

# Transformative Constitutionalism: The Indian Judicial Experience

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## Abstract

Transformative constitutionalism focuses on constitutional guarantees and tools in order to align the existing Constitution with the need of the changing times. It aims at effectively enforcing the spirit and ethos of the Constitution. The chapter analyzes the concept of transformative constitutionalism through the judicial experience. Firstly, it aims at understanding the meaning and nature of the concept of transformative constitutionalism by tracing its origin as well as its use across jurisdictions. Secondly, the chapter focuses on understanding the judicial approach towards the concept of transformative constitutionalism as a judicial tool for dispensing justice. Thirdly, the chapter traces the various developments in the Indian Judicial experience which have led to the strong establishment of Constitutionalism in India. Fourthly, the chapter explores recent endeavors by the Indian judiciary which have helped materialize the idea of Transformative Constitutionalism in India. The chapter discusses various aspects where the Indian judiciary has consciously evolved and transformed ideals and values embedded within the framework of the Constitution fundamental rights. Lastly, the chapter summarises the effect and value of transformative constitutionalism, its limitations and potential in the times to come.

Keywords: Transformative Constitutionalism, Indian Judiciary, Constitutional Interpretation, Judicial Reform in India, Fundamental Rights and Justice Delivery

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## 1 Introduction

Prof. Baxi peeled the dialectics pertaining to constitutionalism by identifying three 'C's': The constitution, constitutional law and constitutionalism itself. These three 'C's' signify the text, the official interpretation of the text and the normative, ideological essence of the constitution, respectively. For Baxi, these aspects form the basis of conflicts and contradictions in interpreting and implementing

constitutions.<sup>1</sup> However, Baxi identifies the aspect of a Constitutional promise signified by constitutionalism and the existing contradictions understood as ‘betrayals’ where the prerogative of “transformation” lies. In essence, to ‘right’ the ‘wrong’, by embracing the spirit and ideals of the constitution, the necessity of Transformative Constitutionalism has been ushered, especially by the judiciary which has played the most pivotal role in conceptualizing and evolving the law from this perspective.

## 2 Transformative Constitutionalism: A Conceptual Understanding

The concept of ‘transformative constitutionalism’ does not come with a description that fits all of its myriad forms across jurisdictions. In that sense, ‘transformative constitutionalism’ proposes a sense of organic growth which is determined by the distinct institutions, social and political issues that prevail therein. From that perspective, ‘transformative constitutionalism’ entails a uniqueness as it is shaped not so much by the Constitution itself but rather the issues that it seeks to redress. In this backdrop, the concept and origin of ‘transformative constitutionalism’ in modern day jurisprudence becomes relevant. The American academician Karl Klare coined the term “transformative constitutionalism” in 1998 in an article titled ‘Legal Culture and Transformative Constitutionalism’ published in the context of South African constitutionalism. It described a process which signified “constitutional enactment, interpretations, and enforcement committed to... transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.”<sup>2</sup>

Klare identified that the new South African Constitution was drafted keeping in mind the history of the nation and was developed with optimism and positivity.<sup>3</sup> However, Klare recognised the complexity the situation posed considering that the more formal legal methodologies and reasoning would be still riddled with apartheid which was very much a reality which existed not so long ago. It is in this backdrop that Klare proposed that the methodologies and interpretations of the past had to be discarded and a new approach which was ‘transformative’ in nature was required. Such an approach of transformative constitutionalism would be “an enterprise of inducing large-scale social change through nonviolent political processes grounded in law”.<sup>4</sup> It would be seen as a holistic approach which would be aimed in bringing out the best out of the constitution, to right the wrongs and bring about more fundamental change.

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<sup>1</sup>Upendra Baxi, “Preliminary Notes on Transformative Constitutionalism”, in Oscar Vilhena, Upendra Baxi, and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* 19–47 (Pretoria University Law Press, Pretoria, 2013).

<sup>2</sup>Karl E. Klare, “Legal Culture and Transformative Constitutionalism” 14 *South African Journal on Human Rights* 146 (1998).

<sup>3</sup>Karl E. Klare, “Legal Culture and Transformative Constitutionalism” 14 *South African Journal on Human Rights* 146, 153 (1998).

<sup>4</sup>Karl E. Klare, “Legal Culture and Transformative Constitutionalism” 14 *South African Journal on Human Rights* 146, 150 (1998).

## *Transformative Constitutionalism: Issues and Challenges*

In terms of why transformative constitutionalism is different and impactful, Justice Pius Langa, former Chief Justice of the South African Constitutional Court suggested that the idea of transformative constitutionalism has created a space for greater discourse and contestation which in turn provides for a more permanent change.<sup>5</sup> In that sense, transformative constitutionalism pushes for constant improvement and progressive change.<sup>6</sup>

In *Road Accident Fund v. Mdeyide*<sup>7</sup>, the South African Constitutional Court of succinctly described the primary purpose of transformative constitution as process of realisation by which people disadvantaged and deprived by their social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of the constitutional democracy. The concept of transformation is fundamentally based on an evaluated need for modification, in keeping with complex social developments. However, social developments cannot be reduced to a scientific theory since practical change occurs when there is an environment of reflection, debate and diversity of opinion, which in turn is essential to theory.<sup>8</sup>

The focus is on stimulating the nation towards achieving the underlying values and goals enshrined in the constitution. It derives its strength and core from the constitution philosophy, ideology and values envisaged in it. But only when democratic and constitutional institutions imbibe and adhere to constitutionalism can effective transformation in turn be made in society.

### **3 Judicial Interplay with Constitutionalism**

Transformative constitutionalism is effectively constitutionalism in action in an egalitarian society facilitating the realization of the ideals of the constitution in particular and human rights in general. It equips the Court to move a step further from the liberal model, enabling sweeping transformation focusing on recognition, realization and enforcement of substantive justice. Therefore, judicial systems have strived to bring forth a sweeping transformation focusing on recognition, realization and enforcement of substantive justice.

The Hon'ble Supreme Court of India in *Navtej Singh Johar v. Union of India*<sup>9</sup> recognised that 'change is inevitable' and it is the duty of the courts to give life to rights envisaged by the Constitution in keeping with the ever-changing times. The Apex Court observed "constitutional vision of equal rights in consonance with the current demands and situations and not to read and interpret the same as per the standards of equality that existed decades ago. There is a constant need to transform the constitutional idealism into reality by fostering respect for human rights, promoting inclusion of pluralism, bringing

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<sup>5</sup>Pius Langa, "Transformative Constitutionalism" 17 *Stellenbosch Law Review* 351, 354 (2006).

<sup>6</sup>Michaela Hailbronner, "Transformative Constitutionalism" 65 *American Journal of Comparative Law* 527, 533 (2017).

<sup>7</sup>2011 (2) SA 26 (CC).

<sup>8</sup>Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* 205 (Law Book Company, Sydney, 2002).

<sup>9</sup>(2018) 10 SCC 1.

harmony, that is, unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny.”<sup>10</sup>

The term ‘transformative’ in association with ‘constitutionalism’ creates an inherent quest to transform the Indian society positively in consonance with the spirit of Constitutional ethos, rights and guaranties. It also adds a dimension of pragmatism and relevancy in terms of interpreting and enforcing the Constitution permitting it to continue as a ‘living law’.<sup>11</sup>

The Court has not only in the recent years recognised but also time and again reinforced the idea of a transformative constitutionalism as an essential facet of the Indian Constitution. Therefore, Constitutional Courts are at very center of devising tools and mechanism which are essential to transformative constitutionalism. It works towards exposition and progressive interpretation of the Constitution, especially when societal developments and realities are no longer accommodated in the existing constitutional framework. It is the role of the Courts to give a new lease of life to such a Constitution in order to keep it relevant, progressive and pragmatic. Therefore, the judicial developments are most pertinent to understand the shift in from a rigid interpretation of the Constitution to a progressive one overseeing access to rights and liberties.

It is important to keep in mind the fact that the Indian Constitution draws its origin from a complex social fabric riddled with colonial oppression and discrimination. With the coming in of the Constitution, the idea of sovereignty was born and aimed at uplifting the ‘subject’ of colonial rule to the status of a ‘citizen’, laden with social, economic and human rights. However, there was dissonance between the ideology of the Constitution and the pre-existing laws which continued in independent India as well. Therefore, the role of the Constitutional Courts has been most striking in upholding constitutionalism and evolving the constitution on the edifice that pre-existed it.<sup>12</sup>

#### **4 The Journey of Instilling Constitutionalism: Indian Experience**

The Indian judiciary has had a significant journey in enforcing constitutionalism while the Parliament strived to shape the policy and legislative framework for the present and the future. It is often on account of significant leaps taken by Parliament that the Judiciary, as the custodian of the Constitution, had to step in. The initial decade was marked by issues pertaining to the interpretation of fundamental rights particularly right to property and the scope and nature of the directive principles of state policy.

The rise of the ninth schedule as a shield for the government to protect legislations from the scrutiny of the Court irrespective of their inconsistency with fundamental rights, was a matter of grave concern

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

<sup>11</sup>*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>12</sup>G. Kannabiran, *The Wages of Impunity: Power, Justice and Human Rights* 50 (Orient Blackswan, Hyderabad, 2004).

## *Transformative Constitutionalism: Issues and Challenges*

which irked the Court.<sup>13</sup> Subsequent to 1964, an ideologically driven surge was witnessed in the judiciary as the guarantor of the constitution. The judiciary took significant steps to neutralize the decisions of the parliament in face of ‘constitutional decay’.<sup>14</sup> This in turn fueled the tussle for power between the Court on one hand and the Parliament and executive on the other hand.<sup>15</sup>

The judicial pronouncements particularly in the late 1960s and early 1970s, paved the way for a more robust judiciary which stood strong in the face of the executive’s challenge to the fundamental rights of the citizens of India and the power of judicial review itself.<sup>16</sup> This stand of the judiciary was even more commendable with the wake of the Indira Gandhi regime. The mid-1970’s was marked with extensive invasive alteration of the very edifice of the Constitution.

Ultimately in *Kesavananda v. Union of India*<sup>17</sup>, the Supreme Court determined the concept of basic structure. The power of amendment was limited as the Parliament could no longer alter the ‘basic structure and framework of the Constitution’.<sup>18</sup> The judicial pronouncement of Keshavananda Bharti helped solidify its position as the guardian of the Constitution and placed it at the very center of the polity.<sup>19</sup>

However, the period which ensued was marked by the darkest hour for the Indian judiciary. Seervai rightly states that during the emergency period one witnessed ‘two Supreme Courts’.<sup>20</sup> The one which exhibited great judicial fortitude stuck down Art. 329A (4) which had been enacted with the idea to exclude the election of certain posts from judicial scrutiny, particularly to protect the election of Prime Minister Indira Gandhi.<sup>21</sup> However, the second Supreme Court dove deep into the darkest realms in the history of Indian judiciary with the (in) famous Habeas corpus judgment *ADM Jabalpur v. Shiv Kant Shukla*.<sup>22</sup> The Court closed its doors during the darkest period of political history, the 1975 National emergency by holding that writ of habeas corpus under Art.226 was unavailable to the detainees. At the

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<sup>13</sup>*Golaknath v. State of Punjab*, AIR 1967 SC 1643, 1717.

<sup>14</sup>G.E. Beller, “Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India” 36 *Western Political Quarterly* 513, 525 (1983).

<sup>15</sup>J. Ferejohn, “Independent Judges, Dependent Judiciary: Explaining Judicial Independence” 72 *Southern California Law Review* 353 (1999).

<sup>16</sup>*Golaknath v. State of Punjab*, AIR 1967 SC 1643; *R.C. Cooper v. Union of India*, AIR 1970 SC 564; *Madhav Rao Jivaji Rao Scindia v. Union of India*, (1971) 1 SCC 85.

<sup>17</sup>(1973) 4 SCC 225.

<sup>18</sup>*Kesavananda v Union of India*, (1973) 4 SCC 225.

<sup>19</sup>G.E. Beller, “Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India” 36 *Western Political Quarterly* 513, 516 (1983).

<sup>20</sup>Shylashri Shankar, “Descriptive Overview of the Indian Constitution and the Supreme Court of India”, in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* 122 (Pretoria University Law Press, Pretoria, 2013).

<sup>21</sup>*Indira Gandhi v. Raj Narain*, AIR 1975 SCC 2299.

<sup>22</sup>(1976) 2 SCC 52.

same time, the Prime Minister actively packed the Court with flexible judges and transferred those who refused to toe the line.

Further attempts were made in the form of the 42<sup>nd</sup> Amendment to nullify the effect of the basic structure doctrine, which severely impacted judicial independence and the very Constitution itself. It is this period which gave the Court the necessary thrust to take up a more expansive approach to give greater meaning to the Constitution and more accessibility to the Court. The rise in public interest litigation and a relaxed threshold of locus standi allowed the Court to reinvent itself in the face of much needed change and embark a journey in determining a more relevant and progressive Constitution. Therefore, from the darkest hour rose a renewed judiciary and a more nuanced Constitution.

## **5 Piecing the Transformative Constitutional Fabric**

In the recent years, a significant endeavor by the Indian judiciary, particularly the Apex Court has helped materialize the idea of a Transformative Constitutionalism. The judiciary has consciously evolved ideals and values embedded within the framework of the fundamental rights to create greater harmony and progress in the social fabric. Shedding the rather tepid approach, the judiciary in the 21<sup>st</sup> century has bolstered its duty as not only the custodian of the Constitution but also as its ultimate interpreter. It has engaged with oft neglected, marginalized issues with renewed fervor, paving a path for an ever evolving, living Constitution. It has evolved an approach balancing the constant and endless need of transformation due to changing times with the avowed ethos and principles of the Constitution. It is in this sense that the approach of transformative constitutionalism also provides a more practical solution to complex social problems, while effectively strengthening the values of a progressive, egalitarian Constitution.

### **5.1 Sexual minorities and Transformative Constitutionalism**

The 21<sup>st</sup> century has ushered a robust Indian Judiciary striving to engage in bringing about radical change in consonance with Constitutional principles and ideology. The Courts have revitalized the Constitution in order to restructure social hierarchies, bridge economic and political inequalities and foster equality, liberty and fraternity, even for the most marginalized sections of society. One such section of society has been the LGBTQ community which has grappled to find its right in a post-independent Constitution.

This issue came at the forefront when the constitutionality of Section 377 of the Indian Penal Code, 1860, was under challenge. The provision had its roots in colonial India and remained unaffected despite the coming in of a robust Constitution. The legal tussle to decriminalize homosexuality culminated with the Supreme Court of India's decision in *Navtej Singh Johar v. Union of India*<sup>23</sup>, where it unanimously struck down S.377, IPC. Chief Justice Misra engaged with the concept of transformative constitutionalism as a revolutionary mission of the Constitution of India to transform a "medieval, hierarchical society into a modern egalitarian democracy". From this perspective, Court invoked

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<sup>23</sup>(2018) 10 SCC 1.

transformative constitutionalism from a broader perspective, effecting not only the State but also social, political and economic constructs.

Model of transformative constitutionalism equipped the Court to engage and transform such constructs supported by social morality, by testing it against nuanced constitutional scrutiny. Therefore, while maintaining a heterogeneous fabric of society, Court urged the State to curb tendencies of majoritarianism and popular sentiment over and above Constitutional ethos.<sup>24</sup> Justice Chandrachud succinctly summarised the existing social backdrop against which sexual minorities in Indian society continued to strive for their fundamental rights.

Justice Chandrachud stated that sexual minorities in India continued to wait and watch while rest of Indian citizens were freed from colonial rule, their rights continued to remain suspended under an antiquated colonial-era law, effectively reducing them to second-class citizens of India.<sup>25</sup> Court pitted the notions of social morality which continued to assess homosexuality as a social anomaly, against more fundamental constitutional values. Court held that Section 377 violated a catena of rights including equality, freedom of expression and privacy and failed to satisfy the test of proportionality.<sup>26</sup> Unable to reconcile Section 377 with existing Constitutional order, Court invoked the transformative Constitution and decriminalized homosexuality.

## **5.2 Developing Right to Privacy**

The Indian judiciary has played a critical role in revisioning the facets of Article 21 of the Constitution of India but drawing facets of it which remained implicit till date. The *Justice K.S. Puttaswamy v. Union of India*<sup>27</sup> judgment has played a pivotal role by developing the right to privacy as a fundamental right. The judgment pertains to a challenge to the validity of the Aadhaar Card Scheme of the Union Government contending that it violated the right to privacy on grounds of violation of right to privacy. The Court declared that right to privacy is a part of the right to life and personal liberty under Article 21 and is a part of the freedoms guaranteed by Part III of the Constitution.<sup>28</sup> At the same time, Court clearly stated that similar to all other fundamental rights, right to privacy is also not an absolute right and where a law infringes such right it must qualify as a valid law that is just, fair and reasonable. Court penned down that the Constitution must evolve with the changing times and address the issues and challenges which it comes across. Court held that the interpretation of the Constitution must be resilient and flexible in order “to allow future generations to adapt its content bearing in mind its basic or essential features”.<sup>29</sup>

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<sup>24</sup>*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>25</sup>*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>26</sup>Sujit Choudhry, “Postcolonial Proportionality: Johar, Transformative Constitutionalism, and Same-Sex Rights in India”, in Philipp Dann, et al. (eds), *The Global South and Comparative Constitutional Law* 190–209 (Oxford University Press, Oxford, 2020).

<sup>27</sup>AIR 2017 SC 4161.

<sup>28</sup>*Justice K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161.

<sup>29</sup>*Justice K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161.

### 5.3 Autonomy, Dignity and Privacy

In *Common Cause (A Regt. Society) v. Union of India and Ors.*,<sup>30</sup> Court recognised the right to die with dignity is a right envisaged within Article 21, Constitution of India and upheld the legality of passive euthanasia. In the regard, the Court held that aspects of bodily privacy and integrity were vital facets of privacy and elaborated on various aspects pertaining to procedures for the same. Court reiterated that living with dignity, liberty, integrity and autonomy are essential aspects of right to privacy. Court provided for support of medical experts and application of the best interest principle in situations where the patient is incompetent to take an informed decision. Furthermore, an adult person having mental capacity to take an informed decision has the right to refuse treatment including life-saving apparatus and devices. Therefore, Court recognised the individual's choice of sound mind to exercise his right of bodily integrity and self-determination by executing an advance medical directive in accordance with safeguards.<sup>31</sup>

In *Jacob Puliyel v. Union of India*,<sup>32</sup> Court while engaging with the issue of autonomy of an individual to choose to receive the Covid-19 vaccine held that forceful vaccination would result in bodily intrusion in violation of right to privacy protected under Article 21, Constitution of India. The Court recognised it as a facet of the right to refuse to undergo any medical treatment. At the same time, the Court held that in the interest of public health, Government can impose certain limitations. However, such impositions must meet the requirements of legality, need and proportionality as enunciated in the *Justice K.S. Puttaswamy* judgment.<sup>33</sup>

### 5.4 Transformative Constitutionalism, Life and Personal Liberty

The Court has further explored elements of right to life in order to grant acceptance to an individual's right to make life choices, even if unconventional in terms of social dogmas. By transcending traditional limitations, Court has effectively expounded elements of freedom of expression, right to life and personal liberty which remained constrained on account of social structures and rigidities. In *Shafin Jahan v. Ashokan K.M.*<sup>34</sup> Court recognised right of an individual to choose a life partner. Similarly, in *Shakti Vahini v. Union of India*<sup>35</sup>, the Court recognised right to choose a life partner as a facet of individual liberty.

This judgment particularly dealt with consequence of honour killing which plagues society as a response to individuals exercising this right. Court issued various punitive and remedial measures alongwith preventive guidelines in order to redress the social malady of honour killing. Therefore, by evolving the

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<sup>30</sup>AIR 2018 SC 1665.

<sup>31</sup>*Common Cause (A Regt. Society) v. Union of India and Ors*, AIR 2018 SC 1665.

<sup>32</sup>2022 SCC OnLine SC 533.

<sup>33</sup>*Justice K.S. Puttaswamy v. Union of India*, AIR 2017 SC 4161.

<sup>34</sup>(2018) 16 SCC 368.

<sup>35</sup>AIR 2018 SC 1601.

approach of transformative constitutionalism, Court has addressed a number of social aspects which continued to remain neglected even by State. It has paved a way for the Constitution to agitate progressive change while infusing new life into the Constitution.

In *National Legal Services Authority (NALSA) v. Union of India*<sup>36</sup>, Court was faced with the legal conundrum of recognizing “third gender” for persons who did not fall in the male and female gender binary. The Court engaged at length with a dialogue identifying “dignity” associated with freedom of self-expression. Court defined concept of gender identity not limited to biological characteristics but a more fluid idea of innate perception by the individual. It revived the most fundamental rights such as dignity, freedom of expression, equality and right against discrimination, which had remained suspended on account of lack of inclusivity.

Court stated that Article 14 envisaged a right to equality which would be extended to “all persons” in gender neutral terms. It further stated that transgender persons were excluded in all aspects of social and public life based on technical constraints of gender. Such exclusion was in direct violation of Articles 15 and 16 which specifically prohibited discrimination on ground of “sex”. Term sex was given a wide explanation and was not limited to biological features but also included gender identity based on self-perception as well. Therefore, without categorically invoking the model of transformative constitutionalism, the Court interpreted the Constitution to include within its realm a progressive and inclusive understanding of gender identity.

### **5.5 Remediating Caste Based Inequities**

In *B.K. Pavitra v. Union of India*<sup>37</sup>, the Apex Court upheld the constitutionality of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act 2018. Court by upholding the statute sought to redress historical caste-based inequities by relying on transformative value of Constitution. Court invoked transformative constitutionalism in order to justify affirmative action and compensate for historical wrongs perpetuated by the caste based system. Justice Chandrachud referred to the Constituent Assembly Debates wherein it was recognised that Indian society suffered from deep structural inequalities and that the Constitution would serve as a transformative document to overcome them. Therefore, Justice Chandrachud categorically recognised that reservations in legislatures and state services for Scheduled Castes and Scheduled Tribes is one method for overcoming such ingrained inequalities.

### **5.6 Revisiting and Transforming Judicial Interpretations**

The landmark judgment of *Joseph Shine v Union of India*, is a prime instance where the Court invoked the concept of transformative constitutionalism to reassess and interpret its’ own previous interpretation.

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<sup>36</sup>AIR 2014 SC 1863.

<sup>37</sup>AIR 2019 SC 2723.

Court revisited its' approach of criminalizing adultery based on colonial legislation and understanding and rather chose a progressive interpretation becoming with the prevailing times. Court held that no longer could a woman be considered as a sexual property of another person who would be relegated without any sense of choice. Therefore, Court embarked upon the path of transformative constitutionalism and refused to remain in a time capsule and continue to treat adultery as a crime. Apex Court struck down S.497, Indian Penal Code, 1860 since it made adultery an offence only for the man and not for the married woman. Court nuanced constitutional values of equality and dignity and refused to perpetuate an interpretation which rendered women as without will or subordinate under the institution of marriage.

### 5.7 Exploring Institutional and Social Dogmas

In *Indian Young Lawyers Association v. UOI*<sup>38</sup>, the Honble Supreme Court determined the Sabarimala Temple issue with regards to the ban imposed on menstruating women between the age of 10 to 50 years of age from entering the temple. The exclusionary practice was being enforced under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules 1965 which was framed under the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965. Justice Chandrachud in his concurring opinion explored aspects of radical equality. Justice Chandrachud stated that the Indian Constitution was in fact transformative in its very essence since it not only gives birth and governs institutions in an independent India but also helps it to step outside the shadow of colonial rule.

At the same time, Justice Chandrachud recognised the aspects within the existing social fabric, be it in the form of caste or in the form of patriarchy, which still required tremendous work in order to give life to the true ethos of the Constitution. Therefore, Justice Chandrachud stretched the reach of Constitutional values and principles to even social institutions which facilitated discriminatory practices. It is by such interpretation, Justice Chandrachud evolved the issue from restriction of worship based on biological characteristic in a singular temple to a broader, nuanced, social institutional discrimination. In fact, Justice Chandrachud took this opportunity to explore a new understanding of Article 17, Constitution of India and the social concepts of untouchability and impurity. Justice Chandrachud analysed the Constituent Assembly Debates wherein there was no consensus over the precise scope and ambit of the phrase “untouchability”, especially as it provides to abolish untouchability ‘in any form’.

In fact it was noted that KT Shah specifically ‘warned’ that the provision might be extended to cover women to which Dr. Ambedkar did not respond and therefore left the concept of untouchability wide in terms of its breadth and its meaning. Though, Justice Chandrachud’s judgment does not deny in any way that caste-based untouchability is in fact at the heart of Article 17, however, acknowledged the logic of purity and pollution as the basis of caste-based untouchability, also takes other forms and manifestations such as exclusion of women from various activities due to impurity. Therefore, through the Sabarimala

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<sup>38</sup>(2019) 11 SCC 1.

verdict, Justice Chandrachud truly gave insight into the potential of transformative constitutionalism to address the needs of the changing times.

## **6 Conclusion**

The judiciary has been entrusted with the task of interpreting the law and at the same time ensuring that it evolves and keeps up with the need of time. In postcolonial nations, judicial role has often been more expansive considering the shift in major institutional and social framework. Court has not been restricted to merely interpreting text but has strived to bolster constitutional values and ideals while engaging with a greater sense of creativity. Though often Court has been criticized for displaying tendencies of overarching activism, it still strives to create a progressive, transformative constitution. In this respect the judiciary takes up numerous roles such as a transformer of law, protector of rights and values, stimulus of change, vehicle of democratic ideals and sometimes an institution which works in seclusion in complete compliance with doctrine of separation of powers.<sup>39</sup> Therefore, it would be apt to assume that though the judiciary cannot take up only a singular mode of exercise of its power, it can evolve and transform as per the vision that resonates most with the prevailing needs of the time, inconsonance with the spirit and ideals of the constitution.

Therefore, through transformative constitutionalism the Courts have perceived and taken rights seriously through taking human suffering seriously.<sup>40</sup> In its own right the Court has often devised its own tools and mechanisms to alter and reshape the law such as diluting the concept of locus standi through the innovation of Public Interest Litigation and the expansive interpretation fundamental rights, particularly Article 21. However, while doing so the Court has also entered legislative and executive territory creating unprecedented overlap. This thin line of separation of powers when crossed does draw support to the argument of possible judicial tyranny.

The issue also lies with the term “transformative” which in its very nature invokes a sense of constant change and flexibility. It raises concern in terms of the limit and applicability of an unbridled judicial tool which if applied too liberally or based on individual preferences can erode even the most vital aspects of the Constitution and the very essence of our democracy. Therefore, judiciary must exercise tremendous restraint especially while utilising the concept of transformative constitutionalism as it may be paving a path to an uncertain precedent. Judiciary should make greater efforts to not only flesh out the concept of transformative constitutionalism but also lay down conditions and guidelines while exercising the same.

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<sup>39</sup>Sanskriti Prakash and Akash Deep Pandey, “Transformative Constitutionalism and the Judicial Role: Balancing Religious Freedom with Social Reform” 4 *Indian Journal of Law and Public Policy* 108, 111 (2017).

<sup>40</sup>Upendra Baxi, “The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer’s Combat with the Production of Rightlessness in India,” in C. Raj Kumar and K. Chockalingam (eds), *Human Rights, Justice, & Constitutional Empowerment* 3–25 (Oxford University Press, New Delhi, 2007).

Transformative constitutionalism conceptually has tremendous potential to achieve and evolve notions and requirements of social justice. But it is also important to understand that this concept is one existing in continuum and not in isolation as “transformation envisaged by the constitution is a process of constant dialogue and contestation in the pursuit of a more just society”<sup>41</sup>. Therefore, it requires to be exercised with a nuanced understanding of the prevailing social needs and circumstances while striving to achieve greater constant dialogue and contestation. As aptly said by Chief Justice Langa that “transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.”<sup>42</sup>

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<sup>41</sup>Solange Rosa, “Transformative Constitutionalism in a Democratic Developmental State” 3 *Stellenbosch Law Review* 542, 565 (2011).

<sup>42</sup>Pius Langa, “Transformative Constitutionalism” 17 *Stellenbosch Law Review* 351, 354 (2006).