
AN ANALYSIS OF TRANSFORMATIVE CONSTITUTIONALISM AND THE ROLE OF JUDICIARY IN INDIA

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ABSTRACT

In India Constitution is considered to be the law of the land. A constitution is a document that embodies the will of the people in which they have expressed themselves. It establishes the fundamental framework for describing fundamental rights, duties, political principles, as well as the structure, powers, and responsibilities of the various government institutions. The word constitutionalism basically means the adhering to the ideas and principles specified by the constitution. The word 'constitutionalism', it is an idea that the government's powers should be limited and observation of these limitations determines their authority. The basic idea is to make efforts in preventing autocratic or arbitrary governments. The main motive and aim of the constitution is to protect the rights of the individuals and regulate the state in a civil manner, wherein, the idea of Transformative constitutionalism is solely based on the transforming society for the better. In simple, it tends to make use of constitutional guarantees as a machinery to transform the society which can be especially done through protecting the interests of the minorities as well as through affirmative measures. This article seeks to analyse the concept, evolution and role of judiciary in Transforming society by the principles of transformative constitutionalism.

Keywords: Constitutionalism, Transformative constitutionalism, Social justice, Fundamental rights, Judiciary.

INTRODUCTION

“Transformative constitutionalism refers to the infusion of the values of liberty, equality, fraternity and dignity in the social order. Thus, transformative constitutionalism is an inevitable as well as a significant process that helps to define the essence for democracy and a Constitution within it¹.”

-Justice Chandrachud

A constitution is a document that embodies the will of the people in which they have expressed themselves. The fundamental political principles, as well as the structure, powers, and responsibilities of the various governmental institutions, are described by it, establishing the framework. The will of the people is expressed by this framework, while also defining the powers and limitations of various government organs and agencies. If the government exercises its powers arbitrarily, the exercise of those powers can be limited, and the judiciary plays an important role in practicing constitutionalism. The concept of limited government, or the restriction of arbitrary government powers, is what constitutionalism refers to. While Constitutionalism acknowledges the importance of a strong government, it also acknowledges the requirement for sensible limitations to prevent the misuse of power. According to Baxi who defines constitutionalism as follows: *“Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance.²”* Wherein the Transformative constitutionalism entails principles of equality, liberty, fraternity and dignity with adaption to the requirement of the society. The law is dynamic and the constitution is transformational which can adapt within the significance of constitutional morality and as per the requirements of the society. The transformative constitutionalism is an idealistic approach in order to achieve the main objectives and goals of the constitution, wherein the judiciary plays an important and crucial role in the idea of transformative constitutionalism which is rooted in the law as a tool for social change and to interpret the law in accordance with societal

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

² Upendra Baxi, Postcolonial Legality, in Henry Schwarz and Sangeeta Ray, (eds.), A Companion to Postcolonial Studies 540, 544. Cited in Vrinda Narain, Postcolonial Constitutionalism in India: Complexities & Contradictions, 25 S. CAL. INTERDISC. L.J. (2016) p. 122

needs. Indian people fought and struggled not only against the colonialism but also against the social evils that prevailed in the ancient past. In the Indian constitution various articles and provisions are used to exhibit the constitutions transformative intent. Since then the ideals of constitution such as equality, liberty and fraternity tends to transform the society for the better.

For an evident examples such as the abolition of sati, untouchability, caste discrimination, gender inequality & etc.,

ORIGIN AND EVOLUTION OF TRANSFORMATIVE CONSTITUTIONALISM:

The traces of evolution of Transformative constitutionalism arises from a publication in a South African journal of Human Rights in 1998 By Karl Klare, who is a constitutional scholar and professor in University of Columbia drew the concept debates and discussions about the subject. The definition and meaning with regards to transformative constitutionalism continues to hold debates and discussions across the world countries wherein the paramount idea of transformative constitutionalism is entails principles of equality, liberty, fraternity and dignity and other main aims of constitution with adaption to the requirement of the society. Klare defines transformative constitutionalism as: *“a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”*³. Transformative Constitutionalism tends a mechanism to bring in the social and political change from an unjust past to a democratic future using the Constitution as a tool to achieve its main aims and objectives. Justice Pius Langa, the former Chief Justice of South Africa, stated that constitutions drafted by countries with a colonial history are frequently viewed as *“a historic bridge between the past of a deeply divided society marked by strife, conflict, untold suffering and injustice, and a prospect founded on the recognition of human rights, democracy, and peaceful coexistence.”*⁴.

In India, it can be said even during the colonial period there have been some instances of the concept of Transformative constitutionalism wherein the abolition of sati in 1829, abolition of

³ Klare, E. Karl., Legal Culture and Transformative Constitutionalism, 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, (1998) p. 146. Cited in Alisha Dhingra, Indian Constitutionalism: A Case of Transformative Constitutionalism, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES, 2(7), (2014) p. 136.

⁴ Pius Langa, Transformative Constitutionalism, 17 STELLENBOSCH L. REV. p. 351-352 (2006). Cited in Vrinda Narain, Postcolonial Constitutionalism in India: Complexities & Contradictions, 25 S. CAL. INTERDISC. L.J. 109 (2016)

Devadasi system, The Hindu Widow Remarriage Act, 1856 The Female Infanticide Prevention Act, 1870 are such evident examples of existences of the concept of Transformative constitutionalism even before drafting the Indian Constitution. After the colonial period in India, the key supporter of this perspective is Justice Krishna Iyer, where he interpreted the constitution as transformative in order to provide social justice as per the requirements in the society. In the case of *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, he stated that *“The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the pariah, the mlecha, the bonded labour, the hungry, hard-working half-slave, whose liberation was integral to our independence. To interpret the Constitution rightly, we must understand the people for whom it is made—the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities.”* and moreover he also interpreted the above argument as *“We, as judges dealing with a socially charged issue of constitutional law, must never forget that the Indian Constitution is a National Charter pregnant with social revolution, not a Legal Parchment barren of militant values to usher in a democratic, secular, socialist society which belongs equally to the masses, including the harijan-girijan millions hungering for a humane deal after feudal-colonial history's long night⁵.”*

Moreover in India, Justice.P.N.Bhagawati plays an important role in Transformative constitutionalism which by he introduced the concept of Access to justice; PUBLIC INTEREST LITIGATION. As PIL cases progressed through the court system, the Court's attention was drawn to very specific causes, almost all of which affected constituencies that were particularly marginalized. When the Court attempted to justify its admittedly risky steps to improve the situation of these constituents, it frequently cited the fact that the vast majority of these groups would not have easy access to justice. For instance Vishaka V. State of Rajasthan, Hussainara khaton V. State of Bihar are such verdicts which shows the usefulness and importance of PIL in India.

ROLE OF JUDICIARY IN TRANSFORMATIVE CONSTITUTIONALISM:

The Hon'ble Supreme court functions as curator and intrepeter of the constitution through important judicial pronouncements which are now considered to be the law and which also

⁵ Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India(1981) 1 SCC 246 : 1981 SCC (L&S) 50 at page 264

have bolstered the ethos of transformational constitutionalism. Some of the landmark verdicts such as:

1. In the case of **Kesavananda Bharati v. State of Kerala**,⁶ held that, the concept of the basic structure theory was established, and it was agreed upon that while the Parliament had the power to modify the fundamental rights of the Constitution, the basic structure of the Constitution should remain unchanged. The Supreme Court, acting as the protector of the Indian constitution, declared that any constitutional amendment that alters the 'Basic structure' would be deemed illegal. This ruling defined the 'Basic Structure Doctrine' of the Indian Constitution and became a significant precedent for courts worldwide.
2. In the case of **Maneka Gandhi v. Union of India**⁷, ruled that the Article 21 of the constitution text refers to Procedure established by Law, wherein a law cannot be arbitrary, unfair and unjust. It also gave birth to different sub rights under Article 21. The notion of liberal interpretation to Article 21 led to numerous transformative Sub rights.
3. In the case of **Justice K.S.Puttuswamy V. Union of India**⁸, the SC ruled that 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.
4. In the case of **Indira Swahney V. Union of India**⁹, the Supreme Court made an attempt to find an appropriate solution that maintains a fine balance between society and the rights of the underprivileged/backward classes. The only issue at hand was the Supreme Court's ruling on the legitimacy of the Mandal Commission Report. In reality, the Apex Court was tasked with making a lot of complex decisions that had broad implications. This was a landmark judgement that helped the Indian society in Transforming and

⁶ (1973)4 SCC 225

⁷ 1978 AIR 597, 1978 SCR (2) 621

⁸ (2017) 10 SCC 1.

⁹ AIR 1993 SC 477

providing better opportunities and standard of Living of the Backward classes through reservations.

5. In the case of **Joseph Shine V. Union of India**¹⁰, the SC ruled that, 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.
6. In the case of **Dr. Maya D Chablani vs Radha Mittal (2021)**¹¹ 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.

CONCLUSION:

The Supreme Court plays a crucial role in maintaining a balance between societal interests and social changes by interpreting the constitution in a way that serves the broader interests of society. Each provision of the constitution aims to address specific issues within society, and when there are multiple possible interpretations, the court chooses the one that best addresses those concerns. The goal of transformational constitutionalism is to uphold and strengthen the principles of our compassionate constitution. Justice Chandrachud emphasizes that the constitution seeks to bring about societal transformation, and by recognizing the rights of others within the framework of constitutional discourse, we not only empower those individuals but also undergo a transformative process ourselves. Often, we tend to focus only on our own freedoms without acknowledging the significance of respecting the freedom of others. However, it is through recognizing and respecting the freedom of others that society undergoes transformation and progresses toward a better future. The unwavering support and dedication of the judiciary in promoting positive change in society are crucial for achieving transformative

¹⁰ (2019) 3 SCC 39.

¹¹ <https://indiankanoon.org/doc/1763700/>

constitutionalism. Nevertheless, this responsibility does not solely rest with the courts; citizens also have a vital role in bringing about necessary transformations in the Constitution to meet the demands of the modern world. A crucial initial step is recognizing our own rights and values while also respecting the rights of others. While it is important to preserve the fundamental structure of our dynamic constitution, the development of our fundamental rights should be an ongoing process to ensure that society continues to progress and undergo social revolution.

REFERENCES:

1. Upendra Baxi, Postcolonial Legality, in Henry Schwarz and Sangeeta Ray, (eds.), *A Companion to Postcolonial Studies* 540, 544. Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 *S. CAL. INTERDISC. L.J.* (2016) p. 122
2. Madhav Khosla, *The Indian Constitution* (Oxford University Press, New Delhi, 2012), p. 14. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, *Asian Journal of Multidisciplinary Studies* 2(7) (2014) p. 135
3. Klare “Legal Culture and Transformative Constitutionalism” 1998 *SAJHR* 146-188 as cited by Justice SM Mbenenge, *Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape*, <http://www.saflii.org/za/journals/SPECJU/2018/13.pdf>
4. VILHENA, BAXI AND VILJOEN (EDS.), *TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA* (Pretoria University Law Press, Pretoria, 2013).
5. Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, *ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES* 2(7), (2014) p. 135.