TRANSFORMATIVE CONSTITUTIONALISM: RENAISSANCE OF FUNDAMENTAL RIGHTS IN INDIA

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LL.M. II Semester

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•	International Cases
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9.	West Virginia State Board of Education v. Barnette
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6.	Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt
7.	Chintamani Rao v. State of M.P

8.	Daryao v. State of UP
9.	Dharam Dutt v. Union of India
10.	Fazal Rab Chaudhary v. State of Bihar
11.	Francis Coralie Mullin v. UT of Delhi
12.	Hathi Singh Manufacturing Co. v. Union of India
13.	Indra Sawhney v. Union of India
14.	Jagdish Lal v. State of Haryana
15.	Jagjit Singh v. State
16.	Kathi Ranning v. State of Saurashtra
17.	Kanaiyalal v.Indumati
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19.	Lohana Vasantlal Devchand v. The State
20.	M.G. Badappanavar v. State of Karnataka
21.	M. Nagraj v. Union of India
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41.	Society of Un-aided Private Schools of Rajasthan v. Union of India
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51.	T. Devdasan v. Union of India
52.	Union of India v. Virpal Singh Chauhan
53.	Vasantha v. Union of India

Table of Statues

1. 1950- Constitution of India.
2. 1935- Government of India Act.
3. 1860- Indian Penal Code.

Table of Abbreviations

Serial no.	Abbreviation	Explanation
1.	Air	All India Reporter
2.	Anr	Another
3.	Art.	Article
4.	Ch.	Chapter
5.	CJ.	Chief Justice
6.	cl.	Clause
7.	DLT	Delhi Law Tribunal
8.	DPSP	Directive Principles of State Policy
9.	HC	High Court
10.	ICCPR	International Covenant on Civil and Political Rights
11.	ICESCR	International Covenant on Economic, Social and Cultural Rights
12.	INC	Indian National Congress
13.	J.	Justice
14.	Ltd	Limited

15.	OBCs	Other Backwards Classes
16.	S.	Section
17.	SC	Supreme Court of India
18.	SCs	Schedule Castes
19.	STs	Schedule Tribes
20.	UDHR	Universal Declaration of Human Rights
21.	UN	United Nations
22.	UP	Uttar Pradesh
23.	USSR	Union of Socialist Republic

Chapter I

1.1 Introduction

The concept of fundamental rights flows from the human rights philosophies which have been a part of the human civilization since time immemorial. Fundamental rights differs from the human rights as fundamental rights are regarded the basic rights which are necessary for a dignified democratic life and therefore, can be enforced against the State. It is the duty of the State to protect these rights against all odds and provide to its citizens a meaningful existence. But, as the saying goes power corrupts and absolute power corrupts absolutely. It has been found that the worst human rights abuses have been at the hand of the State and therefore, different measures have been put in place overtime to regulate the excess of the State's power.

The making of Indian Constitution was momentous in the country's freedom struggle. It was an opportunity to draft the law of the land for the governance of its own people. The members of the Constituent Assembly were aware of this fact and knew well of the prevailing circumstances in the country. Therefore, they chose very specific fundamental rights and provided them exclusive place in the Constitution so as to keep them away from the clutches of the State. But, the adequacy of such protection was felt not to be sufficient and therefore an independent judiciary was put in place to be the guardian and protector of these fundamental rights. Thus, the role of Constitutional Courts is immense when it comes to the interpretation of Constitution to promote individual liberties and keep the Constitution alive to the changing need of the society.

The idea of constitutionalism focuses on the similar objectives of limiting the power of the State and advocates checks and balances in the system of governance. One of the sub-sect of constitutionalism is transformative constitutionalism. As the scope of fundamental rights evolves the role of judiciary as an organ of the State increases. Being an organ of the State, the judiciary cannot be bestowed with unlimited power so as to interpret the Constitution on one's own understanding and personal opinions. Therefore, the idea of transformative constitutionalism becomes important. It takes seriously the text of the Constitution, its structure and the historical moment of its framing. Evethough, it considers the importance of the past but does not remain fixed there. It advocates a transformative reading of the Constitution but employs certain measures by way of which any transformative interpretation

of the Constitutional provision provided by the judiciary has to be substantiated by the founding principles upon which the Constitution rests.

1.2 Statement of Problem

With changing times the scope of fundamental rights have evolved substantially. With new fundamental rights been demanded from the State the role of judiciary as the custodian of fundamental rights has increased greatly. But judiciary being a part of the State cannot be bestowed will unlimited power to interpret the Constitution based on one's understanding and personal opinions. Therefore, the question as to how the Constitution has to be interpreted becomes important. The concern raised here is that, whatever interpretation is provided to the Constitutional provisions it must be justified by some substantial grounds. These substantial grounds can be the founding principles upon which the Constitution rests. Transformative constitutionalism can be the answer for the same as it aims to understand these founding principles and use them to justify the increasing role of judiciary in enlarging the scope of fundamental rights.

1.3 Literature Review

The literature will be taken from books, online sources, newspapers and articles available on internet as well as databases.

1. *THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY OF NINE ACTS- GAUTAM BHATIA, HaperCollins Publishers, 2019.*

   This book formulates an idea which revolves around the historical reading of the Indian Constitution to showcase its progressive potential. In this books the author claims that the judiciary has been interpreting the Constitution in two contrasting ways.

   The first is the formal reading of the Constitution under which it is regarded as an evolutionary document which has culminated as a result of the constitutional processes that were taking place during the colonial times. Therefore the Constitution must be read keeping in mind such historical backgrounds.

   The alternate reading, that the author is promoting, is the transformative reading of the Constitution under which the Constitution is to be treated as a new testament which is specifically designed to govern the Indian. This transformative document is not to be interpreted with a conventional understanding but an open mind to

accommodate the changing contours of fundamental rights and to help keep the Constitution alive for the need of the changing society.

2. *M.P. Singh, Constitutionalism in the Indian Comparative Perspective, 11 NUJS L. Rev. 4 (2018).*

   In this article the author has investigated into the historical evolution of constitutionalism. He cites a number of authors who have been trying to conceptualize the idea of constitutionalism. He starts his enquiry from the time of Plato and Aristotle and the Roman Empire when the very idea of rule of law was in its very raw shape. From there he travels to the understanding of common law system when at the time of Magna Carta the King was compelled to accede to the demand of the people and was subjected to the common law system and finally ends his investigation to the latest understanding of the term transformative constitutionalism.

   In all his deliberation over the historical evolution of constitutionalism it is found that the one essential quality that is common to every philosopher or academician who has worked on the same is that it is a legal limitation on the power of the government.

   Lastly, he explains D.D. Basu's, who has been one of the most profound constitutional law academician in India, understanding of the idea of constitutionalism. After all these discussion he explains how the term transformative constitutionalism is being used by the India judiciary to accommodate different fundamental rights.

3. *Zia Mody, 10 Judgements That Change India, Penguin Random House India.*

   The book covers 10 judgements from India's independence in order to showcase how the Indian judiciary pronouncements help in bringing change in the Indian legal regime. It does not only cover the pronouncement part of the judgement but shows the overall scenario that was prevalent at that particular time when the case came before the court.

   The ten judgements that the book covers have had a profound impact on the lives of the common citizenry of the country and the author aims to provide a glimpse of how the judiciary, which was at once considered the weakest branch of the state machinery, build its way to be the influential in the thriving Indian democracy.

   The book is important for this research as it shows the circumstances that surrounds a particular case which in one way or the other influenced the decision of the court. It is this form of interpretation of the Indian Constitution that has to be checked on the

founding principles of the Indian Constitution and this is what transformative constitutionalism aims to achieve.

1.4 Objective

This research has been undertaken to fulfil the following objective:

1. To understand the concept of Fundamental Rights.
2. To assess and analyse Fundamental Rights under Constitution of India.
3. To undertake conceptual understanding of Constitutionalism.
4. To understand the notion of Transformative Constitutionalism.
5. To analyse the role of Constitutional Courts in developing the concept of Transformative Constitutionalism in India.

1.5 Research Questions

This dissertation seeks to answer the following questions:

1. What are Fundamental Rights?
2. What are Fundamental Rights guaranteed by the Constitution of India?
3. What is Constitutionalism and Transformative Constitutionalism?
4. What is the role of Constitutional Courts in bringing the concept of Transformative Constitutionalism in India?

1.6 Limitations:

This dissertation will deal with the evolution of Fundamental Rights in the context of Indian democracy. It will deal with the understanding of transformative constitutionalism as a sub-sect of constitutionalism and its importance in interpretation of the Indian Constitution. Lastly, it will deal with the role of the judiciary is developing the idea of transformative constitutionalism by way of different case laws.

1.7 Research Methodology

The doctrinal method of research has been followed. It will be confined to the research questions. The object of the research being kept in mind, various case studies, articles and other sources have been referred.

1.8 Chapterization

- **Chapter I: Introduction**

  This chapter will introduce the overall topic of this dissertation i.e. Transformative Constitutionalism: Renaissance of Fundamental Rights in India. It will lay down the statement of problem that this dissertation will work upon and the objectives that it seeks to fulfil. It will include the research questions that will be answered in the succeeding chapters and the limitation beyond which this dissertation would not travel. Lastly, it will include a literature review which will include some of the resources that are helpful for answering the questions raised in this dissertation.

- **Chapter II: Fundamental Rights: Historical Backdrop**

  This Chapter will deal with the evolution of fundamental rights and its journey to the pages of the Indian Constitution. It will also lay down different fundamental rights that are guaranteed by the Indian Constitution and their importance in the life of the Indian citizenry.

- **Chapter III: Transformative Constitutionalism: A Conceptual Understanding**

  This chapter will provide with a conceptual understanding of the idea of transformative constitutionalism. It will deal with its evolution and importance and how it can be used in the interpretation of the Constitution that will is true to its founding principles.

- **Chapter IV: Constitutional Courts and Transformative Constitutionalism**

  This chapter will deal with the importance of Constitutional Courts in developing the idea of transformative constitutionalism by way of different case laws.

- **Chapter V: Findings and Conclusion**

  This chapter will sum up the findings that can be observed in the research paper and will conclude by summarising the chapters discussed above.

Chapter II

Fundamental Rights: Historical Backdrop

2.1 Introduction

The concept of fundamental rights flow from the human rights philosophies whose origin can be traced to the year 539 BC when the troops of Cyrus the great conquered Babylon. Cyrus freed all the slaves and declared that all people had a right to choose their religion. These principles along with others were engraved on baked-clay cylinders known as Cyrus Cylinders and served as an inspiration for the first four articles of the Universal Declaration of Human Rights.[1]

The promulgation of Magna Carta in 1215 by King John of England established for the first time the principle that each individual, including the King, was subject to law[2], thus introducing a raw concept of Rule of Law. The evolution of the principles of Magna Carta is represented by the English Bill of Rights which outlined constitutional and civil rights of the individuals and ultimately gave Parliament power over monarchy.[3]"The intrinsic values of the Magna Carta echo in the United States Bill of Rights (1791) as well as in the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950)."[4]

From the 17th century the understanding that "humans have certain basic, essential, natural and inalienable rights or freedoms has been evolving. It is also understood that it is the function of the state to recognise these rights and freedoms so that the human liberty may be preserved, human personality develops and an effective social and democratic life can be promoted."[5]

Natural law philosophers such as Locke and Rousseau promoted the concept of human rights and philosophised over such inherent human rights that needs to be protected by the state under the 'social contract' theory.[6]Locke idea of social contract was based on the "new secular approach to natural law wherein the legitimacy of the state rested upon the trust of the

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[1] Marco Sutto, 'Human Rights evolution, a brief history' (2019) <https://www.coespu.org/index.php/articles/human-rights-evolution-brief-history> accessed 1 June 2021.
[2] Claire Breay, Julian Harrison, 'What is Magna Carta' (2014) <https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction#> accessed 1 June 2021.
[3] cf Sutto (n 1).
[4] cf Breay (n 2).
[5] M.P. Jain, *Indian Constitutional Law* (7th edn, LexisNexis 2014) 846.
[6] N.V. Paranjape, *Studies in Jurisprudence and Legal Theory* (9th edn, Central Law Agency 2019) 160.

people to the rulers and infringement of the trust was treated as a breach of the people's fundamental natural rights which justified revolt against the government."[7] According to Locke, "man is born with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the Law of Nature and he has by nature a power to preserve his property- that is, his life, liberty, and estate, against the injuries and attempts of other men."[8]

The Declaration of the Rights of Man and of the Citizen which was adopted France National Assembly in 1789 is regarded as one of the basic charters of human liberties and was inspired by the Lockeian philosophy[9] and whose principles enthused the French Revolution.[10]Some of the basic values brought in by the declaration were that all "men are born and remain free and equal in rights",[11] that "the aim of all political association is the preservation of the natural and inalienable rights of the man."[12] These rights included liberty, property, security and resistance to oppression, the right to participate in legislation directly or indirectly[13], freedom of religion[14]and speech and expression.[15]

The adoption of the first three Geneva Conventions[16] and the Hague Convention were of great significance as they expressed deep concerns on the basic level of human dignity during wartime and promoted the same, laying the foundation of the International Humanitarian Law. The World War II and the holocaust that followed propelled the human rights into the world conscience. The Trials at Nuremberg[17] and Tokyo[18] after World War II introduced the world with new concepts of "crime against peace" and "crimes against humanity."

The need for an international body as a custodian of human rights was long due which led to the establishment of United Nations (UN) in the year 1945. The Preamble to the UN Charter affirmed the founding members commitments to "save the succeeding generations from the

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[7] ibid 160.
[8] John Locke, 'Two Treaties of Government' <https://www.britannica.com/biography/John-Locke/Two-Treatises-of-Government> accessed 2 June 2021.
[9] cf Jain (n 5).
[10] cf Sutto (n 1).
[11] Declaration of the Rights of Man 1789, Art. 1.
[12] ibid Art. 2.
[13] ibid Art. 6.
[14] ibid Art. 10.
[15] ibid Art. 11.
[16] American Red Cross, 'Summary of the Geneva Conventions of 1949 and their Additional Protocols' (2011) <https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf> accessed 5 June 2021.
[17] History.com Editors, 'The Road to the Nuremberg Trials' (2010) < https://www.history.com/topics/world-war-ii/nuremberg-trials> accessed 5 June 2021.
[18] Facing History, 'The Tokyo Trials' <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-10/tokyo-trials> accessed 5 June 2021.

scourge of war, to reaffirm faith in fundamental human rights, equal rights for men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained in order to promote social progress and better standards of life in larger freedom."[19]With a strong political commitment in place a Commission on Human Rights was established to draft a document elaborating upon the meaning of fundamental rights and the freedoms stated in the Charter. The Commission, under the supervision of Eleanor Roosevelt, came about with 30 articles, notably known as The Universal Declaration of Human Rights (UDHR).[20]UDHR was the first internationally accepted charter and stated that, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[21] It also declared that "everyone has the right to life, liberty and security"[22] and that "everyone is entitled to all the rights and freedoms set forth in the Declaration, without any distinction of any kind."[23] The UDHR, although not legally binding, has been substantiated by other international treaties such as "International Covenants on Economic, Social and Cultural Rights (ICESCR) and International Covenants on Civil and Political Rights (ICCPR) and are together known as the International Bill of Human Rights."[24]

The very idea of rights that are fundamental to a dignified human existence has continued to evolve overtime and in lieu of which the UN has adopted more than twenty principal treaties which includes conventions preventing and prohibiting specific abuse like torture and genocide[25] and also to protect predominantly vulnerable groups such as refugees[26], women[27], and children.[28] The recognition of different rights at the international levels has made way to their understanding and inclusion in the domestic laws of different countries. The indispensable and inalienable human rights which are justifiable in the court of law and

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[19] UN, 'Preamble' <https://www.un.org/en/about-us/un-charter/preamble> accessed 6 June 2021.
[20] UN, 'UDHR: History of the Declaration' <https://www.un.org/en/about-us/udhr/history-of-the-declaration> accessed 5 June 2021.
[21] UDHR Art. 1.
[22] ibid Art. 3.
[23] ibid Art. 2.
[24] United for Human Rights, 'What are Human Rights' <https://www.humanrights.com/what-are-human-rights/international-human-rights-law/international-human-rights-law-continued.html> accessed 6 June 2021.
[25] Human Rights Here and Now, 'Celebrating UDHR' http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-5/6_glossary.htm#Anchor-Genocide-22908 accessed 6 June 2021.
[26] Convention Relating to the Status of Refugees 1951.
[27] Convention on the Elimination of All Forms of Discrimination against Women 1979.
[28]Convention on the Rights of the Child 1989.

which cannot be limited or abridged by ordinary legislation are known as Fundamental Rights.

2.2 Fundamental Rights

The aim of the human rights is to protect individuals from excesses of the state. Although all human rights are important the state provides protection to only certain rights which it considers quintessential for the fulfilment of a dignified life. Therefore, the underlying idea of establishing certain basic or fundamental rights is to protect them and keep them outside the reach of transient political majorities.[29]It is also equally important that such rights are ingrained in a way that they are insulated from any violation or interference from an oppressive government. It is in furtherance of this understanding that, some written constitution guarantee specific rights to the people and forbid governmental bodies from interfering with the same. However, these guaranteed rights are not completely outside the questioning of the government and can be limited or abridged, but such limitation or abridgement can only be made by an elaborate and formal process of constitutional amendment rather than by an ordinary legislation. It is these right which are characterised as Fundamental Rights.[30]

The idea of guaranteeing fundamental rights can be traced back to the Constitution of the United States (US) drafted in the year 1787. The US Constitution is regarded as the first modern constitution to recognise and concretise the philosophy of human rights by providing them place in the Constitution and by making them justiciable and enforceable in the court of law.[31] The original draft of the US Constitution did not include any fundamental rights upon which it was vehemently criticised. Accordingly, the Bills of Rights was incorporated in the Constitution in 1791 in the form of ten amendments.[32] The philosophy behind fundamental rights in the US as described by Justice Jackson was that, "The very purpose of the Bills of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free

[29] cf Jain (n 5) 846.
[30] ibid 846- 847.
[31] ibid 847.
[32] America's Founding Documents, 'The Bill of Rights: A Transcription' <https://www.archives.gov/founding-docs/bill-of-rights-transcript> accessed 7 June 2021.

press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote; they depend on the outcome of no elections."[33]

In the age old democracy of the United Kingdom (UK) there is no official document guaranteeing fundamental rights to people. The doctrine of Parliamentary Sovereignty is supreme and does not envisage a legal check on the power of the Parliament to make laws, even though such law may abridge, modify or abolish any of the basic rights and liberty of the people.[34] However the power of the executive is limited and it cannot interfere with the rights of the individuals without the sanction of the law.[35]

Therefore, until 1998, the protection of individuals' freedom in UK was not backed by any constitutional guarantees but was based on public opinion, good sense of the citizenry, robust common law traditions favouring individual liberty and parliamentary form of government. For the protection of the individuals' rights UK had signed the European Charter of Human Rights and Fundamental Freedoms[36]but it was criticised on the point that it did not bind the Parliament and could be used only to interpret local laws. Thus, a need for a Bill of Rights was long felt and ultimately the British Parliament enacted the Human Rights Act, 1998. The purpose of the Act is to "give effect to the rights and liberties provided under the European Convention on Human Rights." The Act makes it mandatory that all legislations, so far as possible, should be read and given effect in a way which makes it compatible with the conventions rights.[37]The Act also mandates that the Court determining a question regarding a convention right should take into consideration any "judgement, decision, declaration or an advisory opinion of the European Court of Human Rights, so far it is relevant to the proceedings in question."[38] The Courts have the authority to declare that a legal provision is incompatible with the convention right[39] upon which the Minister may by order make such amendment to the legislation as he deems necessary to remove the incompatibility.[40]Therefore, the Minister has been empowered to make 'remedial orders' to correct any incompatibilities between the primary legislation enacted by the Parliament and the Convention. Also, a draft of the order has to be approved by both Houses of the

[33] West Virginia State Board of Education v Barnette [1943] 319 U.S. 624.
[34] Wright LJ in Liversidge v. Anderson [1942] A.C. 206.
[35] Atkin LJ in Eshugbayi v. Government of Nigeria [1931] A.C. 662.
[36] Equality and Human Rights Commission 'What is European Convention on Human Rights' https://www.equalityhumanrights.com/en/what-european-convention-human-rights accessed 7 June 2021.
[37] Human Rights Act 1998, s 3 (1).
[38] ibid s 2(1) (a).
[39] ibid s 4 (1).
[40] ibid s 10 (1) (b).

Parliament. Thus, the real authority still lies in the hand of the Parliament and this has been a cause of criticism from the proponents of the fundamental rights.

Similarly, different countries around the world have recognised an array of rights which they consider as fundamental to a dignified human life. These rights are governed by different conventions or have been incorporated in the Constitution to protect them from encroachment from other organs of the state. Therefore in the modern era, "it has almost become as a matter of course to prescribe formally the rights and liberties of the people which are deemed worthy of protection from government interference. The wide acceptance of the notion that a formal Bill of Rights is a near necessity for an effective constitutional government and the feeling that mere custom or tradition alone cannot provide to the Fundamental Rights the same protection as their importance deserve has gained substantial weight."[41]

2.3 Fundamental Rights in India

The Constitution of India holds a place of pride among the constitutions of the South and South-East Asia as a liberal constitution operating in the largest democracy in the world.[42] But this pride was never given to the Indians on a silver platter and they had to struggle hard to frame their own Constitution for the governance of their own will. It was Mahatma Gandhi who was first to assert this when in 1922 he said that "Swaraj will not be a gift of the British Parliament. It will be a declaration of India's full self-expression. That it will be expressed through an Act of Parliament. Swaraj can never be a free gift by one nation to another. It is a treasure to be purchased with a nation's best blood. It ceased to be a gift when we have paid clearly for it."[43]"The Indian National Congress (INC) made the demand of the constituent assembly a part of its official agenda in 1934 and rejected the 1933 White Paper which formulated proposals for the Indian constitutional reforms and later formed the basis of the 1935 Act. Thereafter, in many of its provincial legislative assemblies and in the central legislative assembly in 1937 and in its different sessions at Faizpur, Haripura, and Tripuri, and at the Simla Conference in 1945, the Congress reiterated that India could only accept a Constitution drawn from the people and framed 'without any interference by a foreign authority."[44]

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[41] cf Jain (n 5) 849.
[42] M P Singh, 'Fundamental Rights, State Action and Cricket in India' (2005) 13 Asia Pac L Rev 203.
[43]Sudarshan Pradhan, 'Making of the Indian Constitution' (2020) (Odisha Review) <http://magazines.odisha.gov.in/Orissareview/2020/Jan/engpdf/1-5.pdf> accessed 25 June 2021.
[44] Granville Austin, 'The Indian Constitution: Cornerstone of the Nation' (1966) OUP.

As the Second World War broke out in 1939, in order to get the support of the Indians,the British, for the first time announced, in 1940 by August Offer that the Indians should be the sole authority in the drafting of the country's new Constitution. It also offered to set up, "a body representative of the principal elements in India's national life, in order to devise the framework of the new Constitution", after the end of the War.[45] But this offer was vague as it did not provide as to how the body is going to be constituted and the method to be followed in deciding the membership of the body to be constituted which showed that the British had reluctantly agreed to the idea of Constituent Assembly and were not serious about its implementation. Therefore it was rejected by the INC and other Nationalists. "In 1942, the British Government appointed Cripps Mission which categorically stated that the Constitution making Authority would be in the hand of the Indians alone. It was laid down the modalities which were missing from the previous proposal. But this proposal also failed because of the confrontation between the INC and the British which resulted into Quit India Movement of 9August 1942."[46]This was the first time that the nationalists openly demanded the British to 'Quit India' and urged the Indians to 'Do or Die' for the struggle. But the British Government was able to suppress the movement and at the end of the War in 1945 issued a white paper which was followed by the Simla Conference where once again the INC strongly asserted for an independent constituent body to draft the Indian Constitution.

It was only with the victory of the Labour Party in England that the attitude towards the demands of the Indians changed. The British Government promised to convene a Constitution making body as soon as possible. In 1946 the Cabinet Mission plan which was appointed to carry out this task visited India and on 24th March after due deliberation between the INC, the Muslim League and the British the Constituent Assembly came into existence.[47]

It is important to understand the reason behind the incessant demand of an independent Constituent to the draft the Indian Constitution. The Nationalists precisely understood the need of the Indian society for that moment and for times to come. Therefore, its members were not selected exclusively on party basis, but were drawn from all walks of life and thus represented almost every section of the Indian people. Also, it had an enormous significance for the right of the Indian citizenry as only those who understood the plight of their sufferings at the hand of foreign power could frame provisions to protect them from similar hardships.

[45] ibid 3.
[46] cf (n 43) 3.
[47] cf Austin (n 44) 3.

Therefore, when it came to the question of fundamental rights of the people the role of an independent Constituent Assembly was immense.

The Constituent Assembly, therefore provided an exclusive place to the Fundamental Rights under Part III of the Constitution. This was done by the makers of the Constitutions because of two reasons. Firstly, during the colonial times there happened large scale human rights violations by the then rulers of the Indian state. The key political party, the INC, had for long demanded these rights against the colonial oppression. Therefore, the framers of the Constitution, many of whom have suffered long incarceration during the British regime, were very positive on inclusion of these rights in the Constitution itself. Secondly, the Constituent Assembly was awake to the reality that Indian society was fragmented into various religious, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give a sense of security and confidence to such diverse populace. Also, it was felt necessary that few rights should be provided to the people which can be enforced against the government as oppression at the hand of the government was evidently seen at many places. At that time India did not had rich democratic culture and the threat of oppressive laws against individuals' and minorities enacted by the majority in the legislature could easily become a reality, and thus to minimise these kinds of scenarios a Bill of Rights in the Constitution was a must.[48]Therefore, whether to incorporate Fundamental Rights or not in the Constitution was never a question considered by the Assembly and its inclusion was welcomed and accepted by all hands. In fact, the main debate surrounding the Fundamental Rights was on the restrictions imposed "on the Fundamental Rights and efforts all along was to have Fundamental Rights on as broad and pervasive a basis as possible."[49]

The Fundamental Rights in India are influenced by some of the provisions of the Bill of Rights in the US Constitution but the former cover a much wider ground than the latter. In US the Constitution has declared the Fundamental Rights in a much broader and general terms and no specific restrictions have been imposed but as no right is absolute, the courts have from time to time imposed some restrictions and limitations of these rights. The Indian Constitution differs from the US one in this behalf, so far as some of the rights are worded generally; in respect of some Fundamental Rights, the exceptions, qualifications and limitations has been formulated and expressed in an elaborate manner in the Constitution

[48] ibid.
[49] ibid.

itself, while in case of some of the other rights the Constitution has empowered the Legislature to impose restrictions.

The Constituent Assembly learning from the experiences of the US was aware of the difficulties in articulating the Fundamentals Rights in general terms and leaving on the courts understanding to enforce them. Some of such difficulties were that, the Legislature not able to know the view of the courts on a particular enactment and consequently the process of legislation becomes difficult. There also arise a large number of litigation challenging the validity of the law and also the opinion of the judiciary changes frequently thus bringing uncertainty of law. Also, the judges are not the elected representative of the people and are therefore not as sensitive to public need in the social and economic sphere as are the elected legislators. Lastly, a constant intervention by the judiciary in the legislature working by declaring legislation unlawful on their own understanding could lead to a drift between the two organs of the state which cannot be a healthy situation for a thriving democracy. Thus, a complete and unqualified veto over the legislation could not have been left in the hand of the judiciary. The framers of the Constitutions tailored the provisions in a way that these difficulties could be avoided and a balance can be maintained between different organs of the state.

The Fundamental Rights in India has been grouped in seven heads under Part III of the Constitution which are as follows:

a) “Right to Equality (Articles 14-18)
b) Right to Freedom (Articles 19-22)
c) Right against Exploitation (Articles 23-24)
d) Right to Freedom of Religion (Articles 25-28)
e) Cultural and Educational Rights (Articles29-30)
f) Right to Property (Articles 30-31)
g) Right to Constitutional Remedies (Articles 32-35)”[50]

2.3.1 Right to Equality (Article 14-18)

The Indian society has, from time immemorial, governed by a system of Varnas which, at first, was merely a reflection of one’s occupation but with time became more rigidly interpreted to be determined by one’s birth and did not allow one to change his/her caste and

[50] Constitution of India, Ch. III.

marry into other castes.[51] This brought in a sense of superior- inferior relationship among different caste groups and also introduced the notion of purity. This notion of purity introduced a casteless group known as the 'Untouchables' and divided the society even further. Therefore, Right to Equality as a constitutional guarantee was a must for an independent India.

The underlying object of Article (hereinafter Art.) 14 to 18 of the Constitution is to present a scheme which prohibits all forms of discrimination. "Art. 14 secures to all persons, citizens or non-citizens, the equality of status and opportunity mentioned in the Preamble of the Constitution."[52] It embodies the general principle of equality before law and prohibits unreasonable discrimination between persons.[53] But as there are many specific discriminatory situations specific provisions for the same were made by subsequent Articles. Therefore, Art. 15 prohibits discrimination of citizens on specific grounds such as religion, race, caste, sex or place of birth. Art. 16 guarantees the citizens of India equality of opportunity in matters of public employment. Art. 17 prohibits untouchability in all its form and Art. 18 abolishes titles, other than a military or academic distinction. Under the equality scheme of the Constitution Art. 14 is the genus while Articles 15 and 16 are the species.[54] They together constitute a single code of constitutional guarantee supplementing each other.

"Equality is one of the magnificent corner-stone of the Indian Democracy."[55]"The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution."[56]The equality code has been declared by the Supreme Court of India (hereinafter SC) as the basic feature of the Constitution,[57] which means that, if any change is brought in, even by way of a constitutional amendment, which transgresses the constitutional guarantee of equality then it can be declared as unconstitutional by the courts. In Badappanavar[58] the SC stated that, "Equality is the basic feature of the Constitution of India and any treatment of equals unequally and unequals as equals will be a violation of basic structure of the Constitution."

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[51] Lumen, 'Caste System in Ancient India' <https://courses.lumenlearning.com/atd-fscj-worldreligions/chapter/caste-system-in-ancient-india/> accessed 10 June 2021.
[52] Natural Resources Allocation, In re Special Reference No.1of 2012.
[53] J.N. Pandey, *Constitutional Law of India* (56th edn, Central Law Agency 2019) 84.
[54] Naz Foundation v Government of NCT of Delhi WP(C) No.7455/2001.
[55] Thommen J., Indra Sawhney v Union of India AIR 1993 SC 447.
[56]Ashutosh Gupta v State of Rajasthan AIR 2002 S 1533.
[57] M. Nagraj v Union of India AIR 2007 SC 1.
[58]M.G.Badappanavar v State of Karnataka AIR 2001 SC 260.

i) Article 14: *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*

As can be seen Art. 14 comprises of two expressions "equality before law" and "equal protection of law." The first expression i.e. equality before law is of English origin and has a negative connotation implying the absence of any special privilege in favour of any individuals and the equal subject of all classes to the ordinary law. The second expression, equal protection of law, "is based on the last clause of the first section of the 14th Amendment to the US Constitution and directs that equal treatment should be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favour or discrimination;"[59] thus implying equality of treatment in equal circumstances. Before the Indian Constitution both these expressions have been used conjointly in Article 7 of the UDHR, 1948 and may have influenced the formulation of Art. 14. The underlying purpose of the two expressions is to give as wide amplitude to Art. 14 as possible.

Equality before law and equal protection of law is not taken to be equal treatment of every individual irrespective of one's differences. As it is understandable that no two beings are equal in all respects, the same treatment of them in every respect would result in unequal treatment. Therefore, "the underlying principle of equality is not uniformity of treatment to all in all respects, but rather to give the same treatment in respects in which they are equal and different treatment in those respects in which they are different."[60]

It has been recognised that for public welfare it is necessary that suitable legislations are in place to classify persons, property and occupations. Therefore, the varying needs of different classes of persons require different treatment. So, "a reasonable classification is not only permitted but is necessary if society is to progress."[61] Thus, Art. 14 prohibits class legislation but allows reasonable classification. However, "the classification must not be arbitrary, artificial or evasive and must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation."[62]Therefore, the test of a reasonable classification must fulfil two conditions:

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[59] V.N. Shukla, *Constitution of India,* (12th edn. EBC 2015) 39.
[60] ibid 49.
[61]Jagjit Singh v State AIR 1951 Hyd. 11.
[62] R.K. Garg v Union of India AIR 1981 SC 2138.

1. “The classification must be founded on an intelligible differentia which distinguishes between persons or things that are grouped together from other left out of the group; and
2. The differentia must have a rational relation to the object sought to be achieved by the Act.”[63]

Article 14 is applicable only in the situations where equals are treated unequally without any reasonable justification but where equals and unequals are treated differently Art. 14 does not apply. The class legislation which Art.14 forbids is the one which makes an impropriate classification under which privileges are conferred upon a group of individuals arbitrarily taken from a population. The point to note here is that in that particular population all persons stand on the same footing to the privilege so granted and there lies no substantial differences for justifying inclusion of one and the exclusion of the other from such privilege.[64]

The SC by a number of case laws have elucidated important principles to further the scope of permissible classification. Some of them are as follows:

1. “A law may be constitutional even though it relates to a single individual if, on account of some special circumstances, or reason applicable to him and not applicable to others, that single individual may be treated as a class by himself. But such laws are seen with suspicion, especially when they affect private right of an individual.
2. There is always a presumption in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The person, therefore, who pleads that Art. 14 has been violate, must make out that not only he has been treated differently from other, but he has also been treated differently from persons similar circumstanced without any reasonable basis, and such differential treatment has been unjustifiably made. [65]
3. It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds.
4. The legislature is free to determine the degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

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[63] cf Pandey (n 53) 89.
[64] Monoponier Co. v City of Los Angeles 33 Cal App. 675.
[65] Ranchand Jagdish Chand v Union of India AIR 1963 SC 563.

5. In order to sustain the presumption of constitutionality, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.
6. While good faith and knowledge of the existing conditions on part of the legislature are to be presumed, the presumption of the constitutionality cannot be carried to the extent of always holding that there must be some undisclosed or unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.
7. A classification need not to be scientifically perfect or logically complete.
8. The validity of a rule has to be judged by assessing its overall affect and not by picking up exceptional cases. What the court has to see is: whether after taking all aspect into consideration, the classification is just,
9. The Court must look beyond the ostensible classification and to the purpose of the law, and apply the test of palpable arbitrariness in the context of the felt needs of the times and societal exigencies informed by experience to determine reasonableness of classification.
10. There is no right to equality in illegal acts. Discrimination cannot be alleged on the ground that somebody has obtained an illegal benefit.
11. The right to equality is available in the grant of favours as well as imposition of burdens."[66]

ii) Article 15: "*Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."*

Art. 15 applies the general principle of equality before law embodied under Art. 14 to specific situations. "When a law comes within the prohibition of Art. 15 it cannot be validated by a recourse to Ar. 14 by applying the principle of reasonable classification."[67] It is only when the discrimination is centred upon one of the grounds stated in Art. 15, the rationality behind such classification will be tested under Art. 14. The protection of this article is available only to the citizens and not to a foreigner. Art. 15 has six clauses:

1. *"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."*

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[66] cf Shukla (n 59) 52-53.
[67]KathiRanning v State of Saurashtra AIR 1952 SC 123.

The word ‘discrimination against’ means select for unfavourable treatment and therefore if the law makes any differentiation based on the grounds mentioned above it will be declared as invalid. The word ‘only’ used in Clause (1) of Art. 15 indicates that discrimination cannot be made simply on the basis that the individual belongs to a particular religion, race etc. This means that, keeping other qualifications constant, no individual can be preferred or disqualified based on religion, race, caste, sex etc. Therefore, discrimination on the grounds other than the mentioned ones is not prohibited but such discrimination cannot be based solely on these mentioned grounds.

2. *“No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to*
   a. *access to shops, public restaurants, hotels and palaces of public entertainment; or*
   b. *the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public”.*

Cl. (1) of Art. 15 prohibits discrimination by the State whereas cl. (2) prohibits discrimination on both fronts, the State as well as the individuals. The main aim of cl. (2) is to remove such discrimination which were a part of the Indian society due to the prevailing caste system in which a person from lower caste was not allowed to use the amenities listed above.

Also, the prohibition will only be applicable if the State bears their maintenance either wholly or partly or such places are open for the general public. “The expression ‘maintained wholly or partly out of state funds or dedicated to the use of general public’ qualifies each of the places mentioned in sub-clause (b). Consequently, a private well or tank does not come under the purview of this clause. Where a place of public resort of not maintained by the State, it must be dedicated by the owner to the use of general public.”[68]

3. *“Nothing in this article shall prevent the State from making any special provision for women and children”.*

Under Art. 15, cl. (3) lays one of the two exceptions that are allowed under the general scheme of equality elucidated by cl. (1) and (2) of Art. 15. It empowers the State to make special provisions for women and children as such provisions are required because of their very nature. The reason being that women have been subject to past inequalities because of

[68] cf Shukla (n 59) 89.

which they require the support of the State to put them on an equal footing to that of mainstream society. Therefore, "the objective of Art. 15(3) is to eliminate the socio-economic backwardness of the women and to empower them in a manner as to bring about effective equality between men and women. Art. 15(3) thus relieves the state from the bondage of Art. 15(1) and enables it to make special provision to accord socio-economic equality to women."[69]

4. *"Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".*

"Cl. (4) enables the state to make special provisions for the advancement of socially and educationally backward classes of citizens or for the Schedule Castes (hereinafter SCs) or Schedule Tribes (hereinafter STs). Such provisions include reservation and quotas and can be made in exercise of executive power without any legislative support."[70]Art. 15(4) is only an enabling clause and state is not mandated under it to provide for reservation. The principle that governs Art. 15(4) is that preferential treatment should be valid on the ground that the socially and educationally backward classes of citizens require it to uplift themselves and be a part of mainstream society. The class envisioned under the clause must satisfy the requirement of both backwardness i.e. socially and educationally backwardness.

iii) Article 16: "*Equality of opportunity in matters of public employment."*

Art. 16(1) is considered as one of the aspect of the wide scope of Art. 14. It specifies the generality of Art. 14 and promoted the right of 'equality of opportunity' in the matters of State employment. "It gives the right only for equal opportunity, i.e. the right to be considered for the employment or appointment. It does not give the right to be employed or appointed to the office under the state. Therefore, it does not prevent the state from laying down the requisite qualifications for recruitment for government services and it is open to the authority to lay down such other conditions for appointment as would be conducive to the maintenance of proper discipline among government servants."[71]

Cl. (2) is an elaboration of the facet of Cl. (1) and together they lay down the general rule of equality of opportunity or appointment under the state. "The two clauses also postulate the

[69] cf Jain (n 5) 937.
[70] cf Sawhney (n 55).
[71] Diva Rai, 'Right to Equality: Article 16, 17 & 18 under the Indian Constitution' (2020) https://blog.ipleaders.in/right-to-equality-article-16-17-18/ accessed on 6June 2021.

universality of Indian citizenship. As there is a common citizenship, residence qualification is not required for service in any state. Both these clauses specify certain mandate and grounds on which citizens cannot be discriminated against each other for employment or appointment to any office under the state. Cl. (1) of Art. 16 has a wider scope than that of cl. (2). This is because of the reason that any discrimination on the ground other than the mentioned ones in cl.(2) is to be judged under the general principles laid down in cl. (1)."[72]

Cl. (3) authorises the "Parliament to regulate the extent to which it would be permissible for the State to depart from the law laid down in cl. (2). It is the Parliament alone which can prescribe such conditions, and that too in regard to the State and not the Union appointments."[73]

Cl. (4) expressly provides for reservation in appointments or posts in favour of any backward class of citizens which, in the opinion of the state has not been adequately represented in the services under the state. Therefore, the enquiry on the backwardness of a particular class of citizen rests upon the objective factors to be determined by the state. "But, while the said authority has been assigned to the State it does not have a final say in the matter. State's determination is justifiable and may be challenged if it is based on irrelevant considerations."[74]"Reservation under cl. (4) may be made in the exercise of executive power without ant legislative support."[75]

Cl. (4A) was introduced by the Constitution (77th Amendment) Act, 1995 to side-step the decision of Mandal Commission in which it stated that no reservation in promotion can be made under cl. (4) of Art. 16. It is to be noted here that the clause does not affect the Commission's decision regarding the Other Backward Classes (OBCs) but only makes it inapplicable in the matters of Schedule Castes (SCs) and Schedule Tribes (STs)."Justifying the reservation for SCs and STs candidates in promotions, the court at one point held that even the seniority which is acquired by way of their promotion over the general class candidates could not be affected by subsequent promotion of the general class candidates."[76]However, there were case laws in place before this[77] and subsequent[78] to this judgement which held "that reserved category promotees could not count their seniority in

[72]Sukhnandan Thakur v State of Bihar, AIR 1957 Pat. 617.
[73] cf Shukla (n 59) 116.
[74]TrilokiNathTiku v State of J&K, AIR 1967 SC 1283.
[75] CAG v Mohan Lal Mehrotra, AIR 1991 SC 2288.
[76]Jagdish Lal v State of Haryana, AIR 1997 SC 2366.
[77] Union of India v Virpal Singh Chauhan, AIR 1996 SC 448.
[78]Ajit Singh (II) vs State of Punjab, (1999) 7 SCC 209.

the promoted category from the date of their continuous officiating in the promoted post vis-à-vis the general candidates who were senior to them in the lower category and who were later promoted."[79] In order to annul the decisions in the Virpal Singh and Ajit Singh cases on the issue of seniority, the Constitution (85thAmendment) Act, 2001 introduced the word "with consequential seniority" in cl. (4A).

Cl. (4B) was introduced by the Constitution (81th Amendment) Act, 2000 as a way out to the Mandal Commission case[80] in which it was laid down that the upper limit of reservation for a year will be 50 percent and upheld reservation of 49.5 percent, thus leaving no scope to fill the backlog vacancies which could not be filled in the preceding years. Unlike cl. (4A), cl. (4B) is not confined to the SCs and STs. The five-judge Bench in the Nagraj[81] case "unanimously upheld the validity of the amendments introducing cl. (4A) and cl. (4B) to Art. 16."

Under cl. (5) "protection is provided to the incumbent of any office which is connected with the affairs of any religious or denominational institution and also to any member of governing body to be a person professing that particular religion or belonging to that particular denomination and such appointment will not be treated to be repugnant to Art. 15."[82]Thus, appointments to religious institutions or institutions regulating religious institutions may be restricted to persons of that religion.

Cl. (6) was inserted in Art. 16 by way of Constitution (103rd Amendment) Act, 2019 to provide 10 percent reservation of posts to economically weaker sections of the society in addition to the existing reservation in each category.

iv) Article 17: *"Abolition of Untouchability"*

The objective behind Art. 17 is to eradicate the menace of untouchability in all its forms. To substantiate the vision of Art. 17 the Parliament legislated the Untouchability (Offences) Act, 1955, under which it laid down the punishment for practising and promoting untouchability in any of its forms. The Constitution does not define the word untouchability as the Constituent Assembly was not able to come to a precise definition of the same. However, it has held that Art. 17 does not relate to untouchability in its literal sense but the "practice as it had developed historically in this country." Therefore, if a person is treated as a untouchable

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[79] cf Shukla (n 59) 119.
[80] AIR 1993 SC 477.
[81] AIR 2007 SC 71.
[82] Constitution of India, Art. 15(5)

either temporarily or otherwise on the ground that he is suffering from any type of epidemic or contagious disease etc. then it will not fall within the purview of Art. 17.

v) Article 18: "*Abolition of titles"*

During the British regime there were a number of titles that were conferred to the Indians as a mark of respect for their work to the Crown. Similarly, there were also a number of titles that were prevalent in the Indian society which were given to one person by the others as a mark of respect. But soon these titles became a way to subjugate others which was against the equality clause of the Constitution. Therefore, Art. 18(1) "prohibits the state from conferring any 'title' except military and academic distinctions." No title can be accepted by a foreigner from any foreign state who holds any office of profit or trust under the state, without the consent of the President. Also, no person holding any office of profit under the state is to accept any present, emolument, or office of any kind form or under any foreign state without the consent of the President.

2.3.2 Right to Freedom (Article 19-22)

Among all the fundamental rights guaranteed under the Indian Constitution the rights assuring personal liberty to the individuals' are considered to be the most important. These intrinsic rights are protected under the constitutional scheme of Art. 19-22. The cumulative reading of these four rights form the backbone of the fundamental rights chapter of the Indian Constitution. Among all these right the six fundamental freedoms ensured by Art. 19 are considered as quintessential for personal liberty of an individual.

i) Article 19:"*Protection of certain rights regarding freedom of speech etc."*

1. *"All citizens shall have the right-*
    a. *To freedom of speech and expression;*
    b. *To assemble peaceably and without arms;*
    c. *To form associations or unions;*
    d. *To move freely throughout the territory of India;*
    e. *To reside and settle in any part of the territory of India;*
    f. *To practice any profession, or to carry on any occupation, trade or business".*[83]

[83] Constitution of India, Art. 19(1).

The various freedoms provided by Art. 19 are "needed not only to promote certain basic rights of the citizens but also certain democratic values. It brings in a feeling of oneness and unity in the country as all citizens experience the same kind of freedom in their democratic lives."[84]"These rights are recognised and guaranteed as a natural rights, inherent in the status of a citizen of a free country but are not absolute in nature and uncontrolled in operations."[85]The arrangement under Art. 19 lists a group of six rights enumerated as cl. (a) to (g) and have been accepted as the fundamental rights of the citizens. Based upon various dimensions and underlying philosophies these rights are not considered to be on the same footing to one another.

The common thread that runs throughout cl. (2) to (6) is that "the operation of any existing law or enactment by the state of any law which imposes reasonable restrictions to achieve certain objects, is saved; however the quality and content of such law would be different by reference to each of sub-clauses (a) to (g) of cl. (1) of Art. 19."[86]Thus, both the Parliament as well as the State Legislatures have the power to control, curtail and regulate these rights to a certain extent. "The State cannot travel beyond the contours of cl. (2) to (6) in curbing the Fundamental Rights guaranteed under cl. (1). The Court is not concerned with the necessity of the impugned legislation or the wisdom of the policy underlying it, but only whether the restriction is in excess of the requirement, and whether the law has overstepped the Constitutional limitations."[87]

Three noteworthy features of cl. 19(2) to (6) are:

1. Any restriction that is imposed under them must have the authority of law and no limitations can be put by an executive action without the sanction of law.
2. Each restriction must be reasonable.
3. The restriction must fulfil the purpose laid down cl. (2) to (6).

The Court has the final say on reasonableness or purpose of the limitation. Thus, any decision by the Legislature on the determination of restriction on any of these right is not irrefutable and is subject to judicial review.

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[84] cf Jain (n 5) 1012.
[85] cf Shukla (n 59) 127.
[86]Dharam Dutt v Union of India, AIR 2004 SC 1295.
[87] Society of Un-aided Private Schools of Rajasthan v Union of India, AIR 2012 SC 3445.

a) Test of Reasonable Restriction:

The phrase 'reasonable restriction' means that "the restriction imposed on a person on the enjoyment of his right should not be arbitrary or in excessive nature, beyond what is required in the interests of public."[88]A law cannot be said to be having the quality of reasonableness if it arbitrarily or excessively intrudes an individual's rights, and unless it balances the guarantees of Art. 19(1) and Art. 19(2), it must be judged as unreasonable and illegal.[89] There must be a reasonable relation between the limitation imposed and the object that the legislation is trying to achieve and the restriction must not exceed the requirement of the specified objective.

There cannot be a rigid standard or a broad pattern of reasonableness that can be placed to be relevant for all adjudications. Each case has to be adjudged on its own merits. The SC in the case of Papnasam[90] elucidated certain principles to take into consideration while ascertaining the constitutionality of a statutory provision which imposes restriction on any of the right mentioned under Art. 19(1) when questioned on the basis of reasonableness:

a. "The restriction must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved.
b. There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object sought to be achieved.
c. No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of qualification of reasonableness, therefore, is expected to vary from case to case.
d. In interpreting constitutional provisions, the Court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation.
e. In appreciating such problems and felt need of the society the judicial approach must necessarily be dynamic, pragmatic and elastic.
f. It is imperative that for consideration of reasonableness of restriction imposed by a statue, the Court should examine whether the social control as envisaged in Art. 19 is being effectuated by the restriction imposed on the Fundamental Right.

[88] cf Pandey (n 53) 209.
[89]Chintamani Rao v State of M.P, AIR 1951 SC 118.
[90]Papnasam Labour Union v Madura Coats Ltd., AIR 1995 SC 2200.

g. The Rights guaranteed to a citizen by Art. 19 do not confer nay absolute or unconditional right. Each Right is subject to reasonable restriction which the legislature may in public interest. It is therefore necessary to examine whether such restriction is meant to protect social welfare satisfying the need of the prevailing social values.
h. The reasonableness has got to be tested both form the procedural and substantive aspects. It should not be bound by procedural perniciousness or jurisprudence of remedies.
i. A restriction imposed on a Fundamental Right guaranteed by Art. 19 must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonably discriminatory. Therefore, a restriction to be reasonable must also be consistent with Art. 14 of the Constitution.
j. In judging the reasonableness of the restriction imposed under 19(6), the Court has be beer in mind Directive Principles of State Policy (DPSP).
k. Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a DPSP can be presumed to be a reasonable restriction in public interest."[91]

ii) Article 20: *"Protection in respect of conviction for offences."*

1. *"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."*
2. *"No person shall be prosecuted and punished for the same offence more than once".*
3. *"No person accused of any offence shall be compelled to be a witness against himself."*

The Indian Constitution by way of Art. 20 provides certain safeguards to a person accuse of a crime which are as follows:

a. Cl. (1) of Art. 20 provides protection against ex-post facto laws
b. Cl. (2) of Art. 20 provides protection against double jeopardy; and
c. Cl. (3) of Art. 20 protects against self-incrimination.

[91] ibid. See also, cf Jain (n 5) 1017.

a) Protection against Ex-post facto laws:

Art. 20(1) "imposes a restriction on the law making power of the legislature. Ordinarily, a legislature is empowered to make prospective as well as retrospective laws, but cl. (1) prohibits the legislature from making retrospective criminal laws. However, it does not restrict imposition of civil liability retrospectively, i.e. with the effect from a past date."[92]

Art. 20(1) has two parts. The first part states that "no persons is to be convicted of an offence except for a 'law in force' at the time of the commission of the act charged as an offence. A person is to be convicted for violation of law in force when the act charged in committed. A law enacted later, making an act done earlier, which was not an offence when done, as an offence, will not make the person liable to be convicted under it."[93]Therefore, if a law is enacted on some future date it cannot be used to punish the act which is not categorised as an offence till the said law was enacted. "The second part immunizes a person from a penalty greater than what he might have incurred at the time of committing the offence. Thus, a person cannot be made to suffer more by an ex-post facto law than he would be subjected to at the time he committed the offence."[94]

b) Protection against double-jeopardy:

The double-jeopardy doctrine roots back to a well-established "maxim of the English Common Law *Nemo debetbisvexari* which means that an individual that a man must not be put twice in peril for the same offence. Therefore, when a person is convicted for an offence by a competent court, the conviction serves as a bar to any further criminal proceeding against him for the same offence. If the person is indicted again for the same offence in the court, he can plead, as a complete defence, his formal acquittal or conviction."[95]

The Fifth Amendment to the US Constitution provides inter alia: "Nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb." Cl. (2) of Art. 20 does not provide protection as broad as the American and the British legal regime, as under the said regimes protection against double jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. "But under Art. 20(2) the protection against double punishment is given only when the

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[92]Hathi Singh Manufacturing Co. v Union of India, AIR 1960 SC 923.
[93]Kanaiyalal v Indumati, AIR 1958 SC 444.
[94] Wealth Tax Commr. Amritsar v Suresh Seth, AIR 1981 SC 1106.
[95]cf Pandey (n 53) 273.

accused has not only been 'prosecuted' but also 'punished, and is sought to be prosecuted for the second time for the same offence. The use of the word 'prosecution' thus limit the scope of the protection and if there is no punishment as a result of the prosecution cl. (2) has no application."[96]

c) Prohibition against self- incrimination:

Cl. (3) of Art. 20 is based on the universal principle of the English and American jurisprudence which states that no individual is bound to provide such testimony by way of which he can be exposed to a prosecution of a crime. The provision is supported by the cardinal principle of criminal law which states that an accused must be presumed to be innocent until proven guilty. Therefore, is rests upon the prosecution to prove the case against the accused and in this process the accused need not provide any admission or submission against his own free will.

An essential rule of criminal jurisprudence against self-crimination has been raised to a constitutional guarantee under Art. 20(3) and any confessional statement of the accused found to be involuntary is hit by cl. (3) of the Art. 20. This protection is available to any person accused of a crime and does not allow to force him to be a witness against himself.

iii) Article 21: *"Protection of life and personal liberty."*

"Art. 21, though spelled in a negative language, confers on every person the fundamental right to life and personal liberty which has become an exhaustible source of many other rights."[97]These rights are available to both, the citizens as well as the non-citizens. Although, being the most fundamental of all rights available to any individual, its contours are so broad that its definition cannot be ascertained. Undoubtedly, such as right cannot be confined to an assurance of not taking away the life of an individual and must have a wider interpretation.

With reference to the corresponding provision in the 5th and 14th Amendment to the US Constitution, which states that no person shall be deprived of his "life, liberty or property, without due process of law", in Munn v. Illinois[98], Field J stated, "by the term 'life', as here used, something more in meant than a mere animal existence". This statement was further

[96]ibid.
[97] Maneka Gandhi v Union of India AIR 1978 SC 597.
[98] Munn v Illinois, 94 US 113 (1877).

expanded in Francis Coralie Mullin v. UT of Delhi[99]in which Bhagwati J held: “We think that the right to life includes right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”

By way of various case laws the SC of India has established that Art. 21 mandates the following requirements that must be fulfilled before a person is deprived of his life and liberty:

1. The requirement of a valid law.
2. The requirement of a valid procedure by the stated law.
3. The procedure to inculcate the principles of just, fair and reasonableness.
4. The law must endure the requirement of Art. 14 and Art. 19 i.e., it must be reasonable.

There have been a plethora of cases by way of which the courts have expanded the scope of Art. 21 to include:

1. “Right to know.
2. Right to shelter.
3. Right to privacy.
4. Right to legal aid.
5. Right to reputation.
6. Right to go abroad.
7. Right to livelihood.[100]
8. Right to speedy trial.
9. Right to compensation.
10. Right to self-preservation.
11. Right to sleep undisturbed.
12. Right against hand cuffing.
13. Right against custodial death.
14. Right to clean drinking water.
15. Right against public hanging.
16. Right against delayed execution.
17. Right against solitary confinement

[99] Francis Coralie Mullin v UT of Delhi AIR 1981 SC 746.
[100] Olga Tellis v Bombay Municipal Corpn. AIR 1986 SC 180.

18. Right to a reasonable accommodation to live in.
19. Right to unpolluted environment and preservation and protection of nature's gift.
20. Rights such as protection of wild life, forests, lakes, ancient monuments, flora-fauna, unpolluted air, protection from noise, air and water pollution, maintenance of ecological balance and sustainable development.[101]
21. Right to education incorporated under Art. 21A as a Fundamental Right in 2002 by way of Constitution (86th Amendment) Act under which every child has the right to free education until she completes the age of fourteen years.

iv) Article 22: *"Protection against arrest and detention in certain cases."*

As per the provision of Art. 21 "no person can be deprived of his life or liberty except according to procedure established by law." On the plain reading of this provision is becomes amply clear that the life and liberty of a person can be curtailed but, in accordance with a procedure laid down by a valid law. The procedural requirements to curtail the liberty of an individual have been enumerated under Art. 22 of the Constitution. Art. 22 also mandates that these procedures must be included in any legislation to make it a valid law for curtailment of an individual's liberty. If in any case these procedural requirements are ignored than deprivation of personal liberty will not be in accordance with the procedure established by law and thus will be illegal.

Two types of matters are dealt under Art. 22;

1. Matters of ordinary laws of crimes under which a person is arrested.

2. Matters of law of 'Preventive Detention' under which a person is detained.

Rights of arrested persons under ordinary laws:

Four rights have been guaranteed under cl. (1) and (2) to any person arrested for an offence under ordinary law. Available to both the citizens and non-citizens but not for a person arrested or detained under laws relating to preventive detention.

a. "Right to be informed 'as soon as possible' of ground of arrest,
b. Right to consult and to be presented by a lawyer of one's choice,

[101] cf Shukla (n 59) 209-10. See also Legal Service India.com, 'Constitution of India provides Fundamental Rights under Chapter III' <http://www.legalserviceindia.com/articles/art222.htm> accessed 15June 2021.

c. Right to be produced before a Magistrate within 24 hours of arrest,
d. Freedom from detention beyond the stipulated period expect by the order of the Magistrate."[102]

Cl. (1) aims to provide, to the arrested person, the earliest possible opportunity to remove any kind of mistake, misapprehension or misunderstanding that the arresting authority might have at the time making the arrest. Secondly, to know exactly what are the charges against him upon which he is being arrested, so that he can exercise his second right to consult a lawyer to defend him against those charges.

Cl. (2) provides one of the most important safeguard to the arrested person that "he must be produced before a Magistrate within 24 hours of his arrest." This is done so that an independent authority exercising judicial powers may without any delay apply its mind to the facts of the case. "The Criminal Procedure Code, 1973 (CrPC) contain similar provisions in Sections 56 and 303, but the Constitutional makers were enthused to make these safeguards a part of the Fundamental Rights. Therefore, once it is shown that the arrest made by the police was illegal, it becomes necessary for the state to establish that the direction made by the Magistrate for detention of the accused was after considering all relevant factors before him."[103]

Cl. (3) enacts two exceptions under which the fundamental rights guaranteed by cl. (1) and (2) of Art. 22 do not apply: 1) to the enemy aliens, and 2) to persons arrested or detained under nay law providing for preventive detention.

Cl. (4) to (7) deal with preventive detention. Laws relating to preventive detention have been taken by the Indian legal regime from its colonial masters which, during the First and the Second World Wars allowed the preventive detention on the grounds of necessity.But no power of preventive detention has been used by the British Parliament during peace time. The Indian Constitution, however, recognises preventive detention during normal times also.To balance the necessity of laws for preventive detention and mandate of Art. 21, the Constitution by way of cl. (4) to (7) provides certain safeguards to restrain the legislative powers conferred on the legislature and to prevent misuse of the power by the executive.

The safeguards provided by the said clauses are:

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[102] Constitution of India, Art. 22.
[103]Madhu Limaye, re AIR 1969 SC 1014.

1. "Review by Advisory Board.
2. Communication of grounds of detention to detenue.
3. Detenue's right of representation."[104]

2.3.3. Right against Exploitation (Art. 23- 24)

Art. 23 and 24, although being Fundamental Rights, remained underutilized for almost thirty years by the judiciary as there were few significant judicial ruling with regard to these provisions. But, it all changed from 1982 when these provisions gained importance and were used extensively by the judiciary to work towards the upliftment of the poor in the country. Art. 17, 23 and 24 are some of the Fundamental rights that can be enforced not only against the state but against the whole world. Therefore, these provisions have wide scope to not only cover any oppression done by the state but against any such practice wherever they are found.

i) Article 23: *"Prohibition of traffic in human beings and forced labour."*

Art. 23(1) proscribe three unsocial practices:

a) Begar:

"The term mean compulsory work without any payment. It is labour or service which a person is forced to give without any remuneration for it. A practice that was widely prevalent in the erstwhile India and was a great evil at the time of India's independence and therefore was prohibited by the Constitution by way of Art. 23(1)."[105]

b) Traffic in Human Beings:

"The expression 'traffic in human beings' commonly known as slavery, implies buying and selling of human beings as if they are chattels, and such a practice is constitutionally abolished. Traffic in women and children for immoral purpose is also covered under this provision."[106]

c) Forced Labour:

Art. 23 intends to comprehend 'forced labour' as something that covers both traffic in human beings or begar under its purview. There is one exception to this provision on forced labour. Under Art. 23(2), State has been given the authority to enforce compulsory service for public purposes. But on such imposition by the State there can be no discrimination on the ground of

[104] Constitution of India Art. 22.
[105] People's Union of Democratic Rights v Union of India AIR 1982 SC 1473.
[106] Raj Bahadur v Legal Remembrancer AIR 1953 Cal 522.

religion, race, caste, class or any of them. In the Constituent Assembly debates this provision was justified on the ground that there can be times when compulsory service may be required and whenever such need arises, every citizen will be obligated to render it, and the state is under no obligation no pay for the same.

ii) Article 24: *"Prohibition of employment of children in factories, etc."*

Child labour has been a critical human as well as an economic problem. Poor families try to increase their income by adding income from employment of their children. The process is gainful for both the parties the employers of children and the families of the children and that is the major reason given to not ban child labour in all its form as it may not be socially feasible in the socio-economic conditions prevalent in India. Therefore, Art. 24 validates only a partial ban on child labour.

Under Art. 24 "no child under the age of fourteen years can be put to work in any factory or mine, or any other hazardous employment." The SC has emphasised that Art. 24 embodies a Fundamental Right "which is plainly and indubitably enforceable against everyone."[107] Therefore, by way of this provision the courts have ruled that no employment of children can be made in any hazardous work such as construction work, firework factories, bangle industries etc.

2.3.4. Right to Freedom of Religion (Articles 25-28)

India is a country of immense diversity and colours. It is a multicultural society with a number of religions assimilated in one societal structure. Looking at the numerous religion practiced in the country the Constitutional makers wanted to ensure religious freedom to all such denomination. Religion being a very sensitive topic in India it was important to ensure State neutrality is such matters but as there could be no consensus in the Constituent Assembly on the term 'secularism' it was not specifically written in the original Constitution.

"Religious tolerance and equal treatment of all religious groups are essential parts of secularism. The concept of secularism is implicit in the Preamble of the Constitution which declares the resolve of the people to secure to all citizens liberty of thought, belief, faith and worship."[108]The Constitution (42nd Amendment) Act, 1976, inserted the word 'secular' in the

[107] ibid.
[108] Constitution of India, Preamble.

Constitution. The Amendment was intended to merely spell out clearly the concept of 'secularism' in the Constitution.

"Secularism in India does not mean irreligion. It means respect for all faiths and religions and the State does not identify itself with any particular religion. India being a secular country there is no preferred religion as such and all the religious groups enjoy the same constitutional protection without any favour or discrimination."[109]

Art. 25 to 28 are applicable to both citizens as well as non-citizens alike. These are also considered as group rights as they are not only available to individuals but also religious groups. These articles provide protection to religion and religious practises from the interference of the State. In the US, religious freedom is guaranteed by the First Amendment under which the government is forbidden to pass any law "respecting an establishment of any religion" as well as a law "prohibition the free exercise of religion."

i) Article 25:*"Freedom of conscience and free profession, practice and propagation of religion."*

Art. 25(1) available to citizen and non-citizen alike, guarantees the "freedom of conscience and the right freely to profess, practise and propagate religion." However, the right is not absolute and "subject to public order, health, morality and other provisions of Part III of the Constitution." Cl. (2) of the Art. lays down further exceptions as "sub-cl. (a) of cl. (2) saves the power of the State to make laws regulating or restricting any economic, financial, political or secular activity which may be associated with religious practice and sub-cl. (b) reserve the State's power to make laws providing for social welfare and social reform even though they might interfere with religious practices."[110]

"Freedom of conscience connotes a person's right to entertain beliefs and doctrines concerning matters, which are regarded by him to be conducive of its spiritual well-being."[111] The right is not only to accept such religious beliefs as may be approved by his judgement or conscience but also to exhibit his sentiments in overt acts as are enjoined by his religion. Therefore the right has been provided to 'profess, practice and propagate' one's religious beliefs. "Rituals, observances, ceremonies and modes of worship considered by the religions

[109] cf Jain (n 5) 1244.
[110] cf Pandey (n 53) 258.
[111]Ratilal Panchand Gandhi v State of Bombay AIR 1954 SC 388.

as its integral part is also protected. What constitute an integral and essential part of a religion is a question that has to be decided by the courts with reference to the doctrine of a particular religion and includes practices regarded by the community as part of its religion."[112]

ii) Article 26: *"Freedom to manage religious affairs."*

Art. 26 lists down the rights available to religious denominations in India."It guarantees to every denomination or a section of it to establish and maintain institutions for religious or charitable purposes and to manage in its own way all affairs in matter of religion. Rights are also given to such denominations or a part of it to acquire and own movable and immovable properties and to administer such property in accordance with law."[113]

The nomenclature 'religious denomination' under Art. 26 stands for a religious sect having a shared faith and should be known by a distinctive name. "The word 'religious denomination' take its colour from 'religion' and therefore there must be a common faith of the community based on religion, and the community members must have a common religious tenets peculiar to themselves."[114]Thus, to form a religious denomination three conditions must be fulfilled:

1. Should be a group of persons who rely on a system of beliefs which they feel to be conducive for their spiritual well-being.
2. Should have a common organisation.
3. These groups of individuals should have a distinctive name.

iii) Article 27: *"Freedom as to payment of taxes for promotion of any particular religion."*

Under Art. 27 no tax can be levied on the proceeds which are to be specifically used for payment of expenses to promote or maintain any religion or religious denomination. The foremost condition that must be fulfilled for this Art. to be applicable is that the levy must be in the nature of a tax and if such imposition resembles a fee it will not be within the purview of Art. 27. There is not much difference between a tax and a fee and both are the ways by which the government collects funds for general welfare. But the Constitution has made a difference between a tax and a fee for governmental purposes.

[112]Seshammal v State of TN AIR 1972 SC 1586.
[113] Constitution of India, Art. 22.
[114] Sri AdiVisheshwara of Kashi Vishwanath Temple v State of UP (1997) 4 SCC 606.

"A tax is in the nature of compulsory exaction of money by the public authority for public purposes and it is used for general expenses of the state and does not confer any special benefits to the payer of the tax. Fees, on the other hand, are payments primarily in the public interest but for some special services rendered or some special work done for the benefit of those from whom payments is demanded. Thus, in a fees there is always an element of quid pro quo which is absent in a tax. Thus, a fee can be levied on pilgrims to a religious fair to meet the expenses of the measures taken to safeguard the health, safety and welfare of the pilgrims."[115]Similarly, when the government provides any supervision for the management of the religious endowments to meet such expenses a fee can be levied over such religious denomination.

iv) Article 28: *"Freedom as to attendance at religious instruction or religious worship in certain educational institutions."*

Art. 28(1) prohibits imparting of religious education in any educational institution which is wholly maintained from the funds of the State. Art. 28(2) lays down the exception to this rule and states that this restriction will not be applicable to an education institution which, even if it is administered by the state, is established under an 'endowment' or 'trust' requiring that religious instruction must be imparted in such an institute.

In state recognised educational institutions, religious education can be imparted on a voluntary basis. According to Art. 28(3), "no person attending an educational institute recognised by the State or receiving aid from the State funds, can be required to participate in any religious instruction imparted in the institution, or to attend any religious worship conducted in the institution, or any premises attached thereto, unless he consents to do so voluntarily or, if a minor, his guardian gives his consent for the same."

Under Art. 28 three types of educational institutions are recognised:

1. Institution of complete public nature, where no religious education can be imparted in any way.
2. Institutions where the role of the state is that of a trustee, religious education is permissible.
3. Denominational institutions aided by the state, religious education is permitted on voluntary basis.

[115]Ramchandra v State of West Bengal AIR 1966 Cal. 164.

2.3.5 Cultural and Educational Rights (Art. 29-30)

Art. 29 and 30 protect and guarantee certain cultural and educational rights to various cultural, religious and linguistic minority residing in India.

i) Article 29: *"Protection of interests of minorities."*

Under cl. (1) right has been provided to every section of the citizens to conserve their distinct language, script or culture. It is a protection from the State intervention if any section of the society wants to preserve their language, script or culture. "A minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its language, script or culture."[116]

Unlike other constitutional guarantees, Art. 29(1) is not subject to any reasonable restriction. The right conferred upon the citizens to conserve their language, script or culture is made absolute by the Constitution.

The benefit of Art. 29(2) is not confined only to minority groups but extend to all citizens whether belonging to minority or majority group in the matter of admission to the educational institutions maintained or aided by the state. "Art. 29(2) is broad and unqualified and confer a special right on all citizens for admission into the State maintained or aided educational institutions. To limit this right only to minority group will amount to holding that the citizens of the majority group have no right to be admitted into an educational institute for the maintenance of which they contribute by way of taxes."[117]

ii) Article 30: *"Right of minorities to establish and administer educational institutions."*

Art. 30(1) gives the linguistic or religious minorities' two rights:

1. "To establish, and
2. To administer educational institutions of their choice."

The benefit of Art. 30(1) is only for linguistic and religious minorities and not to any other section of the Indian citizenry. "Although, Art. 29 and 30 are grouped together it will be wrong to restrict the right of minorities to establish and administer educational institutions of their choice only to educational institution concerned with the conservation of the language, script or culture of the minorities. The reason being, first, Art. 29 confers the fundamental

[116] Constitution of India, Art. 30(1).
[117] State of Bombay v Bombay Educational Society, AIR 1954 SC 561.

right on any section of the citizen irrespective of their being a minority whereas Art. 30(1) confers the right only to minorities. Secondly, Art. 29(1) is concerned with language, script or culture, whereas Art. 30(1) deals with minorities based on religion or language. Thirdly, Art. 29(1) is concerned with the right to preserve language, script or culture, whereas Art. 30(1) deals with establishing and administering educational institutions of their choice. Fourthly, the conservation of language, script or culture under Art. 29(1) may be by means wholly unconnected with educational institutions, and similarly establishment and administration of educational institutions by minority under Art. 30(1) may be unconnected with any motive to conserve language, script or culture. Therefore, it may be that Art. 29(1) and Art. 30(1) overlap but the former cannot limit the scope of the latter. The scope of Art. 30 rests on the fact that the right to establish and administer educational institutions of their choice is limited to linguistic and religious minorities only, and no other section of the society has such right. Further Art. 30(1) gives the right to linguistic minorities irrespective of their religion. It is, therefore, not at all possible to exclude secular education from Art. 30."[118]

2.3.6 Right to Constitutional Remedies (Art. 32-35)

"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," Dr. Ambedkar.[119]

The importance of this Art. can be realised from the very words of one of the most eminent members of the Constituent Assembly and "it is true that the declaration of fundamental rights will be meaningless unless there is an effective machinery for the enforcement of these rights. If there is no remedy then there is no right at all. It is, therefore, in the fitness of the things that our Constitution makers incorporated Art. 32 as a fundamental rights so that the heart and soul of the Constitution remains intact."[120]

i) Article 32: *"Remedies for enforcement of rights conferred by this Part".*

The right to move to SC guaranteed under cl. (1) can be exercised only through 'appropriate proceedings.' What does 'appropriate proceeding' mean? "Initially the Court found the answer with reference to cl. (2) of Art. 32 and stated that only those proceedings were

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[118]Commr., Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.
[119] CAD. Vol. VII at 953.
[120] cf Pandey (n 53) 446.

appropriate which invoke, by original petition, the jurisdiction of the SC to issue writs or orders or directions of the types described in cl. (2)."[121] But soon the Court moved beyond this restrictive interpretation and clarified that, "there is no limitation in regard to the kind of proceedings envisaged in cl. (1) of Art. 32 except that the proceeding must be 'appropriate' and this requirement of appropriateness must be judged in the light of the purpose of which the proceeding is to be taken, namely, enforcement of a fundamental right."[122]"The word appropriate does not refer to any form but to the purpose of the proceeding and, therefore, as long as the purpose of the proceeding is enforcement of fundamental rights, it is appropriate and when it relates to the enforcement of fundamental rights of poor, disabled or ignorant by a public spirited person even a letter addressed to the Court can be regarded as an appropriate proceeding."[123]

Under cl. (2) the SC is authorised to issue directions in the form of order or writs which include "writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari." These writs are the potent weapon given in the hands of the judiciary by the Constitution for the enforcement of different rights enumerated under Part III of the Constitution. "These writs were known as the prerogative writs under the English law and have their origin in the exercise of the King's prerogative power of superintendence over the observance of law by his officials and were issued by the King Bench." Cl. (2) of Art. 32 has a wide scope and does not limit the power of the Court to issuance of writs only, nor is the Court obligated to observe the technicalities of the prerogative writs under the English Law. "The power of the Court under Cl. (2) is not confined to only issuance of writs but also extends to issuing of any directions or orders which may be appropriate for the enforcement of the fundamental rights. Also, the power of the Court is not only injunctive in nature i.e., preventing the infringement of any fundamental right, but also remedial is scope and provides relief against the breach of fundamental right already committed. "[124]

Under cl. (3)"the Parliament is authorised by law to empower any other court to exercise, within the local limits of its jurisdiction, any power conferred upon the SC by cl. (2)." It is to be noted here that the Constitution itself by way of different provisions empowers every HC, "to issue to any person or authority within the territories in which it exercises its jurisdiction,

[121]Daryao v State of UP AIR 1961 SC 1461.
[122]BandhuaMuktiMorcha v Union of India AIR 1984 SC 802.
[123] ibid.
[124] M.C. Mehta v Union of India (Shriram- Oleum Gas) AIR 1987 SC 1086.

directions, orders or writs for the enforcement of any fundamental rights."[125]This power conferred on the HC or to be conferred on any court under this cl. is not to be treated as a derogation to the power conferred on the SC by cl. (2) of Art. 32.

Under cl. (4) it is stated that, "the right to move to the SC for the enforcement of fundamental rights shall not be suspended except as otherwise provided by the Constitution." Under Art. 359 the Constitution empowers President to suspend the enforcement of Fundamental rights when the proclamation of emergency under Art. 352 is in operation. This provision was used twice, once in the year 1962 and then in 1971, when national emergency was proclaimed on the ground of external aggression and then in 1975 on the ground of internal disturbance. "Twice the scope of Presidential order under Art. 359 has come for the perusal of the Court. Though divided on the issue, no doubt was entertained by the Court nor the parties that the right to move to the SC for the enforcement of the fundamental rights remains suspend even without an express mention of Art. 32 in the order under Art. 359." However, Art. 20 and 22 have been excluded from the ambit of Art. 359 by the Constitution (44th Amendment) Act, 1978.

[125] Constitution of India, Art. 226.

Chapter III

Transformative Constitutionalism: A Conceptual Understanding

3.1. Introduction

It is well known that power corrupts and absolute power corrupts absolutely. In a political setup unlimited power in the hands of the State jeopardizes the freedom of people. It is with this idea that a system of checks and balances is recognised in almost every democracy around the world so as to control the State in its use of power in order to restrict its interference with the freedoms of the individuals.

The modern political thinkers draw a distinction between 'Constitutionalism' and 'Constitution'. "The Constitution of a country seeks to establish its fundamental or basic organs of the government and administration, describe their structure, composition, powers and principal functions, define the inter-relationship of these organs with one another, and regulate their relationship with the people, more particularly, the political relationship."[126] Therefore, a constitution is a physical document which contains the fundamental laws of the land. Constitutionalism, on the other hand, is a system of governance which while recognising the need of the government insists for limitations to be put in places to control its powers. "It formulates checks and balances and puts retrains on the power of the legislature and the executive to not allow them to become uncontrolled and arbitrary."[127] Thus, there may be a case where a country may have a Constitution but not necessarily constitutionalism because constitutionalism is an idea which is not embedded in some physical document but within the philosophy of the nation's life. Constitution is a means by way of which the idea of constitutionalism is provided a concrete base so that it cannot be interfered by the State. 'Constitutionalism' connotes in essence limited government or a limitation on government. "It is the antithesis of arbitrary powers and the antithesis of constitutionalism is despotism. It is only when the Constitution of a country seeks to decentralise power instead of concentrating it at one point, and also imposes other restrains and limitations thereon, does a country has not only constitution but also constitutionalism."[128]

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[126] K.C. Wheare, Modern Constitutions (1968) Indian Political Science Association.
[127] cf Jain (n 5) 6.
[128] ibid.

The concept of constitutionalism has evolved overtime just like any other social science concepts and its understanding has changed with the changing need of the society. Therefore, there cannot be a specific time to pinpoint its creation or emergence. Generally, the definition has been refined overtime with the changing social and political structure. Its evolution can be traced back to the times of Plato and Aristotle and the Roman Empire. In the Roman Empire the difference between the lex and jus was recognised under which the lex represented any rule made by the State to be within the concept of law and jus mandated such rules to abide to the quality of being just and fair.

The Common law system is often credited to be the first in establishing the concept of constitutionalism and has been claimed to be a part England before the Norman Conquest of 1066when it began taking its modern shape and sowed the seed of constitutionalism.[129] Starting from the Magna Carta in 1215 when the King was compelled to recognise certain rights and claims of the people and was subjected to the law of the land, it was refined by different jurists like Bracton who distinguished between the State and the law. It was in the later parts of the seventeenth century when Sir Edward Coke pursued the process and claimed precedence of common law over the State made law. In the Glorious or Bloodless Revolution of 1688-89 any differences that existed between the nature of law and the state was removed by way of a constitutional norm which established the rule that the King is not only answerable to the God but also to the people. Though, not personally, but through his ministers who are answerable in law for all their acts to people through their representatives in Parliament.[130] The Act of Settlement, 1701 provided a major push as it ensured the independence of judiciary from the King by making their tenure irrevocable during their good behaviour. Thus, the tradition set by Bracton and Coke continued in the eighteenth century as well with constitutional scholars such as Blackstone, Bagehot and Dicey who, with their work, continued questioning the growing powers and responsibilities of State and its consonance with the common law traditions and rights of the people.

But even though the idea of constitutionalism was embedded deep in the human thought it was still to be defined. The array of incidents leading to the Russian Revolution of 1917 brought a paradigm shift in the legal regime and its impact was felt on other societies and their political formations. In lieu of this a need arose to understand the vision of the society and comprehend its weaknesses. It was this time when the social scientists involved

[129]Mahendra Pal Singh, 'Constitutionalism in the Indian Comparative Perspective' (2018) 11 NUJS L Rev 647.
[130] ibid 649.

themselves to investigate and present a different form of social and political vision of the society by means of constitutional structures that were prevalent in the US and most parts of the West. One of such social scientist, a professor at the Harvard Law School, Charles H. McIlwain is accredited for introducing the concept of constitutionalism when he devoted his six lectures at the Cornell University in 1938-39 exclusively to its understanding and its evolution in the West.[131] He described it as, "Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law." [132] Recognising the need of some discretion by the government in policy making, he stated, "But the most ancient and most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law."[133]

In the US restrictions on liberties were put on those who were critical to the kind of state US was and an inclination towards the ideologies of Union of Soviet Socialist Republics (USSR) was seen. But soon different societies in the Europe started establishing welfare states in the light of the changing social and economic scenarios and the US too relaxed its attitude towards the ideology and reinstated the belief that constitutionalism is the restrain on the powers of the state in order to protect the civil and political right so the individuals from the excess of the State.

Accepting that the term constitutionalism is not defined anywhere, Louis Henkin, who is widely considered one of the most influential contemporary scholars of international law and the foreign policy of the US, explained it in terms of its demands which include its basis in "popular sovereignty, supremacy of the constitution, political democracy and representative limited government, separation of powers or other checks and balances, civilian control over military, police governed by law and judicial control, and an independent judiciary which requires that government respects and ensures individuals rights which are same as accepted by the Universal Declaration of Human Rights, determination of any derogation of rights by constitutional bodies, existence of institutions to monitor and assure respect for the

[131] ibid 648.
[132] C.H. McIlwain, 'Constitutionalism Ancient and Modern' (1987) Cornell University Press, 21-22.
[133] ibid 22.

constitutional blueprint, for limitation on government, and for individual rights, and respect for self-determination of people".[134]

This kind of philosophy of putting restrains on the State powers perhaps could not have sustained in the light of the expanding ideas of communism under the Soviet Union regime. However, with the weakening and final breakdown of the Soviet Union and its fading dominance over the East European countries, many discarded communism and started establishing new constitutions. It was during this time that Andras Sojo, a Hungarian Scholar, authored the book titled "Limiting Government: An Introduction to Constitutionalism" initially in Hungarian in 1995 and then in English in 1999 as a guidance of the new regimes that were coming up in the East Europe. He noted that "Constitutionalism is the restriction on State power in the preservation of public peace"[135] and admits that "there is no satisfactory definition of constitutionalism, but one does not only feel when it has been violated, one can prove it."[136]

It is unclear as to when exactly the term 'constitutionalism' was originally used but according to Sojo it can be attributed to the French Revolution which initiated its use by the commencement of the nineteenth century.[137] Coinciding with Sojo's English version, Scott Gordon, the Canadian Economist wrote that "the term 'constitutionalism' is fairly recent in origin, the idea could be traced back to classical antiquity". His understanding of "constitutionalism denotes that the coercive power of the state is constrained."[138] In his book he analyses all the major constitutional systems until the end of last millennium in the West, he concluded "that the continuous development of constitutionalism is a comparatively recent phenomenon, traceable no further than to seventeenth- century England."[139] He added that "efficient government and constrained government are not incompatible and both objectives have being realized, in practice, in numerous states dating back as far as ancient Athens." It is important to note here that he further admits that the, "Constitutional democracies have not succeeded in constructing a perfect system for controlling the state, and like other dimensions

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[134] Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects in Constitutionalism, Identity, Difference, and Legitimacy' (1994) M. Rosenfeld edn., 39, 41-42.
[135] Andres Sajo, 'Limiting Government: An Introduction to Constitutionalism' (1999) Central European University Press <https://www.academia.edu/7446796/_andras_sajo_limiting_government_an_introduction_bookzz_org_ > accessed on 28 June 2021.
[136] ibid 9.
[137] ibid 9.
[138] Scott Gordon, 'Controlling the State: Constitutionalism from Ancient Athens to Today' (1999) Harvard University Press.
[139] ibid 358.

of social perfection, such an ideal is unlikely to come within our grasp. But while perfection is impossible, improvement is not".

Nick Barber states that the existing account of constitutionalism has a negative connotation based on Max Weber's description of the state as "a human community that successfully claims monopoly of the legitimate use of physical force within a gives territory." According to him "so far constitutionalism has been understood in a negative connotation of regulating and controlling the use of force by recognising certain negative rights provided to the individuals against the state. Based on this he propounds the idea of positive constitutionalism under which the citizenry expect from the state to have the capacity to promote their well-being."[140] Such a State is to be based on certain principles such as state sovereignty, separation of power, the rule of law, civil society, democracy and subsidiarity. These principles will help the State in fulfilment of its obligation which is to ensure the well-being of its citizens, which is the foremost justification of its very existence. Therefore, Barber states that, "all principles of constitutionalism ultimately find their origins in the characteristic purpose of the State i.e. the advancement of people's well-being" and "a successful state will possess an institutional structure that is characterised by constitutionalism."[141] Thus, labelling the existing models of constitutionalism as negative model based on an improvised understanding of the state, Baber advances a richer understanding of the State that acknowledges its role in advancing the well-being of its citizenry. Discussing all the principles in detail Barber admits that "exceptions may be made in their execution and in fact all real world State fall short on the demands of constitutionalism and in the process of bringing changes in the Constitution to meet such demands care must be taken to analyse the costs and risk involved in bringing about the required changes."[142]

Similarly Prof. Dieter Grimm, a widely known German scholar and a former judge of the Federal Constitutional Court of Germany, make a comparative analyses of the evolution of constitutionalism in the UK and US on one hand and in Germany on the other and stated that, "while the model of the US is strictly developed on the concept of individual rights vis-a-vis the power of the State and the concept of representation in and control of Parliament in the UK as a protector of rights of the individuals, on the continent the idea is developed by

[140] Nicolas W. Barber, 'Introduction: Constitutionalism' (2015) Oxford Legal Studies Research Paper No. 7/2015 <https://ssrn.com/abstract=2565721> accessed 17 June 2021.
[141] ibid 18.
[142] ibid 237.

drawing a distinction between the state and the society." This distinction is based on the relationship in which society is stripped of all its political powers and the state is equipped with the monopoly of power and it is because of this reason that the State power is to be bound by law. It is because of this relationship between the society and the State that the latter holds an entitled position as a matter of principle and the former the obligated position.[143] However, he finds that this position is changing because of two reasons. "First, because the State functions of the basis of adult franchise while the political parties remain unregulated by the constitution and secondly, because of the vast economic powers in private hands. While the former enters into all organs of the State and controls it according to its policies, the latter compels the State to act in line with its (society's) interests."[144]

"This may be regarded as one of the reasons for social state being included as one of the basic features of most of the constitutions on the continent, which is reflected in the Lisbon treaty of 2007 that holds somewhat similar status as constitution for the member States. The Treaty also recognises the social and economic rights on the similar footing as that of civil and political rights. This understanding of constitutionalism among the continental countries seems to have been adopted in many countries in Europe, Africa, Asia and Latin America."[145]

This understanding of constitutionalism, without impeding the definitions of constitutionalism formulated in the UK and US, adds certain additional dimensions to it under which it requires the state to adhere with certain obligations towards its citizenry. The Constitution of India and many other countries after World War II have incorporated a more positive understanding of constitutionalism.[146]

In an another approach, considering the already existing and currently increasing diversity and plurality based on race, religion, language, culture and other such factors around the globe, James Tully, has argued and justified, on philosophical and political grounds, the accommodation of these diversities as a facet of constitutionalism with the view of inculcating the respect for one another and respect of each other differences.[147] He states that, "a constitution that ignores such accommodation and respect for diversities and plurality does not fulfil the requirement of constitutionalism. Many older constitutions which did not had

[143] Dieter Grimm, 'Constitutionalism, Past Present and Future' (2016) <http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2018/08/Grimm.pdf> assessed 20 June 2021.
[144] ibid 63.
[145] cf Singh (n 129). 656
[146] ibid.
[147] ibid.

this aspect have introduced it either through amendments or judicial interpretation or appropriate legislation and constitutional application. The ones which have not inculcated this attribute lack an important aspect of constitutionalism, even if they guarantee equality of treatment to all individuals."[148]

3.2 Constitutionalism: An Indian Perspective

With the advent of globalisation and the exponential increase in the role of the State as a welfare entity all the constitutions, particularly the ones after WW II have expressly provided for the establishment of social State in place of Laissez Faire State. But the case in India has been different from the rest of the world as enough evidence are available to show that that even during the regimes of kings and Mughals the rulers cared for the welfare of their people and understood their demands.[149] This scenario slowly changed with new colonisers coming to India and in order to strengthen and expand their rule started to ignore the plight of their subjects. With this the right consciousness of the Indians escalated and they started following individuals who showed support for their encroached rights. For example Raja Ram Mohan Roy played a prominent role in restoring pre- British traditions and getting social reforms done such as abolition of Sati. Similarly, people believed in Mahatma Gandhi because he showed his support to the basic rights that people were demanding from the British colonisers at that time. Ultimately under the All India Congress all the Indian population came together and initiated their formal demands from the colonisers for the protection of basic rights in the form of a Constitution, which overtime through Annie Besant's Bill of Right 1925, Moti Lal Nehru Report of 1928, Karachi Resolution of 1931 and similar unrelenting movements started conceiving the kind of Constitution India must have. With the understanding gained from the Government of India Acts of 1919 and 1935 and judicial pronouncements under the 1935 Act much of the future constitution was already being conceived by the time India formally started its Constitution making process.

It is because of this understanding of its past history and precedents in pre-British and British that India could conceive and frame a Constitution inspite of its partition, diversity and immense problems of merging more than five hundred Indians states into the Union of India. "But perhaps most striking was belief", says De "shared by politicians, bureaucrats, and

[148] ibid.
[149]Rohit De, 'Constitutional Antecedents' (2016) Oxford Handbook of the Indian Constitution (S. Choudhry, M. Khosla & PB. Mehta edn) 20-23.

judges across the ideological divide that constitutions would continually evolve and that constitutionalism meant a commitment to principles ... rather than to a strict interpretation of the text."[150] Prof. Ackerman and many others thought on similar footing and were surprised by the very fact as to "how a country with immense diversity, poverty, ignorance and many other negative factors could have been working reasonably well since January 1950."[151] To this, the credit has been given to the "kind of constitutionalism that the makers had learnt, practiced and incorporated in the Constitution and according to which they and their successors and the common citizenry have worked with deep desire that it must work indefinitely with some adjustments and improvements as the time demands. Also at the same time they have agreed that the basic structure of the Constitutions shall also be kept intact."[152]

Thus, when it comes to the definition of constitutionalism from the above deliberation one can understand that there is no precise definition of constitutionalism and as a concept it is still developing. In Indian perspective the one name which resounds most often when discussing on constitutional law is of Dr. D.D. Basu. While deliberating on constitutionalism he states, "The principle of constitutionalism requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of separation of power; it requires a diffusion of powers, necessitating different independent centres of decision-making. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights.... Constitutionalism is about limits and aspirations. The Constitution embodies aspiration to social justice, brotherhood, and human dignity. It is a text which contains fundamental principles. .. .The tradition of written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution. The Constitution is a living heritage and, therefore, you cannot destroy its identity."[153]

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[150] ibid 37.
[151] B. Ackerman, 'The Rise of World Constitutionalism' (1997) Virginia Law Review 783.
[152] Uday S. Mehta, 'Indian Constitutionalism Crisis, Unity and History' (2016) Oxford Handbook of the Indian Constitution (S. Choudhry, M. Khosla & P.B. Mehta edn) 38.
[153] D.D. Basu, 'Shorter Constitution of India' (LexisNexis 15 edn. 2017).

3.3 Transformative Constitutionalism

The concept of transformative constitutionalism is a subset of constitutionalism which came from the South African Constitution and their freedom struggle. "It was Karl Klare who in his article 'Legal Culture and Transformative Constitutionalism' spoke on transformative constitutionalism in South African context."[154] According to him the "concept of transformative constitutionalism is a 'long term project' which is shaped by the political and social institutions through the enactment, interpretation and enforcement of the Constitution."[155]Justice Langa of South Africa had on his analysis of transformative constitutionalism stated that, "This is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change."[156]

Therefore, what is to be understood here is that the very idea of transformative constitutionalism revolves around the country's Constitution and the way it is interpreted. The judiciary has been provided with this responsibility to have this decisive role. The Constitutional Courts has played the prominent role overtime and from the very beginning of the Constitution there have been two approaches that have been adopted:

a) The Conservative Constitution

Under this approach the Constitution is characterised as a conservative document and this approach relies on various understanding like the Constituent Assembly functioning under the old regime, to the earlier political setup, and to a gradual evolution towards self-government, all tapped into an established intellectual tradition. This is the tradition of constitutional continuity.[157] The purveyors of this tradition could count among themselves an authority as eminent as B.N.Rau, the Constitutional Advisor, who in his book, 'India's Constitution in the Making', classifies the moment of Independence as 'transference of power'[158] To justify the 'transfer' idiom it was stated that first, the Constituent Assembly itself was no revolutionary body and it derived its authority from the Cabinet Mission Plan of 1946, and its member were elected under the limited suffrage provision of the existing

[154]Ayush Verma, 'Transformative Constitutionalism'<https://blog.ipleaders.in/transformative-constitutionalism/amp/> accessed 24 June 2021.
[155] ibid.
[156] ibid.
[157]Arudra Burra, 'The Cobwebs of Imperial Rule' (2010) <http://www.india-seminar.com/2010/615/615_arudra_burra.htm> accessed 25 June 2021.
[158] B.N. Rau, 'India's Constitution in the Making' (Orient Longman 1960).

colonial framework.[159] Second, the Constituent Assembly borrowed heavily from the Government of India Act of 1935. As much as 75 per cent of the Indian Constitution was based on that colonial law. The influence was so prominent that, in 1958, Justice Venkatarama Aiyar observed that the provision so the Constitution must be interpreted in the light of Government of India Act, because "a Federal Constitution has been established under the Government of India Act, 1935, and though that has undergone considerable change by way of repeal, modification and addition, it still remains the framework on which the present constitution is built."[160]

The point is also made that the Constitution has adopted some of the very provisions that been subject to bitter protests during the course of freedom struggle. These included preventive detention, granting the political executive the power to pass ordinances bypassing legislative procedure and the power to effectively suspend the legal system by declaring an emergency. Thus, it is argued that if the Constitution was meant to be a transformative document it would have at the very least repudiated these hallmarks of arbitrary power instead of endorsing them. Instead, specific proposals were made in the Constituent Assembly to incorporate some core civil rights such as a guarantee against arbitrary searches and seizures which were rejected. All this prompts that freedom was secondary importance to the framers of the Constitution, relegated behind the overreaching concerns of national integration and security, elevation of economic and social evils, and India's international standing.[161]

Third, it is argued, that the system of government that the Constitution set up was neither new nor revolutionary and it only established that Westminster system of parliamentary democracy.[162] Therefore, the parliamentary system under the Constitution did not bring any radical change but only a system of 'responsible and limited'[163] government, which had been functioning under the 1935 Act. This included provincial legislative councils and ministers elected on the basis of limited franchise, which had limited law making power, often subject to overriding authority of the Governor- General.[164] Thus, the Constitution only marked the

[159] cf Austin (n 44).
[160] MPV Sundararamier v State of AP, 1958, SCR 1422.
[161]Gautam Bhatia, 'The Transformative Constitution' (HarperCollins 2019).
[162] Madras Bar Association v Union of India (2014) 10 SCC 1.
[163] cf Mehta (n 132)
[164] Government of India Act 1935.

culmination of this incremental, but inevitable, process. The process was not that of a destruction of the last regime but only an evolution.

b) The Transformative Constitution

This approach argues that, "the Constituent Assembly might have owed its legal existence to the colonial regime but the very first thing it did was to declare itself sovereign, and frame the Constitution on its own terms."[165] When objections were raised in the Constituent Assembly on relying so much on the 1935 Act, Dr. B.R. Ambedkar, defended it by stating that,"it was only the 'details of administration' that had been borrowed."[166] This was true in the sense that there was some models of a 'responsible government' that exited in India, but it was not remotely comparable to a complete working parliamentary democracy, based on the principles of universal adult franchise and equal citizenship, which the Indian Constitution brought into existence.

It is also argued that the Constitution in many ways brought in a radical change from the time it came into force. First, "that it transformed the legal relationship between the individual and the State. It transformed the subjects of the colonial regime into citizens of a republic. It replaced the colonial logic of governing and administering a population with the democratic logic of popular sovereignty, public participation and limited government. Other than the guarantee of the universal adult franchise and structure of parliamentary democracy, this transformation was expressed through the fundamental rights provided under the Constitution. These fundamental rights, alien to 1935 Act, represented a tectonic shift in constitutional philosophy."[167]

Second, "the Constitution sought a thoroughgoing 'reconstruction of the state and society itself.' The Constitution recognised that State has never been the locus of concentrated power in the Indian society. Rather the Indian society has been hierarchies established and maintained by 'self-regulating communities' taking many different forms, primarily caste, and the State had rather limited powers to interfere with a social segment's internal organisation.[168] The freedom struggle that culminated in the framing of the Constitution was on one end a movement for liberation from political servitude, but it was equally a struggle

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[165] cf Austin (n 44).
[166] C.A.D. Vol. VII, 4 November 1948 (Speech by Dr. B.R. Ambedkar)
[167]Ananth Padmanabhan, 'Rights: breath, scope and applicability' The Oxford Handbook of the Indian Constitution (Sujit Chou, Madhav Kho, and Pratap edn 2016).
[168]Sudipta Kaviraj, 'The Imaginary Institution of India' (Permanent black 2010) 12.

for self- determination against multi-layered oppressive structure of the feudal order as well as the structures that constituted colonial domination."[169] This is reflected by the Constitution's horizontal rights provisions i.e. fundamental rights enforceable against groups, communities and private parties.

The contemporary, dominant approach of the constitutional interpretation is that of a 'living tress':[170] The Constitution is treated as an evolving document , with judges bearing the responsibility of updating it so as to keep pace with the changing times. This approach is invoked to justify the expansion of Art. 21, as well as the expansion of judicial power beyond what was contemplated by the framers of the Constitution and what is permitted by the text. In oppose to this is the constitutional originalism, which is in many ways discredited in India and reference of it draws thoughts of return to the Gopalan which is considered as the conservative approach at its epitome. Trapped between the historical unacceptability of originalism and boundless manipulability of the living tree, constitutional interpretation seem to be at an impasse.

This is where transformative constitutionalism comes into picture and paves a middle path. It takes seriously the text of the Constitution, its structure and the historical moment of its framing. In order to glean the meaning of the Constitution's provisions, it examine the discussion of the Drafting committee, where these provisions were first proposed and given shape, and then Constituent Assembly debates, where they passed through the furnace of fierce opposition before being moulded into the final form. While conceding that this is by no means a definitive enquiry, transformative constitutionalism rules out interpretation that simply cannot be reconciled with the historical informed reading of the constitutional text.[171] Unlike prominent variants of originalism, however, transformative constitutionalism is not stuck at the moment of the framing. While it takes text, structure, and history as a crucial blocks of constitutional meaning, it does not accord an overriding veto power to any of them. It does not bind itself to a mythical 'original intent' of the framers, nor does it tie itself to the 'original meaning' that the words used by the Constitution carried in 1950.[172] Transformative constitutionalism recognises that the framers were building a Constitution to last for generations. They were careful and conscious about the words they chose, and the words they chose, for most parts, expressed principles that would endure and not concrete commitments

[169]Anupma Roy, 'Gendered Citizenship: Historical and Conceptual Exploration' (Orient BlackSwan 2013).
[170] Supreme Court Advocates on Record Assn. v Union of India, (1993) 4 SCC 441.
[171] Grewal and Purdy, 'The Original Theory of Constitutionalism' (2016) Yale Law Journal.
[172] cf Bhatia (n 140).

that would soon lose their salience and become antiquated in the rapidly changing world.[173]Transformative constitutionalism task is to identify and express these founding principles within which constitutional interpretation can be carried on.[174]

There are many instances when the courts have used this approach in order to interpret the Constitution in a way which is true to its core principles. These pronouncements have not just influenced that very case but have elaborated upon the principles which needs to be followed for years to come. The Supreme Court of India and the High Courts have played a crucial role in bringing in the concept of transformative constitutionalism which is discussed in the chapter following chapter.

[173] Ronald Dworkin, 'Constitutional Cases: Taking Rights Seriously' (1977) Harvard University Press, 131-150.
[174] cf Bhatia (n 140).

Chapter IV

Constitutional Courts and Transformative Constitutionalism

4.1 Introduction

The Constitution was framed by the Constituent Assembly in 1949 and much has changed since then. Although, the Constituent Assembly members were intellects in their own fields and knew the nerves of the country, they could not have imagined, in any ways possible, what exactly lies ahead. This problem was evident to the Constituent Assembly that the Constitution may become rigid with changing times and would ultimately lose its usefulness. To limit this they took several steps. First, they worded some of the provisions loosely leaving ample scope to put in more than what was written. Second, they placed fundamental rights in a way that they compensate and complement each other. Lastly, and most importantly, they tried to make the judiciary as independent as possible keeping it immune from the influence of the legislative and the executive.

The independence of judiciary has been quintessential for the sustenance of fundamental rights in India. It has come to be known as the guardian and protector of the fundamental rights. This has been because of the reason that on several occasion the judiciary has stepped in to protect the rights guaranteed by the Constitution against the excess of the State. There have been plethora of cases in which the judiciary has taken position and has been put to test for being the voice of the unheard and had paved the way to interpret the fundamental rights in a way that the Constituent Assembly members could not have thought of and by doing so has kept the Constitution ever growing and organic.

To put this point into context some of the cases are discussed below just to provide an idea of how the Constitutional Courts in India have played a crucial role in interpreting the fundamental rights in a way that keeps the transformative vision of the Constitution alive without changing the very essence of the Constitutional provisions. These cases show the rich intellect produced overtime by the Constitutional Courts which have sustained, and will sustain, the ever changing demand of the society.

4.2 Sex Discrimination: Anuj Garg and the Anti- Stereotyping Principle

In 1914, the colonial government enacted the Punjab Excise Act which regulated the transport and sale of liquor in Delhi. Sec. 30 of the Act "prohibited the employment of 'any man under the age of 25 years' or 'any woman' in any part of such premise in which liquor or intoxicating drug is consumed by the public."[175] The Constitutionality of Sec. 30 was challenged after eight decades in the year 1999. The Delhi HC held that it was discriminatory against the women and struck it down. In 2008 the case reached to the Apex court.[176] The government of Delhi argued that the provision was in favour of the women as it protected women from the hazard of the liquor industry. The SC did not take much time and concluded that the law resulted in 'invidious discrimination perpetuating sexual differences.'[177]

In order to understand this judgment from the transformative constitutionalism point of view one has to examine first, the fundamental rights guaranteed by Art. 15(1). Second, the history of Indian sex discrimination jurisprudence before Anuj Garg. Which is broadly divided into two approaches; the first is the 'formal reading' which justifies differential treatment between men and women on the basis of presumed 'natural differences' between the sexes. In oppose to this approach is the 'transformative reading' which rejects the notion of 'natural difference'.

It views discrimination as the basis of "social, economic, and cultural structures and institutions which create patterns of exclusion."[178] Third, an analysis of the roots of gendered stereotypes to a social and political consensus which divided the colonial India in 'two separate spheres'- "the public sphere to be occupied by men and the private sphere-representing the community- that was the domain of the women."

I. Article 15: 'State shall not discriminate..on grounds only of..sex..'

Discrimination can be defined as "an unequal and unjustifiable distribution of benefits and burdens between people or groups of people."[179] When considering sex discrimination under Art. 15 the first question that is raised is whether all sex based discrimination are at least presumptively discriminatory until the state justify such classification, or whether something

[175] Punjab Excise Act 1914, s 30.
[176] Anuj Garg v Hotel Association of India (2008) 3 SCC 1.
[177] ibid 55.
[178] Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) South African Journal on Human Rights 253-255.
[179]Patanjali Shastri J., Kathi Ranning Rawat v State of Saurashtra AIR 1952 SC 123.

more than mere classification is needed to make out a claim of discrimination. On reading Art. 15(1), the term ‘ground’ need not translate into ‘reason for’. It could be understood to refer to the personal attribute of sex, caste, race, religion, and place of origin. When read in this way Art. 15 does not attempt to locate the root of discrimination but focuses on how the act of discrimination, in its effect might involve one of the grounds listed in Art. 15(1). The Canadian SC has put this as, “the distinction between the two approaches is a distinction between locating discrimination in the ‘moral blameworthiness’ of individual actors and their actions (in this case, the State) on the one hand, and on the other locating it in ‘policies and practices’ whose effect is discriminatory even if that effect is unintended or unforeseen.”[180]

Also, Art. 15(1) cannot be separated from Art. 15(3) which is framed as an exception to Art. 15(1), saving State action which would otherwise be violative of the non-discrimination clause, as long as it is special provision for women.[181] But the question arises whether the phrase ‘special provision’ provide complete freedom to the State. This seems unlikely because, structurally, Art.15 (3) is nested not only with Art. 15, but within the broader equality code of the Constitution (Art. 14-18). Therefore, the purpose of the provision seems to be obvious: to allow the State to make laws removing existing social or cultural barriers that prevent women from achieving genuine equality with men in various fields. Thus, to fall within Art. 15(3), the State action would need to bear some relation to the goals so stated. However, the nature and degree to which the state might be called upon to demonstrate that relation is left open.[182]

II. The Two Approaches

i) The Formalist Reading:

Broadly, the formalist reading of Art. 15 consists of three prongs. First, State sanctioned differential treatment between men and women does not amount to ‘discrimination’ if it based upon ‘natural differences’ between men and women. These natural differences are presumes to exist between all men and women or at least between enough men and enough women that the law can assume them to be universal when making a classification. Second, the word ‘ground’ is to be read as referring predominantly to the form of the legislative

[180] CN v Canada, 1987 1 SCR 1114.
[181] Constitution of India, Art. 15(3).
[182] President of the Republic of South Africa v Hugo 1997 (6) BCLR 708.

classification under challenge (eg. sex + property) and not its impact. Third, the phrase 'only…of sex' in Art. 15(1) is to be read to mean as 'sex alone and nothing else.'[183]

The formal approach reads 'grounds' to mean the bases, or objects, of legislation, and equates it with the manner in which benefits or burdens are distributed. Also, formal approach holds that if legislation assumes 'natural differences' between men and women, then it isn't discriminatory at all but merely a 'reasonable classification'. Lastly, the formal approach holds that the word 'only' in Art. 15(1) exempts state actions which can be justified by reasons other than sex, or legislative classifications that are not directly or frontally drawn along the lines of sex.[184]

ii) The Transformative Reading

The hallmarks of the transformative approach are: first, "that it focuses not on a particular manner in which the legislative classification is drawn (its object or its form), but upon its impact, or effects, upon men and women; second, it rejects any state classification which relies upon the trope of 'natural differences' between the genders;[185] and third, as a corollary, it no longer allows the word 'only' to be used to limit the scope of Art. 15(1) by granting safe harbour to laws that have not formally disadvantaged women, or have done so on the presumption of natural differences."[186]

The approach particularly becomes important because, in the modern times, it will be rare to find the state expressly invoking stereotypes to justify discriminatory laws. What will be far more common, is that legislative form, which will appear to be worded neutrally, will nevertheless be founded on stereotypical assumptions that have disadvantaged women and continue to do so at a structural and institutional level. Therefore, under Art. 15(1), legislation would be tested on its "systematic and institutional effects, and not on the basis of goals and aims that the state sought to achieve." And under no circumstances could discriminatory legislation be justified by resorting to stereotypes about the roles, abilities and capabilities of the sexes.

[183] cf Bhatia (n 140) 10.
[184] ibid 18-19.
[185] Vasantha v Union of India (2001) IILLJ 843.
[186] cf Bhatia (n 140) 16.

III. Separate Spheres

The division of the world into gendered public and private spheres was a much seen feature of the subcontinent's social and political thought from the second half of the nineteenth century. It was influenced by the combination of Enlightenment and Victorian morality on the one hand[187] and appeals to an authentic 'Indian tradition' on the other.[188] This division relates both a physical division of space (home and outside) and a division of function. While the outside was the realm of economics and politics, the domestic space was characterised by 'enlightened childcare, cookery, accounts and family education'. Furthermore, this relation between the two was hierarchical because 'the male world of work and public intervention carried more prestige and status than the female world of domesticity'.[189]

The separate spheres division was so pervasive that at the first meeting of the All India Women Conference,1927 passed various resolutions on education that endorsed sex segregation so as to prepare men and women for 'their different task in life', as well as highlighting motherhood and social service as a core values of women's education.[190] But this dominant view did not go unchallenged. In Samya, perhaps the first Indian political text on equality to come out in the colonial times, the famous writer and thinker Bankim Chandra Chattopadhyay devoted a full chapter to sex discrimination. Bankim cited disparities in education, in the right to remarriage, and in the right to move outside the four walls of the house, each of which corresponded to the gendered division of the public and private sphere.[191] Having located the root of disparity in the assumptions of gendered role he argued for sex equality with three crucial insights. First, "he delinks whatever natural differences that existed in men and women from differences in rights. Second, he rejected the relevance of natural differences in fixing social roles for men and women. Finally, and most importantly, he located the root cause gender equality not in the individual acts but in the designs of social institutions and rules. He argued that the role of equality was to 'amend' precisely those social rules that made natural differences salient in fixing social roles and in allocation of rights to men and women."[192]

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[187] Rosalind O'Hanlon, 'A Comparison between Women and Men: Tarabai Shinde and the Critique of Gender Relation in Colonial India' (Oxford University Press 1994) 15.
[188] cf Roy (n 148).
[189] cf Roy (n 148).
[190]Maitrayee Chaudhary, 'The Indian Women's Movement' (2005) (Maitrayee Chaudhary edn. Zed Books).
[191] Bankim Chandra Chattopadhyay, 'Samya 55' (2002) (Bibek Debroy trans. ,Liberty Institute) Ch. 5.
[192] ibid.

These arguments were also supported by known reformers such as Raja Ram Mohan Roy and Ishwar Chandra Vidyasagar and eventually reach into official political discourse, in the form of the INC- sponsored National Planning Committee's 1939 report, titled 'Women Role in a Planned Economy'.[193] The document began with noting "woman shall have an equal status and equal opportunities with man…the State while planning shall consider the individual as a unit…marriage shall not be the condition precedent to the enjoyment of full and equal civic status, social rights and economic privileges."[194] It specifically demanded, among other things, 'a full and equal share in the economic life of the community'[195]and expressly rejected any separation of educational curricula on the lines of sex.[196] Therefore, the equality thinkers and the 1939 report, were simultaneously advancing a version of the anti-stereotyping principle to rule out separate-sphere-based justification of discrimination, and also affirming an understanding of discrimination that focused upon the impact and effects of institutions upon the lives of people, rather than the conduct or hostile intentions of individual actors.

IV. Anuj Garg and Transformative Constitutionalism

The transformative understanding of Anuj Garg represents another step towards a long path that has been drawn over many decades. Bankim's Samya, the 1939 Congress document, the deliberation of the Constituent Assembly for the words chosen for Art. 15, and the judgements of various HCs in the years after Independence, all represent an evolving tradition of thinking about gender and equality. And it is this tradition that culminated in Anuj Garg, with the acknowledgement that the constitutionality of discriminatory laws must be tested by their systemic and institutional effects rather than their intentions. However, throughout history, the transformative tradition has had to contend with another, more conservative, approach to gender and equality, an approach rooted in the separate sphere understanding of sex roles, and which is drawn upon an entirely different reading of Art. 15(1) of the Constitution.

[193]Leela Kasturi, 'Report of the Sub-Committee, Women's Role in the Planned Economy' (1947) National Planning Committee Series.
[194] ibid 139.
[195] ibid 144.
[196] ibid 149.

4.3 Equality Before Law: Naz Foundation and Equal Moral Membership

"Words are like magic things….but even the magic of words sometimes cannot convey the magic of the human spirit".-Jawaharlal Nehru, speech on the Objective Resolution (December 1946)

The Division Bench of Delhi HC in the case of Naz Foundation v. NCT Delhi[197], held that "Sec. 377 of the Indian Penal Code (IPC), commonly known as the 'sodomy law', which is a colonial era law criminalising 'carnal intercourse against the order of nature' was unconstitutional to the extent that it criminalized same sex intercourse between consulting adults in private." The Court undertook a detailed analysis of the sodomy law and elucidated as to how it contravenes the rights of the LGBT community with regard to equal before law and its equal protection (Art.14), right against discrimination on the ground of sex (15[1]), and right to privacy (Art.21) and while doing so the Court paid due consideration of the overarching web of Objective Resolution.

Inclusiveness. Discrimination. Equality. Dignity. These four words underpin the judgment of Chief Justice Shah and Justice Murlidhar in the Naz Foundation case. "The judgment is taken as a transformative one not because of its much celebrated outcome i.e. the decriminalization of homosexuality, but because of its radical reimagination of the Constitution's promise that the State shall not deny to any person equality before law or equal protection of law.[198] It moved away from the formalistic vision of equality, under which the State was only asked to 'rationally justify' the different treatment of individuals and classes, and which had crippled the Indian equality jurisprudence from the very beginning. Instead it chose to ask a different question altogether: did not the roots of inequality and discrimination lie in the denial of full inclusiveness within the polity, and in the undermining of human dignity?"[199] To understand its transformative approach one has to first analyse the origin of Sec. 377 of IPC and the judicial interpretation that led up to this judgment. Second, understand the SC's dominant approaches towards understanding Art. 14 of the Constitution- the 'classification test', the 'arbitrariness test', and the 'legitimate purpose test'. Third, the classification used in the

[197] 160 DLT 277 (2009).
[198] Constitution of India, Art.14
[199] cf Bhatia (n 140) 40.

judgment itself and its transformative content. Lastly, the promise of Naz Foundation case for the future of Indian equality law.

I. Colonial Antecedents, Postcolonial Interpretations

In order to challenge any law on basis of unequal treatment it must be first shown as to whom the law treats unequally. On a plain reading of Sec. 377 it does not single out any particular individual, or a group of individuals, for unequal treatment. It only criminalizes 'carnal intercourse against the order of nature'.

The question arises what amounts to carnal intercourse against the order of nature. For, Thomas Macaulay, who drafted the first version of the IPC in 1837, and for his colonial successors who based the final language of Sec 377 on Edward Coke's seventeenth century compilation of English law,[200] the issue was too disgusting to even allow an explanatory discussion.[201] It was now left on the courts to come with their own understanding of the phrase and thus, differences arose. The HC of Sind, in 1925, made the observation that "the natural object of carnal intercourse is that there should be a possibility of conception of human beings."[202] A few decades later, the Gujarat HC drew a fine distinction between the "sexual act of cunnilingus or fellatio that were done to excite sexual organs for coitus, and the same acts performed as substitute for coitus. The Court classified the latter as 'sexual perversion' and against the order of nature".[203] A few years later, the phrase 'sexual perversity' was repeated by the SC but without any further elaboration.[204]

In Naz Foundation case the Delhi HC observed this change from the 'procreation' focused viewpoint of Sec. 377 to a standard that focused on 'sexual perversity' and stated that, "it is that at the heart of all these judgements was the view that the 'natural' way of conducting carnal intercourse is through penetrative, penile-vaginal sex. Sexual acts which could reasonably be categorised as part of a prelude leading to coitus would escape from the purview of Sec. 377, but all 'non-procreative sexual acts' would fall within its scope. Thus, every sexual act performed by homosexual people would necessarily violate Sec. 377, since it could not possibly lead to penile-vaginal sexual intercourse. Also, non-penile-vaginal sexual

[200] Douglas Sanders, 'Section 377 and the Unnatural Afterlife of British Colonialism in Asia' (2009) Asian Journal of Comparative Law 1,7.
[201] Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals' (2006) Economic and Political weekly 4817.
[202] Khandu v Emperor AIR 1925 Sind 286, 2.
[203] Lohana Vasantlal Devchand v The State (1968) 9 CLR 1052.
[204] Fazal Rab Chaudhary v State of Bihar (1982) 3 SCC 9.

acts between heterosexuals would be illegal only if they were intended to provide sexual satisfaction in their own right, rather than mere excite the sexual organs for eventual coitus." In order to challenge Sec. 377 on the basis of Art. 14 one has to address the point, as was supported by the State, that Sec.377 did not only single out only homosexuals for discrimination.

II. Article 14: The Tradition Approach

i) Classification and its Discontents

At the beginning of the Indian constitutionalism, when the maturing SC faced, for the first time, to interpret the equal protection clause of the Constitution, it noted "that the first clause of Art. 14 was borrowed from the Irish Constitution, while the second part was identical to the US Constitution fourteenth Amendment."[205]The SC began its Art. 14 journey by adjudicating that equality requires similar treatment of those who are similarly situated while allowing for differential treatment of those who are differently situated, relying primarily on US precedent. To put it another way, Art. 14 forbids 'class legislation', but allows for 'reasonable classification'. Therefore a legislative classification would be tested on two grounds: "First, is there any 'intelligible differentia' between the things brought within the scope of legislation and those left out. And second, it there any 'rational nexus' between the intelligible differentia and the legislative goal."[206]

In the Naz judgment the Court relied heavily on an influential article written by American scholars Tussman and tenBroek[207] which have been elaborated upon four issues and which the Court had to put into perspective while it applied the stated standards to concrete legal problems. First, is the problem of over-inclusiveness and under-inclusiveness. "Because of the complex nature of the world there could be divine exactitude in the drawing a line while: some persons would always find themselves on the wrong side and the court would have to decide how much slack to allow the state before 'a rational nexus' becomes irrational. Second, while deciding the question of rationality, the court would have to decide the extent of deference that it would accord to the Legislature. Third, the scholars proposed that equality, by its very nature, exclude certain kinds of classifications from being invoked in defence of a particular legislative purpose: 'the assertion of human equality is closely

[205] Fourteenth Amendment to the Constitution of United States, s 1.
[206] See Chap 2, Art. 14.
[207] Joseph Tussman and Jacobus TenBroek, 'The Equal Protection of Law' (1949) The California Law Review.

associated with the denial that the differences in colour or creed, birth or status, are significant or relevant to the way in which men should be treated….such kind or classification can never be made no matter how reasonably they may be related to a legitimate public purpose."[208] Finally they argued that, "not only certain kinds of classification ought to be excluded under the equal protection enquiry, but also certain legislative purposes. In particular, laws motivated by 'hostility' or 'discriminatory intent' towards specific groups has been stated by the Courts as illegal."[209] With regard to and in comparison to these four- standardised conceptual universe, the SC's equality jurisprudence, as can be evaluated in the first decade of independence, can only be termed as minimalistic.[210]

ii) The Arbitrariness Approach

The Canadian SC handed down its first judgment in 1989 under Sec. 15, the equality and non-discrimination clause of the newly enacted Charter of Rights and Freedoms and explicitly rejected the reasonable classification formula for adjudicating equality claims.[211] Labelling the test as, "seriously deficient because of its mechanical formalism, its reduction of equality to a 'categorization game' and its blindness to systematic disadvantage, the SC focused its enquiry, instead, on the universal right to 'equal concern and respect'."

With time a number of jurisdictions have found the said test as dissatisfactory and insufficiently sensitive to social context. For example, the US under the Fourteenth Amendment mandate, developed a system of 'tiered scrutiny' under which classifications based upon certain grounds, such as race, were automatically had to pass through a more stringent procedure of justification to be defended by the State than the rational review.[212]Similarly, in its new Constitution, the South African Constitutional Court followed Canada's example and made dignity the basis of equality and non-discrimination jurisprudence.[213]Taking note of all these changes, the Indian SC responded to the insufficiency of the rational classification test and termed it as 'arbitrariness'. From the very beginning, the word 'arbitrariness' has featured in Art. 14 judgments. In Chiranjit Lal

[208] ibid 354.
[209] ibid 358.
[210] cf Bhatia (n 140) 45. See: Chiranjit Lal Chaudhary v. Union of India, 1950 SCR 869, for over-inclusiveness and over- exclusiveness.
[211] Andrews v Law Society of British Columbia (1989) 1 SCR 143.
[212]Adarand Constructors v Pena, 515 US 200 (1995).
[213]Harksen v Lane, 1997 (11) BCLR 1489.

Chawdhary, J. Fazl Ali observed that "any classification which is arbitrary and which is made without any basis is no classification".[214] This observation was followed in many of the subsequent cases. Many hailed this as the approach that freed Art. 14 from the 'traditional and doctrinaire' classification test, and inaugurated the era of 'substantive equality'.[215]The main difficulty with the Court's definition of the term "arbitrariness" was that it was neither self-evident nor self-interpreting, and the court has never clarified what the term "arbitrariness" actually means.[216] In recent years, the constitutional status of the arbitrariness standard itself has been contested,and apart from a brief attempt by the concurring opinion in 2017, there has been no serious effort by the court to clarify its content.

III. Naz Foundation and Reimagining Equality

The constitutional equality jurisprudence was highly unsatisfying at the time of the Naz Foundation case. The classic rational classification test, which has been in use unaltered since 1950, has long been recognised as insufficient to deal with cases of complex disparities. The alternative- the arbitrariness approach- was hardly better. If Naz Foundation had to prove that Sec. 377 violated Art. 14, it would have to first remodel the SC's constitutional equality jurisprudence while at the same time remain faithful to the SC's precedents.

i) Classification: Proportionality, Burden of Proof, Deference

The State argued in favour of Sec. 377 on two grounds. The first being 'public health'. It argued that, "homosexual community is more susceptible to AIDS. Accordingly, the criminalization of same-sex acts by Sec. 377 was designed to protect and promote public health."[217]

If was expected that the Court would, under the precedents of traditional classification test, together with an inclination to presume the constitutionality of an archaic provision, accept the argument put forth by the State. But, the Court did not seemed convinced with the State's submission and explaining by way of fourteen detailed paragraphs,[218]analysing the submissions made to it by the parties, came with its own assessment of the soundness of the

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[214] cf Chaudhary (n 188) [9].
[215] Catherine A. MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws' (2006) International Journal of Constitutional Law of India 181, 188.
[216] See e.g., Maneka Gandhi v Union of India (1978) 2 SCR 621; Ajay Hasia v Khalid Mujib (1979) 3 SCR 1014.
[217] cf Foundation (n 52) [24].
[218] ibid 61-74.

public health argument. It cited comparative law; "evidence supplied by National AIDS Control Organisation; the 2001 Declaration of Commitment on HIV/AIDS in the UN General Assembly's special session; the (Indian) National Human Rights Commission's National Conference on Human Rights and HIV/AIDS; and a UNAIDS Declaration- the import of all of which was that the real cause in the spike of AIDS cases among homosexuals was the criminalization of homosexuality, which drove person underground and undermined safe sex practices."[219] The level of detailed analysis by the Court and its refusal to accord significant deference to the State's position suggest a "departure from the classical 'rational review' standard under Art. 14, which is defined by its minimalism."[220] Towards its conclusion on Art. 14 the Court observed, "The State interest 'must be legitimate and relevant' for the legislation to be non arbitrary and must be proportionate towards achieving the state interest."[221] This statement of the Court is crucial because in addition to the relevance between legislative goal and legislative classification, the Court added another requirement-proportionality. "This is a term of art, and is used as an element of rights review by courts in many jurisdictions. A far more exacting standard than the rational review, proportionality requires not only that the challenged law should have a rational connection to the legislative policy, but also while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures should be made by the Legislature so as to achieve the object of the legislation".[222] In cases involving personal autonomy, "proportionality does not require the Court to defer to the State's claim[223] instead, it puts the onus on the State to demonstrate that its curtailment of a right is proportionate and meets the required standard."[224]

On the question on the meaning of proportionality that the SC was trying to place within the contours of Art. 14. The HC tried to elucidate its stance by citing the judgement of Anuj Garg (discussed above) "to invoke 'deeper judicial scrutiny' of laws that encoded oppressive cultural norms especially to target minorities and vulnerable groups"[225] The Court summed up Anuj Garg judgement as "requiring a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny."[226] Therefore, deeper scrutiny review was acceptable on the ground that Sec.

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[219] ibid 62, 66.
[220] cf Bhatia (n 140) 51.
[221] cf Foundation (n 52) [92].
[222] Teri Oats Estates v UT Chandigarh, (2004) 2 SCC 130.
[223] Aharon Barak, 'Proportionality', Oxford Handbook of Comparative Constitutional Law', 738-748.
[224] Ibid 734.
[225] cf Foundation (n 52) 107.
[226] ibid 111.

377 brought sexual orientation in the picture that were analogous to the five grounds listed under Art. 15(1), where its similarity with the five mentioned grounds was determined by the potential of it to impair an individual's personal autonomy. Thus, the Court advanced an interpretation of the Constitution that read the equality (Art.14) and non-discrimination (Art. 15[1]) provisions together. "It did so by incorporating the governing principles of the non-discrimination clause- which was more specific, but limited to a close list of five grounds- into the equality clause, which is more abstract, but covers all potential instances of disadvantageous or discriminatory legislative classification."[227]

ii) Purpose: The Constitutional Morality

The State's second defence for Sec. 377 was that of 'public morality'. And it argued that the public morality was strongly opposed to homosexuality. The Court's reply was a very straightforward one stating that, "public morality, without anything more, could not constitute a legitimate state purpose' under Art. 14." The State argued that, "criminal legal system and especially the sentencing provisions are, at least in part, based upon the legislature's sense of public morality". Therefore, the argument was not that public morality, by itself, an illegitimate purpose under Art. 14. "What was illegitimate was not the fact that the State was invoking, but that public morality in this case was equated to bare hostility against the LGBT class which severely affected its rights and interests. It was this form of public morality which was not a valid or defensible purpose that the State might be permitted to invoke."[228] Why? Because, the Court held, "it was directly in contrast with the morality that was grounded within the Indian Constitution, which expressly 'recognises, protects and celebrate diversity'. Stigmatizing homosexuals on the basis of their sexual identity violated 'constitutional morality', which was the only kind of morality that was relevant for constitutional adjudication."[229]

What is constitutional morality? The Delhi HC, drawing from both B.R. Ambedkar and the Constitutional Court of South Africa, defined constitutional morality as "morality derived from constitutional values', distinct from popular morality which is bases on shifting and subjective notion of right and wrong".[230]This shows another prominent conceptual advancement with regard to Indian equality jurisprudence. "Legislation that justifies

[227] cf Bhatia (n 140) 53.
[228] cf Foundation (n 52) 92.
[229] Ibid para 80.
[230] Ibid 79.

inequality invoking public hostility against a class of people, based upon characteristics related to personal autonomy, and which have the effect of stigmatizing them and undermining their dignity, could not survive Art. 14 scrutiny. This is because its very purpose contravened constitutional morality requirement of inclusiveness and tolerance of diverse way of living."[231]

IV. The Aftermath: Koushal, Rajbala and Navtej

On 11th December 2013, in Suresh Kumar Koushal v. Naz Foundation[232], the two judge Bench of the SC reversed the Delhi HC verdict and reinstated Sec. 377 as it has been before Naz Foundation verdict. The Court stated that, "what Sec. 377 does is merely define a particular offence and prescribes punishment."[233]In adjudicating that Sec.377 only explains an offence, and because of this it was automatically rescued from the inspection of Art. 14 and 15, the Bench in the Koushal judgment failed to appreciate any of the jurisprudential advancement that the Naz Foundation had put forth.

Two years later, when two Indian states enacted law requiring a minimal education qualification for contesting local government elections, the SC had the chance, once again, to advance Naz Foundation's vision of equality and non-discrimination. The law was challenged because "it disproportionately affected the women and disadvantaged castes, who for innumerable reasons have been unable to access primary education. Furthermore, given that the challenge was to an electoral law, and therefore to the very basis of the system that granted laws their presumptive legitimacy, it was a chance to apply rigorous scrutiny under Art. 14."[234] But, once again, in Rajbala v. State of Haryana,[235] the SC declined the opportunity, simply by making the unsubstantiated observation that "it is only education which gives a human being the power to discriminate between right and wrong, good and bad".[236]

Koushal and Rajbala marked a temporary closure to the transformative potential of Art. 14 and 15(1) of the Constitution. In both cases, the SC failed to engage at all with the arguments in the Naz judgment. But, the day finally arrived, on 6 September 2018, a Constitutional

[231] cf Bhatia (n 140) 55.
[232] (2014) 1 SCC 1.
[233] ibid para 42.
[234] cf Bhatia (n 140) 69.
[235] (2016) 1 SCC 463.
[236] ibid 85.

bench of the SC overturned the Koushal judgement, and largely restored the judgment of the Delhi HC in the Naz Foundation case. While the judgements of Chief Jusitce and J. Nariman proceeded on the basis of individual choice and the manifest arbitrariness of Sec. 377, the concurring opinions of J. Chandrachud and J. Malhotra had some resonance with the arguments advanced in Naz case. J. Chandrachud, for example, explicitly agreed with the shortcomings of the classification standard, and indicated that the disadvantage- based interpretation of Art. 14 signalled a possible way forward.[237] Although the Justices did not go further down this road in Navtej Johar, the foundation for future transformative constitutionalism around the Art. 14/15 axis have now been laid.

4.4 Equality of Opportunity: N.M. Thomas, Group Subordination and the Directive Principles

Equality forbids 'class legislation' but not 'reasonable classification. This makes sense because of the reason that Constitution places individual at its heart, thus cannot permit laws that allocate burdens and benefits based on class. This view is substantiated by Art. 15(1), 16(1), and 16(2) which provides concrete embodiment to the Constitution's Equality Code. Reading Art. 16(1) and (2) together, one can drive the vision of equality that mandates the State indifference to ascriptive characteristics in public employment. In order words, a person's race, caste, class etc. cannot feature in decisions about public employment. Art. 16(4) echoes in Art. 15(4), which authorises the State to make provisions for the 'advancement of socially and educationally backward classes of citizens or for the SCs or for the STs. But the question arises that if equality's slogan is 'no class legislations', then Art. 15(4) and 16(4), which explicitly uses the word 'class' seem in an entirely different direction. Should there be a limited equality so as to guarantee meaningful social justice in a deeply riven society. Or our initial presumption about the very meaning of 'equality' under the Constitution needs revision. The history of the SC's 'reservation' jurisprudence is a history of a struggle between two competing vision of equality. In 1975, State of Kerala v. N.M. Thomas[238], the Court embraced one vision and rejected the other. However, after forty years of the judgment the transformative character of this judgment is yet to be articulated.

To understand its transformative vision one has to first, survey some of the initial judgements of the SC on Art. 15 and 16 as in the first two decades, the Court held that Art, which allowed

[237]Navtej Johar v Union of India W.P. (Crl.) No. 76/2016.
[238] (1976) 2 SCC 310.

class-based affirmative action, were constitutional mandated 'exceptions' to the Equality Code. Secondly, one has to understand the State of Kerala v. N.M Thomas in which the SC changed this view and J. Mathew and J. Krishna Iyer, in their complementary majority opinion, "advanced a vision of equality according to which individual disabilities were embedded in class identity, within a set of social hierarchies that the Constitution Equality Code was created to surmount." Thirdly, the transformative understanding of the judgment's majority opinion and lastly, the role of DPSP, which were used "as a system of framework values that gave life to the abstract concepts outlined in the Fundamental Rights chapter."

I. The 'Caste- Blind' Supreme Court

In the early twentieth century, there was an increasing awareness that the individual's opportunity for education, economic, and social advancement were heavily determined by one's membership of different social groups, and in particular, to one's caste. The ruler of the princely state Kolhapur, Shahuji Maharaj, influenced by the writings of the egalitarian thinker Jyotirao Phule, introduced for the first time affirmative action in 1902, reserving 50 per cent seats of government and administrative posts for backward castes. Giving his justification for such reservation, Shahuji noted that despite an active attempt to foster education to all classes in the state, there has been a lack of success because "the reward for higher education are not sufficiently widely distributed." This observation made by him is noteworthy because it reflects Shahuji's acknowledgement of the structural and institutional barriers that prevent an equitable distribution of opportunities right from the beginning of the life. Following Kolhapur's example, by the 1920's numerous princely states instituted quota systems in educational institutions and for recruitment to governmental posts.[239]

The State of Madras has a pre-constitutional reservation policy for admission to medical institutions which allocated among "non-Brahmin Hindus, backward Hindus, Brahmins, Harijans, Anglo- Indians and Muslims" on quota basis. Soon after the Constitution came into force, the policy was challenged in State of Madras v. Champakam Dorairajan,[240] in which the SC agreed, holding "that the right to get admission into any educational institution of a kind mention in clause (2) of Art. 29 is a right which an individual has as a citizen and not as a member of any community or classes of citizens."[241] A policy that made admission

[239] cf Bhatia (n 140) 77.
[240] 1951, SCR 525.
[241] Ibid para 9.

conditional upon class membership, therefore, was unconstitutional. The State argued that, "under Art. 46 of the Constitution, which is a part of DPSP, the State is mandated to "promote with special care the education and economic interests of weaker sections of the people."[242] Therefore, the Constitution itself envisages policies aimed at sections, groups that had suffered, and continue to suffer, from various disadvantages. The Court rejected this argument stating that "DPSP are specifically made unenforceable in the court cannot override the provisions found in Part III of the Constitution."[243] Therefore, the Court ruled that the Constitution was caste blind because it required that, except where specifically provided, the State must treat citizens as individuals and not a member of racial, ethnic or religious groups.

With another ruling the SC doubled on caste-blind equality after Dorairajan. In General Manager, Southern Railway v. Rangachari[244]it held that Art. 16(4) covered only "reservation of appointments, or posts. Accordingly, in those aspect of public employment that did not fall within this phrase – such as salary, increment, gratuity, pension and age of superannuation,[245] there could be no reservation, because these matters do not form the subject matter of Art. 16(4)." This judgment made starkly clear that 'equality of opportunity' and 'reservation' were antithetical concepts. The latter existed only because, and to the extent that, Art. 16(4) allowed for it.

In consequence to this principle two more corollaries were evolved by the SC soon after. First, in M.R. Balaji v. State of Mysore,[246] in which the Court capped the reservation at a maximum of 50 per cent on the ground that exceptions (15[4] and 16[4]) cannot swallow the rule of equality and non-discrimination. This was reaffirmed soon after in T. Devadasan v. Union of India,[247] where the Court prohibited the State from "carrying forward unfulfilled vacancies into succeeding recruitment years. And secondly, is the legitimacy of reservation was solely due to Art. 15(4) and 16(4), then no person could claim them as a matter of right."[248]

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[242] Constitution of India, Art. 46.
[243] cf Dorairajan (n 217) [10].
[244] 1962 SCR (2) 586.
[245] ibid 20.
[246] 1963 Supp. (1) SCR 439.
[247] (1964) 4 SCR 680.
[248]C.A. Rajendran v Union of India (1968) 1 SCR 271.

II. State of Kerala v. N.M. Thomas

Following the Balaji rule of capping reservation at 50 per cent, a majority of the court rejected the carry forward principle.[249] J. Subba Rao dissented. His dissent was not limited to reservation cap, but presented a serious challenge to the entire philosophical structure that the Court had been following in the first decade. After surveying the constitutional provision, he observed: "If Art. 16(1) stood alone all the backward communities would go to the wall in a society of uneven social structure; the said rule of equality would remain only a utopian conception unless a practical content is given to it."[250]The crucial philosophical shift initiated by J. Subba Rao was that in his view, ascriptive group markers such as class were not to be understood as 'personal characteristics' alone, but as personal characteristics embedded within an 'uneven basic social structure'. The concept of equality of opportunity had to take into account how these personal characteristics interact with social structure. To illustrate his point, J. Subba Rao took the example of a race between a racehorse and an ordinary horse, noting that if they both started together, it would only be a 'farce of a competition'.[251] As per him a racehorse was not a racehorse by nature but as a result of many generations of conscious breeding and a lifetime of painstaking care- advantages which are not available to ordinary horses. J. Subba Rao was laying the ground for the moral and constitutional argument that any meaningful conception of equality and equality of opportunity must necessarily take history of 'calculated oppression' and 'habitual submission' into account.

The shift was complete in the sense that Art. 16(4) was no more an exception of Art. 16(1) but an 'emphatic' expression of the same intention. Art. 14, 15 and 16 constituted a comprehensive Equality Code whose philosophy was to take into account, and surmount inequalities generated by social and institutional structures over time. It was twelve years later, in N.M. Thomas, that J. Subba Rao's formulation of this more substantive conception of equality was given a rich and detailed articulation. In N.M. Thomas, "a government order granted provisional promotion to members of SCs and STs who did not have the requisite qualifications to be eligible for promotion, along with a two year grace period for them to gain such qualifications. This was challenged. The contention raised by the aggrieved parties was that the classification done was clearly void under Art. 16(1) and (2), and not covered by 16(4)." Under existing precedent this was a simple case, if Art. 16(4) did not apply, then

[249] T. Devdasan v Union of India 1964 SCR (4) 680.
[250] ibid [26].
[251] ibid.

special provisions for SCs and STs clearly violated Art. 16(1) and (2). But the Court gave a split decision by 5:2. CJ. Ray, writing the majority opinion, began by stating, "the question of unequal treatment does not really arises between persons governed by different conditions and different sets of circumstances."[252] As it was until now, using characteristics external to the context of employment, had been held not to be reasonable. CJ. Ray turned this on its head.

J. Mathew began his opinion by identifying the moot question. Everyone agreed that equality entailed treating equal equally and unequals unequally. The question was what did it meant to people to be equal or unequal: that is, 'what is to be allowed as significant difference such as would justify differential treatment.[253]CJ Ray had broaden it to include inadequate representation itself as a relevant difference. But this was insufficient and J. Mathew took the idea further. Whereas, until now, the SC had asked whether a particular mode of recruitment was consistent with the goal of the state employment, J. Mathew turned this on its head, starting with the presumption that everyone was entitled to the public good of State employment. However, given that this pubic good was scarce, the State would have to devise some method of selecting some people and excluding others. Then question then became: on what basis can the State exclude persons, or a group of persons, from their share of representation.

To illustrate his argument, J. Mathew cited an argument drawn from British philosopher Bernard Williams: "imagine a warrior society where the position of a soldier carried prestige and power. Up to a point this was also a slave-owing society and slaves were barred from becoming a soldier. But eventually they were emancipated and the said bar was removed. However, because they had been kept weak systematically and malnourished during their period of slavery, they were unable to pass the physical tests that were required to qualify as a soldier. Bernard Williams argued that the ostensibly neutral physical tests did not, in any genuine way, further the principle of equality."[254] This paragraph was at the heart of J. Mathew's transformative vision of equality, a vision that involved a fundamental shift from viewing 'personal characteristics' as part of who you are to viewing them as a part of a humanly constructed environment that can facilitate or hinder your access to basic public goods. A person member to Schedule Tribes, for example, was to be understood not as a

[252] State of Kerala v N.M. Thomas1976 SCR (1) 906 [31].
[253] ibid [54].
[254] ibid [60].

mark of personal identity, but as socially constructed fact that severely limited one's access to opportunities. While j. Mathew opinion laid out the philosophical foundations of the new vision of equality, it remained incomplete it did not answer the question which he himself posed: what difference between persons were to be treated as relevant for the purpose of compensatory treatment under Art. 16(1).

J. Krishna Iyer answered that question in his concurrence. According to him, the type of differences that the doctrine of equality is meant to take into account, and compensate for, are those imposed by social and institutional structures (over time), and which have the effect of denying people 'equal access' to basic necessities.[255]

We are now in the position to appreciate the transformative constitutional vision of equality based on a combine reading of J. Mathew and J. Krishna Iyer opinions in N.M. Thomas. According to this vision, every individual has an equal right to access basic public goods, including state employment. In cases where these goods were scarce, the State would have to devise a procedure of selection, of exclusion or inclusion. Any State process would have to take into account both internal rationality (efficiency and merit) as well as external circumstances, such as historical and present day social and institutional discrimination. Equality meant taking into account, and compensating for, historical and social circumstances that impeded an individual's access to the basic public necessities important for sustaining a dignified democratic life.[256]

III. DPSP and the Transformative Vision of N.M. Thomas

The genealogy of the term 'backward classes' was inconclusive, making it unclear what exactly was the normative basis of determining who was entitled to reservation under Article 16(4). After all, in his speech, Ambedkar referred both to 'Reconciling' equality of opportunity and claims of representation as well as ensuring that the 'exception' (of reservations) did not swallow up the 'rule' (of equality of opportunity)- which, of course, was precisely how the pre-Thomas court understood the constitutional scheme. The distinction is important: the rule- exception language suggests that Article 16(1) and 16(4) contain a post principles, and the judicial task is to balance (or 'reconcile') them by marking out their respective, separate domains. The N.M. Thomas understanding, however, is that the

[255] ibid [141].
[256] cf Bhatia (n 140) 91.

‘reconciliation’ is achieved in Article 16(1) itself, through a vision of individual inequality that is sensitive to group disadvantages, and that 16(4) is only a concrete restatement of this reconciliation.

Article 46- with its mandate to the government to promote the interests of ‘weaker sections’ and to protect them from ‘exploitation’- was to be ‘read into’ Article 16 (1)’s guarantee of equality of opportunity and give it enforceable content. It was in N. M. Thomas that, for the first time, the Court understood the ‘harmonious relationship, between Parts III and IV in the fashion outlined above: that Part IV expressed a system of political, social, and economic values that gave concrete shape to abstract Fundamental Rights and help the Court to determine which of the many possible concrete interpretation of those rights to select in any given case (in N. M. Thomas, it was the right to equality).

N. M. Thomas, therefore, was transformative in two senses. It was transformative in replacing the caste- blind vision of equality with a richer, more substantive vision. This vision retained the focus upon the individual, but also postulated the goal of equality as overcoming structural and institutional barriers that prevented individuals from accessing basic public goods because of their membership of certain groups. And it was transformative in articulating a new relationship between Parts III & IV of the Constitution: the socio-economic commitments of the directive principles were meant to serve as framework values for interpreting fundamental rights, especially where Fundamental Rights, couched in abstract principles, were susceptible to more than one interpretation.

Therefore, from the above discussion one can deduce that first, the right to equality, and right to opportunity are individual rights. Second, that these are substantive rights, designed to overcome asymmetrical social and institutional barriers to assessing basic public goods. And third, because in India these structural disadvantages and disability have been imposed largely on basis of group membership, the equality provision of the Constitution need to take groups into account, even though the rights remain individual rights.

This articulation is helpful in understanding some of the most well-known and controversial doctrines evolved by the SC in the post- N. M. Thomas era. In Indira Sawhney v. Union of India, the SC held that the benefit of reservation could not accrue to creamy layer among the backward groups; those individual members who have managed to escape the markers of the backwardness to an extent enough for them to no longer count as member of that group in a

meaningful way[257]. It will be immediately obvious that the existence of the creamy layer doctrine is consistent only with an individual-centric view of the right to equality of opportunity. If the right was that of the groups, then it would make no sense to undertake an investigation for the relative backwardness of individual within those groups.

In R. K. Sabharwal v. State of Punjab,[258] the SC held that even if a certain number of reserved candidates managed to compete successfully with the general pool, this would not lead to a proportionate decrease in the number of available reserved seats. "However, if reservation is a group right, meant to uplift a historically subordinated group to a level of substantive equality then it makes perfect sense to stop once the prescribed percentage of representation has been achieved with- whether through a general pool or reserved quota. On the other hand, if the right is an individual right that is instantiated through the individual's membership in a group, then the Court's holding was understandable: the fact that some members of the subordinated group have achieved parity with the rest of society doesn't affect the scope of right held by other members of the group."[259]

4.5 Religious Freedom and Group Identity: Saifuddin and the Anti-Exclusion Principle

In August 2016 the HC of Bombay upheld the right of the women for entry in Haji Ali Dargah.[260] A year later, the famous Sabrimala dispute was referred by the SC to a Constitutional Bench to answer on whether Sabrimala temple could deny access to women between the ages of ten to fifty. But before all this, in January 2016, the case of Central Board of the Dawoodi Bohra Committee v. State of Maharashtra came before the five judge bench of the SC. Dawoodi Bohra posed one tough question before the SC: how will the Constitution mediate between the claims of religious communities and claims of its own constituents while maintaining the guarantee of freedom of religion to both the religious groups and the individuals?

The case of Dawoodi Bohra requested the Court to re-examine a fifty year old judgment of Sardar Syedna Tahir Saifuddin v. State of Bombay.[261]Saifuddin challenged the constitutional validity of the Bombay Prevention of Excommunication Act, 1949, under which the excommunication that was practiced within the religious groups was made illegal. The

[257] Indira Sawhney v Union of India AIR 1993 SC 477.
[258]1995 AIR SC 1371.
[259] Cf Bhatia (n 140) 103.
[260]Noorjehan Safia Niaz v State of Maharashtra (2016) 5 AIR Bom R 660.
[261] 1962 SCR Supl. (2) 496.

petition was made by the head priest of the Dawoodi Bohra community. His contention was that the Act was unconstitutional because it took away his power of excommunication which is protected under the constitutional guarantee of religious freedom under Art. 25(1) of the Indian Constitution. It also violated Art. 26(b) of the Constitution which guarantees the Dawoodi Bohra's community to manage its own affairs.

By a majority of 4:1, the SC agreed with the petitioner. J. Das Gupta, along with three judges, held that Art. 25 and 26 of the Constitution protected practices that are essential, or integral parts of a religion. After due diligence, he found that excommunication was required for maintaining the commonality in the community, preserving its cohesiveness and discipline, and therefore was protected under the Constitutional guarantee of Art. 25 and 26. According to him, the Act could not be saved by Art. 25(2)(b) as it only aimed to prohibit excommunication on religious grounds and there was no particular 'social welfare or reform' that the State was trying to achieve. J. Ayyangar, concurring with J. Gupta stated that, "even if the State was trying to reach a social reform by way of this Act it could not be allowed, because of the reason that the Constitution does not allow to reform a religion out of its very existence".[262]The only judge that dissented was CJ. Sinha. In his opinion, "the person who is excommunicated is barred from exercising his rights with regards to place of worship, rights in property, burial rights in community burial ground etc. These rights cannot be said to be purely religious rights as they also have rights of civil nature".[263]He upheld the Act stating that it promotes the ideals of Art. 25(1) and of Constitution which advances individual freedom and human dignity. It provides the freedom to the individual to oppose the unnecessary domination of his religious sentiments without the fear of exclusion and stigmatization.[264]

The Saifuddin judgments represent a substantial question on the conceptualization of the rights and the limitation of, the religious freedom guaranteed under the Constitution of India. It poses a dilemma on the relationship between the community and its individual constituent and the State. The attempt for the revision of the Saifuddin judgment was significant not because of its own unique facts but because of the reason that it questioned the sixty year old practice of the judiciary to interpret the religious freedom guaranteed under the Constitution. To understand the transformative contribution of the case one has to first analyse the majority

[262] ibid [61].
[263] ibid [19].
[264] ibid [23].

and the minority opinions and comprehend the friction that builds in between the individual's right to religious freedom and religious communities right to manage its own affairs. Then, secondly, the examination of 'essential religious practice' test upon which the majority opinion and the concurrence opinion in the Dawoodi Bohra case rests. Thirdly, analyse the path shown by CJI Sinha's dissenting opinion to comprehend the complexities of religious freedom of individual and groups. Lastly, an understanding which pays due consideration to the Indian history, to the arrangement of the Indian Constitution and to the transformative vision of the Constitution which aims promote individual freedom by limiting the power of group affiliation.

I. Individual, Community and the State

The guarantees that Art. 25 provides for is that "all individuals have equal entitlement to the freedom of conscience and their right to freely profess, practice, and propagate their religion is protected under the Constitution."[265]However, these rights are subject to "public order, morality and health and also other provisions of this part." Following this provision is Art. 25(2)(a) under which the State has the authority to make laws which "regulate or restrict any economic, financial, political and other secular activities that may relate to religious practice." And Art. 25(2)(b) allow for laws for bringing in "social welfare and reforms and for opening of Hindu religious establishments that are of public character to all those who belong to Hindu religion."

Two things to note here are, first, that the Constitution underlines the distinction between religious and secular activities which may falls within the ambit of religious practice. The task of drawing the dividing line between the secular and religious practice falls under the authority of the courts. Second, the state has the authority to intervene, and reconcile different relations within the religious denominations to promote social welfare and reform in the society. Once again the courts are the ultimate arbiters of any questions raised.

Under Art. 26(b) religious denominations are allowed to manage their own affairs in the matters of religion and have the power to administer property owned or acquired by it in accordance with law. Two things to be noticed here are that, under Art.26 groups are the bearer of the rights and, like Art. 25, Art. 26 allows law and the courts to notify differences between religious matters and secular activities, as shown by the explicit text of Art. 26

[265] Constitution of India, Art. 25.

which lays that the property may be managed only as per the law. When this religious autonomy guarantee of Art. 25 and 26 is read together, they guarantee both the individuals and groups their religious freedom while the state if allowed to regulate matters of secular nature that might take religious form and also to introduce reformative laws that might intrude the internal autonomy of religious denomination.

Taken textually, the provisions appears to be in contrast to each other and has been noticed by many scholars who disagree on whether the provisions have manged to attain a workable model of reconciling competing interests or have only succeeded in establishing an irreconcilable contradiction. Therefore, one can state that Ar. 25 and 26 fail to provide an understanding to differentiate between a religious and secular activity. Also, there is no clarification whether Art. 26(b) provides protection to a group right against the intervention of the State, or such protection is also guaranteed to group rights against its own constituent and vice versa. These were some of the major questions that the majority opinion failed to answer in the Saifuddin case.

II. 'Essential Religious Practices'- Tracing the Origins

In Saifuddin case, the majority ruled against the validity of the Act holding that "excommunication was an integral and essential part of Dawoodi Bohra religion." While doing so they stated that, "in order to decide what constitutes as an integral or essential part of a religion or religious practice one has to refer to the doctrines of that particular religion."[266]Once this was established, any interference with the power of the head priest over excommunication was considered to be an intrusion with a matter which is purely religious and therefore could not be saved on the ground that the Act promotes social reform as mentioned in the Constitution.[267] The terminology 'essential religious practices' has been long criticised on the point that, it is not the duty of the judiciary to advocate upon the importance of particular doctrines or beliefs which may (or may not be) integral to a religion.[268]

What is the origin of the phrase 'essential religious practices' can be found in the Constituent Assembly Debates in which while discussing on the religious freedom clauses, Ambedkar observed, "the religious conceptions in this country are so vast that they cover every aspect of

[266] ibid [33].
[267] cf Bhatia (n 140) 146.
[268]Suhrith Parthasarathy, 'The Flawed Reasoning in the Santhara Ban', The Hindu, 24August 2015.

life, from birth to death. I do not think it is possible to accept a position of that sort, we ought to strive thereafter to limit the definition of religion in such manner that we shall not extend beyond our beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that laws relating to tenancy or succession should be governed by religion."[269] Ambedkar was speaking of a very specific concern many scholars have understood as a "differentiation between the thin and thick role of religion."[270] In Western democratic countries, where role of religion has mainly been limited to private worship and ceremonies, State's legislative programs are hardly interrupted by the religious autonomy to bring in changes to individual freedom in any meaningful way. However, in India, as pointed out by Ambedkar himself, "religion, the private life of the individual, and the public life of the community are inextricably bound together".[271] Therefore, the State would have no choice but limit the scope of religious freedom to particular matters which are fundamentally religious and differentiate the matters which are secular in nature but over which religion nevertheless claims domination. This is explicitly laid in the Constitution by way of sub-clauses of Art. 25 and 26. And, as it has been seen, Ambedkar intentions, from the very beginning, was to deny religious denominations to have an absolute domination over their constituents.[272]

In the early 1954, the SC accepted the 'thick' understanding of religion as it rejected the 'thin' conception which would limit it private matters of thought, conscience and belief. Rather, it accepted that the provisions on religious freedom would also protect action and practice. The Court went on to hold that under Art. 26(b), it is upon the religious denominations to decide what rites and ceremonies to consider as essential to their religion.[273] Therefore, the error that the Court made was that, from the very beginning it adopted an internal point of view to differentiate between religious and secular, knowing the fact that religion in itself has a vast sphere and it is not logically feasible to make religion arbiter to decide what comes within its domain.

However, this misadventure was rectified by the Allahabad HC, when it was asked to decide on a government regulation which prohibited bigamy as violative of Art. 25(1). It was

[269] Parliament of India, CAD, Vol. VII, 2 December 1948 (speech by B.R.Ambedkar), <http://164.100.47.132/LssNew/constituent/vol7p18.htm>l accessed 25 June 2021.
[270] T.N. Madan, 'Secularism in its Place', (1987) The Journal of Asian Studies, Vol. 46, No. 4 747-759, <https://iow.eui.eu/wp-content/uploads/sites/18/2014/05/Bhargava-01-Madan.pdf> accessed 27June 2021.
[271] ibid, in T.N. Madan words, religion is 'constitutive of society' 6.
[272] cf Bhatia (n 140) 147.
[273] The Commissioner, Hindu Religious Endowment, Madras v Lakshmindra Swaminar 1954 SCR 1005, [20].

contended from the petitioner's side that there are some of the religious duties which can only be performed by a Hindu son and therefore, bigamy is a must when there is no male child from the first marriage. The Court went to examine some of the important Hindu religious scriptures and ruled that on its investigation it could not find any source which supported the understanding of the petitioner and thus, "polygamy cannot be said to be an essential part of Hindu religion."[274]The major shift made by the Court was in the use of word 'essential' as it changed it from "the nature of practice i.e. whether it is religious or secular to its importance within the religion." In other words, the query now changed from whether a particular practice was essentially religious to what is its importance when it comes to a particular religion. This shift was important because of the reason that now the Court had the authority to answer queries which were earlier regarded to be an internal matter of a religion and thus, could define whether a practice was essential for the religion or not.[275]

III. Civic Equality and the Transformative Constitution

The dissenting opinion of CJ Sinha in the Saifuddin case can be understood to be taken in three steps. First, he located in the long history of social welfare legislations the importance of Excommunication Act and in doing so he observed that the purpose of the Act was to promote individual freedom and provide a choice to choose one's way of life, avoiding all the undue interference with one's freedom of religion. The Act also ensured that human dignity of an individual is maintained.[276]Second, he appreciated the distinction made by Ambedkar in differentiating the essential and incidental religious practice and observed that excommunication deprives an individual of his basic civil rights such as right to worship, right to community burial and right to use community properties etc. And third, he travelled beyond the contours of Art. 25 and 26 as he linked the act of excommunication to the untouchability mentioned under Art. 17 of the Constitution. In relating social exclusion with Art. 17, CJ Sinha chose to enlarge the very meaning of the word untouchability and encompassed an inclusive understanding of social ostracism and the mischief by way of which an individual is treated as a pariah and is deprived from of his human dignity.[277]

But the question arises that on what basis did CJI Sinha choose such an expansive, abstract definition of untouchability? In order to answer this one has to look back to the Constituent

[274] Ram Prasad Seth v State of UP AIR 1957 All 411, [12].
[275] cf Bhatia (n 140) 149.
[276] cf Saifuddin (n 237) [11].
[277] cf Bhatia (n 140) 156.

Assembly Debates in which an amendment was proposed by Naziruddin Ahmed who advocated for restriction on the scope of untouchability to that of 'religion and caste'.[278] Upon this K.M.Munshi pointed out that "the word 'untouchability' was contained within quotation marks which makes it amply clear that the purpose was to 'understand it in the sense in which it is ordinarily understood",[279]but many of the members still found it ambiguous and called for a clearer definition.[280]Among all these discussions, K.T. Shah explicitly 'warned' that the definition might even extend to cover women in its ambit, who on various occasions had been treated like untouchables by the society.[281]

One important question still remains unanswered: freedom from what? In his dissent, CJ Sinha was not referring to coercion and interference with individual freedom by the State. Instead, he was referring to those communities who because of their collective beliefs are able to coerce and interfere with the freedom of its own members. CJ Sinha was of the opinion that the guarantee under Art. 25 and 26 does not only extend to religious denominations in order to preserve their integrity but also include individuals' rights which can be enforced against their own groups. It was this balance between group integrity and social reform that the scheme laid down under the Art. 25 and 26 scheme, was to be understood.

The thick or dominant role that the religion and religious group play in the life of an Indian citizen rules out any formulation of the traditional liberal approach when it comes to right to freedom of religion. The Indian Constitution by its scheme of Art. 25 and 26 aims to reconcile these two approaches and make way for reformative legislations which promote individual freedom and human dignity.

The Sabrimala case was decided by the SC on 28th September 2018 in the case of "Indian Young Lawyers' Association v. State of Kerala, by a majority of 4:1 the SC decided in favour of the women's rights to enter Sabrimala."[282] While the CJ and J. Nariman decided the case along traditional lines using the essential religious practice test and also analysing whether Art. 26 was applicable or not, the dissenting opinion of J. Malhotra and J. Chandrachud throw in some interesting ideas to ponder upon. While J. Malhotra rejected the essential religious

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[278] Parliament of India, CAD, Vol. VIII, 29 November 1948 (speech by Naziruddin Ahmed).
[279] Parliament of India, CAD, Vol. III, 29 April 1947 (speech by KM Munshi).
[280] ibid (speech by Rohini Kumar Choudhury).
[281] Parliament of India, CAD, Vol. VIII, 29 November 1948 (speech by K.T. Shah).
[282] W.P. (Civ.) 373/2006.

practices test altogether and saw the question of religious worship as raising no significant fundamental rights issues at all. J. Chandrachud agreed that the essential religious practices, in its present form, was unsustainable. What he also did was to undertake a detailed Art. 17 analysis and advocated for a broad reading of the provision and link it up with anti-exclusion principles. J. Chandrachud judgment is a powerful articulation of the transformative interpretation of Art. 25 and 26 and provides a strong intellectual foundation upon which the future discourse on the right to individual freedom and right to religion can rest.

Chapter V
Findings and Conclusion

5.1 Findings

1. The Fundamental Rights are the inalienable rights guaranteed to every citizen of India and are enforceable against the State. It is important to conceptualise the guaranteed Fundamental Rights because these are the major armament in the hands of the general public by way of which they enforce their basic necessities to live a dignifies democratic life and also avoid State's excess use of power. The role of judiciary, therefore, becomes quintessential for sustenance of these Fundamental Rights.

These Fundamental Rights may seem to be static words placed together guaranteeing certain rights but in reality they are much more than they may look to the plain eyes. These rights embed in themselves the seeds of future guarantees that the upcoming generation may assert with the changing times. The forefathers, who made this Constitution come to life, did not make it to become obsolete with the changing scenarios, but prepared it to fit and flourish for times to come. This change can be brought about by a transformative interpretation of the Constitutional provisions which mediates between the past, present and future of the rights so guaranteed. This transformative interpretation is what is called 'transformative constitutionalism': a way in which constitutional provisions are interpreted by the judiciary in to assimilate the changing demands of the society without changing the very essence of the Constitution itself.

2. The origin of transformative constitutionalism comes from the understanding of constitutionalism. Through this research it can be understood that the very idea of transformative constitutionalism is in its germinating stage because of which there is no one definition of the term and different legal philosophers are coming up with their own understanding of the term.

In India, the term holds great significance because of various reasons. First, that India is a diverse country with so many colours, creeds, communities brought together and therefore, balancing the competing interests become challenging and this is where transformative constitutionalism can be used to understand the need of different sections and assimilate the same in order to decrease disputes. Second, India has a written Constitution and it's the holy

book governing the laws of the land and therefore any change that it brought about has to be in consonance with its understanding and transformative constitutionalism promotes the same. And third, as one has understood that the idea of constitutionalism is limitation on the power of the government and with the advent of globalization statesare taking up the role of welfare entities their involvement in the lives of their subjects has risen exponentially and transformative constitutionalism is the answer to it. By recognising novel ideas of different freedoms it tends to limit the intervention of the State powers in the life of the individuals. Thus, transformative constitutionalism is the answer to many of the questions that the contemporary democracies are struggling with.

3. The Constitutional Courts in India have played a prominent role in advancing the idea of transformative constitutionalism. This has been done by way of several case laws which transcend beyond the ordinary nomenclature of the Constitutional text and look at the Constitution as an all-encompassing document of Fundamental Rights.

Discussion on all these case laws and the role of the Constitutional Courts also help one understand the two approaches that has been undertaken by the Courts in interpretation of the Constitution i.e. the Conservative Approach and the Transformative Approach. The Conservative Approach being dominant because the Courts have to justify their stance in case of a transformative interpretation and if it fails to do so it is criticized to be outstretching its given power. To do away with this it must bring in idea of transformative constitutionalism which relying on the history of the Constitution itself provides good backing to any of the transformative reading of the Constitutional provision.

5.2 Conclusion

J. Michael Kirby and Ramesh Thakur in their article titled "The 2018 decision merits a rich tribute for its transformative constitutionalism" had equated constitutionalism to Rajdharam, the ancient Hindu concept which had integrated religion, duty, responsibility and law. In this article they talk about "how the verdict of Navtej Singh Johar has assimilated textual analysis, ancient and modern history, India's political history, philosophical reasoning, and doctrinal application. And that the judgement deserved a rich tribute for its contribution to transformative constitutionalism."[283]

[283] Michael Kirby & Ramesh Thakur, 'Navtej Johar, A Verdict For All Times', The Hindu, 31 December, 2018.

J. Deepak Mishra has been credited and appreciated by the legal fraternity for converting the concept of transformative constitution propounded with respect to South African Constitution in 1996 into transformative constitutionalism and using it to promote the desired social cause without disturbing the essence of the Constitutional text. Explaining his understanding of Transformative Constitutionalism he states,

"The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Constitution of India, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times."[284]

The cases referred above shows the glimpse of the transformative character of the Constitution of India and the potential in the hands of the judiciary to recognise and enforce novel ideas of freedom against the State. The understanding of J. Mishra on transformative constitutionalism in itself shows the attitude of the judiciary to give effect to rights of the individuals and groups that the State so vehemently argue against and wants to keep a blindfold towards it. The idea of transformative constitutionalism is a new idea still in its germination stage but it carries the hope of a bright future without destroying the experience of the past.

India is a country with diversity like none other. This diversity gives it the colours that has made it world known. But with diversity comes different complexities that are not very common around the world and thus need imagination and creativity to deal with such instances. Keeping in mind this diversity the Constitution makers embedded certain rights in the Constitution itself which came to be known as the 'Fundamental Rights' as these are basic rights to a dignified democratic life. They were well aware of the groupism mentality that the Indian society was divided into due to various factors such as religion, race, sex, caste etc. This is the reason why the Constitution has provisions not only to deal with vertical

[284] M.P. Singh, Decriminalisation of Homosexuality and the Constitution 2 NUJS L. REV. 361 (2009) [96].

discrimination i.e. between State and its subjects but for horizontal discrimination as well i.e. against other citizens. This is just one way by way of which the Constitutional makers dealt with discrimination prevailing in the Indian society and there are numerous provisions which surround the individual in a way that protect her from diminishing her identity to a mere animal existence.

This makes the chapter on ‘Fundamental Rights’ of immense importance. The chapter gave a conceptual idea of what the fundamental rights are and how they came into being. The historical enquiry led to the understanding that the concept of fundamental rights flows from the philosophies of human rights and is the most refined version of human rights which can be enforceable against the State. It is well known that the Indian state recognises certain fundamental rights and has provided them special place in the Constitution. But what was not clear was the understanding as to why only these human rights were recognised and what the history behind such recognition. The Fundamental Rights chapter adequately answers this enquiry and explores the Constitution making process which sheds some light on why specific rights were given precedence over others. The chapter also briefly lists all the fundamental rights included in the Constitution. This is done to provide a complete understanding on the fundamental rights to the reader and non-reader of law alike.

With the understanding on fundamental rights the question arises that the text of the Constitution has remain the same from its initiation, barring few amendments, but as noticed by many scholars it has kept well with time. How has this become possible with such diversity and competing interests? This led to our second enquiry: what is Transformative Constitutionalism?

Starting with the difference between Constitution and Constitutionalism, the understanding makes it abundantly clear that Constitution is not a precursor of constitutionalism. Constitution is a physical document which defines and contain the fundamental laws of the land. Constitutionalism, on the other hand, is a system of governance which while recognising the need of government insist for limitations to be put in place to control its powers. Therefore, a country may have a constitution but not necessarily constitutionalism.

The history of constitutionalism was essential to get the wholesome understanding of constitutionalism and trace the roots of transformative constitutionalism. From the Magna Carta, that introduced the idea of ‘law is supreme’ to the contemporary philosophers like

Charles H. McIlwian and Louis Henkin the philosophy of constitutionalism has changed overtime with the changing political and social structure. But in every definition that crossed the eyes one quality of constitutionalism remained the same: it is the legal limitation on the government. The Indian understanding of the term constitutionalism can be found in the deliberation of one of the most profound constitutional law academicians Dr. D.D. Basu., whose definition of constitutionalism makes it crystal clear what is demanded by the Indian State when it is said that it adheres and inculcates the idea of constitutionalism.

With the understanding of constitutionalism the idea of transformative constitutionalism becomes clear. The two approaches that the Constitutional Courts in India have adopted while interpreting the Constitution is that of a 'conservative constitution approach' and the 'transformative constitutional approach'. Both have their own pros and cons, as the conservative approach tends to provide more weightage to the past and is traditionalist when approached by an evolving idea of freedom or liberty while the transformative one is open to such ideas but tend to jeopardize the rich past which has guided the Indian state in its darkest days. This is the place where transformative constitutionalism is introduced to fill in the gap which both these approaches are failing with. Transformative constitutionalism takes seriously the text of the Constitution, its structure and the historical moments of its framing. But, while giving due regard to the past, it is not stuck at the moment of the framing. It understands that in the rapidly changing world the Constitution needs to be timely updated but without losing the principles upon which it rests. Therefore, Transformative constitutionalism task is to identify and express these founding principles within which constitutional interpretation can be carried on.

The transformative constitutionalism idea revolves around the methodology by which the Constitution is interpreted. The duty and authority to interpret the Constitution has been given to the judiciary who acts as the guardian and protector of the fundamental rights of the citizens. Therefore, it is the duty of the courts to interpret the Constitution in a way that it does not become rigid and lose its usefulness with the changing scenarios. The theoretical understanding of transformative constitutionalism became clear with tracing of its roots in an historical enquiry but to conceptualize the idea its practical utility had to be probed. For this, some of the less known but most influential cases has been discussed to provide a glimpse of the transformative vision of the Constitution.

The Anuj Garg case shows how the separate sphere understanding has divided the world into gendered public and private spheres under which the outside realm of economics and politics belong to the men while the domestic space which is characterised by enlightened childcare, cookery, accounts and family education belong to the women. This division between the two is hierarchical because the male world of work and public intervention carries more prestige and status than the female world of domesticity. But the transformative approach of the case challenges this and acknowledges that the constitutionality of discriminatory laws must be tested by their systematic and institutional effects rather than their intentions.

The Naz foundation case needs no introduction and has been considered a case of path breaking interpretation by the judiciary. Although, the Navtej Singh Johar case is considered more apt to be discussed, the transformative constitutionalism principles deliberated upon by the Court in the Naz foundation case is the basis upon which the Johar case rests and therefore in a discussion on transformative constitutionalism has to be considered first. Even after strong support by the State for the retention of Sec. 377 justifying it on the grounds of public health and public morality, the Court did not accept the contentions raised by the State and justified its stand beautifully by way of transformative interpretation of the constitutional provision to uphold the rights of the homosexual community.

Similarly, N.M. Thomas case, on its first look, does not seem to have any significant impact on the interpretative aspect of the Constitution. This is because of the reason that its transformative vision is not reflected in the majority opinion but in the minority one. It made judiciary to look at caste not as an individual character but as a structural disadvantage that has been imposed largely on the basis of group membership, and therefore, had to be taken into consideration while distribution of public goods which includes state employment as well. The N.M. Thomas case was also the first one to understand the harmonious relation between Part III and Part IV of the Constitution and was used by the Court to substantiate its understanding and push the transformative vision of the Constitution.

Religion plays a vital role in the life of each and every individual in India and therefore is of great significance. But what happens when one's religion becomes the source of their hardship. This was the basic question that was asked in the Saifuddin case. Saifuddin case questioned the balance that the Constitution aims to achieve between the individual religious freedom and group autonomy guaranteed under Art. 25 and 26 of the Constitution. Tracing to the origin of the 'essential religious practices', which has been used by the courts to

adjudicate upon religious enquiries and answering as to why this precedent set by the courts is incorrect. The answers that the case elaborates upon are significant in the changing dimensions of individual's rights and their precedence over religious freedoms. Such a change can be seen in the Sabrimala judgment in which the SC upheld the right of the women to enter Sabrimala temple, thus, upholding the individual's rights over that of religious sect.

There is one question that needs to be addressed here. Why only these judgments are focused when there are plethora of judgements given by various courts which have brought substantial change in the Indian legal regime, like the Maneka Gandhi case or the Puttaswamy case. The answer to this enquiry is twofold. First, it is accepted that there are various cases which have brought substantial change in the Indian legal regime by way of their transformative interpretation of the Constitution, but due to paucity of time and the limitation of this research only a glimpse of the transformative character of the Constitution could be analysed. Secondly, and more importantly, eventhough many of the cases have brought substantial change in the understanding of the fundamental rights (like Maneka Gandhi) they are not true to the definition of transformative constitutionalism. This is because of the reason that transformative constitutionalism takes seriously the text of the Constitution, its structure and the historical moments of its framing and does not provide the privilege to the judiciary to come up with its own interpretation and personal opinions while interpreting the provisions of the Constitution. It is because of this reason that many eminent legal scholars do not consider Public Interest Litigation (PIL) as a part of the transformative constitutionalism and contend that the large part of the history of PIL has been the history of judges and academicians substituting the ideal of justice for the concrete articulation of justice in the Constitution. It is argued that the problem with PIL is not simply that it does not maintain its fidelity with the Constitution but rather it has misunderstood the role of the judiciary in the constitutional scheme of our Constitution.

But, in any case, it cannot be denied that some of the cases which do not fall within the ambit of transformative constitutionalism, have brought huge relief to the Indian citizenry and there transformative character cannot be outweighed. As we understand that transformative constitutionalism is still in its germinating stage and therefore, has to be true to the Constitutional provisions which forms the soil of its nourishment. But as the concept grows overtime it might spread its roots to other jurisdictional understanding of different concepts and may outgrow the understanding of the Constitution of India. It cannot be said till what

time the foresight of our constitutional makers will guide us into the future but whenever it goes of the understanding of transformative constitutionalism will take motivation from other jurisdiction and will help the judiciary to justify its stand on its transformative rulings. When this happens concepts like PIL and other such interpretation may become a part of a transformative constitutionalism.

This work was carried out with one sole objective: to understand what is there to be done for a thriving future without disturbing the experience and care of the past. To elaborate on this understanding, the current scenarios of the contemporary chaos unsettles within the author's mind, who being a budding Constitution reader fails to grasp the potential of the Constitution he holds, not because the text is unclear but because these demanding times do not go along with what he reads and understands. This unsettling thought pushes to widen the clutches of one's understanding and find ways that lead to a welcoming future. Transformative Constitutionalism is one of the ways that may answer many of the questions that the contemporary democracies today are struggling with. A struggle to understand the growing diversity, the growing understanding of rights and liberties, State's duties amidst all this and the genuine limitation to negate the excess of anything.

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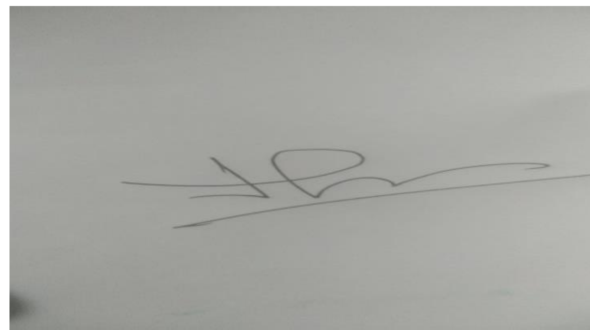
Appendix

CERTIFICATE

This is to certify that RITUMUKESH MISHRA has completed his dissertation titled "TRANSFORMATIVE CONSTITUTIONALISM: RENAISANCE OF FUNDAMENTAL RIGHTS IN INDIA" under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.



Date: 1/08/2021

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DECLARATION

I, RITUMUKESH MISHRA, do hereby declare that the dissertation titled "TRANSFORMATIVE CONSTITUTIONALISM: RENAISANCE OF FUNDAMENTAL RIGHTS IN INDIA" submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

Date: 1/08/2021

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