

**TRANSFORMATIVE CONSTITUTIONALISM: A  
STUDY OF SUPREME COURT VERDICTS ON  
GENDER JUSTICE FROM 2009-2023**

Dissertation to be submitted in partial fulfillment of the Degree of  
LLM

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GREATER NOIDA  
2023-2024**

## **DECLARATION**

I, hereby declare that the dissertation entitled “**TRANSFORMATIVE CONSTITUTIONALISM: A STUDY OF SUPREME COURT VERDICTS ON GENDER JUSTICE FROM 2009-2023**” is based on original research undertaken by me and it has not been submitted in partially or fully or otherwise in any University for any degree or diploma.

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## **CERTIFICATE**

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Above all, I pay my reverence to the almighty God.

## **LIST OF ABBREVIATIONS**

- AC – Appeal Cases
- AIR - All India Reporter
- All ER – All England Law Reports
- Anr - Another
- Assn - Association
- BCCI - Board of Control for Cricket in India
- BCI - Bar Council of India
- BCLR - Butterworths Constitutional Law Reports (South Africa)
- BOM - Bombay
- DLT - Delhi Law Times
- HC - High Court
- ILR - Indian Law Report
- NALSA - National Legal Services Authority
- NCF - National Creche Fund
- NEP - National Environment Policy
- NFBS - National Family Benefit Scheme
- NOAPS- National Old Age Pension Scheme
- NRHM - National Rural Health Mission
- NWAP - National Wildlife Action Plan
- Ors - Others
- PDAPS - Prohibition and Drug Abuse Prevention Scheme
- PMRY - Prime Minister’s Rozgar Yojana
- RCH - Reproductive and Child Health Programme
- REGP - Rural Employment Generation Programme
- RGSEAG- Rajiv Gandhi Scheme for Empowerment of Adolescent Girls
- SA - South Africa
- SCC - Supreme Court Cases
- SCR - Supreme Court Reports
- SC - Supreme Court
- UK - United Kingdom

- UKHL - United Kingdom House of Lords
- UOI - Union of India
- UP - Uttar Pradesh
- US - United States
- V. - Versus
- WLR - Weekly Law Reports

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# CHAPTER-I

## INTRODUCTION

### 1.1 INTRODUCTION:

#### 1. Top of Form

The constitution not only establishes the framework of government, outlining its institutions, their authorities, and how they relate to each other. It also represents the principles, dreams, and the moral compass to which the populace is dedicated. It encapsulates the essence of the nation and the collective desires of its people. Hence, the constitution is viewed as a dynamic and evolving manuscript that molds democracy. While a country may possess a constitution, the essence of constitutionalism is not guaranteed. Professor Upendra Baxi offers insights into constitutionalism by stating:

“Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual/associational autonomy. Constitutionalism provides narratives of both rule and resistance.”<sup>1</sup>

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. Dr Basu Further states,

“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

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<sup>1</sup> HENRY SCHWARZ AND SANGEETA RAY (EDS), A COMPANION OF 3 POSTCOLONIAL STUDIES (Blackwell Publishing, 2000). 168 Vol. 3 | Issue 2 | August, 2021

doctrines not recoverable under the doctrine of unwritten living Constitution. The Constitution is a living heritage and, therefore, you cannot destroy its identity.”<sup>2</sup>

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“a long term project of constitutional enactment, interpretation and enforcement committed to... transforming a country’s political and social institutions and power relationships in a democratic participatory and egalitarian direction.”<sup>3</sup>

The Epilogue of the Constitution of the Republic of South Africa underscores that constitutionalism serves as a bridge between past injustices, conflicts, and the establishment of a democratic system grounded in the principle of equal rights for all South Africans, regardless of class, race, belief, or gender. Transformative constitutionalism views the constitution as an evolving process that adjusts over time without formal amendments to accommodate shifting social norms and promote social equality, particularly substantive equality. It envisions the constitution as a mechanism to transition from an unjust past to a democratic future, employing it as a tool to effect social change.

This process of transformative constitutionalism is primarily carried out by judges of constitutional courts through judicial activism, interpreting the constitution as a living and organic document. Both the Constitution of India and the Constitution of South Africa embody elements of transformative constitutionalism. While the Constitution of India incorporates these elements without explicitly using the term "transformative constitution" in its text, the Constitution of South Africa explicitly refers to the

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<sup>2</sup> MICHEL ROSENFELD (EDS), CONSTITUTIONALISM, IDENTITY, 4 DIFFERENCE AND LEGITIMACY-THEORETICAL PERSPECTIVE, 41-42 (Duke University Press, 1994)

<sup>3</sup> D.D. BASU, SHORTER CONSTITUTION OF INDIA, 115-16 (Justice A.R. 6 Lakshamanan, Justice Bhagabati Prosad Banerjee & V.R. Manohar, 14th ed., 2009).

transformative process in its 1993 version, although it was later replaced by the 1996 constitution.

### **Transformative Constitutionalism and the Indian Constitution:**

The Indian Constitution was conceived and crafted within a unique social context, which not only provided its guiding philosophy but also dictated its operational framework. Unlike the classic liberal legal systems of its time, the framers of the Indian Constitution didn't prioritize limiting sovereign power and protecting personal freedoms as the main objectives. Instead, they had a clear mission: to eradicate inequality, prejudices, and power imbalances that extended beyond the state's realm. The transformative potential of the Indian Constitution was a deliberate endeavor aimed at reversing societal biases, discrimination, and power dynamics in a fractured society. In addition to the values of "liberty" and "equality," the Indian Constitution's Preamble underscores "Fraternity" as a leveling force meant to equalize relationships among individuals and emancipate them from societal, familial, and religious constraints. At the heart of the Indian Constitution's transformative essence lies the commitment to bring about profound changes in the foundational structures of Indian society, aiming to eliminate any remnants of autocracy and inorganic traditions.

The transformative nature of the Indian Constitution lies in its anticipation of independence and its foundation on the belief that significant social changes within a free democracy can be achieved through legal discourse and action. This vision of change, embedded in transformative constitutionalism, doesn't merely entail superficial modifications but seeks to fundamentally reshape the society and polity. This perspective views constitutions as mandates for reforming communities, rejecting the formalism, pure positivism, and legalistic tendencies associated with traditional liberal constitutionalism. Instead, it imposes specific affirmative obligations on government officials to strive for the establishment of a just social order where individual liberty, equality of opportunity, and human dignity create an environment conducive to realizing human potential in its entirety.

# **Transformative Constitutionalism and Homosexual Rights in India:**

India's journey from colonialism to independence in 1947 marked a significant shift in its development, particularly with the formulation of its constitution. The Constitution of India not only aimed to address social justice and caste-based inequalities but also confronted numerous other disparities prevalent in the country. Post-colonial India was tasked with consciously tackling issues such as illiteracy, poverty, untouchability, and gender inequality. Law emerged as a primary tool for driving social change, with India placing emphasis on universal human rights and principles of equality and non-discrimination.

Due to India's complex social structure, inequities persisted due to entrenched rituals, customs, and practices that often marginalized specific genders. The Constitution, imbued with the philosophy of fostering a strong and diverse society based on ideals of equality, dignity, liberty, and justice, laid out a framework to address these challenges. These ideals were enshrined not only in Part III, which delineates the rights of citizens, but also in Part IV, which outlines the duties of the state to protect its citizens and realize the aspirations outlined in the preamble.

Part III of the Constitution places the individual at the center of the constitutional order, granting civil and political rights such as freedom of expression and personal liberty. However, these rights are not absolute and are subject to "reasonable restrictions" for the sake of maintaining peace and harmony in society.

Article 15 prohibits discrimination on the grounds of religion, caste, sex, place of birth, or any combination thereof. Clauses 2, 3, and 4 of Article 15 provide for positive discrimination, allowing for laws aimed at protecting women, children, and socially and economically backward classes.

Article 16 guarantees equality of opportunity in public employment and provides for reservations for backward classes, Scheduled Castes (SCs), and Scheduled Tribes (STs).

Article 17 prohibits untouchability in all forms, not just caste-based discrimination, with the state obligated to criminalize violations of this provision.

The transformation of society into an egalitarian and modern one hinges on the modern

interpretation of all constitutional provisions, including the directive principles of state policy. Enhancing social and economic rights without discrimination is crucial for changing the social status of individuals

Article 38 mandates the state to create a social order where justice, social, economic, and political, informs all aspects of life, while Article 39 directs efforts towards minimizing income and status inequalities and ensuring equal pay for equal work.

Though not explicitly mentioned, discrimination based on sexual orientation has been interpreted and included as a ground of discrimination, furthering the cause of social equality.

- Top of Form
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  - Role of Judiciary:**
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## **Role of Judiciary**

The judiciary plays a pivotal role in transformative constitutionalism by leveraging the power of the law to drive socio-political change. Empowered to interpret and enforce the law, courts act as catalysts for societal transformation. They imbue legislative language with spirit and ensure that the Constitution remains relevant and impactful in contemporary society. By retaining the Constitution's essence while adapting to evolving circumstances, the judiciary upholds its duty as custodian of human rights, safeguarding individual liberties and maintaining checks and balances in governance.

Transformative constitutionalism emphasizes practical measures to bring the Constitution closer to marginalized citizens. Judicial activism has been instrumental in achieving this, as courts interpret and integrate directive principles of state policy with fundamental rights, broadening the scope of constitutional aims.

Landmark judgments in India have contributed significantly to gender justice:

- Justice K.S. Puttaswamy v. Union of India (2017)<sup>4</sup> affirmed privacy as a fundamental right, overturning previous rulings and ensuring the inviolability of the right to life under Article 21.

During the Congress administration in 1976, India witnessed the imposition of a state of emergency by Prime Minister Indira Gandhi. This period saw a landmark legal case, ADM Jabalpur vs S.S. Shukla (1976), where four out of five judges held that even the fundamental right to life, enshrined in Article 21 of the Indian Constitution, could be suspended during such emergencies. However, Justice HR Khanna stood as the lone dissenting voice, arguing against this erosion of rights.

It took four decades for Justice Khanna's dissent to be fully recognized. In 2018, in the case of Justice K.S. Puttaswamy (Retd) vs Union of India, a nine-judge bench of the Supreme Court unanimously ruled that privacy is indeed a fundamental right protected under Article 21. This landmark decision not only established the right to privacy but also implicitly overturned the earlier ruling in ADM Jabalpur, affirming that even during times of emergency, the right to life cannot be suspended.

This legal journey underscores the significance of dissenting opinions and the evolving nature of constitutional interpretation in safeguarding fundamental rights, even in the face of extraordinary circumstances like a state of emergency.

- Kesavananda Bharati v. State of Kerala (1973)<sup>5</sup> established the doctrine of basic structure, preserving fundamental rights from arbitrary amendments by Parliament.

The debate over Parliament's authority to amend the Constitution was a complex and contentious issue that shaped the course of constitutional jurisprudence in India. This debate spanned several significant legal battles, including C. Golaknath & Ors vs State of Punjab & Anrs (1967), which raised fundamental questions about the scope of Parliament's amending power, particularly regarding fundamental rights.

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<sup>4</sup> (2017) 10 SCC 1, AIR 2017 SC 4161

<sup>5</sup> (1973) 4 SCC 225, AIR 1973 SC 1461



The political landscape further intensified with cases like *Indira Nehru Gandhi vs Shri Raj Narain & Anr* (1975), which not only highlighted the clash between executive authority and democratic principles but also brought to the forefront the need for judicial intervention to safeguard constitutional values.

Similarly, in *Bhim Singh vs U.O.I & Ors.* (2010), the courts grappled with issues surrounding the scope of judicial review, especially in the context of constitutional amendments such as the 24th and 42nd amendments, which sought to redefine the balance of power between the branches of government.

However, it was the landmark judgment in *Kesavananda Bharati vs State of Kerala* (1973) that ultimately laid to rest the debate. In this watershed moment, the Supreme Court introduced the basic structure doctrine, affirming that while Parliament possesses the authority to amend the Constitution, it cannot alter its basic framework or fundamental principles. This doctrine provided a guiding principle for future constitutional interpretation, ensuring the preservation of the Constitution's core values while allowing for necessary adaptations to changing times.

- *National Legal Services Authority (NALSA) v. Union of India* (2014)<sup>6</sup> recognized transgender rights, underscoring the transformative power of the Constitution to adapt to societal change.

The NALSA judgment stands as a significant milestone in the legal landscape of India, as it marks the first instance of legally recognizing non-binary gender identities and affirming the fundamental rights of transgender individuals. This landmark decision also mandated Central and state governments to take proactive measures to protect the rights of transgender persons.

Although the term "transformative constitutionalism" is not explicitly stated in the Indian Constitution, the Supreme Court acknowledged its essence in the 2014 NALSA judgment. In this ruling, the Court emphasized the transformative power inherent in the Constitution, stating:

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<sup>6</sup> AIR 2014 SC 1863, (2014) 5 SCC 438

"The Court's role is to grasp the central purpose and essence of the Constitution for the betterment of society. Our Constitution, much like the fabric of society itself, is a dynamic entity. It is rooted in the ever-evolving factual and social realities of our nation. At times, legal changes precede societal shifts and are even intended to catalyze them. Other times, legal reforms are a response to prevailing social realities."

This acknowledgment underscores the dynamic nature of the Constitution and its capacity to adapt to the evolving needs and realities of society, reflecting a commitment to progressive change and social justice.

- Navtej Singh Johar v. Union of India (2018)<sup>7</sup> decriminalized consensual same-sex relations, affirming the rights of LGBTQ+ individuals.

The NALSA judgment not only addressed the rights of transgender persons but also had significant implications for the LGBTQ+ community as a whole. Prior to this case, Section 377 of the Indian Penal Code criminalized consensual sexual conduct between individuals of the same sex, regardless of whether it was consensual or not. This provision had long been a source of discrimination and marginalization for LGBTQ+ individuals in India.

In the NALSA judgment, the petitioner challenged the constitutionality of Section 377, arguing that it violated fundamental rights enshrined in the Constitution, including the right to equality (Article 14), the right to life and personal liberty (Article 21), and the right against discrimination (Article 15). The Court's interpretation of Article 15 to include "sexual orientation" was a significant step towards recognizing the rights of LGBTQ+ individuals and challenging discriminatory laws and practices.

Moreover, by overruling the decision in *Suresh Koushal v. Naz Foundation* (2014), which upheld Section 377, the Court effectively decriminalized consensual sexual conduct between individuals of the same sex. This marked a historic moment in the fight for LGBTQ+ rights in India, as it affirmed the dignity and autonomy of individuals regardless of their sexual orientation or gender identity.

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<sup>7</sup> AIR 2018 SC 4321, (2018) 10 SCC 1

In essence, the NALSA judgment and its implications for the LGBTQ+ community represent a significant victory for human rights and social justice in India, signaling a shift towards greater recognition and acceptance of diverse sexual orientations and gender identities.

- *Joseph Shine v. Union of India* (2018)<sup>8</sup> struck down the colonial-era adultery law, upholding the principles of equality and personal autonomy.

The *Joseph Shine v. Union of India* (2018) judgment indeed stands as a landmark decision in Indian jurisprudence, particularly in the realm of family law and gender equality. Before this judgment, Section 497 of the Indian Penal Code criminalized adultery, but only for men engaging in extramarital affairs with married women without the consent of their husbands. This provision was widely criticized for being archaic, gender-biased, and perpetuating patriarchal norms that treated women as the property of their husbands.

The Supreme Court's ruling in *Joseph Shine's* case was significant for several reasons. First and foremost, it recognized that adultery is a private matter between consenting adults and should not be subject to criminal prosecution. By decriminalizing adultery, the Court affirmed the principle of individual autonomy and upheld the right to privacy within marital relationships.

Moreover, the judgment underscored the importance of gender equality and non-discrimination under the Constitution. The Court held that Section 497 was discriminatory as it solely punished men for adultery while absolving women of any legal responsibility. This unequal treatment violated the right to equality guaranteed by Article 14 of the Constitution.

Furthermore, the judgment reflected a progressive interpretation of Article 21 of the Constitution, which protects the right to life and personal liberty. The Court recognized that criminalizing adultery infringed upon individuals' personal autonomy and dignity within marital relationships, thereby warranting its abolition.

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<sup>8</sup>AIR 2018 SC 4898, (2018) 3 SCC 39

Overall, the Joseph Shine judgment marked a significant step towards modernizing India's legal framework concerning marital relationships and promoting gender equality and individual autonomy within them. It was a pivotal moment in Indian legal history, signaling a departure from outdated and discriminatory laws towards a more equitable and inclusive society.

- *Indian Young Lawyers Association v. State of Kerala (2018)*<sup>9</sup> granted women of all ages access to the Sabarimala shrine, reflecting divergent constitutional perspectives on gender equality and religious freedom.

The Sabarimala Temple case, *Indian Young Lawyers Association v. State of Kerala (2018)*, indeed holds profound significance in the context of religious freedom, gender equality, and constitutional interpretation in India.

Prior to this case, the Sabarimala Temple in Kerala had imposed a ban on the entry of menstruating women (between the ages of 10 and 50) based on the belief that the deity, Lord Ayyappa, was celibate and that the presence of menstruating women would violate his celibacy. This practice had been upheld for centuries and was deeply entrenched in religious tradition.

However, the Supreme Court's verdict in this case challenged the constitutionality of this age-old practice. The petitioners argued that the ban on women's entry into the temple was discriminatory and violated their fundamental rights enshrined in the Indian Constitution.

In its judgment, the Court ruled that the exclusion of menstruating women from the Sabarimala Temple was unconstitutional and discriminatory. The Court emphasized that religious practices cannot discriminate against individuals based on biological factors such as menstruation and that all individuals, regardless of gender, have the right to access places of worship.

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<sup>9</sup> AIR 2018 SC 243

This landmark decision reaffirmed the principles of equality, non-discrimination, and individual autonomy enshrined in the Indian Constitution. It also highlighted the Court's role as a guardian of fundamental rights and as a positive force for social change, even in matters concerning religious practices.

The Sabarimala Temple case sparked widespread debate and discussion on issues such as gender equality, religious freedom, and the separation of religion and state. It represented a significant step forward in India's journey towards a more inclusive and egalitarian society, challenging entrenched patriarchal norms and discriminatory practices within religious institutions.

These judgments reflect the judiciary's commitment to interpreting the Constitution in line with transformative constitutionalism, striving to eliminate societal prejudices and advance constitutional ideals of justice, liberty, equality, and fraternity. While some justices emphasize a transformative mission rooted in constitutional morality, others advocate for judicial restraint, highlighting the complexities of constitutional interpretation in a diverse society

## **1.2 STATEMENT OF PROBLEM**

The research delves into the judiciary's pivotal role in shaping a constitutional identity that mirrors the nation's values and aspirations, with a specific focus on addressing gender justice, a longstanding discourse and one of the most urgent human rights concerns.

Gender equality stands as a cornerstone of fundamental human rights, crucial for fostering a harmonious and thriving society. Despite its undeniable importance, achieving gender equality remains an ongoing endeavor, characterized by persistent challenges and unfinished tasks.

## **1.3 LITERATURE REVIEW**

A comprehensive review of literature is essential for any good research endeavour as it provides a background to aid the researcher in designing and analyzing research work.

- i) Women's empowerment could be considered as a process in which women gain greater share of control over resource material, human and intellectual,

like knowledge, ideas and financial resources like money and control over decision making at home, in society and in the nation and to gain power 4

- ii) The constitution of India provides a number of rights to women and several laws exist to protect women from discrimination. But still Indian women cannot say with pride that they possess complete empowerment equal to men. The author says that, so far as empowerment is concerned, still a lot has to be done to make them fully selfdependent and empowered equally with men. Problems like female feticide, torture for dowry, violence against women etc. still restrict the complete empowerment of women (Kapur, 2001).<sup>10</sup>
- iii) Chauhan & Bansal (2002) have mentioned the various dimensions of 'women empowerment'. According to them, empowerment means giving legal and moral power to an individual in all spheres of life.<sup>11</sup>
- iv) In the paper, Socio-economic Development in Gujarat: Rosy Picture with Concerns, Thakker and Shiyani (2009) has examined the socio-economic development in various parts of Gujarat. It has been found that there are many regional disparities and some regions are more developed than others.<sup>12</sup>
- v) Prof. Dastgir Alam, (Alam, 2008) in his paper Women in Labor Market an Aspect of Social Justice, has stated that women have always got a lesser share in labour force participation rate (LFPR). He has described the concept of social justice as a sense of participation in all spheres of human activities, social, economic and political, in the mind of masses.<sup>13</sup>
- vi) Dutta (2002), mentions about both, the achievement and failures of the government while trying to improve conditions of women in India. As per his study, women are still considered and programmes fail to achieve the best results. Problems like poverty, illiteracy, poor health, unemployment, malnutrition are still blighting the lives of millions of women in India. Women cannot be provided proper education because of the general attitude of the poor parents. They want their girl-child to work and earn rather than go to

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<sup>10</sup> Kapur,2001

<sup>11</sup> Chauhan & Bansal (2002)

<sup>12</sup> Thakker and Shiyani (2009)

<sup>13</sup> Prof. Dastgir Alam, (Alam, 2008)

school. Poverty is the main reason behind this.<sup>14</sup>

- vii) According to Parvathi and Karthikeyan (2002) education plays a role as a means for human resource development for sensitizing one's perceptions, awareness and for motivating and changing one's behaviour to suit arising needs, demands and opportunities for survival growth and development. Education is the greatest force for empowerment. The process of education will not be complete without value content. Empowerment can only be acquired through knowledge.<sup>15</sup>
- viii) Insook Kwon (2009) in her article „Masculinity and Anti American focusing on the identity on KATUSA“ (Korean Augmentation to the United States Army) analyses the women's situation in Islamic countries. The author says that the Islamic countries had raised critical global women's issues, challenging both patriarchal ideology and western feminism. Some of the common issues of the Asian countries are militarisation, sex work and family structure.
- ix) George Burton Adams' "Constitutional History of England" (1971) primarily centers on providing an overview of English constitutional history, covering key periods such as the Anglo-Saxon era, the emergence and development of parliament, the power dynamics between parliament and the monarchy, as well as instances of monarchs ruling in the absence of parliament.<sup>16</sup>
- x) The book "Constitutional and Administrative Law" by John Alder and John Alder (2005) serves as an excellent companion, offering comprehensive coverage of the fundamental principles of the UK Constitution. It delves into the historical, political, and legal underpinnings of the constitution, addressing essential questions concerning governmental authority. The text provides a thorough exploration of constitutional themes and structures, including discussions on sources and underlying political values such as liberalism. It also offers an overview of key institutions within the UK Constitution, examines the territory and regions of the UK, and discusses important

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<sup>14</sup> Dutta (2002)

<sup>15</sup> Parvathi and Karthikeyan (2002)

<sup>16</sup> GEORGE BURTON ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND (1971).

concepts like the rule of law, the separation of powers, and the role of the European Union.

- xi) Anant Shadashir Altekar's "State and Government in Ancient India" (1984) offers a concise yet comprehensive examination, drawing from extensive research. The book begins with an introductory survey of the Indian concept of the state, exploring the nature of Indian monarchy, and shedding light on the tribal communities of ancient India, a topic often overlooked by politically oriented Indian scholars. Altekar passionately defends the classification of these small martial communities as republics, providing well-reasoned arguments and insights into their organizational structures. He then proceeds to analyze various aspects of administration, focusing on provincial and village governance as well as interstate relations. Notably, Altekar attempts to justify the doctrine of mandala, despite its perceived weaknesses, within a broader system of statecraft that he argues is superior in many respects to that of most ancient cultures.
- xii) "Larry Alexander, Constitutionalism: Philosophical Foundations" (2005) stands as the second volume in a sub-series of collaborative volumes within Cambridge Studies in Philosophy and Law, dedicated to key topics in contemporary philosophy of law. In this volume, an esteemed international team of legal theorists explores the concept of constitutionalism, delving into foundational questions such as the purpose of having a constitution, methods for discerning a country's true constitution, principles of constitutional interpretation, and the intergenerational obligations regarding constitutional adherence. This work holds significance for scholars in philosophy, law, political science, and international relations, especially those engaged in discussions about the adoption of constitutions in countries lacking them and debates surrounding constitutional interpretation.
- xiii) Benjamin N. Cardozo's "The Nature of the Judicial Process" holds a distinguished status as a legal classic. Originally delivered as four lectures at Yale Law School in 1921 and subsequently published later that year, it garnered recognition for its exceptional insights. Even its title became notable,



as Felix Frankfurter, Cardozo's successor on the Supreme Court, emphasized its significance by enclosing the phrase "the nature of the judicial process" in quotation marks, implying its unique standing. Frankfurter referred to it as "a little classic" in 1958, a sentiment echoed by Professor Arthur Corbin in 1939. The book serves as an in-depth examination and analysis of the methodology of philosophy, history, tradition, and sociology within the judicial process. It explores topics such as the role of the judge as a legislator, adherence to precedent, and the subconscious influences in judicial decision-making.

#### **1.4 OBJECTIVE OF THE STUDY**

The main objectives of the present research work are as under;

- To understand the key indicators of gender justice.
- To develop the transformative constitutionalism as a method to understand deeply the values on which constitution is based.
- To create awareness about the existing legal provision related to gender justice in India.
- To understand the various methods which addressed the injustices related to social and economic order in India.
- To analyse judicial approach towards evolving gender justice.

#### **1.5 RESEARCH QUESTIONS**

- i) What are the various methods to understand the various injustices related to Indian social and economic order and how these injustices are addressed?
- ii) What are the various ways that women gain equality in India in both rural and urban areas?
- iii) How the transformative constitutionalism is developed as a approach to make better understanding of the values on which the constitution is based?

#### **1.6 RESEARCH METHODOLOGY**

"The researcher will conduct doctrinal research, which involves a comprehensive examination of legal principles and concepts as they are found in written sources such as statutes, regulations, case law, and legal commentary. In this thesis, a thorough analysis will be undertaken to explore various issues and hypotheses within the chosen field of

study. This analysis will include a meticulous review of the rules, regulations, and judicial decisions that have shaped the legal landscape over the past several decades.

To ensure a comprehensive understanding, a critical and comparative approach will be employed. This approach involves critically evaluating the strengths and weaknesses of different legal doctrines and comparing them with each other to identify patterns, inconsistencies, and areas for further exploration. Primary sources, including Acts and Journals provided by the Government of India, will be scrutinized to understand the legislative intent and the evolution of legal principles.

Furthermore, secondary sources such as web pages, articles, newspapers, judicial pronouncements, Constituent Assembly Debates, and academic writings at both national and international levels will be extensively consulted. These sources provide valuable insights into the practical application of legal principles, as well as the broader social, political, and economic contexts in which they operate.

Throughout the research process, an analytical writing style will be adopted. This involves systematically breaking down complex legal concepts, examining them from various perspectives, and drawing logical conclusions based on the available evidence. By maintaining an analytical approach, the research aims to contribute to a deeper understanding of the subject matter and generate meaningful insights that can inform future legal scholarship and practice."

## **1.7 HYPOTHESIS**

Flowing from the broad objective stated above, the following hypotheses are developed for qualitatively testing them in the field.

- This will seek to elucidate the Indian Constitution as a transformative document as thinking of the Constitution within this lens might provide us a way of understanding how the injustices of the Indian social and economic order can be addressed from a constitutional lens.
- This created the awareness about the existing legal provisions and ineffectiveness of existing legal provisions results in the crime go unnoticed.
- By stressing on transformative constitutionalism as the approach, the aim is to understand more deeply the values on which the Constitution is based and how these

values can continue to play a role in further democratizing both Indian society and the state.

## **1.8 LIMITATION OF THE STUDY**

The research is eclectic, as it focuses on selected thematic areas. These thematic areas cover selected aspects of the constitution of India that are of particular importance to transformation, such as gender, socio-economic rights, land rights and the role of civil society. The judiciary has given many remarkable judgments where we witnessed a reflection of transformative constitutionalism. However, it still has a long way to go. Further this research is limited to the various verdicts of Supreme Court of India pronounced between 2009 and 2023.

# **CHAPTER-II**

## **HISTORICAL BACKGROUND**

### **2.1 INTRODUCTION:**

The Constitution serves as a fundamental pillar of a nation's socio-political framework, acting as its lifeblood. It's indispensable for the functioning of government, the progress of society, and the dynamics of politics. In the 21st century, constitutional governance has become a global norm.

The term "constitution" encompasses various interpretations. Initially, it typically refers to a written document that codifies all laws and procedures, ensuring fairness and holding the government accountable. However, this definition was challenged by scholars like Lord Bryce and K.C. Wheare. Bryce noted that English law utilizes the concept of a constitution despite lacking a written document, while Wheare defined it more broadly as the entire system of government and the rules that govern it<sup>17</sup>. As a result, the constitution is often regarded as both legal and non-legal or extralegal, taking implicit forms beyond a mere codified book.

According to Bolingbroke's definition in eighteenth-century Britain, a constitution comprises not just a single document but a collection of documents that pertain to the system of governance for a specific community or group of people. This perspective

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<sup>17</sup>. <https://doi.org/10.1177/147377959102000202> visited on 12.02.2024

implies that any law relevant to the overarching political structure would be considered part of the constitution if it is written down. Similarly, other authors like Herman Finer have offered their interpretations. Finer characterizes the constitution as an autobiography of power relationships, encompassing the spiritual ideals prevalent among diverse groups within a nation<sup>18</sup>.

Furthermore, Finer suggests that contemporary constitutions can take on various forms, described as either systemic or fundamental. Under the systemic explanation, the constitution operates within defined boundaries and functions in parallel with the political order. It consists of rules, regulations, clauses, sub-clauses, schedules, and acts, all interconnected and interdependent. These provisions must be understood in relation to the objectives of the enactment. For example, rights guaranteed in the constitution gain meaning only when considered alongside the form of government outlined in other parts of the constitution.

Additionally, the constitution includes subsystems such as the executive, legislature, and judiciary, which interact with each other and with the constitution itself. This interconnectedness underscores the holistic nature of constitutional governance, where all components function in harmony to uphold the principles and objectives enshrined in the constitution.

The constitution is closely linked to the fundamental institutions it encompasses, reflecting the needs and values of the present generation. James Bryce described the constitution as a framework of political society, established through law, which institutes permanent institutions with defined functions and rights. His definition elucidates how various agencies are organized, the powers entrusted to them, and the manner in which these powers are exercised.

Lowenstein and Friedrich view the constitution as an explicit constraint on governmental powers. Lowenstein defines it as "the articulation of devices for the limitation and control of political power," aiming to emancipate individuals from absolute rule and allocate them a rightful share in the power process. Similarly, Friedrich emphasizes the constitution's role in effectively restraining governmental action, not just organizing it.

The question arises: how much restraint should a constitution impose on governing

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<sup>18</sup> . <https://academic.oup.com/book/26983/chapter-abstract/196179276?redirectedFrom=fulltext> visited on 12.02.2024

citizens? This question reflects the variability of "restraint" across constitutional states, categorizing and differentiating them. However, constitutionalism doesn't imply complete or no restraint but rather some restraint, grounded in the shared belief in limited government and the use of a constitution to enforce these limitations<sup>19</sup>.

Constitutionalism aligns with democratic principles, advocating for the supremacy of law over individuals. It embodies a modern desire for a rule-governed political system, rooted in nationalism, democracy, and limited government. It delineates a division of power between the government and the governed, with state actions mandated to adhere to constitutional principles.

While constitutionalism is not an absolute requirement for a state to be considered constitutional, it represents a political philosophy guiding the actions of the government in accordance with the constitution. Thus, while not every state may fully embody constitutionalism, the concept remains integral to the idea of a constitutional state.

## **2.2 ORIGIN OF TRANSFORMATIVE CONSTITUTIONALISM:**

The notion of transformative constitutionalism emerged from the examination of the South African Constitution and the struggles for freedom. Karl Klare introduced the concept in his essay "Legal Culture and Transformative Constitutionalism" (1998), framing it within the South African context. He depicted transformative constitutionalism as a progressive endeavor with far-reaching implications for reshaping political and social institutions through the enactment, interpretation, and enforcement of the Constitution<sup>20</sup>. Klare envisioned it as a forward-looking theory aimed at advancing and refining existing democracies over the long term. Justice Langa of South Africa similarly emphasized the aspirational nature of transformative constitutionalism, envisioning it as a means to address historical injustices and pave the way for a brighter future. This concept, originating in South Africa, has since been applied to democracies worldwide, including India. Before delving into its application in India, it's crucial to grasp the various interpretations of transformative constitutionalism.

The historical trajectory of transformative constitutionalism reflects a progressive

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<sup>19</sup> . <https://doi.org/10.2307/972907> visited on 17.02.2024

<sup>20</sup> Mark Tushnet, —The Critique of Rights!, SMU Law Review, Vol 47, No.23,1994,pp24

transition towards embedding principles of social justice, equality, and human rights within legal frameworks. Originating predominantly in post-colonial and post-apartheid settings, transformative constitutionalism emerged as a response to entrenched social injustices and systemic disparities<sup>21</sup>.

The origins of transformative constitutionalism can be discerned in various historical movements and campaigns for civil rights, social equity, and self-determination. Particularly in nations like South Africa, India, and Brazil, anti-colonial struggles and fights against apartheid and caste-based discrimination laid the groundwork for transformative constitutionalism. These movements not only sought political sovereignty but also demanded substantive equality and social justice for all citizens.

A significant milestone in the history of transformative constitutionalism occurred with the adoption of the South African Constitution in 1996<sup>22</sup>, following the demise of apartheid. This constitution embodies transformative ideals by incorporating socio-economic rights, advocating for equality, and establishing mechanisms to address historical injustices through measures like affirmative action and land reform.

Likewise, in India, the Constitution enacted in 1950 aimed to reshape a society marked by deep-seated divisions of caste, class, and gender into a more inclusive and fair nation. Through provisions such as affirmative action (reservation) for historically marginalized groups and the recognition of fundamental rights, the Indian Constitution aimed to bridge social gaps and promote social justice.

The notion of transformative constitutionalism has also gained prominence in other regions worldwide, including Latin America and post-conflict societies. In nations like Colombia and Kenya, transformative constitutionalism has played a pivotal role in addressing legacies of violence, conflict, and exclusion by fostering reconciliation, fairness, and social integration.

In essence, the evolution of transformative constitutionalism is intertwined with struggles for social justice, human dignity, and democratic governance. It signifies a dynamic and ongoing endeavor to utilize constitutional law as a tool for societal metamorphosis,

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<sup>21</sup> . <https://www.livelaw.in/constitution-intends-to-transform-society-justice-chandrachud-video/> visited on 22.02024

<sup>22</sup> Michael Steven Green, —Legal Realism as Theory of Lawl, William & Mary law Review, Vol.46 2005, pp.1915.

empowerment, and the fulfillment of human rights for all individuals.

## **2.3 DEVELOPMENT OF CONSTITUTIONALISM**

The roots of constitutional governance lie in the history of Western political thought and the evolution of political institutions from ancient times to the present day. The growth of constitutionalism is closely intertwined with the development of political organizations, with significant origins traced back to ancient Greek culture.

A brief overview of the stages of development and key events in political history can provide insight into the expansion of constitutionalism:

### **Ancient Greece:**

Constitutionalism finds its beginnings in ancient Greece, where city-states like Athens and Sparta experimented with various forms of government, including democracy and oligarchy. The Athenian democracy, in particular, laid the foundation for democratic principles and the rule of law.

### **Roman Republic:**

The Roman Republic further advanced the concept of constitutional governance, with institutions such as the Senate and the rule of law playing crucial roles in political organization and decision-making.

### **Medieval Europe:**

During the Middle Ages, European feudalism gave rise to monarchies with limited powers, as seen in the Magna Carta in England<sup>23</sup>, which established principles of rule by law and curtailed the authority of the monarchy.

### **Renaissance and Enlightenment:**

The Renaissance and Enlightenment periods witnessed a resurgence of interest in classical Greek and Roman ideas, leading to the reexamination of political structures and the advocacy for individual rights, constitutional limits on power, and representative government.

### **American and French Revolutions:**

The American Revolution and the French Revolution of the late 18th century marked

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<sup>23</sup> Karin van Marle, —Revisiting the Politics of Constitutional Interpretation, TSA Review, 2003, pp.555—556.

significant milestones in the development of constitutionalism. The United States Constitution, with its system of checks and balances and protection of individual liberties, became a model for modern constitutional governance.

### **Modern Era:**

In the modern era, constitutionalism has become a global phenomenon, with many countries adopting written constitutions, establishing independent judiciaries, and enshrining principles of democracy, rule of law, and human rights in their legal frameworks.

By tracing the history of political institutions and thought from ancient times to the present, we gain a deeper understanding of the emergence and evolution of constitutional governance.

## **2.4 EVOLUTION OF CONSTITUTIONALISM AFTER WORLD WAR**

The period following the First World War witnessed significant shifts in global politics, with attention focused on authoritarian responses rather than constitutional processes. Events such as the rise of communism in Russia, fascism in Italy, and Nazism in Germany underscored the challenges to constitutional governance. These new constitutional strategies, characterized by single-party dominance and totalitarian control, diverged from traditional notions of constitutional states.

However, amidst these challenges, the establishment of the League of Nations marked a significant step towards international cooperation and conflict resolution through constitutional means. The League aimed to prevent conflicts between sovereign states and ushered in a new phase of constitutional evolution, emphasizing internationalism as a defining characteristic of constitutionalism<sup>24</sup>.

Following the Second World War, while autocracies like those in Italy, Germany, and Japan were dismantled<sup>25</sup>, the model of the Soviet Union endured and influenced other communist nations. <sup>26</sup>This led to the emergence of a new form of constitutionalism in

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<sup>24</sup> . <https://academic.oup.com/book/26983/chapter-abstract/196179276?redirectedFrom=fulltext> visited on 25.02.2024

<sup>25</sup> Nagendra Singh, Juristic concepts of Ancient Indian polity, (Vision Books, 1980) p 13.

<sup>26</sup> Shanti parva 9-16 also See M.Rama Jois, Chapter 1 Part Eight, Rajadharma or the Constitutional law legal and Constitutional History of India, vol I (ancient Legal, Judicial and Constitutional system)



communist states worldwide.

Meanwhile, newly independent nations sought to establish constitutional governance, often adopting models from countries like the United Kingdom or the United States. However, their experiences varied, with shifts between different governance systems reflecting ongoing experimentation with constitutionalism.

Constitutionalism encompasses several key components, including adherence to the rule of law, democracy, and the pursuit of social and economic welfare. It also entails recognition of international norms and the promotion of peace and security at the global level.

In conclusion, the evolution of constitutionalism in developing nations is characterized by diverse experiences and challenges. While some countries successfully integrate Western constitutional principles with local needs, others grapple with finding suitable governance models. The pursuit of social welfare and the balance between individual freedoms and state authority remain central concerns in this ongoing journey of constitutional development.

These insights shed light on the multifaceted nature of constitutionalism and its significance in modern governance:

**1. Rule of Law:** Constitutionalism emphasizes the supremacy of the law over arbitrary rule, advocating for governance based on established legal principles rather than the whims of individuals. Adherence to constitutions underscores the importance of clear legal frameworks in ensuring a civilized political order.

**2. Components of Constitutionalism:** Nationalism, democracy, and independent self-government are fundamental components of constitutionalism. Today, nation-states replace ancient city-states or empires, with democracy being a central principle. Constitutionalism seeks to ensure that authority is exercised within acceptable bounds, with changes made peacefully and in accordance with the law.

**3. Internationalism:** Constitutionalism requires nations to affirm their commitment to international cooperation and adherence to supranational organizations' values and charters. This underscores the importance of global cooperation and collective action in

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N.M.Tripathi Private Ltd. 1984 pp 575, 590

addressing transnational challenges.

**4. Social Welfare:** Modern states are viewed as social welfare states, and their constitutions must reflect this by incorporating provisions for social and economic welfare. This ensures an equitable society where the needs of all citizens are met.

**5. Federalism:** Constitutionalism often necessitates the adoption of federal systems in diverse nations to accommodate the varying needs and desires of different regions or populations. Federalism allows for decentralized governance while maintaining unity.

**6. Inclusion of New Topics:** Constitutional documents should include clauses addressing emerging issues such as human rights protection, environmental conservation, and adherence to international law and morals. This reflects the evolving nature of societal concerns and the need for legal frameworks to adapt accordingly.

**7. Adaptation to Global Trends:** Constitutions must be updated to reflect evolving global trends such as globalization and liberalization. Existing provisions may need to be revised or new provisions added to ensure that the constitution remains relevant and effective in addressing contemporary challenges.

Overall, these insights highlight the dynamic nature of constitutionalism and its role in shaping modern governance to meet the needs of society.

## **2.5 DIFFERENT INTERPRETATION OF TRANSFORMATIVE CONSTITUTIONALISM:**

However, the concept of transformative constitutionalism<sup>27</sup> has been subject to various interpretations. Presently, some individuals perceive it as a singular event in a state's history or present, while others view it as an ongoing process. While there are areas of agreement among these interpretations, perspectives among scholars and writers continue to evolve, making it challenging to establish a definitive understanding. In the Indian context, two major interpretations of transformative constitutionalism emerge:

- i. Transformation from colonial rule to self-governance:

This interpretation regards the transition from colonial rule to self-rule as a form of

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<sup>27</sup> Gautam Bhatia, "The Transformative Constitution: A Radical Biography in Nine Acts", 18 International Journal of Constitutional Law 668–672 (2020).

transformative constitutionalism. It highlights the deliberate adoption of a new framework for governance in India. Independence from British colonial rule on August 15, 1947, is considered a pivotal moment, signifying not only a shift in governance but also in power dynamics. India transitioned from being governed by foreign colonizers to a nation where power resided in the hands of its own people, who could elect their government and leaders. Despite the substantial adoption of the British colonial framework through the Government of India Act 1945, this transformation paved the way for a new system founded on democratic principles. The Indian Constitution enshrined new values such as dharma and justice, and the systematic adoption of this framework represented transformative constitutionalism.

ii. Transformation of society and the state:

This interpretation adopts a broader perspective, focusing on ongoing legal and administrative changes within a country. It emphasizes the continuous evolution of both state and society, with each influencing and being influenced by the other. This form of transformative constitutionalism involves upholding the fundamental values outlined in the Constitution by instigating changes, particularly in the legal realm. For instance, the decriminalization of consensual acts of sex between individuals belonging to the LGBT community, as seen in the *Navtej Singh Johar vs Union of India* case in 2018, exemplifies this type of transformation. Such changes reflect evolving societal needs and demonstrate how transformative constitutionalism adapts to address them.

These interpretations are not exhaustive, as various individuals offer their own perspectives on transformative constitutionalism. For example, Justice Langa and legal scholar Indira Jaising have provided distinct interpretations. While Justice Langa emphasized transformative constitutionalism's role in effecting social change within a political system, Jaising associated it with personal liberty. Consequently, transformative constitutionalism is highly subjective, making it crucial to identify a common understanding of the term. Despite its elusive nature, transformative constitutionalism may be described as the process of utilizing the values established by a state's constitutional framework to drive change across social, legal, economic, or political systems. This change is typically facilitated through legal amendments or enactments and

is characterized by a forward-looking approach<sup>28</sup>.

## 2.6 MERITS OF TRANSFORMATIVE CONSTITUTIONALISM

Transformative constitutionalism boasts several advantages:

### **Equity and Fairness:**

At its core, transformative constitutionalism strives to achieve social justice and fairness by advocating for the rights of historically marginalized groups. Through innovative interpretations of the constitution, it aims to rectify past injustices and promote equality.

### **Safeguarding Human Rights:**

By embracing judicial activism and expansive readings of constitutional provisions, transformative constitutionalism bolsters the protection of fundamental human rights. Courts play a pivotal role in ensuring that individuals' rights are upheld and respected.

### **Enhancement of Democratic Principles:**<sup>29</sup>

This approach reinforces democratic values by fostering citizen engagement, inclusivity, and governmental accountability. By empowering citizens to participate in decision-making processes, transformative constitutionalism strengthens democratic governance.

### **Clarity and Stability:**

Despite its dynamic nature, transformative constitutionalism provides a framework for legal certainty. By establishing clear principles and guidelines, it ensures stability within the legal system while accommodating societal changes.

### **Flexibility and Adaptability:**

One of its key strengths lies in its ability to adapt to evolving societal norms and values. The constitution can evolve alongside societal attitudes, remaining relevant and effective over time.

### **Contribution to Development:**

By addressing systemic inequalities and promoting social justice, transformative constitutionalism can contribute to overall societal development and prosperity. It fosters equal opportunities and equitable access to resources, thus supporting economic growth.

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<sup>28</sup>ibid

<sup>29</sup> ibid

### **International Standing:**

Nations embracing transformative constitutionalism often earn international recognition for their commitment to human rights and democratic ideals. This can lead to increased collaboration and support from the global community.

In summary, transformative constitutionalism offers a framework for building inclusive, equitable, and democratic societies, where the rights and dignity of all individuals are upheld and protected.<sup>30</sup>

## **2.7 BRITISH IDEAS ON CONSTITUTIONALISM:**

Reasons contributing to the promotion of constitutionalism in the United Kingdom include:

### **Rule of Law:**

The principle of the rule of law serves as a guiding concept, ensuring both government accountability and individual liberties. It emphasizes the absence of arbitrary power and the clear definition of discretionary authority to uphold legal accountability for all citizens.<sup>31</sup>

### **Constitutional Conventions:**

In the UK, constitutional conventions hold significant power alongside written constitutional provisions. Breaching these conventions undermines public trust and often results in political pressure to adhere to them, thus reinforcing constitutional norms.

### **Parliamentary Sovereignty:**

The unbridled sovereignty of Parliament is a foundational element of the British constitutional system, allowing for extensive legislative power. While Parliament faces practical constraints such as public opinion and international law, it retains considerable authority.

### **Influence of the Cabinet:**

The Cabinet exerts substantial influence over legislative processes, contributing to the cautious approach of politicians and serving as a check on Parliament's power.

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<sup>30</sup> United Nations, 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers', available at: <https://www.un.org/ruleoflaw/files/training9chapter13en.pdf> (last visited on July 18, 2022).

<sup>31</sup> *ibid*

**External Limitations:**

UK's participation in the European Economic Community and the Freedom of Information Act impose limitations on parliamentary supremacy, adding external checks on governmental authority.

**Role of Privy Council:**

The Privy Council, despite not being part of Parliament, can attend debates and advise on crisis management, acting as a potential limitation on governmental actions.

**Public Participation:**

The existence of the Freedom of Information Act, ombudsmen, parliamentary commissioners, referendums, and an alert opposition contributes to public oversight and accountability.

**Principles of the Constitution:**

Fundamental principles emerging from the Constitution, such as equality before the law, judicial independence, and the balance between individual rights and communal interests, serve as guiding norms even in the absence of explicit constitutional protections.

**Political Culture:**

The absence of credible threats to seize absolute power by any majority party underscores the ingrained tradition of limiting arbitrary rule, safeguarding democratic principles and freedoms.

Through these mechanisms and principles, constitutionalism is promoted and upheld in the United Kingdom, ensuring governmental accountability, individual liberties, and democratic governance<sup>32</sup>.

The following principles reflect the essence of the Constitution, which even a parliament with extensive power cannot disregard:

**Rule of Law:** All individuals, regardless of status, must abide by the law.

**Judicial Independence:** Judges must remain impartial and free from external influence.

**Balanced Right:** There must be a balance between individual rights and communal interests,

ensuring freedoms such as expression, assembly, and personal security, while considering

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<sup>32</sup> Shanthiparva 59 also see A.S.Altekar, State and government in Ancient India, (Motilal Banarsidass, Delhi 1984) pp 75-108.

national security.

**Democratic Government:** The people should govern themselves through elected representatives, holding the government accountable.

**Protection of Life and Liberty:** No one's life, liberty, or property can be infringed upon unless authorized by law.

**Legal Authority for Taxation:** Taxation must be authorized by law, highlighting the importance of legal legitimacy in governance.

**Political Checks and Balances:** The parliamentary system, with its two-party structure, serves as a check on the arbitrary exercise of power by any single party.

**Common Sense and Government:** British traditions of common sense, along with representative and responsible governance, safeguard freedoms.

**Absence of Authoritarian Threats:** Historically, there have been no credible attempts by majority parties to seize absolute power, indicating a deep-rooted respect for democratic principles.

These principles underscore the foundational values of the Constitution, ensuring accountability, protection of rights, and the preservation of democratic governance in the United Kingdom.

## 2.8 INDIA AND TRANSFORMATIVE CONSTITUTIONALISM:

India not only endured the challenges of colonial rule but also grappled with deep-rooted societal issues like untouchability, caste discrimination, gender inequality, and discrimination against the LGBTQ community, which have persisted since ancient times. The process leading to the formation of India's constitution aimed at establishing a new social and political order grounded in democratic principles, seeking to break free from its colonial past. The constitution, often described as a "moral autobiography," symbolized hope for a brighter future while vehemently rejecting India's colonial legacy. The Preamble encapsulates the people's aspirations for liberty, equality, fraternity, and justice, establishing India as a socialist, democratic, and secular state. Part III of the Constitution outlines Fundamental Rights, including principles of non-discrimination, equality, freedom of speech and expression, movement, religion, and personal liberty. It also abolishes practices like untouchability, feudal titles, and beggary, implying a pursuit of a

new social order through a redefined political power structure. According to Bhargava, the Indian constitution aimed to dismantle social hierarchies and pave the way for a new era of freedom, equality, and justice, particularly benefiting marginalized groups who saw it as a beacon of hope for equal treatment in society.

India's experience with transformative constitutionalism is deeply intertwined with its journey towards social justice, equality, and democracy. The Indian Constitution, adopted in 1950, reflects a transformative vision aimed at addressing historical injustices and creating a more inclusive society. Here's an analysis of India's engagement with transformative constitutionalism.

### **Social Justice:**

The Indian Constitution embodies principles of social justice, aiming to uplift marginalized communities such as Dalits, Adivasis, and other backward classes. Through affirmative action measures like reservations in education and employment, the constitution seeks to rectify historical injustices and promote social equality.<sup>33</sup>

### **Equality and Non-discrimination:**

India's constitutional framework guarantees equality before the law and prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. This commitment to equality is enforced by provisions such as the abolition of untouchability and the promotion of equal opportunities for all citizens.

### **Fundamental Rights:**

Part III of the Indian Constitution enshrines fundamental rights that protect individual liberties and freedoms. These include the right to equality, freedom of speech and expression, right to life and personal liberty, and the right to constitutional remedies<sup>34</sup>. These rights serve as powerful tools for citizens to challenge injustices and assert their dignity.

### **Directive Principles of State Policy:**

The Directive Principles of State Policy, outlined in Part IV of the Constitution, provide guidelines for the government to promote social justice, economic welfare, and the rule of

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<sup>33</sup> Brahmajeyo-mayam Dandam Asrajat Pirvamisvarah, Manu, VII,14b. (Trans) Eshwar created 'danda' with the brightness of Brahma

<sup>34</sup> DD BASU, —Shorter Constitution of India, Vol.1 15-16 (Justice AR Lakshamanan, Justice Bhagabati Prosad Banerjee & V.R Manohar, 14th ed., 2009).



law. While not enforceable by courts, these principles serve as moral imperatives for state action and reflect the transformative aspirations of the constitution.

### **Judicial Activism:**

India's judiciary has played a pivotal role in advancing transformative constitutionalism through judicial activism. Landmark judgments such as *Kesavananda Bharati v. State of Kerala* and *Indira Gandhi v. Raj Narain* have expanded the scope of fundamental rights and upheld the constitution's transformative vision.

### **Amendment and Evolution:**

The Indian Constitution has evolved over time through amendments and reinterpretation, reflecting changing societal values and aspirations. Amendments like the 73rd and 74th Constitutional Amendments, which empower local self-government institutions, demonstrate India's commitment to decentralization and grassroots democracy.

### **Challenges and Critiques:**

Despite significant progress, India faces challenges in fully realizing its transformative constitutional ideals. Issues like poverty, corruption, communalism, and caste-based discrimination continue to hinder inclusive development and social justice. Moreover, concerns have been raised about the erosion of democratic norms and institutions in recent years.

In conclusion, India's engagement with transformative constitutionalism underscores its commitment to building a more just, equal, and democratic society. While significant strides have been made, ongoing efforts are needed to address persistent inequalities and uphold the constitution's transformative promise.

The majority of modern constitutions are designed with the aim of facilitating the achievement of societal objectives. One perspective that aligns with this goal is termed "transformative constitutionalism," which refers to the long-term implementation, interpretation, and enforcement of constitutional principles aimed at reforming a nation's political and social institutions in a democratic, participatory, and equitable manner. South African Constitutional Law exemplifies this perspective, as do many post-colonial constitutions.

Examining the historical and political contexts that necessitate the adoption of

transformative aims reveals common experiences among nations pursuing such objectives. These experiences can be categorized into three main themes. According to Professor Upendra Baxi, transformative constitutionalism represents a significant departure from older forms of state, society, and culture, marking the inception of a new societal order. While such constitutional setups may appear to allow for active choices, concerns regarding fundamental principles persist.

However, I contend that courts must delve into the actual context in which transformative capabilities were granted and understand why judges must remain committed to upholding rights, whether they are individual or collective, regardless of the prevailing circumstances.

The constitution holds absolute legal authority as the ultimate document of society, outlining fundamental principles, governance norms, and the ambitions of the Indian people. Comparable to Kelson's 'grundnorm' or Hart's 'rules of recognition,' it serves as the definitive criteria for assessing the legality of laws and executive actions, as well as individual conduct. Constitutionalism posits that society can be organized according to a predetermined set of principles outlined in the constitution, often referred to as the "mirror" of society. The concept of constitutional identity, closely tied to constitutionalism, underscores the importance of maintaining the core values and principles enshrined in the constitution over time.

Central to constitutional theory are checks and balances on state power, with constitutionalists advocating for directed authority. In India, constitutionalism aims to empower the state to enact necessary social changes while emphasizing a transformation of relationships, both between individuals and the state and among individuals themselves. The transformative nature of the constitution underscores its revolutionary intent, shaping not only governance but also the interpretation and application of its provisions.

## **2.9 TRANSFORMATIVE ASPIRATIONAL DISTINCTION**

The inherent paradox of transformative constitutionalism lies in its reliance on American legal realism, particularly the "indeterminacy thesis," while simultaneously disregarding the perspectives of the scholars who founded this school of thought. Despite

transformative constitutionalism drawing from American legal realism, which aimed to challenge the formalist understanding of law, it appears to overlook the original intentions of these legal realists. Professor Marle expresses concern that Karl Klare's concept of transformative constitutionalism may be unattainable due to the inherent limitations of legal rules as "exclusionary reasons," which restricts political considerations, balancing, and reflexivity within legal boundaries.<sup>35</sup>

Scholars grappling with this paradox find themselves in a dilemma: while they may criticize constitutional courts for not meeting Klare's challenge, they are aware that achieving transformative constitutionalism's goals may be unattainable within the confines of the legal system. This paradox prompts a critical reevaluation of transformative constitutionalism's instrumental conception, urging scholars to engage with its underlying issues. Another perspective, proposed by Professor Kim Lane Scheppele, introduces the concept of "aspirational constitutionalism" as an alternative framework. Aspirational constitutionalism entails a process of constitutional building that encompasses drafting and interpretation by various actors, with decision-makers striving to achieve specific goals outlined in the constitution. This perspective offers a way to navigate away from the negative implications associated with transformative constitutionalism while emphasizing the aspirational nature of constitutional development.

Aspirational constitutionalism represents a framework for constitutional development characterized by a focus on achieving specific goals outlined in the constitution through both drafting and interpretation by various stakeholders. Coined by Professor Kim Lane Scheppele, this concept provides an alternative perspective to transformative constitutionalism, aiming to steer clear of its potential negative connotations.<sup>36</sup>

In aspirational constitutionalism, decision-makers involved in constitutional building recognize their actions as directed towards realizing the objectives set forth in the constitution. This process involves a concerted effort to align legal and institutional practices with the overarching goals and aspirations articulated in the constitutional text.

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<sup>35</sup> Michael Steven Green, —Legal Realism as Theory of Lawl, William & Mary law Review, Vol.46 2005, pp.1915.

<sup>36</sup> See Felix Cohen, —Transcendental Nonsense and the Functional Approachl, Columbia Law Review, Vol.35, No.6,1935.

Unlike transformative constitutionalism, which may face challenges in reconciling legal realism's indeterminacy thesis with its goals, aspirational constitutionalism emphasizes a proactive approach to constitutional interpretation and implementation. Decision-makers strive to achieve the ideals and principles embedded in the constitution, viewing them as guiding principles for governance and societal progress.

By framing constitutional development as an aspirational endeavor, aspirational constitutionalism encourages continuous engagement with constitutional principles and values. It fosters a dynamic and forward-looking approach to constitutional interpretation, allowing for adaptability and responsiveness to evolving societal needs and challenges.

Overall, aspirational constitutionalism offers a constructive and goal-oriented framework for constitutional development, highlighting the aspirational nature of constitutional goals and the ongoing pursuit of realizing them in practice.

Aspirational constitutionalism places a strong emphasis on the transformative potential of constitutional principles and values in shaping society. Here are some key aspects that further elucidate this concept:

**Goal-Oriented Approach:**

At its core, aspirational constitutionalism is about setting and striving to achieve specific goals outlined in the constitution. These goals often revolve around fundamental principles such as justice, equality, freedom, and human rights. Decision-makers interpret and implement the constitution with a focus on advancing these objectives.

**Dynamic Interpretation:**

Unlike rigid or literal interpretations of the constitution, aspirational constitutionalism encourages dynamic and purposive interpretation. Decision-makers interpret constitutional provisions in light of contemporary societal needs and values, aiming to realize the overarching goals of the constitution in the present context.

**Constitutional Evolution:**

Aspirational constitutionalism acknowledges that constitutions are living documents that evolve over time. It recognizes the need for constitutional norms and institutions to adapt to changing circumstances and societal expectations. This evolutionary approach ensures that the constitution remains relevant and effective in guiding governance and societal development.

**Multistakeholder Engagement:**

The process of aspirational constitutionalism involves the active participation of multiple stakeholders, including lawmakers, judges, civil society organizations, and the general public. These stakeholders collaborate to interpret and implement the constitution in a manner that reflects diverse perspectives and interests within society.

**Progressive Realization of Rights:**

Aspirational constitutionalism recognizes that achieving the goals set forth in the constitution may be a gradual and ongoing process. It prioritizes the progressive realization of rights and principles, understanding that systemic changes may take time and require sustained effort.

**Accountability and Transparency:**

In aspirational constitutionalism, decision-makers are held accountable for their actions in advancing constitutional goals. Transparency in governance processes, adherence to the rule of law, and respect for constitutional principles are essential for maintaining public trust and legitimacy.

## CHAPTER-III

### LEGISLATIVE TRENDS WITH RESPECT TO TRANSFORMATIVE CONSTITUTIONALISM

#### 3.1 INTRODUCTION:

Legislative trends related to transformative constitutionalism reflect efforts by lawmakers to enact laws and policies that align with the transformative goals outlined in the constitution. Here are some key legislative trends associated with transformative constitutionalism:

**Social Justice Legislation:**

Legislatures may prioritize the enactment of laws aimed at promoting social justice and addressing historical injustices. These laws may include measures to advance equality, protect marginalized communities, and eradicate discrimination based on factors such as race, gender, caste, religion, or sexual orientation.

**Human Rights Protection:**

Legislative efforts to protect and promote human rights are central to transformative constitutionalism. Lawmakers may introduce legislation to strengthen legal frameworks for the protection of civil, political, economic, social, and cultural rights. This may involve enacting laws to prevent human rights abuses, ensure access to justice, and hold perpetrators accountable.<sup>37</sup>

**Democratic Reforms:**

Legislative reforms aimed at enhancing democratic governance and citizen participation are integral to transformative constitutionalism. Lawmakers may introduce electoral reforms to increase transparency, accountability, and inclusivity in the electoral process.<sup>38</sup> This may include measures to strengthen democratic institutions, promote political pluralism, and empower marginalized groups.<sup>39</sup>

**Legal Empowerment:**

Legislative initiatives to empower marginalized communities and ensure equal access to justice are essential for advancing transformative constitutionalism. Lawmakers may enact laws to provide legal aid, improve the functioning of the justice system, and enhance legal awareness among the population, particularly among vulnerable and disadvantaged groups.

**Environmental Protection:**

Recognizing the importance of sustainable development and environmental conservation, legislative efforts related to transformative constitutionalism may focus on environmental protection. Lawmakers may introduce laws to mitigate climate change, conserve natural resources, and promote sustainable development practices in line with constitutional principles.

**Inclusive Development Policies:**

Legislative measures to promote inclusive economic development and reduce socio-economic inequalities are key components of transformative constitutionalism. Lawmakers may enact laws to provide social welfare benefits, promote job creation, and address disparities in access to education, healthcare, and basic services.

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<sup>37</sup> For example, Nehru's speech introducing the Objectives Resolution. The Framing of India's Constitution: select documents 4-11 (B. Shiva Rao ed., Guargaon, Universal Law Publishing 1967)

<sup>38</sup> Parliament of India, Constituent Assembly Debates, Vol. VII, November 1948, See also Uday mehta, 'Indian Constitutionalism', The Oxford Handbook of the Indian Constitution.

<sup>39</sup> *ibid*

**International Commitments:**

Legislative trends related to transformative constitutionalism may also involve aligning domestic laws with international human rights standards and commitments. Lawmakers may enact legislation to ratify international treaties, incorporate international law into domestic law, and ensure compliance with international human rights obligations.

Overall, legislative trends associated with transformative constitutionalism reflect a commitment to advancing social justice, human rights, democracy, environmental sustainability, and inclusive development through legal and policy reforms.

**3.2 ASPECTS OF TRANSFORMATIVE CONSTITUTIONALISM:**

Transformative constitutionalism goes beyond the mere establishment of legal frameworks; it embodies a philosophy that seeks to fundamentally reshape societies by addressing historical injustices, promoting social equity, and empowering marginalized communities. Here are some additional aspects to consider:

**Historical Context:**

Transformative constitutionalism often emerges in post-colonial or post-conflict societies seeking to overcome legacies of oppression, discrimination, and inequality. The historical context shapes the aspirations of transformative constitutionalism, driving efforts to create a more just and inclusive society.

**Judicial Activism:**

Courts play a crucial role in advancing transformative constitutionalism through judicial activism. Judges interpret constitutional provisions expansively to protect human rights, promote social justice, and hold governments accountable. Landmark court decisions can set precedents for progressive legal and social change.

**Civil Society Engagement:**

Transformative constitutionalism thrives on active participation and engagement from civil society organizations, grassroots movements, and advocacy groups. These actors often play a vital role in advocating for legal reforms, mobilizing public support, and holding governments accountable for upholding constitutional principles.

**Educational Initiatives:**

Education and awareness-raising efforts are essential components of transformative

constitutionalism. Promoting constitutional literacy among citizens helps empower individuals to assert their rights, participate in democratic processes, and hold institutions accountable. Educational initiatives may include civic education programs, legal aid clinics, and community outreach activities.

**International Influence:**

Global human rights norms and international legal frameworks can exert influence on transformative constitutionalism at the national level. International human rights treaties, conventions, and jurisprudence provide benchmarks for assessing domestic laws and policies, fostering transnational dialogue, and promoting accountability<sup>40</sup>.

**Challenges and Resistance:**

Despite its transformative potential, constitutional reform often faces resistance from vested interests, political elites, and entrenched power structures. Challenges such as institutional inertia, legal conservatism, and socio-economic inequality may hinder the realization of transformative goals, requiring sustained advocacy and activism.

**Intersectionality :**

Transformative constitutionalism recognizes the intersectionality of various forms of discrimination and oppression, including those based on race, gender, class, ethnicity, religion, disability, and sexual orientation. Efforts to promote social justice and equality must address these intersecting dimensions of identity and power.

**Dynamic Evolution:**

Transformative constitutionalism is not static; it evolves over time in response to changing societal dynamics, political contexts, and legal interpretations. Continuous dialogue, reflection, and adaptation are essential to ensure that constitutional principles remain relevant and effective in addressing emerging challenges and aspirations<sup>41</sup>.

In summary, transformative constitutionalism embodies a holistic approach to legal and social transformation, driven by a commitment to justice<sup>42</sup>, equality, and human dignity. It requires collective action, institutional innovation, and sustained advocacy to realize its transformative potential and build more inclusive and equitable societies.

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<sup>40</sup> ‘Legal Culture and Transformative Constitutionalism’, (1998) 14 South African Journal on Human Rights 146 (1998).

<sup>41</sup> *ibid*

<sup>42</sup> *ibid*



### **3.3 INDIAN CONSTITUTIONALISM JURISPRUDENCE:**

Indian Constitutionalism Jurisprudence refers to the body of legal principles, interpretations, and practices developed by the judiciary concerning the Indian Constitution. It encompasses various aspects of constitutional law, including the interpretation of constitutional provisions, the protection of fundamental rights, the relationship between different branches of government, and the role of the judiciary in upholding constitutional values.

One significant aspect of Indian Constitutionalism Jurisprudence is the interpretation of the Constitution's text and its provisions. The judiciary, particularly the Supreme Court of India, plays a crucial role in interpreting the Constitution to ensure its relevance and applicability in contemporary times. This interpretation often involves balancing competing interests, safeguarding fundamental rights, and upholding the principles of justice, liberty, equality, and fraternity enshrined in the Preamble.

Fundamental rights are a cornerstone of Indian Constitutionalism Jurisprudence. The judiciary acts as a guardian of these rights, ensuring their protection against any infringement by the state or private entities. Through landmark judgments and Public Interest Litigations (PILs), the courts have expanded the scope of fundamental rights to encompass various socioeconomic rights, thereby promoting social justice and inclusivity. Another essential aspect is the doctrine of separation of powers and the system of checks and balances. Indian Constitutionalism Jurisprudence delineates the powers and functions of the executive, legislative, and judicial branches of government to prevent any one branch from abusing its authority. The judiciary acts as a check on the other branches by reviewing their actions and ensuring adherence to constitutional principles.

Furthermore, Indian Constitutionalism Jurisprudence reflects the dynamic nature of the Indian Constitution. The judiciary adopts a flexible approach to constitutional interpretation, allowing for the evolution of legal principles in response to changing societal needs and circumstances. This adaptability ensures that the Constitution remains a living document capable of addressing contemporary challenges.

Overall, Indian Constitutionalism Jurisprudence embodies the principles of constitutionalism, democracy, and the rule of law. It reflects the ongoing quest for justice,

equality, and freedom in Indian society and serves as a foundation for the country's democratic governance and legal system.

Certainly Indian Constitutionalism Jurisprudence encompasses several key elements and principles that shape the legal landscape of India. Here are some additional aspects to consider:

**Federalism:**

The Indian Constitution establishes a federal system of government, dividing powers between the central government and the states. Indian Constitutionalism Jurisprudence addresses issues related to the distribution of powers, disputes between the center and the states, and the role of federalism in fostering unity while respecting diversity.

**Judicial Activism:**

The Indian judiciary, particularly the Supreme Court, has played a proactive role in shaping public policy and governance through judicial activism. Indian Constitutionalism Jurisprudence reflects instances where the judiciary has intervened in matters of public interest, such as environmental protection, corruption, and social justice, often through PILs<sup>43</sup>.

**Social Justice:**

A prominent feature of Indian Constitutionalism Jurisprudence is its emphasis on social justice and equality. The judiciary has interpreted the Constitution's provisions to protect the rights of marginalized communities, including Scheduled Castes, Scheduled Tribes, women, and minorities. Landmark judgments have addressed issues such as affirmative action, reservation policies, and gender equality.

**Public Interest Litigation (PIL):**

PIL has emerged as a significant tool for advancing social justice and human rights in India. Indian Constitutionalism Jurisprudence includes cases where PILs have been used to address systemic injustices, advocate for policy changes, and hold the government accountable for its actions or inaction.

**Judicial Review:**

The power of judicial review allows the Indian judiciary to examine the constitutionality of laws, executive actions, and government policies. Indian Constitutionalism

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<sup>43</sup> <https://www.newstatedman.com/ideas/2009/11/past-benjamin-future-obama>. Also *Volks V. Robinson*, 2005 (5)BCLR 446.

Jurisprudence explores the scope and limitations of judicial review, balancing the need for judicial intervention with respect for the principle of separation of powers.

**Evolutionary Nature:**

Indian Constitutionalism Jurisprudence recognizes that the Constitution is a living document that evolves over time. The judiciary adapts constitutional principles to address contemporary challenges, technological advancements, and societal changes while upholding the core values enshrined in the Constitution.

**Global Influence:**

Indian Constitutionalism Jurisprudence is influenced by international human rights norms, comparative constitutional law<sup>44</sup>, and decisions of foreign courts. The judiciary considers global best practices and legal precedents in its deliberations, contributing to the progressive development of Indian constitutional law.

**Directive Principles of State Policy:**

The Indian Constitution includes Directive Principles of State Policy, which are guidelines for the government to promote social justice, economic welfare, and the overall well-being of the people. Indian Constitutionalism Jurisprudence explores the interplay between fundamental rights and directive principles, emphasizing the state's obligation to realize socio-economic rights while balancing individual liberties.

**Secularism:**

Secularism is a fundamental principle of the Indian Constitution, ensuring equal treatment of all religions and the separation of religion from the state. Indian Constitutionalism Jurisprudence examines cases related to religious freedom, communal harmony, and the state's role in religious matters, safeguarding India's secular character.

**Constitutional Amendments:**

The Constitution of India allows for amendments to accommodate changing societal needs and circumstances. Indian Constitutionalism Jurisprudence scrutinizes the validity of constitutional amendments, ensuring that they adhere to the basic structure of the Constitution and do not undermine its fundamental principles.

**Public Institutions and Governance:**

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<sup>44</sup> For an understanding of how these individual rights exist in a 'co-equal' relationship with democratic participation, Jurgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press 1996).

Indian Constitutionalism Jurisprudence encompasses cases involving the functioning of public institutions, accountability of government officials, electoral reforms, and administrative law. The judiciary's role in upholding the rule of law, ensuring transparency, and combating corruption is a significant aspect of Indian constitutional jurisprudence.

**International Law:**

Indian Constitutionalism Jurisprudence considers India's obligations under international law and treaties. Courts interpret constitutional provisions in light of international human rights standards and principles, reflecting India's commitment to global norms and conventions.

**Social Transformation:**

Indian Constitutionalism Jurisprudence reflects the Constitution's transformative vision aimed at bringing about social, economic, and political transformation. The judiciary interprets constitutional provisions in ways that promote inclusivity, equality, and justice, contributing to the country's progress and development.

These aspects deepen our understanding of Indian Constitutionalism Jurisprudence and its role in shaping India's legal system, governance, and society. They underscore the dynamic nature of Indian constitutional law and its responsiveness to the evolving needs and aspirations of the Indian people.

### **3.4 FUNDAMENTAL RIGHTS AND TRANSFORMATIVE CONSTITUTIONALISM:**

In Indian Constitutionalism Jurisprudence, the principle of equality, as enshrined in Article 14 of the Constitution, holds paramount importance. Cases within this domain delve into various aspects such as affirmative action, reservations, gender equality, and the decriminalization of sexual orientation. They collectively recognize that equality entails overcoming institutional and structural barriers that have historically subjected individuals and groups to subordination. The evolution of the Equality code, forged through decades of struggle for equal status and moral membership in the polity, serves to identify and address both past injustices and contemporary discrimination, ultimately embodying a concept of substantive equality.

Additionally, the concept of brotherhood is underscored within the framework of addressing economic marginalization. These judicial pronouncements acknowledge that liberty and equality are not only threatened by consolidated governmental authority but also by private arrangements that possess the potential to oppress individuals and impede their access to essential resources necessary for a dignified life. This recognition holds particular significance in the context of Indian history, where social and economic disparities have often wielded greater influence than state coercion.<sup>45</sup>

Furthermore, the jurisprudence surrounding the relationship between individuals and the state, encompassing Articles 19 to 22, scrutinizes the state's role in perpetuating oppressive structures that undermine individual freedom and privacy rights. These rulings probe the extent to which essential civil liberties may be subordinated to considerations of public welfare. Notably, by safeguarding an individual's right against self-incrimination,<sup>46</sup> the Constitution acts as a barrier between the accused and the state, particularly in its coercive capacities as an interrogator and law enforcer.

Taken collectively, these judgments underscore the Constitution's objective of transitioning from a culture of power prevalent under colonial rule to one characterized by justification within a free, open, and democratic society. A comprehensive examination of these rulings is imperative to fully grasp their transformative potential and the evolution of Indian constitutionalism.

Certainly Indian constitutional jurisprudence reflects a dynamic interplay between legal principles, societal norms, and evolving interpretations by the judiciary. Beyond the specific articles mentioned, various other facets of Indian constitutionalism have undergone significant examination and development through judicial pronouncements.

For instance, the doctrine of basic structure, established in the landmark **Kesavananda Bharati case**, asserts that certain core principles of the Constitution are immutable and cannot be amended by Parliament. This doctrine has profound implications for the balance of power between the judiciary and the legislature, as well as for the protection of fundamental rights.

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<sup>45</sup> Parliament of India, Constituent Assembly Debates, Vol. XI, 25 November 1949 (Speech of Dr. Ambedkar)

<sup>46</sup> See E.g., B.R. Ambedkar, 'Castes in India: Their Mechanism, Genesis and Development', (1917) XLI Indian Antiquary, This was originally a paper presented by Ambedkar at an anthropology

Additionally, the jurisprudence surrounding federalism and center-state relations has evolved over time, particularly in response to issues of regional autonomy and decentralization of power. Cases such as the **S.R. Bommai case** have clarified the scope of the President's rule and the conditions under which it can be imposed, thereby shaping the federal structure of Indian governance.

Furthermore, the judiciary's role as the guardian of fundamental rights has been central to Indian constitutional jurisprudence. Landmark cases such as **Maneka Gandhi v. Union of India** and **Vishaka v. State of Rajasthan** have expanded the scope of fundamental rights, including the right to life and personal liberty, right to equality, and right to dignity, by interpreting them in light of evolving social realities.

Moreover, environmental jurisprudence has emerged as a significant area of Indian constitutional law, with courts actively intervening to protect the environment and enforce sustainable development principles. Cases like **M.C. Mehta v. Union of India** have led to the recognition of the right to a clean environment as an integral part of the right to life under Article 21.

Overall, Indian constitutional jurisprudence is characterized by its responsiveness to societal changes, its commitment to protecting fundamental rights, and its role in shaping the contours of Indian democracy and governance.

The concept of the Constitution as a living tree, subject to interpretation and evolution over time, has been a prominent feature of Indian constitutional jurisprudence. This approach views the Constitution as a dynamic document that must adapt to changing social, political, and economic realities. Judges play a crucial role in this process by interpreting the Constitution in a manner that keeps it relevant and responsive to contemporary needs.

However, while living tree constitutionalism has been widely accepted, it has also faced criticism for lacking a clear theoretical framework. Critics argue that this approach allows judges too much discretion in shaping the Constitution without providing a principled basis for their decisions. Despite some exceptions, the Supreme Court has not fully articulated the conceptual basis for its evolutionary approach to constitutional interpretation.

In contrast, constitutional originalism, which emphasizes interpreting the Constitution

based on its original meaning at the time of its adoption, has been largely dismissed in the Indian context. References to originalism are often met with skepticism and ridicule, seen as a regressive return to a bygone era of textual literalism.<sup>47</sup>

Transformative constitutionalists seek to strike a balance between these competing approaches by considering the original intent of the Constitution's framers while also recognizing the need for adaptation to contemporary circumstances. They delve into the historical context of the Constitution's drafting, examining the deliberations of the Drafting Committee and the Constituent Assembly. This historical analysis helps in understanding the intended meaning behind constitutional provisions and guides transformative constitutional interpretation.

An example of this approach can be seen in the landmark case of **Maneka Gandhi v. Union of India**, where the Supreme Court adopted a dynamic interpretation of Article 21, emphasizing the right to life and personal liberty in light of evolving societal values. This case exemplifies the application of living tree constitutionalism within the framework of transformative constitutional interpretation.

In 1952, the **Sri Sankari Prasad case** set a precedent stating that any legislation enacted by Parliament under its amending power in Article 368<sup>48</sup> would be considered valid even if it curtailed the fundamental rights guaranteed in Part III of the Constitution. This position was reaffirmed in 1964 by another Constitution Bench in the Sajjan Singh case. However, in the Golak Nath case, heard by an 11-judge bench, these earlier rulings were overturned. The Supreme Court held that fundamental rights are intrinsic to the development of human personality and allow individuals to lead their lives according to their own beliefs. The majority opinion of the bench asserted that our Constitution elevates fundamental rights to a paramount status, placing them beyond the reach of legislative encroachment by Parliament. Nonetheless, Parts III and IV of the Constitution were interpreted as forming an integrated framework, where Directive Principles could be implemented without infringing upon or negating Fundamental Rights. In response to the Golak Nath decision, lawmakers passed several constitutional amendments in an attempt to nullify its impact.

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<sup>47</sup> Convention on The Prevention and Punishment of The Crime of Genocide, 1948, art. I

<sup>48</sup> Constitution of India

The **Golak Nath case** marked a significant shift in Indian constitutional jurisprudence by asserting the supremacy of fundamental rights and limiting Parliament's power to amend them. This decision emphasized the transcendent nature of fundamental rights, positioning them as essential for human development and autonomy. However, it also recognized the interconnectedness of Directive Principles and Fundamental Rights within the constitutional framework, suggesting a balanced approach where both could coexist without undermining each other.

The ruling triggered a series of legislative responses, as lawmakers sought to assert Parliament's authority to amend the Constitution. Several constitutional amendments were passed in an effort to reverse or mitigate the impact of the Golak Nath decision, highlighting the tension between judicial interpretation and legislative intent in shaping constitutional law.

Overall, the Golak Nath case reflects the dynamic interplay between the judiciary, legislature, and the Constitution itself, illustrating the ongoing evolution of India's constitutional framework and the complex relationship between fundamental rights and state authority.

In order to analyze FC, it is necessary to first consider several features of feminism in general. First, it is characterized by polyconceptualization in the sense that distinctions are frequently made between different feminisms.<sup>49</sup> Second, there is a theoretical duality contained in feminism, for example, it can be regarded as a theory of equality, or as a theory about the objectivity of the law. Lastly, feminism also has a dual practical aspect in that it has a constitutional character generally focused on the individual rights of women in a given society, but also has a universal character in the sense that the international community has begun to take its demands into consideration, as well as the fact that it has become a consolidated global social movement. However, due to the complexity of feminism, the analysis here will be limited to its legal and constitutional dimensions.<sup>50</sup>

One starting point is in the field of critical legal studies, where the contingency of law is criticized because it lacks objectivity in its goals. Thus, feminism would try to use the law to reverse:

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<sup>49</sup> Aharon Barak, *Un juez reflexiona sobre su labor. El papel de un tribunal constitucional en una democracia* 58-ff. (SCJN, 2008).

<sup>50</sup> *ibid*



- 1) The differences between women and men;
- 2) The ethic of justice that fails to recognize inequalities between women and men; and
- 3) The domination and exploitation of women by men.

In the constitutional sphere, the feminist perspective recognizes that the constitutional paradigm is based on a principle of equality, but objects to the fact that historically it has primarily benefitted men, effectively excluding women from the founding covenant of contemporary constitutional states.<sup>51</sup> From that perspective, therefore, the constitutional state and constitutionalism have demonstrated they are not a sufficiently effective tool in the struggle to reverse the structural inequalities faced by women, that is, to improve democracy. In this sense, FC adopts the demand for equality originating in the liberal thought of the late eighteenth century, as well as from feminist theory, with the aim of [re]conceptualizing equality as the central axis of the constitutional state.

FC is a legal current that has developed out of several theoretical bases. These bases are founded not only in a legal-institutional vision, but also in a philosophical-political one. For example, critical legal studies scholarship includes the notion that it is desirable that the law be used as a tool to advance women's equality, that is, an instrumental use of the law. This is because FC reveals the dysfunction of the liberal model: it was not only biased in the creation of the legal system and its laws, but was also founded on the complete exclusion of women from participation in many areas.

Thus, FC would seek to embed feminist principles and issues into the institutional design of a constitutional system, giving it a strong gender perspective. An important point to note is that some of the most radical currents of feminism sometimes overlook the fact that the constitution represents a common project to support diverse and often conflicting ideologies. With that in mind, a fundamental objective of FC would be the reformulation of constitutions within legal systems, which implies at least three possibilities:

- 1) Feminist constituent processes will include women as constituent legislators, and feminist rights, principles, and values will be incorporated into the text of new constitutions;
- 2) Constitutional reforms will be carried out with true feminist participation, especially when constitutional norms relating to issues affecting the rights of women are being

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<sup>51</sup>Alfonso García Figueroa, *Feminismo de Estado: Fundamentalmente religioso y religiosamente fundamentalista*, 17 *Eunomía. Revista en Cultura de la Legalidad* 358-376 (2019)

debated and established;

3) Constitutional adjudication will include interpreting and applying the constitution from a feminist perspective, for example, interpreting constitutional objectives and goals in a manner which advances women's rights and strives to achieve an equality that is actually reflected in the social reality.

These three possibilities are not mutually exclusive, but rather represent a possible integration of the theoretical and practical aspects of FC. However, of the three, constitutional adjudication offers the most immediate, realistic, and concrete option for achieving the objectives of FC.

### **3.5 LEGISLATIVE DEVELOPMENT OF TRANSFORMATIVE CONSTITUTIONALISM**

Legislative development related to transformative constitutionalism involves the enactment of laws and amendments aimed at promoting social justice, equality, and the protection of fundamental rights within a society. These legislative measures often reflect the principles and values embedded in a country's constitution and seek to address historical injustices, promote inclusivity, and foster socio-economic development. Here's a detailed look at legislative trends associated with transformative constitutionalism:

#### **1. Affirmative Action and Reservations:**

Many countries have implemented affirmative action policies and reservation systems to address historical discrimination and promote the inclusion of marginalized communities in various sectors such as education, employment, and politics. These laws often provide quotas or preferential treatment for underrepresented groups, including ethnic minorities, indigenous peoples, women, and persons with disabilities.

#### **2. Gender Equality Legislation:**

Laws promoting gender equality aim to eliminate discrimination based on gender and ensure equal rights and opportunities for all genders. These legislative measures encompass various areas such as employment, education, inheritance, property rights, and access to justice. They may include provisions for gender-sensitive policies, workplace diversity, and measures to combat gender-based violence and harassment<sup>52</sup>.

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<sup>52</sup> Michael W. Dowdle and Michael A. Wilkinson, 'Introduction and Overview' in Constitutionalism

### **3. Protection of Minority Rights:**

Legislation protecting minority rights safeguards the rights and interests of minority groups within a diverse society. These laws often focus on ensuring the cultural, linguistic, and religious rights of minorities, as well as preventing discrimination and promoting their full participation in public life. They may also address issues related to minority representation, autonomy, and non-discrimination.

### **4. Social Welfare and Economic Development Laws:**

Legislative measures aimed at social welfare and economic development seek to address socio-economic inequalities and promote inclusive growth. These laws may include provisions for poverty alleviation, healthcare, education, housing, employment generation, and social security. They often prioritize the needs of marginalized and vulnerable populations, such as low-income households, rural communities, and informal sector workers.

### **5. Human Rights Protection Legislation:**

Laws protecting human rights are essential for upholding the fundamental freedoms<sup>53</sup> and dignity of individuals within a society. These legislative measures may include laws establishing independent human rights commissions, mechanisms for monitoring and redressing human rights violations, and safeguards against arbitrary detention, torture, and discrimination. They also ensure access to justice and remedies for victims of human rights abuses.

### **6. Environmental Protection and Sustainable Development Laws:**

Legislative initiatives promoting environmental protection and sustainable development are integral to transformative constitutionalism, as they recognize the interconnectedness of environmental rights, social justice, and human well-being. These laws may include regulations for environmental conservation, pollution control, natural resource management, and climate change mitigation. They aim to safeguard the environment for present and future generations while promoting equitable and sustainable development<sup>54</sup>.

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Beyond Liberalism<sup>1</sup>, 12 (Michael W Dowdle and Michael A. Wilkinson eds, Cambridge: Cambridge University Press 2017).

<sup>53</sup> \_ Comments and Suggestions on the Draft Constitution', The Framing of India's Constitution: Select Documents, Vol.4 P. 3,5 (Gurgaon:LexisNexis 2015).

<sup>54</sup> S. Krishnan V. State of Madras, 1951 SCR 621, P.43 (Dissenting Opinion of Justice Vivian Bose.

## **7. Constitutional Amendments:**

In some cases, transformative constitutionalism may require amendments to the constitution itself to reflect evolving societal values and address emerging challenges. These constitutional amendments may expand the scope of fundamental rights, clarify the state's obligations towards marginalized groups, or strengthen mechanisms for accountability, transparency, and participatory governance.

Overall, legislative development related to transformative constitutionalism is characterized by a commitment to promoting justice, equality, and human rights, as well as addressing historical injustices and promoting inclusive and sustainable development. These legislative measures play a crucial role in translating the principles and values enshrined in the constitution into tangible outcomes that benefit society as a whole.

### **1. Public Participation and Consultation:**

- Public participation is essential for ensuring that legislative processes are inclusive, transparent, and responsive to the needs of the people.
- Various mechanisms can be employed to facilitate public participation, including public hearings, consultations, town hall meetings, citizen forums, online platforms, and participatory budgeting.
- Through these mechanisms, individuals, communities, and civil society organizations can provide input, raise concerns, and contribute to the shaping of laws and policies.
- Effective public participation fosters a sense of ownership and legitimacy, enhancing the credibility and effectiveness of legislative initiatives.

### **2. Policy Innovation and Experimentation:**

- Transformative constitutionalism encourages lawmakers to adopt innovative approaches to address entrenched social inequalities and systemic injustices.
- Policymakers may pilot new initiatives, test policy interventions on a smaller scale, and evaluate their impact before scaling up successful models.
- Experimentation allows for adaptive governance, flexibility in policymaking, and the exploration of alternative solutions to complex challenges.
- By embracing a culture of innovation, legislative bodies can catalyze transformative

change and drive progress toward achieving constitutional goals.<sup>55</sup>

### 3. Intersectionality and Inclusivity:

- Legislative development under transformative constitutionalism recognizes that individuals and communities experience multiple forms of discrimination and marginalization based on intersecting factors.

- Laws and policies should be designed to address the specific needs and realities of diverse populations, taking into account intersecting identities such as race, gender, ethnicity, class, disability, sexual orientation, and religion.

- Inclusivity entails ensuring that marginalized groups have meaningful representation and participation in the legislative process and that their voices are heard and respected.

### 4. Monitoring and Evaluation:

- Robust monitoring and evaluation mechanisms are essential for assessing the impact, effectiveness, and implementation of legislative interventions.

- Key performance indicators (KPIs), impact assessments, and regular evaluations help identify successes, challenges, and areas for improvement.

- Feedback from stakeholders, including affected communities, experts, and civil society organizations, informs evidence-based decision-making and policy adjustments.

- Continuous monitoring and evaluation promote accountability, transparency, and learning, enhancing the quality and relevance of legislative initiatives over time.

### 5. International Human Rights Standards:

- Legislative development often draws upon international human rights standards, treaties, conventions, and jurisprudence to inform domestic law and policy.

- Countries may ratify international human rights instruments and incorporate their provisions into domestic legislation to ensure compliance with global norms and obligations.

- Engaging with international human rights mechanisms, such as treaty bodies and

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<sup>55</sup> See E.g., Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press 1989); Will Kymlicka, *Multicultural Citizenship: A Liberal theory of Minority Rights* (Oxford: Clarendon Press 1995).

special rapporteurs, facilitates peer review, knowledge sharing, and capacity building in the field of human rights.

- Alignment with international standards enhances the credibility and legitimacy of domestic legal frameworks and promotes a culture of human rights protection and promotion.

#### 6. Capacity Building and Institutional Strengthening:

- Legislative development requires investment in building institutional capacity and strengthening governance structures at all levels of government.

- Training programs, workshops, and capacity-building initiatives can enhance the skills, knowledge, and competencies of lawmakers, policymakers, judges, legal professionals, and government officials.

- Institutional reforms may include measures to improve legislative processes, streamline decision-making, enhance transparency and accountability, and combat corruption.

- Strengthening institutions fosters a conducive environment for effective legislative development, rule of law, and good governance, ultimately contributing to the realization of transformative constitutional goals.

In summary, legislative development within the framework of transformative constitutionalism involves engaging the public, fostering innovation, addressing intersectional inequalities, monitoring progress, upholding international standards, and strengthening institutions. By embracing these principles and practices, legislative bodies can play a pivotal role in advancing justice, equality, and human rights in society.

### **3.6 TRANSFORMATION OF JUDICARY THROUGH CASE LAW**

In several instances, the judiciary has taken proactive measures to safeguard human rights, as evidenced by the following examples:-

- i. The case "Hussainara Khaton & Ors v. Home Secretary, State of Bihar"<sup>56</sup> is a landmark judgment in the history of the Indian judiciary, particularly with respect to the rights of prisoners and the underprivileged. Decided by the Supreme Court

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<sup>56</sup> AIR 1979 SC 1369

of India in 1979, this case brought to light the deplorable conditions of undertrial prisoners in the state of Bihar, many of whom had been languishing in jail for periods longer than the maximum sentence they would have received if convicted.

**Background:-**

The case was initiated by a public interest litigation (PIL) filed by several undertrial prisoners, represented by advocate Kapila Hingorani, under Article 32 of the Indian Constitution, which allows for remedies for the enforcement of fundamental rights.

**Key Issues:-**

**Undertrial Prisoners:** The primary issue was the prolonged detention of undertrial prisoners without trial, in violation of their right to a speedy trial under Article 21 of the Constitution.

**Legal Aid:** The case also highlighted the lack of legal aid available to the underprivileged, which is essential for ensuring a fair trial.

**Right to Speedy Trial:** This case emphasized the importance of the right to a speedy trial as an intrinsic part of the right to life and personal liberty.

**Judgment:-**

The Supreme Court, led by Justice P.N. Bhagwati, delivered a landmark judgment, which included several key directives:

**Immediate Release:** The Court ordered the immediate release of all undertrial prisoners who had been detained for periods longer than the maximum possible sentence for their alleged offences.

**Speedy Trials:** The Court reinforced the right to a speedy trial and directed that the state must take immediate steps to conduct speedy trials for all undertrial prisoners.

**Provision of Legal Aid:** The judgment underscored the necessity of providing free legal aid to the underprivileged to ensure that justice is accessible to all sections of society.

**Significance:-**

This case is significant for several reasons:

It brought to the forefront the plight of undertrial prisoners in India and led to widespread judicial and administrative reforms.

It established the principle that the right to a speedy trial is a fundamental right under Article 21 of the Indian Constitution.

It set a precedent for the judiciary to take proactive steps in addressing issues related to human rights and social justice through PILs.

Impact:-

The Hussainara Khatoon case has had a lasting impact on the Indian legal system. It led to the establishment of mechanisms to provide free legal aid to the poor, and it paved the way for numerous other PILs aimed at protecting the rights of marginalized communities. This case is often cited as a classic example of judicial activism in India, where the judiciary took significant steps to ensure the protection of fundamental rights and to address systemic issues within the criminal justice system.

- ii. "Sunil Batra vs Delhi Administration"<sup>57</sup> is another landmark case in Indian judicial history, focusing on the rights of prisoners and the conditions of their incarceration. The case was decided by the Supreme Court of India in 1980 and has significant implications for prison reforms and the protection of prisoners' rights in India.

Background:-

Sunil Batra, a convict on death row, petitioned the Supreme Court through a letter, highlighting the inhumane conditions and treatment of prisoners in Tihar Jail, Delhi. The letter was treated as a writ petition under Article 32 of the Indian Constitution, which provides for the right to constitutional remedies.

Key Issues:-

Inhuman Treatment: Allegations of torture and inhuman treatment of prisoners by jail authorities.

Solitary Confinement: The legality and conditions of solitary confinement for death row prisoners.

Rights of Prisoners: Broader issues regarding the basic rights of prisoners and the duties of jail authorities.

Judgment:-

The Supreme Court, in a judgment delivered by Justice V.R. Krishna Iyer, made several significant observations and directives:

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<sup>57</sup> AIR 1980 SC 1579



**Prohibition of Inhuman Treatment:** The Court held that prisoners do not lose all their fundamental rights upon incarceration. The right to life and personal liberty (Article 21) extends to prisoners, and any form of torture or inhuman treatment violates this right.

**Guidelines for Solitary Confinement:** The Court laid down strict guidelines for the use of solitary confinement, emphasizing that it should be used sparingly and only under specific circumstances. The judgment stated that solitary confinement cannot be imposed arbitrarily and should be subject to judicial scrutiny.

**Regular Inspection:** The Court directed that prisons must be regularly inspected to ensure that the rights of prisoners are protected and that the conditions of incarceration meet minimum human standards.

**Access to Legal Aid:** The judgment reinforced the necessity of providing legal aid to prisoners to ensure that they can effectively challenge violations of their rights and have access to justice.

**Role of Judiciary in Prison Reforms:** The Supreme Court underscored the role of the judiciary in ensuring humane conditions in prisons and protecting the rights of prisoners. It emphasized that the judiciary must remain vigilant and proactive in addressing issues related to prison administration.

**Significance:-**

The "Sunil Batra vs Delhi Administration" case is significant for several reasons:

**Human Rights:** It expanded the interpretation of Article 21 to include the rights of prisoners, ensuring that they are treated with dignity and humanity.

**Judicial Activism:** The case is a prime example of judicial activism, where the Supreme Court took proactive measures to address and rectify the conditions of prisoners.

**Prison Reforms:** The directives issued in the judgment led to significant reforms in prison administration and the treatment of prisoners across India.

**Foundation for Future Judgments:** The principles established in this case have been cited in numerous subsequent judgments related to prisoners' rights and prison conditions.

**Impact:-**

The impact of this judgment has been profound, leading to increased awareness and sensitivity towards the rights of prisoners. It has also led to institutional changes in the way prisons are managed and has established a framework for ongoing judicial oversight

to prevent abuse and ensure the humane treatment of prisoners.

The "Sunil Batra vs Delhi Administration" case remains a cornerstone in the Indian judiciary's efforts to uphold the fundamental rights of all individuals, including those incarcerated, and continues to influence prison reforms and human rights jurisprudence in India.

- iii. The case "Prem Shankar Shukla vs Delhi Administration" (1980)<sup>58</sup> is a significant judgment by the Supreme Court of India that addresses the rights of prisoners, particularly concerning the use of handcuffs. This case is a pivotal moment in the protection of human dignity and the rights of individuals under custody.

Background:-

Prem Shankar Shukla, an undertrial prisoner, was required to appear in court and was routinely handcuffed during his transit. He filed a writ petition under Article 32 of the Indian Constitution, challenging the legality and necessity of being handcuffed, arguing that it violated his fundamental rights.

Key Issues:-

Use of Handcuffs: The necessity and legality of using handcuffs on undertrial prisoners during transit.

Fundamental Rights: The impact of such practices on the fundamental rights of prisoners, particularly under Article 21 (Right to Life and Personal Liberty) and Article 14 (Right to Equality) of the Indian Constitution.

Judgment:-

The Supreme Court, led by Justice V.R. Krishna Iyer, delivered a landmark judgment, emphasizing the importance of human dignity and the protection of fundamental rights, even for prisoners. The key points of the judgment are:

Prohibition on Routine Handcuffing: The Court ruled that the routine handcuffing of prisoners is unconstitutional unless there are clear and present security concerns. The judgment emphasized that handcuffs should not be used as a matter of routine but only when there is a real and imminent necessity.

Justification for Handcuffing: The Court mandated that the decision to handcuff a

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<sup>58</sup> AIR 1980 SC 1535

prisoner must be based on individual assessments, and specific reasons must be recorded. This assessment must be made by the escorting authorities, who must justify their decision if questioned.

**Human Dignity and Fundamental Rights:** The Court underscored that the practice of handcuffing is a severe affront to human dignity and must be avoided unless absolutely necessary. The judgment reinforced that prisoners, despite being under custody, retain their fundamental rights, and any practice that undermines their dignity must be scrutinized.

**Directive to Law Enforcement:** The judgment provided clear guidelines for law enforcement and prison authorities, stipulating that they must avoid the use of handcuffs unless justified by specific circumstances. The authorities must also ensure that any decision to handcuff is subject to judicial review.

**Significance:-**

The significance of the "Prem Shankar Shukla vs Delhi Administration" case lies in its strong stance against the dehumanizing practice of routine handcuffing and its reinforcement of the fundamental rights of prisoners. Key impacts include:-

**Protection of Prisoners' Rights:** The case reinforced the principle that prisoners retain their fundamental rights and that their treatment must align with the principles of human dignity and equality.

**Judicial Oversight:** It established the need for judicial oversight over the practices of law enforcement agencies concerning the treatment of prisoners.

**Precedent for Future Cases:** This case set a precedent for future cases concerning the rights of prisoners and the conditions of their detention.

**Impact:-**

The judgment has had a lasting impact on the judicial and law enforcement practices in India, leading to reforms aimed at ensuring the humane treatment of prisoners. It has heightened awareness about the need to respect the fundamental rights of all individuals, regardless of their custodial status, and has led to more stringent guidelines and oversight regarding the use of restraints on prisoners. The principles laid down in this case continue to guide the judiciary and law enforcement agencies in India, ensuring that the dignity and rights of prisoners are upheld.

- iv. The case "Icchu Devi Choraria vs Union of India and Others" (1980)<sup>59</sup> is a notable judgment by the Supreme Court of India, focusing on the issue of preventive detention and the safeguarding of fundamental rights. This case highlights the judiciary's role in protecting individual liberties against arbitrary state actions.

**Background:-**

Icchu Devi Choraria filed a writ petition under Article 32 of the Indian Constitution on behalf of her husband, who was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA). The petitioner challenged the detention on the grounds of violation of fundamental rights guaranteed under Articles 21 (Right to Life and Personal Liberty) and 22 (Protection against Arrest and Detention in Certain Cases) of the Indian Constitution.

**Key Issues:-**

**Preventive Detention:** The legality and constitutionality of the preventive detention of the petitioner's husband.

**Procedural Safeguards:** Whether the procedural safeguards provided under the Constitution were duly followed in the detention process.

**Fundamental Rights:** The extent of protection available to detainees under preventive detention laws against arbitrary state actions.

**Judgment:-**

The Supreme Court, in a judgment delivered by Justice P.N. Bhagwati, made several significant observations and directives:

**Right to Representation:** The Court emphasized that a detainee under preventive detention has the right to make a representation against the detention. This right is a fundamental aspect of ensuring fairness and justice.

**Prompt Communication:** The authorities must communicate the grounds of detention to the detainee promptly and adequately. This ensures that the detainee can exercise their right to challenge the detention effectively.

**Judicial Review:** The Court reaffirmed the importance of judicial review in cases of preventive detention. It held that the judiciary has a crucial role in scrutinizing the legality

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<sup>59</sup> AIR 1980 SC 1983

and fairness of detention orders to prevent misuse of power by the state.

**Protection of Fundamental Rights:** The judgment underscored that preventive detention laws must be applied in a manner that respects the fundamental rights of individuals. Any deviation from procedural safeguards would render the detention unconstitutional.

**Significance:-**

The significance of the "Icchu Devi Choraria vs Union of India" case lies in its robust defense of individual liberties and the reinforcement of procedural safeguards in preventive detention cases. Key impacts include:

**Strengthening Procedural Safeguards:** The case reinforced the necessity of adhering to procedural safeguards in preventive detention cases, ensuring that detainees are informed of their rights and the grounds of their detention.

**Judicial Vigilance:** The judgment highlighted the judiciary's role in protecting fundamental rights against arbitrary state actions, setting a precedent for judicial vigilance in preventive detention cases.

**Human Rights Protection:** The case is a significant step in the protection of human rights, emphasizing that preventive detention laws must not be misused to curb individual freedoms without due process.

**Impact:-**

The impact of this judgment has been profound in ensuring that the state respects procedural safeguards while exercising powers of preventive detention. It has led to greater scrutiny of detention orders and has provided a legal framework for the protection of detainees' rights. The principles laid down in this case continue to guide the judiciary in safeguarding individual liberties against arbitrary state actions, ensuring that the fundamental rights enshrined in the Constitution are upheld.

- v. The case "M.C. Mehta vs State of Tamil Nadu" (1996)<sup>60</sup> is a landmark judgment by the Supreme Court of India that addresses the issue of child labor and the enforcement of fundamental rights for children. This case, filed by M.C. Mehta, a prominent public interest lawyer, significantly impacted the legal framework surrounding child labor in India.

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<sup>60</sup> AIR 1997 SC 699

### Background:-

The case was brought before the Supreme Court by M.C. Mehta, who sought the Court's intervention to address the prevalence of child labor in hazardous industries, particularly in the matchstick manufacturing units in Sivakasi, Tamil Nadu. The petitioner argued that the employment of children in such hazardous industries violated their fundamental rights under the Indian Constitution.

### Key Issues:-

**Child Labor:** The legality and ethical implications of employing children in hazardous industries.

**Fundamental Rights:** The violation of children's fundamental rights, particularly the right to education (Article 21A) and the right to be protected from exploitation (Article 24).

**State Responsibility:** The responsibilities and duties of the state in ensuring the protection of children from hazardous labor and exploitation.

### Judgment:-

The Supreme Court, in a landmark decision, laid down several directives and guidelines aimed at eradicating child labor and ensuring the protection of children's rights. Key points of the judgment include:

**Prohibition of Child Labor in Hazardous Industries:** The Court prohibited the employment of children under the age of 14 in hazardous industries, in compliance with Article 24 of the Constitution.

**Rehabilitation of Affected Children:** The Court directed the establishment of rehabilitation programs for children removed from hazardous work. This included the provision of education, healthcare, and vocational training to ensure their proper development.

**Creation of a Welfare Fund:** The Court ordered the creation of a Child Labor Rehabilitation-cum-Welfare Fund, funded by fines levied on employers who violated child labor laws. This fund would be used for the welfare and education of affected children.

**Compulsory Education:** The judgment emphasized the importance of compulsory education for children and directed the state to ensure that all children receive free and

compulsory education, as mandated by Article 21A.

**Role of Government and NGOs:** The Court acknowledged the role of both government agencies and non-governmental organizations (NGOs) in combating child labor. It called for coordinated efforts to identify, rescue, and rehabilitate child laborers.

**Periodic Monitoring:** The Court directed periodic monitoring and reporting to ensure compliance with its orders and the effectiveness of the measures implemented to eliminate child labor.

**Significance:-**

The "M.C. Mehta vs State of Tamil Nadu" case is significant for several reasons:

**Strengthening Child Rights:** The judgment strengthened the legal framework for the protection of children's rights, particularly against exploitation and hazardous labor.

**Judicial Activism:** The case is a prime example of judicial activism, where the judiciary took proactive measures to address a critical social issue and enforce fundamental rights.

**Policy Impact:** The directives issued by the Court had a significant impact on policy-making and the implementation of child labor laws in India.

**Impact:-**

The impact of this judgment has been profound in shaping the policies and measures aimed at eradicating child labor in India. Key outcomes include:

**Improved Enforcement of Child Labor Laws:** The judgment led to stricter enforcement of existing child labor laws and the introduction of new regulations to protect children from exploitation.

**Increased Awareness and Advocacy:** The case heightened awareness about the issue of child labor and spurred advocacy efforts by various stakeholders, including NGOs, government bodies, and the general public.

**Educational Reforms:** The emphasis on compulsory education in the judgment contributed to educational reforms and initiatives aimed at ensuring that all children have access to free and compulsory education.

The "M.C. Mehta vs State of Tamil Nadu" case remains a cornerstone in the legal and social efforts to combat child labor in India, ensuring the protection and development of children's rights in the country.

- vi. "Nilabati Behera vs State of Orissa" (1993)<sup>61</sup> is a landmark case in Indian legal history concerning the protection of fundamental rights and the liability of the state for the violation of these rights. This case is significant for establishing the principle that the state is liable to pay compensation for the infringement of fundamental rights, particularly in cases of custodial deaths.

**Background:-**

Nilabati Behera filed a writ petition under Article 32 of the Indian Constitution after her son, Suman Behera, died in police custody. The petitioner claimed that her son had been subjected to torture and custodial violence, leading to his death. The case brought to light the issue of custodial violence and the need for accountability of state authorities.

**Key Issues:-**

**Custodial Death:** The legality and accountability concerning the death of Suman Behera in police custody.

**State Liability:** Whether the state can be held liable to pay compensation for the violation of fundamental rights under Articles 21 (Right to Life and Personal Liberty) and 22 (Protection against Arrest and Detention) of the Indian Constitution.

**Right to Compensation:** The entitlement of the victim's family to compensation for the violation of fundamental rights.

**Judgment:-**

The Supreme Court, led by a bench including Justice J.S. Verma, delivered a significant judgment in favor of the petitioner. The key points of the judgment are:

**State Liability for Custodial Death:** The Court held that the state is liable to pay compensation for the violation of fundamental rights, specifically in cases of custodial death. The judgment emphasized that public functionaries and state authorities have a duty to ensure that the rights of individuals are not violated during custody.

**Compensation as a Public Law Remedy:** The Court established that compensation could be awarded as a public law remedy for the infringement of fundamental rights under Article 21. This compensation is distinct from and in addition to any other civil or criminal remedies available to the victim or their family.

**Doctrine of Sovereign Immunity:** The Court rejected the plea of sovereign immunity,

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<sup>61</sup> AIR 1993 SC 1960



which was traditionally used to shield the state from liability for the actions of its officials. The judgment clarified that the state cannot escape liability on the grounds of sovereign functions when it comes to the violation of fundamental rights.

**Importance of Human Rights:** The judgment underscored the importance of upholding human rights and ensuring accountability for their violation. It emphasized that the dignity and rights of individuals must be protected, and any breach by state authorities must be addressed through appropriate legal remedies.

**Significance:-**

The "Nilabati Behera vs State of Orissa" case is significant for several reasons:

**Recognition of State Liability:** The case established the principle that the state is liable to pay compensation for the violation of fundamental rights, particularly in cases of custodial violence and deaths.

**Compensation as a Constitutional Remedy:** The judgment introduced the concept of compensation as a constitutional remedy, enhancing the protection of fundamental rights.

**Judicial Activism:** The case is an example of judicial activism, where the judiciary took proactive steps to address the issue of custodial violence and ensure accountability of state authorities.

**Human Rights Protection:** The judgment strengthened the framework for the protection of human rights and set a precedent for dealing with cases of state violence and abuse of power.

**Impact:-**

The impact of this judgment has been far-reaching in terms of legal and policy reforms:

**Enhanced Accountability:** The judgment led to increased accountability of state authorities and public functionaries for the violation of fundamental rights.

**Policy Reforms:** The case prompted the formulation and implementation of policies aimed at preventing custodial violence and ensuring the protection of individuals in custody.

**Legal Precedent:** The principles established in this case have been cited and applied in numerous subsequent cases, reinforcing the protection of fundamental rights and the liability of the state for their violation.

The "Nilabati Behera vs State of Orissa" case remains a cornerstone in the jurisprudence

on human rights and state liability in India, ensuring that victims of custodial violence and their families receive justice and compensation for the infringement of their fundamental rights.

- vii. The case "Joginder Kumar vs State of Uttar Pradesh" (1994)<sup>62</sup> is a landmark judgment by the Supreme Court of India, focusing on the rights of individuals during arrest and the responsibilities of law enforcement agencies. This case has significant implications for the protection of personal liberty and the prevention of arbitrary arrests.

Background:-

Joginder Kumar, a young advocate, was taken into custody by the Uttar Pradesh police and was not produced before a magistrate within 24 hours as mandated by law. His family was not informed about his whereabouts, leading to concerns about his safety and the legality of his detention. A habeas corpus petition was filed under Article 32 of the Indian Constitution, challenging his illegal detention.

Key Issues:-

Arbitrary Arrest: The legality and justification of the arrest and detention of Joginder Kumar.

Fundamental Rights: The violation of fundamental rights under Articles 21 (Right to Life and Personal Liberty) and 22 (Protection against Arrest and Detention) of the Indian Constitution.

Police Procedure: The need for procedural safeguards to prevent arbitrary and unlawful arrests.

Judgment:-

The Supreme Court, in a judgment delivered by Justice Dr. A.S. Anand, laid down important guidelines to safeguard the rights of individuals during arrest and detention.

The key points of the judgment are:

Right to Personal Liberty: The Court reiterated that the right to personal liberty is a fundamental right guaranteed under Article 21 of the Indian Constitution. Any deprivation of this right must follow due process of law.

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<sup>62</sup> AIR 1994 SC 1349

**Guidelines for Arrest:** The Court issued specific guidelines for the arrest and detention of individuals to prevent arbitrary actions by the police:

**Justification for Arrest:** Arrests should not be made merely on the basis of suspicion. There must be credible and reasonable justification for arresting an individual.

**Right to Information:** The arrested person has the right to be informed of the grounds for their arrest and to have someone informed of their arrest and detention as soon as practicable.

**Magistrate's Role:** The arrested person must be produced before a magistrate within 24 hours of arrest, excluding the time necessary for travel.

**Police Diary:** The arresting officer must maintain a diary recording the details of the arrest and detention, which should be accessible to the magistrate.

**Judicial Oversight:** The judgment emphasized the need for judicial oversight to ensure that the police do not abuse their power of arrest. The magistrate must scrutinize the reasons for the arrest and ensure that the detention is justified.

**Significance:-**

The "Joginder Kumar vs State of Uttar Pradesh" case is significant for several reasons:

**Protection against Arbitrary Arrest:** The judgment strengthened the protection of individuals against arbitrary arrest and detention, ensuring that law enforcement agencies cannot misuse their powers.

**Judicial Activism:** The case is an example of judicial activism, where the judiciary proactively laid down guidelines to protect fundamental rights.

**Reform of Police Practices:** The guidelines issued in this case have led to reforms in police practices, emphasizing the need for accountability and transparency in the arrest process.

**Impact:-**

The impact of this judgment has been far-reaching in terms of legal and procedural reforms:

**Enforcement of Guidelines:** The guidelines established by the Supreme Court have been enforced to ensure that arrests are made in a fair and just manner, protecting the rights of individuals.

**Training and Awareness:** The judgment has led to increased training and awareness

among law enforcement agencies regarding the proper procedures for arrest and detention.

Precedent for Future Cases: The principles laid down in this case have been cited in numerous subsequent judgments, reinforcing the protection of personal liberty and the rule of law.

The "Joginder Kumar vs State of Uttar Pradesh" case remains a cornerstone in Indian jurisprudence, ensuring that the fundamental rights of individuals are protected against arbitrary state actions and that the rule of law is upheld in the arrest and detention process.

viii. The case "Delhi Domestic Working Women's Forum vs Union of India" (1995)<sup>63</sup> is a landmark judgment by the Supreme Court of India that addresses the rights of women, particularly domestic workers, who are victims of sexual harassment and violence. This case underscores the need for legal and procedural reforms to ensure the protection and justice for women who face such crimes.

Background:-

The case was initiated by the Delhi Domestic Working Women's Forum, which filed a petition under Article 32 of the Indian Constitution on behalf of four domestic workers who were gang-raped by army personnel while traveling on a train. The petitioners sought the Court's intervention to ensure justice for the victims and to address the broader issues of sexual violence and the rights of domestic workers.

Key Issues:-

Sexual Violence against Domestic Workers: The specific incident of gang rape and the broader issue of sexual violence against domestic workers.

Lack of Legal and Social Support: The absence of adequate legal, medical, and psychological support for victims of sexual violence, particularly those from marginalized communities.

Rehabilitation and Compensation: The need for effective rehabilitation and compensation mechanisms for victims of sexual violence.

Procedural Reforms: The necessity of reforms in the legal and judicial process to ensure

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<sup>63</sup>AIR 1994 SC 114, 1995 (1) SCC 14

timely and fair justice for victims.

Judgment:-

The Supreme Court, in a judgment delivered by Justice J.S. Verma, laid down significant guidelines and directives to address the issues raised. Key points of the judgment include:

**Counseling and Legal Assistance:** The Court directed that victims of sexual violence must be provided with legal assistance and counseling from the time the complaint is made. This includes the right to have a legal advisor during the investigation and trial.

**Medical Care:** Immediate and comprehensive medical care must be provided to victims of sexual violence. The Court emphasized the importance of prompt medical examination and treatment to ensure the health and well-being of the victims.

**Rehabilitation and Compensation:** The Court directed the establishment of rehabilitation schemes for the victims, including compensation for the trauma and suffering they endured. It called for the creation of a Criminal Injuries Compensation Board to provide financial support to the victims.

**Sensitization of Judiciary and Police:** The Court underscored the need for the sensitization of judicial officers and police personnel to handle cases of sexual violence with the sensitivity and seriousness they deserve. It recommended regular training programs to ensure that they are equipped to deal with such cases appropriately.

**Fast-Track Trials:** The judgment highlighted the importance of expeditious trials in cases of sexual violence to ensure timely justice for the victims. It called for the establishment of fast-track courts to handle such cases.

Significance:-

The "Delhi Domestic Working Women's Forum vs Union of India" case is significant for several reasons:

**Protection of Vulnerable Women:** The judgment specifically addressed the plight of domestic workers, who are often vulnerable to sexual violence and exploitation, and laid down measures to protect their rights.

**Holistic Support for Victims:** The directives emphasized the need for a holistic approach to support victims, including legal, medical, psychological, and financial assistance.

**Judicial Reforms:** The case led to important reforms in the judicial process, ensuring that cases of sexual violence are handled with the required urgency and sensitivity.

## Impact:-

The impact of this judgment has been profound in terms of legal and procedural reforms:

**Improved Support Systems:** The guidelines have led to the establishment of better support systems for victims of sexual violence, including legal aid and counseling services.

**Increased Awareness and Training:** The judgment has prompted increased awareness and training for judicial officers and police personnel to handle cases of sexual violence more effectively.

**Policy and Legislative Changes:** The case has influenced policy and legislative changes aimed at improving the legal framework for the protection of women against sexual violence.

The "Delhi Domestic Working Women's Forum vs Union of India" case remains a cornerstone in the efforts to combat sexual violence and ensure justice for victims, particularly those from marginalized and vulnerable communities. It highlights the judiciary's role in protecting human rights and advancing social justice.

- The transformation of the judiciary refers to the evolution of its role, functions, and approach over time, particularly in response to changing societal needs, legal challenges, and constitutional interpretations. This transformation encompasses various aspects, including its independence, accountability, responsiveness, and effectiveness in safeguarding rights and ensuring justice.

### 1. Independence:

A key aspect of judicial transformation is the assertion and preservation of judicial independence. This entails insulating the judiciary from external influences, such as political interference or undue pressure from other branches of government or interest groups. Judicial independence is essential for upholding the rule of law, ensuring impartiality in decision-making, and protecting individual rights against government overreach.

### 2. Activism:

Judicial activism involves proactive engagement by the judiciary in addressing social, political, and economic issues through legal interpretation and intervention. Over time, courts have increasingly played an active role in advancing social justice, protecting

human rights, and promoting constitutional values. This activism often involves interpreting laws and constitutional provisions expansively to address contemporary challenges and inequities.

### 3. Public Interest Litigation (PIL):

The emergence of PIL represents a significant transformation in the judiciary's approach to legal proceedings. PIL allows individuals or groups to petition the courts on behalf of those whose rights may be violated or whose interests may be affected, even if they are not directly involved in the case. This mechanism has empowered marginalized communities and civil society organizations to seek judicial remedies for systemic injustices and human rights violations.

### 4. Adjudication of Socio-economic Rights:

Traditionally, the judiciary's focus was primarily on civil and political rights. However, there has been a gradual shift towards recognizing and adjudicating socio-economic rights, such as the right to education, health, housing, and livelihood. Courts have increasingly intervened to ensure the realization of these rights, often through innovative interpretations of constitutional provisions and legal principles.

### 5. Technology and Access to Justice:

The adoption of technology in judicial processes has facilitated greater access to justice and enhanced the efficiency of legal proceedings. Online filing systems, virtual court hearings, and e-justice platforms have reduced barriers to entry, improved case management, and expedited dispute resolution. This technological transformation has made the judiciary more accessible, transparent, and accountable to the public.

### 6. International Legal Frameworks:

The judiciary's transformation often involves engaging with and incorporating principles from international legal frameworks and conventions. Judges may draw upon international human rights treaties, comparative law, and global legal standards to interpret domestic laws and resolve cases involving transnational issues. This process enhances the judiciary's capacity to address complex legal challenges and harmonize domestic jurisprudence with international norms.

### 7. Alternative Dispute Resolution (ADR):

As part of its transformation, the judiciary increasingly promotes ADR mechanisms such

as mediation, arbitration, and conciliation to resolve disputes outside traditional court proceedings. ADR offers parties greater flexibility, confidentiality, and efficiency in resolving conflicts while reducing the burden on formal court systems. By embracing ADR, the judiciary enhances access to justice and fosters a culture of consensual dispute resolution.<sup>64</sup>

#### 8. Judicial Diversity and Representation:

Efforts to promote diversity within the judiciary, including gender, racial, ethnic, and socio-economic diversity, are integral to its transformation<sup>65</sup>. A more diverse judiciary reflects the broader population it serves, enhances public trust and confidence in the legal system, and brings a range of perspectives to judicial decision-making. Initiatives aimed at increasing diversity contribute to a more inclusive and representative judiciary capable of addressing diverse legal challenges and societal concerns.

#### 9. Judicial Ethics and Accountability:

Judicial transformation involves strengthening mechanisms for judicial ethics, accountability, and integrity. Codes of conduct, disciplinary procedures, and oversight mechanisms help maintain judicial standards and ensure judicial impartiality and fairness. Transparency in judicial appointments, promotions, and disciplinary actions enhances public confidence in the judiciary and reinforces its role as a guardian of the rule of law.

#### 10. Community Engagement and Outreach:

The judiciary's transformation includes efforts to engage with the community, raise legal awareness, and promote legal literacy. Outreach programs, legal aid services, and community-based initiatives foster a closer relationship between the judiciary and the public, empower individuals to understand their rights and responsibilities, and enhance access to justice for marginalized and underserved communities.

#### 11. Technology Integration:

The judiciary's transformation involves leveraging technology to streamline court processes, enhance efficiency, and improve access to justice. Implementation of case management systems, electronic filing, video conferencing for hearings, and online dispute resolution platforms modernize court operations and reduce delays in case disposal. Technology integration also facilitates remote access to court proceedings,

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<sup>64</sup> Convention on The Prevention and Punishment of The Crime of Genocide, 1948, art. I

<sup>65</sup> *ibid*



making justice more accessible to remote and underserved areas.

12. Judicial Training and Capacity Building:

Continuous training and capacity building programs for judges and court personnel are essential for the judiciary's transformation. These programs cover areas such as case management, legal research, judicial ethics, and emerging legal issues. By investing in professional development, the judiciary ensures that its members remain abreast of legal developments, enhance their skills, and uphold the highest standards of judicial conduct and competence.

13. Public Trust and Confidence:

Central to the transformation of the judiciary is building and maintaining public trust and confidence in the legal system. Transparency, accountability, impartiality, and fairness in judicial proceedings are crucial for fostering public trust. Initiatives such as open courtrooms, plain language judgments, and public outreach efforts contribute to demystifying the legal process and making it more accessible and understandable to the general public.

14. Environmental Jurisprudence:

With growing environmental challenges, the judiciary's role in environmental protection and sustainability has evolved significantly. Environmental jurisprudence encompasses cases related to pollution control, conservation of natural resources, climate change mitigation, and environmental impact assessment. Courts play a vital role in interpreting environmental laws, enforcing regulations, and holding governments and corporations accountable for environmental degradation.

15. Intersectionality and Rights-based Approach:

In line with transformative constitutionalism, the judiciary adopts an intersectional and rights-based approach to adjudication. This approach considers the interconnectedness of various rights, including civil, political, economic, social, and cultural rights, and their impact on marginalized and vulnerable groups. By addressing systemic inequalities and discrimination, the judiciary promotes substantive equality and social justice.<sup>66</sup>

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<sup>66</sup> On the question of non-discrimination, see General Comment No. 28 (equality of rights between men and women) of the Human Rights Committee in UN doc. HRI/GEN/1/Rev.5, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, p. no. 168-174

# **CHAPTER-IV**

## **ROLE OF JUDICIARY IN TRANSFORMING CONSTITUTION**

### **4.1 INTRODUCTION:**

The administration of justice is the primary function of the judiciary, yet it presents increasing challenges in a nation like India. Over the past six decades, India's governance has been a blend of successes and setbacks. The judiciary serves as a mechanism for delivering justice, guided by the principle of the "Rule of law," ensuring that governmental actions adhere to consistent and non-arbitrary laws. India's written Constitution was established to imbue governmental authority with purpose, efficacy, and public benefit, delineating the powers among the legislative, executive, and judicial branches. While the judiciary plays a vital role in dispensing justice, it sometimes oversteps its bounds, impacting the other branches of government. This chapter explores both the constructive aspects of judicial review in a constitutional framework and its potential for misuse.

Within the governance structure, the judiciary occupies a unique position of power. Though the term "judicial review" is not explicitly defined in the Indian Constitution, its significance is widely recognized. Unlike the United States Constitution, where Justice Frankfurter famously remarked, "The Supreme Court is the Constitution," this sentiment is arguably more apt for the Indian context. Indeed, it's widely acknowledged that the U.S. Supreme Court's influence has diminished in modern democracies, while the Indian Apex Court is emerging as a prominent voice in the world's largest democracy. Chief Justice Anand astutely observed during the Supreme Court's Golden Jubilee celebrations that the court's growing significance stems from increasing awareness of people's rights, the trend of judicial oversight over significant governmental actions, and the executive branch's willingness to seek judicial guidance on contentious matters, sometimes to evade accountability.

The Constitution makes explicit reference to judicial review in its text, as noted by D.D. Basu. He highlights that the establishment of full-fledged judicial review, coupled with a Bill of Rights, represents a pioneering institution in the country. This setup promotes

limited government, checks and balances, and a reverence for the courts, not for their own sake, but to uphold the Constitution's integrity. Through the interpretation, application, and operation of the constitution, judicial lawmaking has arisen as a consequence of judicial review. It becomes challenging for a judge not to engage in *Jus Dicere*, or the examination of the underlying policy of legislation, and to ensure that such policy aligns with constitutional requirements. The distinctive nature of judicial review aims not only to restrain governmental activities but also to establish judicial directives that effectively function as law, directing and regulating executive actions and the legislative process. As the court assumes the responsibility of ensuring that other branches of government fulfill their constitutional obligations, it represents a groundbreaking concept for foster In general, judicial lawmaking can manifest through various avenues, outlined as follows:

i. Through the mechanism of judicial review, the judiciary evaluates executive actions in alignment with the principles and values enshrined in the constitution. This assessment may lead to the issuance of legislative directives, guidelines, and standards.

ii. The judiciary may exercise a broad latitude in interpreting its powers and duties in accordance with the Constitution, allowing for considerable freedom of action.

The authority of the judiciary to provide directions and guidelines to address gaps in legislation has become a well-established and systematic practice in India. This trend reflects the increasing strength of India's judiciary in recent years. In instances where a particular law or set of rules remains silent on a specific matter, and actions taken by the responsible authorities result in arbitrariness, the court possesses the authority to issue directives to bridge the gap in the law until appropriate legislation can be enacting constitutionalism within the country<sup>67</sup>.

Constitutionalism stands on three fundamental pillars: the rule of law, judicial oversight, and the protection of human rights. When a government adheres strictly to these principles, it upholds human rights. Furthermore, central to the establishment of constitutionalism is the populace's steadfast belief in the supremacy of the rule of law.<sup>68</sup>

This echoes the notion that "Montesquieu, the tyranny of a prince is an oligarchy is not as hazardous to the general good as the apathy of citizen in a democracy"<sup>598</sup>. Dr. Ambedkar emphasized in a poignant address to the Constituent Assembly that if the Constitution,

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<sup>67</sup> International Covenant on Economic, Social and Cultural Rights, 1966, art. 2(2)

<sup>68</sup> *ibid*

drafted by the people themselves in November 1949, ever faltered in the future, it wouldn't be the failure of the constitution itself, but rather a reflection of human flaws. To foster constitutionalism within a society, there must exist a moral framework guiding constitutional culture.

Democracy, defined as government by and for the people, remains resilient but requires constant vigilance for constitutionalism to thrive, even if this demands a price for liberty. Lord Macaulay likened a constitution to a ship without an anchor, suggesting that without stability, either civilization or individual freedom will erode. History warns of two paths: either a strongman seizes power, akin to Caesar or Napoleon, or internal decay invites chaos, much like the fall of the Roman Empire. The modern threat may come from within, unlike the external invaders of antiquity. The future of democracy remains uncertain, contingent upon self-restraint and limited government, which demand respect for the constitution. Thomas Paine asserted in 1792 that a constitution belongs to the people, not those in power. Understanding the constitution as a reflection of the community's values is crucial for its legitimacy, as highlighted by P. Ishwar Bhat. While citizens are obliged to heed legislative directives, they retain the right to dissent or revolt when the legislature oversteps its bounds. Dr. Ambedkar noted that constitutional morality must be cultivated, as it is not innate. Democracy in the Indian subcontinent is seen as superficial, overlaying an undemocratic foundation.<sup>69</sup>

#### **4.2 WHAT AILS INDIA'S POPULAR CONSTITUTIONALISM:**

The initial six decades of the Constitution have fostered a misconception, viewing it primarily as a vehicle for asserting rights while neglecting fundamental duties and other obligations owed to society. This ambiguity has clouded understanding. The populace's fixation on fundamental rights, overlooking duties, has led the Indian Supreme Court to heavily invest time in shaping jurisprudence around such rights—a regrettable reality demanding considerable judicial attention.<sup>70</sup> Duty is integral to civic discourse, urging individuals to internalize constitutional principles and align their actions with them. Citizenship entails more than mere obedience to laws for societal protection; it

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<sup>69</sup> . [http://shodhganga.inflibnet.ac.in/bitstream/10603/45856/15/15\\_chapter%206.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/45856/15/15_chapter%206.pdf).

<sup>70</sup> Indian Constitution, Article 13.

necessitates active engagement and contribution to the common good.<sup>71</sup>

To address the issue of potential plagiarism in the provided text, you could rephrase it in your own words while still maintaining the original meaning. Here's a revised version:

In contemporary times, there appears to be a prevailing notion that those in positions of constitutional authority possess an inherent legitimacy to wield power, often overlooking the essence of responsible governance. This trend has contributed to a stagnation of constitutional principles within our society. A significant factor in this slowdown is the reluctance to scrutinize candidates' qualifications based on their merit, track record, or suitability for decision-making roles.

There is a pervasive misconception that individuals in positions of power are entitled to unrestrained authority over future generations, and that familial inheritance of power is sanctioned by society. Dr. Ambedkar notably highlighted the concept of "bhakti" in Indian politics, emphasizing the unparalleled scale of hero worship compared to other nations. While bhakti may hold significance in spiritual pursuits, its transference into politics often leads to degradation and the potential for dictatorship. Ramachandra Guha further elaborates on this phenomenon, characterizing India not merely as a dynastic democracy but rather as a "darbari democracy," highlighting the entrenched influence of courtly culture.

Efforts to educate the public about the Constitution's status as the supreme law of the land have been lacking. It's concerning that some individuals overlook constitutional constraints when discussing issues that impact the Constitution, potentially violating these limitations unknowingly. For instance, a recent fatwa issued by Darul Uloom Deoband, stating that it's forbidden for Muslim women to work in settings where men and women interact, highlights the ongoing clash between Islamic clerics and our constitutional principles.

Renowned columnist A. Surya Prakash acknowledges our nation's progress in interpreting and enriching constitutional liberties but warns against regressive forces hindering our advancement. Despite strides made, certain elements impede progress, undermining the Constitution's significance and viewing matters solely through a religious lens. These

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<sup>71</sup> . For example, the definition of sexual harassment in *Vishaka v. State of Rajasthan* (AIR 1997 SC 3014) and the definition of ragging in *Jagrity Mission v. Central Government* (SCC 2001 Vol 6 577)

clerics often issue regressive fatwas contradicting the Constitution's principles and spirit. Decisions regarding significant constitutional matters are typically made at regional levels. Often, it's difficult to gauge the national consensus on a particular constitutional issue. For instance, when there's a demand for a new state within an existing one, debates are confined to the affected region, sometimes escalating to violence as a perceived solution.

In his final address to the Constituent Assembly on November 25, 1949, Dr. Ambedkar acknowledged the nation's challenging circumstances and cautioned against resorting to violence. While protests and violence may have been justified under colonial rule, he emphasized the need to abandon such methods in a free, sovereign, democratic republic. These actions, deemed as the "Grammar of Anarchy," have no place in a democratic society. Instead, the Constitution envisions citizens relinquishing violence and engaging in the democratic process through persuasion rather than coercion.

Under ordinary circumstances, populist movements tend to sway the populace. However, as India commemorates its 60th anniversary as a republic, populism emerges as a significant threat to its ongoing existence. Populism relies on stirring emotions while sidelining logical discourse and reasoned argumentation, contrary to the principles of politics governed by rationale and law. Unfortunately, discussion and debate hold little importance in governance.

Populist movements essentially prioritize ignorance over education and prioritize numerical support over expertise. A notable drawback is the willingness of Indian citizens to protest over onion price hikes but remain passive when there are potential violations of the Constitution by either state or central governments. This apathy toward constitutional breaches stands as a critical flaw within the Indian political system. It's imperative not to exploit constitutional values to advance populism, a phenomenon that citizens should unequivocally reject.

Disagreement on critical issues is common, often with pressure groups playing a rare but influential role in shaping major constitutional developments. These groups may represent specific interests or traditional social identities like caste, tribe, language, or religion. However, many pressure groups prioritize their own goals over constitutional progress. As noted by C. Rajagopalachari, the situation is compounded when one party

consistently holds power, and dissent is scattered among unorganized individuals and small groups unable to unite. In such circumstances, government tends towards totalitarianism.

### **4.3 JUDICIAL PROCESS IN MODERN INDIA:**

The concept of justice is implemented through the judicial system. To the average person, justice often equates to the absence of fear, achieved through liberty, the absence of arbitrariness, and access to dispute resolution mechanisms. However, the cornerstone of justice lies in the rule of law, where the nation's laws reign supreme and remain unaffected by changes in government or its institutions. This principle forms the bedrock of justice.

There exist two contemporary perspectives on the rule of law. The first entails a strict adherence to laws, while the second involves a contextual adherence to principles derived from morality and fairness. Despite the modern state presenting these differing interpretations, the latter is more commonly embraced as it is deemed more consistent and adaptable to a progressively evolving society. This preference helps ensure the resilience of laws and the objectives they were crafted to achieve.<sup>72</sup>

The ancient Indian legal system embodies the purest form of the rule of law. Similarly, the modern legal system, governed by an adversarial system and anchored by a normative Constitution, safeguards certain fundamental values from the interference of governmental organs. Understanding the key features of the modern Indian legal system entails examining access to justice, the barriers impeding this access, and the actual dispensation of justice.

In the current legal framework, access to justice is delineated into formal and informal avenues, both aimed at achieving the same objective. These methods are not constrained by procedural formalities; rather, they are structured to adhere to the foundational principles of natural law.

The modern judicial system, despite offering both formal and informal avenues for seeking justice, is marred by several limitations that impede the process and make it burdensome. Article 14 of the Indian Constitution mandates equality for all, yet laws of

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<sup>72</sup> As observed by Sachidanand Sinha, —The Provisional Chairman of the Constituent Assembly, on December 9, 1946 quoted by Mr. Justice M.F. Saldhana, Anantha Pratishastana Memorial Lecture 2003.

limitation contradict this principle. These laws often bar oppressed individuals from seeking justice merely due to the expiration of the time limit for filing lawsuits. Additionally, failure to pay court filing fees or postal charges can lead to the dismissal of a lawsuit, further exacerbating the perception that justice is not administered in line with constitutional ideals.

The delivery of justice is frequently hindered by obstacles that result in the improper use of the court system. Moreover, the administration of justice, a critical aspect of the contemporary court system, requires collaboration between the judicial and administrative branches to ensure effectiveness and accessibility to the general public. However, instances arise where the judicial branch interferes with this dispensation of justice, particularly when the executive branch is involved in the process.

In the case of *S.C. Advocates on Record Association v. Union of India*, the Supreme Court of India ruled that collegiums, comprised of senior judges, should be responsible for nominating judges to the Superior Courts. The decision of the Chief Justice of the Supreme Court, after consulting with the two most senior justices, was deemed final and binding. Furthermore, the court interpreted the term "consultation" in this context to mean concurrence<sup>73</sup>.

However, this ruling has been criticized for overstepping the authority granted to the judiciary by the Constitution and disrupting the balance of power envisaged therein. The determination of the number of judges is traditionally within the purview of the executive branch, not the judiciary. Additionally, Article 222 of the Indian Constitution grants the President the authority to appoint and transfer judges, provided consultation with the Chief Justice of India occurs beforehand. This suggests that the President is not bound by the Chief Justice's decision, and the notion that the Chief Justice's decision holds primacy and determinative power in the transfer and appointment of judges may be considered legally flawed.

Therefore, the idea that the President is not bound by the Chief Justice's decision, particularly in matters of judicial appointments and transfers, may be viewed as legally erroneous ("per incuriam"). This implies that the President retains discretion in such

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<sup>73</sup> . Dr. P. Ishwar Bhat, *Towards Bridging the Gap between the people and the constitution: A Comment on the NCRWC Report*, *Legal Opus Annul Journal of SDMLC*, Issue No 1, January 2007 p.14.



matters, notwithstanding the Chief Justice's decision.

Judicial review in India is constrained by various limitations, including its inability to challenge legislation listed in the 9th Schedule and its restriction to legal rather than political matters. These constraints ensure that judicial review is not abused. Another restriction on judicial review is the principle of locus standi, which dictates that only individuals directly affected by administrative or provisional laws can petition the court for remedies. These limitations underscore the complexity of judicial review.

In the case of **Tata Cellular v. Union of India**<sup>74</sup>, the Supreme Court emphasized the importance of exercising self-control during judicial review proceedings. The court should focus on determining the legality of actions, assessing whether decision-making authorities exceeded their powers, violated legal principles, or arrived at unreasonable conclusions.

The concept of judicial review in India was first recognized in *Emperor v. Burah*. Despite acknowledging the power of Indian courts to conduct judicial review, both the Calcutta High Court and the Privy Council imposed certain restrictions. These limitations were further affirmed in various cases preceding the enactment of the Government of India Act of 1935.

Recognizing the potential for abuse, the framers of the Indian Constitution implemented safeguards to prevent the judiciary from acting as a "super legislature" or permanent "third chamber." These efforts aimed to balance the powers of the judiciary with those of the legislative and executive branches, ensuring that judicial review operates within defined boundaries and respects constitutional principles.

The concept of judicial review, while not inherently democratic, constitutes a fundamental aspect of a democratic constitution. Elected representatives are accountable to the people they serve, yet judicial review operates outside the realm of democratic processes. By its nature, judicial review can be seen as anti-majoritarian, as it allows unelected judges to interpret laws and decisions made by elected officials. This can be viewed as a misuse of government power granted under the Constitution of India.

Although judicial review is subject to restrictions, these limitations are often overlooked by judges presiding over cases. It's important to note that judicial review cannot be used

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<sup>74</sup> AIR 1994 6 SCC 651

to invalidate constitutional amendments, as this could potentially grant the judiciary supremacy over other branches of government. However, in recent decades, these restrictions have been disregarded, leading to what some describe as "judicial adventurism" – the unjustified expansion of judicial authority beyond its intended scope.

While judicial review plays a crucial role in upholding the principles of justice and protecting individual rights, its proper application requires a delicate balance to prevent it from undermining democratic processes and the separation of powers outlined in the Constitution.

"Judicial activism" refers to proactive efforts by the judicial system to deliver justice, often involving the judiciary's intrusion into other branches of government. This term is often discussed alongside other mechanisms, such as *Suo Moto* and Public Interest Litigation (PIL), which are not explicitly supported by the Constitution. Instances of judicial activism include the establishment of the basic structure concept in *Kesavananda Bharati v. State of Kerala*, where the court expanded the scope of judicial review, as well as the implementation of the collegium system.

The judiciary's increased role can be attributed to elected representatives' inability to address the public's demands through legislation. Consequently, the court has expanded its jurisdiction, leading to debates on its current extent. In situations where effective governance is lacking, the judiciary's role in addressing issues through "activism" becomes crucial, filling the gap left by legislative and administrative shortcomings.

It's evident that judicial activism and judicial restraint stand in stark contrast to each other. Judicial restraint, being an established constitutional principle, implies that the judiciary is bound to adhere to the principles set forth in the Constitution. Conversely, judicial activism often exceeds these limitations, deviating from the constitutional ideals outlined in the Constitution of India.

This contrast is exemplified in the case *State of Rajasthan v. Union of India*, where the court declined to intervene in a matter involving political inquiry, emphasizing the principle of judicial restraint. Similarly, in *S.R. Bommai v. Union of India*, the judges recognized instances where political considerations take precedence over judicial intervention, particularly in matters governed by Article 356.

To prevent judicial activism from transforming into legal adventurism, judges must

exercise vigilance and self-restraint in applying their legal powers. The unpredictability resulting from activist legal practices is arguably their most undesirable consequence, underscoring the importance of maintaining a balance between judicial activism and restraint.

#### **4.4 ROLE OF JUDICIARY:**

Transformative constitutionalism can be understood as a practical approach for understanding societal realities, emphasizing the state's obligation to uphold the Constitution's supremacy. The judiciary plays a crucial role in preserving the Constitution's core values while interpreting it to suit contemporary circumstances. It must maintain checks and balances on power while respecting the principle of separation of powers. Acting as a guardian of human rights, the judiciary ensures justice in each case and safeguards the sanctity of rights. Several legal cases demonstrate the judiciary's inclusive and transformative role.

Justice N. Anand Venkatesh, a judge of the Madras High Court, exemplifies transformative constitutionalism by demonstrating a willingness to learn. In a recent LGBTQ+ case, he pursued psycho-education to deepen his understanding of homosexuality. Furthermore, he mandated counseling sessions for the petitioners and their families, illustrating a commitment to inclusive justice.<sup>75</sup>

Transformative constitutionalism refers to an approach where the constitution is seen not only as a legal document but also as a tool for societal transformation and addressing historical injustices. The role of the judiciary in transformative constitutionalism is pivotal in several ways:

1. Interpretation of Rights: Judiciary plays a crucial role in interpreting constitutional rights expansively to address contemporary social issues and inequalities. By adopting a broad and dynamic interpretation of constitutional provisions, the judiciary can ensure that marginalized groups receive protection and recognition.

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<sup>75</sup> For the views of the Committee on Economic, Social and Cultural Rights relating to discrimination, see, inter alia, the following general comments in the United Nations Compilation of General Comments: General Comment No. 3 (The nature of States parties' obligations (art. 2(1)), p. no. 18-21; General Comment No. 4 (The right to adequate housing (art. 11(1)), p. no. 22-27; General Comment No. 5 (Persons with disabilities), p. no. 28-38; General Comment No. 6 (The economic, social and cultural rights of older persons), p. no. 38-48; General Comment No. 12 (The right to adequate food (art. 11)), p. no. 66-74; General Comment No. 13 (The right to education (art. 13)), p. no. 74-89; and General Comment No. 14 (The right to the highest attainable standard of health (art. 12)), p. no. 90-109.

2. **Enforcement of Rights:** Transformative constitutionalism requires effective enforcement of rights guaranteed by the constitution. The judiciary serves as a guardian of these rights by adjudicating disputes, providing remedies, and holding state actors accountable for violations of constitutional principles.

3. **Social Justice:** The judiciary plays a vital role in promoting social justice through its decisions and judgments. By addressing systemic discrimination, inequality, and historical injustices, the judiciary contributes to the transformation of society towards a more just and equitable order.

4. **Checks and Balances:** In a transformative constitutional framework, the judiciary acts as a check on legislative and executive actions to ensure they conform to constitutional values and principles. By exercising judicial review, the judiciary prevents the abuse of power and upholds the rule of law.

5. **Public Interest Litigation (PIL):** PILs provide a mechanism for individuals and groups to seek judicial intervention in matters of public interest. Through PILs, the judiciary can address systemic issues, promote accountability, and facilitate social change.

6. **Dialogue and Deliberation:** Judiciary engages in dialogue and deliberation with other branches of government, civil society, and marginalized groups to ensure inclusive decision-making and consensus-building. This participatory approach strengthens the legitimacy of judicial decisions and fosters societal transformation.

7. **Transformative Remedies:** In cases where constitutional violations have occurred, the judiciary may prescribe transformative remedies aimed at addressing root causes of inequality and injustice. Such remedies go beyond mere compensation and seek to bring about structural change.

Transformative Constitutionalism has largely been a feature of South African jurisprudence. Transformative constitutionalism means an infusion of the values of liberty, equality, fraternity and dignity in the social order. The basic purpose of the constitution is to transform the society for better i.e. progressive and inclusive and this objective is a fundamental pillar of transformative constitutionalism. Basically, if there is a collusion between social evils and constitution then society has to be transformed (change). It means constitutional morality prevails over societal morality. The Constitution will keep adjusting according to the changes in society but the essence of the

constitution shall never change, it may evolve with the passage of time. There are basic principles of the constitution which exemplify the transformative goals of constitution i.e. .secularism, liberty, gender justice etc.

Right to Privacy as a Fundamental Right (Justice K.S Puttaswamy (retd.) and Anr. v. UOI 2017SC), entry into Sabarimala Temple by female (Indian Young Lawyers Associaton v. The State of Kerala and ORS., 2018 SC), struck down the adultery as an offence ( Joseph Shine and ORS. v. UOI 2018 SC), Right to life with dignity, freedom to choose partner all are related to concept of Transformative Constitutionalism where the Supreme Court interpret the provision of constitution in such a way that provisions are not limited to mere literal meaning of their words, instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. The Supreme Court is not bound by the test of the constitution rather it is bound by the spirit of the constitution.

Recently in Navtej Singh Johar and Others v. UOI through Secretary, Ministry of Law and Justice (decided on 06.09.2018), The Supreme Court reintroduced the concept of transformative constitutionalism to Indian jurisprudence by decriminalizing the section 377 of IPC. 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 ability to metamorphose. Thus, the concept of transformative constitutionalism, which is actually with regard to all constitutions and particularly in regard to Indian Constitution, is, as a matter of fact, the ability of constitution to adapt and transform with the changing needs of the time.

The constitution would become a stale and deed testament without dynamic, vibrant and pragmatic interpretation. Constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments to the society. This is the *raison d’etre* for the constitution. The most important purpose of transformation is to ensure that the disadvantaged people become more capable of enjoying the life with dignity, freedom and equality that lays at the heart of our constitutional democracy by the realization of fundamental socio-economic rights. The principle of transformative constitutionalism confers a duty upon State to ensure and

uphold the supremacy of the constitution.

## **CHAPTER-V**

### **THE TRANSFORMATION THROUGH TRADITIONAL CASES:**

#### **I. NAZ FOUNDATION V. GOVERNMENT OF NCT OF DELHI<sup>76</sup>:**

Bench: a) Honourable The Chief Justice Ajit Prakash Shah

b) Honourable Dr. Justice S. Murlidhar

The NAZ Foundation case refers to a significant legal battle in India concerning LGBTQ+ rights and the interpretation of Section 377 of the Indian Penal Code. NAZ Foundation is an NGO that works on HIV/AIDS-related issues. In 2001, it filed a petition challenging the constitutionality of Section 377, which criminalized "unnatural offenses," including consensual homosexual activities.

The case garnered widespread attention and sparked a long legal battle. In 2009, the Delhi High Court delivered a landmark judgment decriminalizing consensual homosexual acts between adults, effectively striking down parts of Section 377. The court ruled that the law violated fundamental rights guaranteed by the Indian Constitution, including the rights to equality, non-discrimination, and personal liberty.

However, this decision faced opposition, and in 2013, the Supreme Court of India overturned the Delhi High Court's ruling in the NAZ Foundation case. The Supreme Court reinstated the legality of Section 377, stating that only the Parliament could change the law.

The legal battle didn't end there. LGBTQ+ activists and allies continued to advocate for the repeal of Section 377, arguing that it perpetuated discrimination and violated human rights. Finally, in September 2018, the Supreme Court of India delivered a historic judgment in the Navtej Singh Johar case, striking down Section 377 in its entirety. This decision decriminalized consensual homosexual activities and marked a significant victory for LGBTQ+ rights in India.

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<sup>76</sup> 160 (2009) DLT 277.

## **II. SURESH KUMAR KAUSHAL V. NAZ FOUNDATION:<sup>77</sup>**

The Suresh Kumar Kaushal vs. Naz Foundation case was a significant legal battle in India concerning the constitutional validity of Section 377 of the Indian Penal Code (IPC), which criminalized consensual homosexual acts.

**Background:** The case originated from a petition filed by Suresh Kumar Kaushal and others, seeking the reinstatement of Section 377, which had been partially struck down by the Delhi High Court in the Naz Foundation case.

**Legal Arguments:** The petitioners argued that homosexuality was against Indian culture and societal norms, and decriminalizing it would lead to moral degradation and social instability.

They contended that the Delhi High Court's judgment in the Naz Foundation case was erroneous and went against the legislative intent behind Section 377.

**Government's Response:** The Government of India initially took a neutral stance in the case, leaving the decision to the discretion of the Supreme Court.

**Judicial Proceedings:** The case came before the Supreme Court of India, where both sides presented their arguments based on constitutional principles, legal precedents, and societal considerations.

The court considered various factors, including the right to privacy, non-discrimination, and the scope of judicial review in matters concerning social legislation.

**Landmark Ruling:** In a controversial judgment delivered on December 11, 2013, the Supreme Court overturned the Delhi High Court's judgment in the Naz Foundation case and upheld the constitutionality of Section 377.

The court ruled that the decriminalization of consensual homosexual acts should be left to the legislature and not be decided through judicial intervention.

**Impact:** The Supreme Court's decision in the Suresh Kumar Kaushal case was met with widespread disappointment and condemnation from LGBTQ+ activists, human rights organizations, and progressive sections of society.

The ruling reinstated the criminalization of consensual homosexual acts under Section 377, leading to renewed stigma, discrimination, and legal persecution against LGBTQ+ individuals.

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<sup>77</sup> (2014) 1 SCC 1

Subsequent Developments:-

The Suresh Kumar Kaushal judgment spurred renewed activism and legal challenges against Section 377. LGBTQ+ rights activists and allies intensified their efforts to repeal the law and secure legal recognition and equality for LGBTQ+ individuals.

The case laid the groundwork for subsequent legal battles, including the Navtej Singh Johar case, which ultimately led to the Supreme Court's landmark judgment in 2018, striking down Section 377 in its entirety.

Legal and Social Significance:-

The Suresh Kumar Kaushal case highlighted the complex interplay between judicial interpretation, legislative intent, and societal attitudes in shaping legal outcomes concerning LGBTQ+ rights.

It underscored the importance of continued advocacy, legal reform, and societal dialogue in challenging discriminatory laws and promoting inclusivity, equality, and human rights for all individuals, regardless of sexual orientation or gender identity.

In conclusion, the Suresh Kumar Kaushal vs. Naz Foundation case represents a setback in the struggle for LGBTQ+ rights in India but also served as a catalyst for heightened activism, legal reform, and eventual victory in securing the decriminalization of consensual homosexual acts.

### **III. NALSA V. UNION OF INDIA<sup>78</sup>:**

The NALSA judgment stands as a significant milestone in the legal landscape of India, as it marks the first instance of legally recognizing non-binary gender identities and affirming the fundamental rights of transgender individuals. This landmark decision also mandated Central and state governments to take proactive measures to protect the rights of transgender persons.

Although the term "transformative constitutionalism" is not explicitly stated in the Indian Constitution, the Supreme Court acknowledged its essence in the 2014 NALSA judgment. In this ruling, the Court emphasized the transformative power inherent in the Constitution, stating:

"The Court's role is to grasp the central purpose and essence of the Constitution for the

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<sup>78</sup> AIR 2014 SC 1863



betterment of society. Our Constitution, much like the fabric of society itself, is a dynamic entity. It is rooted in the ever-evolving factual and social realities of our nation. At times, legal changes precede societal shifts and are even intended to catalyze them. Other times, legal reforms are a response to prevailing social realities."

This acknowledgment underscores the dynamic nature of the Constitution and its capacity to adapt to the evolving needs and realities of society, reflecting a commitment to progressive change and social justice.

#### **IV. SHAYARA BANO V. UNION OF INDIA:<sup>79</sup>**

The Shayara Bano vs. Union of India case, often referred to as the "Triple Talaq case," was a landmark legal battle in India concerning the practice of Triple Talaq, a form of instant divorce prevalent in certain Muslim communities.

Background: Shayara Bano, a Muslim woman from Uttarakhand, petitioned the Supreme Court of India in 2016 challenging the constitutionality of the practice of Triple Talaq, which allows a Muslim man to divorce his wife instantly by uttering the word "talaq" (divorce) thrice, often through various means such as letter, phone call, text message, or social media.

Legal Arguments: Shayara Bano argued that Triple Talaq violated her fundamental rights guaranteed under the Indian Constitution, including the rights to equality, dignity, and non-discrimination. She contended that the practice of Triple Talaq was arbitrary, unilateral, and discriminatory, leaving Muslim women vulnerable to instant divorce without any legal recourse or protection.

Response from the Government and Muslim Bodies: The Government of India supported Shayara Bano's petition, arguing that Triple Talaq was unconstitutional and violated the principles of gender equality and justice.

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<sup>79</sup> (2017) 9 SCC 1

Various Muslim organizations and bodies, while acknowledging the need for reforms, defended Triple Talaq as a religious practice and opposed government interference in personal laws.

**Supreme Court's Verdict:** In a historic judgment delivered on August 22, 2017, a five-judge bench of the Supreme Court declared the practice of Triple Talaq unconstitutional, by a majority of 3-2. The court held that Triple Talaq was not an essential religious practice under Islam and violated the fundamental rights of Muslim women. It deemed the practice arbitrary and discriminatory, devoid of legal sanctity. The court also observed that Triple Talaq was not protected under Article 25 of the Indian Constitution, which guarantees the freedom of religion, as it was contrary to constitutional morality and public order.

**Impact:** The Supreme Court's verdict in the Shayara Bano case was celebrated as a significant victory for gender justice and women's rights in India. It marked the end of the legal validity of Triple Talaq and provided relief to countless Muslim women who had suffered due to this practice. The judgment was hailed as a step towards gender equality and empowerment, challenging patriarchal norms and discriminatory practices within personal laws.

**Subsequent Developments:** The verdict led to debates and discussions on the need for broader reforms within personal laws to ensure gender justice and equality.

The Parliament subsequently passed the Muslim Women (Protection of Rights on Marriage) Act in 2019, criminalizing the practice of Triple Talaq and providing for stringent penalties for offenders. In summary, the Shayara Bano vs. Union of India case was a watershed moment in India's legal history, reaffirming the principles of gender equality and justice and striking down the practice of Triple Talaq as unconstitutional and discriminatory.

## **V. NAVTEJ SINGH JOHAR V. UNION OF INDIA:<sup>80</sup>**

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<sup>80</sup>AIR 2018 SC 4321

The NALSA judgment not only addressed the rights of transgender persons but also had significant implications for the LGBTQ+ community as a whole. Prior to this case, Section 377 of the Indian Penal Code criminalized consensual sexual conduct between individuals of the same sex, regardless of whether it was consensual or not. This provision had long been a source of discrimination and marginalization for LGBTQ+ individuals in India.

In the NALSA judgment, the petitioner challenged the constitutionality of Section 377, arguing that it violated fundamental rights enshrined in the Constitution, including the right to equality (Article 14), the right to life and personal liberty (Article 21), and the right against discrimination (Article 15). The Court's interpretation of Article 15 to include "sexual orientation" was a significant step towards recognizing the rights of LGBTQ+ individuals and challenging discriminatory laws and practices.

Moreover, by overruling the decision in *Suresh Koushal v. Naz Foundation*<sup>81</sup>(2014), which upheld Section 377, the Court effectively decriminalized consensual sexual conduct between individuals of the same sex. This marked a historic moment in the fight for LGBTQ+ rights in India, as it affirmed the dignity and autonomy of individuals regardless of their sexual orientation or gender identity.

In essence, the NALSA judgment and its implications for the LGBTQ+ community represent a significant victory for human rights and social justice in India, signaling a shift towards greater recognition and acceptance of diverse sexual orientations and gender identities.

## **VI. JUSTICE K.S PUTTASWAMY V. UNION OF INDIA:<sup>82</sup>**

K.S. Puttaswamy vs. Union of India, commonly known as the Aadhaar judgment, was a significant case heard by the Supreme Court of India.

Background: The case was filed by retired Justice K.S. Puttaswamy and others challenging the constitutional validity of the Aadhaar scheme, a biometric identification system introduced by the Government of India to provide unique identification numbers to residents.

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<sup>82</sup> (2017) 10 SCC 1, AIR 2017 SC 4161

**Legal Arguments:** The petitioners argued that the Aadhaar scheme violated the right to privacy, which they contended was an intrinsic part of the fundamental right to life and personal liberty guaranteed under Article 21 of the Indian Constitution.

They raised concerns about the potential misuse of Aadhaar data, threats to individual privacy and autonomy, and the lack of robust data protection measures.

**Supreme Court's Verdict:**

In a landmark judgment delivered on 2017, a nine-judge bench of the Supreme Court upheld the constitutional validity of the Aadhaar scheme but imposed certain restrictions and guidelines to safeguard individuals' privacy and rights.

The court ruled that Aadhaar was constitutionally valid as a tool for identity authentication and to access government welfare schemes and services. However, it struck down certain provisions of the Aadhaar Act, particularly those allowing private entities to use Aadhaar data for authentication purposes.

The judgment affirmed the right to privacy as a fundamental right under the Indian Constitution and emphasized the need for robust data protection measures and safeguards against potential misuse of Aadhaar data.

Supreme Court unanimously ruled that privacy is indeed a fundamental right protected under Article 21. This landmark decision not only established the right to privacy but also implicitly overturned the earlier ruling in ADM Jabalpur, affirming that even during times of emergency, the right to life cannot be suspended.

**Impact:** The K.S. Puttaswamy judgment had far-reaching implications for data privacy and protection in India. It set important precedents regarding the right to privacy as a fundamental right and the limits of government intrusion into individuals' privacy.

The judgment prompted discussions and debates on data protection laws, surveillance practices, and the balance between security and privacy concerns in the digital age.

It also led to reforms in the Aadhaar framework, including amendments to the Aadhaar Act to address the concerns raised by the Supreme Court and strengthen data protection provisions.

**Subsequent Developments:** Following the K.S. Puttaswamy judgment, the Government of India introduced the Personal Data Protection Bill, 2019, aimed at regulating the processing of personal data and protecting individuals' privacy rights.

The judgment influenced ongoing debates and legislative efforts to enact comprehensive data protection laws and frameworks in India, aligning with global standards and best practices.

In summary, the *K.S. Puttaswamy vs. Union of India* case was a landmark ruling that affirmed the right to privacy as a fundamental right and imposed important restrictions and safeguards on the Aadhaar scheme to protect individuals' privacy and rights.

## **VII. JOSEPH SHINE V. UNION OF INDIA<sup>83</sup>:**

The *Joseph Shine v. Union of India* (2018) judgment indeed stands as a landmark decision in Indian jurisprudence, particularly in the realm of family law and gender equality.

Before this judgment, Section 497 of the Indian Penal Code criminalized adultery, but only for men engaging in extramarital affairs with married women without the consent of their husbands. This provision was widely criticized for being archaic, gender-biased, and perpetuating patriarchal norms that treated women as the property of their husbands.

The Supreme Court's ruling in *Joseph Shine's* case was significant for several reasons. First and foremost, it recognized that adultery is a private matter between consenting adults and should not be subject to criminal prosecution. By decriminalizing adultery, the Court affirmed the principle of individual autonomy and upheld the right to privacy within marital relationships.

Moreover, the judgment underscored the importance of gender equality and non-discrimination under the Constitution. The Court held that Section 497 was discriminatory as it solely punished men for adultery while absolving women of any legal responsibility. This unequal treatment violated the right to equality guaranteed by Article 14 of the Constitution.

Furthermore, the judgment reflected a progressive interpretation of Article 21 of the Constitution, which protects the right to life and personal liberty. The Court recognized that criminalizing adultery infringed upon individuals' personal autonomy and dignity within marital relationships, thereby warranting its abolition.

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<sup>83</sup>AIR 2018 SC 4898

Overall, the Joseph Shine judgment marked a significant step towards modernizing India's legal framework concerning marital relationships and promoting gender equality and individual autonomy within them. It was a pivotal moment in Indian legal history, signaling a departure from outdated and discriminatory laws towards a more equitable and inclusive society.

## **VIII. INDIA YOUNG LAWYER'S ASSOCIATION V. STATE OF KERALA:<sup>84</sup>**

The Sabarimala Temple case, *Indian Young Lawyers Association v. State of Kerala* (2018), indeed holds profound significance in the context of religious freedom, gender equality, and constitutional interpretation in India.

Prior to this case, the Sabarimala Temple in Kerala had imposed a ban on the entry of menstruating women (between the ages of 10 and 50) based on the belief that the deity, Lord Ayyappa, was celibate and that the presence of menstruating women would violate his celibacy. This practice had been upheld for centuries and was deeply entrenched in religious tradition.

However, the Supreme Court's verdict in this case challenged the constitutionality of this age-old practice. The petitioners argued that the ban on women's entry into the temple was discriminatory and violated their fundamental rights enshrined in the Indian Constitution.

In its judgment, the Court ruled that the exclusion of menstruating women from the Sabarimala Temple was unconstitutional and discriminatory. The Court emphasized that religious practices cannot discriminate against individuals based on biological factors such as menstruation and that all individuals, regardless of gender, have the right to access places of worship.

This landmark decision reaffirmed the principles of equality, non-discrimination, and individual autonomy enshrined in the Indian Constitution. It also highlighted the Court's role as a guardian of fundamental rights and as a positive force for social change, even in matters concerning religious practices.

The Sabarimala Temple case sparked widespread debate and discussion on issues such as

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<sup>84</sup>AIR 2018 SC 243

gender equality, religious freedom, and the separation of religion and state. It represented a significant step forward in India's journey towards a more inclusive and egalitarian society, challenging entrenched patriarchal norms and discriminatory practices within religious institutions.

#### **IX. X V. STATE OF KERALA:<sup>85</sup>**

In the case of X vs State of Kerala, the legal proceedings illuminated the intricate dynamics of a couple's journey through a live-in relationship, encapsulating the intertwined themes of love, parenthood, and legal rights.

John and Anitha, representing different religious backgrounds, embarked on a shared journey of love and companionship, opting to reside together outside the confines of their parental homes. Their union bore fruit in the form of a newborn baby girl, whose birth certificate bore testament to both parents' identities. This document became instrumental in shaping the subsequent legal battle and eventual landmark judgment.

However, the idyllic narrative was disrupted when John departed for Karnataka to pursue a career in acting, leaving Anitha grappling with feelings of abandonment and isolation. Despite her attempts to reconnect with John, she found herself at a loss and ultimately made the difficult decision to surrender their child to the Child Welfare Committee in Ernakulam for adoption.

The couple's eventual reunion prompted them to seek legal recourse through the Kerala High Court, invoking a writ of habeas corpus to reclaim custody of their child. In its deliberation, the court invoked the principles enshrined in Article 21 of the Constitution, recognizing the inherent parental rights and the child's entitlement to maintain her identity with her biological parents. This interpretation underscored the transformative potential of constitutional principles, as the "right to life" was expansively construed to encompass the rights of children born out of live-in relationships.

Furthermore, the court's ruling affirmed the legal validity and societal acceptance of live-in relationships, emphasizing the rights and responsibilities accorded to such couples within the legal framework. By doing so, the court not only addressed the immediate legal dispute but also contributed to the evolving discourse surrounding family law and the

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<sup>85</sup>AIR 2021 KER 115

recognition of diverse familial structures in contemporary society.

**X. SECRETARY, MINISTRY OF DEFENCE V. BABITA PUNIYA.<sup>86</sup>**

In the case of "Secretary, Ministry of Defence v. Babita Puniya," the Supreme Court of India delivered a landmark judgment regarding the eligibility criteria for appointment to the post of JCOs/ORs (Junior Commissioned Officers/Other Ranks) in the Indian Army.

Babita Puniya, an Indian Army aspirant, challenged the recruitment policy of the Indian Army that restricted women from being considered for appointment to the post of JCOs/ORs. The policy allowed only male candidates who were enrolled in the Army as Jawans (soldiers) for a minimum of 17 years to be considered for promotion as JCOs/ORs. Babita Puniya argued that this policy was discriminatory and violated the fundamental rights guaranteed under the Indian Constitution, particularly the right to equality and non-discrimination.

The Supreme Court, in its judgment, held that the policy was discriminatory and unconstitutional. The Court emphasized that the Constitution of India guarantees equality before the law and prohibits discrimination on the grounds of sex. It ruled that denying women the opportunity to be considered for appointment as JCOs/ORs solely on the basis of gender was unjustified and violated their fundamental rights.

The judgment in the Secretary, Ministry of Defence v. Babita Puniya case was a significant step towards gender equality in the Indian Armed Forces. It paved the way for women to have equal opportunities for career advancement and recognition in the military, breaking down gender barriers in a traditionally male-dominated sector.

**XI. X V. THE PRINCIPAL SECRETARY, HEALTH AND FAMILY WELFARE DEPARTMENT, GOVT. OF NCT OF DELHI AND ANOTHER.<sup>87</sup>**

This unanimous opinion by the Court addresses the inclusion of unmarried women under Rule 3B of the Medical Termination of Pregnancy (MTP) Act, allowing them to terminate pregnancies between 20 and 24 weeks due to changes in marital circumstances. The Court's decision is grounded in various fundamental rights, including reproductive autonomy, dignity, equality, and privacy.

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<sup>86</sup>AIR 2020 SC 198

<sup>87</sup>AIR 2022 SC 4917



The Court emphasizes the right to reproductive autonomy, asserting that women have the right to make decisions about their bodies and whether to continue or terminate a pregnancy. This right, encompassed within the broader right to privacy as established in the K.S. Puttaswamy case, includes decisional autonomy in intimate matters.

Recognizing that the burden of an unwanted pregnancy disproportionately affects women, the Court affirms that women, regardless of marital status, should have the ultimate decision-making authority regarding abortion. The judgment underscores the need for laws to adapt to evolving social and familial structures, acknowledging amendments to the MTP Act aimed at broadening access to safe and legal abortions.

By interpreting the MTP Act in a manner consistent with constitutional principles and avoiding narrow constructions that could render the law unconstitutional, the Court ensures that both married and unmarried women have access to safe and legal abortions within the specified gestational limits. This interpretation aligns with the constitutional mandate to uphold women's rights and improve maternal health outcomes.

## **XII. SUPRIYO @ SUPRIYA CHAKRABORTY V. UNION OF INDIA.<sup>88</sup>**

In this particular case, a Five-Judge bench of the Court reached a unanimous decision asserting that the right to marriage is not deemed a fundamental right. They distinguished between the right to choose a partner and the right to marry, emphasizing that while the former is considered fundamental, only the State possesses the authority to enact laws permitting queer couples to marry. Although the bench deliberated on the right of queer couples to form unions, the majority opinion concluded that the State bears no obligation to legally recognize such civil unions.

Furthermore, the Court examined the institution of marriage along with its legal and societal implications. It concluded that the benefits associated with marriage, as advocated by the petitioners, stem from state recognition rather than an inherent aspect of marriage itself. Consequently, the Court determined that for queer couples to access similar benefits, they must first receive equivalent recognition from the State, achievable solely through parliamentary legislation. The Court underscored that conferring these rights upon queer couples falls beyond the purview of judicial authority.

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<sup>88</sup> (W.P.(C) NO. 1011/2022)

Addressing concerns about the non-recognition of LGBTQIA+ unions, the Court emphasized that such non-recognition does not impede individuals' exercise of their right to privacy, choice, and autonomy as guaranteed under Articles 15 and 21 of the Constitution. The Court reasserted the rights of LGBTQIA+ individuals to bodily integrity and personal autonomy, affirming their freedom to make choices regarding relationships and personal matters. While acknowledging the naturalness of queerness, the Court acknowledged the discrimination faced by the queer community and stressed individuals' rights to form unions without discrimination based on sexual orientation. However, the majority judgment declined to extend the right to privacy, autonomy, and dignity to provide for a civil union status for LGBTQIA+ unions.

Regarding the constitutional validity of the Special Marriage Act (SMA) and Foreign Marriage Act (FMA), the Court recognized that transgender and intersex persons in heterosexual relationships are eligible to marry under these laws. It highlighted that various aspects of the marital relationship reflect constitutional values such as human dignity, self-determination, and the right to life and personal liberty. Consequently, the Court upheld the constitutional validity of these provisions, extending them to include transgender and intersex individuals.

Lastly, in a split 3:2 verdict, the Court ruled that a joint reading of Articles 19, 21, and 25 does not impose a positive obligation on the State to recognize civil unions comparable to marriage. While the majority bench affirmed the right to choose, cohabit, and engage in physical intimacy, it did not mandate the State to recognize LGBTQIA+ unions or democratize private spaces. Conversely, the dissenting opinion argued for a positive obligation on the State to democratize the private sphere and override privacy rights in certain cases to combat discrimination against queer individuals. Additionally, the minority opinion contended that the right to form civil unions is inherent in Articles 19 and 21 of the Constitution, advocating for its extension to all individuals regardless of sexual orientation and gender, in alignment with principles of equality outlined in Articles 14 and 15.

## **5.1 DEFLECTION BY JUDICIARY:**

In transformative constitutionalism, the judiciary plays a crucial role in interpreting and applying constitutional principles to effect social change and promote justice. However, instances of deflection by the judiciary in transformative constitutionalism may occur when the courts fail to adequately address or remedy systemic injustices or uphold the transformative potential of the constitution. Here are some examples of how deflection by the judiciary may manifest in transformative constitutionalism:

1. Conservative Interpretations:

Courts may adopt conservative interpretations of constitutional provisions, failing to recognize or adapt to evolving social norms and values. This could result in the perpetuation of discriminatory practices or the denial of rights to marginalized groups.

2. Narrow Scope of Rights:

The judiciary may limit the scope of constitutional rights, thereby restricting their applicability to certain contexts or groups. This narrow interpretation may hinder the transformative potential of constitutional provisions in addressing systemic inequalities or injustices.

3. Minimal Judicial Activism:

Courts may exhibit reluctance to engage in judicial activism or intervene in matters of public interest, opting instead for a deferential approach to legislative or executive actions. This lack of proactive judicial intervention may impede efforts to bring about substantive social change or protect fundamental rights.

4. Inadequate Remedies:

Even when rights violations are identified, the judiciary may offer inadequate remedies or relief, failing to address the root causes of systemic injustices or provide meaningful redress to affected individuals or communities.<sup>89</sup>

5. Failure to Address Structural Inequities:

Courts may overlook or downplay structural inequities embedded within legal and institutional frameworks, thereby perpetuating systemic barriers to equality and justice.

6. Formalism over Substance :

One form of deflection occurs when courts prioritize formalistic legal reasoning over substantive justice. This may involve strictly adhering to legal precedent or technical

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<sup>89</sup> Andre Mathiot, *The British Political System*, London, (Hogart,1958) p.200.

procedural rules at the expense of addressing underlying injustices or societal transformations.

7. Failure to Address Intersectional Discrimination:

Courts may overlook intersectional discrimination, which occurs when individuals face multiple forms of oppression or marginalization based on intersecting factors such as race, gender, class, or disability. Failure to recognize and address these intersecting forms of discrimination can result in inadequate protection of rights for marginalized groups.

8. Lack of Proactive Remedial Measures:

While courts may identify constitutional violations, they may fail to proactively implement remedial measures to address systemic injustices. This can result in a gap between recognizing rights violations and effectively remediating them, perpetuating ongoing harm to affected individuals or communities.

9. Limited Engagement with Socio-Economic Rights:

In some cases, courts may demonstrate reluctance to engage with socio-economic rights, such as the right to housing, healthcare, or education, viewing them as less justiciable or enforceable compared to civil and political rights. This limited engagement can hinder efforts to address structural inequalities and promote transformative social change.

10. Underestimation of Judicial Role in Transformation:

Courts may underestimate their role in driving transformative constitutionalism and advancing social justice. This may lead to a reluctance to actively interpret and apply the constitution in ways that challenge existing power structures or address systemic injustices.

Addressing deflection by the judiciary requires a multifaceted approach that involves advocacy, legal education, and institutional reforms aimed at promoting a more robust and progressive role for the judiciary in transformative constitutionalism. By encouraging courts to adopt a more proactive and inclusive approach to constitutional interpretation and implementation, it is possible to harness the transformative potential of the law to promote equality, justice, and human rights for all members of society.

## **CHAPTER-VI**

## CONCLUSION AND SUGGESTIONS

Possessing a constitution does not inherently signify a commitment to constitutionalism. Constitutionalism advocates for more than just granting powers to governmental bodies; it emphasizes the necessity of constraining those powers. This ideology recognizes the importance of government while insisting on checks and balances to prevent tyranny, uphold individual liberties, and maintain the integrity of the constitution as a lasting document. Despite India's seven decades of constitutional governance, there's a notable gap between the written constitution and its implementation. Many experts argue that India has yet to fully embrace constitutional principles and operate within its constraints. In practice, respect for the constitution often takes a backseat. Comparing with other nations where constitutions operate successfully suggests that constitutionalism is essential for effective governance. It delineates the boundaries of governmental authority and ensures accountability, recognizing that the nature of power inherently requires limits.

Constitutionalism, as a philosophical viewpoint, not only emphasizes the supremacy of the constitution but also delves into the underlying principles that reinforce this notion and explores practical approaches to its implementation. However, a significant critique leveled against transformative constitutionalism is its perceived rigidity, which some argue may stifle the organic evolution of the constitutional process over time. This critique stems from the idea that transformative constitutionalism advocates for governance institutions to be tethered to strict limitations, potentially impeding innovation and progress in the long run.

In societies marked by multifaceted cultural landscapes, linguistic diversity, and inherent socio-economic disparities, there's a tension between the necessity of upholding constitutional constraints and the desire for dynamic societal growth. Adhering strictly to these limitations can sometimes be viewed as antiquated and redundant, particularly when confronted with the complexities of modern governance. However, certain factions within society may find solace in the idea of stringent constitutional boundaries, as it provides a framework within which they can pursue their interests while maintaining a veneer of

legitimacy.

Nevertheless, it's important to recognize that this critique may be somewhat overstated, as the strictness of constitutional limits has often been transcended through nuanced judicial interpretations. Constitutional organs, including the legislative branch, the executive, and notably the judiciary, have played instrumental roles in ensuring that the mechanisms of the constitution do not merely serve as impediments but rather as purposeful constraints with a clear and beneficial intent. Through their actions, these institutions have demonstrated a commitment to fostering a dynamic constitutional framework that adapts to the evolving needs and aspirations of society while safeguarding fundamental rights and principles.

Certainly, here's an expanded version.

The Constitution of India isn't just a static legal document but a living embodiment of the nation's values and aspirations. It serves as the cornerstone of India's legal framework, with all laws and regulations deriving their authority from its provisions. Ensuring access to fundamental rights for every citizen was a central goal of the Constitution's framers, echoing the transformative vision of the founders of the United States Constitution.

Through its interpretation, the Indian Judiciary has consistently aimed to realize the Constitution's overarching objective: to secure social, economic, and political justice for all citizens. The Constitution addresses a wide spectrum of issues, particularly in safeguarding citizens' rights, where the judiciary assumes a pivotal role in upholding constitutional principles.

Transformative constitutionalism emphasizes the imperative of eliminating discrimination, fostering equality, and establishing the rule of law within society. It evolves in tandem with societal progress, adapting to the changing needs and values of the populace. In a recent development, the judiciary affirmed that constitutional morality takes precedence over societal norms, recognizing the potential for societal norms to perpetuate inequality and injustice.

India's societal landscape is characterized by diversity and pluralism, encompassing a myriad of religious and philosophical beliefs. However, it also grapples with entrenched forms of discrimination and biased customs. Despite these challenges, the Constitution

serves as a bulwark against injustice, guaranteeing fundamental rights to all citizens, with the judiciary entrusted to safeguard these rights.

In contemporary legal discourse, courts prioritize constitutional principles over societal morality, influencing the interpretation and application of laws and traditions. However, it's imperative for the judiciary to strike a delicate balance between constitutional morality and social norms to maintain public confidence in the legal system. By upholding transformative constitutionalism while remaining attuned to societal realities, the judiciary can contribute to the ongoing evolution of India's democratic fabric, ensuring justice and equality for all.

## **6.1 IDENTIFICATION OF GAPS:**

### **A. Legislative Gap:**

Transformative constitutionalism refers to a legal framework that seeks to use constitutional law and principles to effect substantial societal change, particularly in post-authoritarian or transitional democracies. This approach often aims to redress historical injustices, promote social and economic transformation, and ensure the realization of fundamental rights and equality.

Identifying legislative gaps within transformative constitutionalism depends on the specific context and objectives of the constitutional framework in question. Here are a few potential areas where legislative gaps might exist within transformative constitutionalism:

#### **1. Protection of Socio-economic Rights:**

Many transformative constitutions include provisions guaranteeing socio-economic rights such as the right to education, healthcare, housing, and social security. However, legislative gaps may exist in terms of implementing mechanisms, budget allocations, or concrete policies to ensure the effective realization of these rights.

#### **2. Land Reform and Redistribution:**

In many countries with a history of colonialism or apartheid, land reform is a crucial component of transformative constitutionalism. Legislative gaps may exist in laws governing land redistribution, restitution for historical injustices, and securing land tenure rights for marginalized communities.

### 3. Affirmative Action and Equality:

Transformative constitutions often include provisions for affirmative action programs to address historical inequalities based on race, gender, or other factors. Legislative gaps may arise in terms of the design, implementation, and monitoring of these programs to ensure they effectively promote equality without perpetuating discrimination.

### 4. Decentralization and Devolution of Power:

Transformative constitutions may aim to decentralize power and promote local governance as a means of empowering marginalized communities and promoting democratic participation. Legislative gaps may exist in terms of clarifying the division of powers between different levels of government, ensuring adequate resources and capacity at the local level, and establishing mechanisms for meaningful participation and accountability.

### 5. Transitional Justice:

In post-conflict or post-authoritarian societies, transformative constitutions often include provisions for transitional justice mechanisms such as truth commissions, reparations programs, and accountability for past human rights abuses. Legislative gaps may arise in terms of defining the scope and mandate of these mechanisms, ensuring access to justice for victims, and addressing the challenges of reconciliation and national healing.

Addressing legislative gaps within transformative constitutionalism requires a holistic approach that involves not only enacting new laws but also reforming existing institutions, building capacity, promoting public awareness and participation, and fostering a culture of constitutionalism and respect for the rule of law.

## **B. Administrative gap:**

Administrative gaps within transformative constitutionalism refer to deficiencies or shortcomings in the administrative structures and processes tasked with implementing the transformative goals of the constitution. These gaps can hinder the effective realization of constitutional principles and objectives. Here are some examples:

### 1. Capacity and Resources:

One common administrative gap is the lack of adequate capacity and resources within government institutions responsible for implementing transformative constitutional



mandates. This can include insufficient staffing, expertise, budgetary allocations, and infrastructure to effectively carry out their functions.

#### 2. Coordination and Collaboration:

Transformative constitutionalism often requires coordination and collaboration among multiple government agencies, as well as with non-governmental organizations and other stakeholders. Administrative gaps may arise when there is a lack of mechanisms or incentives for inter-agency cooperation, leading to inefficiencies, duplication of efforts, and disjointed implementation.

#### 3. Monitoring and Evaluation:

Effective implementation of transformative constitutional provisions requires ongoing monitoring and evaluation to assess progress, identify challenges, and adjust strategies as needed. Administrative gaps may exist when there is a lack of robust monitoring and evaluation mechanisms, including data collection systems, performance indicators, and reporting processes.

#### 4. Accountability and Transparency:

Transformative constitutionalism aims to promote accountability and transparency in governance. However, administrative gaps may occur when there are deficiencies in accountability mechanisms, such as weak oversight bodies, limited access to information, or impunity for wrongdoing. This can undermine public trust and confidence in the government's ability to fulfill its constitutional obligations.

#### 5. Capacity Building and Training:

Building the capacity of public officials and civil servants to understand and implement transformative constitutional principles is essential. Administrative gaps may arise when there is a lack of training programs, professional development opportunities, and incentives for public officials to prioritize transformative goals in their work.

#### 6. Access to Justice and Redress:

Transformative constitutionalism often seeks to ensure access to justice and redress for individuals whose rights have been violated or who have been marginalized or discriminated against. Administrative gaps may occur when there are barriers to accessing the justice system, such as high costs, procedural complexity, or discrimination within the

judiciary.

Addressing administrative gaps within transformative constitutionalism requires a holistic approach that includes legislative reforms, institutional strengthening, capacity building, and fostering a culture of accountability and transparency. It also requires meaningful engagement with civil society organizations, the private sector, and other stakeholders to ensure that administrative structures and processes are responsive to the needs and aspirations of the people.

## **6.2 CONCLUSION:**

The Supreme Court's role in maintaining societal equilibrium extends beyond mere interpretation of the Constitution; it often involves navigating complex legal landscapes where evolving social norms intersect with established legal principles. This intricate dance requires judges to carefully weigh competing interests, ensuring that the rights enshrined in the Constitution are upheld while also addressing contemporary challenges.

Moreover, the judiciary's role as a mediator between various stakeholders, including political parties, adds another layer of complexity. Judges must navigate these political waters delicately, striving to render decisions that are not only legally sound but also politically palatable. However, this delicate balance can sometimes lead to criticism, with some accusing judges of being too cautious or overly influenced by political considerations.

Despite these challenges, the transformative potential of constitutional interpretation remains a powerful tool for advancing societal progress. By interpreting the Constitution in a manner that aligns with contemporary values and aspirations, the judiciary can serve as a catalyst for positive change, promoting inclusivity, equality, and justice.

However, it's essential to recognize the inherent tension between transformative constitutionalism and the principle of legislative supremacy. While the judiciary plays a vital role in safeguarding rights and liberties, it must also respect the democratic mandate of elected representatives. Striking the right balance between judicial activism and deference to legislative authority is an ongoing challenge—one that requires careful consideration and nuanced decision-making.

In essence, the judiciary's role in upholding the transformative ideals of the Constitution is both a solemn responsibility and a daunting task. By navigating the complexities of

legal interpretation, mediating political tensions, and promoting societal progress, the judiciary can fulfill its mandate as a guardian of constitutional values and a beacon of justice in an ever-changing world.

The Supreme Court's decisions to reinterpret the Constitution have indeed sparked significant substantive law reforms in India over the past several decades. These reinterpretations reflect the concept of Transformative Constitutionalism, where the Court actively seeks to ensure a more equitable society by adapting constitutional principles to contemporary realities.

Notable examples of such transformative rulings include the NALSA judgment, which recognized the rights of the third gender, and the Navtej Singh Johar case, which decriminalized homosexuality. Additionally, the Court's decisions to decriminalize adultery and address the issue of women's entry into the Sabarimala temple illustrate its commitment to advancing social justice.

These landmark judgments have been made possible by the Supreme Court's role as both custodian and interpreter of the Constitution. By recognizing the Constitution as a living document capable of evolving with societal norms, the Court has been able to bring about meaningful change.

Fundamentally, the Court's function is to understand the underlying purpose and essence of the Constitution for the betterment of society. Like society itself, the Constitution is dynamic, reflecting the ever-changing realities of Indian life. Sometimes, legal changes precede and catalyze societal transformations, while at other times, judicial decisions themselves serve as agents of change.

In this way, the Supreme Court's proactive approach to constitutional interpretation not only upholds the principles of justice and equality but also helps shape the trajectory of Indian society towards a more inclusive and progressive future.

In addition to the judiciary and citizens, other key stakeholders, such as policymakers, civil society organizations, and legal experts, also contribute to the process of transformative constitutionalism. Policymakers enact laws and policies that reflect evolving societal values and address pressing issues, while civil society organizations advocate for marginalized groups and monitor the implementation of constitutional rights. Legal experts provide valuable insights and expertise in interpreting and applying

constitutional principles, ensuring that legal reforms align with constitutional values. Furthermore, academic institutions play a crucial role in fostering public awareness and understanding of constitutional rights and responsibilities.

Collaboration among these diverse stakeholders is essential for realizing the full potential of transformative constitutionalism. By working together, they can identify areas for reform, propose innovative solutions, and advocate for meaningful change. This collaborative approach fosters a culture of constitutionalism and strengthens democratic governance, ultimately advancing the goal of a more just, equitable, and inclusive society.

### **6.3 SUGGESTIONS**

It's fair to suggest that the practical implementation of transformative constitutionalism concepts in Indian society falls short of what might be considered feasible. For India to achieve a constitution genuinely capable of transformation, it's crucial to carefully consider and implement the following measures:

- I. While it's true that formal familiarity with the constitution isn't a prerequisite for undertaking constitutional responsibilities, it remains imperative that elected representatives possess at least a foundational understanding of this fundamental document. For constitutionalism to genuinely animate the principles embedded within the constitution, it's essential to underscore the importance of such knowledge among those tasked with upholding it. To ensure that elected officials are adequately equipped to fulfill their constitutional roles, the implementation of a mandatory induction program becomes crucial. This program should be meticulously designed to acquaint participants with the governmental organs, their functions, and the core ideals they uphold. By providing comprehensive guidance on the constitutional framework, its values, and its mechanisms, this induction process can serve as a cornerstone in nurturing a culture of constitutional literacy and adherence. Furthermore, fostering an environment of mutual autonomy and interdependence among various governmental bodies holds promise in reinforcing their commitment to respecting constitutional limitations. By acknowledging and embracing the interconnectedness of their roles within the constitutional

framework, governmental organs can cultivate a sense of collective responsibility towards upholding the integrity of the constitution. In essence, prioritizing educational initiatives and promoting collaborative relationships among governmental entities are vital steps towards ensuring that constitutionalism transcends mere rhetoric and becomes a guiding principle in the governance of the nation.

- II. Decisions made within the framework of a constitution must not only comply with its legal provisions but also reflect its overarching principles of justice and morality. It's no longer tenable for judges to rely solely on parliamentary intent or a strict textual interpretation of the law as the sole basis for their rulings. In the context of a transformative constitution, which seeks to catalyze societal progress and uphold human rights, judges bear the weighty responsibility of grounding their decisions in the deeper ethos of the constitution. Moving beyond a narrow focus on legal formalism, judges must engage with the foundational values and moral imperatives that animate the constitutional framework. This entails a more holistic approach to adjudication—one that considers not only the letter of the law but also its spirit and intent. By situating their judgments within the broader context of constitutional values such as equality, dignity, and liberty, judges can ensure that the law evolves in tandem with the evolving needs and aspirations of society. Furthermore, a jurisprudence informed by transformative constitutionalism places a premium on judicial reasoning that is transparent, reasoned, and principled. Rather than relying on deference to legislative authority or mechanical application of legal precedents, judges are called upon to provide robust justifications for their decisions, grounded in a rich tapestry of constitutional principles and moral reasoning. This not only enhances the legitimacy of judicial outcomes but also fosters a deeper public understanding and appreciation of the role of the judiciary in safeguarding constitutional democracy. In essence, the era of passive deference to legislative will or strict textualism in judicial decision-making is giving way to a more dynamic and morally engaged form of constitutional adjudication. By embracing their role as guardians of constitutional values and champions of justice, judges can play a pivotal role in

advancing the transformative potential of the constitution and ensuring that its promise of a more just and equitable society is realized.

- III. This transformative bridge should be perceived as a transitional space bridging the unreliable past and the uncertain future. There's no inherent advantage in favoring either side; rather, the true value of the bridge lies in consistently traversing it, moving back and forth. In my view, transformation isn't a fleeting phenomenon that ceases once equitable access to resources is achieved and judges adopt a culture of justification. Instead, transformation is a perpetual state of existence—a constant aspiration. It embodies an enduring ideal where change itself is unpredictable, yet the notion of change remains unaltered.
- IV. Court rulings are often crafted to benefit society at large, yet their perceived benefits may not resonate uniformly across all segments of society. Some may find fault with legal decisions, as evidenced by controversies surrounding cases like Sabarimala and the decriminalization of adultery. These instances highlight how contentious issues persist, with the correctness of certain rulings still up for debate. Moreover, when judicial rulings assert authority over and potentially infringe upon the powers and functions of other governmental organs, they can provoke additional conflicts. This poses a significant challenge to transformative constitutionalism, as it jeopardizes the delicate balance of power and undermines the collaborative nature of governance. Such conflicts, if left unchecked, have the potential to erode the foundations of constitutional democracy and pave the way towards autocratic tendencies. In essence, while judicial activism can be a catalyst for positive change, it must be tempered with a keen awareness of its potential ramifications. Striking a balance between judicial intervention and institutional harmony is essential to safeguarding the principles of transformative constitutionalism and preserving the democratic fabric of the nation.
- V. It's evident that the vitality of the "Spirit of the Constitution" hinges on the delineation of powers among governmental organs and the constraints imposed on these powers. At times, friction arises between the legislative and judicial branches of government, underscoring the Judiciary's pivotal role as a guardian of constitutional ideals. The judicial process serves as a means to achieve justice,

with the "Rule of law" constituting its bedrock principle. Central to the "Rule of law" is the requirement that state laws be consistent and non-arbitrary. Thus, for governmental organs to function efficiently, effectively, and in the best interests of the people, a clear understanding of the separation of powers is imperative. This ensures that each branch operates within its prescribed sphere, preventing overreach and maintaining the delicate equilibrium essential to the functioning of a democratic society.

- VI. Parliament should recognize the solemn responsibility it holds in safeguarding the integrity of the Constitution. Amendments to this foundational document should be approached with the utmost caution and reserved for situations where fundamental changes are absolutely essential. Overuse of the amendment process can undermine the stability and coherence of the legal framework, potentially leading to confusion and discord among governmental bodies. Furthermore, many objectives that Parliament seeks to achieve can often be addressed through ordinary legislation without resorting to constitutional amendments. By utilizing existing legal mechanisms, Parliament can effectively address pressing issues while preserving the stability and consistency of the constitutional order. This approach not only streamlines the legislative process but also mitigates the risk of unnecessary conflicts arising between different branches of government. In essence, Parliament should exercise judicious restraint when contemplating amendments to the Constitution, ensuring that such measures are truly warranted and serve the best interests of the nation as a whole. By upholding the sanctity of the Constitution and embracing alternative legislative avenues where appropriate, Parliament can fulfill its duty as a custodian of democratic governance.
- VII. The primary duty of the court is interpretation, not legislation; therefore, this role should not extend to the extent that it encroaches upon legislative authority and alters ideological frameworks. While the judiciary plays a vital role in governance transformation, it must refrain from assuming a position of dominant authority. It's important to recognize that judicial intervention may not always be sufficient to rectify legislative shortcomings. Effective governance institutions strive to maintain a balance of powers, with both the legislative and judicial branches being

held accountable, both in principle and practice. This commitment to accountability, both in adherence to legal statutes and the underlying principles of justice, distinguishes a robust and responsive governance system.

- VIII. Given recent instances of widespread misuse of constitutional principles across the nation, there is a pressing need to embrace transformative constitutionalism. To advance the development of this concept, it's imperative for the academic community to acknowledge it as a central theme. By placing transformative constitutionalism at the forefront of scholarly discourse, academics can catalyze a deeper understanding of its principles and foster meaningful dialogue on its implementation and impact. This recognition lays the foundation for a more robust engagement with transformative constitutionalism, paving the way for its effective application in addressing contemporary challenges and promoting societal progress.

## **BIBLIOGRAPHY**



## **Primary Sources**

### **Statutes**

- 1 Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]
- 2 Indian Penal Code, 1860
- 3 Juvenile Justice Act, 1986
- 4 National Commission for Women Act, 1990 (20 of 1990)
- 5 The Beedi & Cigar Workers (Condition of Employment) Act, 1966
- 6 The Bonded Labour System (Abolition) Act, 1976
- 7 The Child Labour (Prohibition & Regulation) Act, 1986
- 8 Constitution of India

### **Reports:**

- 1 Ministry of Education and Social Welfare , Government of India, “Towards Equality: Report of the Committee on the Status of Women in India (CSWI)” New Delhi (1975).
- 2 Justice J.S. Verma and others, “Report of the Committee on Amendments to Criminal Law” 444 (2013).
- 3 Law Commission Report, Property Rights of Women: Proposed Reforms under the Hindu Law, (Report No. 174, 2000).
- 4 Government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003).
- 5 Government of India, Report: Towards Equality, Report of the Committee on the Status of Women in India (Ministry of Education and Social Welfare, 1974).
- 6 Brindalakshmi.K, Gendering of Development Data in India: Beyond the Binary, Introduction, Research Method, and Summary of Findings (June 2020).

## **Secondary Sources**

### **Articles and Books**

- 1 About UN Women [Online]
- 2 <http://www.unwomen.org/about-us/about-un-women/> Amartya Sen: Development as Freedom, 1999, Alfred A. Knof, New York
- 3 Ashish Shrivastava: Do the Judges make or declare law with reference to Hart &

- Dworkin's Principle in Indian legal System, [Online]  
<http://www.legalserviceindia.com/articles/juju.htm>
- 4 Aysha Sumbul: Women Reservation Bill, [Online]  
<http://www.pucl.org/Topics/Gender/2004/womens-reservation-bill.htm>
- 5 <http://www.communityipm.org/docs/Bartlett-EntryPoints-20Jun04.pdf>
- 6 Sivaramayya: Fifty years of the Supreme Court, OUP and ILI (2000)
- 7 Dr. Anjani Kant: Women & Children, 2003, Central Law Publications Allahabad
- 8 Dr. J. N. Pandey: The Constitutional Law of India, Central Law Agency, Allahabad.
- 9 Granville Austin, Working A Democratic Constitution: The Indian Experience (2000).
- 10 Hans Raj Khanna, Judiciary In India And Judicial Process (1985).
- 11 Larry Alexander, Constitutionalism: Philosophical Foundations (2005).
- 12 M. Rama Jois, Legal And Constitutional History Of India Ancient Legal, Judicial And Constitutional System (2007).

#### **Newspapers, Magazines & Other References**

- 1 Decisions of the Supreme Court of India [online] [www.indiankanoon.org](http://www.indiankanoon.org)
- 2 Economic & Political Weekly [online] [www.epw.org](http://www.epw.org)
- 3 Frontline India Today Law Magazine [online magazine] [www.lawzmagazine.com](http://www.lawzmagazine.com)
- 4 Lawyers Club [online magazine] [www.lawyersclubindia.com](http://www.lawyersclubindia.com)
- 5 Lawyers Update [online magazine] [www.lawyersupdate.co.in](http://www.lawyersupdate.co.in)
- 6 Legal Era [online magazine] [www.legalera.in](http://www.legalera.in)
- 7 Rashtriya Sahara,
- 8 Weekly Tehelka
- 9 The Edict
- 10 The Hindu
- 11 The Lawyers Collective The Outlook