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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **TRANSFORMATIVE CONSTITUTIONALISM IN INDIA: AN OVERVIEW**

AUTHORED BY - AYUSHI TYAGI<sup>1</sup> & ARRYAN MOHANTY<sup>2</sup>

## **Abstract**

Constitutionalism denotes adherence to the principles delineated by a system of governance, while transformation signifies the orchestrated instigation of change. Transformative constitutionalism perpetually challenges the inflexibility of the Constitution, assuming a pivotal role in societal transformation and upholding its core principles and values, which are non-negotiable due to its primary objective of safeguarding individual freedom. The concept of Transformative Constitutionalism is not novel, having emerged in 1998 and initially expounded upon in the work “*Legal Culture and Transformative Constitutionalism*” by American scholar Karl Klare.

The constitution serves as a paramount legal instrument, embodying the sovereignty of a nation. It is the preeminent document in society, enunciating the foundational principles and governance norms for Indian culture, reflective of the aspirations and objectives of its populace. Compared to Kelson’s “grundnorm” or Hart’s “Rules of Recognition,” the Constitution constitutes the ultimate yardstick for the validity of any legislation, executive action, or individual conduct in Indian society. Mirroring society, the Constitution embodies the concept of Constitutionalism, advocating for the organization of society based on established principles, steering it towards its overarching objectives. Endowed with a transformative essence, the Constitution distinctly underscores a commitment to reshaping relationships between individuals and the State or among individuals themselves, thereby influencing its operation and interpretation.

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## Introduction

The Constituent Assembly convened for 166 days to compose our Constitution. This duration spanned two years, 11 months, and 18 days, culminating in the adopting the Constitution of India. During those 166 days, the process entailed extensive debates and challenges regarding developing a dynamic document delineating individuals' fundamental rights and governmental authority. Throughout this procedure, numerous aspirations and objectives were articulated. The enduring impact of this legal text has consistently been transformative since its inception. Transformation, in essence, denotes the act of instigating change. The impetus behind such change has invariably been enhancing societal equality and freedom. The term 'constitutionalism' embodies the notion that governmental powers should be restricted, and adherence to these constraints delineates their legitimacy. Fundamentally, the aim is to prevent authoritarian or capricious governance.<sup>3</sup>

Constitutionalism encompasses a range of interpretations. Constitutionalism comprises a complex interplay of concepts, attitudes, and behavioral norms that articulate the notion that governmental authority is derived from and constrained by a foundational body of law.<sup>4</sup> Prof. McIlwain asserts that constitutionalism is fundamentally characterised by imposing limits on governmental power, directly contrasting arbitrary rule and despotic governance. Rather than being ruled by individual discretion, the governance is guided by legal frameworks, which lie at the core of constitutionalism.<sup>5</sup> Baxi elucidates constitutionalism as a framework that encompasses the structures and mechanisms of governance and power legitimization and serves as a platform for diverse discussions related to justice, rights, development, and individual autonomy. It offers narratives encompassing governance principles and avenues for opposing such governance. Klare introduces the concept of transformative constitutionalism as a sustained initiative involving enacting, interpreting, and enforcing constitutional principles aimed at reshaping a nation's political and social structures and power dynamics towards a more democratic, participatory, and egalitarian trajectory. Hence, constitutionalism is a notion that underscores legal constraints on state authority, emphasizing

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<sup>3</sup> Aditi Aggarwal, Transformative constitutionalism and role of the judiciary, iPleaders (Last visited on September 16, 2023 at 10:33 PM) <https://blog.iplayers.in/transformative-constitutionalism-role-judiciary/>

<sup>4</sup> Abhishek Roy, Transformative Constitutionalism And Indian Supreme Court: A Study Of Navtej Johar's Case, Legal Service India (Last visited on June 18, 2023 at 10:55 AM) <https://www.legalserviceindia.com/legal/article-3156-transformative-constitutionalism-and-indian-supreme-court-a-study-of-navtej-johar-s-case.html>

<sup>5</sup> MD. Saif Ali Khan & Dr. Sharafat Ali, Transformative constitutionalism: Contemporary Issues and Challenges in India, Vol.3 Issue 3, IJLMH, 1411, 1411-1412 (2020) <https://ijlmh.com/transformative-constitutionalism-contemporary-issues-and-challenges-in-india/>



adherence to the constitution, the rule of law, and ultimately, the popular will.<sup>6</sup> Dr. DD Basu opined on Constitutionalism, “*The concept of constitutionalism necessitates the regulation of governmental authority to prevent it from undermining the democratic ideals on which it is founded. Among these democratic ideals is the safeguarding of basic Rights. The Constitution reflects an ambition for societal fairness, unity, and human worth. It is a document that enshrines essential principles. The practice of documented constitutionalism facilitates the application of notions and principles of an uncodified, dynamic Constitution. The Constitution is an evolving legacy and, as such, its essence cannot be eradicated.*”

Transformation encapsulates a systematic approach to instigating change, whereas constitutionalism embodies the principle of upholding the foundational principles established by a governmental system. These intertwined concepts collectively formulate the concept of transformative constitutionalism. Transformative constitutionalism is grounded in subjective interpretation without a singular or definitive explanation. Each interpretation is fiercely debated, resulting in the absence of a concrete understanding of the concept to date.<sup>7</sup> Transformative constitutionalism has served as a political doctrine for a considerable duration, with the South African Constitution serving as a pivotal resource for tracing the origins of these ideologies. The central tenet of this vision of transformative constitutionalism asserts that connecting or ascribing to the Constitution of any specific nation is exceptionally challenging, if not impossible, due to the inherent universality of the concept. The primary objective is to enhance constitutional safeguards and methodologies to cultivate a more progressive society. This endeavor seeks to level the playing field in society and promote a culture of inclusivity for all members. Scholars acknowledge that pursuing “*substantive equality*” is a pivotal strategy in partially achieving this objective. Implementing affirmative action initiatives and enforcing socio-economic rights, particularly those safeguarding the welfare of marginalised communities, are essential in realising this goal.<sup>8</sup>

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<sup>6</sup> Sanskriti Prakash & Akash Deep Pandey, Transformative Constitutionalism & the Judicial Role: Balancing Religious Freedom with Social Reform, Manupatra (Last visited on June 19, 2023 at 11:02 AM) [https://docs.manupatra.in/newsline/articles/Upload/AB27D7AA-C3B3-4538-BA67-0100E7A0F797.1-G\\_constitution.pdf](https://docs.manupatra.in/newsline/articles/Upload/AB27D7AA-C3B3-4538-BA67-0100E7A0F797.1-G_constitution.pdf)

<sup>7</sup> Sharanya Ghosh, Transformative Constitutionalism, iPleaders (Last visited on September 27, 2023 at 10:45 AM) <https://blog.iplayers.in/transformative-constitutionalism/>

<sup>8</sup> Dharmesh, An analysis of transformative constitutionalism in India and the role played by the judiciary in shaping the constitution, Vol.5 Issue 1, IJLPSR, 129, 129-130 (2023) <https://www.lawjournals.net/assets/archives/2023/vol5issue1/6015.pdf>

## **Transformative Constitutionalism: Meaning, Origin & Evolution**

Transformative constitutionalism denotes instigating societal change by integrating principles such as equality, liberty, fraternity, and dignity. Its primary objective is to realize the fundamental goal of the Constitution, which is the enhancement of society. An interpretation of this concept suggests prioritising Constitutional morality over societal norms. Another perspective posits that while the core structure of the Constitution remains immutable, it continuously adapts to meet the evolving demands of society. Justice Chandrachud aptly articulates that transformative constitutionalism entails incorporating values like liberty, equality, fraternity, and dignity into the fabric of society. Therefore, transformative constitutionalism emerges as a necessary and pivotal process in delineating the essence of democracy and the Constitution embedded within it.

The “transformative constitutionalism” movement emerged in South Africa's post-apartheid era. The preamble of the Interim Constitution of South Africa articulates a vision of bridging the historical divide in a society plagued by conflict, suffering, and injustice towards a future grounded in human rights, democracy, peaceful coexistence, and development opportunities. In examining transformative constitutionalism, Justice Langa articulated the aspiration for a Constitution to address past wounds and lead toward a brighter future, emphasizing the necessity for change. As such, while transformative constitutionalism originated in South Africa, its application has extended to various democracies worldwide, including India.

The terminology “transformative constitutionalism” remains subject to ongoing debate due to the diverse range of global experiences, yet there are key distinguishing features that define it. The essential roles of the state, particularly the judiciary, in championing liberation and upholding the fundamental values of equality, fraternity, and liberty enshrined in the Constitution represent vital elements of this concept. Given that these values form the cornerstone of any well-functioning society, the state must engage in their promotion actively.

In India, it can be posited that even throughout the colonial era, there existed manifestations of Transformative constitutionalism, as exemplified by the eradication of sati in 1829, the abolition of the Devadasi system, The Hindu Widow Remarriage Act of 1856, and The Female Infanticide Prevention Act of 1870. These instances illustrate the presence of Transformative constitutionalism even before the formulation of the Indian Constitution. In the Akhil Bharatiya Soshit Karamchari

Sangh v. Union of India case,<sup>9</sup> Justice Krishna Iyer asserted that “*The genuine essence of our culture, articulated by the eminent architects of modern India, advocated for the elimination of the sufferings endured by the outcasts, the marginalised, the bonded laborers, the impoverished, hard-working individuals who were essentially half-slaves, whose emancipation was intrinsic to our quest for independence. To interpret the Constitution correctly, it is imperative to comprehend the populace for whom it is designed—the refined values, the challenges, the ambitions, and the guidelines established by the Constitution for the principled resolution of societal inequities.*” Furthermore, he also construed the aforementioned argument as follows: “*As adjudicators grappling with a socially significant matter of constitutional law, we must always bear in mind that the Indian Constitution is a National Charter imbued with a social transformation, not merely a Legal Document devoid of assertive principles aimed at fostering a democratic, secular, socialist society that is equally accessible to the masses, including the millions of oppressed individuals yearning for a fair treatment following the prolonged era of feudal-colonial subjugation.*”

Among Indian jurists, Justice Krishna Iyer has emerged as a prominent proponent of this approach, significantly influencing the author’s perspectives. The aspirations, principles, and interconnections, and authority among the various branches of government are enshrined in a constitution, which also represents these concepts. It embodies the people's unwavering ambition and the nation's essential character. Consequently, the Constitution is regarded as a dynamic document that significantly contributes to the advancement of democracy. Merely possessing a constitution does not guarantee adherence to its principles. According to Baxi, constitutionalism encompasses procedures for legitimising authority in general and establishing administrative institutions, frameworks, and mechanisms. Constitutionalism serves as a mechanism for uniting individuals to deliberate on issues such as justice, rights, progress, and personal freedom. It transcends being solely a governance system. Exploring constitutionalism can provide insights into the origins of power and the motivations behind opposition.

## **Different Interpretations of Transformative Constitutionalism**

However, the concept of transformative constitutionalism has been subject to various interpretations. Some individuals perceive it as a singular occurrence within a State's history or present, whereas others argue that it embodies a continuous process. Despite certain commonalities among these

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<sup>9</sup> (1981) 1 SCC 246

interpretations. The perspectives of scholars and writers are constantly evolving, making it challenging to establish their meaning definitively. In the Indian context, two primary interpretations of transformative constitutionalism exist:

The shift from colonial governance to self-rule constitutes a form of transformative constitutionalism due to India's deliberate adoption of a new governmental framework. This viewpoint identified a moment of transformative constitutionalism when India achieved independence on August 15, 1947, breaking away from British colonial domination. The transformation affected the governance structures and redefined the locus of power within the nation. India transitioned from being under foreign rule to being self-governed, enabling its populace to elect its leaders and shape its government. While much of the administrative framework was inherited from the Government of India Act 1945, this transformation laid the groundwork for a system founded on democratic principles - a system designed and operated by the citizenry for the citizenry. The Constitution introduced new values, emphasizing principles of dharma and justice, which subsequently guided the system's restructuring. Therefore, deliberately adopting a fresh governmental framework and establishing the Indian Constitution exemplify transformative constitutionalism.

The metamorphosis of society and the state is a topic that delves into the ongoing legal and administrative modifications within a nation. This perspective focuses on the perpetual evolution of how a State operates concerning societal functions and vice versa. The reciprocal influence between the state and society leads to continuous transformations and advancements. This concept reflects transformative constitutionalism, where the fundamental principles outlined in the Constitution are preserved through instigating changes, particularly in the legal domain. A noteworthy instance is the case of *Navtej Singh Johar vs Union of India* in 2018,<sup>10</sup> Section 377 was decriminalised to allow consensual sexual activities among individuals of the LGBT community.<sup>11</sup> This alteration occurred more than 70 years post-independence, illustrating a shift in societal requirements. Numerous other illustrations exist that exemplify this type of transformative constitutionalism.

These are not the sole interpretations of the concept. Indira Jaising articulated during her address at NLSIU Bengaluru in 2019 that transformative constitutionalism, in her view, pertains to personal liberty. Consequently, numerous alternative interpretations of this concept exist, which are highly

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<sup>10</sup> AIR 2018 SC 4321

<sup>11</sup> The Indian Penal Code, 1860, § 377

subjective. Therefore, identifying a shared definition or terminology is crucial for comprehending the essence of the concept. While challenging to delineate precisely, transformative constitutionalism can be characterized as utilising the foundational principles established by a state's constitution to instigate transformations in social, legal, economic, or political structures. This evolution is primarily instigated through legal revisions or implementations and is oriented towards a forward-thinking perspective.

Gautam Bhatia, a Constitutional law scholar, eloquently delineates the initial school of thought in his presentation on 'The Transformative Constitution' hosted by Manthan, a leading platform in India for public deliberation. He explicates the primary viewpoint as positing that the Constitution lacks transformative qualities. Several arguments supporting this viewpoint include:

- The Constitution merely shifted authority from the British Government to the current governing body overseeing the nation's populace, or that the transition was from a colonial regime to an elected administration.
- Another contention is that most constitutional provisions stem from the Government of India Act, 1935, crafted by foreign rulers.
- The establishment of the Constituent Assembly, tasked with formulating the Constitution, was itself sanctioned under colonial legislation. Many oppressive laws enacted by the British regime persist in our Constitution and are still in effect.
- A nuanced differentiation lies in our existing Constitution being a structured legal document.

He proceeds to elaborate on how individuals began comprehending the true significance of terms like equality, privacy, and life, instigating societal norms shift. There was a growing awareness regarding the authentic meaning and importance of the Constitution. Consequently, they examined its core principles beyond serving as a framework for a political transition or a simple transfer of authority. This led to a realization that:

- The transfer of authority was essentially from the British Government to the populace of India, who were endowed with entitlements such as the right to equality<sup>12</sup> (Article 14), the right to life <sup>13</sup>(Article 21), the right to profess and practice their religion (Article 25),<sup>14</sup> the right to

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<sup>12</sup> The Constitution of India, 1949, Art.14

<sup>13</sup> The Constitution of India, 1949, Art.21

<sup>14</sup> The Constitution of India, 1949, Art.25

freedom of speech and expression (Article 19),<sup>15</sup> and so forth.

- The concept of suffrage was deliberated upon. Citizens now possess the ability to elect their representatives and even dismantle the government if it fails to meet expectations. Moreover, the government is liable for all its actions.
- This transition facilitated the establishment of a novel system founded on the principles of being created by the people, of the people, and for the people.
- Social structures like gender, caste, and economic hierarchies within the "private sphere" have now been subjected to democratisation.

Hence, our Constitution's methodical embrace and formulation represent one approach to interpreting the concept of 'transformative constitutionalism'.

One interpretation posits that transformative constitutionalism is a perpetual process involving the state and society's continuous evolution or alteration. This encompasses legal and administrative adjustments that reshape societal trajectory to align with evolving national dynamics. Over time, the nation has witnessed notable judicial decisions expanding the realm of fundamental rights, guided by the changing needs of society. For instance, the 'right to freedom' interpretation in the 1990s differed significantly from contemporary perspectives, both in the eyes of the courts and the public. Undoubtedly, the breadth of this right has expanded.

### **Transformative Constitutionalism in a “Modern” State**

Although a significant proportion of the population in India resides in rural areas, the country can be characterized as a contemporary state built upon the traditional, conservative social framework. One essential query to ponder is the definition of a contemporary state. Does it entail reorganising or rejecting the principles and values established by our forefathers? The term 'modern' does not imply a departure from the past; rather, it denotes an expansion and evolution of the principles and values introduced in 1950 during the constituent assembly. Modernisation involves not dismissing the ideas of the past or completely discarding them. Instead, it consists of modifying, adjusting, and supplementing past beliefs to align with the needs of a specific era and location. The foundational principles absorbed by the concept of constitutionalism are expanded and reshaped in a contemporary

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<sup>15</sup> The Constitution of India, 1949, Art.19

state to align with the societal structure that inevitably undergoes social change. Freedom movements in the Global South possess a unique characteristic as they must confront external and internal adversaries. While the external threat typically takes the form of colonial powers, the internal challenges encompass broader issues such as social hierarchies based on caste, race, gender, and class, as well as poverty and socioeconomic disparities. During the Constitution's adoption, the Constituent Assembly faced the challenge of eliminating these internal threats to the State. Consequently, the Constitution was utilized as a tool aimed at dismantling internal inequalities. Scholars have echoed similar sentiments when elucidating India's constitutional journey.<sup>16</sup>

## **Transformative Constitutionalism of the Global North & Global South**

Constitutionalism and transformative constitutionalism represent distinct concepts elucidated through examples from the experiences of the United States and India. The constitutionalism observed in the United States needs to have a transformative quality as it strives towards fostering a fairer and more just society, thereby emphasizing liberty. This form of constitutionalism, termed constitutionalism 1.0 by Mirjan Damaska, does not mandate the State to actively promote social justice. Consequently, the constitutional landscape in the Global North differs from that of the Global South, where States must adopt an activist stance. The Global South, characterized by socio-cultural and economic hierarchies and limited resources, as evident in nations like India and South Africa, necessitates State intervention to address prevailing inequalities. The modern constitutional aspirations of the Global South are rooted in influences from the Global North, notably from philosophers such as Thomas Hobbes, John Locke, Rousseau, Kant, Mill, and Montesquieu, whose ideas form the basis of contemporary constitutional principles. Moreover, the contributions of modern political philosophers like John Rawls and Robert Nozick have significantly reshaped the foundational elements of modern constitutionalism. In contrast, the Global South must be more represented in scholarly discourse and legal frameworks concerning modern constitutionalism, with minimal acknowledgment of its jurisprudential contributions. The focus of discussions on contemporary law and constitutionalism predominantly tilts towards the Global North. Nevertheless, the Indian Supreme Court stands out as a pivotal institution in the Global South, actively engaging in transformative constitutionalism to

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<sup>16</sup> Varnav Somwal, A Study Of Transformative Constitutionalism: The Indian Experience, Vol.IV Issue VI, IJLLR, 1, 11 (2022) <https://www.ijllr.com/post/a-study-of-transformative-constitutionalism-the-indian-experience>

address the challenges of upholding liberal democratic values amidst pervasive inequality. By emphasizing individual autonomy and equality, the Court in India seeks to uphold the principles of liberal democracy.<sup>17</sup>

## **Transformative Constitutionalism & Economic Dignity**

In jurisdictions like India, courts frequently utilize various "constitutional values" when resolving complex legal cases. It is expected to hear about a court's decision that safeguards personal liberty, privacy, autonomy, or the 'dignity' of an individual, or upholds concepts such as justice, constitutional morality, rule of law, or the majesty of law. Scholars, philosophers, practitioners, and judicial authorities have all recognized dignity as a constitutional value that manifests in diverse ways. In 2020, a Full Bench of the Honorable Supreme Court of India in the case of Gujarat Mazdoor Sabha v State of Gujarat,<sup>18</sup> where the Court invalidated two notifications issued by the State of Gujarat under Section 5 of the Factories Act, 1948.<sup>19</sup> This particular notification, released amidst the COVID-19 lockdown in India, granted an exemption to all factories in Gujarat from complying with the workers' rights as outlined in the aforementioned legislation, referred to as "economic dignity," while invalidating two Gujarat notifications issued during the COVID-19 pandemic as unconstitutional. Throughout its judgment, the Court frequently emphasized the term 'dignity', particularly about upholding the fundamental rights and human rights of laborers/workers in Gujarat. Nevertheless, the Court missed providing a comprehensive explanation of the concept of 'economic dignity.'<sup>20</sup> Social and economic rights are crucial components of a comprehensive understanding of dignity. Previously, the Supreme Court has affirmed that socio-economic justice is a fundamental entitlement of marginalised groups. As established in the case of Muralidhar Dayaneo Kesekar,<sup>21</sup> both the fundamental rights enshrined in Part III and the Directive Principles of State Policy in Chapter IV of the Constitution have been developed to promote socioeconomic justice while ensuring "*political justice*" and striving for an "*egalitarian social order*." The court observed that socio-economic well-being represents "*a form of liberty as it frees individuals from societal constraints that limit their choices and hinder their self-improvement*." Additionally, it stated that economic rights are an

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<sup>17</sup> Ibid, 11-12

<sup>18</sup> (2020) 10 SCC 459

<sup>19</sup> The Factories Act, 1948, § 5

<sup>20</sup> Shrivastava, Abhijeet and Shrivastava, Anujay, 'Economic' Dignity and Transformative Constitutionalism in India – Attempting to Cut the 'Gordian Knot' (August 17, 2021). [2021] 1(4) JCLJ 446-457, Available at SSRN: <https://ssrn.com/abstract=3900739>

<sup>21</sup> Muralidhar Dayaneo Kesekar v Vishwanath Pandu Barde, 1995 Supp (2) SCC 549 [5]



essential prerequisite for uplifting underprivileged individuals into the national mainstream, thereby safeguarding human dignity. The court also expressed the view that fundamental rights guaranteed by the Constitution serve as mere illusions for the marginalized, disadvantaged, and deprived segments of society if these individuals cannot effectively exercise such rights.

The decision made by the court in the GMS case reaffirms the transformative purpose of the Constitution. The inclusion of labor welfare as a crucial component of this transformative vision is evident in the Directive Principles of State Policy (DPSP). As highlighted by Austin, the framers of the Constitution were well aware of the widespread poverty in India resulting from colonial policies and were strongly driven to attain economic equality and independence. This aligns with the principles of transformative constitutionalism, which consider various factors such as the constitutional text, structure, historical context, and debates during the drafting process to uphold the original aspirations of the Constituent Assembly.

Drawing from the insights of the *Bhikusa Yamasa Kshatriya* case,<sup>22</sup> the court emphasized the State's responsibility to prevent labor exploitation and ensure the well-being of workers. While there may be a tension between safeguarding labor rights and addressing public health emergencies like the pandemic, it is crucial to strike a balance. It is essential to interpret statutory provisions, such as the Act, in a manner that only allows the State to disregard provisions that promote fairness and dignity in the workplace if such measures are directly linked to protecting national security from serious threats. The approach taken by the court appears to reflect the sentiment of a previous ruling by the Constitutional Bench in the case of *State of UP v Jai Bir Singh*,<sup>23</sup> where it was established that labor laws should not be automatically construed to benefit either employees or employers (industrialists), as neither party should have total control over the other. This becomes particularly significant in light of the State of Gujarat's attempts, through its notifications, to promote the interests of industrialists by essentially stripping away almost every legal right of workers during the lockdown period.

The judiciary affirmed that the rights established by the legislation, which had been temporarily halted, embody the hard-earned achievements of many laborers striving for working conditions that respect their dignity. Citing previous rulings, it noted that the statutory requirement for payment of overtime wages was a response to the substantial disparity in power between laborers and employers.

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<sup>22</sup> *Bhikusa Yamasa Kshatriya (P) Ltd v Union of India*, AIR 1963 SC 1591

<sup>23</sup> (2005) 5 SCC 1

The legislation was identified as a crucial component of the state's policy vision, aligning with the Directive Principles of State Policy outlined in Articles 38,<sup>24</sup> 39,<sup>25</sup> 42,<sup>26</sup> and 43<sup>27</sup> of the Indian Constitution. Through efforts to rebalance the power dynamics skewed in favor of management and industrialists, the law safeguards the dignity of laborers. Moreover, the court's remarks not only resonate with the fundamental principles of the Constitution but also echo the Gandhian philosophy of societal progress through collective efforts. This analysis delves into the profound impact of transformative constitutionalism on the concept of 'dignity,' particularly 'economic dignity' in legal doctrine. The examination further scrutinizes the Supreme Court's position in the GMS case. Subsequently, we aim to develop a comprehensive comprehension of economic dignity derived from this ruling and others, evaluating its implications. By investigating the precise consequences of economic dignity as construed, we will subsequently engage in a broader contemplation of the status of Constitutionalism in India, and its interplay with this concept.

In the past, there have also been specific other rulings that have referred to socio-economic rights in the context of human dignity. In the well-known 'bonded labour' case,<sup>28</sup> there were discussions regarding decent working conditions, maternal assistance, safeguarding the health and vigor of laborers, and similar aspects, considered essential prerequisites for enabling individuals to lead a dignified life. Consequently, fundamental socio-economic rights were construed as the mechanisms to safeguard human dignity in its most basic form. In the case of *R Chandevrappa v State of Karnataka*,<sup>29</sup> where the dispossession of land owned by indigenous tribes was invalidated, Justice Ramaswamy elaborated extensively on the State's obligation to promote distributive justice, emphasizing that economic empowerment was the cornerstone for actualizing dignity as a universal principle. In the *Haribhai Mevabhai* case,<sup>30</sup> the Supreme Court viewed socio-economic justice as enshrined in the Preamble as a tool for ensuring dignity for all citizens. Lastly, in a scenario where sanitation workers lost their lives in an accident due to the State's failure to provide a safe working environment, the court once again turned to the socioeconomic dimensions of dignity. It was ruled

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<sup>24</sup> The Constitution of India, 1949, Art.38

<sup>25</sup> The Constitution of India, 1949, Art.39

<sup>26</sup> The Constitution of India, 1949, Art.42

<sup>27</sup> The Constitution of India, 1949, Art.43

<sup>28</sup> *Bandhua Mukti Morcha v Union of India*, 1984 3 SCC 161

<sup>29</sup> 1995 6 SCC 309

<sup>30</sup> *Panchayat Varga Sharmajivi Samudaik Sahakari Khedut Coop Society & Ors v Haribhai Mevabhai & Ors*, 1996 10 SCC 320

that, at the very least, the affected families are entitled to 'adequate' compensation from the State and the contractor responsible.<sup>31</sup> In all these instances, what is evident is that courts refrain from providing detailed explanations regarding the conceptual significance of 'economic' dignity. Nevertheless, their impromptu evaluations, factual determinations, and the remedies awarded share a common notion - that dignity encompasses a fundamental consideration for an individual's socio-economic or financial welfare. After reviewing the rulings mentioned above and similar ones, various scholars have also acknowledged the court's focus on the “fundamentals” necessary for a respectable existence, including the time an individual spends in the professional sphere.

From this analysis, it is our perspective that the concept of 'economic dignity' should not only encompass the compensatory elements of one's employment (such as salary) but should also include establishing essential conditions for a respectable workplace. These conditions consist of a secure work environment, support for maternity needs, and other factors, all while being supported by the government's responsibility to enhance the economic empowerment of disadvantaged groups as much as possible. Ensuring these conditions would serve as the method to guarantee the achievement of dignity outlined in the Constitution. This approach of means leading to ends not only respects the opinions of the judiciary in the cases mentioned earlier but also aligns with the vision of India's founders, who envisioned the preservation of dignity as the ultimate goal of the Constitution. Therefore, this interpretation of economic dignity contributes to advancing transformative constitutionalism. As a principle aiming to secure fundamental or minimal 'economic' guarantees, economic dignity is vital in understanding the Constitution's assurances. Additionally, economic dignity would prevent the violation of workers' rights in favor of majority-held moral beliefs, as emphasized by the Supreme Court in recent cases, where constitutional morality is deemed superior to "social" morality. In this context, it could play a significant role in recognizing the oppression faced by various marginalised professions through the gradual realization of their rights. Once again, economic dignity shows promise as a tool for transformative constitutionalism, as previously explained. Nonetheless, it is crucial to acknowledge that economic dignity would only provide basic protections to all individuals. The government's ethical obligation to go beyond these minimal safeguards would remain essential.

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<sup>31</sup> Delhi Jal Board v National Campaign For Dignity & Rights of Sewerage And Allied Workers & Ors., 2011 8 SCC 568

# Transformative Constitutionalism, Religious Freedom & Personal Laws

India is the domicile of followers of various faiths, thereby establishing itself as a genuine religious democracy. The Indian Constitution aimed to foster tolerance and comprehension among the diverse faiths within the nation, a goal shaped by the historical context of the country's partition. Given the deep-rooted religious nature of people's daily lives, the constitutional framework did not strictly adhere to the concept of a “*strict wall of separation*” as seen in secularism. Instead, it embraced a model characterized by “*principled distance*” and the principles of “*equal respect and tolerance for all.*” During that period, social issues such as child marriage, sati, caste discrimination, and untouchability were prevalent, particularly within Hinduism, necessitating eradication to establish a more just social structure. Article 25 of the Constitution ensures the freedom to openly profess, practice, and propagate one's religion within the boundaries of morality, public health, and legal norms. Nonetheless, Article 25(2)(b)<sup>32</sup> includes a provision allowing the state to enact laws aimed at social transformation or opening public Hindu religious institutions to all Hindu segments. The clash between legislation defended by the state as social reform and opposition from religious groups citing violations of Article 25 has frequently led to conflicts between these legal provisions in practice. Thus, India's constitution embodied three critical perspectives on religion: “religious freedom,” “state impartiality towards all religions,” and “reformative justice,” which permitted governmental limitations on religious freedom in the interest of public welfare and order, as well as regulation of religious practices and institutions in areas such as finance, politics, and economics. Judges in India must weigh religious freedom, social justice, and individual liberty in their deliberations. State intervention in religious matters was deemed necessary to drive social reform forward.

The constitutional framework of India upholds the principle of equality and protects religious freedoms. Throughout history, Indian courts have consistently upheld the rights to equality and freedom of religion. In a notable case, *Narasu Appa Mali*,<sup>33</sup> raised a question before the Bombay High Court regarding the status of personal laws on Hindus and Muslims as 'laws in force' under Article 13 of the Indian Constitution.<sup>34</sup> The court's ruling clarified that 'Personal law' does not fall under the category of law in force as defined by Article 13. Despite this, personal laws take

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<sup>32</sup> The Constitution of India, 1949, Art. Article 25(2)(b)

<sup>33</sup> *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84

<sup>34</sup> The Constitution of India, 1949, Art.13

precedence over fundamental rights in a conflict.

In *Kaur v Kaur*,<sup>35</sup> the Delhi High Court expressed reservations about introducing constitutional law into domestic affairs, likening it to a disruptive force. The intrusion of constitutional principles into the private realm of marital life is viewed as potentially detrimental to marriage and its traditional values. Within the intimate and sensitive sphere of the home, neither Article 21 nor Article 14 of the Constitution find relevance. The imposition of constitutional norms in such personal matters threatens the sanctity of marital relationships.

The landmark case of *Shah Bano*<sup>36</sup> saw the Supreme Court ruling in favor of granting maintenance to Shah Bano under Section 125 of the Criminal Procedure Code,<sup>37</sup> acknowledging the right of divorced Muslim women to financial support post the iddat period. This decision was met with opposition from conservative groups, leading to protests that prompted the Parliament to pass the Muslim Women's (Protection of Rights on Divorce) Act in 1986. This legislation effectively overturned the Supreme Court's verdict, reflecting the influence of public outcry on legal outcomes.

In the case of *Danial Latifi*,<sup>38</sup> the constitutional validity of the Muslim Women's (Rights on Divorce) Act, 1986 was contested on the basis that the law created an unjustifiable distinction between women from different religious groups, thereby denying Muslim women the right to claim maintenance under secular law. The Supreme Court, in its ruling affirming the constitutionality of the law, interpreted the provision for 'reasonable and fair provision and maintenance' to imply that the payment should be provided within the Iddat period, rather than being restricted solely to that period. The Supreme Court, in upholding the constitutional validity of the act, emphasized the importance of considering the prevailing social conditions when interpreting provisions related to matrimonial relationships within our society. It is evident that within our society, characterised by male economic and social dominance, a significant disparity in economic power exists between men and women, regardless of their societal status. Despite often being highly educated, women tend to assume a dependent role upon marriage, dedicating themselves entirely to the well-being of the family and making profound emotional, mental, and physical investments in the marital relationship. The dissolution of such a

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<sup>35</sup> AIR 1984 Del 66

<sup>36</sup> *Mohd Ahmed Khan v Shah Bano Begum*, (1985) 2 SCC 556

<sup>37</sup> The Code of Criminal Procedure, 1973, § 125

<sup>38</sup> *Danial Latifi v Union of India*, (2001) 7 SCC 740

relationship raises complex questions regarding how to compensate for the emotional distress and loss of investment experienced by the woman involved, challenges for which there are no easy answers. While monetary compensation towards livelihood may offer some consolation, it is widely acknowledged as a fundamental human right to ensure gender equality and social justice, transcending religious boundaries. It is difficult to reconcile the intention of Muslim law to assign a different form of responsibility, such as passing it on to unrelated heirs or the Wakf Board, in addressing the aftermath of a matrimonial breakdown.

In the case of Shayara Bano,<sup>39</sup> the Supreme Court invalidated triple talaq as unconstitutional or anti-Islamic. The ruling was issued by a five-judge panel of the Supreme Court, comprising the then Chief Justice Jagdish Singh Khehar and Justice S. Abdul Nazeer, who expressed dissenting opinions from the other three judges: Justices Rohinton F. Nariman and Uday U. Lalit. Additionally, Justice Kurian Thomas provided one opinion and a separate opinion. Justice Nariman contended that this particular form of Talaq is arbitrary since it allows a Muslim man to terminate the marital bond capriciously and without any effort toward reconciliation to preserve it. Justice Nariman scrutinized instant triple talaq through the lens of the constitutional principle of equality as enshrined in Article 14 of the Indian Constitution. He deemed triple talaq unreasonable and arbitrary, advocating for its nullification. According to him, arbitrariness should be evaluated using constitutional justification.

The process is initiated by establishing and activating constitutional protections for activities perceived as inherently religious, specifically practices with religious characteristics. Concerning a religious community's core rituals and traditions, governmental intervention is permissible only in cases where these practices contravene public order, health, morals, or other legal constraints. The state can enact laws related to social welfare or implement changes. State intervention was confined to activities primarily of a commercial, political, or economic nature. In the case of *Ratilal v. State of Bombay*,<sup>40</sup> the present ERP test asserts that practices deemed “*essential to religion*” and so crucial that the constitution safeguards these traditions, altering them would fundamentally disrupt the essence of religion. As far as our understanding goes, neither the Constitution nor any reasonable interpretation thereof mentions this criterion of being “*essential to religion*.” By assuming the role of interpreting religious scriptures and introducing new criteria to establish the indispensability of

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<sup>39</sup> Shayara Bano v. Union of India, AIR 2017 SC 4609

<sup>40</sup> AIR 1954 SC 388

religious practices, the court has additionally encroached upon religious freedom and secular principles. The case of *State of Mysore v. Venkataramma Devaru*<sup>41</sup> was significant in the Supreme Court's jurisprudence, involving an in-depth examination of sacred texts to disprove untouchability as a core tenet of Hinduism. One notable criticism of the judiciary was its perceived intrusion into religious affairs, despite the option of simply deeming untouchability illegal under Article 17<sup>42</sup> and Article 14. In a subsequent case, *Adhitayan v. Travancore Devaswam Board*,<sup>43</sup> the court determined that the appointment of exclusively Brahmin priests infringed upon Article 17 of the Constitution. In the legal dispute of *Sastri Yagnapurushadji and others v. Muldas Bhudardas Vaishya*,<sup>44</sup> the petitioners argued that their non-Hindu status exempted them from regulations governing temple entry. Through thoroughly examining Hinduism's core principles, the court concluded that the “*satsangis*” indeed fell within the umbrella of Hinduism. Moreover, the court contended that its position on temple access stemmed from a misinterpretation of the teachings of Swami Narayan, alongside superstitions and ignorance. As a result, the judiciary endeavored to enlighten a religious institution about its faith, a task the judges seemed inadequately equipped for due to their limited theological knowledge. In the case of *Nikhil Soni v. Union of India*,<sup>45</sup> the Supreme Court reversed the Rajasthan High Court's ruling that banned religious institutions from illegal activities and determined that *santhara* did not qualify for protection under Article 25 of the Constitution, as it failed to meet the criteria for being classified as an essential religious practice.

A request was submitted to the Indian Supreme Court to adjudicate the case of *Ismail Faruqui v. Union of India*<sup>46</sup> concerning the legality of the Indian government's acquisition of the land where the Babri Masjid stood. The issue of whether praying in a mosque constitutes an integral aspect of Islam was presented to the court. Upon reflection, the court determined that it does not, as prayer can be performed anywhere, not exclusively in a mosque. Consequently, the freedom of religion does not extend protection to this practice. This standard notably limits an individual's freedom to practice their religion as they wish, as it only protects actions considered “mandatory” and “highly essential.” It should be preserved as long as a tradition does not infringe upon other fundamental rights or threaten public health, morals, or order.

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<sup>41</sup> AIR 1954 SC 375

<sup>42</sup> The Constitution of India, Art.17

<sup>43</sup> AIR 1993 KER 42

<sup>44</sup> AIR 1966 SC 1119

<sup>45</sup> AIR 2015 SC 1345

<sup>46</sup> AIR 1995 SC 605A

In the case of *Durgah Committee v. Syed Hussain Ali, Ajmer*,<sup>47</sup> Justice Gajendragadkar concluded that certain rituals may be linked to mere superstition. These rituals necessitate a detailed and careful examination. The Supreme Court introduced an additional criterion of reasonableness. Concepts such as “rationality” and “morality” lack a definitive, universally accepted basis, making them inherently subjective. A judge's personal beliefs influence their thought processes. A judge's evaluation of "morality" or "rationality," which may differ from that of a religious institution, should not be the sole factor in determining the morality or rationality of an action. Granting a select group of judges such extensive authority will inevitably lead to societal conformity to their ideologies and prevailing cultural norms, restricting diversity.

The case of *Acharya Jagdishwaranand v. Commissioner of Police*,<sup>48</sup> decided by the Calcutta court, ruled that tandava was not considered a fundamental Ananda Margi practice. This ruling was based on the fact that tandava was not introduced until 1966, while the faith was established in 1955. Consequently, the age of practice is considered alongside its significance following the court's decision. In the *Union of India v. Bal Patil* case,<sup>49</sup> the Supreme Court declared that Jainism should be viewed as a “*reformist movement within Hinduism*” rather than a distinct religion. Despite the substantial theological differences between the two faiths regarding believing in a divine entity, the court deemed this disagreement irrelevant and issued its judgment. This decision faced backlash from academics, who contended that the law should not dictate the boundaries of religious practices. Therefore, the prevailing viewpoint is that merely establishing the religious nature of an activity is insufficient; one must also demonstrate its necessity, rationality, and historical importance.

## **Role of Judiciary in Transformative Constitutionalism**

Upon resolving the emergency, a body of legal precedents emerged based on the foundational principles of liberty, equality, and fraternity outlined in the constitution. The authority of the Supreme Court diminished after the emergency period, during which Congress took charge, leading to efforts to restore credibility by establishing the public interest litigation system, a mechanism for resolving legal conflicts. Justice Bhagwati contends that the adversarial system standard in the Commonwealth is unsuitable for India due to its emphasis on “self-identification of injury and self-selection of

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<sup>47</sup> AIR 1960 SC 1402

<sup>48</sup> AIR 1984 SC 447

<sup>49</sup> AIR 2005 SC 3762



remedy." Given the high levels of illiteracy, the lack of literacy skills could jeopardize access to justice for individuals. It is essential to note that the limitations imposed on public interest litigations (PILs) are significant. Given its reliance on judicial "discretion," Public Interest Litigation (PIL) has the potential to serve as a repressive tool, surpassing other methods in its oppressive nature. The concept of "discretion" cannot be used for wrongful actions due to the absence of the notion of fault in India. Poor behavior cannot thrive in India's hierarchy of command, yet decision-makers are afforded the autonomy to act without considering future repercussions. The state's judiciary holds the authority to determine the appropriate implementation of the law, ensuring the enduring relevance of the Constitution in today's world, despite its age. In many postcolonial nations embracing transformative constitutionalism, the judiciary's role extends beyond mere interpretation of the constitution to align with the constitutional goals and ideals in the context of the evolving society. This requires reading the language of the Constitution in harmony with its objectives and values. However, the judicial branch must not disregard the explicit mandates of the Constitution improperly, as it is tasked with safeguarding constitutional principles by devising innovative interpretations that uphold the prescribed division of powers. Therefore, to fulfill its duties effectively, the court must refrain from unlawful actions or overstepping its legal boundaries.

When the courts participate in issues falling within the jurisdiction of another governmental body, such as cases involving judicial legislation, this is identified as activist judicial behavior. This behavior may occur when judges invalidate a law that may be arguably constitutional or interpret a clause in a complex case in an original manner, deviating from past decisions and disregarding the principle of *sui generis*, resolving disputes with multiple perspectives, and so on. The role of the courts becomes a complex topic in such scenarios. The central inquiry is whether the court should strictly adhere to existing legislation or explore innovative approaches to interpreting the law to address the intricate nature of the issue and align it with evolving societal standards. According to the constitutional doctrine of "transformative constitutionalism," developing a body of legal principles called "jurisprudence" that supports instigating change becomes crucial. Understanding the Constitution's historical context and historically marginalized groups' obstacles is essential. Postcolonial constitutionalism showcases the court's attention to people's struggles by highlighting their dedication to safeguarding individuals' rights. The performance of the Indian judiciary in upholding constitutional values and objectives has been inconsistent. The Supreme Court has involved the public by introducing the Public Interest Litigation (PIL) system, expanding the scope

of legal standing through epistolary jurisdiction, and taking proactive measures by addressing issues through suo moto cognizance. The verdict rendered by the Supreme Court in the case of Qureshi v. State of Bihar<sup>50</sup> elucidated that individuals practicing the Islamic faith were not under an obligation to partake in the slaughtering of cows as a religious obligation, notwithstanding their ability to slaughter other animals during the festival of Eid. The ruling issued by the Supreme Court emerged as a direct outcome of the existing ambiguity in the matter. Applying the duty test by the Supreme Court in this specific instance limits the degree to which individuals can exercise their constitutionally guaranteed right to the freedom of religion. Likewise, in the legal proceeding of Fasi v. SP of Police,<sup>51</sup> a law enforcement officer contended that a regulation that barred him from growing facial hair violated his right to religious liberty as enshrined in the constitution. He found himself in a situation where he was not permitted to cultivate a beard due to the constraints set forth by the regulations. The petitioner put forth arguments citing religious texts from the Quran. However, the court dismissed these arguments by pointing out that there exist practitioners of the Islamic faith who do not possess facial hair.

In the Kesavananda Bharati v. State of Kerala case,<sup>52</sup> it was determined that the notion of the basic structure theory, emphasizing that although Parliament possessed the authority to amend the fundamental rights outlined in the Constitution, the core framework of the Constitution must remain unaltered. The Supreme Court, in its role as the guardian of the Indian constitution, decreed that any constitutional amendment affecting the 'Basic structure' would be considered unlawful. This decision established the 'Basic Structure Doctrine' of the Indian Constitution and set a significant legal precedent globally. In the Maneka Gandhi v. Union of India case,<sup>53</sup> the judgment highlighted that Article 21 of the constitutional text pertains to the Procedure established by Law, stipulating those laws must not be capricious, inequitable, or unjust. Furthermore, this case gave rise to various derivative rights under Article 21. The application of a broad interpretation of Article 21 resulted in the emergence of numerous consequential Sub rights. In the Justice K.S.Puttuswamy V. Union of India case,<sup>54</sup> the Supreme Court affirmed that the 'Right to Privacy' is intrinsic to life and liberty and safeguarded by Article 21 of the Indian Constitution. This case marked a significant milestone in

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<sup>50</sup> AIR 1958 SC 731

<sup>51</sup> (1985) ILLJ 463 KER

<sup>52</sup> (1973) 4 SCC 225

<sup>53</sup> 1978 AIR 597

<sup>54</sup> (2017) 10 SCC 1

India's jurisprudence concerning the Right to Privacy. Consequently, Justice Khanna's stance was validated, asserting that the fundamental right to life under Article 21 remains inviolable, even in scenarios of emergency proclamation or presidential suspension orders.

In *Indira Swahney V. Union of India*,<sup>55</sup> the Supreme Court endeavored to discover a suitable resolution that upholds a delicate equilibrium between society and the entitlements of the underprivileged or backward classes. The singular focus centered on the Supreme Court's verdict regarding the validity of the Mandal Commission Report. The Apex Court was confronted with many intricate determinations with far-reaching consequences. This marked a pivotal judicial pronouncement that facilitated the metamorphosis of Indian society by enhancing opportunities and elevating the living standards of the backward classes through quota systems. In the case of *Joseph Shine V. Union of India*,<sup>56</sup> the SC determined that construing Article 21 of the Constitution to decriminalize adultery was warranted. Previously, Section 497 of the Indian Penal Code<sup>57</sup> criminalised adultery. Under this provision, a man engaging in sexual relations with a married woman without her husband's consent faced legal repercussions. Due to its lack of requirement for a married woman's consent, this section was deemed capricious and biased, leading to its annulment.

## **Conclusion & Suggestions**

The Constitution of India serves as a dynamic document and functions as the fundamental legal framework of the nation, from which all other laws derive their legitimacy. It ensures the essential rights of the citizens of the country. The framers of the Constitution envisioned a transformative document designed to address future perspectives. With a primary objective of ensuring Social, Economic, and Political justice to the citizens, the Constitution offers solutions to various issues. The judiciary plays a crucial role in safeguarding citizens' rights, with transformative constitutionalism aiming at eliminating discrimination, promoting equality, and upholding the Rule of Law. This approach aligns with societal progress. Recent judicial developments have highlighted a shift towards prioritizing constitutional morality over social morality, leading to challenges and debates in the country. India, a developing nation with a diverse society encompassing various beliefs, often tolerates certain forms of discrimination rooted in societal norms. Despite this, the Constitution

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<sup>55</sup> AIR 1993 SC 477

<sup>56</sup> (2019) 3 SCC 39

<sup>57</sup> The Indian Penal Code, 1860, § 497

guarantees fundamental rights and embodies specific values, with the judiciary as the guardian. The constitutional courts are tasked with protecting fundamental rights and invalidating practices contradicting the Constitution. Recent trends show a judicial emphasis on constitutional principles, sometimes at the expense of social norms. It is recommended that while promoting transformative constitutionalism and societal change in line with the Constitution's objectives, the courts should balance constitutional and social morality to maintain public confidence in the judiciary.

The Supreme Court plays a crucial role in balancing societal interests with social changes by interpreting the Constitution to serve more societal interests. Each provision of the Constitution is designed to eradicate specific societal harms, and when multiple interpretations are possible, the one that most effectively eliminates mischief is adopted. Transformational constitutionalism is solely focused on upholding and reinforcing the principles of our compassionate constitution. Justice Chandrachud asserts that the Constitution seeks to revolutionize society. By acknowledging the rights of others within constitutional discussions, we not only empower those whose rights are admitted but also engage in a transformative process ourselves as we respect the liberty of others. Often, we prioritise our freedom without considering the importance of respecting the freedom of others; however, it is through recognizing the liberty of others that societal transformation occurs and matures. Pursuing transformative constitutionalism heavily relies on the judiciary's consistent support and dedication to instigating positive societal changes. In addition to the judiciary, citizens are pivotal in initiating transformative constitutional changes that align with contemporary needs. The initial step involves recognizing our rights and values, while also being mindful not to violate the rights of others. While preserving the foundational framework of our nation's dynamic constitution is crucial, the progression of our fundamental rights must be continuous to ensure that the cycle of social transformation advances in society.