

Transformative Constitutionalism in India

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Abstract

This article deals with the concept of transformative constitutionalism in the context of India much detail. The intricacies of the meaning of the term are explained in detail in a much simple language. Its origin has also been discussed in brief. The relevance and need of transformative constitutionalism in India has been dealt with in great depth and an analysis of the same has been made. Several case laws which have either applied the concept or have elaborated on them have also been mentioned.

Keywords: Transformative, Constitutionalism, Colonial, unconstitutional, limit, judiciary, fundamental, rights

Meaning of Transformative Constitutionalism

India is a democratic country where the supreme law of the land is its Constitution. In countries which genuinely strive to adhere to the principles of democracy, the constitutions are responsible for determining the various dimensions by which the society works and are governed.¹ Thus, it becomes necessary to understand the meaning of a term known as 'Transformative Constitutionalism' which comprises of two words - Transformative and Constitutionalism. 'Constitutionalism' is mostly linked with the political theories of John Locke and the founders of the Republic of America who hold the viewpoint that a government should have limited powers or some limitations on their authorities should necessarily exist. It is the system of government which encompasses all the possible dimensions of the rule of law.² Constitutionalism thus means no exercise of arbitrary or unreasonable power on the hands

¹Kiruthika Dhanapal, "Constitutionalism", Legal Services India (September 26, 2020, 03:11 pm)
<http://www.legalservicesindia.com/article/1699/Constitutionalism.html>

²Varun Chhachhar and Arun Singh Negi, "Constitutionalism-A Perspective", Poseidon (September 26, 2020, 02:00 pm) <https://poseidon01.ssrn.com/delivery.php?>

of the government. The term transformative in simple terms means change. Professor Upendra Baxi remarks that Constitutionalism provides for the narrative of both role and resistance in a democratic society.³ Hence, transformative constitutionalism implies the change in the limitations that exist on the government. It means that the Constitution and its principles are not stringent or rigid but are to change in accordance with the needs of the society they are governing.

The concept of transformative constitutionalism lies in its flexible nature and in the conviction that any large scale change transformation within any system of government can be carried out by law or any process or instrumentality of law.⁴ The concept is extremely essential for countries with history of colonial rule as hereby transformative constitutionalism acts as a way of bringing in change in the society whereby the majority of the people were bereft of basic human rights. It allows the state to devise such mechanisms which alter the redundant laws and rules from the colonial era.

Origin of Transformative Constitutionalism

It was for the first time in South Africa that the concept of transformative constitutionalism was developed by the legal scholars. The work of US Professor Karl Klare titled South African Journal of Human Rights paved the way for future debate on the issue.⁵ In 2006, J SM Mbenenge of the South African High Court remarked that judges, other functionaries and institutions are the major role players in transformative constitutionalism. It is the judiciary indeed which is the guardian and custodian of the inherent constitutional principles of human dignity, equality, freedom, etc. The judiciary is obliged to apply the constitutional principles or interpret the constitution in such a way that they strive towards improving the life and liberty of all the citizens of the country.⁶ The principle developed in South Africa probably because the judiciary thereby aimed at rooting off the practice of apartheid that is the legal discrimination between the people of the black and white skin color. Justice Pius Langa , the retired Chief Justice of South Africa held the view point that it is the ultimate goal of the constitution to cure

³Sanskriti Prakash and Akashdeep Pandey, “Transformative Constitutionalism and the Judicial Role: Balancing Religious Freedom with Social Reform”, Manupatra (September 26, 2020, 03:40 pm)
http://docs.manupatra.in/newsline/articles/Upload/AB27D7AA-C3B3-4538-BA67-0100E7A0F797.1-G_constitution.pdf

⁴Mayank Bhandar, “Transformative Constitutionalism” , Legal Services India (September 26, 2020, 03:25 pm)
<http://www.legalserviceindia.com/legal/article-2275-transformative-constitutionalism.html>

⁵Meera Emmanuel , “Constitution Day 2019: Transformative Constitutionalism and the Indian Supreme Court”, Bar and Bench (September 24, 2020 , 01:00 pm)
<https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism>

⁶Supra 5

the wounds of the past and thus guide the citizens towards a better future for the purpose of which transformative constitutionalism must be necessarily the core ideal of the Constitution .⁷ German scholar Micheala Hailbronner said that just like South Africa , in Germany transformative Constitutionalism came to be held in extremely high spirits as it was necessary to pull out Germany from the aftermath of World War I and World War II which caused much damage to the German society in many aspects .⁸

Transformative Constitutionalism in India: Provisions

India has not only suffered from the ill effects of British colonialism but alongside had also dealt with several social evils like untouchability, gender discrimination, superstitions, poverty , child marriage , etc which have been prevalent since the ancient times . The framers of the constitution while drafting the supreme document of constitution were primarily driven by the idea of leaving its past of British colonial rule much behind and of bringing in a new India which is entirely bereft of any traces from the colonial era .⁹ The constitutional framers strived to incorporate the ideals of democracy and a free and liberal society in the constitution for the very same reason. Thus the aspect of transformative constitutionalism is altogether much important in context of the Indian set up. There are certain provisions in the Constitution of India, 1950 which have the principle of transformative constitutionalism embedded within them. The Preamble of the Constitution talks about the aspirations of the citizens and the related ideals of secularism, liberty, socialism, sovereignty, secularism, democracy, etc. The Part III ranging from Article 12 to Article 35 of our constitution grants certain fundamental rights to all the citizens which were earlier not given to them during the British rule in India before 1947. The right to equality¹⁰, right against non discrimination¹¹, freedom of speech and expression¹², freedom to practice religion of own choice¹³ and right to life and liberty¹⁴ are some of the most talked about fundamental rights in the Constitution . Article 17 and Article 23 of the Constitution of India, 1950 abolishes untouchability and begar respectively. These articles point towards the zeal of the framers of the constitution and the citizens for establishing a brand new societal order through the powers in the constitution mentioned either explicitly or

⁷Ibid

⁸Michaela Hailbronner , “Transformative Constitutionalism: Not Only in the Global South”, Oxford Academic (September 27, 2020, 02:00 pm)

<https://academic.oup.com/ajcl/article-abstract/65/3/527/4158464?redirectedFrom=fulltext>

⁹Upendra Baxi, *Postcolonial Legality*, Henry Schwarz and Sangeeta Ray, (eds.), pg 540, 544

¹⁰The Constitution of India,1950, Art 14

¹¹The Constitution of India,1950, Art 15

¹²*Id.* Art 19

¹³*Id.* Art 25

¹⁴*Id.* Art 21

implicitly. It is thus believed that the Constitution of India was designed in such a way so as to break social hierarchy.¹⁵ Article 368 of the Constitution of India 1950 grants the power to the parliament to amend the constitution and mentions the procedure thereof. This implies that the constitution framers never intended that the constitution is to remain static forever but is to change with the need to the times. Article 32¹⁶ and Article 226¹⁷ also grant the powers to the citizens to seek the enforcement of their fundamental rights or bring in before the judiciary such laws or societal issues which need to be deleted to transform for the betterment of the society.

The Role of Judiciary in the ‘Transformative Constitutionalism’

Not only the Parliament, but also the judiciary has a role to play in the adherence to the principle of ‘Transformative Constitutionalism’. The judiciary in India has been entrusted with the task of interpreting the law. It is largely the Constitutional Courts that determine that the supreme document of Constitution continues to remain relevant even after seventy years of its enactment. In countries with the history of colonial rule, the role of judiciary is not merely to interpret the law but also to interpret it in such a way that it adheres to constitutional goals to bring in a new modern society. This does not mean that the Courts can while interpreting the constitution can ignore its jurisdiction or the doctrine of separation of powers. Transformative Constitutionalism expects from the judiciary to come up with the jurisprudence which goes along with the vision of transformation for the good of the society.

The judiciary in India has had no fixed attitude towards the upholding of constitutional values and aspirations. It was by the judicial mechanisms that the concept of Public Interest Litigation came into existence. PIL relaxed the rule of locus standi which allowed the people to file cases affecting the rights of the people at large. PIL thus allows the citizens to bring before the judiciary the problems affecting the society and when the courts give judgments on these matters, the constitutional provisions often get a new and diverse interpretation and have thus a transformed meaning than before. The courts are empowered to take suo moto cognizance of certain matters which it deems fit in the light of the then circumstances. During the initial months of the pandemic, the courts took suo moto cognizance of the problems faced by the migrant workers. Over a period of time, the Supreme Court has expanded the scope of the

¹⁵Rajeev Bhargava (ed.), Outline of Political Theory Of The Indian Constitution in Politics And Ethics of The Indian Constitution, (Oxford University Press, New Delhi, 2008), p. 15.

¹⁶The Constitution of India, 1950

¹⁷Ibid

fundamental rights especially Article 21¹⁸ which deals with the right to life and personal liberty. However this expansionist power of the SC is often criticized on the grounds that it tends to encroach upon the field of work reserved for the executive and legislature. No doubt that the Supreme Court has been interpreting the Constitution differently with respect to the needs of the time as in consonance with the principles of transformative constitutionalism, however it cannot be said that such an approach has been constant in nature. It has been observed that in certain cases the Supreme Court has adopted the approach of an activist but in others it has strictly adhered to the language of the constitution as seen in *Suresh Kumar Koushal v Naz Foundation*¹⁹, *ADM Jabalpur v Shivakant Shukla*²⁰ to name a few.

The Indian Judiciary on Transformative Constitutionalism: Its Application and Landmark Case Laws

India has been a culturally rich and diverse nation whereby people of different religions co-existed in harmony. However, it also cannot be denied that once in a while some scuffle does occur between the different communities. In the context of India, the concept of transformative Constitutionalism comes into play when redundant social evils in the name of religion and regressive laws from the colonial era are to be wiped out. The Constitution of India, 1950 was drafted in the backdrop of the partition of India in 1947 because of which it became an obligation on the framers of the constitution to inculcate such provisions which foster the love between the people from different religious communities. Due to the profound importance of religion in the daily lives of the people, the strict ideal of secularism is not followed in India and instead it would be certain principles of religious pluralism that are also adhered to.²¹ However since the society was very much caught up in several social evils, it became necessary for the constitution framers to balance religion along with righteousness to form an egalitarian society. No doubt that Article 25 of the Constitution of India, 1950 grants the fundamental right to practice and profess religion of one's own choice but it also places certain restrictions on the same on the grounds of public order, morality and health. Article 25(2)(b) of the Constitution of India, 1950 lays down that the State is empowered to make a law for social reforms. These provisions in the Constitution imply the adherence and faith of the law on the ideal of transformative constitutionalism.

¹⁸Ibid

¹⁹Civil Appeal No. 10972 of 2013

²⁰1976 (2) SCC 521

²¹Rajeev Bhargava, The Distinctiveness of Indian Secularism, T.N. Srinivasan (ed.) *The Future of Secularism* (Oxford University Press, Delhi, 2006), p. 20

To end this constant fight between religion and social reforms, the Indian Constitution maintained a three level test which consists of - religious freedom, state neutrality towards all religions and reformative justice whereby it is within the powers of the state to curtail the freedom to religion on certain grounds specified in Article 25 of the Constitution. The judges in India have to be careful enough to balance the religious freedom, social justice and liberty of the individual. Initially the courts stated that the practices which were essentially religious were granted the protection under Article 25²². According to the present situation, those practices in a religion which are the core of a religion or are such that not practising them makes it impossible to practice the religion are given protection under Article 25 of the Constitution of India, 1950. The Court also conferred itself with the power of interpret the religious texts in order to understand if a certain practice is essential to a religion. This role of the Courts depicts its aim of rooting off all those evils which are practiced in the society in the name of religion and culture.

In the case of *BK Pavitra v Union of India*²³, transformative constitutionalism was brought in to justify the historical wrongs committed. Justice DY Chandrachud remarked that there exists substantial degree of evidence to prove that the role of the Constitution is to serve as a transformative document to overcome the inequalities which are deep rooted in the society.²⁴In certain cases, transformative constitutionalism was invoked to simply acknowledge the blunders that were committed earlier and to correct such blunders so that the future generations do not have to suffer. Also there are a plethora of cases which do not use the term transformative constitutionalism but do apply the principle. In the landmark judgment of *NALSA v Union of India*²⁵, it was held that it is the duty of the Courts to read and understand the Constitution in such a way that it affects the welfare of the people in a positive manner. The Constitution hereby was recognized of being at par with a living organism which does not remain still at one place or does not remain the same throughout its life but continues to change, evolve and transform.²⁶ Many a times, it is the law which is a reflective of the changing society or is an impetus to the change taking place in the society.²⁷This particular judgment had been profound in the lives of the transgender as it gave them recognition as the third gender, allowing them to thus carry on their true identity in the public sphere.

²²The Constitution of India,1950

²³AIR 2017 SC 820

²⁴Ibid

²⁵ 2014 5 SCC 438

²⁶Ibid

²⁷Ibid

In the landmark case of *Navtej Johar v Union of India*²⁸ whereby Section 377 of the Indian Penal Code, 1860 was struck down to the extent that it criminalized homosexual activities between two consenting adults, Justice K.M. Khanwilkar on behalf of Justice Dipak Misra laid down that the entire idea of a Constitution is to guide a country towards a resplendent future. Therefore, it is the very purpose of the Constitution to transform the society for the better; which is also the core pillar of the ideal and principle of transformative constitutionalism. In *Indian Young Lawyer's Association v State of Kerala*²⁹ much famous as the Sabrimala temple judgment, it was declared that the menstruating women that are the women between the age group of twelve to fifty shall be allowed to enter the inner sanctum of the Lord Ayappa's temple where they were earlier not allowed to do so. In *Shayara Bano v Union of India*³⁰ much famous as the triple talaq case, the 5 judge bench in the ratio of 3 : 2 declared the practice of Triple Talaq or Talaq - ul - biddat as being unconstitutional. This was a clear example whereby the concept of transformative constitutionalism was applied to root out such a religious practice which had taken up the shape of a social evil.

In *Shakti Vahini v Union of India*³¹, the Supreme Court held that the right to choose a life partner is a fundamental right and factors like the consent of the families of the adults are not to be considered for the same. This judgment seeks to transform the general Indian attitude towards love marriages and also seeks to though indirectly condemn the growing trend of honour killings. In the case of *Joseph Shine v Union of India*³², Section 497 of the Indian Penal Code, 1860 and Section 198(2) of the Criminal Procedure Code, 1973 which punished only the man indulged in a sexual relationship with a married woman was declared as being unconstitutional on the grounds of violation of Article 14, Article 15(1) and Article 21 of the Constitution of India, 1950. This was a clearly unjust provision which was discriminatory towards the males and hence to strike it down was clearly a step towards the transformation of a law affecting the society adversely.

Conclusion

The concept of transformative constitutionalism is nothing but the idea that the constitution can be amended or its interpretation can be changed as per the changing norms and advancement of

²⁸AIR 2018 SC 4321

²⁹(2017) 9 SCC 1

³⁰ Writ Petition no. 116 of 2018

³¹(2018) 7 SCC 192

³²AIR 2018 SC 1676

the society at large. The concept is not at all complex but us rather the easiest to understand in the jurisprudence of constitution. The Constitution of any country cannot work for long if it is extremely stringent to the extent that it is unable to adapt as per the needs of its citizens. One practice of religion or any piece of law which was relevant earlier might not be relevant now given the constant transformation the society is undergoing in the current era. This idea which developed firstly in South Africa is very relevant in all the countries where by the welfare of the citizens is of paramount importance. The Constitution of India, 1950 itself contains such provisions which allow the legislature, executive and judiciary to interpret the constitution in tandem with the changing times though with the adherence to the core principles of the constitution. India had and currently also has been the unfortunate victim of several social evils largely due to the British colonial rule. Several laws which existed in the British era continued to be applied after the independence. However, many of these laws were not suited for the Indian society or with the passage of time such laws ceased to be relevant. In such a circumstance, it is the transformative nature of the constitution which comes to the rescue. The landmark cases of *NALSA v Union of India*³³ and *Navtej Singh Johar and Ors v Union of India*³⁴ are the much recent examples whereby transformative constitutionalism brought in a positive change for the people at large. Thus, this idea shall always remain essential and in the core of the constitution for the benefit of the citizens of our country.

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³³Supra 25

³⁴Supra 28