
TRANSFORMATIVE CONSTITUTIONALISM

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ABSTRACT

Constitutionalism refers to sticking to the ideals specified by a system of government, whereas transformation refers to bringing about change in an organised manner. Transformative constitutionalism is constantly in opposition to the constitution's rigidity. It plays a critical role in the change of society and the protection of the constitution's essential principles and value system, which we cannot compromise because the constitution's major goal is to safeguard individual liberty. India, as a democracy, is constantly threatened by the political executive exercising violent majority power over the "law of the land." Political dissenters and outspoken opponents have been seen being pursued by political parties seeking to establish the government. While an active judiciary just applies the existing laws to the facts, an activist judiciary goes a step further to interpret the laws in light of the current circumstances, in order to provide justice to those who have been wronged by simple application of the law. This is where the need of an activist judiciary comes into play, as it serves as a "philosophic counsellor" whose opinion is vital to democracy.

Introduction

A constitution is a live biological document that embodies the people's will. The creation of a constitution is generally a watershed point in a country's history. This is especially true for countries that have been colonised in the past. In such nations, the constitution contains not just restrictions on governmental authority, but also clauses that "reflect the ambitions of the country" to bring about a change in the current order of things. The Indian Constitution, which has a similar historical context, is seen as a transformational constitution. ¹By interpreting constitutional provisions, the court has been granted the ability to give life to the letters of the law. Many experts have criticized India's judiciary in recent years for "overreaching" or adopting a "active" role. However, such criticism is predicated on the idea that the judiciary has overreached its 'proper duty.'

Transformative constitutionalism entails instilling principles such as equality, liberty, fraternity, and dignity into society. It entails achieving the Constitution's primary goal of transforming society for the better. It tries to give paramount significance to Constitutional morality rather than what constitutes morality in society, according to one interpretation. Another interpretation is that the Constitution's core structure and substance will never change, but it will continue to adapt to the requirements of society. The constitution is transformational, and there is an unambiguous focus throughout the constitution on our commitment to changing relationships, both between individuals and between individuals and between individuals. Our constitution's operation and interpretation are highlighted by this transformational vision.

Transformative Constitutionalism is an idealistic approach to achieving specified goals by protecting people's fundamental rights and opportunities². The judiciary is a crucial aspect of Transformative Constitutionalism since the ideology embeds religion in the law as a tool for social and political change, and the courts act as a catalyst for change because they are sworn to interpret and administer the law. There is frequently a fear of becoming upset while accepting change; nevertheless, this fear may be disentangled via group efforts. Transformative constitutionalism aspires to build a society based on continually changing principles.

¹ <https://www.livelaw.in/constitution-intends-to-transform-society-justice-chandrachud-video/>

² <https://www.legalserviceindia.com/legal/article-5155-transformative-constitutionalism-and-role-of-judiciary.html>

History of transformative constitutionalism in colonial India

A publication in the South African Journal of Human Rights in 1998 by Karl Klare, a US scholar professor, that drew the attention of many legal academics and sparked a flurry of debates and discussions about the subject. He defined transformational constitutionalism as a long-term undertaking including constitutional enactment, interpretation, and enforcement. He went on to say that this notion is dedicated to democratically reforming a country's political and social structures, egalitarian orientation, and power dynamics.

Even during colonial times, there have been some instances of transformative constitutionalism in India. Sati, the practice of a Hindu woman immolating herself on her husband's funeral pyre after his death, was prohibited in 1829 by Lord William Bentinck after Raja Ram Mohan Roy's continuous attempts. Lord Canning approved the Hindu Widow's Remarriage Act, 1856, which legalized widow remarriage after several campaigns in support. The Female Infanticide Prevention Act of 1870 was enacted to address the issue of female infanticide. The passage of the Age of Consent Act, 1891, "which raised the age of consent of sexual intercourse for all females, married or single, from ten to twelve years," was another transformational event.

Various social groups and social reformers who pushed for women's rights backed it up. Although these changes were criticised by orthodox and conservative individuals at the time, they served to improve the lives of Indian women by providing them with essential rights that they had previously been denied.

Transformative constitutionalism and judiciary

The Supreme Court's function as custodian and interpreter of the Constitution, together with increased acknowledgment of the Indian Constitution as a transformative, rather than rigid, constitution, has enabled it to effect these reforms. Several recent Supreme Court decisions have bolstered the ethos of transformational constitutionalism. Some instances are as follows:

Kesavananda Bharati v. State of Kerala (1973)³

The topic of whether or not the parliament has the right to modify the Constitution sparked a lengthy debate. *C. Golaknath & Ors versus State of Punjab & Anrs* (1967), *Indira Nehru Gandhi vs Shri Raj Narain & Anr* (1975), and *Bhim Singh vs U.O.I & Ors* were among the

³ (1973) 4 SCC 225.

numerous cases heard by the Supreme Court (2010). The extent of judicial review was also disputed during the debates for the Constitution's 24th and 42nd amendments. In the case of *Kesavananda Bharati versus State of Kerala*, this debate was eventually settled (1973). The basic structure theory was established, and it was agreed that while the Parliament might change the Constitution's essential rights, the Constitution's basic structure should be retained and kept as is. The Supreme Court, as the guardian of the Indian constitution, ruled that if the constitution's 'Basic structure,' or basic structure, is changed, the constitutional amendment might be declared illegal. It defined the Indian Constitution's 'Basic Structure Doctrine.' This was a seminal decision that served as a model for other courts throughout the world.

Justice K.S.Puttaswamy v. Union of India (2018)⁴

In the case of *ADM Jabalpur versus S.S. Shukla* (1976), four out of five judges decided that even the right to life granted by Article 21 of the Indian Constitution might be suspended under an emergency declared by Indira Gandhi during the Congress administration in 1976. Privacy is a basic right under Article 21 of the Indian Constitution, According to the Supreme Court, the 'Right to Privacy' is fundamental to life and liberty and is protected by Article 21 of the Indian Constitution. This case established a landmark in India's Right to Privacy jurisprudence. As a result, Justice Khanna was confirmed correct, and the basic right to life under Article 21 cannot be suspended, even after a proclamation of emergency or a suspension order from the President.

Dr. Maya D Chablani vs Radha Mittal (2021)

Dr. Maya D Chablani versus Radha Mittal (2021) was a recent case heard by the Delhi High Court, and its decision was well praised. The Indian Constitution's 'Right to Life' was extended generously to street dogs under Article 21. In this case, it was determined that street dogs had a 'right to food,' and citizens have the right to feed them as long as they do not infringe on the rights of others. The HC also established comprehensive rules for the nutrition of these dogs. It was claimed in relation to Article 21 that such a right protects the lives of animals as well.

Anuradha Bhasin vs Union of India (2020)⁵

⁴ (2017) 10 SCC 1.

⁵ <https://indiankanoon.org/doc/82461587/>

This is a case from earlier this year, when the Jammu and Kashmir Reorganisation Bill 2019 was approved, and the government announced an internet ban as well as a complete shutdown of all communications. There were also restrictions on public movement and assembly imposed under section 144 of the CrPC. Journalists were barred from travelling and publishing anything that may be construed as a breach of Article 19(1)(a), or the right to freedom of expression. The Supreme Court ruled that article 19(1)(a) includes the right to access the internet, and that the ban on journalists breaches article 19(1)(g), which guarantees the freedom to practise any profession, occupation, trade, or business through the internet.

Joseph Shine v. Union of India (2018)⁶

Another major decision, this time interpreting Article 21 of the Constitution to legalise adultery. Section 497 of the Indian Penal Code had previously made adultery a crime. A man who engaged in sexual intercourse with a married lady without her husband's consent was punished under that provision. Because it was silent on a married woman's permission, this section was considered to be arbitrary and discriminatory, and it was knocked down.

Conclusion

By interpreting the constitution in such a way that more and more societal interests are served, the Supreme Court plays an essential role in balancing societal interests with social changes. Every article of the constitution is intended to eliminate some form of harm in society, and if two or more interpretations are conceivable, the interpretation that best eliminates mischief will be accepted. The sole goal of transformational constitutionalism is to maintain and strengthen the principles of our humane constitution. According to justice Chandrachud, the Constitution aims to transform society, and by recognising the rights of others in terms of constitutional discourse, we are not only empowering those whose rights we recognise, but we are also, more importantly, attempting to transform ourselves when we recognise the freedom of others. Too often, we are so focused on our own freedom that we overlook the necessity of recognising the freedom of others, for it is by acknowledging the freedom of others that society is transformed and eventually becomes.

⁶ (2019) 3 SCC 39.

Transformative constitutionalism is impossible to achieve without the judiciary's unwavering support and commitment to effect constructive change in society. ⁷In addition to the courts, citizens have a critical role in bringing about a transformative change in the Constitution that matches the necessities of today's world. Recognizing our own rights and ideals is the first step, as is remembering not to infringe on the rights of others. Whereas it is critical to preserve the core framework of our country's living constitution, the evolution of our basic fundamental rights must be continual in order to keep the wheel of social revolution turning in society.

⁷ <https://www.livelaw.in/constitution-intends-to-transform-society-justice-chandrachud-video/>