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Transformative Constitutionalism in Contemporary Indian Society

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ABSTRACT

The idea of constitutionalism is not new rather it is embodied in human thought. Constitutionalism is the antithesis of tyrannical governance, which is based on the arbitrary will of a small group of people or an individual rather than the rule of law. All contemporary constitutions, from the British unwritten constitution to the American written constitution, allow for the fundamentals of constitutionalism; in fact, their very existence is an effort to restrict the scope of government. Transformative constitutionalism always plays a very significant role in transforming the society by protecting the basic principles of the Constitution, its value system and freedoms of the individuals. It is a way of interpreting the Constitution to bring social, economic and political change. The apex court of India always plays a vital role as a custodian and interpreter of the Constitution. In addition to it, Indian Constitution as a transformative constitution rather than a rigid always enabled the Supreme Court to make these reforms more effective. Various pronouncements are given by our esteemed judges of the apex court in the past couple of decades to bring positive changes and provide an outlook how the legal framework and mechanisms may change and improve in future. The main aim of the transformative constitutionalism is to maintain and strengthen the principles enshrined in the Constitution which cannot be achieved without the constant support of the judiciary alongwith the commitment to effect such constructive changes. The researcher in this paper has made an effort to explain the significant and inevitable role played by the Transformative constitution to define the essence of democracy and the constitution within it. The researcher has also analyzed the various pronouncements given by the apex court reflecting the transformative constitutionalism.

Keywords: Constitution, Constitutionalism, Transformative, Apex Court.

I. INTRODUCTION

The Constitution of a country is the basic or fundamental document of a country and contains the first law of the country. It is considered as a vehicle of the nation's progress. It is the highest law of the land and source of all the powers. The laws enacted by the legislature in the country

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must be under or within this document which is also called the grundnorm of the country. It is not merely a lengthy legal document but an expression of people's faith and aspirations. It is a charter of values and principles; a dream of a free, just and equal society. Being a living and organic document, horizons of the Constitution is said to be expanding with the passage of time.²

Hon'ble Chief Justice of India, Justice Kapadia (as he then was) writing for the constitution bench asserted that "The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. To set out the principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs".³ He further emphasized, "A Constitutional provision must be construed not in a narrow and restricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges".⁴

The written Constitution of every democratic country contains threefold objectives i.e., -to establish the framework structure of the government; to delegate or assign the powers to various organs of the government; and to restrain the exercise of those powers in order to preserve individual rights. The Constitutional values become meaningful only on achieving the constitutional vision which is, indeed, a herculean task for both government as well as society. No doubt, this challenge has always been there, but it has acquired new facet with time. Referring to the Constitution of USA, Justice Frankfurter remarked: "It is not a printed finality, but a dynamic process. Its application to the actualities of Government is not a mechanical exercise, but a high function of statecraft".⁵

The concept of Constitutionalism is very vague. It recognizes the need for the government with powers but at the same time insists that limitations be placed on those powers as the unlimited powers may lead to an authoritarian, oppressive government which imperils the freedoms of the people. It is only when the Constitution of a country seeks to decentralize power instead of concentrating it at one point, and also imposes other restraints and limitations thereon, then a country do not have only 'constitution' but also has 'constitutionalism'.⁶

The idea of constitutionalism is not new rather it is embodied in human thought. The natural law philosophers like Aquinas, Paine, Locke, Grotius and Rousseau have promoted this idea

² Narender Kumar, *Constitutional Law of India* 2-3 (Allahabad Law Agency, Faridabad, 2019).

³ M. Nagaraj v. Union of India, AIR 2007 SC 71.

⁴ *Id.* at 3.

⁵ P. Ishwara Bhat, *Constitutionalism and Constitutional Pluralism*, 55 (LexisNexis, Haryana, 1st edn., 2013).

⁶ M.P Jain, *Indian Constitutional Law* 6 (LexisNexis Butterworths, Wadhwa Nagpur, 5th edn., 2009).

throughout their writings. The Magna Carta (1215) strengthened the traditional view that law is supreme. A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law with separation of powers, free elections to legislature, accountable and transparent democratic government, fundamental rights of people, federalism, decentralization of powers are some of the principles and norms which promote Constitutionalism in the country.⁷ According to Louis Henkin, Constitutionalism implies:⁸

- a) Popular sovereignty
- b) Supremacy of the Constitution and Rule of Law
- c) Political Democracy
- d) Representative Limited Government
- e) Separation of Power
- f) Civilian Control of the Military force
- g) Police governed by Law and Judicial Control
- h) An Independent Judiciary

The abovementioned elements of Constitutionalism restrict the powers of the State in a particular way. Constitutionalism in those polities which adopt it shares a common essential quality: the legal limitation upon governmental powers. Constitutionalism is the antithesis of arbitrary rule, the opposite of tyrannical government found in the coarse will of an individual or a limited group rather than the rule of law. From the unwritten constitution of British to the written constitution of American, all modern constitutions give space to essentials of constitutionalism; actually, their very existence is the attempt to limit government. Though it is possible to analyze the essentials of it, yet constitutionalism remains in a constant state of variability, dynamic and progressive while adding strength to limited government from within a constitutional framework.⁹

Transformative constitutionalism always plays a very significant role in transforming the society by protecting the basic principles of the Constitution, its value system and freedoms of the individuals. Chief Justice Deepak Misra said, “The whole idea of having a Constitution is to guide the nation towards a resplendent is to transform the society for the better and its

⁷*Ibid.*

⁸ Constitution and Constitutionalism: a study perspective in India, *available at*: <https://blog.ipleaders.in/constitution-constitutionalism-study-perspective-india/> (last visited on September 11, 2022).

⁹ Paul T. Babie and Arvind P. Bhanu, The Form and Formation of Constitutionalism in India, *available at*: <https://www.mdpi.com/2075-471X/11/2/33/pdf> (last visited on September 11, 2022).

objective is the fundamental pillar of transformative constitutionalism”.¹⁰ There are two key aspects of the term transformative constitutionalism:¹¹

1. It helps in realization of equality by recognizing and eliminating all forms of discrimination as they may have existed or may develop in the future;
2. It points out the universal nature of transformative constitutionalism in the private sphere by using the term “positive social relationships” for recognition of full human potential rather than limiting it to interactions of the individuals with the State.

II. ORIGIN OF TRANSFORMATIVE CONSTITUTIONALISM IN INDIA

The origin of transformative constitutionalism is drawn to post-apartheid South Africa. A former Chief Justice of South Africa traces the basis of transformative constitutionalism to the Preamble of the Interim Constitution of South Africa which reads: “A historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex”.¹²

German scholar Michaela Hailbronner gave logic that German jurisprudence is also based on similar principles, with a view to correcting historical wrongs committed during the Nazi era. She points out in a 2017 paper, “Like South Africa after apartheid, Germany emerged after the Second World War a broken and morally discredited country with a strong imperative of political and social change ... In spite of the conservative orientation of German constitutional framers, however, German constitutionalism became, over time, transformative in important respects. That it did is due primarily to the Justices at the German Constitutional Court and German legal scholars ...”¹³

During colonial times in India, various instances of transformative constitutionalism can be found like Lord William Bentinck prohibited Sati system in 1829 after continuous efforts done by Raja Ram Mohan Roy, the Hindu Widow’s Remarriage Act, 1856 was approved by Lord

¹⁰ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 available at: <https://indiankanoon.org/doc/168671544/> (last visited on September 6, 2022).

¹¹ Priya Shekhawat, Transformative Constitutionalism, available at: <https://www.ijlmh.com/wp-content/uploads/2020/01/Transformative-Constitutionalism.pdf> (last visited on September 4, 2022).

¹² Constitution Day 2019: Transformative Constitutionalism and the Indian Supreme Court available at: <https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism> (last visited on September 8, 2022).

¹³ Constitution Day 2019: Transformative Constitutionalism and the Indian Supreme Court available at: <https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism> (last visited on September 8, 2022).

Canning, the Female Infanticide Prevention Act of 1870 was enacted to address the issue of female infanticide, the Age of Consent Act, 1891 raised the age of consent of sexual intercourse for all females, married or single, from ten to twelve years. Though all these changes were criticized by orthodox and conservative people of the society at that time, but these developments served to improve the lives of Indian women by providing them with essential rights that they had previously been denied. Though the word transformative constitutionalism is nowhere expressly mentioned in the Constitution of India but Constitution being a living document is always having aim to protect and promote the basic ideas and the value system of the Constitution as well as the interests of the minority's class of the society.¹⁴

III. JUDICIAL ATTITUDE TOWARDS TRANSFORMATIVE CONSTITUTIONALISM

The apex court of India always plays a vital role as a custodian and interpreter of the Constitution. In addition to it, Indian Constitution as a transformative constitution rather than a rigid always enabled the Supreme Court to make these reforms more effective. Various pronouncements are given by our esteemed judges of the apex court in the past couple of decades to bring positive changes and provide an outlook how the legal framework and mechanisms may change and improve in future. In *Kesavananda Bharati v. State of Kerala*¹⁵, the basic structure theory was established and it was clearly held by the court that under Article 368 of the Constitution, Parliament is having the power to amend the provisions of the Constitution but it cannot amend the basic structure of the Constitution. This crucial decision served as a model for other courts throughout the world.

Then *National Legal Services Authority (NALSA) v. Union of India*¹⁶, one of the landmark decisions of the Apex Court is the first judgment to legally recognise non-binary gender identities and uphold the fundamental rights of transgender persons in India. The court held that as recognition of one's gender identity lies at the heart of the right to dignity and freedom, it must be protected under Article 21 of the Constitution. The Central and State governments are also given directions through this judgment to take proactive action in securing transgender persons' rights. The Supreme Court took note of the transformative power of the Constitution in its judgment in the following words: "The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly

¹⁴ Srishti Patwa, Transformative Constitutionalism available at: <https://www.legalserviceindia.com/legal/article-8173-transformative-constitutionalism.html> (last visited on September 10, 2022).

¹⁵ AIR 1973 SC 1461 available at: <https://indiankanoon.org/doc/257876/> (last visited on September 7, 2022).

¹⁶ AIR 2014 SC 1863 available at: <https://indiankanoon.org/doc/127517806/> (last visited on September 7, 2022).

changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. When we discuss about the rights of Transgender in the constitutional context, we find that in order to bring about complete paradigm shift, law has to play more pre-dominant role. As Transgender in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of their constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the Transgender which legitimately belongs to them.”¹⁷

In *Justice K.S. Puttaswamy v. Union of India*¹⁸, a retired judge of the High Court filed a writ petition in the Supreme Court challenging the constitutional validity of the Aadhar card scheme introduced by the UPA Government. In a historic decision delivered on August 24th 2017, the Bench unanimously recognized a fundamental right to privacy of every individual guaranteed by the Constitution, within Article 21 in particular and Part III on the whole. The court also overruled its previous decisions given in the case of *M.P. Sharma* and *Kharak Singh*, insofar as the latter held that the right to privacy was not recognised under the Indian Constitution. The court while reaffirming the right to privacy as a fundamental right also laid down in this case the need for the implementation of a new law relating to data privacy, expanded the scope of privacy in personal spaces, and discussed privacy as an essential value. Since the 2017 judgment, the fundamental right to privacy has been cited as precedent in various landmark judgments, such as the *Navtej Johar*¹⁹ and *Joseph Shine*²⁰ judgments.

In *Shayara Bano v Union of India*²¹, Ms. Bano filed a writ petition at the Supreme Court in February 2016 challenging the constitutionality of talaq-e-biddat, polygamy, and nikah-halala. Ms. Bano claimed that these practices violate the Right to Equality, the Right against Discrimination, and the Right to Livelihood. She further argued that these practices were not protected by the Right to Freedom of Religion. Religious freedom is subject to other fundamental rights, public order, morality, and health. The Supreme Court in a 3:2 split held that the practice of talaq-e-biddat or instantaneous triple talaq is unconstitutional and violative

¹⁷ *Ibid.*

¹⁸ AIR 2017 SC 4161 available at: <https://indiankanoon.org/doc/193543132/> (last visited on September 8, 2022).

¹⁹ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 available at: <https://indiankanoon.org/doc/168671544/> (last visited on September 22, 2023).

²⁰ Joseph Shine v. Union of India, AIR 2018 SC 4898 available at: <https://indiankanoon.org/doc/42184625/> (last visited on October 10, 2023).

²¹ (2017) 9 SCC 1 available at: <https://indiankanoon.org/doc/115701246/> (last visited on September 6, 2023).

of Article 14, 15 and 21 of the Constitution. It was said that the practice of ‘talaq-e-biddat’, could not be regarded as a part of any “essential religious practice”, and as such, could not be entitled to the protection of Article 25.

*Navtej Singh Johar v. Union of India*²² is a landmark decision of the Supreme Court of India in 2018 that decriminalized all consensual sex among adults, including homosexual sex. The court held that Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual. The Constitution has been conceived of and designed in a manner which acknowledges the fact that ‘change is inevitable’. It is the duty of the courts to realize the constitutional vision of equal rights in consonance with the current demands and situations and not to read and interpret the same as per the standards of equality that existed decades ago. The judiciary cannot remain oblivious to the fact that the society is constantly evolving and many a variation may emerge with the changing times. There is a constant need to transform the constitutional idealism into reality by fostering respect for human rights, promoting inclusion of pluralism, bringing harmony, that is, unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny.

*Joseph Shine v. Union of India*²³ is another major decision that decriminalized adultery while interpreting Article 21 of the Constitution. Section 497 of the Indian Penal Code had previously made adultery a crime for those men who engaged in sexual intercourse with a married lady without her husband’s consent. Because it was silent on a married woman’s permission, this section was considered to be arbitrary and discriminatory, and it was struck down and declared as unconstitutional. Adultery has been declared as an offence in as many as 60 countries including South Korea, South Africa, Uganda, Japan etc., on being gender discriminative and violating the right to privacy. Even Lord Macaulay, the creator of the Penal Code objected its presence in the Penal Code as an offence rather suggested that it should be better left as a civil wrong. The law evolves with the time and many recent judgements have increased the scope of fundamental rights in conformity with changing societal values and increasing individual liberty. This judgement joins them in creating history by knocking down 158-year-old law which has lost its relevancy with changing social and moral conditions.

²² AIR 2018 SC 4321 available at: <https://indiankanoon.org/doc/168671544/> (last visited on September 6, 2023).

²³ AIR 2018 SC 4898 available at: <https://indiankanoon.org/doc/42184625/> (last visited on January 7, 2024).

In *Indian Young Lawyers Association v. the State of Kerala*²⁴, this case was filed in 2006 by the Indian Young Lawyer's Association through public interest litigation (PIL) before the Hon'ble Supreme Court of India regarding the entry of menstruating women into the temple of Sabrimala, which had been restricted. It was argued that this restriction was violative of Articles 14, 15, 17, 25 and 26 of the Constitution. On September 28, 2019, the Supreme Court had by a 4:1 verdict held that the devotees of Sabarimala deity Lord Ayyappa do not constitute a separate religious denomination and therefore, cannot claim the benefit of Article 26 of the Constitution of India. The Court, while playing the role of a positive interferer of religion, held that the women of all age groups can enter the temple. In this case, the apex court held that freedom related to religion is an essential element for the smooth functioning of democracy in a country like India. There are lots of differences between constitutional ideals and social reality. The court through this decision has tried to bridge the gap between constitutional ideals and social reality.

In *M Siddiq (D) Thr Lrs vs. Mahant Suresh Das & Ors*²⁵, the Court while relying on a report by the Archaeological Survey of India held that remains of a building under the demolished structure of the Masjid was "not Islamic". The disputed land was handed over to a trust to be set up by the Government of India with the purpose of building a Hindu temple. The Court also gave directions that 5 acres of land be provided to the Sunni Waqf Board for the purpose of building a mosque and stated that the demolition of the mosque had been against the rule of law. This is one of the most recent examples of transformative constitutionalism where efforts were made by the judiciary to bring the religious communities together instead of being divided over religious issues so that neither of the community felt offended. Here, an attempt is made through transformative constitutionalism to describe a systematic movement towards a society where without any disparities and discrimination all religions in the society can co-exist together, a process about which our constitutional framers had thought since from its creation. Though this judgement has invited very mixed responses but it is clear that it has been pronounced while keeping in view the future approach while focusing more on national unity over religious differences.

*Anuradha Bhasin v. Union of India*²⁶ is a case when the Jammu and Kashmir Reorganization Bill, 2019 was approved, and the government announced an internet ban as well as a complete

²⁴ (2019) 11 SCC 1 available at: <https://indiankanoon.org/doc/163639357/> (last visited on January 7, 2024).

²⁵ Civil Appeal Nos. 10866-10867 of 2010 available at: <https://indiankanoon.org/doc/107745042/> (last visited on January 20, 2024).

²⁶ 2020 SCC Online SC 25 available at: <https://indiankanoon.org/doc/82461587/> (last visited on January 17, 2024).

shutdown of all communications. There were also restrictions on public movement and assembly imposed under section 144 of the Cr.P.C. Journalists were barred from travelling and publishing anything that may be considered as a breach of Article 19(1)(a), or the right to freedom of speech and expression. The Supreme Court held that Article 19(1) (a) includes the right to access the internet, and that the ban on journalists violates Article 19(1) (g), which provides the freedom of practicing any profession, occupation, trade, or business through the internet. The court further held that the suspension or restriction of internet services should not be done in a disproportionate way. Thus, the Court asserted that the degree and scope of restrictions had to be proportionate to the situation that the Government was trying to address.

Dr. Maya D Chablani v. Radha Mittal ²⁷ was a recent case heard by the Delhi High Court, and its decision was very well appreciated. ‘Right to Life’ guaranteed under the Indian Constitution was extended liberally to street dogs under Article 21. In this case, a single-judge Bench of the High Court said that animals have a right under the law to be treated with compassion, respect, and dignity, and that their protection is the “moral responsibility of each and every citizen, including the governmental and non-governmental organisations”. It was claimed under Article 21 that such a right protects the lives of animals as well. Then on May 19, 2022 in special leave petition out of the judgement passed by the Delhi High Court, a three-judge Bench of the Supreme Court also vacated the stay on a Delhi High Court order from last year that said that stray dogs have a right to food and water, and citizens have the right to feed them but while doing so, proper care and cautions must be taken so that rights of any other person should not be curtailed. The court also put responsibility on the shoulders of the government authorities, Municipal Corporation and police as well in this regard so that no hindrance should be caused to food givers or caregivers of the dogs.

In *Farhan v. State & Anr* ²⁸, the court held that the Constitution is transformative as citizens are transforming. It must be ensure through Social transformation that right to justice, liberty, equality and fraternity of citizens is protected. The rights of the citizens travel along the constitutional path because personal and social moralities of judges travel to the destination of constitutional morality. Substantive equality is dependent on the recognition of historical wrongs and discovering remedies for curing the wrong. The right of a wife to say “yes” to sexual intercourse includes the corollary i.e. the right to say “no”.

²⁷ 2021 SCC OnLine Del 3599 available at: <https://indiankanoon.org/doc/167511972/> (last visited on September 9, 2022).

²⁸ Writ Petition (Criminal) no: 964/2017 available at: <https://indiankanoon.org/docfragment/124655100/?formInput=marital%20rape> (last visited on September 12, 2022).

The transformative power of the Constitution, however, is not viewed as just a means to correct historical wrongs. As elaborated by former South African Chief Justice, Justice Pius Langa, “they may also hold the key to a more equitable future, beyond mere course correction. Transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.”²⁹

IV. CONCLUSION AND SUGGESTIONS

The Constitution of India is a living and organic document. It provides protection to the fundamental rights of the citizens. The constitution framers were having vision and ideas of making the Constitution transformative from future perspective. This is the reason the Constitution is having solution for every problem. Transformative constitution always promotes equality and rule of law by eliminating all forms of discriminations in the society. But the willingness on the part of the society to welcome such positive changes with whole heartedly is also very important. While giving recognition to one’s own fundamental rights and values, he should not ignore the rights and freedoms of others also.

Judiciary in India always plays a very effective role by interpreting the Constitution in such a way that balances between societal interest and social changes can be maintained. The main aim of the transformative constitutionalism is to maintain and strengthen the principles enshrined in the Constitution which cannot be achieved without the constant support of the judiciary alongwith the commitment to effect such constructive changes. The various judgements discussed above have made it clear that the judiciary is playing a very inclusionary and transformative role but while upholding the transformative constitutionalism as well as transforming the society, the court should also make balance between constitutional morality and social morality to repose faith of the people in judiciary. The various judgements delivered

²⁹ Constitution Day 2019: Transformative Constitutionalism and the Indian Supreme Court *available at*: <https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism> (last visited on September 8, 2022).

by the apex court in the past decades revolved around the concept of transformative constitutionalism by using the Constitution as an instrument to improvise the conditions of existing human rights, legal rights and constitutional rights in the country. Thus, it can be said that Transformative Constitution is playing a very significant role in defining the essence of democracy as well as Grundnorm of the country in present contemporary Indian society.
