



These judgements interrogate the State's role in upholding oppressive structures (in this case, family structures) that threaten individual freedom and the right to privacy. Speech, Association, Personal Liberty, and the State of Exception: Jyoti Chorge v. But to this interpretive approach, two objections may be raised. It means a way of life which recognizes liberty, equality, and fraternity as the principles of life. The cases engage with gender equality, the decriminalization of sexual orientation, and the justifications for affirmative action and reservations. In particular, it was a struggle that found utterance in the curtain-raiser to the Constitution: the Preamble, with its three words which, over the course of almost two centuries, had acquired the force of an incantation: liberty, equality, fraternity.⁵⁰ III. This fundamental truth was enunciated by Dr S. They had participated in the struggles and, short of holding elections, every effort had been made to give their gathering a representative character.¹⁰⁵ To give expression to this 'emotion recollected in tranquillity', transformative constitutionalism examines the historical roots of the Fundamental Rights chapter in the liberation struggles: not just the dominant nationalist avatar of the freedom movement, but the plurality of liberation struggles that preceded the drafting of the Constitution, in the course of which Indians gave shape to their aspirations in the language of liberty, equality, and fraternity. For example, when the State guaranteed to all the 'equality' than others? For Justice Shah, that event signified continuity: marked by words and phrases such as 'continuance', 'evolution', 'gave shape', and 'change in form'. We cannot understand the Constitution's repudiation of gender discrimination without listening to the voices of the women who used the language of equal rights to publicly intervene in the nineteenth-century debates surrounding the restitution of conjugal rights, the twentieth-century controversies over the Child Marriage Bill, and the equally public struggle of the suffrage movement. I have no quarrel with the original purpose of PILs as a mode for giving voice to those unable to approach the courts by themselves. So, while these judgements are each worth studying individually their transformative potential only shines through when we read them together: as integral elements of the constitutional trinity, mutually reinforcing and creating the necessary foundation for a free and egalitarian democratic politics. Rather, in doing so, it misunderstands the role of the courts in our constitutional scheme vis-à-vis popular democracy. In 1954, considering a very similar set of facts, Justice Vivian Bose had set his face firmly against the Privy Council's 'Act of State' doctrine. However, there is nothing natural or inevitable about this characterization of constitutionalism.⁶⁸ The US Constitution took the form that it did because it was driven by an ascendant bourgeoisie class, arose out of a reaction against an absolutist monarchy, and was designed to guard against the threats to freedom posed by centralized and concentrated power. The second set of cases engages with the concept of fraternity, and interprets those articles of the Constitution that have remained marginalized, both in judicial and in academic discourse. By contrast, the intellectual opponent of living-tree constitutionalism, i.e., constitutional originalism, is discredited in India. This included provincial legislative councils and ministries elected on the basis of limited franchise, which had limited law-making powers, often subject to the overriding authority of the Governor-General.²⁴ The representation might have been imperfect, but—so the argument goes—that was simply a question of degree.²⁵ The Constitution only marked a culmination of this incremental, but inevitable, process. Religious Freedom and Group Identity: Saifuddin and the Anti-Exclusion Principle 6. Trapped between the historical unacceptability of originalism and the boundless manipulability of the living tree, constitutional interpretation seems to be at an impasse.¹⁰⁰ Transformative constitutionalism takes seriously the text of the Constitution, its structure, and the historical moment of its framing. They form a union of trinity ... liberty cannot be divorced from equality, equality cannot be divorced from liberty. To avoid being ambushed by attractive, but ultimately doubtful, interpretations of liberty, equality, and fraternity, it is crucial to understand, as B.N. Rau did in 1948, that despite its numerous references to 'groups' and 'denominations', it is the individual that is placed at the heart of the Constitution's Fundamental Rights chapter. Emotion Recollected in Tranquillity: The Interpretive Approach What interpretive theory underlies this vision of the transformative Constitutionalism shares some of the commitments of originalism. We need to go beyond the narrow canon that is invoked in defence of constitutional continuity, a canon that is limited to a surface reading of the constitutional text, a surface comparison with colonial legal instruments, and a surface contextualization of the pre- and post-constitutional political framework. It replaced the colonial logic of governing and administering a population⁴⁰ with the democratic logic of popular sovereignty, public participation, and limited government. Together, these nine judgements articulate, in concrete terms, the transformative vision of the Indian Constitution. I. The Indian Constitution of the Indian Constitution. I. The Indian Constitution. I. The Indian Constitution. I. The Indian Constitution of the Indian Constitution. I. The Indian C Author's Note Prologue: The Past Is a Foreign Country Part One: Equality 1. As with the respondent-citizens before the Supreme Court in 1964, he had founded his argument in the moment of constitutional framing: In our opinion, the Constitution ... blotted out in one magnificent sweep all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State now seeks to uphold ... the past was obliterated except where expressly preserved; at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.⁷ Ten years later, Justice Shah took direct issue with these words, labelling them 'assumptions ... not supported by history or by constitutional theory'.⁸ He insisted, instead, that the promulgation of the Constitution marked 'merely [a] change in the form of Government',⁹ which was nothing more than the 'final step in the process of evolution towards self-government'.¹⁰ This was evident from 'the continuance of the Bowinion',¹¹ even after the adoption of the new Constitution. Beyond Liberalism In its commitment to the trinity of liberty, equality, and fraternity, the Indian Constitution and its Fundamental Rights chapter departed from the template that had been established by the United States Constitution in 1776, and that has served as the global default ever since. In his concurring opinion, Justice J.C. Shah addressed the constitutional argument of the respondent-citizens, and rejected it in the following words: There is no warrant for holding at the stroke of midnight of the 25th January, 1950, all our pre-existing political institutions completely unrelated to the past. Ambedkar's reference to the 'union of trinity' reflected the insight that the content of liberty and equality (which were otherwise abstract terms) would be shaped by fraternity. A version of Chapter 2 was published earlier as 'Equal moral membership: Naz Foundation and the refashioning of equality under a transformative Constitution', (2017) 1(2) The Indian Law Review 115 (Publisher: Taylor & Francis); of Chapter 4 as 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach', (2016) 11(1) The Asian Journal of Comparative Law 87 (Copyright: Cambridge University Press); and of Chapter 5 as 'Freedom from community: Individual rights, group life, state authority, and religious freedom under the Indian Constitution', (2016) 5(3) Global Constitutionalism 351 (Copyright: Cambridge University Press). It is the writings of B.R. Ambedkar, from his Report to the Southborough Committee to Annihilation of Caste and the story of the Mahad Satyagraha, that will allow us to understand how the Constitution was committee to Annihilation social and economic hierarchies. The text of the Equality Code, born out of more than a century of struggles for equal status and equal moral membership of the polity, locates and identifies sites of historical and current discrimination. Beginning with the judgement in Maneka Gandhi v. But to defend this as 'transformative jurisprudence', we must ignore the Constitution's text, structure, drafting history, and underlying philosophy. Framed as exhortations to the legislature,⁷³ the DPSPs embody many of the principles of a social-democratic welfare State: equitable distribution of resources, special solicitude towards vulnerable sections, and other socio-economic rights. And the dependence was mutual. The Supreme Court judgements in the adultery challenge (Chapter 1), the Section 377 challenge (Chapter 2), and the Sabarimala temple entry case (Chapter 5) were delivered after I had finished writing this book. But in his closing speech to the Constituent Assembly on 25 November 1949, the day before the Constitution was adopted, B.R. Ambedkar articulated what these words meant to him: Political democracy cannot last unless there lies at the base of it social democracy. The Constitution In characterizing the Constitution In characterizing the Constitution as a conservative document, Justice Shah was not arguing in a vacuum. It had mattered before in 1950, when in its very first decision the Supreme Court had upheld the constitutionality of preventive detention laws that replicated their colonial antecedents. And lastly, they look at how-by guaranteeing a right against self-incrimination-the Constitution stands between an individual accused of a crime, and the State in its most violent avatar: that of an interrogator and enforcer of laws. The Freedom to Work: Peoples Union for Democratic Rights and Forced Labour Part Three: Liberty 7. The Nine Judgements It is not the aim of this book to glorify the courts as agents of constitutional transformation, or to place the language of rights that they speak upon a pedestal. B.R. Ambedkar, in his closing speech to the Constituent Assembly (1949) We have it in our power to begin the world over again. For Justice Bose, on the other hand, it marked transformation: a past that was 'blotted out', 'abandoned', 'obliterated'; and a 'new order' that was born. State of Karnataka Epilogue: 'Something of Freedom Is Yet to Come': The Aadhaar Case, Technological Self-Determination and the Future of Transformative Constitutionalism Notes Index Acknowledgements About the Book About the Author Copyright Author's Note AS A PRACTISING LAWYER, I was professionally involved with four of the cases discussed in this book: the constitutional challenge to Section 377 of the IPC (Chapter 2), the right to privacy case (Chapter 7), the bail applications of Kabir Kala Manch before the Supreme Court (Chapter 8), and the constitutional challenge to Aadhaar (Epilogue). Liberty, Equality, Fraternity was a familiar one, from the time of the French Revolution. Thomas Paine (1776) IN MARCH 1948, THE ruler of Sant, a princely state in western India, granted to some of his subjects (the jagirdars¹) rights over certain forests. IV. First, the Constitution transformed the legal relationship between the individual and the State. The Constituent Assembly might have owed its legal existence to the colonial regime, but one of its first acts was to declare itself sovereign, and frame the Constitution on its own terms.³³ In defending himself against the charge that he had simply copied the 1935 Act into the Constitution, insisted that it was only the 'details of administration' that had been borrowed.³⁴ This was not an unfair argument.³⁵ And while some measure of 'responsible government' existed in British India, it was scarcely comparable with the full-blooded parliamentary democracy, founded on universal adult franchise and equality of citizenship, which the Constitution brought into existence.³⁶ As Uday Mehta points out, for all the surface similarities with the colonial past, there was much in the Constitution that was a radical departure: Here was a document which granted universal adult franchise in a country that was by any reckoning deeply religious; which evacuated as a matter of law every form of prescribed social hierarchy under extant conditions marked by a dense plethora of entrenched hierarchy, the Constitution created a federal democracy with all the juridical and political instruments of individual, federal, local, and provisional self-governance, where the nearest experience had been of imperial and princely authority.³⁷ These words lay the foundations for the argument of this book: that the Indian Constitution was a transformative constitution.³⁸ But what did it seek to transform? Ultimately, it is a combination of all of these—text, structure, drafting history, and broader social and political history, including non-dominant dissenting strands of that history. equality to be about overcoming institutional and structural barriers that have kept individuals and groups in a state of subordination. These principles of liberty, equality, and fraternity are not to be treated as separate items in a trinity. But an important clarification is due here. It mattered vividly in 1954 and 1964 in determining the legality of the State's refusal to recognize the pre-existing rights of its citizens. A. Because of their importance to the argument—and, more broadly, to the project of transformative constitutionalism—I have instead addressed them in brief postscripts to each chapter. While conceding that this is by no means a definitive enquiry, transformative constitutionalism rules out interpretations that simply cannot be reconciled with a historically informed reading of the constitutional text.¹⁰¹ For instance, it rules out the judicial pyrotechnics that rewrote Article 21 in Maneka Gandhi v. The respondent-citizens objected strongly. As Ambedkar visualized it, the principle of fraternity would interrogate, undermine, and eventually break down the hierarchical social relations that, over the course of centuries, had come to be treated as 'natural'.⁵⁴ Fraternity would reject 'forms of domination',⁵⁵ characterized by 'social patterns, power relations, and other systematic (structures)'.⁵⁶ These forms were not imposed by an authoritarian and visible State, but owed their force to silence and slow time, to the insidious and often invisible social processes that, having accumulated over millennia, sometimes by co-option and hegemony, now possessed the immovability of mountains.⁵⁷ What was the purpose of the State guaranteeing liberty if, at the first attempt at exercising their newfound freedom, communities faced excommunication, boycott, and violence? 'Historical truth is hardly ever more than a descriptive hypothesis,' the Italian oral historian Alessandro Portelli remarked wryly, '[but] legal truth, on the other hand, has a performative nature, measured in years in jail.'93 The transformative Indian Constitution is by no means limited to the courtroom (nor should it be), but the court remains an integral part of the story. For transformative constitutionalism, the Congress party's 1931 Karachi Bill of Rights is as important as Rukhmabai's letters to the Times of India in 1885, arguing for marital equality within the family; and Jyotirao Phule's Gulamgiri is as relevant as the work of the Sub-Committee that drafted the Fundamental Rights chapter. And it is Gandhi's uncompromising approach to civil rights and his defence of all speech—even 'revolutionary speech'—that will enable us to understand the transformative potential in the simple words: 'all citizens shall have the right to freedom of speech and expression'.⁴⁹ That is just the beginning. Indeed, specific proposals to that effect were rejected, and Ambedkar expressed most eloquently by Justice Vivian Bose (again) in his dissenting opinion in Krishnan v. Transformative constitutionalism recognizes that the framers were building a Constitution meant to last for generations. It would require a constable to enforce them.⁵¹ In this paragraph, I contend, Ambedkar distilled the heart and soul of the Indian Constitution. It transformed the subjects of a colonial regime into citizens of a republic. While taking text, structure, and history as crucial building blocks of constitutional meaning, it does not accord an overriding veto power to any of them. Equality Before Law: Naz Foundation and Equal Moral Membership 3. This book advances Justice Bose's vision of the Constitution, a vision that understood both the historical moment of framing, and the Constitution itself, as fundamentally transformative. Without equality, liberty would produce the supremacy of the few over the many. They argued that 'this rule was a relic of the imperialistic and expansionist philosophy of ... British Jurisprudence, which is inconsistent with our constitutional set-up'.³ It was inconsistent 'with the true spirit of our Constitution, which seeks to eschew all arbitrary authority, and establishes the rule of law by subjecting every executive action to the scrutiny of the courts'.⁴ The respondent-citizens invited the State could not simply wipe out their rights when it assumed sovereignty over the state of Sant. Here, I shall attempt a brief summary: through a transformative understanding of liberty, equality, and fraternity, the Constitution is committed to creating the framework that makes democratic politics possible. Liberty, equality, and fraternity were the three mutually reinforcing pillars upon which the edifice of the Constitution was erected. B.N. Rau, who was charged with vetting all the suggestions, rejected the proposal. While fraternity was the bridge that would make liberty and equality meaningful, its role was not merely auxillary. It tells that story through nine judgements, ranging across our constitutional history, and selected from both the Supreme Court and the high courts. In its classic sense, it referred to that threshold of individual freedom that the State could not cross. And it has mattered ever since, whether it is a landmark Supreme Court judgement upholding the fundamental right to privacy, or a barely noticed judgement of a high court applying the guarantee of gender equality to pregnancy-based discrimination. This was the tradition of constitutional continuity.13 The purveyors of this tradition could count among themselves an authority as eminent as B.N. Rau, the Constitutional Advisor, who began his book, India's Constitution in the Making, by classifying the moment of Independence as 'transference of power'.14 To justify the idiom of 'transfer' (as opposed to transformation), they could also call upon some formidable evidence. Privacy and the Criminal Process: Selvi v. With a few exceptions,98 the Supreme Court is yet to provide us with a conceptual grounding for its evolutionary approach. For this reason, the Fundamental Rights chapter contains explicit safeguards for minorities to preserve their culture and way of life and for religious denominations to manage their own affairs. It was not, however, a socialist Constitutional trinity travelled well beyond classical liberal constitutionalism's focus upon limiting State power, it did not quite travel far enough to determine economic and social policy. Transformative constitutionalism takes seriously Kannabiran's insight that: ... a constitution framed after a liberation struggle or a struggle for independence is like poetry, emotion recollected in tranquillity ... there should not be two social histories, one for political theorizing and another for legal theorizing ... the people who met in the Constituent Assembly were not mere technicians who had gathered there to prepare a handbook for running the government. This was especially true where the laws themselves had long sanctioned discriminatory and unequal treatment: between men and women, rich and poor, white and brown, caste and caste, and the loyal and the disloyal.⁵² And so we had our 'Equality Code', contained within Articles 14 to 18. These included preventive detention, granting the political executive the power to pass ordinances bypassing legislative procedure, as well as the power to effectively suspend the legal system by declaring an Emergency.¹⁹ If the Constitution was meant to be transformative, surely it should have, at the very least, repudiated these hallmarks of arbitrary power instead of endorsing them? Nonetheless, they found their way into the Indian Constitution, and gave it its transformative character. B. Various aggrieved parties (the respondents) moved court. Transformative constitutionalism does not seek to interfere with the democratic process itself, or to determine outcomes. First, the Constitution itself.³⁰ Notwithstanding this broader argument, it is important to differentiate the nationalist movement from the framing of the Constitution. All three were equally integral. Equality of Opportunity: N.M. Thomas, Group Subordination, and the Directive Principles Part Two: Fraternity 4. This was an 'act of State' that was immune from judicial challenge. The Constitution is a transformative document, but its transformative vision has several components.⁸¹ Courts are not automatically entrusted with giving effect to the entire constitutional vision on their own.⁸² On the constitutional vision on their own.⁸² On the constitutional vision on their own.⁸¹ Courts are not automatically entrusted with giving effect to the entire constitutional vision on their own.⁸² On the constitutional vision on the constitutional visional the Supreme Court in 1964.² The State's defence was simple: the Privy Council of the United Kingdom, which had been the highest court of appeal for colonial India, had repeatedly held that when a sovereign State acquires fresh territory, it could choose whether or not to recognize the rights enjoyed by the territory is inhabitants under the previous fresh territory. regime. State of Madras: Is not the sanctity of the individual recognized and emphasized again and again? It derived its own authority from the 200 from the 1935 Government of India Act. Pattabhi Sitaramayya, seven members of the Constituent Assembly wanted to rephrase the fraternity clause of the other way around. These have been slightly edited to fit the scheme of this book, and are reprinted with the permission of the publishers. Union of India—the jewel in the crown of living-tree constitutionalism. In acquiring Sant, the government had exercised its sovereign prerogative and decided not to recognize the forest grant. Through the substantive expansion of Article 21 (and Article 142), and the removal of procedural constraints in order to enable 'justice', it now involves the courts in playing an active role in governance, and taking both quasi-legislative and executive actions. Unlike the modern West, which understood sovereignty'.⁴⁴ Hierarchies were established and maintained by 'selfregulating communities' taking multifarious forms (primarily, caste), and the State had 'rather limited powers to interfere with [a] social segment's internal organisation'.⁴⁵ Consequently, in India, freedom and equality were suffocated not merely by 'a despotic government, but also by embodied traditional authority and ... domestic or religious practices'.⁴⁶ The freedom struggle that culminated in the framing of the Constitution was at one end a movement for liberation from political servitude, but it was equally 'a struggle for self-determination.⁴⁷ This story is reflected in the Constitution's horizontal rights provisions (i.e., fundamental rights enforceable against groups, communities and private parties), a rarity in constitutions even today, let alone in 1950: Article 15(2), which bans discrimination in access to restaurants and roads, Article 17, which abolishes untouchability, and Article 23, which proscribes forced labour. And to popular democracy—through the Parliament and the executive—is assigned the task of achieving distributive justice, the attainment of independent socio-economic rights, and that boundlessly manipulable phrase: good governance.⁸³ When it comes to these goals, the courts must not stand in the way of the other organs of State acting to achieve the Constitution's transformative goals,⁸⁴ but nor must they make themselves the vehicles for achieving the goals,⁸⁵ As K.G. Kannabiran correctly recognized, 'the attempt [of the framework'.⁸⁶ D. To the courts is entrusted the task of breathing life into the Fundamental Rights chapter. Is not our Constitution in violent contrast to those of States where the state is everything and the individual but a slave or a serf to serve the will of those who, for the time being, wield almost absolute power? So, as Justice Shah had observed, 'the process was not one of destruction but evolution.²⁶ These arguments about the character of the Constitution are nested within a broader narrative that denies any transformative character to the freedom movement. Civil Rights: Indian Medical Association and Horizontal Discrimination 5. To use familiar shorthand—the Equality Code enshrines a vision of substantive equality as opposed to a merely formal (likes should be treated alike) one. The rest of this book is devoted to answering that question. After the Emergency was lifted, a chastened Court decided to make it up to the country for its past sins. For more than a hundred years, in their struggle against alien colonial rule and against indigenous social and economic domination, Indians imagined, conceptualized, and articulated a vocabulary of rights, of equality and freedom, and of dignity, a vocabulary rooted in the lifeworld of India. Any reference to it draws derisive and fearful comments about a 'return to the Gopalan era'99—the Supreme Court's early, text-bound days. Fraternity was the bridge that would make liberty and equality become 'the natural course of things'. Indeed, despite his earlier enthusiasm for writing socialism into the Constitution, by the end of the drafting process, Ambedkar was clear that it was not the Constitution, by the end of the drafting process, Ambedkar was clear that it was not the Constitution.⁷⁵ The Indian Constitution was compatible with a socialist government, and in some respects (especially through the DPSPs) it even encouraged socialism. That is how we must understand and interpret the transformative Constitution. The limitations of both are well known.⁹⁰ Neither do I accord to courts normative priority over individuals, citizens, communities, and social movements in determining constitutional truth.⁹¹ The Constitutional tr respective meanings [elsewhere]'.⁹² Nonetheless, in India and in many other parts of the world, it is the courts alone whose interpretations are authorized as legally final, and backed up (when necessary) by the force of the State. Each of them could be understood only in the context of the other two. That is why Justice Shah took the unusual step of attacking Justice Bose for his understanding of 'history and constitutional theory'. This is what separates the transformative constitutionalism that is articulated and defended in this book from the dominant, PIL vision of contemporary jurisprudence, which does involve the courts in shaping substantive outcomes. Within a year, the State of Bombaywith which Sant had merged—reneged on the grant. The principle of 'fraternity' commits the Constitution's 'liberty code' (Articles 19 to 22). Readers may like to take my views on these judgements with a healthy dose of scepticism, given that I was an active participant in these cases, and held (and continue to hold) definitive views about them. As Anderson and Guha point out, the existence of words such as 'insaf [justice], hak [right], nyaya [justice], and adhikara [right]' should give pause before lazily subscribing to colonial scholarship (and its postcolonial variants) that holds that 'South Asian societies base their social structure on duties and obligations rather than on rights'.¹⁰⁶ It also ignores the thriving discourse on rights'.¹⁰⁶ It also ignores'.¹⁰⁶ It also ignores'. they chose, and the words they chose (for the most part) expressed principles that would endure, not concrete commitments that would soon lose their salience and become antiquated in a rapidly changing world.¹⁰³ Transformative constitutionalism's task is to identify and express these founding principles that constitute the framework within which constitutional interpretation is to be carried on.¹⁰⁴ How are these principles to be identifed? Sex Discrimination: Anuj Garg and the Anti-Stereotyping Principle 2. But it is a vision that, notwithstanding the Supreme Court's recent indications to the contrary,¹² remains marginalized in a judicial history that has overwhelmingly endorsed Justice Shah's view of conservatism and continuity. As much as 75 per cent of the Indian Constitution was based on that colonial law.¹⁶ So deep was its influence that, in 1958, Justice Venkatarama Aiyar observed that the provisions of the Constitution must be interpreted in light of the Government of India Act, because: ... a Federal Constitution had 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 ...¹⁷ Where then was the break with the past, the rupture with the colonial regime, that Justice Bose had spoken about so lyrically?¹⁸ And, in particular, the Constitution replicated some of the very provisions that had been the subject of bitter protests during the course of the freedom struggle. It was to be one of the concluding royal acts in Sant's 700-year-long history. He argued that 'the reason for putting the dignity of the individual first was that unless the dignity of the individual is assured, the nation cannot be united'.⁶¹ Following his advice, the original phrasing—'FRATERNITY, assuring the dignity of the individual and the unity of the unity of the individual and the unity of transformative constitutionalism is not frozen at the moment of framing. That does not mean, however, that the two were equivalent.³¹ Instead, I shall argue, there were discourses around liberty, equality, and fraternity which were part of the freedom struggle but were ignored, marginalized, or even rejected by the dominant nationalist movement. To answer this question, I begin with Ruti Teitel's important insight: 'As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative.'³⁹ I shall argue that there were two clear 'legacies of injustice' that the Constitution sought to repudiate and transform. We do that struggle a disservice if we erase it from our consideration when interpreting the charter of fundamental rights that, finally, constituted an independent India, is deeply misguided. State of Maharashtra 9. For example, we cannot understand the constitutional guarantee of equal protection of laws without taking into account the 'enormously influential'48 Samya (Equality) (1879), Bankim Chandra Chattopadhyay's nineteenth-century political treatise on equality. When the Draft Constitution was published in February of that year, it was thrown open for public comment. While commending the Objectives Resolution (the blueprint of the Constitution) to the Assembly, Radhakrishnan observed, 'We wish to bring about a fundamental alteration in the structure of Indian society ... to abolish every vestige of despotism, every heirloom of inorganic tradition'.58 And so we had a right against economic exploitation (Articles 23 and 24), the prohibition of untouchability (Article 23 and 24), the prohibition of untouch 17), and a guarantee against economic and social boycotts (Article 15[2]). Similarly, could the venerable principle of the 'freedom of contract', as an aspect of personal liberty, continue to remain oblivious to the imbalances of social and economic power that defined the relationship between employees? Indeed, this understanding of fraternity was put to the test as early as 1948. Prologue The Past Is a Foreign Country On 26th January 1950, India will be an independent country. What was the point of promising equality and non-discrimination if the force of convention continued to restrict women to the 'private sphere'? The Constitution established the Westminster system of parliamentary democracy,²² but this was no abrupt break with an absolutist past. And so, we had our Rights to Freedom, guaranteed by Articles 19 to 22 of the Constitution. It actively discouraged and repressed popular movements, including agrarian and labour struggles, which did not come under its umbrella.²⁷ And Indian nationalism was itself a 'derivative discourse', 28 mirroring colonial institutions rather than seeking to abolish or transform them. And as we have seen, liberty, equality, and fraternity are not hermetically, assess that segment of Indian constitutional jurisprudence which, in popular and scholarly imagination, is taken to represent the Constitution's transformative character: Public Interest Litigation or PIL or 'social action litigation', as one of its votaries insists that it must be called.⁷⁸ For the first twenty-five years of its history (or so the popular argument goes), the Supreme Court was a conservative institution, aligning with landed and propertied interests to thwart the ambitious reform agenda of successive governments. The Preamble promises to secure to all the citizens of India liberty, equality, fraternity (and justice).⁶⁶ It makes no mention of peoples, nations, groups, communities, denominations, or religions. But by a wafer-thir 4-3 majority, the Supreme Court held in favour of the State and the 'public' on the one hand and the 'private' on the one hand and the 'public' one hand and the 'pub and unequal workplace relationships? It sought a thoroughgoing 'reconstruction of State and society itself'.43 In its horizontal—or comprehensive—transformative avatar, the Constitutionalism decisively parts company with both constitutional originalism and living-tree constitutionalism by embracing a more ecumenical interpretive canon, as discussed above. The first set speaks to the Equality Code (Articles 14 to 16 of the Constitution). From at least the first decade of the twentieth century, there had been an incremental evolution of representative systems in India, which the nationalist movement had extracted from the colonial regime inch by inch. There was no time to integrate them into the body of the Constitution ensured it didn't collapse into only vehicle for achieving distributive justice, yet not to be equated with the set of judicially enforceable fundamental rights guaranteed by the Constitution. The judgements of Justices Shah and Bose reflected contesting views of history, and, based upon that history, contesting views about what the Constitution of India represented. By June 1948, Sant had become one of the last princely states to accede to the newly independent Indian Republic. The disagreement between Justice Bose was not merely over whether the jurisprudence of the Privy Council should be followed, but over meaning—what was the meaning of the historical event that was the framing of the Indian Constitution? The task of this book, through the nine judgements that it examines, is to demonstrate how this approach to constitution? The task of this book, through the nine judgements that it examines, is to demonstrate how this approach to constitution? constitutes the public sphere, and by democratizing the very spaces (such as the household and the family) that liberal constitutional management in democratic politics as the State is. At the heart of every constitutional decision is the court's assessment of what the Constitution means, why it exists in the shape and form that it does, and, above all, what injustices it is meant to remedy. The Transformative Constitution The litany of arguments advanced by the defenders of colonial continuity are not definitive. V. The Framework of Democratic Politics But if transformative constitutionalism is neither merely about constraining State power, nor about guaranteeing socio-economic rights and securing distributive justice, then what is it about? But in a country where the most invidious discrimination had been the product of community sanction, where the social and economic boycotts had been the chosen methods to discipline and to punish, and where society was defined by a system of 'graded inequality'⁵³ (Ambedkar's words), it was never going to be enough to direct the State to act by the principles of liberty and equality. It is only when we read the speeches of Congress presidents Motilal Nehru and C.R. Das, savaging the colonial regime's arbitrary executive authority, that the austere right to 'life and personal liberty' will begin to speak to us. Instead, specific proposals to incorporate some core civil rights (such as a guarantee against arbitrary searches and seizures) were considered and rejected by the Assembly.²⁰ All this has prompted scholars to argue that freedom was of secondary importance to the framers of the Constitution, relegated behind the overarching concerns of national integration and security, alleviation of economic and social ills, and India's international standing.²¹ Third, it is argued, even the system of government that the Constitution set up was neither new nor revolutionary. It entails a broader canvas that includes, in the words of the civil rights lawyer K.G. Kannabiran: ... the social history of the period preceding the Constitution ... the struggles of the people were sacrificed and their dreams shattered ... [and] the aspirations of the people to build a better society for themselves.³² II. To understand and incorporate them into our constitutional vision, however, will require an act of imagination. The three pillars of liberty, equality, and fraternity hold up an elaborate constitutional structure that places the individual front and centre. They examine the extent to which core civil liberties can be subordinated to claims of the 'public welfare' (especially in cases of an 'Emergency'). It does so by deepening democracy in the public sphere, where it insists upon a 'culture of justification',⁸⁹ i.e., every act of public power be justification',⁸⁹ i.e., every act of public power be justified by the touchstone of the Constitution. It then commits the Constitution and the State to overcoming them, whether by the removal of discriminatory laws or by positive (affirmative) action. Defined by scholars as the structural-liberal approach to constitutionalism, this template holds that the primary goal of a constitutional freedom, and individual freedom, and individual freedom is to be secured by limiting State power.⁶⁷ This creates a set of binaries that are now treated as fundamental to constitutionalism: the State and the individual; the public sphere (subject to constitutional norms of liberty and equality) and the private sphere (of the family, the workplace, and so on, where these norms are inapplicable); the vertical relationship (between individuals and individuals, or groups and corporations, where the Constitution has no say); and so on. His references to the Constituent Assembly functioning under the old regime, to the earlier political set-up, and to a gradual evolution towards self-government, all tapped into an established intellectual tradition. The living-tree approach is invoked to justify the expansion of judicial power beyond what was contemplated by the framers⁹⁶ (or is permitted by the framers⁹⁶ (or is permitted by the framers⁹⁶ (or is permitted by the framers⁹⁶). were accessible to all, the government would also have to commit to equality of status. Yet, that was not all. The problem with PIL, however, is not simply that it no longer maintains fidelity to the Constitution. The Indian Constitution was transformative in a second sense. The framers were clear that 'private' structures and private institutionally.⁷¹ Additionally, while the constitutional trinity defined individual freedom in relation to equality and fraternity, other parts of the Constitution supplemented this vision by viewing the State not merely as a threat to individual freedom, but as a necessary enabler of it, as a vehicle of social transformation.⁷² This was expressed most clearly in Part IV of the Constitution, the Directive Principles of State Policy (DPSPs). And the difference mattered. Privacy beyond the Public/Private Divide: Sareetha and Freedom within the Family 8. Nor can liberty and equality be divorced from fraternity. Its focus on associating individual freedom within the Family 8. Nor can liberty and equality be divorced from fraternity. Its focus on associating individual freedom within the Family 8. Nor can liberty and equality be divorced from fraternity. it chose a different form of constitutionalism. This is the story of constitution-making the world over, most famously told through the American Revolution. What does social democracy mean? The world over, most famously told through the American Revolution. Constitution is to transform a culture of authority under the colonial regime into a culture of justification in a free, open, and democratic society. I have no doubts on this score.⁶⁵ This basic point is reflected in the Preamble. Union of India,⁸⁰ when the Court decided to rewrite the text of the Constitution because it felt that it was insufficiently progressive, a large part of the history of PIL has been the history of judges and academicians substitution. To start with, it ignores language. Keeping that in mind, this book elects to tell the story of the transformative Constitution. Nor do I take issue with invoking the directive principles to infuse socio-economic content into our fundamental rights, to the extent that this is consistent with the text.⁷⁹ However, PIL today is no longer recognizable by these purposes. Radhakrishnan in his opening speech to the Constitution were aware of the fallacy—which Western political theory would discover a few decades later⁶²—of treating individuals as abstract and disembodied beings, existing in a world without communal ties.⁶³ They were aware that human beings only made sense of themselves and the world around them through the bonds they forged with others, and through the communities to which they belonged. First, that colonial India had no vocabulary of 'rights' (whatever existed was merely derivative of Western conceptions). Parliamentary democracy under the 1935 Act Would the constitutional commitment to equality, therefore, be better understood as a commitment to affirmatively overcoming the structural and institutional Trinity Liberty was simple enough. Fraternity itself could not be defined in isolation from liberty and equality. Asymmetries in power enable domination at the point prior to participation itself and, by extension, choking fair democratic outcomes. In particular, fraternity was not—as some of the French revolutionaries imagined it, and as some Indian judges have understood it recently⁵⁹—about promoting a one-for-all-and-all-for-one vision of the nation, where the State itself became personified as 'a common endeavour'.⁶⁰ Rather, the role of fraternity was to ensure that, in India, liberty and equality would come to mean something real. Apart from the guarantee of universal adult franchise and the structures of parliamentary democracy, this transformation was expressed through the fundamental rights that embodied citizenship and made democracy possible: the freedom of speech, expression, association, and conscience; the right to life and personal liberty; and t alien to the 1935 Government of India Act, represented 'a tectonic shift in constitutional philosophy'.⁴² So far, so familiar. This was where fraternity came in: to liberate and equalize the individual, not from or with respect to the State, but with respect to the state. meant something more than a rope of sand. The liberty-equality-fraternity trinity aims to guarantee the preconditions that make possible any meaningful participation in democratic politics. However, without an explanation of the basis for evolution, and the direction in which the Constitution is meant to evolve,⁹⁷ living-tree constitutionalism remains little more than an incantation, and a vehicle for judicial ideologies to masquerade as constitutional evolution. So was born the PIL, whose principal features now include a loosening of locus standi requirements, procedural innovations designed to ensure responsive governance (ranging from elaborate, near-legislative 'guidelines' filling legal vacuums to the 'continuing mandamus'), and an expansion of Article 21's guarantee of life and personal liberty to include a host of socio-economic rights (many of them incorporated from the DPSPs). The contemporary, dominant approach to constitutional interpretation is that of the 'living tree':⁹⁵ the Constitution is treated as an evolving document, with judges bearing the responsibility of 'updating' it so that it keeps pace with changing times. It does not bind itself to a mythical 'original meaning' that the words used by the Constitution carried in 1950. Equality without liberty would kill individual initiative ... Without fraternity, liberty, l and equality could not become a natural course of things. In dealing with economic exclusion (Article 15[2]), social boycotts and religious excommunication (including religion and 'custom') that nonetheless have the potential to dominate individuals and block their access to the basic goods that are necessary to sustain a dignified life. The Constitutional machinery on the foundations of the earlier political set up ... the process was not one of destruction, but of evolution.⁵ Justice Shah—like his colleagues in the majority—elected to follow the jurisprudence of the Privy Council, which had been 'the law laid down by a five judge bench of the Supreme Court, a decade before. To defend this vision of the transformative Constitution, it is imperative to go beyond the sterile and deadlocked academic debates surrounding the bare text of the document, and (some of) the legal instruments that preceded it. By democratic politics, I mean a rough correspondence between State policies (including economic and social policies) and the popular will, expressed through constitutionally established channels such as periodic elections and the parliamentary structure, and with adequate safeguards against majoritarian tyranny.⁸⁸ One of the greatest impediments to a thriving democratic politics is asymmetry of power: between individual and State, individual and community, and individual (especially in skewed institutional contexts, such as the family and the workplace). In order to glean the meaning of the Constitution's provisions, it examines the discussions of the Drafting Committee, where these provisions were first proposed and given shape, and then the Constituent Assembly Debates, where they passed through the furnace of fierce opposition before being moulded into their final form. That does not mean, however, that the Constitution treated groups and communities on a par with the individual. As we shall see, that remained the prerogative of democratic politics.⁷⁷ C. This has been especially true in Indian history, where social and economic sanctions have often operated with far greater force than the coercive power of the State. Led by B.

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