships between the various sub-systems in complex systems are not fixed, but are often dynamic and susceptible to frequent

---

[57] *Id.*

[58] Constitutional Reform Act, 2005

[59] M.A.HARTMAN, IMPEACHMENT: THE ENGLISH EXPERIENCE. The Yale University Library Gazette, 277-287(1975)

change due to self-organisation resulting in the creation of new, often unanticipated features which ties in to the notion of emergence as a feature of complexity. However, even a cursory foray into the myriad workings of the interconnected subsystems permits us an understanding of how the interactions between the component subsystems result in the emergence of new patterns of organization, broader in scope than any of the individual components. The foregoing analysis of the American and English versions of interconnectivity between the various organs of Government reflect not only the direct consequence of the interactive process, but also the emergence of new unforeseen constitutional paradigms.

Of Complex Constitutional Systems

In the foregoing text our attempt has been mainly focussed on reconciling traditional understanding of the concepts of legal philosophy to the postmodern implications of complex systems science. However, the analysis focuses mainly on constitutional theory and law; an attempt is also made to provide appropriate references to the various aspects of Complex Systems Science. However, we do not dwell in detail on these concepts as our attempt is a theoretical one, far removed from the bulk of literature available on this highly technical area of science. The proposition that Constitutional Systems are complex systems is one that can be seen as novel to both Constitutionalism as well as Complex Systems Science. Indeed, the concept of complexity is wide enough in scope to encompass a study of constitutional systems as well and the idea of constitutional systems exhibit a variety of fundamental traits commonly found in complex systems.

Constitutionalism today stands at the cusp of something new, having overcome raging conflicts between the age-hardened political, social and cultural superstructures and the emerging new concepts of critical studies and postmodernism. Just as with the overcoming of the

reductionist philosophies in science, complexity can bring about an acceptance of emerging methodologies to constitutional theory.

It is therefore, the humble submission of the authors of this paper that the ability to look at the existing constitutional paradigms through the lens of complex systems science can produce a unique synthesis of ideas paving the way forward for new emergent systems to take root.