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EXISTENCE OF SEPARATION OF POWER AND RULE OF LAW IN DEMOCRACY & REPUBLICAN FORM OF GOVERNMENT IN THE ERA OF TRANSFORMATIVE CONSTITUTIONALISM

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ABSTRACT- The concept of constitutionalism calls for the limitation of state powers and powers established by the Constitution. Constitutionalism is the idea that governments can legally limit their powers and also limit their powers and their powers or justifications are subject to these restrictions. In our discussion of the concept of constitutionalism, we compare Thomas Hobbes and John Locke, that is, the concept of constitutional unrestricted sovereignty with the concept of limited sovereignty with considerable 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. The author in this article will try to find out the roadways to transformative constitutionalism inter-relating the above three concepts.

Keywords: constitutionalism, Democracy, Republican

I. 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".Constitutionalism is the idea of a political presumption that makes it clear that the executive does not take over its own power without gaining power, because there is a set of draft laws that give specific powers to the governing body. This idea strongly opposes government, democracy and oppression, and its power does not depend on pre-determined authoritative sources.Force is determined as a natural right of the sort or sovereign in a government. In a religious government, an overseeing party's entire power is derived from a set of strict beliefs that are believed to exist because of the well of God, while in dictatorship, the force is derived from the desire of a single or group of individuals and their belief system, which does not really answer the desire of individuals. As a result, constitutionalism usually supports a form of government in which the power of the government is restricted. Government bodies cannot, if they so choose, behave in violation of their own constitutions.Constitutionalism is the philosophy that regulates the validity of government activity, and it means something much more essential than the principle of legality, which allows officials to obey pre-determined legal laws.At the end of the day, constitutionalism examines whether an administration's demonstration is genuine and whether officials guide their public duties in accordance with laws that have been pre-determined. The last definition demonstrates that simply possessing a constitution does not imply or imply constitutionalism. With the exception of a few states that have unwritten constitutions, almost every country and state on the planet now has a constitution. In any case, this does not mean that each of these states practises constitutionalism. As a result, constitutionalism is unquestionably more essential than a constitution.Constitutionalism's basic features (characteristics) include popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, law-abiding police, an independent judiciary, respect for human rights, and the right to self-determination, according to Henkin.'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".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 customarily found in such a document, it does not follow that it is committed to Constitutionalism".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".As a consequence, constitutionalism naturally prescribes a form of government in which the government's powers are restricted. Government officials, whether elected or not, are prohibited from acting in contravention of their own constitutions.Constitutional law is

the highest law in the country, binding on all people, including the government.Constitutionalism declares the allure of law and order rather than rule by the self-assertive judgment. Constitutionalism is the ability of those in government control to do anything they like in whatever manner they want; they will certainly note both the impediments to power and the methodology laid out in the local area's preeminent, secured rule. In this way, the standard of constitutionalism could be described as the concept of limited government under a higher rule.

II. 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." 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." 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." 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." 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 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." 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."

III. COMPARATIVE ANALYSIS OF CONSTITUTIONALISM

UNITED STATES

American constitutionalism has been characterized as a complex of thoughts, mentalities, and examples of conduct expounding the rule that the authority of government gets from individuals, and is restricted by a collection of principal law. These thoughts, perspectives and examples of conduct, as per one examiner, get from "a unique political and authentic cycle as opposed to from a static group of thought set down in the eighteenth century". In U.S. history, constitutionalism—in the two its enlightening and prescriptive sense—has generally centered around the government Constitution. Undoubtedly, a normal presumption of numerous researchers has been that understanding "American constitutionalism" essentially involves the possibility that went into the drafting of the government Constitution and the

American involvement in that constitution since its approval in 1789. There is a rich practice of state constitutionalism that offers more extensive understanding into constitutionalism in the US.

UNITED KINGDOM

The Assembled Realm is maybe the best case of constitutionalism in a country that has an un-arranged constitution. An assortment of advancements in seventeenth-century Britain, including "the extended battle for power among ruler and Parliament was joined by a blossoming of political thoughts in which the idea of countervailing powers was plainly characterized," prompted a very much created nation with different legislative and private establishments that counter the force of the state.

INDIA

India is a democratic nation with a well-written constitution. Law and order is the justification for the country's administration, and any regulatory design is expected to obey it to the letter and spirit. Constitutionalism is a typical end result of Indian government. However, over the last sixty years of administration in India, there has been a mixed bag of participation.On the one hand, we have great authoritative designs in place to guide even the tiniest of details associated with government assistance boost, but on the other hand, it has simply resulted in excessive bureaucratization and the eventual separation of rulers and ruled. Since independence, those places that were in reverse have persisted as before, the gap between rich and poor has widened, individuals at the bottom of the pyramid have remained on the periphery of formative engagement, organisations have retained pioneer characters, and overall, progress has remained far below expectations for individuals.

CONSTITUTIONALISM & SEPARATION OF POWERS UNDER CONSTITUTION OF INDIA, 1950 vis-à-vis RULE OF LAW

There was no severe partition of forces acquainted in India concurring with the hypothesis of Montesquieu. The type of government received was the Parliamentary type of government as was stylish in Joined Realm. In this way, the President is regarded as the Chief Executive Officer of the Indian Association, who exercises his authority in accordance with the Protected Order and the guidance and exhortation of the Committee of Clergymen. In the exercise of his broad administrative powers, which extend to all matters within the Parliament's authoritative capacity, the President is also tasked with promulgating statutes. This force works in tandem with the Parliament's administrative force. Aside from making laws, he is also entrusted with drafting rules and guidelines relating to assistance issues. These principles and guidelines hold the field and govern the entire direction of public assistance under the Association and the States without the need for parliamentary authorization. In developed countries, declaring a state of emergency adds to the President's circle of authoritative power. He may make laws for a state after the disintegration of the state lawmaking body following the disclosure of crisis in a particular state; on dissatisfaction of the Sacred machinery, when practising the force under the proclamation of crisis. The Prime Minister of India is a member of Parliament, but he is not a member of any of the Houses. No Bill for the creation of new States or the adjustment of limits and so on of existing States, or for influencing tax collection in which States are interested, or for influencing the standards set for delivering cash to the states, or for imposing an additional charge with the end goal of the Association, and no Cash Bill or Bill including consumption structure the united asset of India can be presented for consideration. Aside from that, he has the authority to grant pardons, respites, reprieves, or discipline abatements, as well as to suspend, dispatch, or drive the sentence of any person charged with a legal offence. He also uses his comparative legal abilities to decide on an issue relating to the age of the appointed judges of the Protected courts as they approach retirement from their legal positions. In these lines, Parliament also exercises legislative authority. When conducting legal functions, it has the authority to choose the subject of a breach of its advantage and, if necessary, to rebuff the individual in question. At the same time, the President is the supreme arbiter, and courts are unable to scrutinise the Houses' decisions on this issue. Furthermore, if the President is arraigned, one House of Parliament serves as an examiner, while the other House investigates the allegations and decides if they are serious or not. On an examination of the case law on this matter it is tracked down that in Slam Jawaya Kapur Versus Territory of Punjab , the High Court held that – “The Indian Constitution has for sure not perceived the regulation of partition of forces in its outright inflexibility, yet the elements of various parts or parts of the public authority have been adequately separated and thus it can possibly be said that our Constitution doesn't consider suspicion, by one organ or part of the state, of capacities that basically have a place with another...”. A more refined and explained see taken in Slam Jawaya Kapoor's case can be found in Kartar

Singh Versus Territory of Punjab , where the Court said – "It is that the essential hypothesize under the Indian Constitution that the legitimate sovereign force has been conveyed between the governing body to make the law, the chief to carry out the law and the legal executive to decipher the law inside the cutoff points put somewhere around the Constitution".

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 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. 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...".

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. 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".

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. 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 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".

Rule of Law in modern sense:
The cutting edge idea of law and order is genuinely wide and along these lines sets up an ideal for any administration to accomplish. This idea was created by the Global Commission of Legal advisers, known as Delhi Statement 1959, which was later on affirmed at Logos in 1961. As per this definition "law and order suggests that the elements of the public authority in a free society ought to be so practiced as to make conditions in which the pride of man as an individual is maintained. This pride requires not just the acknowledgment of certain common or political rights yet additionally making of certain political, social, practical, instructive and social conditions which are crucial for the full advancement of his character".

According to Davis, there are seven principal meanings of the term Rule of law:
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. Thus, at long last it might effectively be said that law and order doesn't mean and can't mean any administration under any law. It implies the standard by a vote based law; a law which is passed in a justly chosen Parliament after satisfactory discussion and conversation".
The judiciary in India has broadened the concept of rule of law and interpreted it differently in various cases. It is considered a fundamental structure of the constitution, and as such, it cannot be repealed or destroyed by parliament. In India, the significance of law and order has been abundantly extended and applied diversely in various cases by the legal executive. It is viewed as a fundamental construction of the constitution and consequently, it can't be repealed or annihilated even by parliament, unreasonableness or unfairness (substantively or procedurally) and also consonant with public interest.

IV. CONSTITUTIONALISM & JUDICIARY'S RULE OF LAW

The Supreme Court of India while explaining the rule of law in K.T. Plantation Pvt. Ltd. v. State of Karnataka, 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 ofRameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr. "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, 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 significant viewpoint is the habeas corpus case, ADM Jabalpur v. Shivakant Shukla is quite possibly the main situations with regards to law and order. For this situation, the inquiry under the watchful eye of the court was 'regardless of whether there was any law and order in India separated from Article 21'. This was in setting of suspension of authorization of Articles 14, 21 and 22 during the decree of a crisis. The majority of the bench (Ray, C.J., 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. 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 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."

V. ROADWAYS FROM CONSTITUTIONALISM TO TRANFORMATIVE CONSTITUTIONALISM IN INDIA

In Government of NCT Delhi v. Union of India "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." "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." 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." 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."

VI. CONCLUSION

Dependability and constitutionalism are not interchangeable. Dependability alludes to what in particular is genuine as indicated by a constitution. As a regularizing idea, the constitution needs to meet certain prerequisites. It's essential design in setting up both and restricting the force of the commonwealth, characterizing the political limits between the private and the general population, the state and the individual and the various parts of the public authority. The rule of law, or the principle of "government by law, not by men," is central to the philosophy of limited government. To create legitimacy in the entire constitutional structure, constitutionalism must address the relationship between states and other developing, levels of governance, as well as the issue of adequate competence distribution. It should concentrate first and foremost on how the duties and principles associated with constitutionalism can be safeguarded in the sense of the entire constitutional structure. India is on its way to understanding not just the idea of constitutionalism, but also transformative constitutionalism.

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