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ADVANCING TRANSFORMATIVE CONSTITUTIONALISM IN INDIA

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Abstract

The Supreme Court of India has emerged as a pivotal player in realising transformative constitutionalism. It has embraced the concept of constitutional dialogue and engagement among the diverse stakeholders in society and it envisions a participatory and deliberative process wherein courts, legislature, civil society and marginalised communities actively contribute to shaping the constitutional order capable of driving the needs of social transformation and human flourishing. This paper examines the challenges and contradictions that shape the trajectory of the journey of transformational constitutionalism in India. By critically examining these challenges, we gain insights into the complexities of judicial activism and the enduring quest for a more just and equitable society. While there have been significant rulings that have expanded fundamental rights, protected marginalized groups, and promoted progressive change, there are also concerns about judicial overreach, gaps in implementation, and ongoing systemic inequalities that hinder the full realization of the transformative potential of the Constitution.

Keywords: Transformative Constitutionalism, Constitutional Dialogue, Diverse Stakeholders, Judicial Activism, Progressive Change.

I. INTRODUCTION

In the view of Social Transformation, Transformative constitutionalism is an important object in promoting the traditional notions of understanding the constitution into a holistic view of interpreting the constitution capable of driving the needs of societal changes. It interprets the constitution in such a way that the norms and values are actively shaped and reflect the aspirations and needs of the changing society. Transformative constitutionalism can be studied from the preamble of the Constitution, which pledges to secure justice, liberty, equality and fraternity. As a concept, it has gained significant traction in constitutional discourse, particularly where nations are grappling with transitions from authoritarian regimes, colonial legacies, or entrenched social inequalities. The need for transformative constitutionalism and

adopting this concept in judicial interpretation has become a need to address the struggles for liberation and emancipation in various parts of the state. The word Transformative Constitutionalism suggests that the idea of constitutionalism is not merely a static set of legal norms but a dynamic process of societal transformation. This shows that there is a commitment to harnessing the power of law and institutions to bring about substantive changes in the lives of individuals and communities. At its core, bridges the gap between formal legality and social justice, ensuring constitutional safeguards to every citizen. Even in established democracies, there is persistent challenges to democratic governance due to inequalities, therefore the need of transformative constitutionalism is growing to address systematic racism, economic disparities, gender justice and environmental degradation. The advancement of Transformative constitutionalism offers a framework for reimagining the role of law in promoting the principles of social justice and human flourishing. In recent years, the concept of transformative constitutionalism has found resonance beyond the traditional boundaries of post-colonial or transitional societies. When we go deeper into understanding the concept of transformative constitutionalism, we can find that it is crucial to examine its key principles, debates, and practical manifestations with respect to different national contexts.¹ Transformative Constitutionalism rests on several foundational principles that guide its application and interpretation, some of them are Equality and Non-Discrimination, Social Justice, Democratic Participation, Human Dignity and Pluralism.

A. *Meaning of Transformative Constitutionalism*

Transformative constitutionalism is about harnessing the power of the Constitution and its institutions to bring about substantive and structural changes to address historical injustices and promote a more inclusive and egalitarian society. At a fundamental level transformative constitutionalism challenges the traditional notion of constitutional law as a neutral framework for resolving disputes and upholding individual rights. Transformative constitutionalism underscores the idea of constitutional dialogue and engagement among the diverse stakeholders in society and it envision a participatory and deliberative process wherein courts, legislature, civil society and marginalised community actively contribute to shaping the constitutional order. Beyond merely safeguarding individual rights transformative constitutionalism seeks to address historical injustice address structural inequalities and promote the will be of all

¹ Biehl, Janet and Albie Sachs, *Transformative Constitutionalism*, 87 Tul. L. Rev. 969 (2012).

members of society. It prioritizes the interest of marginalised and vulnerable groups ensuring that they are not nearly passive beneficiaries of constitutional protection but active agents of social change.

B. Pursuit of Transformative Constitutionalism

The pursuit of transformative constitutionalism is not without challenges critics race concerns about judicial overseas the limits of legal formalism and the potential for backlash from entrenched interest moreover the effectiveness of transformative constitutionalism depends on broader societal factors such as political will and institutional capacity the continuity is crucial for understanding the evolving nature of constitutionalism and the dynamic interaction between law and society.

C. Tracing Transformative Constitutionalism

Historically the roots of transformative constitutionalism can be traced back to various movements for social justice and political emancipation from the struggles against colonialism and appetite to the civil rights movement in the United States and the quest for self-determination in post-colonial Nations transformative impulses have long animated the quest for constitutional reforms and social change like India. These movements late the ground work for the recognition of constitutional law at a subordent tool for challenging operation promoting equality and fasting human dignity moreover the continuity of transformative constitutionalism is evident in the enduring quest for democratic governance and the rule of law transformative constitutionalism represents a response to this perennial struggle offering a vision of constitutionalism that is deeply rooted in democratic principles and protection of fundamental rights contemporary challenges such as globalization technology world characteristic complex in the dependency of sovereignty and constitutionalism or being rea imagine in the year of contemporary challenges transformative constitutionalism provides a framework for addressing this challenges by promoting transnational solidarity environmental sustainability and global justice. In India the continuity of transformative constitutionalism is reflected in the Nations constitutional journey from colonial subjugation to democratic self governance the constitution of India adopted in 1950 represented a transformative movement in the international history embody the aspirations of a newly independent people for justice Liberty equality and fraternity.² over the decades the Indian judiciary has played a pivotal role in interpreting and

² Madhav Khosla, "The Indian Constitution", Oxford University Press (2012)

enforcing the transformative principles and enshrined in the constitution often to progressive judgements that expand the scope of fundamental rights and promote social welfare.³

D. Constitution, Constitutionalism and Transformative Constitutionalism

While the Constitution provides the legal framework for governance constitutionalism establishes the principles and values that underpin the constitutional order. Constitutionalism promotes the idea of constitutional democracy wherein popular sovereignty is tempered by the rule of law and respect for minority rights ensuring that democratic governments operate within the boundaries of constitutional constraints. Transformative constitutionalism on the other hand represents a dynamic and forward-thinking approach to constitutionalism that seeks to harness the power of law and institutions to bring about social transformation and justice by understanding the nuances and interrelationships between the concepts we can appreciate the evolving nature of constitutional governance and its potential to shape societies for the better. Transformative constitutionalism involve innovative interpretations of constitutional provisions extensive readings of fundamental rights and creative remedies aimed at addressing structural inequalities.

II. DEVELOPMENT OF TRANSFORMATIVE CONSTITUTIONALISM IN MODERN INDIA

The initial years of Indian independence were a pivotal moment in the nation's history, as a constituent assembly undertook the challenging task of drafting a constitution that would not only establish democratic governance but also pave the way for significant social transformation. This constitution, with its comprehensive bill of rights, provisions for affirmative action, and directive principles of State policy, laid out a blueprint for socioeconomic change and the empowerment of marginalized communities. Notably, key provisions like Article 15 and Article 17 demonstrated a firm commitment to eliminating deep-rooted forms of discrimination and oppression. The Supreme Court of India emerged as a crucial player in the realization of transformative constitutionalism, utilizing its powers of judicial review to interpret the Constitution in a manner that promotes social justice and human rights. Landmark cases such as *Golaknath v. State of Punjab* in 1967 and *Keshavanandha*

³ S.P.Sathe, "Judicial Activism in India: Transgressing Borders and Enforcing Limits", Oxford University Press (2002)

Bharathi v. state of Kerala in 1973 grappled with questions of constitutional interpretation and the extent of legislative power, reaffirming the supremacy of fundamental rights and the foundational structure of the constitution. The advent of public interest litigation in the 1980s marked a paradigm shift in the Indian legal landscape, providing democratic access to justice and amplifying the voices of marginalized communities. Public interest litigation served as a platform for activists, NGOs, and concerned citizens to approach the courts on behalf of those who were unable to assert their rights, thereby catalyzing transformative change in areas such as environmental protection, gender equality, and socio-economic rights.⁴ Throughout its history, the Supreme Court has handed down several landmark judgments that have reshaped the contours of Indian society and advanced the cause of transformative constitutionalism.⁵ In cases like *Vishaka v. State of Rajasthan*⁶, which addressed sexual harassment in the workplace, and *Olga Tellis v. Bombay Municipal Corporation*⁷, which affirmed the right to livelihood as integral to the right to life, the Court demonstrated its commitment to protecting the dignity and rights of the most vulnerable sections of society.⁸ The journey of transformative constitutionalism in India has been marked by challenges and contradictions the critics have raised concerns about judicial over reach delays in the judicature process and instances of executive non compliance with court orders which have Hind the effective implementation of constitutional ideals moreover deep rooted social inequalities, caste based discrimination and economic disparities continue to pose formidable obstacles to the realisation of transformative change. Therefore the supreme court of the custodian of the constitution has a vital role to play in UP holding the principles of transformative constitutionalism and ensuring that constitutional promises translate into tangible realities for all citizens.

III. ADVANCING TRANSFORMATIVE CONSTITUTIONALISM

In the case of *Keshavananda Bharati Case*, The Supreme Court of India has played a pivotal role in advancing the transformative agenda by shaping the legal discourse and influencing societal change. The case marked Constitutional history fundamentally altering the landscape of constitutional jury students in the country, arising from a challenge to the 24th amendment act, which sought to curtail the amending power of the Indian Parliament. This case brought to

⁴ Videh Upadhyay, “Public Interest Litigation in India: Concepts, Cases and Concerns” (Lexis Nexis, 2007).

⁵ Upendra Baxi, “The Indian Supreme Court and Politics” (Eastern Book Company, 2000)

⁶ *Vishaka and Ors. v. State of Rajasthan and Ors.*, AIR 1997 SC 3011

⁷ *Olga Tellis and ors v. Bombay Municipal Corporation and ors.*, 1985 SCC (3) 545

⁸ Hans Dembowski, “Taking the State to Court Public Interest Litigation and the Public Sphere in Metropolitan India” (New Delhi: Oxford University Press, 2001)

the forefront the delicate balance between parliamentary sovereignty and the supremacy of the Constitution. The heart of this case was the doctrine of basic structure, a judicial craft principle that sought to delineate certain core principles and values inherent in the constitution beyond the reach of parliamentary amendments.⁹ The Supreme Court in a historic decision held that while Parliament possessed the authority to amend the Constitution, such amendment must not violate its basic structure.¹⁰ The Court's recognition of the basic structure doctrine provided a framework for future adjudications, enabling it to adapt constitutional principles to the changing needs and aspirations of society. This evolutionary approach to constitutional interpretation has allowed the Indian judiciary to respond effectively to emerging challenges and uphold the spirit of transformative constitutionalism. In essence the *Keshavananda Bharati* case stands as a testament to the resilience of India's constitutional democracy and the judiciary's commitment to upholding its foundational principles. By enshrining the doctrine of Basic Structure, it is reaffirmed that the Supreme Court has the ultimate role in protecting the Constitution and is entrusted with the duty to preserve the sanctity of the Constitution by advancing transformative constitutionalism.

In the case of *Vishaka v. State of Rajasthan*, the Supreme Court addressed the issue of sexual harassment in the workplace following a brutal gang rape in Rajasthan. The court acknowledged the absence of legislative safeguards and invoked fundamental rights to fill this void.¹¹ The court issued guidelines to protect women from sexual harassment in the workplace. These guidelines are based on constitutional principles such as equality, dignity, and the right to a safe work environment. They are guaranteed under articles 14, 19, and 21 of the Indian Constitution. The *Visakhapatnam* judgment led to significant changes in India's legal system, challenging entrenched patriarchal norms and institutional apathy toward gender-based violence. This judgment prompted legislative action, which resulted in the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act in 2013, codifying and expanding the guidelines. The *Vishaka* Judgment serves as a source of hope, reminding us of the transformative potential of constitutional principles and the importance of collective action in creating a fair and just society.

⁹ Granville Austin, *"The Indian Constitution: Cornerstone of a Nation"*, Oxford University Press, Oxford (1996)

¹⁰ *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC1461

¹¹ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011

*In the case of Indra Sawhney v. Union of India*¹², The Mandal case was a significant milestone in addressing reservations in public employment and educational institutions. The Supreme Court upheld the constitutional validity of reservations and introduced the concept of the “creamy layer” to ensure that the benefits of affirmative action reach the most deserving and economically backward sections of society. Despite challenges, the introduction of the creamy layer concept in the Mandal case represents a significant judicial innovation balancing competing interests of principles and social justice for inclusive development.

*In Navtej Singh Johar v. Union of India*¹³, a five-judge bench of the Supreme Court of India delivered a landmark judgment by striking down Section 377 of the Indian Penal Code (IPC), which criminalized consensual homosexual acts between adults. This historic decision not only rectified a grave historical injustice but also marked a significant step towards inclusivity and acceptance in Indian society. The case originated from a batch of petitions challenging the constitutionality of Section 377, a colonial-era law introduced by the British in 1861. The judgment, authored by Chief Justice of India Dipak Misra, held that Section 377 violated the rights to equality, dignity, and privacy guaranteed by the Indian Constitution. The Court emphasized that the LGBTQ+ community is entitled to the full range of constitutional rights and protections. By criminalizing consensual same-sex acts, Section 377 had stigmatized and marginalized LGBTQ+ individuals, denying them equal protection under the law. The Court recognized that sexual orientation is an inherent aspect of one's identity and autonomy and criminalizing same-sex relations infringed on personal liberty. The judgment underscored the principle of constitutional morality and reflected contemporary societal values and norms. The striking down of Section 377 was seen as a reaffirmation of India's commitment to democratic principles and human rights. *Navtej Singh Johar v. Union of India* was a legal victory and a triumph for social justice and inclusivity. It sparked celebrations across the country and garnered widespread acclaim from human rights activists, LGBTQ+ organizations, and progressive segments of society. The judgment emboldened LGBTQ+ individuals to assert their rights and identities openly, challenging prevailing social prejudices and stereotypes.¹⁴ The Supreme Court's progressive stance represents a milestone for LGBTQ+ rights in India, but challenges persist in areas such as employment, education, healthcare, and family relations. Key issues yet to be comprehensively addressed include legal recognition of same-sex

¹² *Indra Sawhney v. Union of India*, AIR 1993 SC 477

¹³ *Navtej Singh Johar v. Union of India* 2018 3 SCC 1

¹⁴ Navtej Johar, “The LGBTQ+ Activists Behind India's Historic Ruling”, BBC News, September 7, 2018.

relationships, adoption rights, and protection from discrimination. While the *Navtej Singh Johar v. Union of India* judgment affirmed principles of equality and personal liberty, achieving full equality and inclusion will require sustained efforts from all stakeholders, including the legislature, judiciary, civil society, and the LGBTQ+ community itself.

The landmark case *Puttaswamy v. Union of India*¹⁵ focused on the right to privacy in the digital age and its implications for individual liberties and state surveillance. The Supreme Court affirmed privacy as a fundamental right, imposing limitations on the state's ability to infringe upon it. The judgment has profound ramifications for data protection regimes and digital governance. Challenges remain in implementation and enforcement, especially regarding the tension between privacy rights and national security imperatives. Overall, the case represents a significant milestone in the protection of privacy rights, but continued efforts are needed to realize its full potential.

The Supreme Court's interpretations in landmark cases such as *Kesavananda Bharati*, *Vishaka*, *Navtej Singh Johar*, *Indra Sawhney*, and *Puttaswamy* have decisively shaped transformative constitutionalism in India. Through these pronouncements, the Court has unambiguously expanded fundamental rights, addressed systemic injustices, championed the cause of marginalized communities, and steadfastly upheld the principles of equality, dignity, and social justice. Nevertheless, challenges persist in translating legal pronouncements into meaningful societal change, and the relentless journey towards a more just and equitable society continues.

IV. PRINCIPLES OF SOCIAL JUSTICE IN FOSTERING INCLUSIVE DEVELOPMENT.

The Supreme Court of India has consistently reiterated the imperative of social justice in its jurisprudence, employing various doctrines and principles to advance this cause such as the *Principle of Substantive Due Process*, *Transformative Equality*, *Right to Education*, *Welfare State Obligations*, *Reservation Policies* etc... The concept of substantive due process focuses on whether the government is justified in interfering with a person's life, liberty, and property. It reflects the belief that a constitution protects persons against unwarranted government interference, including fundamental rights and unenumerated rights like the right to privacy. Substantive due process requires that laws and state action must respect unenumerated rights

¹⁵ *Puttaswamy v. Union of India* 2019 (1) SCC 1

just as they must comply with the fundamental rights expressly enshrined. The Court has invoked the principle of substantive due process to ensure that socio-economic rights are not merely illusory but possess substantive content. In cases such as *Olga Tellis v. Bombay Municipal Corporation*, the Court held that the right to life enshrined in Article 21 of the Constitution includes the right to livelihood, emphasizing the state's obligation to provide for the basic needs of its citizens.¹⁶ This expansive interpretation underscores the Court's commitment to addressing socio-economic inequalities and promoting social justice.

Transformative Equality: The doctrine of transformative equality underscores the need to go beyond formal equality to achieve substantive equality in society. In *Navtej Singh Johar v. Union of India* (2018), while decriminalizing consensual same-sex relations, the Court emphasized that equality demands not merely the absence of discrimination but the presence of affirmative action to uplift marginalized communities. This recognition of transformative equality reflects the Court's endeavor to dismantle entrenched hierarchies and promote social justice for all.

Right to Education: Recognizing education as a transformative tool for social empowerment, the Court has affirmed the right to education as a fundamental right under Article 21-A of the Constitution. In the landmark case of *Unnikrishnan v. State of Andhra Pradesh* (1993), the Court held that education is intrinsic to the dignity of the individual and a means to realize other fundamental rights.¹⁷ This acknowledgment underscores the Court's commitment to levelling the playing field and ensuring equal access to opportunities for all segments of society.

Welfare State Obligations: The Court has emphasized the state's obligations as a welfare state to ensure social justice and equity. In *Bandhua Mukti Morcha v. Union of India* (1984), the Court held that the right against exploitation enshrined in Article 23 encompasses the state's duty to protect the vulnerable sections of society from exploitation and abuse.¹⁸ This expansive interpretation underscores the Court's recognition of the state's affirmative role in promoting social justice and welfare.

¹⁶ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180, (1985) 3 SCC 545.

¹⁷ *Unnikrishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178, (1993) 1 SCC 645.

¹⁸ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, (1984) 3 SCC 161.

Reservation Policies: Affirmative action through reservation policies has been a key tool employed by the Court to address historical injustices and promote social justice. In *Indra Sawhney v. Union of India* (1992), while upholding reservations in education and employment, the Court emphasized the need for proportional representation of historically disadvantaged groups in public institutions.¹⁹ This recognition of the need for compensatory discrimination reflects the Court's commitment to leveling the playing field and ensuring substantive equality in society.

By employing these doctrines and principles, the Supreme Court of India has sought to realize the transformative potential of constitutionalism, advancing the cause of social justice and inclusive development in the nation.

V. PRINCIPLES OF PROPORTIONALITY AS A GUIDING DOCTRINE

When we look into the realm of transformative constitutionalism, the Supreme Court of India frequently finds itself grappling with the complexities arising from conflicting rights and interests. To address this intricate landscape, the Court has embraced the principle of proportionality and the delicate equilibrium of rights as guiding principles in its legal framework. Proportionality involves a meticulous assessment of the relationship between the limitations imposed on a right and the legitimate objective pursued by the state. The Court evaluates whether the restriction is essential, proportionate, and the least intrusive means of achieving the state's goal. This refined approach empowers the Court to uphold constitutional values while acknowledging the valid interests of the state. Furthermore, the Court embarks on a nuanced balancing act when confronted with competing rights and interests. In situations where the exercise of one right may impinge upon another, the Court endeavors to strike an equitable and unbiased balance that safeguards the essence of each right. This involved balancing exercise encompasses a thorough evaluation of the significance of each right in the specific context, ensuring that neither right is unjustly curtailed. Through the application of proportionality and the balancing of rights, the Supreme Court seeks to reconcile conflicting interests in a manner that upholds the overarching principles of justice, equality, and liberty. By adjudicating disputes with sensitivity to the nuances of individual cases and the broader societal context, the Court reiterates its dedication to transformative constitutionalism.

¹⁹ *Indra Sawhney v. Union of India*, AIR 1993 SC 477, (1992) Supp 3 SCC 217.

VI. SUBSTANTIVE DEMOCRACY

Substantive Democracy

The Supreme Court of India has played a pivotal role in safeguarding substantive democracy through its jurisprudential interpretation. This includes protecting fundamental rights, asserting constitutional supremacy, safeguarding minority rights, ensuring election integrity, and promoting democratic governance and accountability. Substantive democracy entails more than just periodic elections and majority rule; it demands active participation, accountability, and the protection of fundamental rights and freedoms for all citizens. The Supreme Court has played a pivotal role in safeguarding substantive democracy through its jurisprudential interpretation, emphasizing the following key aspects:

Judicial Review and Constitutional Supremacy in view of Substantive democracy requires a robust system of checks and balances to prevent the concentration of power and protect individual rights. The Court, through its power of judicial review, has asserted the supremacy of the Constitution and upheld its core values against legislative and executive actions that threaten to undermine them. Landmark cases like *Indira Nehru Gandhi v. Raj Narain*²⁰ underscore the Court's commitment to upholding constitutional supremacy even in the face of political challenges.

Protection of Minority Rights in a vibrant democracy is characterized by the protection of minority rights and the promotion of pluralism. The Court has played a crucial role in safeguarding the rights of minorities, religious and linguistic, against majoritarian excesses. Decisions such as *Minerva Mills Ltd. v. Union of India*²¹ exemplify the Court's dedication to preserving the rights of minorities as integral to the democratic fabric of the nation.

When it comes to Election Integrity and Electoral Reforms, the Free and fair elections are the cornerstone of democracy. The Court has intervened to ensure the integrity of the electoral process, instituting electoral reforms and combating electoral malpractices. Cases like *Association for Democratic Reforms v. Union of India*²² have led to significant reforms such as the disclosure of criminal antecedents and financial details of candidates, enhancing transparency and accountability in the electoral process.

²⁰ *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp SCC 1.

²¹ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

²² *Association for Democratic Reforms v. Union of India*, (2002) 5 SCC 294.

Democratic Governance and Accountability resting while studying Substantive democracy, as it necessitates transparent and accountable governance. The Court has held governments accountable for their actions, ensuring adherence to constitutional principles and norms. Landmark judgments like *S.R. Bommai v. Union of India*²³ have affirmed the principle of democratic governance, emphasizing the importance of accountability and constitutional morality in the functioning of governments.

While protecting the fundamental rights at the heart of substantive democracy lies the protection of rights and liberties. The Court has zealously guarded these rights, ensuring that they are not mere parchment guarantees but enforceable entitlements that shape the lives of citizens. Decisions such as *Kesavananda Bharati v. State of Kerala*²⁴ have reaffirmed the primacy of fundamental rights in the constitutional scheme, laying down essential principles to safeguard them against legislative and executive encroachments.

By safeguarding these principles, the Supreme Court has played a crucial role in nurturing substantive democracy in India, ensuring that democratic governance is not merely a procedural formality but a substantive commitment to justice, equality, and the rule of law.

VII. REVIEW OF PAST

*Joseph Shine v. Union of India*²⁵, The Supreme Court of India has recently ruled that Section 488 of the Indian Penal Code and Section 189(3) of the Criminal Procedure Code are unconstitutional as they infringe upon Articles 13, 15(3), and 22 of the Constitution. The Court has also held that Section 497 of the Indian Penal Code, which previously made adultery illegal for men without the consent of their wives but not for women, is to be struck down. This decision was made on the grounds that the law was discriminatory and arbitrary, and violated women's rights to respect and liberty.

Sabrimala judgment:²⁶ The Supreme Court decision in 2018 granted women aged ten to fifty access to the shrine, with a majority decision and a notable dissenting opinion regarding constitutional perspectives. Justice Chandrachud emphasized individual dignity and

²³ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

²⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

²⁵ *Joseph Shine v. Union of India* AIR (2018) 2 SCC 189

²⁶ *Indian Young Lawyers Association and Ors. v. The State of Kerala.*, (2019) 11 SCC 1.

transformative constitutionalism, while Justice Indu Malhotra emphasized religious rights and the need for judicial restraint in religious affairs. According to Justice Chandrachud, liberal constitutionalism is based on the idea of individual dignity. He believes that the Indian constitution embodies the principles of justice, liberty, equality, and brotherhood. He sought to use 'transformative constitutionalism' to address gender bias in society based on the constitutional ideals. He interpreted Article 25 in the context of an individual's right to religious freedom, stating that the right to visit the Sabarimala shrine is protected under Article 25 as an essential aspect of a woman's right to "profess, practice, and propagate religion." Similarly, in her dissenting opinion, Justice Indu Malhotra stressed the importance of religious rights in constitutional morality. She viewed constitutional morality in the context of "secularism" and non-interference, arguing that judicial restraint in religious matters is necessary. She believes that constitutional morality is not intended for a transformative purpose.

Shayara Bano v. Union of India:²⁷ In a recent case, the judiciary took a stance as a reformer rather than a transformer by ruling that triple talaq is unlawful in a 3:2 majority decision. However, two of the justices on the bench expressed their view that the practice is a fundamental aspect of the Muslim faith, citing Article 25 as protection. The Constitution of India does not safeguard the practice of triple talaq due to the non-inclusion of activities deemed "anti-Quranic" under the Muslim Personal Law Application Act of 1936. The Court highlighted global advancements in Islamic family law and referenced reforms made by "theocratic Islamic regimes" in its decision.

Dr. Maya D Chablani v. Radha Mittal: The case of Dr. Maya D Chablani vs Radha Mittal (2021) was recently addressed by the Delhi High Court, and its ruling was well-received by many individuals. The court applied the concept of the 'Right to life' as per Article 21 of the Indian Constitution to street dogs in a very broad manner. It was determined in this case that street dogs have a 'right to food', and citizens are also entitled to feed them as long as they do not infringe upon the rights of others. The HC also established specific detailed guidelines regarding the feeding of these dogs. In reference to Article 21, it was affirmed that this right also protects the lives of animals.

Anuradha Bhasin v. Union of India: During the time when the Jammu and Kashmir

²⁷ *Shayara Bano v. Union Of India* (2017) 9 SCC 1.

Reorganisation Bill 2019 was passed, the government imposed a ban on the internet and shut down all communications in the region. Additionally, there was a restriction on the movement and assembly of the public under section 144 of the Criminal Procedure Code. Journalists were also barred from travelling and publishing any content, resulting in a violation of Article 19(1)(a) which guarantees the right to freedom of expression. The Supreme Court held that the right to access the internet is encompassed within Article 19(1)(a) and declared that the restrictions on journalists infringed upon Article 19(1)(g), which guarantees the freedom to practice any profession, occupation, trade, and commerce over the internet.²⁸

VIII. CHALLENGES AND WAY FORWARD

In its pursuit of transformational constitutionalism, the Supreme Court of India faces numerous criticisms and obstacles. There are a lot of things that make it hard to achieve revolutionary goals, like ideological disputes and institutional constraints, so people think about the Court's role and how effective it is. The decision of the Delhi High Court in the Naz Foundation case was heavily influenced by the idea of "Constitutional Morality," which must be emphasized. The State had argued that the imposition of public morality through legislation may be a legitimate government objective, and the court was considering this argument. The court responded by severely rejecting the state's argument, citing Article 21's statement that public morality or disapproval cannot be used as a basis to curtail basic rights. Public morality differs from constitutional morality in that it is more susceptible to shifting and individual conceptions of what is right and evil. Contrary to popular belief, only "constitutional" morality can provide a rationale for a strong governmental interest. Even though it represents the majority view, constitutional morality should be given more weight in our framework than popular morality. With respect to Judicial Constraints, the constraints that are imposed by the legal system present the Supreme Court with a number of fundamental obstacles when it comes to putting transformational constitutionalism into practice. As a result of the adjudicative role that it plays, the Court is frequently confronted with issues regarding judicial exceeding its authority. There are limitations placed on the Supreme Court's ability to intervene in policy matters by the doctrine of separation of powers, which makes it more difficult for the Court to bring about systemic change that extends beyond the sphere of law.

In addressing issues in ground realities, although the Court may deliver transformative

²⁸ *Anuradha Bhasin v. Union of India* AIR 2020 SC 1308.

judgments, translating these pronouncements into meaningful action is a major obstacle. The gap between judicial directives and on-the-ground realities undermines the effectiveness of transformative constitutionalism. Bureaucratic inertia, resource constraints, and administrative hurdles often hinder the enforcement of Court orders, diminishing their impact on marginalized communities and vulnerable populations. India's complex socio-economic landscape presents formidable challenges to transformative constitutionalism. Structural inequalities, poverty, and marginalization exacerbate barriers to social justice and equitable development. The Court's ability to address systemic injustices is often limited by its reliance on legal remedies, overlooking the broader socio-economic determinants that perpetuate inequality and exclusion.²⁹

Marginalized Communities Victims of Systemic Neglect: The implementation gap disproportionately affects marginalized communities, who are often the intended beneficiaries of transformative constitutional interventions.³⁰ Despite legal protections and affirmative action measures, marginalized groups such as Dalits, Adivasis, sexual minorities and religious minorities continue to face systemic discrimination and socio-economic exclusion.³¹ The failure to effectively implement transformative directives perpetuates cycles of marginalization and reinforces existing patterns of inequality.

Concomitant Consequences and Opposition are the aggressive attitude that the Supreme Court takes on social matters frequently results in pushback and opposition from conservative sectors and vested interests across the country. Significant challenges to attaining revolutionary goals include opposition from political parties, scrutiny from the media, and criticism from the general public. When contentious matters concerning cultural traditions or religious liberties are brought up, they spark polarized disputes, which in turn undermine the legitimacy and authority of the Supreme Court. It is understood that, transformative constitutionalism is subject to ideological contestations within the judiciary. Divergent judicial philosophies and interpretative approaches shape the Court's jurisprudence and lead to debates about constitutional rights. Liberal interpretations emphasizing progressive values clash with conservative perspectives advocating for judicial restraint, resulting in conflicting judgments and doctrinal inconsistencies.

²⁹ N. Gupta, SOCIO-ECONOMIC REALITIES AND TRANSFORMATIVE CONSTITUTIONALISM, 35, 102-120 no. 6 ECONOMIC AND POLITICAL WEEKLY (2021).

³⁰ Baxi, Upendra, THE FUTURE OF HUMAN RIGHTS 112-130 (Oxford University Press, 2006).

³¹ Thorat, Sukhdeo, UNTOUCHABILITY IN RURAL INDIA 45-62 (Sage Publications, 2018).

Thus, when we navigate the terrain of transformative constitutionalism, the Supreme Court of India confronts a multitude of challenges and criticisms that shape its transformative agenda. From institutional constraints to ideological divides, the journey towards societal transformation is fraught with obstacles that test the Court's resilience and efficacy. By critically examining these challenges, we gain insights into the complexities of judicial activism and the enduring quest for a more just and equitable society. Amidst the array of differing viewpoints, the complex challenge lies in finding the delicate balance between judicial activism and judicial restraint. The judiciary is tasked with the proactive safeguarding of constitutional values and the equitable dispensation of justice, while also demonstrating prudence and restraint in deference to the separation of powers and democratic mandates. Navigating this intricate equilibrium necessitates a nuanced comprehension of the judiciary's role in a democratic society and a steadfast dedication to upholding the rule of law. Legal empowerment begins with education, particularly in marginalized communities that often lack awareness of rights and legal procedures. It is crucial to have community legal education initiatives to address this knowledge gap, empowering individuals to assert their rights and navigate legal processes effectively. These initiatives involve organizing workshops, seminars, and outreach programs to fit the specific needs and contexts of marginalized communities. Community legal education programs serve several purposes, such as enhancing legal literacy, cultivating legal awareness, advocating for preventive legal strategies, and promoting community mobilization. To maximize the impact of community legal education initiatives, it is essential to have collaboration between legal professionals, civil society organizations, and community leaders. These partnerships ensure that educational materials are culturally sensitive, linguistically accessible, and customized to the specific needs of target communities. Transformative constitutionalism is a powerful concept that envisions societal change based on justice, equality, and dignity. It challenges us to move beyond rigid legal frameworks and consider the real-life experiences of those who have been historically marginalized and oppressed. This approach requires a judiciary that actively works towards social transformation, rather than simply resolving disputes. While there have been significant rulings that have expanded fundamental rights, protected marginalized groups, and promoted progressive change, there are also concerns about judicial overreach, gaps in implementation, and ongoing systemic inequalities that hinder the full realization of the transformative potential of the Constitution.