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# Transformative constitutionalism: Contemporary Issues and Challenges in India

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## ABSTRACT

*According to professor McIlwain constitutionalism has one essential quality it is a limitation on government, it is the anti-thesis of arbitrary rule its opposite is despotic government. The government of will instead of law. The limitation of the government by law is essence of the constitutionalism. However, The constitution of India is a living document and living law of the land, it is flexible in nature. The constitution of India marked by a transformative vision its recognizing its supremacy over all the law, custom, usage, practice. Transformative constitutionalism understand the law is dynamic in nature it will change accordance with the needs of the society it means overruling the precedent and enacting new law for social, economic and political justice which is the basic principle of the constitution of India .It is the commitment to substantive equality and improving the socio-economic condition in India. Transformative constitutionalism plays a vital role in order to protect the constitutional ideas of Liberty, Equality and Fraternity. This paper critically examine the transformative constitutionalism, contemporary issues ,The research paper also deal with the evaluation of transformative constitutionalism and outline the various challenges in India.*

*Key word; Transformative, Constitutionalism, anti-thesis, Arbitrary, Despotic*

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

**- Dipak Misra**

## I. INTRODUCTION

According to Aristotle, “constitution is the way in which, citizen who are the component part of the state, are arranged in relation to one another”.<sup>3</sup>The constitution of India is *supreme lex* because it is the *Grundnorm* all law must take validity from the constitution of India. It is the basic law of the land the constitution guaranteed the fundamental right and duties to the

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<sup>3</sup> R.C.Agarwal, 'Political Theory' Edn 2014, S.Chand Publication.pp-316

citizen. It laid down the various procedure and certain power and limitation in the governing the state. it scheme established the rule of law, supremacy of the constitution, separation of power between three organs the government *Legislature*, *Executive* and *Judiciary*.and Independence of judiciary is most important in the democratic country like India judiciary is the custodian of the fundamental right. it plays a very important role in order to protect the basic right of the citizen it imposes restriction on the arbitrary use of power and it is called constitutionalism and it is not necessary every constitution have constitutionalism for example *Hitler* too had the *weimer* constitution but there was not constitutionalism in the Germany. Constitutionalism is the anti-thesis of authoritarianism. The john lock was the exponent of this modern constitutionalism.The foremost important is to have a limited government. and Aristotle says, every good government has to be constitutional which means limited government .the most important point about the constitutionalism is that a constitution does not fall from the sky .it is not given by god nor is it granted by a king ruler, because no ruler would like to reduce his own power .a constitution is framed by the will of the people which is wrested from the ruler; it grows out of the experience and the aspiration of the people.<sup>4</sup>the constitution does not look to the past it is only traditional society that people look to the past.The framer of the constitution determine the course of their future. it involve a break with the past norms the fundamental principle of positive law that a constitution overruled all custom, tradition, rules or statute that come in conflict of the constitution.

### **Essential elements of Constitutionalism.**

- Supremacy of the constitution
- Democratic government
- Independent judiciary
- Concept of judicial review
- Separation of power
- Rule of law
- Individual freedom

However, According to Louis Henkin explains and include its basis in popular sovereignty, supremacy of the constitution, political democratic government and representative limited

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<sup>4</sup> Shibani Kinkar Chaube, 'The making and working of the Indian constitution'Edn 2013,National book trust, India pp-4

government, civilian control of the military, separation of powers or other checks and balances, police governed by law and judicial control, and an independent judiciary which requires that government respects and ensures individual rights which generally are the same as recognised by the *Universal Declaration of Human Rights*<sup>5</sup>

## II. TRANSFORMATIVE CONSTITUTIONALISM

The Transformative constitutionalism always against the rigidity of the constitution. It plays the vital role in order to transformation of the society and to protect the basic principle of the constitution, and its value system and as we know that we can't compromise the value system of the constitution its main aim to protect the individual freedom. In Novtej Johar case Chief Justice Dipak Misra stated that.

*The whole idea of having a constitution is to guide the nation towards a resplendent is to transform the society for the better and his objective is the fundamental pillar of transformative constitutionalism*<sup>6</sup>. The word transformative constitutionalism is never expressly mentioned in the constitution of India but as we know that the supreme court is the guardian of the fundamental right the constitutional court plays a great role in order to protect and promote the basic ideas and the value system of the constitution value system of the constitution also protect the minorities views. The constitution is the living documents of the land it always working. its main aim to protect and promote the *Equality, Liberty, fraternity*. freedom of individual and dignity of individual is the paramount important for the promotion of the basic right the supreme court recognise the constitution is transformative rather than rigid.

### DR D.D BASU'S VIEWS ON CONSTITUTIONALISM

“The principle of constitutionalism requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental Right. The Constitution embodies aspiration to social justice, brotherhood, and human dignity. It is a text which contains fundamental principles. ... The tradition of written constitutionalism makes it possible to apply concepts and doctrine of unwritten living Constitution. The Constitution is a living heritage and, therefore, you cannot destroy its identity.”<sup>7</sup>

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<sup>5</sup> 7 L. Henkin, A New Birth of Constitutionalism: Genetic Influences and Genetic Defects in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 39, 41-42 (M. Rosenfeld ed., 1994)

<sup>6</sup> WWW.Barandbench.com

<sup>7</sup> DD BASU, SHORTER CONSTITUTION OF INDIA, Vol.1 15-16 (Justice AR Lakshamanan, Justice

### III. TRANSFORMATION CONSTITUTIONALISM AND PERSONAL LAWS

#### *(Towards Gender Justice)*

The constitution of india guarantees right to equality also guarantees the freedom of religion. Historically courts in india always approved the freedom of religion on the right to equality. In the case of **Nasaru Appa Malli**,<sup>8</sup> The issue before Bombay high was whether the personal laws of Hindu and Muslim is 'laws in force' within the meaning of the article 13 of the constitution of india court was held that the 'Personal law' is not law in force and does not come within the meaning of article 13 however, it will not be tested with the fundamental right, and when there is any conflict between the personal law and fundamental right the personal laws always prevail.

In the case of **Kaur v Kaur**,<sup>9</sup> Delhi high court observed that,

*Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither article 21 nor article 14 has any place. In a sensitive sphere which is at once intimate and delicate, the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond.*<sup>10</sup>

However, In famous case of **Shah Bano**,<sup>11</sup> Supreme court grant the maintenance under sec 125 of CrPc ,for shah bano,and also held that the divorce muslim women has right to maintenance under sec 125 of CrPc. after the period of iddat, and the muslim personal laws provide maintenance only the period of iddat.the conservative section of the people start protesting against the judgement, influencing from the protest the parliament enact the new law Muslim Women's (Protection of Rights on Divorce) Act, 1986,which overruled the decision of the supreme court.

In the case **Danial Latifi** ,<sup>12</sup> The constitutional validity of the Muslim Women's (Rights on Divorce) Act, 1986.was challenged and contended that the law made unreasonable distinction, distinction between women of two groups, based on religion,and deprived Muslim women from claiming maintenance under secular law.

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Bhagabati Prosad Banerjee & V.R. Manohar, 14th ed., 2009)

<sup>8</sup> State of Bombay v Narasu Appa Mali AIR 1952 Bom 84.

<sup>9</sup> AIR 1984 Del 66.

<sup>10</sup> <https://nludelhi.ac.in/download/publication/2015/august/Transformative%20Constitutionalism.pdf>

<sup>11</sup> Mohd Ahmed Khan v Shah Bano Begum (1985) 2 SCC 556

<sup>12</sup> Denial Latifi v Union of India,(2001) 7 SCC 740.

The supreme court while upholding the constitutional validity of the law, By interpreted the expression ‘a reasonable and fair provision and maintenance to be made and paid to her within the Iddat period’ to mean that the payment was to be made within the Iddat period, and not that the payment was for the Iddat period alone.<sup>13</sup>The supreme court while upholding the constitutional validity of act observed that in the following word,

*In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially, and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, given up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband her emotions, sentiments, mind and body, and her investment in the marriage is her entire life – a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Board.<sup>14</sup>*

In the case of **Shayara Bano**<sup>15</sup>,Supreme court struck down triple talaq unconstitutional or anti Islamic by the supreme court. The judgement was delivered by five judges bench of the supreme court with consist of then Chief justice Jagdish Singh khehar and justice S Abdull Nazeer,pass decenting views from the other three judges Justices Rohinton F Nariman and Uday U Lalit and one opinion and one separate opinion by justiceJustice Kurian Thomas;

Justice Nariman

*“...it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at*

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<sup>13</sup> <https://nludelhi.ac.in/download/publication/2015/august/Transformative%20Constitutionalism.pdf>

<sup>14</sup> <https://nludelhi.ac.in/download/publication/2015/august/Transformative%20Constitutionalism.pdf>

<sup>15</sup> Shayra Bano V Union Of India WT No 118 of 2017.

*reconciliation so as to save it''*

Justice Nariman check instant triple talaq on the constitutional principle of equality under article 14 of the constitution of India. The triple talaq is unreasonable and arbitrary and it will struck down, for him arbitrariness should be seen by help of the constitutional reasoning.<sup>16</sup>

#### IV. TRANSFORMATIVE CONSTITUTIONALISM

‘‘Social morality v Constitutional morality’’

The Constitution of India provide the vision of equality in progressive society it is the living document which guarantees the fundamental right therefore every person is equal in eyes of law article 14 of the constitution guarantees equality before law and equal protection of law

In the famous case of **Navtej Singh Johar**<sup>17</sup>.The five judges of constitutional bench decriminalize sec 377 of India Penal Code, a colonial law which criminalize homosexuality, unconstitutional.

The supreme court held that the constitutional morality always prevail over the social morality that guarantees equal right to minority as equal to the freedom enjoyed by the majority of the people. The majorities view can't stop the minority right. The morality of the constitution of India is always prevail on any other types of morality the constitution of India guarantees the individual liberty. The court also noted that the Sec 377 of IPC, 1860 also violate the freedom of expression of the person.

Here is the time line of what happened in a long drawn out legal battle that finally resulted in victory for democracy and freedom of individuals. While the early phase of the Court was influenced by pre-constitutional modes of delivering justice, only responding to formal equality.

Supreme court while upholding the transformative constitutionalism check the validity of Section 497 of Indian Penal Code 1860 which define Adultery law in India. After passing from various scrutiny of the court including supreme court lastly supreme court in his historic judgement in the case of **Joseph Shine**<sup>18</sup>, Supreme court declared sec 497 is unconstitutional and observed that the law of adultery is anti-women. It also deprives and destroys the women dignity it is against the concept of equality and right to equal opportunity to the women. court further observed that adultery could be a outcome of unhappy marriage. and supreme court further stated that the adultery is still ground of divorce. the constitutional morality is always

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<sup>16</sup> <https://blog.iplayers.in/triple-talaq-shayara-bano-case/>

<sup>17</sup> Navtej Singh Johar v Union of India 2018, SCC 10

<sup>18</sup> Joseph Shine V. Union Of India

prevail on the social morality. Declaration of 158 year old law of adultery unconstitutional by applying the constitutionalism itself shows that the constitution is living document and transformation of the society is the essence of the constitution<sup>19</sup>.

In the case of **State of Maharashtra**<sup>20</sup>, The issue before supreme court was. Is the ban on dance bars is justifiable on the name of social morality. the supreme court observed that'' Depriving the person right to dance and earn income violate the fundamental right to freedom of speech and expression, it also violate article 21 of the constitution, the right to life and personal liberty which also include right to livelihood it is matter of their hunger and day to day expenses of their family. Further, Supreme court struck down the condition in which the dance bar could not be within the radius of one km from the educational and religious institution.

**Secretary, Ministry of Defence** <sup>21</sup>In the most historic Judgment of the supreme court towards the gender justice which is manifestation of the constitution supreme Court of India directed that Permanent Commission should be granted to women in army regardless of their service, the supreme court held that complete exclusion of women from command is against the article 14 of the constitution of India. Court also observed that it is unreasonable and arbitrary in nature the transformation of the constitution towards the achieving the gender justice and blanket non consideration of women for command is not permissible by the constitution of India. The observation of the court regarding mindset of the government and observed that change of mindset is required on the part of the government for the complete end of the gender discrimination in the armed forces. Therefore, It can be seen the constitution is living and transformative in nature the transformative constitutionalism as a tool for the achieving the gender justice. it promote and protect equality principle.

## V. TOWARDS FREEDOM

State plays an active role in ensuring liberty, equality, freedom and other ideals enshrined in the constitution to the content of these ideals. The constitution also provides certain limitation on the same the constitutional court has obligation to protect the rights of the individual in the country. And understanding of Transformative Constitutionalism demands that the state actively pursue these goals and remove all barriers to enjoyment of such rights

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<sup>19</sup> [https://www.business-standard.com/article/current-affairs/adultery-is-not-a-crime-section-497-of-ipc-unconstitutional-sc-118092700259\\_1.html](https://www.business-standard.com/article/current-affairs/adultery-is-not-a-crime-section-497-of-ipc-unconstitutional-sc-118092700259_1.html)

<sup>20</sup> State Of Maharashtra V Indian Hotel Restaurant Ass& other Civil Appeal No,5504 of 2013

<sup>21</sup> Secretary, Ministry of Defence V Babita Puniya &ors. AIR 2020

In **Puttaswamy case**<sup>22</sup> (Privacy case), Supreme Court Held that Right to privacy is fundamental right under Article 21 of Indian constitution, however word privacy is not expressly mentioned in Article 21, therefore Justice Chamleswar Observed that “*silences of the constitution should also be read*”

In the case of **Anuradha Bhasin**<sup>23</sup> Hon’ble Supreme court declare that the freedom of speech and expression to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under art 19(1)(a) and art 19(1)(g). The restriction upon such fundamental right. the supreme court also stated that right should be consonance with the mandate of under art 19(2) and (6) of the Constitution of India and that should be inclusive of the test of proportionality.

It is the Transformative character of the constitution which is against the rigid character of the constitution it is the need of the country in present globalised world the constitution transform accordance with the need of the society.

### **LGBTQI Right V Social Structure**

Transformative constitutionalism provides right to LGBTQI community by the supreme court in Novtej Johar case Supreme court held that transformative constitutionalism as an a objective of recognize by the constitution, The intention of framer of the constitution was to provide the constitution which is living in nature and living document in the country there are certain principle on which constitution is based and it was made for the future as well. and the transformative constitutionalism is the mechanism by which the objective of the constitution can be achieve it plays a vital role in order to protect and promote the equality liberty and fraternity in the society for the achieving the basic ideas of the maker of the constitution. Transformative Constitutionalism has developed by the judicial intervention which lead to growth of the constitutional jurisprudence which protect not only views of the majorities community it also protect the views and right of the minorities which are the basic human right of the person which cannot be taken out by the social morality the constitutional morality is always prevail on social morality which plays a vital role while achieving the basic principle of the constitution of the country for the same. Transformation of the society by help of the constitutionalism is the key aspect in the modern India where the right is guaranteed by the constitution it can’t be taken out without the reasonable or justifiable

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<sup>22</sup>Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors. AIR 2017

<sup>23</sup> Anuradha Bhasin V Union Of India AIR 2020 SC.

ground the individual freedom should always protected by the judicial intervention.<sup>24</sup>

Transformative Constitutionalism, Justice Dipak Misra States that *“the right of the individuals are fundamental right which is protected or guaranteed by the constitution itself the constitution of India is dynamic and living document framed for the future perspective transformation is the basic requirement of the country which shall protected by the judicial intervention, Our Constitution are the dynamic and timeless rights of liberty, Equality, Fraternity. It would be the basic right of the citizen of the country and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature.*

### **Faith V Equality**

Balancing between faith and equality is very taught task to the judiciary, However, in the Sabrimala Judgment<sup>25</sup>, The Supreme court allowed entry of all ages women in Sabrimala Temple with the majority of 4:1 judgment. Five judges bench the four separate judgment, three in favor of entry of women in temple and Justice Indu Malhotra dissenting views from the same .therefore in majority opinion Justice Chandrachud observed that, Individual dignity must be protected by the help of constitutionalism the constitution is based on the principle of *equality, justice, liberty and fraternity*, Hence, the freedom of religion should be interpreted for providing individual dignity and majority of judges apply transformative constitutionalism for the abolishing the gender discrimination from the society itself. and women has equal right to practice and profess religion as same as man under article 25 of the Constitution of India. However, Justice Indu Malhotra interpreted the constitution on the principle of secularism and stated that judicial intervention has no place in religious matter which is not covers in the domain of transformative constitutionalism. Presently case is still under the consideration of Supreme court of India .

In the reference Nine judges bench framed following issues,

1. What is the scope and ambit of right to freedom of religion under Article 25 of the Constitution of India?
2. What is the inter-play between the rights of persons under Article 25 of the Constitution of India and rights of religious denomination under Article 26 of the constitution of india ?
3. Whether the rights of a religious denomination under Article 26 of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health?

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<sup>24</sup> <https://www.livelaw.in/top-stories/absolute-exclusion-of-women-from-command-appointments-in-army-illegal-sc-152811?infinitemscroll=1>

<sup>25</sup> 28<sup>th</sup> sep.2018

4. What is the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality.
5. What is the scope and extent of judicial review with regard to a religious practice as referred to in Article 25 of the Constitution of India?
6. What is the meaning of expression "Sections of Hindus" occurring in Article 25 (2) (b) of the Constitution of India?
7. Whether a person not belonging to a religious denomination or religious group can question a practice of that religious denomination or religious group by filing a PIL?<sup>26</sup>

### **Individual choice v Religious choice**

The famous case commonly known as Hadia case the shafin jahan the Hindu converted into the muslim and solemnize the marriage with the Muslim man the case was investigated by the NIA The Shafin Jahan case the lady was question by the supreme court about his choice and the Shafin Jahan say that she converted into Islam by free will and choose the Muslim man with his personnel choice without any types of compulsion by the other. Supreme court held that marriage with choice is protected by the constitution of the country and individual freedom is guaranteed by the constitution and in famous development privacy case supreme court held that silences of the constitution should also be read. However, the fight for gender justice is always protected by the constitution of the country. In the case of **Shakti Vahini**<sup>27</sup> right to marriage according to choice is the fundamental right and person is free to choose his/her life partner with his choice and court also observed that the permission of the community and the family is not required when he/she is major and competent to the same. Supreme Court also declared the khap limitation is against the law on the same. Transformative constitutionalism plays vital role to protect the basic human right of the people.

## **VI. DILUTION OF LAW OF SCHEDULE CAST AND SCHEDULE TRIBES**

The judgment of the supreme Court in the case of **Subhash Mahajan**<sup>28</sup> was largely criticized by the society and person belong to certain community protest against the same the judgment was based on the presumption of misusing law by the communities which is heavily criticize by the society for the same. The law dilution by the supreme is overruled by the legislative

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<sup>26</sup> <https://www.livelaw.in/top-stories/sabarimala-reference-new-issues-framed-by-9-judge-bench-on-religious-practices-fundamental-rights-152539>

<sup>27</sup> Shakti Vahini V Union Of India( 2018) 7 SCC 192

<sup>28</sup>Subhash Kashinath Mahajan vs The State Of Maharashtra AIR 2018

intervention by amending the same. The Amendment was also challenge in the court but now court give different opinion, while upholding the amendment.

Hence, Indian judiciary plays a vital role in order to apply “Transformative constitutionalism” for the achieving the social justice and protection of individual right, and transforming the society. However, it is also important to establishing the balance between *constitutional morality* and *social morality*. and between *Faith* and *Equality*.

## VII. CONCLUSION AND SUGGESTIONS

Constitution of India is the living document and it is the basic law of the land which the other law must take validity from the constitution. It guaranteed the fundamental right to the citizen of the country. The vision and ideas of the framer of the constitution to make constitution for the future perspective which is transformative in nature. The constitution provide every solution to the problem it main aim to provide *Social, Economic* and *Political* justice to the citizen of the country. The judiciary plays important role in order to protect the rights of the citizen the transformative constitutionalism always focus on abolition of discrimination and provide equality and *Rule Of Law* in the country. The transformative constitutionalism always proceeds with the society progress. In recent development by the judiciary which recognizing the constitutional morality over the social morality that lead to various issues and challenges in the country. As we know that India is the developing country and it has pluralistic society various faith and belief exist in the society certain types of discrimination is always accepted by the society, the society also accepting those custom which is discriminatory in nature other hand constitution of India guarantees certain fundamental or basic right and the constitution has certain value system that the judiciary is the custodian of the fundamental right. The constitutional court has duty to protect the fundamental right and stuck down certain practice which is against the constitution. In recent time court follow the principle of constitutionalism which some time does not care about the social morality. Now days court focus on the constitutional morality while interpretation of the certain law and custom. Then, it is suggested that, court while upholding the transformative constitutionalism and transforming the society which is the purpose of the constitution, at the same time court should also make balance between constitutional morality and social morality that is important for the ensuring faith of the people in judiciary.

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