

## An analysis of transformative constitutionalism in India and the role played by the judiciary in shaping the constitution

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### Abstract

Transformational constitutionalism has existed as a political doctrine for a considerable period of time. The South African Constitution is a prime resource for investigating the roots of these ideas. The concept at the core of this transformative constitutionalism vision is that it is exceedingly challenging, if not unattainable, to ascribe to or connect to the Constitution of any specific nation. This is due to the intrinsic universality of the concept. It strives to optimise constitutional safeguards and methods to establish a more progressive society. This initiative aims to equalize opportunities in society and foster a spirit of inclusivity for all individuals. The academic community recognizes that pursuing "substantive equality" is a crucial strategy for at least partially achieving this goal. Implementing affirmative action programmes and ensuring the implementation of socioeconomic rights, especially those that protect the interests of marginalised communities, would be crucial in attaining this objective. This article's main goal is to help readers comprehend the idea of transformative constitutionalism's historical development. This article also seeks to educate readers about transformative constitutionalism and its possible functions, should it be completely realized, within the Indian constitutional framework.

**Keywords:** Legislative branch, substantive equality, sexual minorities, gender justice, and transformative constitutionalism

### Introduction

*"The purpose of having a constitution is to transform the society" for the better and this objective is fundamental pillar of transformative constitutionalism.*

Justice Dipak Misra

Constitutionalism is the observance of the ideals of a government, while transformation entails the coordination of change. Constantly, transformative constitutionalism contests the rigidity of the constitution. It is fundamental to the evolution of society and the basic values of the Constitution, which safeguard individual liberty and cannot be compromised. The ruthless majority authority of the political executive over the "law of the land" endangers Indian democracy. In their pursuit of power, political parties have targeted dissenters and vocal opponents. To ensure justice for those who have been wrongfully impacted by the law, an activist judiciary interprets the legislation in consideration of the present circumstances, as opposed to merely applying the law to the facts. A "philosophical counsellor" whose opinion is vital to democracy is an activist judiciary<sup>[1]</sup>.

A living organic document that represents the people is a constitution. Constitutions often mark a turning point in the history of a nation. Particularly true of colonized nations is this. These constitutions serve to limit the power of the government and "reflect the nation's aspirations" to alter the existing state of affairs. The history of an Indian Constitution that is analogous is regarded as transformative. In order to implement the law, the court may interpret constitutional provisions. Numerous authorities have criticized the Indian court in recent years for "excessive activity" or "overreaching." Such criticism, nonetheless, presupposes that the judiciary has exceeded its "legitimate responsibility." Constitutionalism that is transformative advances liberty, equality, brotherhood, and dignity. It entails the fulfillment of the primary objective of the

Constitution, which is the betterment of society. One interpretation posits that it gives precedence to constitutional morality rather than social morality. The Constitution will adapt to the requirements of society, while its form and content will remain unchanged, according to another interpretation<sup>[2]</sup>.

The constitution prioritizes the alteration of interpersonal relationships and is therefore transformative. This revolutionary vision sheds light on the operation and interpretation of our constitution. Ideological transformative constitutionalism safeguards the essential rights of individuals and their capacity to attain objectives. In order to promote social and political change, transformative constitutionalism incorporates religion into the law; since the courts are vowed to interpret and implement the law, they are crucial to change. By working together, individuals can conquer the apprehension of experiencing discontentment when embracing change. The objective of transformative constitutionalism is to establish a society in which values are constantly evolving<sup>[3]</sup>.

### Origins of Transformative Constitutionalism

The "transformative constitutional" movement originated in the post-apartheid period of South Africa. The preamble of the Interim Constitution of South Africa states: "A historic bridge between the past of a deeply divided society marked by strife, conflict, untold suffering, and injustice, and the future based on the recognition of human rights, democracy, peaceful coexistence, and development opportunities for all." According to a former Chief Justice of South Africa, this passage marks the beginning of transformative constitutionalism.

The name "transformative constitutionalism" is still debated due to the wide variety of experiences people have had around the world, but there are significant aspects that set it apart. The state's (particularly the judiciary's) pivotal role in the fight for emancipation and the upholding of the

principles of equality, brotherhood, and liberty outlined in the Constitution are two such crucial components. Since these principles are the foundation of any functional society, the state must actively participate in their formation.

The Righteous Judge Among Indian judges, Krishna Iyer has been the most outspoken advocate of this approach; his views have greatly influenced the author's own work.

#### **Because of this, two important parts of the idea of "transformative constitutionalism" become clear<sup>[4]</sup>**

- By identifying and eliminating all forms of prejudice, both current and prospective, its objective is to guarantee that all individuals are treated equitably.
- Since the term "positive social relationships" is used widely rather than exclusively in reference to a person's interactions with the state, transformative constitutionalism is also present in the private sphere. It emphasizes that in order for people to realize their full potential, they must surround themselves with supporting others. Michaela Hailbronner challenges us to think about what transformative constitutionalism isn't by contrasting it with constitutionalism. Drawing on American constitutionalism, he states, "U.S. constitutionalism does not entrust the federal state with the duty of bringing about a more just and equal society," arguing that this is because American constitutionalism is not a transformative version of constitutionalism<sup>[5]</sup>. Taking a cue from Mirjan Damaska's metaphor, the country's interpretation of the law is "reactive," and its constitutionalist stance is "Constitutionalism 1.0," which prioritizes individual freedom. This is why the American constitutional experience is sometimes compared to the goal of transformational constitutionalism in South American countries, where states take an activist stance<sup>[6]</sup>.

This is because the Constitution sought to address the extremely split hierarchies and acute resource scarcity that persist in countries like South Africa and India. So far, the Constitution has failed to provide solutions to these issues.

In addition to preventing us from ever coming up with the idea of a nation, this also prevented us from ever developing any idea of a nation, as Dr. Ambedkar put it. This is because, as a nation, we were unable to exist due of caste-based divisions. Many saw the constitutional movement in India as a departure from long-established hierarchies and customs.

In accordance with the requirements of Article 14, the Rajasthan High Court's entire court has observed that attorneys are not to address justices as "My Lord." More than seventy years have passed since the Constitution came into force, and this decision was made relatively recently. Chief Justice Ravindra Bhatt's court has given us a classic example of how a society may go from colonialism to republicanism, even if it's only in terms of language. In the end, language is the single most effective tool for creating change.

#### **Transformative Constitutionalism: A Facet of New Era**

The people's aspirations, principles, and the interconnections and authority among the many branches of government are enshrined in a constitution, which also serves as a representation of these things. It represents the people's unwavering ambition and the country's fundamental

character. Therefore, the Constitution is considered a living document that greatly aids in the development of democracy. Just because a country has a constitution doesn't mean its citizens adhere to its ideals. Constitutionalism, in Baxi's view, includes procedures for validating authority generally and the creation of administrative institutions, structures, and mechanisms. Constitutionalism is a means of bringing people together to discuss problems such as justice, rights, growth, and individual liberty. It is not only a system of governance. Understanding the origins of power and the factors that motivate opposition can be gained from studying constitutionalism<sup>[7]</sup>.

According to Klare<sup>[8]</sup>, "transformational constitutionalism" is the long-term effort to create, interpret, and uphold a constitution in order to change the power dynamics within a nation's social and political institutions for the better so that democracy, equality, and participation can flourish. Aspects of constitutionalism include upholding the law, the constitution, and popular will, which also includes putting legal constraints on the use of political authority. Some people view the constitutions written by states with a colonial past as "historic bridges" that connect us to a society that was once severely fractious due to bloodshed, injustice, and great suffering. This is because the same people who wrote the colonial documents also wrote the constitutions.

#### **India and Transformative Constitutionalism**

India has confronted both colonialism and enduring social issues, like untouchability, caste discrimination, and gender inequality, which have persisted in the country from ancient times. The urge to reject its colonial past and establish a new social and political order based on democratic principles propelled India's constitution-writing process. The Indian constitution was created as a "moral autobiography" that firmly rejected the colonial past while promising a brighter future. Several articles within the Indian constitution provide as clear examples of the constitution's aim to bring about significant changes and improvements<sup>[9]</sup>.

The Preamble articulates the desires of the populace, encompassing the esteemed objectives of freedom, parity, brotherhood, and fairness. The objective is to construct a state that is both secular and democratic, with socialist principles. Part III of the Constitution delineates the essential entitlements that individuals possess in relation to the state. Principles like equality, nondiscrimination, freedom of speech and expression, freedom of movement, freedom of association, freedom of religion, and individual liberty are all included in these privileges.

Forced labor, feudal titles, and untouchability are eliminated. Thus, the constitution implicitly states that the aim of using political power to create a new social order. According to Bhargava, the Indian constitution was written expressly to topple established social systems and bring in a new era of freedom, equality, and justice. The implementation of this policy brought about a significant transformation, particularly for the underprivileged individuals who aspired for equitable treatment within society.

#### **Transformative Constitutionalism and the Judiciary**

Following the resolution of the emergency, a corpus of legal precedents rooted on the constitutional tenets of liberty,

equality, and fraternity started to develop. The credibility of the Supreme Court waned following the conclusion of the emergency period, during which Congress assumed control. To reclaim it, the system established the public interest litigation system, which is a mechanism of resolving legal disputes. Justice Bhagwati argues that the adversarial system of the Commonwealth is unsuitable for India due to its reliance on "self-identification of injury and self-selection of remedy" <sup>[10]</sup>.

Given the widespread illiteracy, the absence of literacy skills would undermine the assurance of justice for individuals. It is crucial to remember that the restriction upon which PILs are founded imposes numerous limitations on PILs. Considering its significant dependence on the "discretion" of judges, it is apparent that the Public Interest Litigation (PIL) can function as a repressive instrument, potentially surpassing other tools in its oppressive nature.

Due to the absence of the notion of fault in India, the utilization of "discretion" is incapable of being employed for engaging in wrongful actions. In India, it is impossible for poor behavior to rise through the hierarchy of command. Nevertheless, it grants decision-makers a degree of autonomy to act without concern for future consequences.

The state's judiciary possesses the jurisdiction to ascertain the manner in which the law ought to be implemented. It guarantees the continued relevance of the Constitution, despite its antiquity, in the contemporary world. In most postcolonial republics that adopt transformative constitutionalism, the judiciary's responsibility goes beyond just interpreting the language of the constitution in a literal sense. Instead, it must interpret the language in a way that promotes the constitutional purposes and ideals and is in line with the new society. This is because the language needs to be read in alignment with the objectives and ideals of the constitution. Nevertheless, the judicial branch is prohibited from disregarding the constitution's explicit mandates in an inappropriate fashion <sup>[11]</sup>.

Hence, the court is tasked with the dual duty of safeguarding constitutional principles by formulating innovative interpretations of the text that uphold the legally required division of powers. Consequently, in order to carry out its responsibilities efficiently, the court must refrain from engaging in unlawful actions or exceeding its legal authority <sup>[12]</sup>.

When the courts engage in matters that fall under the jurisdiction of another body of government, such as situations involving judicial legislation, this is referred to as activist judicial behavior. This can also happen when judges strike down a legislation that might be debatably constitutional or when they interpret a clause in a complicated case in a novel way, when the court deviates from a series of prior decisions and disregards the principle of *sui generis*, when it resolves a dispute involving multiple perspectives, and so forth. The role of the courts is a challenging subject in these circumstances. The question at hand is whether the court should adhere rigidly to the current legislation or explore innovative methods of interpreting the law to address the delicate nature of the situation and align it with the evolving societal norms <sup>[13]</sup>.

According to the constitutional philosophy of "transformative constitutionalism," it is necessary to develop a body of legislation known as "jurisprudence" that aligns with the objective of bringing about change. It is imperative to have knowledge of the historical background

of the Constitution and the challenges faced by historically marginalized communities. Postcolonial constitutionalism demonstrates the courts' concern for people's suffering by emphasizing their commitment to protecting people's rights. The Indian court's record in respecting constitutional ideals and aims is inconsistent. The Supreme Court has endeavored to engage the public by implementing the Private Individual Litigation (PIL) system, broadening the scope of standing through epistolary jurisdiction, and proactively addressing matters through *suo moto* cognizance.

The Supreme Court's verdict in *Qureshi v. State of Bihar* <sup>[14]</sup> clarified that Muslims were not obligated to slaughter cows as part of their religious duties, even while they had the choice to butcher other animals during Eid. The Supreme Court's ruling was a consequence of this ambiguity. The Supreme Court's utilization of the duty test in this particular case restricts the extent to which individuals can enjoy their constitutional right to freedom of religion. Similarly, in the case of *Fasi v. SP of Police* <sup>[15]</sup> a police officer claimed that his constitutional right to religious freedom was infringed upon by a statute that prohibited him from cultivating facial hair. Three He was prohibited from growing a beard due to the regulations. The petitioner presented evidence from the Quran, but the court rejected it, citing the fact that there are Muslims who do not have facial hair.

Additionally, the court noted that the petitioner himself did not have a beard at the time of his conversion to Islam, leading to the conclusion that having a beard is not a mandatory need. This exemplifies the overt capriciousness with which the courts address issues pertaining to religion. A request was made to the Indian Supreme Court to hear the matter of *Ismail Faruqui v. Union of India* <sup>[16]</sup> concerning the legality of the Indian government's seizure of the land used to construct the Babri Masjid. The court was asked to rule on whether praying in a mosque is a fundamental principle of Islam, and it concluded that it is not because prayer can be said anywhere, not just in a mosque. Consequently, the freedom of religion does not provide any form of protection for it. This criterion significantly restricts an individual's liberty to exercise their religion according to their own preferences, as it only safeguards acts that are deemed "mandatory" and "extremely essential." Customs should be honored as long as they do not harm public health, morals, order, or infringe upon any other fundamental rights.

### No Economic and Social Rights Without Civil and Political Rights

During the debates around the *Olga Tellis and Bombay Hawkers Union case* <sup>[17]</sup>, the Lawyers Collective had a common belief: that prioritizing economic rights would be the key to addressing poverty, as if it had the power to magically eradicate it. Subsequently, the author had developed the belief that individuals belonging to low economic class has failed to fully appreciate their political and civic liberties. But, now everyone is at liberty to concentrate on attaining economic rights. The struggle for independence has been reignited numerous individuals, to ask for their rights including those implicated in the *Bhima Koregaon case* <sup>[18]</sup>. Following the emergency, the judiciary has reached a state of uncertainty about the appropriate course of action. The PIL doors can still be operated at will,

either opening or closing them. This is due to its arduous struggle to maintain the public's confidence in its integrity. The Mandal Commission started the implementation of affirmative action policies during this time. This outcome should not come as unexpected. *In the case of B.K. Pavitra II* <sup>[19]</sup>, the Supreme Court held that the lack of diversity in various sectors of society can be attributed primarily to reservations in educational institutions and promotions. These issues, rooted in the aspiration for genuine equality, have sparked several discussions.

In the B.K. Pavitra case, *Justice Chandrachud's* the comments on the significance of making reservations. "The members of the Constituent Assembly were aware of the profound structural inequalities in Indian society and recognized that the Constitution would serve as a transformative instrument to address them," he stated, emphasizing the presence of compelling evidence. An effective approach to address these disparities is to allocate reserved seats in state legislatures and public service positions specifically for individuals belonging to the SC and ST populations.

### **The Privacy Demand and the Lgbtqi Movement**

Due to several recent court decisions, the body of law relevant to transformative constitutionalism has significantly evolved. This kind of bigotry disproportionately affects LGBTQI populations. The decision in *Navtej Johar v. Union of India* by the Supreme Court <sup>[20]</sup>, which defines "transformative constitutionalism" as the purpose of establishing a constitution, is arguably one of the most famous rulings of the last several years. This ruling is among the most famous ones that the Supreme Court has made recently. They are seeking a document that will guide the nation away from its medieval, hierarchical society and toward a democratic, egalitarian one that is faithful to its original intent. And that is their objective. These concepts can be found in the Preamble to the Constitution. Consequently, the highest court in the land has come to the conclusion that it cannot fulfill its duty as a defender of human rights by continuing to interpret the rights to equality and liberty in a static manner. The court's obligation to safeguard its citizens from prejudice and humiliation led to this outcome. The fundamental tenet of Justice Dipak Misra's transformative constitutionalism is that the principles enshrined in our Constitution are inherently dynamic and subject to constant change. "Giving them a static interpretation would be against the principles of our Constitution," according to him. The most fundamental rights guaranteed by our Constitution, which evolve through time, are freedom and equality. While historical developments do shed light on the concepts behind these rights, they do little to address the fact that the principles upon which these rights are based change with time. It is only fair that each succeeding generation be able to read the Constitution according to their own beliefs and goals.

### **A Balancing Act for Religious Freedom and Social Reform**

India is home to adherents of several faiths, making it a truly religious democracy. Promoting tolerance and understanding amongst the nation's diverse faiths was one of the objectives of the Indian Constitution, which was written against the backdrop of the country's partition. Because of

the deep religious ingrainedness of people's daily lives, the "strict wall of separation" paradigm of secularism was not adhered to when creating the constitution. As an alternative, it was characterized by "principled distance" and "equal respect and tolerance for all." Child marriage, sati, caste discrimination, untouchability, and other social problems were prevalent in the religions of the time, particularly Hinduism, and had to be eradicated if a more equitable social order was to be established.

Article 25 guarantees the freedom to freely profess, practice, and propagate one's religion as long as it stays within the parameters of morality, public health, and law and order. Article 25(2)(b) provides an exemption to the provision, nevertheless, allowing the state to pass a law facilitating social transformation or opening public Hindu religious institutions to all segments of the Hindu population <sup>[21]</sup>. Legislation being defended by the state as social reform and opposed by religious groups on the grounds that it violates Article 25 has frequently resulted in conflicts between these two articles in practice. So, there were three stances on religion in India's constitution: "religious freedom," "state neutrality toward all religions," and "reformative justice," which stated that the government could limit religious freedom in the name of public health, morality, and order, and that it could regulate religious practices and institutions in the realms of finance, politics, and economics. Religious liberty, social justice, and individual liberty all need to be considered by India's judges. It was necessary for the state to intervene somewhat in religious concerns in order to bring about social reform.

### **The dilemma of what is considered 'essentially religious' versus 'essential to religion'**

The process commenced with the establishment and activation of constitutional safeguards for activities that were seen to be inherently religious, namely practices that had a religious nature. Regarding the fundamental rituals and customs of a religious group, the government can only interfere if these practices go against public order, health, or morals, or if they violate other legal restrictions. The state has the authority to enact legislation pertaining to social welfare or make alterations. The state's intervention was limited to activities that were predominantly commercial, political, or economic in nature. In *Ratilal v. State of Bombay* <sup>[22]</sup>, the current ERP test determines that only practices that are considered "essential to religion" and are so fundamental that the constitution protects these customs and that changing them would fundamentally alter religion. To the best of our knowledge, neither the Constitution nor any fair interpretation of it includes any reference to this qualification of being "essential to religion." By taking on the responsibility of interpreting religious texts and adding new standards to establish the necessity of religious acts, the court has further trampled on religious freedom and secularism.

### **Interpreting Religious Text**

*The State of Mysore v. Venkataramma Devaru case* <sup>[23]</sup> comprised the Supreme Court's extensive analysis of sacred writings to prove that untouchability was not a fundamental tenet of Hinduism. One significant critique directed against the court was its interference in religious matters, despite the possibility of merely declaring untouchability as illegal under Article 17 and Article 14. The court, *Adhitayan v.*



*Travancore Devaswam Board* <sup>[24]</sup>, concluded that Article 17 of the Constitution was violated by the selection of priests who were only Brahmin. In *Shah Bano case*, a court has the option to resolve the problem by applying the Criminal Procedure Code instead of solely relying on verse 241 of the Quran. Justice Chandrachud's interpretation of fundamental principles of Islamic law in the *Shah Bano case* <sup>[25]</sup> did not receive unanimous agreement, even from the most knowledgeable Islamic jurists.

In the case *Sastri Yagnapurushadji and others v. Muldas Bhudardas Vaishya* <sup>[26]</sup>, the petitioners claim that because they are not Hindu, they should not be bound by the rules governing temple access. The court's comprehensive analysis of the fundamental tenets of Hinduism resulted in the determination that the 'satsangis' were indeed adherents of Hinduism. The statement further asserted that its stance on temple access was rooted in a misinterpretation of the teachings of its founder, Swami Narayan, as well as in superstition and a lack of knowledge. Consequently, the court educated a religious organization about the significance of their religion, a task that the judges were evidently ill-equipped to perform due to their limited theological expertise.

In the case of *Nikhil Soni v. Union of India*, the Supreme Court <sup>[27]</sup>, overturned the Rajasthan High Court's decision to outlaw the santhara practice. The court found that santhara is not protected by Article 25 of the Constitution since it does not meet the conditions to be considered an essential religious practice.

### The Obligation Test

A petition was filed asking the Indian Supreme Court to decide the matter of *Ismail Faruqui v. Union of India* <sup>[28]</sup> about the legitimacy of the Indian government's appropriation of the land on which the Babri Masjid was built. The issue of whether or not praying in a mosque is a fundamental component of Islam was brought before the court. After giving it some thought, the court decided that it isn't since prayer can be said anywhere, not just in a mosque. Consequently, the freedom of religion does not provide any form of protection for it. This criterion significantly restricts an individual's liberty to exercise their religion according to their own preferences, as it just safeguards acts that are deemed "mandatory" and "extremely crucial." As long as the custom doesn't violate any other fundamental rights or jeopardize public health, morals, or order, it should be safeguarded.

### The Test of Rationality

Regarding *Durgah Committee v. Syed Hussain Ali, Ajmer* <sup>[29]</sup>, Justice Gajendragadkar reached the conclusion that certain rituals may be attributed to mere superstition. These treatments require a thorough and meticulous examination. The Supreme Court included an extra criterion of reasonableness. Values like "rationality" and "morality" have no clear, widely accepted foundation and are therefore quite subjective. A judge's own belief systems shape their cognitive processes. A judge's assessment of "morality" or "rationality," which may differ from that of a religious organization, should not be the only factor used to determine whether the behavior is immoral or irrational. Giving a small number of judges such extensive power will inevitably result in the community being under their ideology and dominant cultural values, stifling diversity.

### The Antiquity Test

*Acharya Jagdishwaranand v. Commissioner of Police* is a case that <sup>[30]</sup> the court in Calcutta decided that tandava was not regarded as an essential Ananda Margi practice. This decision was based on the fact that tandava did not originate until 1966, but the faith itself was established in 1955. Consequently, due to the court's verdict, an extra assessment of age is now incorporated into the assessment of importance. *The Union of India v. Bal Patil* case <sup>[31]</sup> decision, Jainism should be categorized as a "revolutionary movement within Hinduism" rather than as a separate and distinct religion, the Indian Supreme Court decided. Despite the fundamental disagreement between the two religions regarding the belief in God, the court considered this point of dispute to be immaterial and nonetheless rendered the verdict. The verdict faced criticism from several scholars who argued that the law should not be involved in delineating the limits of religious observance. Hence, the prevailing perspective is that it is inadequate to simply establish the religious nature of an activity; instead, one must also exhibit that the practice is required, logical, and holds historical significance.

### Conclusion

The Supreme Court plays a crucial role in balancing societal interests with social changes by interpreting the constitution in a manner that promotes a broader spectrum of society's interests. When many interpretations of a fundamental clause arise, the one that provides the greatest benefit to society will be supported. This is because each provision aims to eliminate a distinct form of harm. The primary objective of transformative constitutionalism is to uphold and enhance the fundamental ideals of our compassionate constitution. Justice Chandrachud asserts that the Constitution's explicit objective is to bring about social reform. By acknowledging the rights of others during constitutional discussions, Author not only empower those individuals but also undergo personal transformation by embracing the liberty of others. Frequently, it suggested prioritizing the personal liberty excessively, to the extent that it should not fail to recognize the significance of respecting the liberty of others. Society undergoes a profound transformation and progresses when its members prioritize the liberty of others.

In order to achieve transformative constitutionalism, it is imperative that the court fully endorse and actively strive to implement positive alterations within society. Furthermore, the active participation of ordinary individuals is crucial in effecting a profound transformation of the Constitution that aligns with the demands of the contemporary era. Initially, everyone must acknowledge their own entitlements and convictions while concurrently exercising caution to avoid encroaching on the entitlements of others. In order to keep up with an ever-evolving society, it is necessary to uphold our nation's living constitution and continuously advance our fundamental rights.

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