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**NAME of the Author:** Saptaparni Raha

**Designation:** Student, LLM 1ST Year, 2ND Semester

**Institution**: Brainware University

**E -Mail ID:** [saptaparniraha475@gmail.com](mailto:saptaparniraha475@gmail.com)

**Contact Number:** 9163560631

**THE CONCEPT OF TRANSFORMATIVE CONSTITUTIONALISM VIS-À-VIS INDIAN JUDICIARY WITH SPECIAL REFERENCE TO ENVIRONMENTAL CONSTITUTIONALISM: AN ANALYTICAL STUDY**

**Abstract**

The constituent assembly struggled and delebarated about how the document would decide a person's fundamental rights and how the scope of the governmet's authority should be for 166 days while they drafted the Indian constitution. Many visions and objectives were discussed. Since we adopted the Indian Constitution, the nation has seen significant change. There was many visions and goals were discussed. Transforming something implies bringing about a change.Since we adopted the Constitution of India it has played a crucial role in transforming the country. The term transformation connotes bringing a change. The author in this article shall explain transformative Constitutionalism in Indian Judiciary by analysing the seminal cases  “*I.C. Golaknath & Ors vs State of Punjab & Anrs (1967),R C Cooper v Union of India(1970),Madhav Rao Jivaji Rao Scindia v Union of India(1971),Kesavananda Bharati v. State of Kerala (1973),Mumbai Kamghar Sabha v. Abdul Bha(1976),Indira Nehru Gandhi vs Shri Raj Narain & Anr (1975),and Maneka Gandhi vs Union Of India on 25 January, 1978”. [[1]](#footnote-1)*Furthermore, arthor shall also examines the challenges and limitations faced by the judiciary in pursuing transformative constitutionalism in the context of environmental issues. It evaluates the effectiveness of judicial interventions in addressing environmental concerns and fostering sustainable development.

**Keywords:** Constitutionalism, Transformative Constitutionalism, Constitution of India, Constituent Assembly and Indian Judiciary.

**Introduction**

Transformative Constitutionalism seeks to bring about societal change by instilling the principles of liberty, equality, and fraternity in the social order, aligning with the objectives of the Indian Constitution. It emphasizes the paramount importance of constitutional morality and recognizes the immutability of the constitution's basic structure. Transformative constitutionalism, according to Justice Chandrachud, is the insertion of ideals like liberty, equality, fraternity, and dignity into the social fabric. It is a crucial and necessary process that defines the essence of democracy and the constitutional framework within it. The aim of this transformation is to uphold equality and liberty in society. Constitutionalism, in essence, entails limiting the government's power and defining these limitations based on their authority. Thus, the introduction of the values of liberty, equality, and fraternity into the social order can be viewed as transformative constitutionalism.

**Origin of Transformative Constitutionalism**

In 1608, King James I of England asserted his authority to personally decide any legal case. However, Chief Justice Coke objected, stating that cases should be adjudicated in a court of law according to the established legal and customary practices of England. The king responded by suggesting that being subject to the law would be treasonous. In turn, Coke emphasized that the king should be subject to God and the law, rather than being subject to any individual. This exchange exemplified the affirmation of judicial power and the rule of law over arbitrary decisions by the sovereign, laying the foundation for judicial activism during the 1600s. Subsequently, Marbury v. Madison, determined that judicial review does not imply the superiority of the judiciary over the legislative branch. Instead, it recognizes that the power of the people, as expressed in the Constitution, surpasses both branches of government. The intentions of the people take precedence over the intentions of their representatives.[[2]](#footnote-2)

**Understanding Transformative Constitutionalism: Harnessing Constitutional Principles for Social Progress**

The legal theory of transformative constitutionalism is defined as a concept that focuses on how constitutionalism can drive social change and protect human rights. It arose as a response to the limitations of traditional constitutionalism, which mainly aimed to restrict government power and safeguard individual rights.

In contrast, transformative constitutionalism places greater importance on the constitution's role in promoting social justice and bringing about societal transformation. It recognizes the constitution's significance in addressing historical injustices, promoting equality, and advocating for marginalized groups.

According to the theory, the constitution should not only establish a framework for governance but also act as a catalyst for social progress. This involves acknowledging and safeguarding citizens' socio-economic rights.

In practice, transformative constitutionalism involves using constitutional provisions to advance social change through judicial interpretation, legislative action, and government policies. It also necessitates active involvement from civil society and other stakeholders in shaping and implementing constitutional reforms.

Overall, it signifies a shift in our understanding of constitutionalism and highlights the constitution's role in promoting social justice and transformation.

**The effect of Transformative Constitutionalism in the Environmental Law of India**

Constitutional protections for the environment that include both rights and duties for the government are referred to as environmental constitutionalism. According to the Gujarat High Court, the dumping of pollutants from the petitioners' factories onto public highways or the public drainage system ran counter to the state's fundamental duty to protect the environment. The High Court of Rajasthan similarly held that anyone who endangers the ecological balance or degrades, pollutes, or manipulates natural resources including air, water, rivers, seas, or other elements is in violation of their fundamental environmental duty. In a writ case alleging the breach of fundamental obligations, these honourable high courts cited the fundamental environmental duty to support their instructions to the pertinent agencies.

**Origin environmental Constitutionalism in India**

There were no clauses specifying citizens' obligations when the Indian Constitution was first passed in 1950. The Drafting Committee received a draught constitution in 1947 from Sir BN Rau, the Constituent Assembly's constitutional consultant, which contained a section on the duties of citizenship. But in the end, this part was left out.Some members of the Constituent Assembly suggested during discussions in 1948–1949 that the Constitution should contain the rights, obligations, and responsibilities of citizens.There were no clauses specifying citizens' obligations when the Indian Constitution was first passed in 1950. The Drafting Committee received a draught constitution in 1947 from Sir BN Rau, the Constituent Assembly's constitutional consultant, which contained a section on the duties of citizenship. But in the end, this part was left out.Some members of the Constituent Assembly suggested during discussions in 1948–1949 that the Constitution should contain the rights, obligations, and responsibilities of citizens. Others countered that every right entails and involves a matching obligation, thinking that citizens would carry out their responsibilities even if they weren't explicitly stated.[[3]](#footnote-3)

**The Judiciary's Interaction with the Constitutional Duty Towards the Environment**

This section examines how environmental constitutionalism and the goal of environmental conservation may be impacted by the judiciary's involvement with individual citizens' constitutional environmental responsibilities. In order to shed light on these issues, it investigates judicial procedures in India that are connected to citizens' fundamental environmental responsibilities. The analysis shows that the judiciary uses the constitutional obligations of citizens and the State to protect the environment to interpret the right to life as including a right to the environment or to restrict other constitutional rights. Additionally, the judiciary departs from the original constitutional aim and structure of these clauses by creating links between the State and the fundamental environmental responsibilities of citizens. Furthermore, by recognising citizens as responsibility-bearers alongside the State and the environment and future generations as the appropriate right-holders, the judiciary broadens the scope of the fundamental environmental obligation of citizens in two important ways.[[4]](#footnote-4)

**Relationship between constitutional environmental duties**

The Constitution's genesis and design distinguish between the State's environmental obligations (Part IV) and citizens' obligations (Part IVA). The judiciary, too, frequently obfuscates the line between the two. The High Court of Himachal Pradesh, which recognised the similarities between the constitutional environmental obligations of residents and the State, serves as an illustration of this.Later, the Supreme Court acknowledged that the purpose of adding Article 51A (g) was for Parliament to ensure that citizens preserve the spirit and message of Articles 48 and 48A as a fundamental duty.

Additionally, it was designed to help achieve the goals outlined in Articles 48 and 48A. In contrast to Article 48A's emphasis on the "environment," which includes "forests, lakes, rivers, and wildlife," Article 51A(g) utilises the word "natural environment." More recently, a few High Courts have emphasised that the State's obligation to protect the environment, as stated in the Directive Principles of State Policy (DPSP), is consistent with the citizens' fundamental environmental duty. Despite the judiciary's lack of further explanation of these remarks, these opinions continue to have an impact on how the fundamental environmental duty is construed in court decisions.[[5]](#footnote-5)

**Transformative Constitutionalism in South Africa**

The end of colonial control did not usher in the freedom, democracy, and wealth that were expected in many regions of Africa. Instead, the early years of the post-colonial era were characterised by political upheaval, military coups, dictatorships, civil unrest, corruption, abuses of human rights, and general hardship. This situation is comparable to the one in George Orwell's "Animal Farm," in which one oppressor was replaced by another. The majority of Africans in South Africa did not significantly benefit from the formation of the South African Republic in 1961, which ended allegiance to the British Crown.Instead, it enhanced and extended the suffering brought on by the apartheid state. Apartheid-era South Africa experienced many of the same issues as other colonised countries in Africa, such as racial discrimination, disenfranchisement, dispossession, political exclusion, and socioeconomic underdevelopment. Although the end of apartheid in South Africa cannot be compared to the liberation of the rest of Africa from European colonial control, it was a process of freedom from a similar situation. As a result, the transition in South Africa after the multiracial elections of 1994 can be compared to the liberation of the rest of Africa because the country's future was now in the hands of a popularly elected government made up mostly of the historically marginalised black majority.

**The Evolution of Constitutionalism and the Preservation of Rights in Africa**

A key issue in constitutional law and the foundation of constitutionalism has been the search of a balance between anarchy and tyranny. Constitutions are primarily meant to provide a framework for the use of public power, ensuring that the government is neither oppressive nor weak. The idea of a government constrained by the law is thus promoted by constitutionalism, with the constitution retaining the ultimate power in the legal system. Protecting fundamental freedoms and rights, maintaining the separation of powers, having an independent judiciary, examining laws for constitutionality, and controlling constitutional amendments are all essential components of constitutionalism. However, it is important to note that these elements alone do not guarantee constitutionalism. A crucial aspect of constitutional justice is the provision of a mechanism for citizens to seek legal recourse in courts for constitutional violations and to enforce constitutional obligations. Additionally, constitutionalism requires a commitment from the political elite to respect and abide by constitutional limits, as mere existence of constitutions does not guarantee their meaningful implementation.

In post-colonial Africa, constitutionalism has been a challenging concept to achieve. Scholars have noted the absence of constitutionalism despite the presence of constitutions in many African countries. After gaining independence, numerous constitutions were disregarded by despotic leaders who showed little regard for the rule of law. The early years of independence were marked by the rule of "founding fathers" who considered themselves above accountability and immune to legal challenges. These leaders were idolized and often viewed as being above the law. The presidents of Kenya, such as Jomo Kenyatta and Daniel arap Moi, were revered and believed to have constitutional immunity.

While several post-independence constitutions, like Kenya's, initially set up structures for multiparty democracy and the defence of human rights, the next period was characterised by one-party rule, individual presidential dictatorships, or military juntas. Numerous post-colonial governments repressed political opposition while omitting to carry out important social, political, and economic reforms. For four decades, the independence party dominated politics in Kenya, where the personal presidency completely intolerated political rivalry. Similar issues developed under military administration in Ghana, Zimbabwe, Malawi, Uganda, Guinea, and Nigeria.

The ensuing era was characterised by one-party rule, personal presidential dictatorships, or military juntas, despite the fact that certain post-independence constitutions, like Kenya's, initially provided frameworks for multiparty democracy and the preservation of human rights. Numerous post-colonial governments repressed political dissent and fell short of enacting major social, political, and economic reforms. Kenya, for example, endured four decades of independence party domination and total intolerance of political rivalry during personal presidential rule. During military control, comparable circumstances emerged in Ghana, Zimbabwe, Malawi, Uganda, Guinea, and Nigeria.

The apartheid regime in South Africa is well-documented for its systemic racial discrimination, marginalization, and dispossession, which were enforced through discriminatory laws. Dissidents faced violence, resulting in tragic consequences such as death, torture, detention without trial, and imprisonment. The following section highlights the failure of courts to effectively uphold constitutionalism and the rule of law during periods of dictatorship and political repression.[[6]](#footnote-6)

**In Africa, when constitutionalism falters and human rights abuses prevail, the courts assume a pivotal role.**

Courts of law must preserve the rule of law, constitutional principles, and fundamental rights in the face of failed constitutionalism and human rights violations in Africa. The state and its agents, who are supposed to protect these ideals, frequently end up disregarding them because of the difficulties they cause individuals in positions of power. This begs the question of how, in the face of autocratic and oppressive regimes, the courts upheld their constitutional duties, particularly in the early years of Africa's freedom. In post-colonial Africa, the courts' reactions to political repression and human rights violations by the state varied, but a consistent trend can be seen: the courts were either impotent or complicit. Numerous instances back up this assertion For instance, in Kenya during the time of one-party rule, the court battled a tyrannical president to defend and uphold human rights.

In the Matiba v. Moi case, it was evident that the judiciary frequently shied away from making judgements that may anger the President. A petition challenging President Moi's election in this instance was rejected on a technicality since the petitioner did not personally sign the petition as required by election law. Based on this technicality, the court denied the petitioner justice while ignoring the substantial arguments stated. Similar occurrences when petitions were rejected on technicalities in later elections prevented the petitioners from achieving justice.

Gibson Kamau Kuria v. Attorney-General is another case that demonstrates the courts' complicity or inability in preserving the rule of law and fundamental rights in Kenya during the one-party system. In this instance, the government seized a human rights advocate's passport to stop him from leaving the country to accept an international honour. The Chief Justice had not set norms to govern the litigation process, according to the High Court, therefore it was unable to enforce his right to freedom of movement. Despite former cases when courts had upheld rights without such obstacles, this ruling gave technicalities precedence over the protection of fundamental rights. This shows that the executive, who was determined to impede the petitioner, was challenged by the court, but neatly avoided by doing so by resorting to technicalities.

**Transformative Environmental Constitutionalism: A new concept in South Africa**

The ideas of transformational and environmental constitutionalism are combined in transformative environmental constitutionalism. A recently developed international idea known as "environmental constitutionalism" acknowledges the need for constitutional protection of the environment. African environmental legislation should adopt a more ecocentric stance when drafting regulations to protect biodiversity and address international environmental problems. Regardless of how humans may perceive it, this strategy recognises the intrinsic importance of all life on Earth, including non-human life. According to transformative environmental constitutionalism, there are no true ecocentric legal rights pertaining to nature, hence in order to address the problems of the Anthropocene age, we should look at the possibility of ecocentric applications. This viewpoint implies the necessity for a particular strategy for "greening the judiciary".[[7]](#footnote-7)

**Eco-centric environmental laws in South Africa in light of the Kruger case**

In its defence of administrative justice law, the High Court of South Africa mostly maintains a homocentric viewpoint, omitting to take rhinos into account. As a result, the value of substantive environmental legislation and concepts that have an ecocentric orientation is still widely underappreciated or ignored.

**Statement of Western Cape High Court in Kruger Case**

Legodi J would have incorporated the NEMA principles into the Kruger project to promote a more environmentally friendly approach. In a legal case regarding the assessment of a coal-fired power station's approval without considering climate change impacts, the Western Cape High Court clarified that the directive principles outlined in NEMA serve as guidelines for all government entities. These principles direct the interpretation, administration, and execution of NEMA, as well as other environmental protection or management laws. Competent authorities must consider these directive principles when evaluating applications for environmental authorization.[[8]](#footnote-8)

**Role of Indian Judiciary ( 1967-73)**

***I.C. Golaknath & Ors vs State of Punjab & Anrs (1967):***The Supreme Court, in addressing the Constitutional validity of the 17th Amendment, introduced the concept of "prospective overruling." It concluded that Parliament lacked the authority to amend Part III of the Constitution, which encompasses fundamental rights, with the intention to diminish or curtail them”.[[9]](#footnote-9)

***R C Cooper v Union of India(1970)[[10]](#footnote-10):*** The validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act, popularly known as the Bank Nationalisation Act, was brought into question concerning the legislative authority of Parliament. The Act was deemed unconstitutional primarily due to its unreasonableness, as it imposed restrictions on banks to engage in "non-banking business," effectively rendering them unable to conduct any business at all.”

***Madhav Rao Jivaji Rao Scindia v Union of India(1971)[[11]](#footnote-11):* “**The main concern raised was regarding the President's appropriate exercise of power in de-recognizing the princes. The court ruled that, in accordance with Article 53 of the Constitution, the President must exercise the executive power of the Union "in accordance with law." This authority was intended to be utilized to uphold and protect the Constitution rather than undermine it.

***Kesavananda Bharati v. State of Kerala (1973): "***In the case of Kesavananda Bharati in 1973, the Supreme Court established that the Parliament possesses the power to amend any provision of the constitution, provided that such amendments do not infringe upon the Basic Structure of the Constitution"[[12]](#footnote-12).

**Transformation Between 1975-78**

***Indira Nehru Gandhi vs Shri Raj Narain & Anr (1975):* “**The majority bench emphasized that free and fair elections are an integral part of the Constitution's fundamental framework. Any attempt to deprive the people of India of this right would constitute a significant violation of their rights. The court further determined that the amendment also contravened other essential principles of the Constitution, including the rule of law and the principles of natural justice, such as the right to be heard i.e Audi Alteram Partem.”[[13]](#footnote-13)

***Mumbai Kamghar Sabha v. Abdul Bha (1976): “***The Supreme Court introduced the concept of judicial activism, albeit without explicitly using the term.”[[14]](#footnote-14)

***Maneka Gandhi v. Union of India (1978): “***The Supreme Court replaced the "procedure established by law" with the due process clause in Article 21 to limit the absolute power and interference of the Executive with individual freedom*”.[[15]](#footnote-15)*

***Transformation from 1978 onwards***

***Vishakha v.State of Rajasthan( 1997):*** *"*The Supreme Court, in its wisdom, has issued guidelines to address and prevent sexual harassment in the workplace. Additionally, the Court has provided a clear definition of sexual harassment*.[[16]](#footnote-16)*

***National Legal Services Authority (NALSA) v. Union of India (2014):****“*The Court's role is to grasp the fundamental objective and essence of the Constitution in promoting societal well-being. Our Constitution, akin to the societal laws, is a dynamic entity. It is founded upon factual and social realities that continuously evolve. At times, legal changes anticipate and aim to catalyze societal transformations, while in other instances, legal changes are prompted by the existing social reality.*[[17]](#footnote-17)*

***Navtej Singh Johar vs Union of India (2018):*** Under Section 377 of the Indian Penal Code, 1860, consensual or non-consensual sexual conduct between two adults of the same sex was considered a criminal offense. However, the petitioner challenged this section, arguing that it violated Articles 14, 21, and 15 of the Constitution. As a result, Section 377 of the Indian Penal Code was decriminalized.[[18]](#footnote-18)

***Joseph Shine vs Union of India (2018):*** The previous criminalization of adultery under Section 497 of the Indian Penal Code imposed penalties on men engaging in sexual intercourse with married women without the husband's consent. However, this judgment decriminalized adultery.[[19]](#footnote-19)

***Indian Young Lawyers Association vs. the State of Kerala (2018):***The petitioner filed a Public Interest Litigation challenging the prohibition on the entry of menstruating women into the Sabrimala temple. It was contended that this restriction violated Articles 14, 15, 17, 25, and 26 of the Constitution. The Supreme Court, in its judgment, granted permission for women of all ages to enter the temple.[[20]](#footnote-20)

***Vineeta Sharma vs Rakesh Sharma (2020):*** Both sons and daughters should be granted coparcenary rights, including daughters born prior to the amendment of the Hindu Succession (Amendment) Act, 2005. This ruling reinforces the significance of the right to equality enshrined in Article 14 of the Constitution. [[21]](#footnote-21)

***Karnataka Hijab ban case (2022):*** Requiring girls to remove their hijabs before entering school invades their privacy, undermines their dignity, and denies them access to secular education, which contravenes Article 19(1)(a), Article 21, and Article 25(1) of the Indian Constitution."[[22]](#footnote-22)

**Conclusion and suggestions**

An activist judiciary plays a crucial role in upholding the "rule of law." However, it is essential that judicial actions and interpretations, even when driven by activism, are firmly grounded in the Constitution. The emergence of principles without a constitutional basis cannot be justified. Therefore, a responsible activist judiciary must give life to the Constitution's provisions, which may otherwise remain dormant. The transformative nature of the constitution contributes to continuous societal progress. India, being a developing country with a pluralistic society encompassing diverse faiths and beliefs, has historically accepted certain forms of discrimination. However, the Indian Constitution guarantees fundamental rights and embodies a set of values that the judiciary is entrusted to safeguard.[[23]](#footnote-23)

The court is in a key position in the field of transformative constitutionalism because of its duty to interpret and uphold fundamental rights as prescribed by the constitution. The paper makes the case that, in light of this relevance, judges in the framework of transformative constitutionalism must go above and beyond simple legal interpretation in order to accomplish the goals of the law. Judges must undergo a psychological transformation in order to realise the high expectations placed on them and take a more certain posture within the context of governance. To do this, courts must adopt a "rights-friendly jurisprudence," which places a high priority on safeguarding fundamental rights, and be prepared to refuse respect to political authorities where the law and the Constitution are being violated or in danger of being violated.Determining the precise traits of the "new" judicial mindset that transformative constitutionalism demands may be difficult, but it is a necessary change that must be made, and it is likely to keep judges and commentators' attention for a while.

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