

# CONSTITUTION OF INDIA - A TRANSFORMATIVE DOCUMENT

## I. Introduction:

The Constitution of India is described as a “charter of social revolution.”<sup>1</sup> Constitution for a nation which seeks to make a new beginning shall not be mere layout of organisation of government and arrangement of powers and functions of the State but it has to be a bridge between the past and future of the nation, a contrivance for transforming a society from then prevailing social ailments to healthy society, a device to determine then present shackles for the growth of the society and self-development of the individual, a plot for movement from police state to welfare state. Further, mere recognition and protection of political rights of the people is not sufficient because that assures only political democracy which will not survive for a long time without there being socio-economic democracy.

In the words of Justice Mukherjee and Justice Hegde “*Our Constitution is not a mere political document. It is essentially a social document. It is based on social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant, but the latter is subject to change. The core of religion always remains constant, but the practices associated with it may change. Likewise, a constitution like ours contains certain features that are so essential that they cannot be changed or destroyed.*”<sup>2</sup> Therefore, the intention behind the framers of the Constitution was to give the Constitution a breathing spirit and preserve the ideals of the Constitution for the generations to come.

<sup>1</sup> Upendra Baxi, “The Little Done, the Vast Undone: Reflections on Reading Granville Austin’s The Indian Constitution” 1967 9 Journal of the Indian Law Institute, p.323.

<sup>2</sup><https://journal.indianlegalsolution.com/2020/07/15/constitutional-identity-judicial-developments-and-new-eras-approach-to-a-progressive-society-eshanee-shashwat/>

Transformative Constitution envisages large scale social change through nonviolent political processes grounded in law. It lays down the transformative project not just for an orderly enhancement of governance powers directed to fostering national 'development' but rather a redemptive potential construed in terms of effective implementation of human rights, especially social and economic rights.<sup>3</sup>

Transformative Constitution avoids civil war in a nation. It creates scope for social evolution instead of violent revolution. It provides for peaceful and positive change brought within the society with the intervention of the State. It facilitates nation building process akin to the idea of law propounded by Roscoe Pound as a tool of social engineering.

Transformation requires enactment, enforcement and interpretation of the Constitution. Thus, coordinated effort of all the three organs of the state is envisaged in the Constitution of India towards the transformation of political, social and economic life and institutions of the State.

Making social transformation a part of the Constitution-making project immediately opens up a set of interesting problems. The first thing that draws one's attention is the inherent tension between the two central terms – 'transformation' and 'constitution.' Constitutions establish an order. Transformations change existing orders. Constitutions are associated with terms like security, stability, predictability, etc. Transformations, on the other hand, bring forth instability, unpredictability, and the loss of security for certain vested entitlements. Transformational constitutionalism was not a brilliant synthesis that managed to overcome this antagonism. Rather it was an

<sup>3</sup> Upendra Baxi in Oscar Vilhena, Upendra Baxi and Frans Viljoen (editors) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, Pretoria University Law Press, 2013, p.

attempt to hold on to both those aspects – order and flux, taming and change – in an uneasy and incomplete dialectical relationship. The reason for that, as has been explained, can be found in the mutual dependency of a social transformative agenda and a constitutional project. The viability of a stable constitutional structure required transformation of the society, while a project of social transformation that did not destabilise the political order required mediating it through the Constitution. Hence, both the elements of order and change had to be retained.<sup>4</sup>

## **II. Constitution of India : *Sui Generis***

### **a. Constitution of India marries power with justice :**

Constitutions balance and reconcile legal, political and social functions in different ways,<sup>5</sup> providing for power structure and scheme of justice. When power is purposive, keeping the power totally uncontrolled results in a situation of anarchy and keeping total control over the power may affect the fulfilment of social expectation – hence a balance must be struck between these two.

Two broad constitutional archetypes can be identified: the procedural and the prescriptive. The differences between these two types of constitutions relate to the nature and purposes of the document itself:

- A procedural constitution defines the legal and political structures of public institutions and sets out the legal limits of government power in order to protect democratic processes and fundamental human rights.

<sup>4</sup>Sandipto Dasgupta , Legalizing the Revolution, Available on-<https://academiccommons.columbia.edu/doi/10.7916/D8RJ4RV6/download> Visited on 27/11/2022.

<sup>5</sup> [https://constitutionnet.org/sites/default/files/what\\_is\\_a\\_constitution\\_0.pdf](https://constitutionnet.org/sites/default/files/what_is_a_constitution_0.pdf)

- A prescriptive constitution emphasises the foundational function of the constitution as a ‘basic charter of the state’s identity’ which plays ‘a key role in representing the ultimate goals and shared values that underpin the state.’<sup>6</sup>

The framework of the Constitution of India is amalgamation of both these archetypes and that is evident from the values and goals enshrined in the Preamble and their embodiment in various substantive and procedural aspects of the constitution. Through this framework it embodies the classical idea of constitutionalism as a limited government and also the idea of transformative constitutionalism. To put it simply, the limits will be put in place through the marriage of the power wielder and positive duties also prescribed to make it a happy marriage and a home.

**b. It is a Living Document :**

When one describes the Constitution as a living document it means that the core structure and substance of the Constitution will never change but it will continue to adapt to the requirements of society. The constitution is transformational, and there is an unambiguous focus throughout the constitution on our commitment to changing relationships. The operation and interpretation of our Constitution are highlighted by this transformational vision.<sup>7</sup>

Our Constitution is based on social as well as factual realities which change constantly; therefore the Constitution itself must be changed so that it does not lose its relevance. Sometimes it may happen that societal change precedes change in law or it may happen that a change in law precedes change in society. At times, changes in law are made due to the fact that there are changes in society.

<sup>6</sup> Elliot Bulmer, What is a Constitution? Principles and Concepts, Second edition. International Institute for Democracy and Electoral Assistance, Strömsborg, 2017

<sup>7</sup> Srishti patwal, Transformative Constitutionalism, <https://www.legalserviceindia.com/legal/article-8173-transformative-constitutionalism.html>

A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings; for, it has been created in such a manner that it can adapt to the needs and developments taking place in the society. It was highlighted by Supreme Court in the case of the *Chief Justice of Andhra Pradesh and others v. L.V.A. Dixitulu and others*,<sup>8</sup> that the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs.

In the case of *Saurabh Chaudri and others v. Union of India*<sup>9</sup> and others, it was observed:- "*Our Constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding.*"

In *Government of NCT of Delhi v UOI*,<sup>10</sup> the Supreme Court, while contemplating on what is it that makes a Constitution a dynamic and a living document, observed that it is the philosophy of 'constitutional culture' which, as a set of norms and practices, breathes life into the words of the great document and it constantly enables the words to keep stride with the rapid and swift changes occurring in the society and the responsibility of fostering a constitutional culture rests upon the shoulders of the State. Thereafter, the Court went on to observe:- The Constitutional courts, while interpreting the constitutional provisions, have to take into account the constitutional culture, bearing in mind its flexible and evolving nature, so that the provisions are given a meaning which reflect the object and purpose of the Constitution.

The judiciary has been given the power to breathe life into the letters of the law by interpreting constitutional provisions. The various tools

<sup>8</sup> 1979 ( 3 ) SCC 34

<sup>9</sup> [2003] 11 SCC 146

<sup>10</sup> (2018) 8 SCC 501

and techniques of interpretation of the constitution are very cautiously utilised by the judiciary to make it an ever evolving document.

**c. It is a bridge between the past and future of the nation :**

Constitution is a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all citizens irrespective of colour, race, class, belief or sex.

At the time of making the Indian Constitution all the members of Constituent Assembly seem to have agreed on the point that there exist deep rooted structural inequalities which are an inherent part of our Indian society and culture and Constitution of India will be the document that will serve as a transformative document and help Indian society to overcome such deep rooted structural inequalities.

Makers of the Constitution of India had the consensus at the time of making of constitution that our constitution should not be read as a static document rather it is a living document that should transform itself with change in the needs of society so that it does not lose its relevance. The views expressed by Dr. B.R Ambedkar in the Constituent Assembly stands testimony for such consensus *“We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life.”*

**d. It is an embodiment of constitutionalism :**

Constitutionalism is an ideology which explains a way of life, values, beliefs and ideals of the people of a nation that serve as a limitation on the State power. Constitutionalism is a goal which a nation has to achieve and for achievement of such a goal the

Constitution is a means.<sup>11</sup> Both the means and end is envisaged in the Constitution of India. The preambular values reflect this ideal very well.

**e. It is a book for social engineers for social engineering :**

Roscoe Pound's idea of law as a tool of social engineering is so well built into the constitutional structure of the Indian Constitution. Nation building is a continuous process, it involves building an efficient structure of the society with minimum friction and waste. That experience has been the working of the Constitution of India as it started building a new India with a strong foundation laid down in the Constitution and has been building it for the last 72 years with least friction and waste in comparison to any other country that has become independent after the II World War. That indicates the strength of our Constitution which is a fine blend of unchangeable and changeable, antagonistic yet workable together, fragile and solid aspects and principles of governance. The seamless web of provisions of the Constitution of India are knitted so well to withstand the aberrations that are but natural to take place in any dynamic society. In this process of identifying, recognising, protecting, limiting and balancing the conflicting interests of individuals, society and State the legends of the Bar specifically and the lawyer community generally and the judiciary from the civil court to Supreme Court of India have contributed immensely, worthy of name as 'Social Engineers.'

**f. It is a vision and mission statement of the nation :**

The Constitution of India is a document prepared by visionaries that took a period of 2 years 11 months and 18 days to make. 389 members from different walks of life shared their visions and discussed the

<sup>11</sup> Urstrulysameer, Transformative Constitutionalism: Analysis of Indian Judicial Approach, <https://www.legalserviceindia.com/legal/article-9598-transformative-constitutionalism-analysis-of-indian-judicial-approach.html>

aspirations of the people and with overlapping consciousness drew broad visions for the nation. They not only set a very progressive and overarching vision but also drew a mission to achieve the set vision. The vision of the Constitution of India is 'Justice' in its widest sense. According to Justice Chinappa Reddy, the Constitution of India is the soul of the Indian Republic.<sup>12</sup>

The concept of 'Justice' can be regarded as a prodigious concept imbibed in our Constitution which owes its genesis to the soil of India. The earliest narrative relating to the Vedic Age speaks of 'Rit' which is a cosmological principle equated with justice which not only governed nature but also the ethical human conduct. To follow 'Rit' was to act in accordance with justice or the natural law.<sup>13</sup>

It was only after the coming in of the Upanishads and the concept of 'Karma' that justice became the consequence of an action. The idea of this concept was that it is only good deeds that are rewarded and those that are bad are shunned whether in one's own life or in the next life. However, during the later centuries justice came to be defined as 'Dharma' and played a significant role in the social and political order. Due to the prevailing form of Kingship, it became the duty of the King to do justice and thus in turn do 'Dharma' to his subjects. This also became a levelling tool to protect the subjects from the tyranny of the rulers which existed before the coming in of this idea that justice and dharma could be equated.<sup>14</sup>

The term 'justice' is found only in a few places in the entire Constitution namely the Preamble, Article 38, Article 39A & Article 142. On one hand Article 38 aims at promoting a social order in which justice viz. social, economic and political shall inform all the institutions

<sup>12</sup> Madhav Khosla, *The Indian Constitution*, 30 (1st ed, 2012)

<sup>13</sup> Chakraborty, Atish, *The Indian Constitution & It's Vision of Justice*. Available at SSRN: <https://ssrn.com/abstract=3508509>

<sup>14</sup> Atish Chakraborty *THE INDIAN CONSTITUTION & ITS VISION OF JUSTICE* <https://www.readcube.com/articles/10.2139%2Fssrn.3508509>



of the nation as has been enshrined in the Preamble. On the other hand Article 39A aims at securing the operation of the legal system that promotes justice, on the basis of equal opportunity and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Furthermore, connecting Article 38 to Article 142, it acts as an enabling provision which gives power to the Apex Court to pass any order or decree with the aim of doing complete justice in any cause or any matter pending before it.<sup>15</sup>

A basic understanding that emanates from a reading of the text of the Preamble is that there is no “them” or “their” in it. It is all pervaded by ‘we,’ ‘us’ and ‘our.’ The Preamble emphasises on the aspect that the Constitution is for all its citizens and hence it uses such words deliberately to put forth the idea that it is not something that belongs to the Nation but instead it is used to refer to something that belongs to the people who are citizens of the Nation. The Constitution thus sends a clear message of inclusiveness, the underlying idea of which is to ensure that people of varied social groups, classes, castes and those representing different faiths, live in harmony and it is by such means that inequality and poverty can be removed. The Preamble further goes on to show that the Constitution not only envisages creating an egalitarian society but also strives to attain a social and economic order in which individuals are responsible for their actions and aims at affording broad protection to economic as well as non-economic liberties, understood in the natural rights tradition while ensuring justice in terms of equal protection under the law. It is glaringly evident from the Preamble that our Constitution puts the ideals of ‘justice’ on the highest pedestal above the other stated goals of liberty, equality and fraternity.<sup>16</sup>

<sup>15</sup> Ibid.

It is glaringly evident from the Preamble that our Constitution puts the ideals of 'justice' on the highest pedestal above the other stated goals of liberty, equality and fraternity. Social Justice has always been the foundation stone of the Indian Constitution and denotes that equal treatment of all citizens in the society should be practised without any distinction based on caste, colour, creed, race, religion, sex and so on. Thus, it means that privileges being extended to particular sections of the society would in turn lead to improvement in conditions of backward classes and women. Economic justice denotes the non-discrimination between people on the basis of economic factors. This means elimination of glaring inequalities in terms of wealth, income and property. A combination of these two forms of justice is what is known as 'Distributive Justice.' Last but not the least; political justice implies that all citizens should have equal political rights in terms of participation in the process of governance of the society.<sup>17</sup>

**g. It is a Transformative Document :**

The Constitution of India is not a transitional document but rather a transformative document. The whole idea of having a Constitution is to guide the nation towards a resplendent future. The hallmark of a truly transformative Constitution is that it promotes and engenders societal change.

It is not just a means to correct historical wrongs, rather it has to be seen as a step towards a more equitable future, beyond mere course correction.

It is a document that embodies both the aspects of justice propounded by the great Greek Philosopher Aristotle. Several provisions of the Constitution provide for distributive justice and corrective justice. Though traditionally it is understood that the

<sup>16</sup> Ibid

<sup>17</sup> Ibid

distributive justice is the task of the law makers and corrective justice is the task of the Judiciary, it is unique in case of Constitution of India because the legislature and executives are not only ordained to administer distributive justice but also enabled to correct the injustices caused in the past, so is the case with the judiciary which is traditionally meant for administering corrective justice but has been a catalyst in bringing in distributive justice by the State.

In a recent discussion on ‘A changing society and constitutional continuity: experience in pursuit of justice,’ Justice D. Y. Chandrachud commented that the Indian Constitution embodied a transformative vision at its birth. The founders attempted a radical transformation of a society which was based on caste and patriarchy, where liberty lay at the command of a colonial master.<sup>18</sup>

The Constitution of India is drafted based on the rich and bitter experiences of the past, with the trust in the present, with the vision of a transformed nation in the future. Thus it is very aptly described as a transformative document.

Uday Mehta points out that the Constitution created a federal democracy in a country which had only experienced imperial and princely authority. It committed the state to be secular in a land that was deeply religious and granted the universal adult franchise in a country that was overwhelmingly illiterate. It not only granted fundamental rights to the individuals but also evacuated every form of prescribed social hierarchy which was widely prevalent in Indian society. In this way, the Constitution brought a radical transformation in the Indian polity and society.<sup>19</sup>

<sup>18</sup> Justice DY Chandrachud, Supreme Court Judge, Speech on the celebration of birth anniversary of late Shri Y.V. Chandrachud, Former Chief Justice of India: A Changing Society and Constitutional Continuity – Experience in Pursuit of Justice (July 12, 2020).

In making constitutions in deeply divided societies, Hanna Lerner argues that the Indian framers opted for 'constitutional incrementalism' rather than 'revolutionism.' The Constituent Assembly was not a revolutionary body.<sup>20</sup> Although in certain social and political issues there has been no transformation in India, there are notable transformations in political democracy, self governance, literacy, health services and education.

The Constitution of the country was not a product of a revolution. Although some of the provisions brought radical shifts, the intention of the framers was to give a transformative character to the Constitution so that it can evolve organically over a period of time. On controversial issues on which they were divided, they used the mechanism of constitutional deference to intentionally formulate provisions to be resolved by the future legislators which proved to be a gateway of transformation.<sup>21</sup>

Justice Dipak Mishra writes *"The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to*

<sup>19</sup> Uday S Mehta, *Indian Constitutionalism: Crisis, Unity and History* in *The Oxford Handbook of the Indian Constitution* (Pratap Bhanu Mehta, Madhav Khosla et al, 2016).

<sup>20</sup> Hanna Lerner, *Making Constitutions in Deeply Divided Societies* 145 (2011).

<sup>21</sup> Available on : [https://thelawblog.in/2021/01/04/constitutional-transformation-radical-or-gradual/#\\_ftn1](https://thelawblog.in/2021/01/04/constitutional-transformation-radical-or-gradual/#_ftn1)

*all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times.”<sup>22</sup> By clarifications of the same he says, “Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.”<sup>23</sup>*

Constitution, in sharp contrast to the classical liberal documents, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self conscious about its historical setting and transformative role and mission<sup>24</sup>

The transformative nature of the Constitution provides a legal normative framework, which will guide “the redress of the injustices of the past as well as to facilitate the creation of a more just society in the future”<sup>25</sup>

### **III. Convergence of organs of the state for transformation envisaged in the constitution:**

To realise the dream and aspirations of the people enshrined in the Constitution of India the coordinated efforts of all the three organs of the State is critical. However it should not be at the expense of independence of the judiciary and over restraint on the executive and legislature and also without disturbing cardinal principles of the

<sup>22</sup> AIR 2018 SC 4321, Para 96.

<sup>23</sup> Ibid.

<sup>24</sup> Klare (1998) SAJHR 153 (Klare (1998) SAJHR 153

<sup>25</sup> Liebenberg Socio-Economic Rights 25

Constitution such as Separation of Powers, Rule of Law and Democracy. The experience of India has been unique in this aspect. In the initial years of operation of Constitution of India if not coherence at least there was no rivalry among the organs of the State, however in the third and fourth decade of the functioning of the Constitution of India the country did witness an unholy development of giving a sense of rivalry among the Organs of the state. But fortunately wisdom of the men of wisdom in all the organs of the State restored the constitutional harmony among the organs though not qualified to be termed as per se coherence but the constitution necessitated coherence for giving effect to the transformative vision enshrined in the Constitution of India. COVID-19, AADHAR, national security, LPG policy, Constitutional identity, Constitutional governance, protective discrimination policies, gender justice, infrastructure development measures, etc., are certain areas where we can witness the constitution necessitated coherence.

#### **IV. Political transformation:**

The Constitution of India enabled the state to bring political transformation through adult franchise, doing away with communal electoral systems, etc., towards realisation of political justice. In the saga of political transformation the judiciary of the nation has a vital role to play. The Indian judiciary has played the role of protector of the Constitution and has safeguarded political democracy whenever there was abuse of power by the power wielder.

Ensuring political justice needed a transformation in the political structure and that transformation started with conferring adult franchise. The State in order to promote equality among all, introduced adult franchise thus bringing political transformation.

Under the Constitution of India all adults above the age of 18 years are eligible to vote for their representatives. No discrimination can be

made on the basis of religion, race, caste, sex, descent, and place of birth or residence. This right is known as universal adult franchise.<sup>26</sup>

The people elect the rulers of the country and the elected representatives remain accountable to the people. The people of India elect them to be part of the government at different levels by a system of universal adult franchise, popularly known as 'one man one vote.' Democracy contributes to stability, continuous progress in the society and it secures peaceful political change. The Constitution of India guarantees universal adult suffrage for all citizens. Article 326 of the Constitution of India describes Universal Adult Suffrage as the basis for elections to all levels of an elected government. No discrimination can be made on the basis of religion, race, caste, sex, descent, and place of birth or residence. This right is known as universal adult franchise.

The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people's will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. The Constitution does not expressly declare the fundamental right to vote of its people, but this fundamental right has nevertheless been considered to be an integral part of the Right to Freedom of Speech provided for in Article 19(1)(a) of the Constitution.

Article 19(1)(b) : Freedom to form associations, unions as well as political elections and parties.

Article 326 : any individual who has reached the age of 18 years has the right to be registered as a voter. Article 324 of the Indian Constitution provides for the supervision, direction and regulation of

<sup>26</sup> Article 325 of Constitution of India

the electoral roll and conduct of elections in India by an independent Election Commission (EC).

**a. Dispensing with communal electorate**

The Indian Council Act, 1909 introduced a system of communal representation for Muslims by accepting the concept of 'separate electorate'. Under this, the Muslim members were to be elected only by Muslim voters. By this Act, the membership of the central and provincial legislative councils was enlarged. However, the number of elected members in these councils was less than half of their total membership. It may also be remembered that the elected members were not elected by the people but by landlords, organisations or traders and industrialists, universities, and local bodies. The British also introduced communal electorates as a part of these reforms. This was meant to create disunity between Hindus and Muslims. Some seats in the councils were reserved for Muslims to be elected by Muslim voters. The growth of communalism had serious consequences for the unity of the Indian people and the struggle for freedom.

**b. Introduction of local self governance**

The 72nd and 73rd amendments to the Constitution of India are the major contribution of the State in making democracy percolate to the grassroots level of the society and make it more meaningful. It is not only a big leap in the direction of political justice but has also contributed to social justice by providing protective discrimination to make the suppressed classes of society be part of the decision making and heading the process.

**c. Judicial efforts in safeguarding and transforming the democracy**

Apart from the legislative measures taken by the State to make political democracy a reality, the judiciary of India has also played a



vital role in safeguarding and transforming the democracy. There were certain circumstances that arose as threats to the democracy and certain problems existed in the electoral systems; in both cases the judiciary has contributed either to safeguard the democracy or intervened in the reformation of the electoral process.

*In Union of India v. Association for Democratic Reforms and Anr.*,<sup>27</sup> the judiciary brought about a major electoral reform by holding that a proper disclosure of the antecedents by candidates in election in a democratic society might influence intelligently the decisions made by the voters while casting their votes. Observing that casting of a vote by a misinformed and uninformed voter, or a voter having a one sided information only, is bound to affect the democracy seriously, the court gave various directions making it obligatory on the part of candidates at the election to furnish information about their personal profile, background, qualifications and antecedents.

The Supreme Court of India, in the matter of *Public Interest Foundation and Others V. Union of India & Anr.*,<sup>28</sup> directed the Law Commission of India to make suggestions on two specific issues, viz., (i) curbing criminalization of politics and the required law reforms; and (ii) impact and consequences of candidates filing false affidavits and required law reforms to check such practice.

In *N. Chandrababu Naidu v. Election Commission of India & Others*,<sup>29</sup> the Hon'ble Supreme Court increased the number of polling stations for which VVPAT paper trail verification exercise is to be conducted from 1 to 5 per assembly segment. Issues like ban against the release of movies favouring any political party and against expansion of ongoing schemes during the election period were discussed in *Sandeep Vinod Kumar Singh vs. Election Commission of*

<sup>27</sup> (2002) 5 SCC 294.

<sup>28</sup> Writ Petition (Civil) No. 536 of 2011

*India and Others*<sup>30</sup> and *Jana Chaitanya Vaidar and Others vs. Election Commission of India*<sup>31</sup> respectively. The Courts have also clarified the legal position in respect of the powers of the Commission under Article 324<sup>32</sup> to requisition personnel and to divest officers from their assignments in certain cases for the sake of purity in elections. Further, judgments on the conduct of bye-elections in cases when the term remaining is less than a year have also been included. This volume also contains judgments on issues such as the validity of NOTA in Rajya Sabha elections, right of persons to canvass while in custody, election symbols, etc. These cases aim to provide a holistic picture of the current developments in the election laws in India.

In *Re: Special Reference No. 1 of 2002*,<sup>33</sup> the Supreme Court emphasised the importance of Election Commission in the following manner: The duty of the Election Commission is to conduct fresh election and see that a democratically elected Government is installed at the earliest and any decision by the Election Commission, which is intended to defeat this very avowed object of forming an elected Government can certainly be challenged before the Court if the decision taken by the Election Commission is perverse, unreasonable or for extraneous reasons and if the decision of the Election Commission is vitiated by any of these grounds the court can give appropriate direction for the conduct of the election.

In *Jan Chaukidari v Union of India*,<sup>34</sup> the Supreme Court held that all those in lawful police or judicial custody, other than those held in preventive detention, will forfeit their right to stand for election. The judges relied on the Representation of the People Act (RPA), which

<sup>29</sup> W.P. (C) NO. 273 OF 2019

<sup>30</sup> W.P. (C) No. 501 of 2019

<sup>31</sup> W.P. (C) No. 3406

<sup>32</sup> <https://eci.gov.in/ebooks/landmark-judgment/index.html#p=12>

<sup>33</sup> (2002) 8 SCC 237 [https://main.sci.gov.in/pdf/SupremeCourtReport/2012\\_v9\\_pii.pdf](https://main.sci.gov.in/pdf/SupremeCourtReport/2012_v9_pii.pdf)

says that one of the qualifications for membership of Parliament or State legislature is that the contestant must be an 'elector.' Since Section 62(5) of the Act prevents those in lawful custody from voting, the reasoning goes, those in such custody are not qualified for membership of legislative bodies.

The reforms that have been suggested by the judiciary in the electoral process are carried out by the legislature and executive to make the whole election process more efficient and fair and that indicates the presence of Constitution necessitated coherence among the organs of the State.

### **V. Social transformation :**

The constitutionalisation of socio-economic rights in the Constitution of India was very natural and an outcome of values of the Indian society. Socio-economic needs of people are essential for vibrant democracy. Constitutionalisation of socio-economic rights does not owe its allegiance to an alien source. It is very much imprinted and inscribed in the tradition of Indian society. In fact, the Constitution of India without social and economic rights would have been a betrayal of aspirations and hopes of millions of people of this country. Thus different Socio-Economic goals are enshrined in Part IV of the Constitution.

Article 38 of the Indian Constitution enjoins upon the State to strive to promote the welfare of the people by securing a social order in which justice, social, economic and political shall inform all the institutions of national life and to minimise inequalities in income, status, facilities and opportunities not only amongst individuals but amongst groups of people.

<sup>34</sup> 2004 (3) JCR 284 Pat

Article 45 enjoins upon the State to endeavour to provide within a period of 10 years, for free and compulsory education for all children until they complete the age of 14 years.

Article 46 provides for the promotion, with special care, of the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and the Scheduled Tribes. It also enjoins protection to them from social injustice and from all forms of exploitation.

As propounded by the Sociological School of Jurisprudence, law and society are related to each other and both tend to change each other from time to time. The concept of transformative constitutionalism can be witnessed growing exponentially in the societal arena. Like South Africa, India's diverse social strata and the inequalities in it forced the judiciary and the legislature to invoke the provisions of the Constitution of India to bring transformation in the social sphere. .

**a. Transformation in the social status**

The social status of the suppressed and vulnerable classes of the society was one of the prime considerations of the framers of the Constitution of India. In order to ameliorate their social status, provisions were laid down and the state is enabled under these provisions to take up measures necessary to bring the desired transformation. Thus the state through various welfare measures has brought noticeable change in the social status of the vulnerable and suppressed classes of society. The empowerment process encompasses special provisions and protective discrimination in education. Through this, social justice is being achieved and in this transformative process there have been a lot of hurdles and they have been successfully addressed by the legislative corrective measures and judicial approval

of such measures subject to certain qualifications prescribed by the judiciary as a protector and defender of the Constitution of India.

By abolishing the inhuman practice of untouchability under Article 17 of the Constitution of India and prohibiting forced labour and begar, the saga of transforming the social status of the suppressed class started. Further by enabling the State to enact law to eliminate discriminatory practices in public places under Article 15 the process of transformation is continued. Not only that, through Constitutional amendments the State was further enabled to take measures to ameliorate the status of the suppressed classes of society who are basically socially and educationally backward.<sup>35</sup> This transformative process is to attain the goal of social justice envisaged in the Constitution of India.

The concept of social justice consists of diverse principles essential for orderly growth and development of personality of every citizen. It is a dynamic device to mitigate the suffering of the poor, weak, dalits, tribal and deprived section of people.<sup>36</sup> The Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and liveable with human dignity.<sup>37</sup> The meaning of the expression is also brought out by Article 46, which aims at protecting the weaker sections from 'social injustice.' Provisions in this behalf have also made in Article 15(4), 16(4), 19(1)(d)(e), 275, 330, 335.<sup>38</sup>

Neither justice can be assured nor liberty earned nor equality and fraternity practised, amongst a people, steeped in ignorance and illiteracy. Progress postulates the kindling of the flame of knowledge and the torch of learning.

<sup>35</sup> Art 15 (4) inserted by the Constitution (First Amendment) Act, 1951, s. 2

<sup>36</sup> Consumer Education & Research Centre vs. U.O.I. AIR 1995 SC 922.

<sup>37</sup> Air India Statutory Corp. Vs. United Labour Union AIR 1997 SC 654,

Right to free and compulsory education of all children from the age of six to fourteen is guaranteed in Article 21A that was inserted vide the Constitution (Eighty-Sixth) Amendment, 2002. A law to give effect to the same was enacted in 2009, the Right to Education Act. This development is the culmination of a series of decisions of the Supreme Court in *Mohini Jain*, *UnniKrishanan*, *M.C Mehta*, etc. After drafting and redrafting many times, the Right to Education Act was made as a genuine instrument to fulfill the basic demand and secure social justice for every child. This policy works on 4A's which tell about what education means to them and their present situation in the context of this ideology.

**Availability** – in that sense education is free and the government is bound to fund the education and ensure the availability of expert and well qualified teachers and also ensure sufficient infrastructure to support the educational framework.

**Accessibility** – means education is for all, there is no sense of discrimination especially to support the weaker sections of the society.

**Acceptability** – that the value of education is appropriate, there is no discrimination and is culturally acceptable and subject to quality; that the school premises is safe and teachers are well qualified.

**Adaptability** – that education is dynamic and develops with the changing needs of society and its people and contributes to overcome the inequalities, such as sex discrimination.

Making an unenforceable right that was enshrined under Article 45 as an enforceable right under Article 21A is big leap in the direction of bringing social transformation of millions of poor people in India and it became possible with the constitution necessitated convergence of all the organs of the State.

<sup>38</sup> *Sadhuram Bansal vs. Pulin Bihari Sarkar*, AIR 1984 SC 1471

### **b. Elimination of discriminatory practices**

The Indian Constitution promises equality to all its citizens and its various provisions elucidated in Part III and Part IV delineate the state's obligation to provide equal opportunities to all its citizens in social, political and economic spheres. *Mohd. Ahmed Khan v. Shah Bano Begum Case*<sup>39</sup> successfully empowered Muslim women with the right to maintenance beyond the period of 'iddat' under Section 125 of CrPC. This decision was however effectively invalidated by enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. As a result, Daniel Latiffi filed a Writ Petition in Supreme Court challenging the Act. The Supreme Court upheld the constitutional validity of the Act but at the same time interpreted the provisions to provide a reasonable and fair provision and for maintenance to be paid to divorced women within the iddat period by her former husband.

In 2017, in the case of *Shayara Bano*,<sup>40</sup> a five-judge Bench of the Supreme Court struck down triple talaq as unconstitutional or anti-Islamic. Justice Nariman stated 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 reconciliation so as to save it.*"

On September 28th 2018, a 5 Judge Bench of the Supreme Court delivered its verdict in the *Sabrimala Temple Entry Case*.<sup>41</sup> The Bench by 4:1 struck down Rule 3(b) of the Kerala Hindu Places of Public Worship Rules, 1965, which allowed the exclusion of women based on custom, as unconstitutional. One of the most prominent opinions was of Justice Chandrachud. He emphasised that physiological characteristics of women, like menstruation, have no significance or bearing on the entitlements guaranteed to them under the Constitution. The menstrual status of a woman cannot be a valid constitutional basis

<sup>39</sup> 1985 (1) SCALE 767; 1985 (3) SCR 844

<sup>40</sup> WP (C) 118/2016

to deny her dignity, and the stigma had no place in a Constitutional order. It was observed that “*At the heart of transformative constitutionalism, is a recognition of change. What transformation in social relations did the Constitution seek to achieve? What vision of society does the Constitution envisage? The answer to these questions lies in the recognition of the individual as the basic unit of the Constitution. This view demands that existing structures and laws be viewed from the prism of individual dignity.*”

A long time argument was going on after the amendment in Hindu Succession Act, 1956 which amended Section 6 to confer legal rights and liabilities upon daughters in the ancestral property by birth in HUF equivalent to the son. The issue was whether this Section 6 can be applied retrospectively or not? The Supreme Court in *Vineeta Sharma v. Rakesh Sharma*<sup>42</sup> emphasising on the origins of coparcenary rights and the Constitutional protections accorded to the women under Article 14 held that Section 6 could be retrospectively applied.

In 1979, the first woman officer in IFS C.B. Muthamma brought a petition against the government on the grounds that she was being overlooked for promotion since she was a woman and thus some rules regarding the employment of women are discriminatory in nature and hence contrary to Articles 14 and 16 of the Constitution. Soon after this petition, she was promoted which led to the dismissal of the petition but the Supreme Court passed a direction to overhaul all the Service Rules and to remove all unreasonable gender - discriminatory provisions.

Soon after this case, Supreme Court struck down the provision which provided that an air hostess needs to leave the job if she gets pregnant in *Air India v Nargesh Mirza Case*.<sup>43</sup>

<sup>41</sup> Indian Young Lawyer Assn (Sabrimala Temple In Re) V. Union Of India; [(2019) 11 SCC 1]

<sup>42</sup> (2020) 9 SCC 1



The most historic judgement towards gender justice came in *Secretary, Ministry of Defence v Babita Puniya & Ors*,<sup>44</sup> where the Supreme Court directed that a Permanent Commission should be granted to women in the army regardless of their service, the Supreme Court held that complete exclusion of women from the command is against Article 14 of the Constitution of India. This judgement paved the way for gender equality in the armed forces by providing Permanent Commissions to female officers in the Indian Army, Indian Air Force and Indian Navy.

### **c. Protective discrimination**

India is a democratic country and is constitutionally committed to individual rights and civil liberties. It has a multicultural population including significant minorities with a long history of deprivation and disadvantage which is a product of the past practices of the state and the social structure as well. The need for establishing an equitable and just society was duly felt by the framers of the Indian Constitution. Therefore they took special care for formulating important provisions to give institutional support to the most disadvantaged social groups such as Scheduled Castes and Scheduled Tribes. Over the time, it has evolved a complex and elaborate scheme of reservation.<sup>45</sup>

To achieve social status for backward classes an inroad was made by the *Champakam Dorairajan case*.<sup>46</sup> In 1951, seats were reserved for Backward Classes in contravention of Constitutional provisions; but the Government defended, purportedly to promote social justice. The Apex Court turned down the reservation made by the State of Madras and held that reservation is unconstitutional. After this decision Article 15(4) (State is empowered to make special provision for

<sup>43</sup> AIR 1981 SC 1829

<sup>44</sup> (2020) 7 SCC 469

<sup>45</sup> [https://www.southcalcuttalawcollege.ac.in/Notice50380PROTECTIVE%20DISCRIMINATION %20UNDER%20INDIAN%20CONSTITUTION.pdf](https://www.southcalcuttalawcollege.ac.in/Notice50380PROTECTIVE%20DISCRIMINATION%20UNDER%20INDIAN%20CONSTITUTION.pdf)

Backward Classes and Scheduled Castes).was enacted by First Amendment Act in the year 1951, again this Article15 (4) was treated as inroad to promote social justice to achieve the object of Article 16(4) i.e., equal opportunity of employment.

In the case of *Balaji v. State of Mysore*<sup>47</sup> the Mysore Government issued an order for reserving seats in the Medical and Engineering colleges in the state whereby it classifies Backward Class into more backward class and backward class and also the total reservation went up to 68% leaving 32% seats available to merit pool. Court held that such classification was not justified under Article15(4). Court held that caste can be a relevant factor, not the sole factor for ascertaining whether a particular class is a backward class or not. However in the Mandal case the court held that classification can be done provided total reservation does not exceed the 50% limit. In *State of Kerala v. N.M. Thomas*,<sup>48</sup> it was held that reservation for Backward Classes may be made even outside the scope of Article16(4). The government order granting two years exemption to Scheduled Castes and Scheduled Tribes from passing the test for promotion in the Railway department was held just and valid. By the Constitution 77th Amendment Act, 1995 Article 16(4) has been added to protect the interests of weaker sections in promotion, particularly of Scheduled Castes and Scheduled Tribes. In fact, Article 16(4) is meant for equal opportunity in employment for all, Article16 (4A) is meant for promotion to Scheduled Castes and Scheduled Tribes. If we analyse Article15 (4) and Article 16(4A), they are only to promote social justice for weaker sections. The decision of *Champkam case*<sup>49</sup> and *Indra Sawhney* was modified by bringing the amendment. Further, a new Article 16(4B) has been inserted by the Constitution 81st Amendment Act, 2019 which specifies that the 50% limit shall not be applicable against carry

<sup>46</sup> 1951 SCC 351

<sup>47</sup> 1963 AIR 649, 1962 SCR Supl. (1) 439

<sup>48</sup> 1976 SCC (2) 310

forward vacancies. Thus, the State shall be empowered to launch a special drive to fill up the carried forward vacancies meant for Scheduled Castes and Scheduled Tribes.

In the year 2005, Parliament passed the 103rd Amendment Bill by Amending Article 15(5) to provide for reservation to weaker sections and this Bill got assent of the President as the 93rd Amendment Act in the year 2005. In the case of *Ashok Kumar Thakur v. Union of India*,<sup>50</sup> it was held that the 'creamy layer' principle is one of the parameters to identify backward classes. Therefore, as Scheduled Castes and Scheduled Tribes and Other Backward Classes are separate classes by themselves, the creamy layer principle cannot be made applicable to Scheduled Castes and Scheduled Tribes. In this case the validity of Constitution (Ninety Third Amendment) Act, 2005 was called into question by which clause (5) to Article 15 has been added. This provides that the State can make any special provision by law for the advancement of socially and educationally backward classes of citizens or Scheduled Castes and Scheduled Tribes in relation to admission to educational institutions including private educational institutions, whether aided or unaided by the State.

Mohan, J. in *Unni Krishnan v. State of Andhra Pradesh and others*<sup>51</sup> the Court opined "*Victories are gained, peace is preserved, progress is achieved, civilization is built up and history is made not on the battlefields, where ghastly murders are committed in the name of patriotism, nor in the counsel chambers where insipid speeches are spun out in the name of debate, not even in the factories where are manufactured novel instruments to strangle life. But in educational institutions which are the seedbeds of culture where children in whose hands quiver the destined of the future, are trained from their ranks*

<sup>49</sup> *supra* note 46

<sup>50</sup> Writ Petition (Civil) No.-265 of 2006

<sup>51</sup> 1993 (1) SCC 645

<sup>52</sup> Civil Appeal No. 2368 of 2011

*will come out when they grow up statesmen and soldiers, patriots and philosophers, who will determine the progress of the land”.*

Shift of reservation policy from public to private sector is inevitable because of the demand of a time in which liberalisation, globalisation and privatisation have played an important role and ignoring these can hamper distributive justice. In the present context, because the nation develops as a whole and in this process responsibility by the private sector is also shared in complementing with government undertaking.

In recent times, a series of judgements has been passed to eradicate gender and caste-based inequalities and eliminate discriminatory practices. For example, the Honourable Supreme Court acknowledged the transformative value of the Constitution to pass its judgement in the *B.K. Pavitra Case*<sup>52</sup> which catered for the issue of caste-based inequities. The Honourable Supreme Court upheld the constitutionality of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act 2018. It was argued that the concept of Transformative Constitutionalism had been invoked to justify affirmative action in order to compensate for historical wrongs. In the judgment authored by Justice D.Y. Chandrachud for Justice U.U. Lalit and himself, he wrote,

*“There is substantial evidence that the members of the Constituent Assembly recognised that*

- (i) Indian society suffered from deep structural inequalities, and*
- (ii) the Constitution would serve as a transformative document to overcome them. One method of overcoming these inequalities is reservations for the SCs and STs in the legislatures and state services.”*

<sup>52</sup> Civil Appeal No. 2368 of 2011

#### **d. Gender justice**

The Constitution under Articles 14, 19 and 21 guarantees the Right of equality and freedom from sexual discrimination to Indian women. Gender justice aims to achieve a life of dignity and freedom for women as a basic Human Right. In *Navtej Singh Johar Case*<sup>53</sup>, the Supreme Court in its judgement declared in so far as Section 377 criminalises consensual sexual acts of adults in private as violative of Articles 14, 15, 19 and 21 of Constitution of India. Marking the vision of equality in a progressive society, the Bench observed that *“It is difficult to right off the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations.”* The Supreme Court held that constitutional morality always prevails over social morality as it guarantees equal rights and freedoms to the minority as the majority and the majority views cannot be imposed to put a check on minority rights. The court held that Transformative Constitutionalism is considered to be one of the objectives of adopting a Constitution itself. *The purpose of it is to have a Constitution that guides the nation of transforming itself from a mediaeval and hierarchical society to an egalitarian democracy to embrace the ideals enshrined in the Preamble to the Constitution. It was held that as a constitutional court whose job is to protect its people from humiliation and discrimination, it cannot provide a static interpretation to the rights of liberty and equality and remain a mute spectator to the struggle for the realisation and attainment of rights.*

#### **VI. Economic transformation :**

Dr. Ambedkar speaking on the importance of social order based on justice, social, economic and political observed that the State shall not

<sup>53</sup> AIR 2018 SC 4321, (2018) 10 SCC 1

be allowed to take any defence for non-implementation of the Directive Principles. He said that “... *framing this Constitution was really two fold: 1) to lay down the form of political democracy; and 2) to lay down that India’s ideal was economic democracy with the prescription that every Government, whatever, in power, would strive to bring about economic democracy.*”

Article 38 provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life. Further by virtue of the 44th Constitution Amendment Act, 1978 clause 2 was added and it made a specific provision enjoining the state in particular to strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39 directs the State inter-alia to secure to the citizens the right to adequate means of livelihood; that the ownership and control of material resources of the community are so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; that the children are given the opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 41 contemplates effective provision for securing the right to work;

Article 42 for securing just and humane conditions of work and for maternity relief.

Article 47 calls for raising the level of nutrition and standards of living of the people and to improve public health. These directives are fundamental in the governance of the country.

While these provisions enshrined in the part IV of the Constitution of India are nonjusticiable, the judiciary started reading Part IV rights into Part III and paved the way for the economic transformation of the common mass of the nation.

In *State of Bihar vs. Kameshwar Singh*<sup>54</sup> Court held that the ideal we have set before us in Article 38 is to evolve a State which must constantly strive to promote the welfare of the people by securing and making as effectively as it may that social, economic and political justice shall inform all the institutions of the national life

Many socio economic rights under Part IV are read into Article 21, by purposive interpretation expanding the facet of the Right to Life and Human Dignity in the following cases:

Livelihood - *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180;

Education - *Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645; *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858; *Society for Unaided Private Schools of Rajasthan v. Union of India and Others*,

Food - *People's Union for Civil Liberties v. Union of India*, *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746

Shelter - *Shanti Star Builders v. Narayan Khimalal Totame*, AIR 1990 SC 630; *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, (1997) 11 SCC 121

<sup>54</sup> AIR 1952 SC 252,

Clean drinking water - *A.P. Pollution Control Board II v. Prof M.V. Nayudu*, (2001) 2 SCC 62; *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664

Equal pay for equal work - *Grih Kalyan Kendra Workers Union v. Union of India*, AIR 1991 SC 1173, *U.P. Land Development Corporation and Another v. Mohd. Khursheed Anwar and Another*, (2010) 7 SCC 739

Right to be considered for employment - *Anuj Garg and Others v. Hotel Association of India and Others*, AIR 2008 SC 663; Articles 14 and 16

Livelihood - *Senior Divisional Commercial Manager v. SCR Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association and Another*<sup>55</sup>, - Article 19 (1) (g)

Forced labour - held to include cases of persons compelled to work for remunerations lower than the statutory minimum wage - *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473; Article 23

Justice Bhagwati opined in *Bandhua Mukti Morcha* that certain Directive Principles (Articles 39, 41, and 42) provide Article 21 with its "life breath." These Articles direct the State to secure, inter alia, a fair economic system, adequate livelihood, education, public health access, and humane working conditions for all citizens.

Over the years, the Indian government has introduced many initiatives to strengthen the nation's economy. The government has been effective in developing policies and programmes that are not only beneficial for citizens to improve their financial stability but also for the overall growth of the economy. Over the recent decade, India's rapid economic growth has led to a substantial increase in demand for

<sup>55</sup> (2016) 3 SCC 582



exports. Moreover, many of the government's flagship programmes, including Make in India, Start-up India, Digital India, the Smart City Mission and the Atal Mission for Rejuvenation and Urban Transformation, are aimed at creating immense opportunities in India.<sup>56</sup>

#### **a. Land reforms**

The British East India Company recognized the zamindars in Bengal as the owners of their estates and the British administration since then has borne much of the political onus of inequitable tenure conditions. The Mahalwari settlement, characteristic of the United Provinces, also acknowledged the former tax collector as the landlord but it preserved the traditional structure to a larger extent by defining the obligations of the village as well as those of the landlord. In some areas, notably in Southern Madras and Bombay, the tax liability was imposed on the individual peasant himself, and thus his ownership was recognized under what is known as the 'ryotwari' system.<sup>57</sup> The 'jagirdari' type of holding developed in the princely states, where much land was held directly by the ruler and large tracts were granted to individuals as tax exempt estates.<sup>57</sup>

The programme of land reforms was one of the major considerations in the schemes of social and economic restructuring of Indian society. The Constitution provides Fundamental Rights (Part-III) and Directive Principles of State Policy (Part-IV). The programme of agrarian reform was formulated to implement the directive of securing social and economic justice to those who worked on land.<sup>58</sup> The Constitution of India has included land reform in the State List (entry 18 of the State list). The state governments are given

<sup>56</sup> Available at <https://www.ibef.org/economy/indian-economy-overview> last visited at 22-11-2022

<sup>57</sup> Konrad Bekker, "Land Reform Legislation in India" *Middle East Journal*, Summer, 1951, Vol. 5, No. 3 (Summer, 1951), pp. 319-336. Available at <https://www.jstor.org/stable/4322295> (last visited on 22-11-2022)

the power to enact laws over matters related to land. Entry 20 in the Concurrent list also mandates the Central Government to fulfil its role in social and economic planning. The Planning Commission was established for suggesting measures for land reforms in the country.

The Constitution (First Amendment) Act, 1951 amended Article 31 and added new Articles 31A and 31B and also added the Ninth Schedule to the Constitution listing 13 state land reforms Acts and providing that these laws would not be void merely on the ground that they infringed any of the Fundamental Right.

In *Shankari Prasad v. Union of India*<sup>59</sup>, the constitutional validity of the first amendment was challenged. The Supreme Court upheld the validity of the said amendment and in *State of Bihar v. Kameshwar Singh*<sup>60</sup> the Supreme Court observed that the land reforms legislation of Bihar was in conformity with Directive Principles of State Policy in order to achieve social justice.

Article 31A brought in by the Constitution (First Amendment) Act, 1951 was substituted by a more elaborate Article by the Constitution (Fourth Amendment) Act 1955. In *Waman Rao v. Union of India*<sup>61</sup> the validity of the Constitution (First Amendment) Act, 1951, which brought into being Articles 31A and 31B and the Ninth Schedule was questioned. The Supreme Court declared that neither Article 31A and 31B nor the Ninth Schedule destroyed or damaged the Basic Structure of the Constitution.

The validity of the (Twenty Fourth Amendment) came up for discussion in *Keshavanda Bharti v. State of Kerala*.<sup>62</sup> Wherein a writ petition was filed initially to challenge the validity of the Kerala Land

<sup>58</sup> <https://legaldesire.com/constitutional-provisions-on-agrarian-reform-legislation/> last visited on 22-11-2022

<sup>59</sup> 1951 SCR 89; AIR 1951 SC 458

<sup>60</sup> *supra* note 54

<sup>61</sup> (1981) 2 SCC 362

Reforms Act, 1963 as amended in 1969. The court held that the 24<sup>th</sup> amendment was valid and parliament had power to amend any or all the provisions of the Constitution including those relating to the Fundamental Rights. And also the court held that power to amend is subject to certain inherent limitations and that parliament cannot amend these provisions of the Constitution which affect the Basic Structure or framework of Constitution.

In *Minerva Mills Ltd. v. Union of India*<sup>63</sup> the Supreme Court tested the Directive Principles as a whole with the Basic Structure theory as propounded in *Kesavananda Bharati Case*. It is observed that the Fundamental Rights in part III and the Directive Principles of State Policy in Part IV are like twin formulae for achieving social revolution. The Indian Constitution is founded on the bedrock of the balance between Part III and Part IV. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the Basic Structure of the Constitution. These Rights are not an end but are means to an end. The end is specified in Part III of the Constitution.

By the 44<sup>th</sup> amendment Article 300-A was added stating that no person shall be deprived of his property save by authority of law. Article 19(1)(f) has been eliminated.

## **VII. Separation of power, rule of law and transformation**

Separation of Power and Rule of Law are two cardinal principles enshrined in the Constitution of India having a great role to play in the day to day administration of the nation and in establishing good governance as also in fulfilling the Constitutional goals.

<sup>62</sup> (1973) 4 SCC 225; AIR 1973 SC 1461

<sup>63</sup> (1980) 3 SCC, 625

### **Importance of separation of power**

Montesquieu explained the doctrine as *“When the legislative and executive powers are united in the same person, or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Where it joined with the executive power, the Judge might behave with violence and oppression. There would be an end to everything where the same man or the same body to exercise these three powers...”*

Justice, Liberty and Equality are the three goal values enshrined in the Constitution to be achieved and that is the function of the power wielder. However the power shall not be concentrated in one hand as that will become a threat to all these goals. Thus to ensure that all the goals are achieved with coordinated efforts, all three organs of the State are obligated to function within the defined sphere without transgressing into each other's domain. Though Separation of Power requires them to work within their sphere it does not prohibit them from working together in coordination. But such coordination should not be at the cost of independence of the Judiciary and excess limitation on the powers of the legislature and executive. Separation of powers in a democracy is to prevent abuse of power and to safeguard freedom for all. The system of Separation of Powers divides the tasks of the State into three branches: legislative, executive and judicial. These tasks are assigned to different institutions in such a way that each can check the other. As a result, no one institution can become so powerful in a democracy as to destroy this system. Checks and balances (rights of mutual control and influence) make sure that the three powers interact in an equitable and balanced way. The Separation of Powers is an

essential element of the Rule of Law, and is enshrined in the Constitution.<sup>64</sup>

India follows the separation of functions and not of powers. Therefore, we do not abide by the principle in its rigidity. This has been pronounced in several cases, such as *A. K. Roy v. Union of India & Anr.*<sup>65</sup> and *Smt. Indira Gandhi v. Raj Narain*.<sup>66</sup> The exercise of both legislative and executive functions by the Cabinet ministers under Article 74(1) brings a better hold over the Executive by mandating their aid and advice for the President. Thus, the Executive is derived and dependent on the Legislature for its legitimacy. The Honourable Supreme Court made this observation in *Ram Jawaya v. the State of Punjab*.<sup>67</sup>

#### **Importance and evolution of rule of law in post independence period**

A.V. Dicey propounded Rule of Law. This theory became famous through his book titled 'The Law of the Constitution.' He had a theory that 'government should be based on principles of law and not men' and proved this by explaining its three main pillars. These are:

**Supremacy of law** - It means the dominance and absolute power of law in the country. Law rules all the people including those framing and administering law. Dicey believed that wherever there is a scope of discretion, there will be arbitrariness. Hence, the law established in the court of law has to be enforced in the land and no person can take law in his or her own hands.

**Equality before law** - This means that law should be administered in a just and fair manner. Every person, whatever his position or rank

<sup>64</sup> Available at <http://factmyth.com/separation-of-powers-and-checks-and-balances/> (last visited on 20-11-2022)

<sup>65</sup> *A.K. Roy v. Union of India* (1982) 1 SCC 271.

<sup>66</sup> *Smt. Indira Gandhi v. Raj Narain*, [1976] 2 SCR 347 on page 415

<sup>67</sup> *Ram Jawaya v. State of Punjab* [1995] SC 1 AIR 549

maybe, should be subjected to the same law and procedure as everyone else in the court of justice. In his words “*every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.*”

**Predominance of legal spirit-** Dicey believed that just framing the above two principles would not be enough and that there has to be an enforcing authority to keep and maintain the law. He thought courts to be this authority. He propounded an impartial and independent judiciary which would be a very important aspect for implementation of Rule of Law.

#### **Rule of law and judicial contribution**

There are a series of judgements relating to this doctrine but the first major judgment by the judiciary in relation to Doctrine of Separation of Power was in *Ram Jawaya v State of Punjab*.<sup>68</sup> The court in the above case was of the opinion that the Doctrine of Separation of Power was not fully accepted in India. Further the view of Mukherjea J adds weight to the argument that the above said doctrine is not fully accepted in India. He states that “*The Indian constitution has not indeed recognized the doctrine of separation of power in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another*”.

#### **VIII. Contradictions and harmonious construction of transformative provisions**

Dr. B. R. Ambedkar on the 26th January, 1950 observed “*we are going to enter into a life of contradictions. In politics, we shall be*

<sup>68</sup> *supra* note 67

*recognising the principle of one man one vote one value. In our social and economic life, we shall, by reason of economic structure, continue to deny [this principle.] How long shall we continue to live this life of contradiction? If we continue to deny it for long, we will do so by putting our democracy in peril.”*<sup>69</sup>

On 19th November 1948, Dr. B.R. Ambedkar underlining Directive Principles of State Policy observed “*While we have established political democracy, it is also the desire that we should lay down as our ideal, economic democracy. We do not want merely to lay down a mechanism to enable people to come and capture power. The constitution also wishes to lay down an ideal before those who would be forming the Government. That ideal is economic democracy, whereby, so far as I am concerned, I understand to mean one man one vote. By this it is clear that the main object behind the Directive Principle is to achieve the ideal of Economic democracy.*”

Directive Principles of State Policy though not legally enforceable are of great importance to create an egalitarian society. It provides a set of guidelines for the government to carry out its functions towards the advancement of society. The term ‘State’ under Article 36 has been defined to have the same meaning as is given to this term in Part III which means it not only includes the legislature and the executive organs of the government but also its agencies and instrumentalities. With respect to its non-enforceability, it has drawn certain critics over a period of time. Being fundamental in direction and principles of governance, all three branches of the government have to take cognizance of them.

The judiciary has come with the principle of ‘Harmonious Construction’ between Fundamental Rights and Directive Principles of State Policy in that respect. There have been many instances when conflicts arose between Fundamental Rights and Directive Principles

<sup>69</sup> Bhim Rao Ambedkar, Constituent Assembly Debates, vol XIX at 979.

of State Policy. The first case handling this issue was *Champakam Dorairajan Case*<sup>70</sup> in which the Honourable Supreme Court stated that Directive Principles of State Policy are a subsidiary of Fundamental Rights. It was further observed that any law that contravenes the provisions under Part III will be held void but the same won't be applicable to Part IV i.e., Directive Principles of State Policy. A similar interpretation was given in *Venkataraman v. State of Madras* case<sup>71</sup> where Fundamental Rights were given more importance than Directive Principles of State Policy.

In 1967, the Apex Court in the *Golaknath Case*<sup>72</sup> ruled out that the parliament cannot amend or curtail Fundamental Rights in order to implement Directive Principles of State Policy. This decision reversed the decision of the *Shankara Prasad* and *Sajjan Singh* cases which observed that parliament has the power to amend all parts of the Constitution. A somewhat balanced approach was observed in this case and it was mentioned that if a law has been made to give effect to Article 39(b) and Article 39(c) and in doing so if Article 14, 19 or 31 get violated then it cannot be declared as void merely on the ground of such contravention.

*In Re Kerala Education Bill*,<sup>73</sup> the Supreme Court observed that “We have to reconcile between these two conflicting interests and to give effect to both if that is possible and bring about a synthesis between the two. The directive principles cannot ignore or over ride the fundamental rights but must, as we have said, subserve the fundamental rights.” It was observed that both Directive Principles of State Policy and Fundamental Rights are complementary and supplementary to each other.

<sup>70</sup> *supra* note 46

<sup>71</sup> AIR 1966 SC 1089

<sup>72</sup> *Golaknath v. State Of Punjab* (1967 AIR 1643, 1967 SCR (2) 762)

<sup>73</sup> 1959 1 SCR 995



In *State of Kerala and Anr v. NM Thomas*<sup>74</sup> it was observed that “*The Directive Principles form the fundamental feature and the social conscience of the Constitution which enjoins upon the State to implement these Directive Principles. The Directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles. 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the Directive Principles. So far as the Courts are concerned where there is no apparent inconsistency between the Directive Principles contained in Part IV and the Fundamental Rights mentioned in Part III, there is no difficulty in putting a harmonious construction which advances the object of the Constitution.*”

The Apex Court in the *Pathumma v. State of Kerala Case*<sup>75</sup> opined that “*the prime objective of the Directive Principles of State Policy is to fulfil various socio-economic goals in order to ensure the immediate achievement of bringing a non-violent social revolution in the Indian Society.*”

The historic case regarding basic structure doctrine, the *Keshavanda Bharti case*<sup>76</sup> laid down that the Directive Principles of State Policy are on a higher pedestal than Fundamental Rights. This case stood for the penetration of the notion of distributive justice under Articles 39(b) and 39(c) into property relations by upholding the constitutional validity of Article 31C. The Bench also held that the power of Judicial Review cannot be taken out by Parliament which in a way paved the path for legislative contribution through agrarian and economic reforms, labour welfare and other social justice statutes.

In *Minerva Mills’ Case*,<sup>77</sup> the Supreme Court held the extension of Article 31C done by the 42nd amendment act as unconstitutional and

<sup>74</sup> *Supra* note 48

<sup>75</sup> (1978) 2 SCC 1

<sup>76</sup> *Supra* note 62

invalid. The judgement though made Directive Principles of State Policy subordinate to Fundamental Rights; it was held ‘the Indian Constitution is founded on the bedrock of the balance between the Fundamental Rights and the Directive Principles.’

**Supreme Court’s rulings following the case were:**

- ❖ Fundamental Rights and Directive Principles of State Policy constitute the core of the commitment to social revolution.
- ❖ The harmony and balance between Fundamental Rights and Directive Principles of State Policy is an essential feature of the basic structure of the Constitution.
- ❖ The goals set out by the Directive Principles have to be achieved without the abrogation of the means provided by the Fundamental Rights.

In *Bandhua Mukti Morcha v Union of India*,<sup>78</sup> the court giving a harmonious interpretation to both Directive Principles of State Policy and Fundamental Rights held that “*The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief..... Since the Directive Principles of State Policy contained in clauses (e) and (f) of Article 39, Articles 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to*

<sup>77</sup> *supra* note 63

<sup>78</sup> (1997) 10 SCC 549

*make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity, but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation”*

- ❖ Directive Principles of State Policy require the state to take measures to eliminate economic disparities and Part III right to property.
- ❖ Guaranteeing freedom of trade and occupation and providing for State Monopoly
- ❖ Right to profess and practice religion and duty to develop scientific temper
- ❖ ‘unity vs. diversity’, ‘independence vs. dependence’, ‘coordination vs. subordination’.

#### **IX. Transformative measures, policies and judgments**

Post 2010 the civil liberties guaranteed by the Constitution have been expanded by relying on the philosophy of the Constitution of India being a transformative document. The recent judgments have emphasised on establishing a more inclusive society, least interference of the state in liberties and freedoms of the individuals, establishing gender neutral norms, ensuring substantial equality instead of formal equality and upholding constitutional morality.

#### ***Navtej Singh Johar V. Union of India*<sup>79</sup>**

In this landmark judgment the Supreme Court held that the LGBTQ community deserves equal rights and respect as any other individual

<sup>79</sup> *supra* note 53

and discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Court declared Section 377 of the Indian Penal Code as unconstitutional as it violated Articles 14, 15, 19 and 21 of the Constitution of India.

***National Legal Services Authority V. Union of India*<sup>80</sup>**

The NALSA case judgement led to the recognition of transgender people as the ‘third gender’ with the Supreme Court affirming that the fundamental rights granted under the Constitution of India will be equally applicable to them, giving them the right to self-identification of their gender as male, female or third gender. The Court held that the right to choose one’s gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the Right to Life (Article 21). The Court also stated that expressing one’s gender identity through words, dress, action or behaviour is included in the right to Freedom of Expression (Article 19). Privacy, self-identity, autonomy and personal integrity are Fundamental Rights protected by Article 19. As gender identity lies at the core of one’s personal identity, gender expression and presentation, it has to be protected under Article 19(1)(a) of the Constitution. Often the state and its authorities, either due to ignorance or otherwise, fail to digest the innate character and identity of transgender persons, which it must do in order to realise their Article 19 rights. The Court declared that the Centre and State governments must grant legal recognition of gender identity as male, female or third gender. A full recognition is to be given even in the absence of any existing statutory regime. Additionally, the Court declared that educational, social and health care issues faced by

<sup>80</sup> AIR 2014 SC 1863; (2014) 5 SCC 438

transgender people must be addressed both at the centre and state government levels.

***K. S. Puttaswamy and Anr. V. Union of India and others*<sup>81</sup>**

This case was initiated through a petition filed by Justice K.S. Puttaswamy, a retired judge of the Karnataka High Court in relation to the Aadhaar Project, which was spearheaded by the Unique Identification Authority of India (UIDAI). The Aadhaar number was a 12-digit identification number issued by the UIDAI to the residents of India. The Aadhaar project was linked with several welfare schemes, with a view to streamline the process of service delivery and remove false beneficiaries. The petition filed by Justice Puttaswamy was a case which sought to challenge the constitutional validity of the Aadhaar card scheme. Over time, other petitions challenging different aspects of Aadhaar were also referred to the Supreme Court. The judgment held informational privacy to be a part of the Right to Privacy. The Court while noting the need for a data protection law left it in the domain of Parliament to legislate on the subject.

***Joseph Shine V. Union of India*<sup>82</sup>**

Joseph Shine filed a Public Interest Litigation (PIL) under Article 32 challenging the Constitutional validity of Section 497 of IPC, 1860 that dealt with the criminal offence of Adultery and Section 198(2), Code of Criminal Procedure 1973 (CrPC) which provided that no person other than the husband of a person accused of adultery would be deemed to be aggrieved by the commission of an offence under Section 497 or Section 498 of the IPC.

The Supreme Court struck down Section 497 on the ground that it violates Article 14, 15 and 21 of Constitution of India and it was an archaic, arbitrary and paternalistic law. Section 198(2) was also struck

<sup>81</sup> (2017) 10 SCC 1, AIR 2017 SC 4161

<sup>82</sup> [(2019) 3 SCC 39, AIR 2018 SC 4898]

down as unconstitutional. It was observed that “*The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Section 497 denies the individual identity of a married woman, based on age-old societal stereotypes which characterised women as the property of their spouse.*”

***Indian Young Lawyer Association (Sabarimala Temple In Re) V. Union of India.***<sup>83</sup>

The Sabarimala Temple is one of the most well known pilgrimages place of Hindus. The Sabarimala shrine, which is one of the most famous temples in Kerala, had restricted women of menstruating age from entry. Several women tried to enter the temple but could not because of threats of physical assault against them. In 1991, A group of five women lawyers had moved the Apex Court challenging the decision of the Kerala High Court. The Court gave a Judgment in favour of the prohibition and said that these restrictions are not discriminatory under the Constitution.

In 2006, the ban was opposed by the Young Lawyers Association appealing that Rule 3(b) of Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965. Later in 2008, the PIL was heard by a Constitutional Bench including the Former Chief Justice on India Dipak Mishra. The court had to decide whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to “discrimination” and thereby violets the very core of Article 14, Article 15 and Article 17 and protected by ‘morality’ as used in Article 25 and Article 26[6] of the Constitution. Whether this restriction violates the provisions of Kerala Hindu Place of Public Worship Act, 1965? Whether the Sabarimala Temple has a denominational character? Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules permits ‘religious

<sup>83</sup> *supra* note 41

denomination' to ban entry of women between the age of 10 to 50 years?

On 28th September 2018, the Court delivered its verdict in this case by 4:1 majority which held that the restriction of women in Sabarimala Temple is unconstitutional. It held that the practice violated the fundamental rights to equality, liberty and freedom of religion, Articles 14, 15, 19(1), 21 and 25(1). It struck down Rule 3(b) of the Kerala Hindu Places of Public Worship Act as unconstitutional. Rule 3(b) allowed for Hindu denominations to exclude women from public places of worship, if the exclusion was based on 'custom.' The Apex Court allowed entry of women of all age groups to the Sabarimala Temple, and held that "*Devotion cannot be subjected to Gender Discrimination.*"

***Janhit Abhiyan V. Union of India*<sup>84</sup>,**

The Court held that reservations for economically weaker sections of citizens up to 10 percent in addition to existing reservations, does not violate Basic Structure on account of the breach of the ceiling limit of 50 percent, because that ceiling limit itself is not inflexible and in any case applies only to reservation relating to Article 15(4), 15(5) and 16(4) of the Constitution.

Dissenting, Justice Ravindra Bhat said that the Constitution does not permit exclusion and that the amendment undermines the fabric of social justice, thereby the basic structure. He also stated that this amendment strikes at the heart of the equality code which is the core of the Constitution as the exclusionary mechanism of the said amendment operates against the socially disadvantaged classes. Further, even if the exclusion is based on deprivation, it is discriminatory; thus, it destroys the equality code. Therefore, he observed that the said amendment is

<sup>84</sup> 2019 SCC OnLine SC 1867

arbitrary and creates hostility for the socially disadvantaged. He stated that economic destitution and economic backwardness is the backbone of this amendment and on this account, the amendment is constitutionally infeasible, however, excluding the classes such as SC, ST and OBC is not constitutionally permissible and violates the non-discriminatory and non-exclusionary facet of the equality code. Further, permitting breach of 50% rule becomes a great way for further infractions which would result in compartmentalisation and then rule of reservation will become right to equality and take us back to State of *Madras v. Champakam Dorairajan*<sup>85</sup>, since equality was to be a temporary aspect. Thus, in the minority opinion, Justice Bhat struck down the constitutional validity of the Amendment. Justice U.U. Lalit concurred.

## **X. Conclusion**

The mandate to transform society in allegiance to the Constitution is a task vested in the state, the judiciary and the citizens. The Constitution has never been a frozen document, and it has always had multiple authors. Notwithstanding the sterling role played by the Drafting Committee and Babasaheb Ambedkar, the Constitution as it exists today is a product of interactions between three elements: the text, the courts and above all, 'the people.' Darwin pointed out that 'it is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change;' similarly only with change and adaptation can our democracy survive. Dr. B. R. Ambedkar opined "*However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.*"

*"I feel that the constitution [of India] is workable; it is flexible and it is strong enough to hold the country together both in peace time and*

<sup>85</sup> *supra* note 46



*in time of war. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile.”*

Justice Brennan stated :- *“We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.”*

Participation and empowerment are central means and ends in our transformative Constitution. Transform our society into one in which there will be human dignity, freedom and equality<sup>86</sup>

Alexander Hamilton who was one of the greatest supporters of the judgment of *Marbury v. Madison*<sup>87</sup> rightly said *“Judicial Review does not suppose a superiority of Judicial to Legislative power. It only supposes that the power of the people (Constitution) is superior to both. The intentions of the people would prevail over the intentions of their agents.”*<sup>88</sup>

<sup>86</sup> Transformative Constitutionalism in a Democratic Developmental State  
Solange Rosa

<sup>87</sup> 5 U.S. 137 (1803)

<sup>88</sup> Dr. Justice B.S. Chauhan, THE LEGISLATIVE ASPECT OF THE JUDICIARY: JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT, available at <https://www.scribd.com/document/339650474/BS-Chauhan-Speech-Lucknow>

Justice H. R. Khanna asserted his opinion through the following statement: As observed by Chief Justice Hughes (Chief Justice of the United States Supreme Court, Charles Evans Hughes, Sr. from 1930-1941), judges are not there solely to decide cases, but to decide them as they think they should be decided. While it may be regrettable that they cannot always agree, their independence should be maintained and recognized that unanimity should be secured through its sacrifice. A dissent in a Court of last resort, to use his words, “...is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may correct the error into which the dissenting judge believes the Court to have been betrayed.”<sup>89</sup>

If the Legislature is quiet on some subject matter, then the Judiciary can frame laws on it in the form of guidelines, as held in *Sub-Committee on Judicial Accountability V. Union of India & Ors.*,<sup>90</sup> by pointing out the grey areas of overlapping powers. These guidelines will be adhered to only until the legislature does not make specific laws. This ensures that no one organ becomes arbitrary. The Constitution guarantees that the discretionary independence bestowed on any one branch of Government is within the democratic principle. The interplay of Judiciary and the doctrine of Separation of Power can be observed in several judicial decisions, and it is progressed through judicial review, the power to review legislative decisions, legality and judicial activism, to make laws on the essential matters of concern if legislature is quiet about it.<sup>91</sup>

Justice Khanna, in his book *Making of India's Constitution*, wrote: “If the Indian Constitution is our heritage bequeathed to us by our

<sup>89</sup> ADM Jabalpur v. Shivkant Shukla AIR 1976 SC 1207

<sup>90</sup> 1991 SCR Supl. (2) 1.

<sup>91</sup> [https://journal.indianlegalsolution.com/2020/07/15/harmonizing-separation-of-power-from-khannas-dissent-to-kashmir-blackout-tanvi/#\\_ftn34](https://journal.indianlegalsolution.com/2020/07/15/harmonizing-separation-of-power-from-khannas-dissent-to-kashmir-blackout-tanvi/#_ftn34)

*founding fathers, no less are we, the people of India, the trustees, and custodians of the values which pulsate within its provisions! A constitution is not a parchment of paper; it is a way of life and has to be lived up to. Eternal vigilance is the price of liberty, and in the final analysis; its only keepers are the people. The imbecility of men, history teaches us, always invites the impudence of power.*<sup>92</sup>

*Rameshwar Prasad and Ors. Vs. Union of India (UOI) and Anr.*<sup>93</sup>  
*“The constitutionalism or constitutional system of Government abhors absolutism - it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself.”* Constitutionalism is about limits and aspirations.

Thus the 21st century has witnessed transformative, legislative, executive measures and judicial interventions and contributions. The Constitution necessitates coherence among all the organs of the State and people of India deserve it for having accepted the supremacy of the Constitution instead of any of the organs of the State.



<sup>92</sup> Hans Raj Khanna, *Making Of India's Constitution* (Eastern Book 2009).

<sup>93</sup> Writ Petition (C) NO.257 OF 2005