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# **TRANSFORMATIVE CONSTITUTIONALISM: RENAISSANCE OF FUNDAMENTAL RIGHTS AND THE EXPANDING ROLE OF CONSTITUTIONAL COURTS IN INDIA**

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## **ABSTRACT**

Transformative Constitutionalism in India signifies not only the dynamic evolution of the constitutional framework but also the vital role of the judiciary in promoting and protecting fundamental rights. The doctrine embodies a commitment to advance substantive equality, liberty, and social justice through the dynamic interpretation and enforcement of constitutional norms and values. This paper undertakes an analysis of the evolutionary trajectory of fundamental rights within the Indian constitutional framework, with particular emphasis on the doctrine of transformative constitutionalism. It explores the distinction between the mere existence of a Constitution and the concept of Constitutionalism, elucidating the imperative of limited government as an essential check against arbitrary State power.

Drawing upon the jurisprudential philosophies that underpinned the drafting of the Indian Constitution, the study demonstrates that fundamental rights are not only enforceable legal guarantees but also instruments to uphold the dignity and meaningful existence of individuals in a democratic society. The research examines how the judiciary, in its role as the constitutional guardian, has fostered a transformative reading of the Constitution, thus promoting an expansion in the scope of fundamental rights in response to changing societal needs.

Through critical analysis of landmark judgments and the application of the anti-stereotyping principle, the research highlights the critical function of Constitutional Courts in actualizing social justice, equality before law, and inclusive participation. The concept of transformative constitutionalism is posited as the methodological backbone for progressive constitutional interpretation, requiring that every judicial innovation be substantiated by the founding principles of the Constitution.

In the end, the study concludes that the Indian Constitution is a living

document, its vitality sustained through the dynamic engagement of the judiciary and that transformative constitutionalism constitutes an indispensable framework for safeguarding fundamental rights, advancing substantive equality, and promoting the rule of law in Indian democracy.

**Keywords:** Fundamental Rights, Transformative Constitutionalism, Social Justice, Rule of Law, Egalitarianism, Constitutional Morality, Judicial Activism, etc.

## I. INTRODUCTION:

The evolution of fundamental rights is a rich tapestry woven over centuries of philosophical thought, legal developments and political struggles. These rights have their earliest known articulation in ancient declarations such as the Cyrus Cylinder (c. 539 BC), often considered as one of the first human rights instruments, which proclaimed freedoms, including religious tolerance and the prohibition of slavery.<sup>1</sup> This ancient progenitor of rights concepts paved the way for medieval constitutional charters such as Magna Carta (1215), which, although aimed primarily at limiting royal excesses in feudal England, introduced fundamental principles such as due process, the rule of law, and the prohibition of taxation without representation.<sup>2</sup> These principles were fundamental to later Western constitutional developments, including the English Bill of Rights (1689), which entrenched individual liberties and parliamentary supremacy.<sup>3</sup> Together, these documents inspired constitutional frameworks around the world that sought to consolidate limited government and promote individual freedoms.

The philosophical foundations of fundamental rights were substantially shaped by social contract theorists such as John Locke and Jean-Jacques Rousseau. Locke, in his *Two Treatises of Government* (1690), asserted that humans inherently possess natural rights to life, liberty, and property, forming the basis of legitimate government through consent to protect these rights.<sup>4</sup> Locke's theory legitimized resistance to governments that did not safeguard these rights.<sup>5</sup> Rousseau, on the other hand, emphasized collective sovereignty through the "general will," reconciling individual liberty with the public good and emphasizing participatory self-governance.<sup>6</sup> These seminal theories formed the normative architecture underpinning modern

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<sup>1</sup> Marco Sutto, 'Human Rights Evolution: A Brief History' (2019).

<sup>2</sup> Clare Brey and Julian Harrison, 'What is Magna Carta?' The British Library (2014).

<sup>3</sup> English Bill of Rights 1689.

<sup>4</sup> John Locke, *Two Treatises of Government* (1690).

<sup>5</sup> Ibid.

<sup>6</sup> Jean-Jacques Rousseau, *The Social Contract* (1762).

rights-based constitutional democracies.

The international human rights regime emerged decisively after the devastations of World War II, culminating in the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948.<sup>7</sup> The UDHR defined a comprehensive range of civil, political, economic, social, and cultural rights as universal, inalienable, and interdependent.<sup>8</sup> While non-binding, the UDHR inspired binding treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966, creating enforceable international obligations for States to protect fundamental rights.<sup>9</sup>

India's constitutional adoption of fundamental rights was firmly rooted in these historical currents and political aspirations for freedom and justice. The colonial period witnessed early demands for rights codification, notably through the Swaraj Bill of 1895, which articulated cries for self-rule and fundamental civil liberties, including free speech and equality before the law.<sup>10</sup> The Indian National Congress, established in 1885, progressively championed the cause of civil, political, and socioeconomic rights through resolutions, reports, and reform proposals such as the Nehru Report of 1928 and the Sapru Committee Report of 1945.<sup>11</sup>

The Constituent Assembly of independent India undertook the task of enshrining these rights into the nation's supreme law with a profound sense of justice and social transformation. Under the leadership of Dr. B.R. Ambedkar, Fundamental Rights were enshrined in Part III (Articles 12-35) of the Constitution of India, guaranteeing equality before the law, freedom of speech and expression, right to life and personal liberty, protection against exploitation, religious freedom, cultural and educational rights, and a right to constitutional remedies for enforcement.<sup>12</sup> These rights serve as a bulwark against State overreach, affirming individual dignity and democratic governance. The justiciability of fundamental rights ensures judicial oversight and enforcement, thereby transforming constitutional promises into tangible

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<sup>7</sup> Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948).

<sup>8</sup> *Ibid.*

<sup>9</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966); International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1966).

<sup>10</sup> Commonwealth of India Bill, 1895 (Swaraj Bill).

<sup>11</sup> Report of the Nehru Committee on Constitutional Reforms, 1928; Tej Bahadur Sapru, Sapru Committee Report, 1945.

<sup>12</sup> Constitution of India, Part III, Arts. 12-35.

protections.<sup>13</sup>

India's constitutional framework also manifests congruence with international human rights values, reflected in the Preamble's principles of justice, liberty, equality, and fraternity.<sup>14</sup> The adoption and integration of international instruments such as the UDHR, ICCPR and ICESCR into the national legal framework further reinforced the constitutional commitment to fundamental rights.<sup>15</sup> The Supreme Court of India has dynamically interpreted and expanded these rights, situating them within a transformative constitutional ethos attuned to social justice and human dignity.<sup>16</sup>

The concept and practice of fundamental rights in India represent an intersection of ancient humanistic ideals, Enlightenment philosophies, post-war international standards and post-colonial constitutionalism. The rights enshrined in the Indian Constitution stand as legally enforceable guarantees critical to safeguarding liberty, equality, and justice, underpinning the nation's democratic fabric and protecting citizens against arbitrary State authority.

## **II. RESEARCH METHODOLOGY AND SCOPE:**

This paper adopts a doctrinal research methodology, primarily relying on primary legal sources including constitutional provisions, judicial decisions of the Supreme Court and High Courts of India, and international human rights instruments. Secondary sources such as academic commentaries, peer-reviewed journal articles, legislative debates, and constitutional committee reports supplement the primary analysis. The study employs a comparative constitutional approach, drawing parallels between the Indian transformative constitutional experience and that of post-apartheid South Africa, where the doctrine of transformative constitutionalism was first formally theorized.

The scope of the paper is confined to the Indian constitutional context, with special emphasis on the period from 1950 to the present. The research focuses primarily on the interpretation and expansion of fundamental rights under Part III of the Constitution of India, the role of the Supreme Court as the principal constitutional court, and the evolution of doctrines such as

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<sup>13</sup> Constitution of India, Arts. 32 and 226.

<sup>14</sup> Constitution of India, Preamble.

<sup>15</sup> UN Human Rights Office of the High Commissioner, Ratification Status for India.

<sup>16</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

constitutional morality, the basic structure doctrine, and the anti-stereotyping principle. While the paper references international human rights instruments for comparative and interpretive purposes, it does not undertake an exhaustive analysis of international law as an independent framework.

### **III. TRANSFORMATIVE CONSTITUTIONALISM: A CONCEPTUAL UNDERSTANDING:**

Constitutionalism represents a political and legal doctrine that underpins the legitimacy of government authority by establishing that power must be exercised within the confines of a constitution. It emphasizes the notion of limited government, a system in which legislative, executive, and judicial powers are checked and balanced to prevent arbitrary or despotic rule, thereby safeguarding individual liberties and upholding justice.<sup>17</sup> Constitutionalism must be viewed distinct from the mere existence of a constitution as a formal document or framework of governance. While a constitution outlines the structure and functions of government, constitutionalism demands adherence to normative principles that constrain power and protect fundamental rights.<sup>18</sup>

The concept of constitutionalism has evolved globally, rooted in ancient legal traditions, enhanced during the Enlightenment, and shaped by the spread of liberal-democratic ideals.<sup>19</sup> Over time, constitutionalism matured from focusing primarily on the formal limitation of government powers to embracing substantive values such as liberty, equality, and the rule of law. However, traditional constitutionalism has faced criticism for its limited capacity to address entrenched social inequalities and deliver transformative social justice.<sup>20</sup>

In contrast, transformative constitutionalism emerged as an innovative paradigm envisioning the constitution not solely as a restraint on power but as an active instrument for societal change. This doctrine entails a commitment to substantive equality, social justice, and the well-being of historically marginalized groups, requiring proactive judicial and governmental efforts to realize the Constitution's democratic and egalitarian promises.<sup>21</sup> Unlike conventional

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<sup>17</sup> K.C. Wheare, *Modern Constitutions* (Indian Political Science Association, 1968).

<sup>18</sup> Mahendra Pal Singh, 'Constitutionalism in the Indian Comparative Perspective', 11 *NUJS L. Rev.* 647, 655 (2018).

<sup>19</sup> Louis Henkin, *Constitutionalism and Rights* (1990).

<sup>20</sup> Karl Klare, 'Legal Culture and Transformative Constitutionalism', 14 *South African J. on Human Rights* 146, 148 (1998).

<sup>21</sup> Gautam Bhatia, *The Transformative Constitution: A Radical Biography* (Hachette India, 2019).

constitutionalism, transformative constitutionalism regards the constitution as a living document that must be interpreted and enforced in light of contemporary social realities and evolving democratic aspirations.<sup>22</sup>

The term originated in the post-apartheid South African context, wherein constitutional designers deployed the Constitution as an explicit tool for redressing past racial injustice and institutional discrimination.<sup>23</sup> Karl Klare described transformative constitutionalism as a sustained project involving the enactment, interpretation, and enforcement of constitutional norms designed to reconstruct political and social institutions towards equity and democracy.<sup>24</sup> Chief Justice Pius Langa has similarly emphasized transformative constitutionalism's role in healing historical wounds and promoting a better future by radically changing society.<sup>25</sup>

This progressive vision soon found resonance in other constitutional democracies, most notably India. Here, transformative constitutionalism operates as a framework balancing fidelity to the Constitution's text and foundational ideals with the necessity of creative, forward-looking interpretation.<sup>26</sup> The Preamble to the Indian Constitution articulates the commitment to justice, liberty, equality, and fraternity values that underpin transformative constitutionalism's ethos.<sup>27</sup>

Under this doctrine, constitutional interpretation acquires a purposive dimension that transcends textual formalism or originalist confines. Courts, especially constitutional courts, are urged to interpret provisions dynamically, taking into account socio-political contexts and broad constitutional values.<sup>28</sup> This approach allows the judiciary to expand and protect fundamental rights in ways that confront systemic discrimination, economic inequality, and social exclusion, thereby advancing the Constitution's transformative mandate.<sup>29</sup>

Before delineating its central principles, transformative constitutionalism must be understood as an interpretive philosophy that conceives the Constitution as a vehicle for deep-rooted social transformation rather than a mere framework for governance. It aspires to realise the transformative vision embedded in constitutional texts by addressing structural inequalities and

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<sup>22</sup> Chief Justice Pius Langa, 'Transformative Constitutionalism' (Opening Address, Nelson Mandela Foundation, 2004).

<sup>23</sup> Klare, *supra* note 20, at 149.

<sup>24</sup> *Ibid.*; Pius Langa, *supra* note 22.

<sup>25</sup> M.P. Singh, *supra* note 18, at 670.

<sup>26</sup> Constitution of India, Preamble.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>29</sup> *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011.

fostering an inclusive, rights-oriented society. In jurisdictions such as South Africa and India, this approach has evolved as a response to historical injustices and continuing socio-economic disparities, placing the Constitution at the centre of progressive change. The following are some of the central principles underpinning transformative constitutionalism:

**(a). Substantive Equality and Social Justice:** Transformative constitutionalism emphasizes achieving substantive rather than formal equality, by recognising that identical treatment may perpetuate inequality in unequal societies. It therefore justifies affirmative action, redistributive policies, and protective discrimination to redress entrenched disadvantages and secure meaningful access to rights for marginalised communities.<sup>30</sup>

**(b). Active Judicial and State Engagement:** The doctrine envisages a proactive role for both the judiciary and the State in realising constitutional promises. Courts are not confined to passive adjudication but act as facilitators of rights, while the State bears positive obligations to create conditions necessary for socio-economic inclusion, participatory democracy, and effective enjoyment of fundamental rights.<sup>31</sup>

**(c). Recognition and Rectification of Historical Injustices:** At its core, transformative constitutionalism acknowledges that present inequalities are often rooted in historical patterns of exclusion and oppression. It mandates corrective constitutional measures aimed at dismantling these structural barriers and ensuring restorative justice through law and policy.<sup>32</sup>

**(d). Living Constitution:** This principle sustains the understanding of the Constitution as a dynamic and evolving document. The constitutional interpretation must remain responsive to changing social realities while remaining anchored in foundational values such as dignity, liberty, equality, and fraternity.<sup>33</sup>

In India, transformative constitutionalism has informed landmark judicial pronouncements expanding constitutional rights in various domains environmental protection, gender justice, LGBTQAI+ rights, disability rights, and the right to education and health care, reflecting a

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<sup>30</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

<sup>31</sup> *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

<sup>32</sup> M.N. Rao, 'Transformative Constitutionalism and Social Justice', 50 JILI 703 (2008).

<sup>33</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

commitment to social justice and dignity.<sup>34</sup> Justice D.Y. Chandrachud has described this interpretive approach as essential to preserving liberty, dignity, and fraternity in a pluralistic society.<sup>35</sup>

Despite its promise, transformative constitutionalism faces challenges, especially regarding judicial activism's limits, democratic legitimacy, and the balance between lawmaking and adjudication.<sup>36</sup> A principled jurisprudential framework is crucial to ensure that transformative constitutionalism fosters social equity while respecting constitutional governance and the separation of powers.<sup>37</sup>

The doctrine of transformative constitutionalism marks a paradigm shift by highlighting constitutional law's capacity to serve as an engine of progressive social change. Rooted in the particularities of global constitutional experience and India's complex social fabric, it calls for an engaged and value-driven judiciary and government dedicated to advancing substantive justice, equality, and democratic ideals consonant with the Constitution's founding principles.

#### **IV. CONSTITUTIONAL MORALITY VERSUS SOCIAL MORALITY - THE JUDICIAL COMPASS:**

A critical distinction that lies at the heart of transformative constitutionalism in India is the differentiation between constitutional morality and social morality. Social morality refers to the prevailing moral standards of the majority of society at any given point in time. Constitutional morality, by contrast, refers to the values, principles, and ethical commitments embedded in the text, structure, and spirit of the Constitution itself.

Dr. B.R. Ambedkar, in his speech before the Constituent Assembly, warned that constitutional morality must be cultivated and cannot be assumed to be naturally present in a society still shaped by centuries of hierarchy and exclusion. He emphasized that the task of the Constitution was precisely to elevate the moral standard of public life above the prejudices and inequalities perpetuated by social custom and tradition.

The Supreme Court of India has increasingly employed constitutional morality as a tool of

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<sup>34</sup> Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

<sup>35</sup> Justice D.Y. Chandrachud, 'Unkinging the Constitution' (2018).

<sup>36</sup> Granville Austin, Working a Democratic Constitution: The Indian Experience (1999).

<sup>37</sup> Ibid.

transformative interpretation, recognizing that deference to social morality would often reinforce the very discrimination and exclusion that the Constitution was designed to dismantle. In *Navtej Singh Johar v. Union of India*, the Court explicitly held that constitutional morality must prevail over public or social morality when the two come into conflict. The Court observed that popular morality or public acceptance cannot be the yardstick by which to assess the validity of a right that is explicitly guaranteed under the Constitution.<sup>38</sup>

Similarly, in *Indian Young Lawyers Association v. State of Kerala*, commonly known as the Sabarimala case, the majority held that the exclusion of women of menstruating age from entry into a temple was violative of their fundamental rights to equality, dignity, and freedom of religion.<sup>39</sup> The judgment affirmed that notions of purity and pollution rooted in social morality cannot override constitutional guarantees. This distinction between constitutional and social morality is one of the most powerful conceptual tools through which Indian courts operationalize transformative constitutionalism, ensuring that the Constitution acts as a counter-majoritarian safeguard for minority and vulnerable groups.

## V. THE ROLE OF CONSTITUTIONAL COURTS IN ADVANCING TRANSFORMATIVE CONSTITUTIONALISM:

The Constitutional Courts in India, particularly the Hon'ble Supreme Court of India, play an instrumental role in imbibing the ideals of transformative constitutionalism, interpreting and expanding fundamental rights in ways that reflect the constitutional commitment to justice, dignity and equality. This judicial activism has been essential in addressing systemic social inequalities, empowering marginalized groups, and shaping the constitutional jurisprudence to meet the contemporary democratic aspirations.

A paradigmatic case that highlights transformative constitutionalism is *Anuj Garg v. Hotel Association of India*, where the Supreme Court struck down discriminatory employment practices that upheld gender stereotyping.<sup>40</sup> The Court highlighted that the constitutional guarantees of equality cannot co-exist with regressive stereotypes or social prejudices. The judgment introduced the anti-stereotyping principle into Indian constitutional law, noting that equality is not a formalistic category but a substantive promise to deconstruct entrenched

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<sup>38</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>39</sup> *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1.

<sup>40</sup> *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1 (India).

inequalities. It further exemplifies the broader commitment of the Court to dismantle practices of social exclusion through purposeful constitutional interpretation.

This transformative methodology represents a decisive departure from conservative or originalist jurisprudence, which restricts constitutional interpretation largely to the intention of the framers or the literal meaning of the provisions, potentially obstructing legal adaptation to social progress. Transformative constitutionalism, in contrast, embraces a living Constitution that facilitates judicial creativity and flexibility to safeguard rights in changing social contexts.<sup>41</sup> It also empowers the courts to proactively protect individual liberty and social justice simultaneously, emphasizing that constitutional provisions are not static artifacts but dynamic models for social transformation.

In *National Legal Services Authority (NALSA) v. Union of India*, the Court further exemplified this approach and legally recognized the rights of transgender people to self-identify and mandated affirmative State measures for their protection.<sup>42</sup> The Court recognized gender identity as an essential component of personal dignity and freedom, and considered legal intervention necessary to correct historical social exclusions and discrimination.

In the landmark decision of *Navtej Singh Johar v. Union of India*, the Supreme Court decisively illustrated this ethos.<sup>43</sup> The Court read down Section 377 of the Indian Penal Code, decriminalizing consensual same-sex relations. In rejecting majoritarian moralism, the Court foregrounded constitutional morality, dignity, and individual liberty, highlighting that the constitutional guarantee of equality and privacy embraces the notions of sexual orientation and identity as well. The judgment charted new territory in the recognition of marginalized identities through transformative constitutionalism.

The impact of transformative constitutionalism extends beyond identity rights. It nurtures expansive interpretations of the phrase “right to life and personal liberty” under Article 21, encompassing environmental rights,<sup>44</sup> reproductive autonomy,<sup>45</sup> and the right to privacy.<sup>46</sup> In the case of *Justice K.S. Puttaswamy v. Union of India*, the Court finally recognized the right to

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<sup>41</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

<sup>42</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

<sup>43</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>44</sup> *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

<sup>45</sup> *Suchita Srivastava v. Chandigarh Administration*, AIR 2009 SC 187.

<sup>46</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

privacy as an intrinsic fundamental right, essential to human dignity and individual liberty, thereby strengthening the transformative character of Indian constitutionalism.<sup>47</sup>

In *Joseph Shine v. Union of India*, the Supreme Court rejected a colonial and patriarchal legal framework that treated women as the property of their husbands, by decriminalizing adultery.<sup>48</sup> The Court explicitly invoked the dynamic and evolving nature of constitutional interpretation, holding that laws inconsistent with dignity, equality, and autonomy cannot survive merely on the strength of historical acceptance. The judgment affirms that transformative constitutionalism requires the Constitution to actively dismantle archaic social structures and realign the law with contemporary constitutional morality.

In *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, the Supreme Court advanced transformative constitutionalism by recognizing reproductive autonomy as an integral aspect of dignity and personal liberty under Article 21.<sup>49</sup> Through a purposive interpretation of the Medical Termination of Pregnancy framework, unmarried women were brought within its scope, thereby removing distinctions based on marital status. The judgment illustrates how constitutional values guide statutory interpretation in response to changing social realities.

The decision in *Sukanya Shantha v. Union of India* reflects transformative constitutionalism through its examination of caste-based discrimination within prison administration.<sup>50</sup> By invalidating discriminatory provisions in prison manuals, the judgment treats the Constitution as a mechanism for addressing structural inequalities within State institutions. It emphasizes that constitutional principles of equality, dignity, and non-discrimination apply even within closed spaces such as prisons.

Recently, in *Imran Pratapgarhi v. State of Gujarat*, the Supreme Court reinforced the idea of transformative constitutionalism by reaffirming freedom of speech under Article 19(1)(a) as a foundational instrument for democratic participation and social critique.<sup>51</sup> The judgment clarifies that artistic and political expression cannot be restricted merely because it challenges authority or generates disagreement, and demonstrates how constitutional guarantees operate

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<sup>47</sup> Ibid.

<sup>48</sup> *Joseph Shine v. Union of India*, (2018) INSC 790.

<sup>49</sup> *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, (2022) INSC 706.

<sup>50</sup> *Sukanya Shantha v. Union of India & Others*, (2024) INSC 753.

<sup>51</sup> *Imran Pratapgarhi v. State of Gujarat & Another*, (2025) INSC 410.

as limits on arbitrary State action.

The judicial advances on gender justice also reveal transformative constitutional commitments. In the landmark decision of *Vishakha v. State of Rajasthan*, the Court formulated guidelines on sexual harassment at workplaces, completely reshaping the legal protections for working women and restoring their dignity at workplaces.<sup>52</sup> The Court worked as an agent of social change and thus affirmed not only through legal reasoning but also through the resulting changes in societal norms and State policies.

## **VI. CHALLENGES TO TRANSFORMATIVE CONSTITUTIONALISM - JUDICIAL OVERREACH AND DEMOCRATIC LEGITIMACY:**

Notwithstanding its progressive achievements, transformative constitutionalism in India is not without its critics and challenges. One of the foremost criticisms levelled against judicial transformation is the concern regarding democratic legitimacy. In a representative democracy, the primary authority to enact law belongs to elected legislators who are accountable to the people. When courts expand rights or invalidate legislative choices through expansive constitutional interpretation, questions inevitably arise about the appropriate boundaries of judicial power.

The originalist judicial approaches focus more on historical textual interpretations, which often resist the expansive readings, raising potential concerns about judicial overreach and challenges to democratic legitimacy.<sup>53</sup> Critics argue that when judges import their own values into the constitutional text under the guise of purposive interpretation, they effectively engage in a form of judicial legislation that displaces the democratic process. This concern is particularly acute in areas such as socioeconomic rights, where courts may direct the allocation of public resources or require the State to undertake specific programs, thereby intruding upon the domain of executive and legislative policy.

Indian courts have sought to maintain a principled balance, leveraging the basic structure doctrine from *Kesavananda Bharati v. State of Kerala*, to protect the constitutional ethos from majoritarian and legislative encroachments.<sup>54</sup> By anchoring transformative judgments within

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<sup>52</sup> *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>53</sup> Granville Austin, *Working a Democratic Constitution: The Indian Experience* (1999).

<sup>54</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

constitutional morality and the essential features of the Constitution, the judiciary preserves democratic structures while facilitating social progress. The doctrine of proportionality and the requirement that judicial innovation be grounded in constitutional text and principles have emerged as important guardrails against unrestrained judicial creativity.

Another significant challenge is the enforcement gap between judicial pronouncements and on-the-ground realities. Transformative judgments often require sustained institutional cooperation, legislative amendments, and resource allocation to translate constitutional ideals into lived experience. The Vishakha guidelines, for instance, remained only partially implemented for nearly two decades before the legislature enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. This gap between proclamation and implementation reveals the limits of judicial power as an instrument of social transformation acting alone.

A third challenge concerns the risk of constitutional fatigue or dilution, where the expansive invocation of transformative constitutionalism in an ever-broader range of contexts may lead to doctrinal inconsistency or a weakening of the principled foundations of the doctrine. For transformative constitutionalism to remain a robust and coherent jurisprudential framework, it must be applied with intellectual rigour and fidelity to constitutional principles, rather than serving as a residual category for any policy preference that courts wish to advance.

## **VII. COMPARATIVE PERSPECTIVES - SOUTH AFRICA, COLOMBIA, AND GERMANY:**

A comparative examination of transformative constitutionalism across different jurisdictions enriches the understanding of the doctrine's diverse manifestations and its universal applicability as a tool of progressive constitutional governance.

The South African Constitution of 1996, which explicitly incorporated the transformative project within its founding text, remains the most comprehensive example of transformative constitutionalism in the world. The Constitutional Court of South Africa has deployed transformative tools to give effect to socio-economic rights such as housing, healthcare, food, and water, as guaranteed under Sections 26 and 27 of the Constitution.<sup>55</sup> In *Government of the Republic of South Africa v. Grootboom*, the Court held that the State has a constitutional

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<sup>55</sup> Constitution of the Republic of South Africa, 1996, ss 26-27.

obligation to take reasonable measures to progressively realize the right to housing, demonstrating how transformation can be pursued through rights adjudication without making the judiciary a direct policy-maker.<sup>56</sup>

In Colombia, the Constitutional Court has similarly employed the concept of a “*living Constitution*” to advance substantive rights for marginalized communities, including Afro-Colombian and indigenous populations, through the tool of the *tutela*, a rapid constitutional remedy analogous to the writ of habeas corpus in common law systems.<sup>57</sup> The Colombian experience illustrates how transformative constitutionalism can be institutionally embedded through procedural innovations that increase the accessibility of constitutional justice.

In Germany, Federal Constitutional Court has developed the doctrine of the “*objective dimension*” of fundamental rights, holding that constitutional rights are not merely subjective entitlements of individuals against the State but also objective values that permeate the entire legal order.<sup>58</sup> This doctrine, rooted in the post-Nazi constitutional settlement embodied in the Basic Law of 1949<sup>59</sup>, has been interpreted to impose positive obligations on the State to create and maintain the conditions in which constitutional rights can be meaningfully exercised.<sup>60</sup> This German tradition of constitutional value-ordering provides a significant parallel to the Indian doctrine of transformative constitutionalism and its emphasis on substantive, rather than merely formal, rights protection.<sup>61</sup>

These comparative experiences confirm that while transformative constitutionalism has its origins in the particular historical context of post-apartheid South Africa, its core insights the Constitution as an instrument of social change, the importance of substantive equality, and the proactive role of courts in advancing constitutional values resonate across diverse legal systems and represent a genuinely global jurisprudential trend.

## VIII. CONCLUSION:

The doctrine of transformative constitutionalism has provided Indian constitutional law with a

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<sup>56</sup> Government of the Republic of South Africa v. Grootboom, [2000] ZACC 19.

<sup>57</sup> Political Constitution of Colombia, 1991, art. 86 (acción de tutela).

<sup>58</sup> Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012).

<sup>59</sup> Basic Law for the Federal Republic of Germany (Grundgesetz), arts 1-19.

<sup>60</sup> Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002).

<sup>61</sup> Upendra Baxi, ‘Transformative Constitutionalism’ in *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).

vital interpretive framework that enables the evolution and expansion of fundamental rights, ensuring their continued relevance in a diverse and dynamic society. This principle stands as a principled middle ground between rigid originalism, which confines judicial interpretation to the framers' perceived intent or textual literalism, and unbounded judicial activism, which risks undermining constitutional coherence and democratic legitimacy. Transformative constitutionalism insists that constitutional interpretation be anchored firmly in the text and founding principles of the Constitution while remaining sufficiently flexible and responsive to contemporary social realities and normative demands.

One of the key findings emerging from the judicial landscape is that transformative constitutionalism effectively reconciles the tension between stability and change within the constitutional order. The Constitution, while rooted in the historical context of Indian independence and the aspirations of its framers, is not a static artifact sealed in time. Rather, it is a living document that calls for the progressive realization of rights, particularly for historically marginalized and vulnerable groups. The Supreme Court has repeatedly emphasized this view, especially through decisions like *Kesavananda Bharati v. State of Kerala*, where the "basic structure doctrine" was articulated.<sup>62</sup> This doctrine protects the core identity of the Constitution, including fundamental rights, against arbitrary amendments by Parliament, thereby ensuring its sanctity while allowing for adaptive interpretation.

Moreover, the idea of transformative constitutionalism recognizes that the full realization of fundamental rights requires an expansive and purposive interpretation that empowers constitutional adjudication to address contemporary challenges such as discrimination, social exclusion, and changing notions of dignity and individual liberty. Judicial recognition of these contemporary issues highlights the principle's ability to bridge the existing gap between the constitutional text and modern societal demands. These judgments are not merely illustrations of individual rights protection but transformative acts that promote social inclusion and challenge perennial social prejudices and injustices embedded in Indian society.

While the transformative approach affirms the proactive role of the judiciary in protecting fundamental rights, it also reiterates the importance of constitutional morality and restraint within the framework of separation of powers. The judicial expansion of rights must be based on principles and guided by the spirit of the Constitution, avoiding overreaching or substituting

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<sup>62</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

the democratic process with judicial will.<sup>63</sup> This balanced stance secures democratic legitimacy by ensuring that courts interpret the Constitution in a manner consistent with its foundational text and objectives, while remaining flexible enough to address changing social realities and societal demands.

The doctrine of transformative constitutionalism thus facilitates a principled middle path that sustains democratic governance, protects individual rights, and promotes social justice. It harnesses both the text and the ethos of the Constitution as a normative compass that guides interpretation and judicial review, while remaining attuned to the pluralistic social fabric and development imperatives. Far from being an invitation to unrestricted judicial legislation, it constitutes a substantive jurisprudential methodology based on the liberal-democratic ideals of constitutionalism.

At its core, transformative constitutionalism embodies the ideal that constitutional law should be both principled and purposeful, balancing fidelity to fundamental principles with responsiveness to contemporary needs. This approach rejuvenates the Indian constitutional project by ensuring that fundamental rights are not confined to paper guarantees but are realistic, enforceable, and inclusive safeguards underpinning the nation's democratic and egalitarian aspirations.

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<sup>63</sup> Granville Austin, *Working a Democratic Constitution: The Indian Experience* (1999).