

Constitutional Transformation Vis-À-Vis Transformative Constitutionalism: The Indian Experience in Post-Colonial Era

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Abstract: The post-colonial world marked a significant transformation in the Asian and the African political and social order so as to ensure to their citizens a better and promising future. India, among various other dominions, emerged as an independent nation tasked with the monumental project of constitution making for establishing a just political and social order for its citizens. Among various contemporaries, the Constituent Assembly of India gifted Indian citizens an indigenous constitution that has endured for more than seven decades while becoming the longest surviving constitution in the post-colonial world with its promise of dispensing justice intact to date. However, the role of transformative process involved therein still remains an underexplored subject in the domain of constitutional jurisprudence. This article identifies, explains and analyzes constitutional transformation in India in relation to the concept of transformative constitutionalism as this has formed the very basis of successful working of the Indian constitution. Through an understanding of the interplay of these core transformative concepts in the Indian experience, the article unveils the secrets of a long-lasting and promising constitution while ensuring real and substantive justice to its people.

Keywords: Transformative Constitutionalism; Constitutional Jurisprudence; Indian Constitution

1. Introduction

As widely understood, nations enact constitutions to establish fundamental governing and administrative institutions or organs; describe their composition, powers and functions; and determine their inter-relationships with one another and with the people. As per House of Lords committee of 2001, constitution means „*the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual*“.¹ These famous perceptions evidently reflect the very purpose of constitutional enactment, however, one element of utmost importance, i.e. transformation, seems to be lost from these widely understood notions of constitution.

It is widely known but insignificantly recognized that each constitution across the world, at the time of its enactment (or amendment), had the objective of transforming the existing social and political

¹U.K. Parliament, House of Lords, Committee on the Constitution, HL Paper 11, 2001–02, c. 2.

order of its respective State. For instance, the preamble of the oldest and shortest constitution in the world², i.e. constitution of United States of America, states that the people of United States, „in Order to form a more perfect Union... establish this Constitution for the United States of America”³ hence evincing that the constitution of the United States has been enacted with a transformative object of formation of a more perfect Union than it earlier was. Another significant instance of this subject can be traced back to enactment of the Indian constitution in the year 1950, which was enacted⁴ by the Constituent Assembly⁵ with a purpose of transforming the existing social and political order through self-governance with a view to eliminate the injustice and oppressions of the colonial era while repealing⁶ the erstwhile colonial constitutional enactment i.e. Government of India Act, 1935⁷. Although the transformative objects of both these constitutions differ in form and purpose but the underlying objective remains the same i.e. transformation of the existing system.

As truly observed by Thomas Jefferson (one of the founding fathers of United States), no society can make a perpetual constitution.⁸ However, by way of infusing certain long-lasting principles within the express letters of constitutional provisions, efforts are made by the framers of a constitution so as to enable it to withstand the test of time for the purpose of securing certainty and stability in the system. Constitutional interpretation is one of the techniques which ensures relevance of constitutional provisions after their enactment. For instance, the judiciary in India, like various other jurisdictions, is primarily vested with the power and duty to safeguard the constitutional principles by way of interpretation and the law declared by the Supreme Court is binding on all courts in India.⁹ Through such power of constitutional interpretation, the judiciary not only protects the rights and interests of the people but also injects life in the constitutional provisions so as to make them survive in the ever-changing society.

In view of the aforesaid, the word transformation when used with constitution broadly connotes two meanings viz. (i) enactment of a completely new constitution or amendment of the existing constitution for bringing fundamental changes in the country’s constitutional principles through its implementation; or (ii) judicial interpretation of provisions of an existing constitution in a manner so as to address the ever-changing needs of the society by identifying and declaring transformative nature of such provisions. The former meaning suggests a substantial or complete replacement of the earlier law with a new enactment by act of legislature whereas the latter seeks to work the existing letters of law by way of judicial creativity in constitutional interpretation. In simple terms, both the

²Terry L Jordan, *The U.S. Constitution and Fascinating Facts About It* (Naperville, IL: Oak Hill Publishing Company, 2013), 25.

³U.S. Const. pmbl.

⁴The Constitution of India was enacted on 26 November 1949. The preamble of the Indian Constitution states, “WE, THE PEOPLE OF INDIA... IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.” See Ind. Const. pmbl.

⁵Constituent Assembly of India was established to enact an „Indian-made” constitution for the people of India which was first convened on 9 December 1946. See Austin Granville, *The Indian Constitution* (New Delhi, IN: Oxford University Press, 1972), 2. The first formal demand of a Constituent Assembly was put forward through a Swaraj Party Resolution dated 3 May 1934 which was issued against the White Paper issued by the British Government in the month of March of 1933. See B Shiva Rao, ed., *The Framing of India’s Constitution: Select Documents*, vol. 1 (New Delhi, IN: Law & Justice Publishing Co, 2021), 76.

⁶Ind. Const. art. 395.

⁷Government of India Act, 1935, 26 Geo. 5, c. 2.

⁸See Paul Leicester Ford, ed., *The Works of Thomas Jefferson, Federal Edition*, vol. 6 (New York and London, G.P. Putnam’s Sons, 1904-5).

⁹Ind. Const. art. 141.

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meanings are two of the many facets of constitutional transformation. Constitutional transformation, in general terms, is understood as the *practice of constitution making and change*¹⁰ which encompasses the aforesaid two aspects in its broader self.¹¹ However, the aforesaid two meanings are identified as most relevant to be discussed further in the light of scope of the subject matter of this research work.

Transformative constitutionalism, on the other side, states that a constitution must strive to achieve the objective of bringing transformation in the society to *heal the wounds of the past and guide us to a better future*¹². In simpler terms, transformative constitutionalism prescribes that the process of enactment or interpretation of a constitution must enable social or political change towards a more egalitarian society for undoing the injustices of the past. The term „transformative constitutionalism“ is known to be coined by American legal scholar, Karl Klare, which he described 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*“¹³.

Although, the practice of constitutional transformation in post-colonial nations across the world would evince that the spirit of transformative constitutionalism was already known to various political and legal systems even prior to usage of the term „transformative constitutionalism“ by Karl Klare. For instance, Karl Klare had first used the term „transformative constitutionalism“ in his article in the year 1998 with respect to constitutional reforms of 1994 in South Africa. However, constitutional transformation in independent India would evince that idea of transformative constitutionalism was inherent in the process of constitution making which has been duly substantiated by the report dated 14–15 November 2014 published by Institute of Democracy and Electoral Assistance which considers the Indian constitution to be „*the first truly transformational constitution*“¹⁴, albeit the same being enacted much prior to Karl Klare’s use of the term „transformative constitutionalism“. Despite the aforesaid, the fact cannot be denied that the principle of transformative constitutionalism has gained much attention across the global south and more particularly in India even after so many years of constitutional enactment, which is much to the credit of Karl Klare’s special emphasis on the subject.

To broadly understand constitutional transformation vis-à-vis transformative constitutionalism, a reading of the foregoing paras would reveal that it is the basic purpose of a constitutional

¹⁰“What is Constitutional Transformation?,” Melbourne Law School, <https://law.unimelb.edu.au/constitutional-transformations/about>.

¹¹As per Constitution Transformation Network of Melbourne Law School, University of Melbourne, Constitutional transformation is defined as the practice of constitution making and change. It encompasses three aspects namely, (i) making new constitutions or amendments thereto; (ii) processes involved in constitution-making which existed prior to constitution; and (iii) processes involved in transition, implementation and interpretation after formal constitutional making. *See Ibid.*

¹²Pius Langa, “Transformative Constitutionalism,” *Stellenbosch Law Review* 17, no. 3 (2006): 352.

¹³ Karl Klare, “Legal culture and transformative constitutionalism,” *South African Journal on Human Rights* 14, no. 1 (1998): 146.

¹⁴The report considers Indian constitution to be the first truly transformational constitution for the reason that, “*It aimed not only to restructure the state, but also to transform deeply entrenched social institutions based on caste and patriarchy by emphasizing transcendent constitutional values such as the principle of equality.*” *See Tom Gerald Daly, “The Judiciary and Constitutional Transitions,”* 2016, International Institute for Democracy and Electoral Assistance, <https://www.idea.int/sites/default/files/publications/the-judiciary-and-constitutional-transitions.pdf>.

transformation which determines whether such constitutional transformation confirms to the principle of transformative constitutionalism or not. For enhanced understanding, it would be relevant to refer back to the example of constitutional transformation in United States and India, wherein, the purpose of constitutional transformation in United States was merely for achieving a more perfect union whereas the purpose of constitutional transformation in India was for transforming a India's political and social institutions in a more democratic and egalitarian direction, which truly confirms to the spirit of transformative constitutionalism. Apart from this example, it is also demonstrated from various other forgoing instances whereby the Indian constitution offers significant ground for an insightful analysis of constitutional transformation vis-à-vis transformative constitutionalism. Hence, this article will analyze the said subject matter in Indian perspective in order to fill in the research gaps with respect to role and importance of transformative process in constitution making and working as well as to substantially contribute to the field of general constitutional jurisprudence.

2. Method

This article is a qualitative research work which uses the doctrinal method of research for exploring the horizons of transformative intent behind the edifice of constitutional making in Indian perspective. Owing to the nature of the subject matter of this research work which examines historical texts and existing legal literature so as identify and analyze the underexplored role and importance of the transformative process involved in constitution framework, the doctrinal method of research is most appropriate for present study.

This method was employed in this research work as it includes various stages such as contextual reading of legal literature, identification and examination of relevant primary and secondary sources and analysis thereof in context of the subject matter of the present research so as fill in the research gaps in existing legal literature. The primary and secondary sources used in this research work includes but are not limited to constitutions, statutes, research articles, case laws, reports, books, journals *et al.* The research would majorly cover authoritative sources relating to the subjects of constitutional jurisprudence and transformative constitutionalism along with such supplemental sources which prove to be necessary for effective explanation of the issue in question.

3. Origin and evolution of constitutional transformation in colonial India

Although it is difficult to mark any starting point of constitutional transformation in India owing to India's rich constitutional literature of ancient times as even before the British colonization, India had its own constitutional framework through which the Indian governance system operated.¹⁵ However, the current legal and constitutional framework in India owes its origin to British legal system after commencement of British colonization of India. Hence, it would be relevant only to analyze the origin and evolution of the process of constitutional transformation in colonial India¹⁶ in order to understand its existing constitutional framework. For the sake of clarity, the era of constitutional transformation in modern India can be divided into three phases:

¹⁵See Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient Legal, Judicial and Constitutional System* (Gurgaon, IN: LexisNexis, 1984).

¹⁶Modern India is basically referred to India at the times of decline of Mughal Empire and inception of subjugation of India by the East India Company and British Crown. See Bipin Chandra, *History of Modern India*, (Noida, IN: Orient Blackswan Pvt. Ltd., 2009).

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- (i) 1600 AD to 1833 AD
- (ii) 1833 AD to 1858 AD
- (iii) 1858 AD to 1947 AD

3.1. 1600 AD to 1833 AD

The advent of British colonization of India dates back to the year 1600 AD which was marked by issuance of the Charter of 1600 by Queen Elizabeth I which granted exclusive trading rights to the East India Company¹⁷ (“Company”) including the territory of the present India.¹⁸ Starting off with trade and commerce in Surat in the year 1608,¹⁹ the Company, slowly and gradually took over the administrative functions of various Indian territories over the two centuries henceforth acting as a full-fledged government for those territories. Progression of the Company in administering the Indian territories increased the maladministration in the Company by its officials due to which the British Parliament passed the Regulating Act of 1773²⁰ in order to regulate the administrative affairs of the Company on Indian territory under its direct control. This transition from commercial activities of the Company represents the era of first constitutional transformation in colonial India henceforth resulting into culmination of the functions of the Company into purely administrative. The formal recognition of this constitutional transformation was marked by the Charter of 1833²¹, which was passed by the then British parliament to cease the commercial activities of the Company and to legally recognize it as the political and administrative authority over the Indian territories controlled and administered by it.²²

3.2. 1833 AD to 1858 AD

The Charter of 1833 allowed the Company to administer and govern its territorial possessions in India for the next 20 years i.e. till the year 1854 AD in „trust for His Majesty, his heirs and successors“.²³ The central purpose of Charter Act of 1833 was to codify laws in India in order to provide stability and uniformity to administrative affairs of the Company. Since the very purpose of Charter Act of 1833 was not met by the Company within the prescribed period of its validity, hence,

¹⁷ Officially established as „The Governor and Company of Merchants of London trading into East Indies“, under the Charter of 1600. The Company was granted exclusive rights for a period of fifteen years to trade to the 'Indies', an area that was defined as extending from the Cape of Good Hope to the Straits of Magellan, including India. See original text of the Charter of 1600 in Panchanandas Mukherji, ed., *Indian Constitutional Documents (1600-1918)* vol. 1 (Calcutta, IN: Thacker, Spink & Co., 1918), 1-20.

¹⁸ The Charter of 1600 provided for constitution, powers and privileges of the East India Company which was managed by an annually elected body known as „Court of Directors“ consisting of 1 Governor and 24 Directors. See *Ibid.*

¹⁹ William Hawkins, as commander, led the first ship of East India Company named „Hector“ at Surat port in India on 24 August 1608. The ship came to India for the purpose of exercising exclusive rights of trade and commerce in the „Indies“ as granted under the Charter of 1600. See PJ Marshall, *The Oxford History of the British Empire*, ed. Nicholas Canny (New York, US: Oxford University Press 1998), 1.

²⁰ The Regulating Act of 1773, officially known as East India Company Act, 1773, was introduced as the Regulating Bill by Lord North on May 1773 in the House of Commons and the same was passed by House of Commons by 131 votes to 21 on 10 June 1773 and subsequently by House of Lords by 74 votes to 17 and received the Royal assent on 21 June 1773. See *East India Company Act, 1773*, 13 Geo. 3, c. 63.

²¹ The Charter Act of 1833 received the Royal assent on 28 August 1833 and came into force on 22 April 1834. See *Saint Helena Act, 1833*, 3 & 4 Will. 4, c 85.

²² Sumeet Malik, *V.D. Kulshreshtha's Landmarks in Indian Legal & Constitutional History*, 11th ed. (Lucknow, IN: Eastern Book Company, 2016), 389.

²³ *Ibid.*

the term of Company's rule in India was further renewed by the Charter Act of 1853²⁴ (formally known as „Government of India Act, 1853“) without prescribing validity period. Meanwhile the aforesaid constitutional reforms, corruption in the Company grew at an exponential rate following other evils of maladministration. Further, due to the atrocities of the Company rule over the native Indians, the first war of independence broke out in the year 1857 AD,²⁵ whereafter, the British Parliament passed the Government of India Act 1858²⁶ pursuant to the bill introduced by Lord Palmerston, the then Prime minister of England, to transfer the business of Government of India from East India Company to the British Crown. Thereafter, till the year of independence i.e. 1947 AD, the Indian territories under the control of the Company came under the direct administration and governance of the British Crown.

3.3. 1858 AD to 1947 AD

This period marks the direct rule of British Crown in India²⁷ which started with the commencement of Government of India Act, 1858. During this period, the British parliament passed various legislations prescribing for legislative, administrative and judicial reforms in the Indian territories for better and effective control over the native Indians. The Act of 1858 was further followed by various legislations namely; Indian Councils Act, 1861²⁸; Government of India Act, 1870²⁹, Indian Councils Act, 1892³⁰; the Indian Councils Act, 1909³¹; Government of India Act, 1915³²; Government of India Act, 1919³³ and Government of India Act, 1935³⁴, prescribing major constitutional reforms in the dominion of India. Although all the aforementioned legislations have due significance in the process of Indian constitutional transformation, the Government of India Act, 1935 has its special place as it circumscribes within itself all the constitutional reforms which were best suited for effective administration of native Indians. The Act of 1935 also forms a basis for major constitutional institutions established under the Indian constitution that were in place during the colonial rule.³⁵ The political and administrative machinery under the Act of 1935, for the reason of its being devoid of establishing a welfare state, eventually failed to satisfy the needs of Indian natives due to which it became difficult for the erstwhile British government to gain effective control over the dominion of India. Moreover, for the reason of multiple nationalist movements for Independence organized in various parts of India³⁶ and further degradation of Britain's financial, defence and administrative

²⁴Government of India Act, 1853, 16 & 17 Vict., c. 95.

²⁵ VD Savarkar, *The Indian War of Independence* (Bombay, IN: Sethani Kampani, 1909).

²⁶ The Government of India Act, 1858 received the Royal assent on 2 August 1858 and the Queen issued a proclamation announcing taking over of the Government of India from the East India Company on 1 November 1858, with the commencement of the Act. See Government of India Act, 1858, 21 & 22 Vict., c. 106.

²⁷ Burton Stein, *A History of India*, ed. David Arnold (Chichester, UK: John Wiley & Sons, 2010), 107.

²⁸ Indian Councils Act, 1861, 24 & 25 Vict., c. 67.

²⁹ Government of India Act, 1870, 33 & 34 Vict., c. 3.

³⁰ Indian Councils Act, 1892, 55 & 56 Vict., c. 14.

³¹ Indian Councils Act, 1909, 9 Ed. 7, c. 4.

³² Government of India Act, 1915, 5 & 6 Geo. 5, c. 61.

³³ Government of India Act, 1919, 9 & 10 Geo. 5, c. 101.

³⁴ Government of India Act, 1935, 26 Geo. 5, c. 2.

³⁵ For instance, the office of Governor-General of India, the Federal Legislature and the Federal Court established by the Act of 1935 under Sections 7, 18 and 200 respectively are analogous to the office of President, the Parliament and the Supreme Court established by the Indian constitution under Articles 52, 79 and 124 respectively.

³⁶ See Bipin Chandra, *India's Struggle for Independence* (New Delhi, IN: Penguin Random House India Pvt. Ltd., 2016).

resources after World War II³⁷, independence of India became a political as well as administrative necessity for Britain. Eventually, the British Parliament passed the Indian Independence Act, 1947³⁸ which began the era of constitutional transformation ingested with the spirit of transformative constitutionalism.

4. Transformative constitutionalism in independent India

The Indian experience of constitutional transformation vis-à-vis transformative constitutionalism begins in the post-colonial era through enactment of the Constitution of India, 1950 which was enacted with the objective of transforming the lives of Indian people by eliminating the injustices of the past casted upon them by colonial legislations. Further, the spirit of transformative constitutionalism has been upheld time and again by the judiciary by way of identifying and interpreting the transformative intent in the unvarying letters of constitutional provisions with the purpose of providing real and substantive justice to people in ever-changing times. For sake of clarity, the principle and practice of transformative constitutionalism in India is dealt in detail under the following sub-headings:

- (i) Transformation by new constitution
- (ii) Transformation by judicial interpretation

Transformation by new constitution

As stated above, the very purpose of constitutional transformation in the colonial era was limited to gain effective control over the dominion of Indian by the British government, however, the same was devoid of the element of transformative constitutionalism. Due to absence of this spirit of transformative constitutionalism in various constitutional reforms of colonial era, a demand for a constituent assembly took considerable pace for enactment of an indigenous constitution³⁹ which would address express the will of the people of India and transform their lives by eliminating the injustices of the past.

The demand of independence as well as a constituent assembly by the Indian people was duly addressed by the British government owing to their necessities in post-World War II period. Hence, the British government introduced the Cabinet Mission Plan⁴⁰ in the year 1946 in order to discuss the arrangements with the then prominent political leaders of India whereby the transfer of power was to be made from British government to indigenous political leadership. This Plan of 1946 came up with a proposal for formation of a constituent assembly for India which would be tasked with the work of enactment of a constitution for India. Conclusively, the Constituent Assembly of India was

³⁷ Andrew Roberts, *Eminent Churchillians* (London, UK: Weidenfeld & Nicolson, 1994), 78.

³⁸ Indian Independence Act, 1947, 10 & 11 Geo. 6, c. 30. The Indian Independence Bill was introduced in the House of Commons on 4 July 1947 and the same came to be finally enacted on 18 July 1947. See B Shiva Rao, ed., *The Framing of India's Constitution: Select Documents*, vol. 1 (New Delhi, IN: Law & Justice Publishing Co., 2021).

³⁹ See B Shiva Rao, ed., *The Framing of India's Constitution: Select Documents*, vol. 1 (New Delhi, IN: Law & Justice Publishing Co., 2021), 76.

established which first met on 9 December 1946 with the objective of framing a constitution of India.⁴¹ While meeting for drafting a constitution for independent India, the constitution makers were well informed of the transformative intent and vision with which the constitution was to be drafted and the same can be best illustrated by quoting one of the members namely, Mr. Mohd. Tahir, who addressed the Constituent Assembly chair in proceedings while stating that, “...*Before framing a constitution for a newly born nation or for a country which has attained freedom, the most essential thing, to mind, is to change its past traditions and old constitutions, which were hitherto in vogue, in such a way as to transform the whole mentality of the people of that country. Sir, you know how during the past so many years of their rule in India, Britishers have changed and enslaved the mentality of the people. Therefore, when we frame a new Constitution, it becomes our duty to make it in such a way as to transform our mentality from that of slavishness to freedom. The old mentality reminiscent of British slavery must be uprooted...*”⁴²

In support of the aforesaid proposition, it is relevant to refer to a judgment of the Supreme Court delivered on 10 May 2019, wherein Justice D.Y. Chandrachud remarked that, “*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.*”⁴³

Eventually, the Indian constitution was enacted and adopted by „*the People of India*” on 26 November 1949 and the same took complete effect from 26 January 1950. The new Indian constitution was enacted with a transformative vision⁴⁴ which became a constitutional epitome unlike its predecessors which were mere administrative documents in letter and spirit. Although the principle of transformative constitutionalism is inherent in the provisions of the Indian constitution, however, major parts and provisions of the Indian constitution are discussed below which reveals its transformative agenda while infusing the spirit of transformative constitutionalism throughout its scheme:

- (i) **Preamble:** The Preamble establishes India as a sovereign democratic republic. The trinity of liberty, equality and fraternity, as envisaged by Dr. B.R. Ambedkar⁴⁵, the Chairman of the Drafting Committee⁴⁶, lies in the heart of the Preamble of Indian constitution which infuses the spirit of transformative constitutionalism throughout its provisions. Further, an assurance by the Preamble of social, economic and political justice to all the citizens confirms to the ideals of transformative

⁴¹ The first meeting of the Constituent Assembly of India took place in Constitution Hall, New Delhi, on Monday, 9 December 1946 at 11:00 AM. See Constituent Assembly Debates (India), vol. 1 (1946).

⁴² See Constituent Assembly Debates (India), vol. 4 (1947).

⁴³ B.K. Pavitra & Ors. v. Union of India & Ors., 16 SCC 129 (2019).

⁴⁴ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Noida, IN: HarperCollins Publishers, 2019), xlv.

⁴⁵ While addressing the chair in the proceedings of Constituent Assembly, Dr. B.R. Ambedkar stated that, “...*These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty equality could not become a natural course of things. It would require a constable to enforce them...*” See Constituent Assembly Debates (India), vol. 11 (1949).

⁴⁶ On 29 August, 1947, the Constituent Assembly established a Drafting Committee under the Chairmanship of Dr. B.R. Ambedkar to prepare a Draft Constitution for India. See “Some Facts,” Parliament of India, Lok Sabha, <http://164.100.47.194/loksabha/constituent/facts.html>.

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constitutionalism which was absolutely absent in the earlier colonial constitutional documents. As also observed by the Supreme Court, *“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...”*⁴⁷

(ii) Fundamental Rights (Part III): The incorporation of fundamental rights in the Indian constitution has radically transformed the relationship of the State⁴⁸ and the individual. India people had witnessed the despotic British rule in the colonial era without any law for ensuring them the basic human rights, let alone their enforcement. The constitutional enactments in the colonial era were merely enforced to command obedience of the people and the judiciary established thereunder pronounced judgements to enforce such oppressive legislations. However, Part III of the Indian constitution guarantees to all its citizens the fundamental rights such as right to equality⁴⁹, freedom⁵⁰, right against exploitation⁵¹ and religion⁵² among various others. Most importantly, it provides a person’s right to move Supreme Court in case of infringement any of the fundamental rights guaranteed under this Part⁵³ and the same is considered to be the heart and soul of the Indian constitution⁵⁴.

(iii) Directive Principles of State Policy (Part IV): The Indian constitution aims at establishing a welfare state as against the police state as established by the colonial constitutional enactments. This part acts as a guiding light for the State to ensure good governance which should be directed towards the wellbeing of its people. Although unenforceable in a court of law⁵⁵, the directive principles form the foundation of the governance system in India. While emphasizing on the importance of Directive Principles, the Supreme Court has held that, *“...Directive Principles, which are fundamental in the governance of the country, must serve as a beacon light to the interpretation of the Constitutional provisions...”*⁵⁶. Among various social and welfare objectives, this part prescribes for separation of judiciary from executive⁵⁷ while ensuring judicial independence which marks a major transformation from the justice administration system in the colonial era where the judiciary majorly acted as a

⁴⁷NavtejJohar&Ors. v, Union of India, 10 SCC 1 (2018).

⁴⁸ As per Article 12 of the Indian constitution, „the State“ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. See Ind. Const. art. 12.

⁴⁹Ind. Const. arts. 14-18.

⁵⁰Ind. Const. arts. 19-22.

⁵¹Ind. Const. arts. 23-24.

⁵²Ind. Const. arts. 25-28.

⁵³Ind. Const. art. 32.

⁵⁴ While presenting his views on Article 32 in the proceedings of Constituent Assembly, Dr. B.R. Ambedkar stated that, *“...If I was asked to name any particular article in this Constitution as the most important--an article without which this Constitution would be a nullity--I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance...”* See Constituent Assembly Debates (India), vol. 7 (1948).

⁵⁵Ind. Const. art. 37.

⁵⁶Olga Tellis v. Bombay Municipal Corporation, 3 SCC 545 (1985).

⁵⁷Ind. Const. art. 50.

mouthpiece of the tyrannical executive will. This spirit of judicial independence runsthrough the provisions pertaining to Union Judiciary⁵⁸ and State Judiciary⁵⁹.

(iv) Universal Adult Suffrage (Article 326):The Indian Councils Act, 1909⁶⁰ introduced the system of communal representation⁶¹ in the colonial era which not only aggravated the communal divide among Hindus and Muslims in India but also officially sowed the seeds of partition⁶² of an undivided India. However, this evil was conveniently addressed by the constitution makers and same was removed by provision of a universal adult suffrage whereby each citizen of India, who is of or above the age of 18 years is entitled to vote in elections to the House of the People⁶³ and state Legislative Assemblies⁶⁴ in India. The said provision has truly transformed India in becoming the largest democracy in the world⁶⁵.

The aforesaid parts and provisions have laid down the founding stones of transformation in the Indian constitution which has provided it the character of a Transformative Constitution. Moreover, these further substantiates the hypothesis that enactment of the Constitution of India, 1950 by the Constituent Assembly has ensured the presence of transformative constitutionalism in Indian constitutional law.

Transformation by judicial interpretation

While highlighting the transformative objective of the Indian constitution, the Supreme Court in a judgement dated 19 September 1975 has observed that, “...*the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy.*”⁶⁶ Taking into account the aforesaid observation, on 6 September 2018, a constitution bench⁶⁷ of the Supreme Court has further affirmed presence of transformative constitutionalism in Indian constitution by observing that, “...*the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.*”⁶⁸

Further, while emphasizing upon its role in upholding the transformative vision of the Indian constitution, another constitution bench of the Supreme Court in a judgement dated 27 September 2018 has observed that, “...*True to its transformative vision, the text of the Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of*

⁵⁸Ind. Const. pt. 5, ch. 4.

⁵⁹Ind. Const. pt. 6, ch. 5.

⁶⁰Indian Councils Act, 1909, 9 Ed. 7, c. 4.

⁶¹The communal representation introduced by the Indian Councils Act, 1909 provided for a system of separate electorates which prescribed that only Muslims voters can elect Muslim representatives. See Barbara Metcalf and Thomas Metcalf, *A Concise History of Modern India*, 2nd ed. (Cambridge, UK: Cambridge University Press, 2006).

⁶²The Indian Independence Act, 1947 declared in independence of all the territories covered under the British Crown or its suzerainty. While declaration of such Independence, the Act provided that *two independent Dominions shall be set up in India, to be known respectively as India and Pakistan.* See Indian Independence Act, 1947, 10 & 11 Geo. 6, c. 30, §1.

⁶³Ind. Const. art. 81.

⁶⁴Ind. Const. art. 170.

⁶⁵“India: the biggest democracy in the world,” October 2014, At a Glance, European Parliament, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2014/538956/EPRS_ATA\(2014\)538956_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2014/538956/EPRS_ATA(2014)538956_REV1_EN.pdf).

⁶⁶State of Kerala & Anr. v. N.M. Thomas & Ors., 2 SCC 310 (1976).

⁶⁷ The constitution bench of the Supreme Court consists of at least five supreme court judges in order to decide a substantial question of law with respect to interpretation of the Constitution. See Ind. Const. art. 145, cl. 3.

⁶⁸Navtej Johar & Ors. v. Union of India, 10 SCC 1 (2018).

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dignity and equality for its citizens..."⁶⁹ Furthermore, while addressing the International Judicial Conference, 2020, the president of India, Ram Nath Kovind has duly admired the role of Indian judiciary in bringing social transformation by specifically acknowledging that *the Supreme Court of India has led progressive social transformation*⁷⁰ in India through its various judgements directed towards gender justice.

For instance, the Supreme Court in the case of *Navtej Singh Johar & Ors v. Union of India*⁷¹, by interpreting the transformative intent in Article 14⁷² guaranteeing right to equality to all sections of society, has declared decriminalization of the offence under Section 377⁷³ of the Indian Penal Code while ensuring gender justice to LGBT community by way of social transformation, though the same was not envisaged by the constitution makers while incorporating Article 14 in the Constitution at the time of constitution making. In another instance, the Supreme Court in the year 1997 in the case of *Vishakha & Ors. v. State of Rajasthan & Ors.*⁷⁴, had issued comprehensive guidelines for safeguarding women against sexual harassment at workplace which popularly came to be known as „Vishakha Guidelines“. The impact of this decision was so intensive that later in the year 2013, the Parliament of India came up with „Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013“⁷⁵ dealing the rights and protection of women against sexual harassment at workplace. Another landmark instance comes on the issue of protection of marital rights of Muslim women wherein the Supreme Court in the case of *ShayaraBano v. Union of India & Ors.*⁷⁶ declared prohibition on practice of triple talaq namely, *talaq-e-biddat*. After this judgement of the Supreme Court, the parliament enacted „The Muslim Women (Protection of Rights on Marriage) Act, 2019“⁷⁷ while prescribing the practice of *talaq-e-biddat* shall not only be considered as void and illegal⁷⁸ but also punishable⁷⁹. While pursuing the transformative object of the Indian constitution, the Supreme Court has accomplished various other transformative objectives such as

⁶⁹Joseph Shine v. Union of India, 3 SCC 39(2019).

⁷⁰“Valedictory Address by the President of India, Shri Ram Nath Kovind at the International Judicial Conference,” February 23, 2020, The President of India, https://presidentofindia.nic.in/writereaddata/Portal/Speech/Document/807/1_sp230220.pdf.

⁷¹NavtejJohar&Ors. v, Union of India, 10 SCC 1 (2018).

⁷²Article 14 of the Indian constitution states that, “*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*” See Ind. Const. art. 14.

⁷³Section 377 of the Indian Penal Code, 1860 stated that, “*Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*” See Indian Penal Code, G.O.I. § 377 (1860).

⁷⁴Vishakha&Ors. v. State of Rajasthan &Ors., 6 SCC 241(1997).

⁷⁵This is a central act no. 14 of 2013. The act received the presidential assent on 22 April 2013 and commenced on 9 December 2013. See Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, G.O.I. (2013).

⁷⁶ShayaraBano v. Union of India &Ors., 9 SCC 1(2017).

⁷⁷This is a central act no. 20 of 2019. The act received the presidential assent on 31 July 2019 and was deemed to be in force from 19 September 2018. See Muslim Women (Protection of Rights on Marriage) Act, G.O.I. (2019).

⁷⁸Section 3 of The Muslim Women (Protection of Rights on Marriage) Act, 2019 states that, “*Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.*” See Muslim Women (Protection of Rights on Marriage) Act, G.O.I. § 3 (2019).

⁷⁹Section 4 of The Muslim Women (Protection of Rights on Marriage) Act, 2019 states that, “*Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.*” See Muslim Women (Protection of Rights on Marriage) Act, G.O.I. § 4 (2019).

recognition of right to privacy⁸⁰ under Article 21⁸¹; decriminalization of adultery⁸² by striking down Section 497⁸³ of the Indian Penal Code, 1860 *et aland* continues to do so till date.

Hence, as evident, the Supreme Court has time and again acknowledged the transformative purpose of the Indian constitution in order to dispense real and substantive justice to the people of India while preventing redundancy of the constitutional text in ever-changing Indian society.

5. Conclusion

The inherent dynamism of the constitutional provisions worked by an active supreme court being conscious of the transformative intent of the Indian constitution has truly transformed the lives of people of India into better than it earlier was in the colonial era and also enabled the constitution to become the longest surviving constitution in the post-colonial world. While analyzing constitutional transformation vis-à-vis transformative constitutionalism in the post-colonial India, it can be conveniently concluded that it is important that the letters of the constitutional text must be enacted with enough flexibility so as to meet the progressive needs of the society, but it is equally important that institutions such as judiciary, which infuses life into the dead letter of the constitutional text, must also recognize such transformative element and bring it into practice so as to provide real and substantive justice to people as well as to ensure that the constitution which is worked upon by it endures for ages to come.

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⁸¹ Article 21 of the Indian constitution states that, "No person shall be deprived of his life or personal liberty except according to a procedure established by law." See Ind. Const. art. 21.

⁸²Joseph Shine v. Union of India, 3 SCC 39(2019).

⁸³ Section 497 of the Indian Penal Code, 1860 stated that, "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor." See Indian Penal Code, G.O.I. § 497 (1860).

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