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**“Dharma is to protect the Needy”**

**Research Article on**

**THE JUDICIARY AND CONSTITUTIONALISM- AN ADVENT OF  
TRANSFORMATIVE CONSTITUTIONALISM**

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## **ABSTRACT**

Judiciary is known to be the “guardian of the constitution” as it is vested with the task of upholding the values of constitutionalism, the rule of law, and ensuring the implementation of separation of powers. This research paper aims at dealing with the role of the judiciary in promoting constitutionalism as well as the advent of transformative constitutionalism. The concept of State has been the most debatable one. It is imperative to note that the Constitution governs both, the Government and its citizens. The judiciary's effort to permeate into the accountability of various institutions of Government and demonstrates the importance of judicial governance. The accountability of government and development of human rights have been observed as the two facets of constitutionalism. Constitutionalism is not just a term but rather the very spirit of the Constitution.. Therefore, the strong weapons and tools of judicial review and independence of judiciary become crucial to stand by. Hence, the paper aims at the critical analysis of the advent of transformative constitutionalism in light of several precedents. Moreover, it is equally important to gauge the need for judicial reforms from the base level and the advent of the virtual judiciary in order to create a comprehensively analytical perception.

**KEYWORDS:** constitutionalism, jurisprudence, transformative constitutionalism, judicial independence, international constitutionalism, human rights, virtual judiciary, judicial reforms.

## INTRODUCTION

The concept of constitutionalism carries with itself the compound of ideas, attitudes, and patterns of behavior which aims to elaborate the principle that the authority of government is derived from the body of fundamental law and has been limited by the same to a great extent is important to assert that this is not a new concept and has evolved over time. This evolution demands judicial intervention in order to bring about radical and fundamental changes with respect to its application in the present time. It becomes pertinent to note that the most difficult part has been entrenching constitutionalism as well as sometimes giving a paradox of constitutions without even considering the aspect of constitutionalism. The major instance of the same is that even if the concept of democracy has been enshrined in the Constitution, it needs to be brought about in real practice. It is an accepted fact that the root of every constitution needs to be the ideals of Constitutionalism, yet, it is observed that even if a particular constitution imbues the principles of constitutionalism, the modifications and the amendments so brought would create a conflict between the same. Yet, the ruling elite appears to be narrowing the scope of the judiciary's role day by day and there have been deliberate attempts by the ruling elite to weaken and alienate the judiciary in the minds of society in so far as the running of government affairs is concerned.<sup>1</sup>

The conceptualization of transformative constitutionalism as has been done by the Supreme Court of India gives a major insight into the progressive side of Indian society. Therefore, there is a need for comprehensive study regarding the notions pertaining to the State, Constitution, the traditional constitutionalism, the jurisprudential aspect, and the whole new notion of transformative constitutionalism.

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<sup>1</sup>Rizine Mzikamanda, *Constitutionalism and the Judiciary: a Perspective from Southern Africa*, JUSTICE AND CONSTITUTIONAL DEVELOPMENT THE REPUBLIC OF SOUTH AFRICA, (November 3, 2017, 10:00 a.m.), [https://www.google.com/search?q=Erin+McKean%2C+the+New+Oxford+American+Dictionary%2C+\(Oxford+University+Press+2005\).&oq=Erin+McKean%2C+the+New+Oxford+American+Dictionary%2C+\(Oxford+University+Press+2005\).&aqs=chrome..69i57.719j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=Erin+McKean%2C+the+New+Oxford+American+Dictionary%2C+(Oxford+University+Press+2005).&oq=Erin+McKean%2C+the+New+Oxford+American+Dictionary%2C+(Oxford+University+Press+2005).&aqs=chrome..69i57.719j0j7&sourceid=chrome&ie=UTF-8)

## MEANING OF STATE

The term State has always been misunderstood with the concept of the Government in general. There have been innumerable theories that revolve around the very notion of State. Dated back to the theories that arose in Rome and Greece by popular theorists like Plato and Aristotle, the “State” came to be seen as an ancient institution that regulated and administered the society.

It has often been said that a State is much more than a Government and these concepts need an understanding considering the blurred boundaries between the two. In simple terms, a Government is nothing but part of the State itself. The State has distinct characteristics: sizes, population, military, sovereign structure, and the Government that rules the same.

There also exists a myth on the concept of nation-state, however, the idea of its origin is unclear itself. The enlightened self-interest can however be state-based. It becomes difficult to imagine a particular nation that is just confined to one State or a State that contains just one nation. Hence, the overall interpretation of the term State seems to be flawed and requires a much deeper understanding. It is entirely different from such concepts of nation, government, and that of sovereignty altogether. However, the appropriate definition has been provided in the Constitution of India which defines State as the entity which includes the Government and Parliament of India and the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.<sup>2</sup>

## THE CONSTITUTION

A Constitution refers to an aggregate of the fundamental principles and the established precedents that constitute the legal basis of a polity, organization, or other types of entities, and commonly determine how that entity is to be governed.<sup>3</sup> According to K.C.Wheare, the separation of power under checks and balances; thus, this clear-cut distinction is not done by judiciary per se, it is done by the Constitution and ensured by the judiciary.

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<sup>2</sup> THE INDIAN CONSTITUTION, Art 12.

<sup>3</sup> Supra 1.

The Constitution of India is termed to be the supreme law of the land. Moreover, it is known to be the bag of borrowings. In order to promote the concept of constitutionalism, it is essential that at the very first stage, the Constitution imbibes the spirit of constitutionalism in itself, since lack of the same would render the possibility of a nation's survival. The Constitution of India imparts the principle of constitutional supremacy and not of parliamentary supremacy, as it has not been created by the Parliament. Being the lengthiest Constitution of the world, the Indian Constitution comprises provisions that deal with various facets of issues pertaining to the society at large. In addition to the same, the Preamble of the Constitution is known to be the most important aspect of the entire Constitution which can only be amended during times of ambiguity.<sup>5</sup> Preamble is also known for being a key to open the mind of the makers of the Constitution in order to show the general purposes for which may show the general purposes for which huge number of provisions were being made in the Constitution.<sup>6</sup> Therefore, in India, the core principles and values of the Constitutional inherit in itself the ideals of constitutionalism.

## MEANING OF CONSTITUTIONALISM

The notion of Indian constitutionalism is embedded in a country's culture, geography, history, sociology, and politics.<sup>7</sup> Western Modernity and Indian Tradition have uniquely fused to engender a construct that has permeated into mixed cultural and socio-economic formations and political-ideological spectrum, resulting in the contemporary India.<sup>8</sup> The term Constitutionalism is coined by popular theorists named John Locke.<sup>9</sup> It also seems to be associated with the founders of the American Republic. In addition to the same, constitutionalism has been defined as idea wherein the government should be limited in a legal sense when it comes to powers and the authority must be depended on observing these limitations.

The term has a deep meaning that appears to be a far cry from the Westminster-inspired parliamentary federalism in the White Commonwealth and is somewhat reminiscent of US American constitutionalism premised on separation of powers and checks and balances. The

<sup>5</sup> Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225.

<sup>6</sup> In Re, Beruberi Union and Exchange of Enclaves, AIR 1960 SC 845.

<sup>7</sup> M.P. Singh, *Foundation and Historical Evolution of Indian Constitutionalism*, 35 SAGE JOURNALS 270 (2017).

<sup>8</sup>Ibid.

<sup>9</sup> John Locke was English philosopher and physician, widely regarded as one of the most influential of Enlightenment thinkers and commonly known as the "Father of Liberalism".

father of modern Constitutionalism is said to be Niccolò Machiavelli.<sup>10</sup> This idea brings with it a host of vexing questions of interest not only to legal scholars but to anyone keen to explore the legal and philosophical foundations of the State.<sup>11</sup> Constitutionalism refers to a structure of governance wherein the power of the government is extremely limited by the rule of law per se. Moreover, it recognizes the very need to limit the concentration of power to protect the rights of groups and individuals.<sup>12</sup>

The study of different Constitutions along with the concept of constitutionalism shows that the idea of constitutionalism has a normative history when it comes to the limitation of powers. For example, the idea of constitutionalism was being proposed in the Constitution of Canada to mend the broken relationship of Canada with that of Indigenous peoples of Turtles' Island which did not turn out to be fruitful in any sense.<sup>13</sup> The notion of constitutionalism is generally associated with the existence of a written constitution from which a particular State derives its authority and legitimacy. This leads to the limitation of the power of a particular State since a written Constitution chalks down commands and direction as to what is required to be done and what is required to be avoided, thus, actually helping the protection of the rights of individuals as well as of the minorities for that matter.

## **POLITICAL AND LEGAL CONSTITUTIONALISM**

In his famous book "Restoring the Constitution",<sup>14</sup> James Ceaser attempted to introduce and present a new terminology of "Political Constitutionalism". According to him, the original text of the Constitution may seem excessively "legalistic," preoccupied as it is with "formulas and rules." Above all, most of them were involved, in mobilizing a revolution against that of Britain on the rather "legalistic" or "procedural" ground that the British

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<sup>10</sup> Mortimer Newline Stead Sellers, *Niccolò machiavelli: Father of Modern Constitutionalism*, UNIVERSITY OF BALTIMORE SCHOOL OF LAW AND LEGAL STUDIES, (2015)

<sup>11</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, (3 ed. Cambridge: Harvard University Press 1991).

<sup>12</sup>Richard Bellamy, *Constitutionalism*, INTERNATIONAL ENCYCLOPEDIA OF POLITICAL SCIENCE (2017),

<sup>13</sup>Jean Leclair, *the Story of Constitutions, Constitutionalism and Reconciliation: A Work of Prose? Poetry? Or Both?*, REVIEW OF CONSTITUTIONAL STUDIES (2010),

[https://www.researchgate.net/publication/327545110\\_The\\_Story\\_of\\_Constitutions\\_Constitutionalism\\_and\\_Reconciliation\\_A\\_Work\\_of\\_Prose\\_Poetry\\_Or\\_Both](https://www.researchgate.net/publication/327545110_The_Story_of_Constitutions_Constitutionalism_and_Reconciliation_A_Work_of_Prose_Poetry_Or_Both)

<sup>14</sup> JAMES CEASAR, *RESTORING THE CONSTITUTION* (The Claremont Review of Books 2012)

Parliament was not authorized to impose "internal taxes" on Americans.<sup>15</sup> The examination of the notion of political constitutionalism is done in two phases. The first phase is the culmination of the delivery of the lecture imparted by JAG Griffith on the topic "the Political Constitution" wherein Griffith sought to describe and defended the United Kingdom's political constitution by adopting a functionalist methodology against those- at that time from the political right- who agitated for reform in ways that sought to contain the radical potential of political action through law.<sup>16</sup> The second phase has originated in the reaction of the rise of the notion of legal Constitutionalism. Political Constitutionalism marks the transition from the existence of the mixed government to the existence of the representative democracy. The scope of political Constitutionalism denotes the revival of political parties from different factions and the impact upon governance at large. The impact upon governance can be seen by the fact that the government is required to rule in accordance to the limitations and reasonable restrictions without violating the rights of the citizens.

The concept of legal Constitutionalism comprises the transition from the separation of powers to judicial review since judicial review has been enshrined in the Constitution to provide powers to the judiciary in order to act as a guardian of Constitution as well as rule of law which directly links to the prevention of infringement of the doctrine of separation of powers. The notion of separation of the powers is the theory that has been developed from the idea of mixed government during the English Civil Wars. Chapter VI of Montesquieu, *the Spirit of the Laws* has been given utmost credits with offering a definitive statement of the doctrine.<sup>17</sup> The account of Montesquieu consists of hallmarks of its origins in the system of mixed government itself.<sup>18</sup> The judicial system came with utmost vigor to decide and solve the cases pertaining to that of government competencies.

The concept of political as well as legal Constitutionalism can be seen in the ideals which are being enshrined in the Constitution of India. The Constitution of India delineates the character as well as the structure of the Indian State. Moreover, the Directive Principles of State

<sup>15</sup> RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF CONSTITUTIONALITY OF DEMOCRACY, (1 ed. Cambridge University Press 2007).

<sup>16</sup> Marco Goldoni & Chris McCorkindale, *Three Waves of Political Constitutionalism*, 30 KING's LAW JOURNAL (2019).

<sup>17</sup> 1 CHARLES- LOUS DE SECONDAT, THE COMPLETE WORKS OF M. DE MONTESQUIEU (T. Evans London 1748)

<sup>18</sup> Ibid.

Policy imposes the obligation on the State which guides its action. The political Constitutionalism can be seen in the way of governance of the Government itself. This means that the State is obliged to function under certain reasonable restrictions whereby it does not violate the rights of the citizens. In the case of *State (NCT of Delhi) v. Union of India*,<sup>19</sup> it was held that the essence of constitutionalism is the control of power by its distribution among several state organs or offices in such a way that they are each subjected to reciprocal controls and forced to cooperate in formulating the will of the state.<sup>20</sup>

## RECOGNITION IN INDIA

The idea of Constitutionalism was recognized by the Supreme Court of India in the case of *I R Coelho v. State of Tamil Nadu*.<sup>21</sup> Here, the apex court held that the principle of Constitutionalism is now a legal principle altogether. Such a principle would require a check on the exercise of powers in order to ensure protection of fundamental rights guaranteed by the Constitution.

In another case of *Rameshwar Prasad v. Union of India*,<sup>22</sup> it was held by the Supreme Court that the notion of constitutionalism of the government abhors the concept of absolutism. This means that the notion is premised on the Rule of Law through which the subjective satisfaction is substituted by an objective constitutional lens. In the case of *Minerva Mills Ltd. v. Union of India*,<sup>23</sup> it was held that the notion of constitutionalism surrounds the limits and aspirations to uphold the Constitution in its precious heritage.

## JURISPRUDENTIAL PERSPECTIVE

It is a well-established fact that a country can have a Constitution, but it is not necessary that it is backed by the spirit of Constitutionalism. For instance; even if a country that is ruled by a dictator may have a Constitution, yet, it may lack the spirit of Constitutionalism.<sup>24</sup> According

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<sup>19</sup> State(NCT of Delhi) v. Union of India, (2018) 8 SCC 501

<sup>20</sup> Ibid.

<sup>21</sup> I R Coelho v. State of Tamil Nadu, AIR 2007 SC 861.

<sup>22</sup> Rameshwar Prasad v. Union of India, AIR 1977 SC 592.

<sup>23</sup> Minerva Mills Ltd.v. Union of India, AIR 1980 SC 89.

<sup>24</sup> Varun Chhachar and Arun Singh Negi, *Constitutionalism - A Perspective*, SSRN (2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1527888](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527888)

to John Austin, a law is the command of the ultimate superior to the subordinates or the inferior subjects which need to be complied, otherwise which would lead to sanctions.<sup>25</sup> The jurists have agreed with the idea of constitutionalism wherein John Austin have proposed that law is the command of the sovereign and the citizens are its subjects (politically inferior) who are bound to obey the command of politically superior subject (sovereign), disobedience of which attracts sanction , and they have been defining it more distinctively. Moreover, it turns out that Dworkin's account of law, in its ambition to generate associative moral obligations for the citizenry as a whole, implies deep popular constitutionalism.<sup>26</sup> Another jurist named H.L.A. Hart, linked the theory of rule of recognition with that of popular constitutionalism. However, the preposition that social facts play an important role in the production of law itself has been agreed by all the positivists. The history of constitutionalism draws a clear comparison between the theories of Thomas Hobbes and John Locke who have explicitly defended the notion of constitutionally unlimited sovereignty and the sovereignty limited by the terms of a social contract containing substantive limitations.<sup>27</sup>

## **STRUGGLE OF HUMAN RIGHTS**

Human Rights refer to rights that every individual possess due to the fact that they are human beings. These are referred to as natural rights. It is crystal clear that constitutionalism is the concept that tends to implements the idea of the rule of law. It tends to bring about predictability and security in relations between individuals and the State. In order to understand the concept of constitutionalism along with that of human rights it is crucial to understand that the Constitution itself include human rights in the form of Fundamental Rights as in the case of India.

Predictability is the factor that entails the State in order to ensure that the law must be objective and should be opposed to being arbitrary thereby being made known to all

<sup>25</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>26</sup> Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL (2006)

<sup>27</sup> 11 THOMAS HOBBES, THE LEVIATHAN 255 (J.C.A Gaskin, Oxford University Press 2008).

beforehand.<sup>28</sup> Therefore, it has been observed that the idea of constitutionalism is a convergent means by which human rights could not be implemented at large as well could not be institutionalized.<sup>29</sup> In any case, the Constitution is believed to be the cornerstone in protecting the rights and liberties of individuals. For example, sexual harassment at workplace is known as infringement of personal liberty and a threat to an individual's safety. Such instances are the constitutional threat in itself thereby violating the principle of constitutionalism which is time and again interpreted in the Constitution of India.

## **INTERNATIONAL CONSTITUTIONALISM**

The State has seen to dominate the historical narrative of modern international law.<sup>30</sup> Through this, the idea of State is often depicted by the terminology of recognition and sovereignty as the centrifugal force in international law.<sup>31</sup> In the past few years, the emergence of numerous actors of the international arena embarked upon a major reconsideration of a particular place of State. This has been coupled with the role of legal orders which has established new layers of governance. The method of doing so is to consider what impact a constitutionalizing process may have upon the role of the state in international law.<sup>32</sup> Moreover, there are two norms of constitutionalism namely separation of powers and democratic legitimacy have shown huge number of difficulties when it comes to the States' role in the international law scenario. Furthermore, it is important to note that since international constitutionalism is not just a concept but a practice, the States are required to take into consideration that their action must be in accordance with the international constitutional order so that constitutionalism can turn out to be legitimate. Thus, international constitutionalism paves a way for transformative constitutionalism.

## **TRANSFORMATIVE CONSTITUTIONALISM**

<sup>28</sup> Stephen Gardbaum, *Human Rights and International Constitutionalism*, INTERNATIONAL LAW AND GLOBAL GOVERNMENT (2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1088039](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088039)

<sup>29</sup> Ibid.

<sup>30</sup> Joseph R. Strayer, *International constitutionalism and the state*, 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2013).

<sup>31</sup> Supra 25.

<sup>32</sup> Ibid.

With the advent of the transformative constitutionalism, substantive law has noticed significant modifications. The entire concept aims at redefining the age-old definitions in the theoretic perception. It has also sought to bring about the application of substantive law in the practical and procedural realms. The concept encompasses two distinct terms that are transformation and constitutionalism. The term transformation, in general, has a definition of bringing about change in a structured way and for something better. The term Constitutionalism, in general, is not only a term but it encapsulates the entire notion and ideal within itself.

The concept of transformative constitutionalism has sought its emergence from the leading case of *National Legal Services Authority v. Union of India*,<sup>33</sup> in which the court recognized and the rights of the third gender and normalized their representation in the society. It has been held by Supreme Court that there is a need to change the very terminology to address trans-genders. It declared that transgender people will be addressed and understood as 'third gender'. Moreover, it was held that Fundamental Rights guaranteed in Part III of the Indian Constitution are unequivocally applicable to the third gender as well.

In *Harsh Mander v. Union of India* (2018),<sup>34</sup> the Delhi High Court struck down various eradicative provisions to decriminalize beggary. It was a colonial law and deemed to have several draconian provisions. It was struck on the grounds that it violated constitutional provisions like Article 14 i.e., the right to equality, Article 19(1) (a) i.e., right to freedom, and Article 21 i.e., right to life and personal liberty.

In another landmark judgment of *Navtej Singh Johar v. Union of India* (2018),<sup>35</sup> the Supreme Court decriminalized Section 377 of the Indian Penal Code. This Section criminalized voluntary sexual intercourse amongst same-sex individuals. In this case, Justice A.M. Khanwilkar opined for the then Chief Justice Dipak Misra that "*the whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism*".<sup>36</sup>

<sup>33</sup>National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

<sup>34</sup> Harsh Mander v. Union of India, on 8 August, 2018.

<sup>35</sup> Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

<sup>36</sup> *Id.*

In the case of *Joseph Shine v. Union of India (2018)*,<sup>37</sup> the Supreme Court decriminalized adultery which was defined in Section 497 of the Indian Penal Code.<sup>38</sup> The apex court observed that even if a man has sexual intercourse with an unmarried woman or a widow, the sanctity of marriage is being destroyed, even if it has not been criminalized by Legislature

In *Indian Young Lawyers Association v. the State of Kerala (2018)*,<sup>39</sup> the prohibition of temple entry to menstruating women by virtue of a custom was struck down. Here, Justice D.Y. Chandrachud offered the vision of transformation to the Constitution of India. Hence, it is evident that specifically in the year 2018, the Indian Constitution has undergone a massive transformation to suit the progressive society.

## **INDEPENDENCE OF JUDICIARY- IS IT COMPROMISED?**

The changes, modifications and the amendments in the judicial system, the question of independence of judiciary is still in persistence. The independence of the judiciary refers to the aspect wherein the judicial system stands independent from the fear, pressure, and decision of the other organs of the State. The intent is to ensure smooth functioning of the judicial system, free from any vices. Over the past few years, the very concept of the independence of judiciary has seen to be deteriorating. The Supreme Court has dealt with this issue in various judgments. The judgment of *Kesavananda Bharti v. State of Kerala*,<sup>40</sup> has clearly reflected the persistent conflict between the Parliament and Supreme Court at that point of time. Thereby, Supreme Court passed on the judgment wherein it held that the basic structure of the Constitution cannot be amended, thus, bringing the ongoing conflict to an end.

## **JUDICIAL REVIEW- A POWERFUL TOOL?**

Judicial review is the most important element of judicial activism. Judicial review refers to the type of court proceeding wherein a judge reviews the lawfulness of a particular decision or

<sup>37</sup> Joseph Shine v. Union of India, AIR 2018 SC 1676.

<sup>38</sup> Indian Penal Code, 1860.

<sup>39</sup> Indian Young Lawyers Association v. State of Kerala, AIR 2018 SC 1690.

<sup>40</sup> Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225.

any action which has been made by a public body.<sup>41</sup> The advent of judicial review in India emerged distinctively many years back. In the infamous case of *Kesavananda Bharti v. State of Kerala*,<sup>42</sup> which is popularly known as the *Fundamental Rights Case*, Justice Khanna held that judicial review has become an integral part of our Constitution and power has been vested in the higher judiciary to decide the constitutional validity of the statutory provisions.<sup>43</sup> In the leading case of *Chandra Kumar v. Union of India*,<sup>44</sup> *Waman Rao v. Union of India*,<sup>45</sup> *R. Coelho v. Union of India*,<sup>46</sup> the Hon'ble Supreme Court has held in all of the mentioned cases that judicial review is considered to be an integral part of the Indian Constitution.

Over the years, it has been noted that the scope of the judicial review seems to decline. With its advent, judicial review was considered to be one of the most powerful instruments, however, with changing times, its importance has declined considerably. However, there is a constant debate and conflict between the two views as some believe that the judiciary has taken over the government while others believe that the government has taken over the judiciary. The incident could be traced back at the time of the Emergency. Being the guardian of Fundamental Rights and the arbitrator of constitutional conflicts between the Centre and the States with regards to the division of powers between them, the Supreme Court is always in a unique position wherein it is competent to exercise the power of reviewing legislative enactments both the Parliament and the States.<sup>47</sup>

## **VIRTUAL JUDICIARY AMIDST THE PANDEMIC- AN EVOLUTION**

The concept of the virtual judiciary is ought to be a whole new concept altogether. Amidst the pandemic situation, the functioning of the judiciary came almost to a halt. In order to resume the same, the idea of *virtual courts* came to light. Initially, there existed conventional

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<sup>41</sup> Raphael Hogarth, *Judicial Review*, THE INSTITUTE OF GOVERNMENT, (March 9, 2020, 10:20 a.m.), <https://www.instituteforgovernment.org.uk/explainers/judicial-review>

<sup>42</sup> Supra 40.

<sup>43</sup> Ibid.

<sup>44</sup> Chandra Kumar v. Union of India, 1991 (1) SCC 18.

<sup>45</sup> Waman Rao v. Union of India, AIR 1981 SC 362.

<sup>46</sup> R. Coelho v. Union of India, AIR 2007 SC 861.

<sup>47</sup> Chinmoy Roy, *Judicial Review and the Indian Courts*, SSRN (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990601](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990601)

courts and online courts, wherein, the former courts were located in the complexes with the physical presence of judges, litigants, and the clients and the latter amounted to the physical presence of the judge in the court with no presence of the lawyers over there. However, the new aspect of virtual hearings emerged during the COVID 19 situation. It has brought about a major transformation in the whole legal system and the justice system. This has not only brought about a major advantageous transformation but has also brought about a crucial question of disadvantageous situation. It has become more efficient for the clients and the lawyers as well. This evolutionary aspect has nullified the fact of the jurisdiction of a court which was defined by the geographical realms earlier in the matters of taxation and corporate law. The malpractices have got much more limited in comparison to initial circumstances. The transparency has increased, and wastage of paper has become too minimal as well as the interaction has increased. However, digital justice has been held back due to many reasons such as the aspect of rule of law has been at stake. The lack of connectivity of the internet and the preference over certain matters amongst the others has brought about major discrepancies in imparting justice to the needy ones.

## **PERSONAL VIEWS**

In the light of above-mentioned facts and circumstances, it is essential to understand that the role of judiciary is important when it comes to constitutionalism. Transformative constitutionalism is actually the inoculation of values, social order, liberty, equality and fraternity along with the ideals of the Constitution. The conflict between the society and the Constitution gives rise to transformation per se. It was held in the case of *N. Nagaraj v. UOI*,<sup>48</sup> that Constitutionalism is related to constitutional identity. The Supreme Court reintroduced the concept of transformative constitutionalism to Indian jurisprudence by decriminalizing the section 377 of IPC.<sup>49</sup> The expression transformative constitutionalism can be best understood by following a rational and logical approach which would simply help in the recognition of the truth in the present day situation.

## **CONCLUSION**

<sup>48</sup> *N. Nagaraj v. Union of India*, 2006 8 SCC 212.

<sup>49</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

To sum up, it has been observed that the judiciary has played a great role in upholding and promoting the spirit of Constitutionalism. The concept of Constitutionalism is the one that needs great emphasis in order to protect and safeguard the Constitution. The meaning of State often seems confusing with that of Government. Moreover, Constitutionalism has a much distinctive perspective as it has been understood from a political view and from that of a legal perspective. The amalgamation of the ideal of Constitutionalism with that of the Indian Constitution is extraordinary.

The Constitution of India follows the very principles of rule of law that limit the excessive powers and control of all government organs. Moreover, system of checks and balances has also been enumerated in the document. Above all, the advent of transformative Constitutionalism depicts the prominent role of the judiciary in promoting Constitutionalism and shaping the concept, thereafter, according to the enormous changing needs and aspirations of society altogether.

The role played by the judiciary in considerably changing the dynamics of the society is commendable. However, the application of many provisions given in the Constitution, nowadays, has been seen to deteriorate the core principles of the Constitution. Since judiciary is known to be the guardian of the Constitution as well as it is impliedly entrusted with the task of protecting the spirit of Constitutionalism. It has become crucial in modern times that since judicial independence is the pertinent aspect of the judiciary and the same needs to be upheld at all times, today's conditions, however, narrates the situation otherwise. If this is assured, such ideals of transformative Constitutionalism flourish to the most considerable extent. In order to promote democracy and to bring about development in the country it is important that transformative constitutionalism is encouraged further. Along with the changing times, it is crucial that appropriate judicial performed is adhered to. Thus, these necessary conditions are required to be followed to the fullest.