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## PREAMBLE AND TRANSFORMATIVE CONSTITUTIONALISM :AN ELUCIDATIVE INSIGHT

The Preamble of the Indian Constitution is one of the distinct features of the Indian Constitution. It embodies the principles of the longest written Constitution of the World in a lucid and elucidative matter. The reflection of the principles envisaged by the Preamble are at the need of the hour in India , with the onset of the Covid-19 pandemic causing massive socio-legal issues such as grant of emergency powers to the Union Executive , near closure of physical courts and a diluted Parliament. The use of transformative constitutionalism by the Supreme Court in recent times played a key in interpreting the principles of the Preamble . The essay seeks to elaborate on this intersectionality between the Preamble and transformative constitutionalism on a fourfold basis – *firstly* – to provide an historical overview of the Preamble from the objective resolution to the Constituent Assembly Debates ; *secondly* – an insight into transformative constitutionalism by the Supreme Court mandate on the same ; *thirdly* highlight the consonance between the Preamble and transformative constitutionalism ; and *fourthly*- reiterate on the need of the Preamble’s principles in current times.

**Keywords :-** *Preamble; Constitutionalism ;Supreme Court , Constitution*

## THE PREAMBLE AND THE CONSTITUENT ASSEMBLY

The Preamble<sup>1</sup> to the Constitution of India lays down the principles envisaged by the Constitution makers and is a reflective India's transition from a dominion State of the British Commonwealth into a republic. It establishes a secular, democratic, socialist state. The principles asserted by the Preamble such as that of justice, sovereignty and liberty to name a few, are the result of substantive discourse in the Constituent Assembly Debates. The principles reflected by the Preamble can be traced back to the Objective Resolution moved by Jawaharlal Nehru on 13<sup>th</sup> December 1946<sup>2</sup> and adopted by the Constituent Assembly on 22<sup>nd</sup> January 1947.<sup>3</sup> The Preamble was intensively discussed by the Constituent Assembly on 17<sup>th</sup> October 1949. Hashrat Mohani's proposal that the Preamble addresses India as an "Union of Indian Socialist Republics" was rejected.<sup>4</sup> The Assembly also debated with great vigor on the need over inclusion of "God" and "Gandhi" in the Preamble. H V Kamath's motion to include an invocation of God and the Bhagavad Gita was similarly rejected by members.<sup>5</sup> Shibban Lal Mishra's to include an ode to Gandhi was also rejected, with a member asserting that the founding principles of the Preamble are decisions of the American Supreme Court.<sup>6</sup> Lastly the motion of Banerjee to include "sovereignty of the people" was also rejected. These myriad debates show that how the careful inclusion of each word in the Preamble ensures it is a testament to the principles mooted by the Constituent Assembly.

## TRANSFORMATIVE CONSTITUTIONALISM

The concept of transformative constitutionalism is without doubt of South African origin. American jurist Karl Klare described it as "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law".<sup>7</sup> The very idea of transformative constitutionalism has not just been expounded by recent judgments of the Supreme Court, but through the very history of the Constitution itself. Remnants of transformative constitutionalism can be traced back to the "Act of State" doctrine laid down by the Privy Council.<sup>8</sup> The State of Bombay defended the action of revoking the forest rights granted to the

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<sup>1</sup> INDIA CONST. Preamble.

<sup>2</sup> 1 CONSTITUENT ASSEMBLY DEBATES 58-64 (Lok Sabha Secretariat, 6<sup>th</sup> ed 2014).

<sup>3</sup> 1 CONSTITUENT ASSEMBLY DEBATES 324 (Lok Sabha Secretariat, 6<sup>th</sup> ed 2014).

<sup>4</sup> 10 CONSTITUENT ASSEMBLY DEBATES 435-437 (Lok Sabha Secretariat, 6<sup>th</sup> ed 2014).

<sup>5</sup> Id at 444-445.

<sup>6</sup> Id at 438-444.

<sup>7</sup> Karl E Klare, *Legal Culture and Transformative Constitutionalism*, South African Journal on Human Rights, 14:1, 146-149, (1998).

<sup>8</sup> State of Gujarat v Vora Fiddali Badruddin Mithirbarwala (1964) 6 SCR 461.

jaghirdars, by invoking the sovereignty of State. The respondents contented by objecting that the doctrine of sovereignty of State is based upon the foundations of British and that it is inconsistent with the “true nature” of the Constitution.<sup>9</sup> Juristic opinion on the nature of the Constitution however, is of conflicting nature with ambiguity over the conservative and evolutionary nature of the Constitution. Supporters of the conservative nature believed in the inherent nature of the Constitution that is primarily the mandate of continuity. On the other hand, many jurists believed in the evolutionary nature of the Constitution that is not to continue the legacy of British Imperialism but to act as an element of transformation and evolution.<sup>10</sup> It is only through a litany of judgements, debates and juristic discourse has this idea of transformative constitutionalism evolved through time.

### THE PREAMBLE AND TRANSFORMATIVE CONSTITUTIONALISM

The intersection of the preamble and transformative constitutionalism has been elucidated by the Supreme Court in recent judgements. In *Navtej Singh Johar and Ors v Union of India*<sup>11</sup> Misra CJ, asserts that the very purpose of having a constitution itself is to adopt its ideals which are enshrined in it. He elucidates that transformative constitutionalism is the ability of the constitution to change with the changing times and that it confers an obligation upon the judiciary to interpret and enforce the constitution with changing needs of the society.<sup>12</sup> This transformative nature of the constitution was legitimized by the Supreme Court through several precedents like *State of Kerala and another v. N.M. Thomas*<sup>13</sup>, *Shakti Vahini v Union of India*<sup>14</sup>, *Shafin Jahan v Ashokan KM and Ors*<sup>15</sup>. In *Justice K S Puttaswamy v Union of India*<sup>16</sup>, Chandrachud J in his dissenting opinion asserts the Constitution as a transformative document. He elucidates the importance of transformative constitutionalism that it one; guarantees the rights of individuals against state excesses and establishes order between the organs of a State; two being transformative must be interpreted according to changing needs of the society; and three that it establishes the primacy of individual over State.<sup>17</sup>

### RELEVANCE OF THE PREAMBLE

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<sup>9</sup> Id at pg 114.

<sup>10</sup> Gautam Bhatia, *THE TRANSFORMATIVE CONSTITUTIONALISM: A RADICAL BIOGRAPHY IN NINE ACTS*, xx-xxvii ,(1<sup>st</sup> ed. 2019).

<sup>11</sup> *NavTej Singh Johar & Ors v Union of India* AIR 2018 SC 4321.

<sup>12</sup> Id at ¶65-74

<sup>13</sup> *State of Kerala and another v. N.M. Thomas* AIR 1976 SC 490.

<sup>14</sup> *Shakti Vahini v Union of India* 2018 1 SCC 275.

<sup>15</sup> *Shafin Jahan v Ashok KM and Ors* 2018 1 SCC 343.

<sup>16</sup> *Justice K S Puttaswamy v Union of India* (2017) 10 SCC 1.

<sup>17</sup> *Supra* note 16 at pg 9-14.

The novel coronavirus ('Covid -19') was declared as a pandemic by the World Health Organization on 11 th March 2020.<sup>18</sup> This declaration prompted governments across the world to go into a state of alarm and take protectionist measures through domestic and international policy changes , some of them having massive socio -legal ramifications. In India , the presence of executive primacy despite the constitutional mandate of separation of powers has led to the introduction of laws that are a clear contrast to the values such envisaged by the Preamble. The implementation of the National Register of Citizens in Assam coupled with the passage of the Citizenship Amendment Act 2019<sup>19</sup> have redelegated a large population of Indians into a subclass of human existence as “illegal immigrants” , exposing them to State excesses in the form of arbitrary detention and denial of citizenship. The absence of Parliamentary oversight over the Union Executive is also reflected since Parliament was convened late, and the key use of question hour was curtailed<sup>20</sup> and Parliamentary Committees were mandated by the Speaker not to cover matters sub-judice and the Union Government uses “sovereignty” as a veil to escape key parliamentary oversight.<sup>21</sup> Lack of key Judicial oversight has also ensured constitutional guarantees of equality , secularism and liberty legitimized by the Preamble go unchecked. The Supreme Court of India through a myriad of actions like introduction of the PIL<sup>22</sup> , suo-moto cognizance and the wide interpretation of Article 21<sup>23</sup> has asserted its role as an arbiter of justice. The Supreme Court however in recent times has not yet adjudicated on key constitutional cases such as the constitutionality of Article 370<sup>24</sup> , Citizenship Amendment Act 2019 <sup>25</sup>and electoral bonds<sup>26</sup> to name a few. Parallels can be drawn to ADM Jabalpur v Shukla in which the Supreme Court ruled that right to life under 21 can be suspended during an emergency. The Supreme Court has also recently come under severe criticism for it's

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<sup>18</sup> WHO Director General's Opening Remarks at the Media Briefing on Covid-19 Pandemic , WORLD HEALTH ORGANIZATION , (May 15, 2020) , <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>19</sup> The Citizenship (Amendment) Act 2019, No 47, Acts of Parliament, 2019 (India).

<sup>20</sup> *Its Official , Question Hour Gone* , THE HINDU , (Sept 25, 2020) , <https://www.thehindu.com/news/national/its-official-question-hour-gone/article32605090.ece>.

<sup>21</sup> Deeksha Bharadhwaj , *House Panels told not to pick sub-judice issues* , THE HINDUSTAN TIMES , (Aug 25 2020) <https://www.hindustantimes.com/india-news/house-panels-told-not-to-pick-sub-judice-issues/story-7iM7g7ZGd1fnehjDpZe8kK.html>

<sup>22</sup> Hussainara Khaton v Home Secretary, State of Bihar (1980) 1 SCC 98 : Sunil Batra v Delhi Administration (1978) 4 SCC 494 : Vishaka v State of Rajasthan (1997) 6 SCC 241 : Bandua Mukti Morcha v Union of India AIR 1984 SC 602

<sup>23</sup> Maneka Gandhi v Union of India 1978 SC 597 : R.C. Cooper v. Union of India, AIR 1970 SC 564 : Olga Tellis v. Bombay Municipal Corp AIR 1986 SC 180.

<sup>24</sup> Manohar Lal Sharma v Union of India , Writ Petition (Civil) No 1013 of 2019.

<sup>25</sup> Indian Muslim League v Union of India , Writ Petition (Civil) No 1470 of 2019.

<sup>26</sup> Association for Democratic Reforms v Union of India , Writ Petition (Civil) No 333 of 2015.

response to petitions regarding the rights of migrant workers during the covid-19 crisis.<sup>27</sup> Though it subsequently took up the matter of rights of migrant workers *suo moto*<sup>28</sup>, the damage was already done. The passage of laws by States such as on dilution of labour laws<sup>29</sup>, anti-conversion and the recent repeal of an amendment<sup>30</sup> by the State of Kerala contrary to the Supreme Court mandate<sup>31</sup> on the same show the stark diversion from the values envisaged by the Preamble. Thus, its only through key consonance of the three wings of State – the Executive, Judiciary and Legislature that the original aspirations of the Preamble can be achieved.

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<sup>27</sup> A P Shah, *failing to perform as a constitutional court*, THE HINDU, (May 25, 2020),

<https://www.thehindu.com/opinion/op-ed/failing-to-perform-as-a-constitutional-court/article31665557.ece>.

<sup>28</sup> In Re Problems and Miseries of Migrant Labourers, *Suo Motu Writ Petition (Civil) No 6/2020*.

<sup>29</sup> The Uttar Pradesh Temporary Exemption from Certain Labour Laws Ordinance, 2020 : Madhya Pradesh Labour Laws (Amendment) Ordinance, 2020 : Industrial Disputes and Certain Other Laws (Karnataka Amendment) Ordinance, 2020.

<sup>30</sup> The Kerala Police (Amendment) Ordinance 2020.

<sup>31</sup> Singhal v. Union of India, (2013) 12 S.C.C. 73.