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Constitutionalism in Separation of Powers & Rule of Law in India: An Analysis

Prithivi Raj

ABSTRACT

The idea of constitutionalism requires limitation on government power and authority established by constitutional law. Constitutionalism is the idea, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations. By discussing the concept of constitutionalism, a comparison is drawn between Thomas Hobbes and John Locke i.e. the notion of constitutionally unlimited sovereignty versus that of sovereignty limited containing substantive limitations. In this article the author will discuss the various aspects of constitutionalism while making Constitution of India, 1950. The author will also throw light upon the Doctrine of Separation of powers and rule of law in the context of constitutionalism in India. The author in this article will try to find out the roadways to transformative constitutionalism in India.

INTRODUCTION

The word 'Constitutionalism' denotes "a complex of ideas, attitudes and patterns of behaviour elaborating the principle that the authority of government derives from the fundamental law".[1] Constitutionalism is a concept in political theory that explains that a government does not derive its power from itself, but gain its power as the result of there being a set of written laws that give the governing body certain powers. This concept is in sharp opposition to monarchies, theocracies, and dictatorships, in which the power does not derive from a pre-drawn legal document.[2] In a monarchy, the power is derived as an inalienable right of the kind or queen. In a theocracy, all of the power of a governing party is derived from a set of religious beliefs, which are thought to exist as a result of the well of God, and in a dictatorship, the power is derived from the will of a single or group of people and their ideology, which does not necessarily represent the will of the people. Constitutionalism therefore naturally prescribes a system of government in which the government's powers are limited. Government officials, whether elected or not, cannot act against their own constitutions.[3] Constitutionalism can be defined as the doctrine that 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.[4] In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-fixed/ pre-determined in advance. The latter definition shows that having a constitution alone does not secure or bring about constitutionalism. Except for a few states which have unwritten constitutions, today almost all the nations/states in the world have constitutions. This does not, however, mean that all these states practice constitutionalism. That is why constitutionalism is far more important than a constitution.[5] 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.[6] 'Constitutionalism' is that it refers to "the limitations deeply embedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law".[7] The prescriptive approach to Constitutionalism addresses what a Constitution should be. Merely because a country has a Constitution; it does not mean it has 'Constitutionalism. Philip P. Wiener says, ".. Even with a formal written document labelled Constitution which includes the provisions

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[1] Don E. Fehrenbacher, Constitutions and Constitutionalism in the Slavenholding South (University of Georgia Press, (1989) P 1

[2] Dr. Moses Adagbabiri, Constitutionalism and Democracy: A Critical Perspective; 1JHSS Vol.5, 2015 P.108

[3] Ibid.

[4] Hilaire Barnett, Constitutional and Administrative Law 5 (London: Cavendish Publishing Limited, 3rd edi., 2000(1995)

[5] Maru Bazezew, Contitutionalism, MLR Vol.3 p.358

[6] Michael Rosenfield ed., Constitutionalism, Identity, Difference and legitimacy, Theoretical Perspectives 4042 (Durham: Duke University Press, 1994)

[7] Gordon, Scott (1999) Controlling the State Constitutionalism from Ancient Athens to Today, Harvard University Press, P 4

customarily found in such a document, it does not follow that it is committed to Constitutionalism".[8] William H. Hamilton has captured this dual aspect by noting that Constitutionalism "is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order.[9] Constitutionalism therefore naturally prescribes a system of government in which the government's powers are limited. Government officials, whether elected or not, cannot act against their own constitutions.[10] Constitutional law is the highest body of law in the land, which all citizens, including the government, are subjected to.[11] Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment. Constitutionalism is that in political fee to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.[12]

DEVELOPMENT OF THE CONCEPT OF CONSTITTIONALISM

Professor McIlwain is credited with introducing the concept of constitutionalism. He defined it in the following words, "[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."[13] Carl Friedrich also defined constitutionalism on similar lines in the following words, "Constitutionalism is built on the simple proposition that the government is a set of activities organised by and operated on behalf of the people, but subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused by those who are called upon to do the governing."[14] Professor Harding, a political scientist, also explains constitutionalism on the same lines, "Arguably the most important aspect of constitutionalism for modern nations, especially those that have had histories of autocracy, is in the placing of limits on the power of government. In the view of many this is the central point of constitutionalism: the limited government."[15] According to Professor Guenther Frankenberg it is "an important phenomenon in its own right" and "not merely a deficient or deviant version of liberal constitutionalism."[16] It can be stated that: "In clinical terms, it can be described as a syndrome – a pattern of governance resulting from the co-occurrence of diverse, distinctive symptoms. Common symptoms are

[8] Philip P. Wiener, ed., "Dictionary of the History of Ideas: Studies of selected Pivotal Ideas (David Fellman, 'Constitutionalism' (1973-74) P 485
[9] Walton H. Hamilton, 'Constitutionalism' in Encyclopedia of the Social Sciences, New York, Macmillan, 1931 P 255
[10] Dr. Moses Adagbabiri, Constitutionalism and Democracy: A Critical Perspective; 1JHSS Vol.5, 2015 P.108
[11] Ibid.
[12] Dr. Moses Adagbabiri, Constitutionalism and Democracy: A Critical Perspective; 1JHSS Vol.5, 2015 P.108
[13] C.H. Mcilwain, Constitutionalism Ancient And Modern, (1987). P.21
[14] Carl J. Friedrich, Constitutional Government And Democracy (1974). P.36
[15] Russel Hardin, Constitutionalism In The Oxford Handbook Of Political Economy (Donald A. Wittman & Barry R. Weingast Ed., 2008). P.289
[16] G. Frankenberg, Abstract In Authoritarian Constitutionalism–Coming To Terms With Modernity's Dreams And Demons, Research Paper Of The Faculty Of Law Of The Goethe University, Frankfurt (2018) P.3

rigged elections or votes with highly implausible outcomes; detention without trial; little if any protection for minorities and little if any tolerance of opposition; gender inequality that suggests an intimate connection with patriarchy; extensions of constitutional tenure of office thinly legitimating sclerotic regimes' clinging to power; recourse to a quasi-dynastic principle by leaders grooming family members or cronies for succession; top-down administration of public arenas, and manipulation of rules of accountability virtually excluding political authorities from significant popular or judicial control, which is frequently replaced by appeals to symbolic support; as well as promulgation of emergency law implemented by an exorbitant security apparatus of secret services, police, military."[17] According to Dr. D.D. Basu's writings, it runs as follows, "The principle of constitutionalism requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of separation of power; it requires a diffusion of powers, necessitating different independent centres of decision-making. … The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights.… Constitutionalism or constitutional system of government abhors absolutism it is premised on the rule of law in which subjective satisfaction is substituted by objectivity provided for by provisions of the Constitution itself. Constitutionalism is about limits and aspirations. The Constitution embodies aspiration to social justice, brotherhood, and human dignity. It is a text which contains fundamental principles. … The tradition of written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution. The Constitution is a living heritage and, therefore, you cannot destroy its identity."[18]

COMPARATIVE ANALYSIS OF CONSTITUTIONALISM[19]

UNITED STATES

American constitutionalism has been defined as a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from the people, and is limited by a body of fundamental law. These ideas, attitudes and patterns of behavior, according to one analyst, derive from "a dynamic political and historical process rather than from a static body of thought laid down in the eighteenth century". In U.S. history, constitutionalism—in both its descriptive and prescriptive sense—has traditionally focused on the federal Constitution. Indeed, a routine assumption of many scholars has been that understanding "American constitutionalism" necessarily entails the thought that went into the drafting of the federal Constitution and the American experience with that constitution since its ratification in 1789.

[17] Ibid.
[18] Dd Basu, Shorter Constitution Of India, Vol.1 (Justice Ar Lakshamanan, Justice Bhagabati Prosad Banerjee & V.R. Manohar, 14th Ed., 2009).P. 15-16
[19] http://www.legalservicesindia.com/article/1699/Constitutionalism.html

There is a rich tradition of state constitutionalism that offers broader insight into constitutionalism in the United States.[20]

UNITED KINGDOM

The United Kingdom is perhaps the best instance of constitutionalism in a country that has an un-codified constitution. A variety of developments in seventeenth-century England, including "the protracted struggle for power between king and Parliament was accompanied by an efflorescence of political ideas in which the concept of countervailing powers was clearly defined," led to a well-developed polity with multiple governmental and private institutions that counter the power of the state.[21]

INDIA

India is a democratic country with a written Constitution. Rule of Law is the basis for governance of the country and all the administrative structures are expected to follow it in both letter and spirit. It is expected that Constitutionalism is a natural corollary to governance in India. But the experience with the process of governance in India in the last six decades is a mixed one. On the one hand, we have excellent administrative structures put in place to oversee even the minutest of details related to welfare maximization but crucially on the other it has only resulted in excessive bureaucratization and eventual alienation of the rulers from the ruled. Since independence, those regions which were backward remained the same, the gap between the rich and poor has widened, people at the bottom level of the pyramid remained at the periphery of developmental process, bureaucracy retained colonial characters and overall development remained much below the expectations of the people.[22]

CONSTITUTIONALISM & SEPARATION OF POWERS UNDER CONSTITUTION OF INDIA, 1950 VIS-À-VIS RULE OF LAW

There was no strict separation of powers introduced in India according to the theory of Montesquieu. The form of government adopted was the Parliamentary form of government as was in vogue in United Kingdom. The President is, therefore, regarded as the Chief Executive of Indian Union who exercises his power as per the Constitutional mandate on the aid and advice of the Council of Ministers.[23] The President is also empowered to promulgate Ordinances in exercise of his extensive legislative powers, which extend to all matters that are within the legislative competence of the Parliament.[24] Such a power is co-extensive with the legislative power of the Parliament. Apart from Ordinance making, he is also vested with powers to frame rules and regulations relating to the service matters. In the absence of Parliamentary enactments,

[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Art. 74 of the Constitution of India, 1950
[24] Art. 74 (1) of the Constitution of India, 1950

these rules and regulations hold the field and regulate the entire course of public service under the Union and the States.[25] Promulgation of Emergency in emergent situations is yet another sphere of legislative power which the President is clothed with. While exercising the power under the promulgation of emergency, he can make laws for a state after the dissolution of state legislature following the declaration of emergency in a particular state; on failure of the Constitutional machinery.[26] The President of India is a part of the legislature, though he is not a member of any House of the Parliament.[27] No Bill for the formation of new States or alteration of boundaries etc of the existing states[28] or affecting taxation in which States are interested or affecting the principles laid down for distributing money to the states or imposing a surcharge for the purpose of the Union[29] and no Money Bill or Bill involving expenditure form the consolidated fund of India[30] can be introduced for legislation except on the recommendation of the President. Besides this, he has also powers to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute, the sentence of any person convicted of any offence which is of judicial nature. He also performs similar judicial functions in deciding a dispute relating to the age of the judges of the Constitutional courts for the purpose of their retirement from their judicial office.[31] In a similar manner, Parliament also exercises judicial functions. While performing judicial functions it can decide the question of breach of its privilege and if proved, can punish the person concerned.[32] While doing so, the President is the sole judge and Courts cannot generally question the decision of the Houses on this point. Moreover, in case of impeachment of the President, one House of the Parliament acts as a prosecutor and the other House investigates the levelled charges and decides whether they are substantive or not. On an analysis of the case law on this matter it is found that in Ram Jawaya Kapur Vs. State of Punjab[33], the Supreme Court held that - "The Indian Constitution has indeed not recognized the doctrine of separation of powers in its absolute rigidity, but the functions of different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another...". A more refined and clarified view taken in Ram Jawaya Kapoor's case can be found in Kartar Singh Vs. State of Punjab[34], where the Court said – 'It is that the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution...'.

[25] Art. 309 of the Constitution of India, 1950
[26] Art. 356 of the Constitution of India, 1950
[27] Art. 79 of the Constitution of India, 1950
[28] Art. 3 of the Constitution of India, 1950
[29] Art. 274 of the Constitution of India, 1950
[30] Art. 117 of the Constitution of India, 1950
[31] Art. 124 (2A) and 217 (3) of the Constitution of India, 1950
[32] Art. 105 of the Constitution of India, 1950
[33] AIR 1955 SC 549
[34] AIR 1967 SC 1643

CONSTITUTIONALISM AND THE DOCTRINE OF RULE OF LAW-

This is one of the most powerful expressions in the systems of modern governments to indicate the aims and objectives with which the governments have to carry on their functions. There were various ideas associated with this ideal which were propounded by the ancient philosophers like Aristotle and Plato. Much credit is given to the British author, Albert Venn Dicey who presented his ideas in a very impressive way to show what the system of government then and the same could work as an ideal for the future generations. The thought of Professor Dicey[35] has been so impressive that the United Nations has borrowed the idea from the expression of Dicey and added a new flesh to the idea and given a new shape to the philosophy of the United Nations in the form of the idea of Good Governance.

DICEY'S THEORY OF THE RULE OF LAW

Dicey wrote that the rule of law had three meanings or may be regarded from three different points of view.

Firstly, the expression means 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power.[36] He further opined that - "We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary process of constraint...".[37]

The second prong of Dicey's rule of law means – 'equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.[38] He further added that - "We, mean in the second place, when we speak of the rule of law as a characteristic of our country; not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[39]

Thirdly, according to Dicey, the rule of law entails that the laws of the Constitution ... are not the source but the consequence of the rights of individuals as defined and enforced by the courts.[40] This last sentence is really a 'special attribute of English institutions that is of British Constitutionalism. He also wrote - "We may say that the Constitution is pervaded by the rule of law on the ground that the general principles of the Constitution (as for example the right to personal liberty or the right of public meeting) are with us for

[35] AV Dicey, Introduction to the Study of the Law of the Constitution, 10th edn. (London, Macmillan,(1961) P 202
[36] Ibid.
[37] AV Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London, Macmillan, 1961), P 188
[38] Ibid.
[39] Ibid.
[40] Ibid.

the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign Constitutions, the security such as it is given to the rights of individuals results or appears to result from the general principles of the Constitution".[41]

The modern concept of the rule of law is fairly wide and therefore sets up an ideal for any government to achieve. This concept was developed by the International Commission of Jurists, known as Delhi Declaration 1959, which was later on confirmed at Logos in 1961. According to this formulation- "The rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil or political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality".[42]

According to Davis, there are seven principal meanings of the term Rule of law[43]:

1) law and order;
2) fixed rules;
3) elimination of discretion;
4) due process of law or fairness;
5) natural law or observance of the principles of natural justice;
6) preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and
7) Judicial review of administrative actions. So, finally it may correctly be said that rule of law does not mean and cannot mean any government under any law. It means the rule by a democratic law; a law which is passed in a democratically elected Parliament after adequate debate and discussion.[44]

In India, the meaning of rule of law has been much expanded and applied differently in different cases by the judiciary. It is regarded as a basic structure of the constitution and therefore, it cannot be abrogated or destroyed even by parliament.[45] The principle of natural justice is also considered as the basic corollary of rule of law. The Supreme Court of India has held that in order to satisfy a challenge under Article 14, the impugned State act (enactment in the form of law passed by parliament) must not only be nondiscriminatory, but also be immune from arbitrariness[46], unreasonableness or unfairness (substantively or procedurally)[47] and also consonant with public interest.[48]

[41] AV Dicey, Introduction to the Study of the Law of the Constitution, 10th edn. (London, Macmillan, 1961), P 195
[42] Delhi Declaration of 1959
[43] http://lawtimesjournal.in/rule-of-law/
[44] Ibid.
[45] Indira Gandhi v Raj Narain, AIR 1975 SC 2299
[46] Nakara v Union of India, (1983) UJSC 217
[47] Maneka Gandhi v Union of India, AIR 1978 SC 597
[48] Kasturi v State of Jammu & Kashmir, AIR 1980 SC 1992

The Supreme Court of India while explaining the rule of law in K.T. Plantation Pvt. Ltd. v. State of Karnataka,[49] held as follows; "The rule of law as a principle contains no explicit substantive component like eminent domain but has many shades and colours. Violation of principle of natural justice may undermine the rule of law resulting in arbitrariness, unreasonableness, etc. but such violations may not undermine the rule of law of law so as to invalidate a statue. Violation must be of such a serious nature which undermines the very basic structure of the constitution and the democratic principles of India. But once the court finds, a statue undermines the rule of law which has the status of a constitutional principle like the basic structure, the said grounds are also available and not vice versa. Any law which in the opinion of the court is not just, fair and reasonable is not a ground to strike down a statute because such an approach would always be subjective not the will of the people because there is always a presumption of constitutionality for a statue. The rule of law as a principle is not an absolute means of achieving equity, human rights, justice, freedom and even democracy and it all depends upon the nature of the legislation and the seriousness of the violation. The rule of the law as an overarching principle can be applied by the constitutional courts, in the rarest of rare cases and the courts can undo laws, which are tyrannical, violate the basic structure of the constitution and norms of law and justice."

In the matter of Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr.[50] "The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself." Constitutionalism is about limits and aspirations.

In the case of Indira Gandhi v. Raj Narain[51], the doctrine of separation of powers was elevated to the position of a basic feature. It was observed: "The exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances. It is contrary to the basic tenents of our Constitution to hold that the Amending Body is an amalgam of all powers- Legislative, executive and judicial. 'Whatever pleases the emperor has the force of law' is not an article of democratic faith."

Another important aspect is the habeas corpus case, ADM Jabalpur v. Shivakant Shukla[52] is one of the most important cases when it comes to rule of law. In this case, the question before the court was 'whether there was any rule of law in India apart from Article 21'. This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The majority of the bench (Ray, C.J.,

[49] (2011) 9 SCC 1
[50] Writ Petition (Civil) 257 of 2005 (Supreme Court of India)
[51] AIR 1975 SC 2299
[52] AIR 1976 SC 1207

Beg, Chandrachud and Bhagwati, JJ.) answered the issue in the negative and observed: "The constitution is the mandate. The constitution is the Rule of Law... There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre Constitution or post Constitution Rule of Law which can run counter to the rule of law embodied in the Constitution, nor there any invocation to any rule of law to nullify the constitutional provisions during the times of emergency... Article 21 is our Rule of Law regarding life and liberty. No other rule of law can have separate existence as a distinct right... The rule of law is not a mere catchword or incantation. Rule of law is not a law of nature consistent and invariable at all times and in all circumstances... There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution." Justice H.R. Khanna, however, in the dissent opinion observed that: "Rule of law is the antithesis of arbitrariness. It is accepted in all civilised societies. It has come to be regarded as the mark of a free society. It seeks to maintain a balance between the opposite notions of individual liberty and public order. The principle that no one shall be deprived of the life and liberty without the authority of law was not the gift of the Constitution. It was necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into force of the constitution. Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the Rule of Law and not of men in all civilised nations."

In I.R. Coelho (Dead) by L.Rs. Vs.State of Tamil Nadu and Ors.[53] The Supreme Court observed on Constitutionalism is that: "The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law. The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism. According to Dr. Amartya Sen, the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society. According to Lord Steyn, judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the

[53] AIR2007SC 861,

principles of justice and law. Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained."

ROADWAYS FROM CONSTITUTIONALISM TO TRANFORMATIVE CONSTITUTIONALISM IN INDIA

In Government of NCT Delhi v. Union of India[54] "Thus, the word 'governance' when qualified by the term 'constitutional' conveys a form of governance/government which adheres to the concept of constitutionalism. The said form of governance is sanctioned by the Constitution itself, its functions are consistent with the Constitution and it operates under the aegis of the Constitution."[55] "Constitutionalism is the modern political equivalent of Rajdharma, the ancient Hindu concept that integrates religion, duty, responsibility and law. … The verdict is a cornucopia of textual analysis, ancient and modern history, India's political history, philosophical reasoning, and doctrinal application. It deserves a rich tribute for its transformative constitutionalism."[56] Justice Dipak Mishra, writes "The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times."[57] By clarifications of the same he says, "Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future."[58]

[54] (2018) 8 SCC 501.
[55] Ibid.
[56] Michael Kirby & Ramesh Thakur, Navtej Johar, a verdict for all times, THE HINDU, December 31, 2018.
[57] M.P. Singh, Decriminalisation of Homosexuality and the Constitution 2 NUJS L. REV. 361 (2009).
[58] Ibid.

CONCLUSION

Constitutionality and constitutionalism are not synonymous. Constitutionality refers to what is legitimate according to a constitution. As a normative concept, the constitution has to meet certain requirements. Its basic structure in setting up both and limiting the power of the polity, defining the political boundaries between the private and the public, the state and the individual and the different branches of the government. The concept of limited government entails the rule of law, the idea of "government by law not by men". Constitutionalism has to address the relationship between the states and the other emerging, levels of governance and the issue of adequate allocation of competences to establish legitimacy in the whole constitutional system. It should foremost be on how the functions and values associated with constitutionalism can be secured considering the constitutional system as a whole. India is on the way to achieve the concept of constitutionalism but also in way to achieve transformative constitutionalism.