

# Transformative Constitutionalism: Role of Judiciary

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## ABSTRACT

The use of transformative constitutionalism tries to bring out the solution arising in the process of enactment, interpretation and enforcement of the Constitution. The concept of transformative constitutionalism recognizes the changing nature of society and declares the Constitution as a transformative, legally binding document rather than a rigid one. It is only because of transformative constitutionalism the Supreme Court was able to deliver the significant decision whether it comes to the point of gender equality while entering religious places like Sabarimala or it is about the decriminalisation of same-sex relations or giving rights to the third gender. This demonstrates the impact of transformative constitutionalism towards the interpretation of the constitution of India. It is also the citizen's responsibility to bring and adopt the changes by making the job of the judiciary easier. Without the commitment of the judiciary to bringing up positive social changes, it would be impossible to carry out transformative constitutionalism, and that is exactly why it is important to have a proactive and independent judiciary to get the best outcome from the use of transformative constitutionalism.

**Keywords:** Transformative constitutionalism, Judiciary, Decriminalization, Fundamental rights, Interpretation

## INTRODUCTION

The Constitution is the legally binding document that is foundational to democracy, the rule of law, human rights, and good governance, crucial for the survival and health of a democratic country. This is the reason why our constituent assembly met for one sixty six days, which were spread over a period of two years, eleven months, and eighteen days for drafting and adopting our constitution. Every democratic country has their written constitutions but in no way it amounts to an abiding constitutionalism. It is more important to have constitutionalism in the constitution than having a mere written constitution because it focuses on providing legitimacy to a democratic government rather than focusing on the legality of actions done by government officials.<sup>1</sup>

The concept of constitutionalism is that of a polity governed by or under a constitution that ordains essentially limited government and rule of law as opposed to arbitrary authoritarian or totalitarian rule. Constitutional government, therefore, should necessarily be democratic government. In other words, Constitutionalism is a political philosophy in which the functions of government of a state must be in accordance with the provisions of the constitution meaning thereby the actions of government must reflect constitutionality.<sup>2</sup>

As the constitutionalism is a political spirit or philosophy, so it is not necessary that the states that have a constitution must be embodied with the concept of constitutionalism. According to Douglas Greenberg, Constitutionalism is a commitment to limitations on ordinary political power, it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights, it draws on particular cultural and historical contexts from which it emanates and it resides in public consciousness. Now question arises whether constitutionalism is present in India or not? It can be analyzed with the help of various provisions of constitution that are:-

- Preamble
- Judicial Review
- Rule of law
- Separation of power
- Checks and balances and so on.

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<sup>1</sup> Retrieved from <https://www.tscl.com/transformative-constitutionalism-significance-and-role-of-judiciary> visited on 20 September, 2024 at 2:35 p.m.

<sup>2</sup> Retrieved from <http://www.legalserviceindia.com/artide/1385-Constitutionalism—changing- paradigm.html> visited on 20 September, 2024 at 2:36 p.m.

There is no exhaustive list of features by which the validity or existence of constitutionalism can be tested; but the every feature which limits the government and proves helpful to establish a position of sovereignty under fundamental principles of constitutional jurisprudence may be a considerable point for constitutionalism.<sup>3</sup> In Indian context, Preamble may be a point to check the presence of constitutionalism. Our Constitution enacted on 26th November, 1949, since then, a question always a matter of great concern that whether preamble is a part of Indian constitution or not. However, in 1960, in **Re Beru Beri case**, it was held that preamble is not a part of constitution but after a long time, In case of **Keshavanand Bharti v State of Kerala, AIR 1973 SC 1461**, 13 judges largest bench of Indian constitutional history rejected previous contentions and declared that-

“Preamble is a part of Indian Constitution”.

Preamble explains the objectives of constitution in two ways, one about the composition of bodies of governance and other about the objectives sought to be achieved in independent India. Objectives explained in preamble as follows:-

- To constitute India into Sovereign, Socialist, Secular, Democratic Republic (words Socialist and Secular inserted by 42nd constitutional Amendment, 1976) Other provisions of preamble that are;-
- Justice - Social, Economic, and Political;
- Liberty - of thought, expression, belief, faith and worship;
- Equality of status and opportunity;
- Fraternity assuring the dignity of the individual and the unity and integrity of the nation (word unity inserted by 42nd constitutional Amendment, 1976) may be invoked to determine the ambit of Fundamental rights and Directive principles of state policy.

### **Constitutionalism**

Constitutionalism is a political and legal doctrine that asserts the legitimacy of the action of government that is determined by the body of laws. It helps in improving the preexisting designed mechanism about who can rule how and for what reason for the betterment of the nation. These are the reasons why the constitution is called as the living law of the country because it changes in response to changing circumstances. Constitutionalism embodies some basic principles which need to be followed such as Separation of powers, judicial control and accountable government.<sup>4</sup>

### **Origin of Transformative Constitutionalism**

The concept of transformative constitutionalism is not a new concept in this modern world. It originated from a publication in a South African journal (Legal Culture and Transformative Constitutionalism) in 1998 that was published by Prof. Karl Klare, a US scholar. It has gained broader meaning in South Africa as well as all around the globe in this new generation. While the phrase “transformative constitutionalism” is not expressly mentioned in the constitution of India, the Supreme Court has recognized the transformative power of the constitution in various judgments, such as the 2014 NALSA judgment and the Navtej Singh Johar case. The courts have always considered the importance of the role of the Constitution in guiding the nation towards a better future and transforming society for the betterment.<sup>5</sup>

### **Transformative Constitutionalism**

A constitution, apart from laying down the interrelationship between the state organs and their scope and powers, embodies the ideals and aspirations and the values to which the people have committed themselves. It mirrors the soul of the nation and the people’s supreme will. That is why the Constitution is considered an organic document that helps in shaping democracy. The mere fact that a nation has a constitution does not imply that it also necessarily has constitutionalism.

Baxi defines constitutionalism thus:

“Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is- not all about governance; it also provides contested sites for ideas and

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<sup>3</sup> Retrieved from <http://www.legalservicesindia.com/article/1479/Indian-Constitutionalism.html> visited on 20 September, 2024 at 3:05 p.m.

<sup>4</sup> Retrieved from <https://www.tsclcd.com/transformative-constitutionalism-significance-and-role-of-judiciary> visited on 20 September, 2024 at 3:06 p.m.

<sup>5</sup> Retrieved from <https://www.tsclcd.com/transformative-constitutionalism-significance-and-role-of-judiciary> visited on 20 September, 2024 at 3:06 p.m.

practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance.”<sup>6</sup>

**Klare defines transformative constitutionalism as:**

‘a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.’ Therefore, constitutionalism as a concept conveys legal restraints on the exercise of state power and adherence to the constitution, to the rule of law and thereby, to the people’s will.<sup>7</sup>

Constitutions that have been made by states having a colonial history are often seen as ‘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...’ Transformative Constitutionalism envisages a mechanism to bring in social change from an unjust past to a democratic future using the Constitution as a tool to achieve this objective.

**India and Transformative Constitutionalism**

India had grappled with not just colonialism, but also social ills such as untouchability, caste discrimination, gender inequality which has been prevalent in India since ancient times. The Indian constitution-making exercise was motivated by the need to overthrow its colonial past and to bring about a new social and political order, based on democratic values. The Indian constitution was constructed as a ‘moral autobiography’, which promised a new future while explicitly rejecting the colonial past.<sup>8</sup> Various provisions under the Indian constitution exemplify the transformative goal of the constitution. The preamble contains the aspirations of the people, with the cherished goals of liberty, equality, fraternity and justice.<sup>9</sup>

It establishes a secular, democratic, socialist state. Part III of the Constitution provides Fundamental Rights against the state, including the ideals of equality, nondiscrimination, freedom of speech and expression, movement, association, freedom of religion and personal liberty. It abolishes untouchability, feudal titles and begar. Thus, the quest for the establishment of a new social order through political power is implicit in the constitution. Bhargava believes that the Indian constitution was ‘designed to break social hierarchies’ and open up a new chapter of freedom, equality and justice. It was a revolutionary moment, especially for the deprived classes, who hoped to receive equal treatment in society after its adoption.

**According to Justice Subbarao,**

Preamble is the soul of the constitution, without which a body in the form of state cannot be survived. The objectives of constitution ensure the dignified conditions for the people of India and provide them all rights and liberties within ambit of fundamental spirit of constitutionalism embodied in entire body of the constitution.

E.g. Dr. Radhakrishnan, former President of India, has explained secularism in this country, as follows:-

When India is said to be a secular state, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives we hold that not one religion should be given preferential status. This view of religious impartiality, or comprehension and forbearance, has a prophetic role to play within the National and International life.<sup>10</sup>

In other words, Secularism, which reflects no state religion, means every citizen has a right to profess religion of their own choice, which promotes automatically liberty of faith and worship. In this way, It can be surmised that preamble hold tire spirit of constitutionalism. Second feature is Judicial Review, however, this doctrine is not clearly stated in Indian constitution but its reflection is somewhere found in Article 13(2). Actually, this doctrine was firstly introduced in 1803 by Justice Marshall in **Marbury v Madison(3) case**, In USA where he clearly said that ‘It is the duty of judge to annul the law made by the legislature which violated the constitution or contrary to it.

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<sup>6</sup>Retrieved from [http://www.legalserviceindia.com/article/13\\_85-Constitutionalism—changing- paradigm.html](http://www.legalserviceindia.com/article/13_85-Constitutionalism—changing- paradigm.html) visited on 22September, 2024 at 5:00 p.m.

<sup>7</sup>Madhav Khosia, *The Indian Constitution* 14 (Delhi: Oxford University Press, 2012)

<sup>8</sup>Supra note 2 at p. 110

<sup>9</sup>United Nation Development Programme Access to Justice: Practice Note (2004)

<sup>10</sup>Retrieved from <http://www.legalservicesindia.com/article/1479/Indian-Constitutionalism.html> visited on 22 September, 2024 at 5:40 p.m.

The similar spirit found in Article 13(2) of Indian Constitution that the laws “which are inconsistent to part III of constitution shall be declared null and void”, but it is not clearly defined that if any contrary law made, then who will check its validity, then an answer comes into light in reference to Justice Marshall that Judiciary can check such contrary acts of legislature and .also can review the laws made by legislature.

And also a concept of “Higher law” emerged from this doctrine, because a judge has to follow the mandates or directions of Higher law while checking the consistency of provision. In written constitution, Higher law depicts constitution as Supreme but where there is no written constitution; there are some principles which can be regarded as Supreme or Higher law principle. In **A.K. Gopalan V State of Madras (1950) SCR 88(100)** has upheld that it is difficult to restrict the sovereign legislative power by judicial interference except so far as the express provision of written constitution. It is only the written provisions of constitution which may restrain legislative power, but where there is no written constitution, then, who restrain legislative power, and then its answer is judiciary by following various principles, precedents, customs, usages, and different statutes can check the consistency. It clearly signifies that in absence of power of judicial review in hands of judiciary, judiciary is only a puppet of legislators.

Justice Frankfurter (4)(USA) said that judicial review, itself a limitation on popular government, is a fundamental part of our constitutional system; means if there is no power of judicial review then the constitution merely becomes a draft for the code of conduct for government as well as citizens, It also signifies as a<sup>11</sup> However, this type of situation has been prevalent in India, till 2007, in different cases, such as Shankari Prasad case, Sajjan Singh case, Golak Nath case, Keshavanand Bharti case, N.Ramchandra case, traced a picture of conflict between legislature and judiciary, no clear cut demarcation of powers under which organs of government can overview the validity of their actions for upholding the true spirit of constitutionalism in a political entity could be realized. But the Raja Ram Pal case and I.R.Coelho v State of Tamil Nadu case 2007 have reshaped the whole demarcation and establish superiority of principles such as Basic Structure Theory enhancing the spirit of constitutionalism.

Third provision is “Rule of Law”, on its basis spirit of constitutionalism can be present in a state. This doctrine is given by dicey (a well-known constitutionalist of England) in 1865 wrote a book titled. “An Introduction to the law of the constitution” in which the term “Rule of Law” was given a comprehensive amplitude. In reality, it is a doctrine of England where there is no written constitution, so it is placed as a higher law there to check the validity of any law made by legislature. This doctrine shows that whatever law is present in our state, must be ruled over everyone, meaning thereby the law is supreme in all respect and in every sphere. It clarifies that “No one above the law”.

Now a question arises, what the law is? The answer of this question resides in two principles that are-

- Due Process
- Procedure established by law.

Due Process is a doctrine of USA, and its ambit is not defined comprehensively, but its sphere is to be explained by judges as per the facts and circumstances of the case. It represents judicial supremacy and also there is a danger for judicial autocracy because the court if not self-restrained may go beyond the limits set by the constitution.<sup>12</sup>

### **Role of Transformative Constitutionalism In Protecting Fundamental Rights And Freedoms**

Transformative constitutionalism takes a more pragmatic' approach towards the realization of constitutional goals by protecting individual's fundamental rights and freedoms. Judiciary is the core element of transformative constitutionalism since the concept places faith in the law as an instrument of social and political change, and in that, the courts act as catalyst of the transformation as they are empowered to interpret and apply the law.<sup>13</sup>

There is often a fear of revolution in the recognition of transformation but such fear can be unraveled through collective efforts. Transformative constitutionalism aims to rebuild society on new principles. Core purpose of constitution is to enable the state to create conditions for a just and humane society. The central notion of transformative constitutionalism lies in social justice. The transformative constitutionalism requires the state to regulate society and bring about social

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<sup>11</sup> Retrieved from <http://www.legalservicesindia.com/article/1479/Indian-Constitutionalism.html> visited on 22 September, 2024 at 5:40 p.m.

<sup>12</sup> Retrieved from <http://www.legalservicesindia.com/article/1479/Indian-Constitutionalism.html> visited on 22 September, 2024 at 5:42 p.m.

<sup>13</sup> Karl Klare, *Legal Culture and Transformative Constitutionalism*, 146-150

justice. This notion is contradictory to Gandhian philosophy of 'social justice'; according to which social justice can be achieved by reformation of individual and -society even in absence of government regulations.<sup>14</sup>

Judiciary still is at highest pedestal of trust and in order to keep accord to its position it needs assume a more assertive role via transformative constitutionalism than that in ordinary traditional contexts.

The assertive role of Indian judiciary through 'transformative constitutionalism' can be accessed in the light of, Sabrimala judgement. Moreover, the real import of transformative constitutionalism lies in positive measures that the State ought to take in bringing the Constitution closer to the most deprived. This has been done by judicial activism by translating and interacting directive principles of state policy along with fundamental rights through its activism and wider interpretation of constitutional goals.<sup>15</sup>

The Court's interpretation about the power of state government and circumstances under which it can curtail fundamental rights guaranteed under the Indian Constitution will have a great impact on legislative powers of state; as it would entail a higher examination of opportunity State legislation that compress individual rights. The use of states legitimate power can no longer be relied upon 'public/social' morality rather it has to meet the test of 'constitutional' morality. On 28th September, 2018 the five- judge constitution bench granted the right to enter the shrine to women between the ages of ten and fifty. The bench consisted of five judges and they delivered four separate judgments: three of them ruled in favour of women's entry and one against. Of the four, two judgments are unique as they present contrasting constitutional perceptions. The majority opinion of Justice D Y Chandrachud and the dissenting view of Justice Indu Malhotra are noteworthy and give rise to another issue. According to Justice Chandrachud individual dignity lies at the more of liberal constitutionalism. In his opinion The Indian constitution, is based upon the principles of justice, liberty, equality and fraternity and therefore all constitutional provisions including the freedom of religion, must be interpreted in such a way that Individual dignity must be upheld.<sup>16</sup>

He tried to apply 'transformative constitutionalism', to end gender biasness from the society; in accordance with constitutional goals. He interpreted Article 25 in the light of constitutional morality of the Constitution, which fundamentally deals with the individual's freedom of religion. In his interpretation, he argues that entering the Sabarimala shrine is a part of Article 25 the individual woman's fundamental right "to profess, practice and propagate religion".

Thus, denial of rights to worship to any particular section within a religion or denomination could amount to a violation of Article 25. Prohibiting women between the ages often and fifty from entering Sabarimala, therefore, amounts to a violation of their freedom of religion. This interpretation of freedom of religion under Article 25 transforms in one fell swoop a provision that has often been used by religious groups to preserve unjust discriminatory practices into a weapon of reform and transformation. In her dissenting judgment, Justice Indu Malhotra gives preference to group rights in the centre of constitutional morality. She interpreted constitutional morality on the basis of principle of "secularism" and non-intervention; where 'judicial restraint' must be observed in religious matters. Constitutional morality, in her account, is not geared to a transformative project. Reform and change are none of the constitution's business. In earlier cases judges adopted a cautious approach leaving it to the followers of a religion to determine what its essential practices were. Over the next few decades, however, the judiciary came to adopt a more rigorous standard paving way for transformative constitutionalism.<sup>17</sup>

In the above case, the judiciary has tried to play a role of reformer rather than transformer by declaring triple talaq as unconstitutional by majority of 3:2. However, two judges of the bench said that the practice does actually form an essential part of the religion of Muslims and therefore observed that they cannot interfere in the present matter as it is being protected by Article 25. The Court further stated that the Muslim Personal Law (Shariat) Application Act of 1937 does not constitutionally protect practices deemed "anti-Qur'anic," and asserted that the practice of triple talaq cannot be protected under the Indian Constitution In support of its opinion, the Court cited global advances in Islamic family law in "even theocratic Islamic states" which adopted reforms.

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<sup>14</sup>Retrieved from <http://www.legalserviceindia.com/article/1385-Constitutionalism-changing-paradigm.html> visited on 22 September, 2024 at 5:45 p.m.

<sup>15</sup>Retrieved from <http://www.legalserviceindia.com/article/1385-Constitutionalism-changing-paradigm.html> visited on 22 September, 2024 at 5:45 p.m.

<sup>16</sup>Karl Klare, *Legal Culture and Transformative Constitutionalism*, 146-150

<sup>17</sup>Karl Klare, *Legal Culture and Transformative Constitutionalism*, 146-150

It further suggested India's parliament "to consider legislation" for handling the issue. Hadiya case, a non-Muslim woman converted to Islam and married a Muslim man. Earlier the Kerala High Court, had annulled Hadiya's marriage on imaginary apprehensions, the Court converted a simple matter of annulment of an illegal marriage into alleged Islamic propaganda and Love Jihad on basis of apprehensions crediting the political propaganda. On 8 March 2018, Hadiya's marriage was restored by the Supreme Court; by doing so the court delivered homilies to the fundamental right to choose a religion and marriage partner.

In *Shakti Vahini v. Union of India*<sup>18</sup>, the court held that 'Right to Choose Life Partner Is a Fundamental Right, Consent of Family, Community are not essential for Marriage between two Adults'. The Court also struck down social limitations against marital unions through khap panchayats and held that if it is prohibited in law, law shall take note of it when the courts are approached and no one has the authority to take law into own hands.

Thus, Judiciary demonstrated the manner in which it can act as a catalyst for transformative Constitutionalism.

## **THE TRANSFORMATION FROM TRADITIONAL JUDGMENTS**

### **Justice K. S. Puttaswamy v. Union of India (2018)**

Emergency imposed by Indira Gandhi during the congress regime in 1976, four out of five judges in the case of *ADM Jabalpur vs S.S. Shukla (1976)*, held that even the right to life given under Article 21 of the Indian Constitution can be suspended at the time of emergency. The fifth judge, Justice HR Khanna dissented and forty-one years later, in the case of *Justice K.S.Puttaswamy (Retd) vs Union of India (2018)*, a nine-judge bench of the Apex Court held that privacy is indeed a fundamental right under the purview of Article 21 of the Indian Constitution. Justice Khanna was thereby proven right and now, even after the proclamation of emergency or by suspension order of the President, the fundamental right to life under Article 21 cannot be suspended.

### **Kesavananda Bharati v. State of Kerala (1973)**

There was a long debate on the question if the parliament has the power to amend the Constitution or not. The Apex Court dealt with many cases like *C. Golaknath & Ors vs State of Punjab & Anrs (1967)*, *Indira Nehru Gandhi vs Shri Raj Narain & Anr (1975)* and *Bhim Singh vs U.O.I & Ors. (2010)*. The scope of judicial review was also debated in the course of the 24th and 42nd amendments to the Constitution. This debate was finally settled down in the case of *Kesavananda Bharati vs State of Kerala (1973)*. The concept of basic structure doctrine was laid down and it was decided that the Parliament can amend the fundamental rights given in the Constitution, but its basic structure should be maintained and preserved as it is.

### **National Legal Services Authority (NALSA) v. Union of India (2014)**

The NALSA judgment is one of the landmark decisions of the Apex Court because it is the first to legally recognise non-binary gender identities and uphold the fundamental rights of transgender persons in India. The judgement also directed Central and state governments to take proactive action in securing transgender persons' rights. While the phrase "transformative constitutionalism" does not find express mention in the Constitution of India, the Supreme Court takes note of the transformative power of the Constitution in its 2014 NALSA judgment in the following words:

*"The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result of social reality."*

### **Navtej Singh Johar vs Union of India (2018)**

Before this case, sexual conduct between two adults of the same sex, consensual or not, was criminalized under Section 377 of the Indian Penal Code, 1860. In this case, the petitioner challenged this section and claimed that it is violative of Articles 14, 21 and 15 of the Constitution. In furtherance of this claim, the Court interpreted that the word 'sex' under Article 15 includes 'sexual orientation.' Further, the rights of the LGBTQ+ community were recognised in this case and the decision in *Suresh Koushal v. Naz Foundation (2014)* was overruled by the Court.

### **Joseph Shine vs Union of India (2018)**

This was another landmark judgment that decriminalized adultery while interpreting Article 21 of the Constitution. Adultery was earlier criminalized under Section 497 of the IPC. That particular section provided punishment for a man

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<sup>18</sup>(2018) 7 SCC 192

involved in sexual intercourse with a married woman, without the consent of her husband. This Section was found to be arbitrary and discriminatory as it was silent on the consent of a married woman, and was thus struck down.

#### **Indian Young Lawyers Association vs. the State of Kerala (2018)**

This case was filed by the petitioners as a PIL before the Apex Court regarding the entry of menstruating women into the temple of Sabrimala, which had been restricted. It was argued that this restriction was violative of Articles 14, 15, 17, 25 and 26 of the Constitution. The Court, playing the role of a positive interferer of religion, held that women of all age groups can enter the temple.<sup>19</sup>

### **TRANSFORMATIVE CONSTITUTIONALISM AND RECENT JUDGEMENTS**

#### **Dr. Maya D Chablani vs Radha Mittal (2021)**

*Dr. Maya D Chablani vs Radha Mittal (2021)* was a recent case dealt with by the Delhi High Court, whose judgment was appreciated by many people. 'Right to life' under Article 21 of the Indian Constitution was applied very liberally on street dogs. It was held in this case that the street dogs have a 'right to food' and citizens also have the right to feed them provided they do not impinge upon the rights of others. Regarding the feeding of such dogs, the HC also laid down certain detailed guidelines. With respect to Article 21, it was stated that such a right protects the life of animals too.

#### **Vineeta Sharma vs Rakesh Sharma (2020)**

This judgment changed the course of history when it was decided by the Court that coparcenary rights under Section 6 of Hindu Succession (Amendment) Act, 2005 are to be given to both the daughter and the son. Even daughters born before the amendment have now been given full coparcenary rights.

Therefore, this landmark judgment again talked about the right to equality under Article 14 of the Indian Constitution and how excluding a daughter from having a part in coparcenary ownership would mean the negation of her fundamental right to equality.

#### **Anuradha Bhasin vs Union of India (2020)**

This case is of the time in the year when the Jammu and Kashmir Reorganisation Bill 2019 was passed and the government announced a ban on the internet along with the shutdown of all communications. Additionally, there was a restriction on the movement and assembling of public u/s 144 of CrPC. Journalists were restricted from travelling and publishing anything which led to violation of Article 19(1)(a), i.e., the right to freedom of expression.

The SC held that the right to access the internet is included under article 19(1)(a) and stated that the restriction on journalists violates article 19(1)(g), i.e., the freedom to practise any profession, occupation, trade and commerce over the medium of internet.<sup>20</sup>

#### **Role of The Judiciary In The Transforming Constitutionalism**

Transformative constitutionalism can be best described as a pragmatic lens that helps in viewing the realities of society. It confers a duty upon the state to uphold and ensure the supremacy of the Constitution. The role of the judiciary is to preserve the essence of the Constitution while interpreting it in such a way that it adapts to the current scenario. Checks and balances in powers have to be made by the judiciary while still adhering to the separation of powers. As a guardian of human rights, the judiciary's role is to ensure that justice is being done in each case and the sacrality of rights have been preserved. We have seen how the judiciary, in the case laws discussed above, played an inclusionary and transformative role. Justice N. Anand Venkatesh, judge of Madras High Court is a role model of transformative constitutionalism, as he showed the willingness to learn and decided to take psycho-education while hearing a recent case relating to LGBTQ+ which will help him better understand homosexuality. Additionally, the judge also ordered counselling sessions for the petitioners and their families.<sup>21</sup>

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<sup>19</sup> Retrieved from <https://blog.ipleaders.in/transformative-constitutionalism-role-judiciary/> visited on 24 September, 2024 at 6:32 p.m.

<sup>20</sup> Retrieved from <https://blog.ipleaders.in/transformative-constitutionalism-role-judiciary/> visited on 24 September, 2024 at 6:32 p.m.

<sup>21</sup> Retrieved from <https://blog.ipleaders.in/transformative-constitutionalism-role-judiciary/> visited on 24 September, 2024 at 6:32 p.m.

## **CONCLUSION**

The judiciary has given many remarkable judgments where we witnessed a reflection of transformative constitutionalism. However, it still has a long way to go. Stan Swamy, who was arrested in the Elgar Parishad case was denied his medical plea ever after being a senior citizen and very ill. He died on July 5 without any bail and as an undertrial. It is a question to ponder upon whether in this case, the right to life should have been interpreted in such a way that could have allowed him a medical plea. Further, India sees a pool of judgments where lines like 'justice delayed is justice denied' become justified. Transformative constitutionalism is something that cannot be achieved without the constant support of the judiciary and its willingness to bring a positive change in society. With the judiciary, the role of citizens is also very important in bringing a transformational change in the Constitution that meets the needs of the present day scenario. The first step of doing this is recognizing our rights and values and also keeping in mind not to infringe upon the rights of others. Where preserving the basic structure of the living document of our country is of utmost importance, evolution of our basic fundamental rights needs to be constant in order to keep the wheel of social transformation moving in the society.

The main idea behind the concept of transformative constitutionalism is to promote social, economic and political changes through the interpretation and using the other ways of applying the provisions that are already being mentioned in the constitution. It is only because of transformative constitutionalism the Supreme Court was able to deliver the significant decision whether it comes to the point of gender equality while entering religious places like Sabarimala or it is about the decriminalisation of same-sex relations or giving rights to the third gender. This demonstrates the impact of transformative constitutionalism towards the interpretation of the constitution of India. It is also the citizen's responsibility to bring and adopt the changes by making the job of the judiciary easier. Without the commitment of the judiciary to bringing up positive social changes, it would be impossible to carry out transformative constitutionalism, and that is exactly why it is important to have a proactive and independent judiciary to get the best outcome from the use of transformative constitutionalism.