

INDIAN JUDICIARY AND TRANSFORMATIVE CONSTITUTIONALISM

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Abstract

The constitution is called as living law of the land as it is transformed according to necessities of the time and situation. Judiciary's activist role has still kept the spirit of constitution alive. The basic rationale of India's Constitutionalism is to empower the state to bring about social transformation. Transformative constitutionalism paves way for increased protection of fundamental rights and freedoms. Transformation involves a disruption of the existing social structures. This article examines the idea of transformative constitutionalism and its implications for the adjudication of fundamental rights and freedoms. The article analyses the need of transformative constitutionalism for the judicial adjudication of rights. Through this article, an attempt is made to analyse the importance of transformative constitutionalism and concludes that the concept demands more from judges than has traditionally been understood in the two legal systems.

Keywords: Indian Constitution, Transformative constitutionalism, Judiciary in India, Judicial activism, Sabarimala Judgment

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“The purpose of having a constitution is to transform society” and to embrace the “ideals of justice, liberty, equality and fraternity.”

- Deepak Misra

Introduction

Constitution is basic law of the land. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers and duties of government institutions and sets out fundamental rights, directive principles and the duties of citizens. A constitution is the legal and moral framework setting out these powers and their limitations. This framework must represent the will of the people, and should therefore have been arrived at through consensus. There are three main organs of government namely legislature, executive and judiciary. All three are assigned different functions and one cannot encroach upon each other's functions. In case government arbitrarily uses its powers limitations can be imposed upon the same for which Judiciary has a vital role to play by practicing constitutionalism.

Constitutionalism' means the limited government or limitation on arbitrary powers of government. Constitutionalism recognizes the necessity of powerful government but with reasonable restrictions in order to avoid misuse of powers. Absence of constitutionalism will lead to despotism. A

government, which goes beyond its limits, loses its authority and legitimacy. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some inbuilt restrictions on the powers conferred by it on governmental organs¹.

Louis Henkin defines 'constitutionalism' as constituting the following elements:

- government according to the constitution;
- Separation of power;
- sovereignty of the people and democratic government;
- constitutional review;
- independent judiciary;
- limited government subject to a bill of individual rights;
- controlling the police;
- civilian control of the military; and
- no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.

Henkin's nine elements of constitutionalism can be divided into two groups, one concerns

¹Kiruthikadhanapa, "Constitutionalism" <http://www.legalservicesindia.com/article/1699/Constitutionalism.html> March 9, 2019 9:14 A.M IST

power construction and power lodging; and the other deals with rights protection².

Transformative Constitution

Transformative constitutionalism, as such, means using the law to effect comprehensive social change through a non-violent political means.³ American academic, Karl Klare (1998) coined the term “transformative constitutionalism”, which he described 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*”⁴.

Transformative constitution can simply mean that the law is transformed through a statute by enacting a new law in place of preceding one in order to bring radical change; Or it could mean that the statute or constitution “*has a transformative purpose*”, i.e., that a change in law is brought about that is purposed to have a transformative impact on its field of action that could not be regarded as transformative of the content of law⁵. The Constitution of India contains several

elements, which can be described as “transformative”.

Role of transformative constitutionalism in protecting fundamental rights and freedoms

Transformative constitutionalism takes a more pragmatic approach towards the realisation of constitutional goals by protecting individual’s fundamental rights and freedoms. Judiciary is the core element of transformative constitutionalism since the concept places faith in the law as an instrument of social and political change, and in that, the courts act as catalyst of the transformation as they are empowered to interpret and apply the law.

There is often a fear of revolution in the recognition of transformation but such fear can be unraveled through collective efforts⁶. Transformative constitutionalism aims to rebuild society on new principles. Core purpose of constitution is to enable the state to create conditions for a just and humane society. The central notion of transformative constitutionalism lies in social justice. The

² *Supra* note 2 March 10 2019 11:10 A.M IST

³ Phephelaphi Dube, “*Transformative constitutionalism demands government takes action*” Nov 29, 2016 <https://projectrise.news24.com/phephelaphi-dube-transformative-constitutionalism-demands-government-takes-action/> March 9, 2019 9:19 A.M IST

⁴ Karl Klare, “*Legal Culture and Transformative Constitutionalism*”, 14 S. Afr. J. Hum. Rts. 146, 150

⁵ Goutham Shivashankar, “*Parliamentary Privileges, The Legislature, Transformative Constitutionalism*”, Aug 1 2018 <https://indconlawphil.wordpress.com/2018/08/01/guest-post-parliamentary-privileges-and-the->

transformative-constitution-a-response-to-karan-lahiri/ accessed on March 11 2019 10:49 .M IST

⁶ Drucilla Cornell, Kenneth Michael Panfilio, “*Symbolic Forms for a New Humanity: Cultural and Racial Reconfigurations of Critical Theory*”, ISBN-13: 9780823232505 Published to Fordham Scholarship Online: March 2011 DOI:10.5422/fso/9780823232505.001.0001 <http://fordham.universitypressscholarship.com/view/10.5422/fso/9780823232505.001.0001/upso-9780823232505-chapter-7> March 9 2019 9:26 A.M IST

transformative constitutionalism requires the state to regulate society and bring about social justice. This notion is contradictory to Gandhian philosophy of 'social justice'; according to which social justice can be achieved by reformation of individual and society even in absence of government regulations⁷.

Judiciary still is at highest pedestal of trust and in order to keep accord to its position it needs assume a more assertive role via transformative constitutionalism than that in ordinary traditional contexts.

The assertive role of Indian judiciary through 'transformative constitutionalism' can be accessed in the light of, *Sabrimala judgement*⁸. Moreover, the real import of transformative constitutionalism lies in positive measures that the State ought to take in bringing the Constitution closer to the most deprived. This has been done by judicial activism by translating and interacting directive principles of state policy along with fundamental rights through its activism and wider interpretation of constitutional goals.⁹

The Court's interpretation about the power of state government and circumstances under which it can curtail fundamental rights

guaranteed under the Indian Constitution will have a great impact on legislative powers of state; as it would entail a higher examination of opportunity State legislation that compress individual rights. The use of states legitimate power can no longer be relied upon 'public/social' morality rather it has to meet the test of 'constitutional' morality. On 28th September, 2018 the five-judge constitution bench granted the right to enter the shrine to women between the ages of ten and fifty. The bench consisted of five judges and they delivered four separate judgments: three of them ruled in favour of women's entry and one against. Of the four, two judgments are unique as they present contrasting constitutional perceptions. The majority opinion of Justice D Y Chandrachud and the dissenting view of Justice Indu Malhotra are noteworthy and give rise to another issue. According to Justice Chandrachud individual dignity lies at the core of liberal constitutionalism. In his opinion The Indian constitution, is based upon the principles of justice, liberty, equality and fraternity and therefore all constitutional provisions including the freedom of religion, must be interpreted in such a way that Individual dignity must be upheld.

⁷ Alisha Dhingra, "Indian Constitutionalism: A Case of Transformative Constitutionalism" Asian Journal of multidisciplinary studies vol.2 issue7 july 2014 issn2321-8819 <http://www.ajms.co.in/sites/ajms2015/index.php/ajms/article/view/456/400> March 10 2019 11:02 A.M IST

⁸ September, 28th 2018

⁹ Kanad Bagchi "Decriminalising Homosexuality in India as a Matter of Transformative Constitutionalism" Sep 9 2018 <https://verfassungsblog.de/decriminalising-homosexuality-in-india-as-a-matter-of-transformative-constitutionalism/> March 9 2019 9:43 A.M IST

He tried to apply ‘transformative constitutionalism’, to end gender biasness from the society; in accordance with constitutional goals. He interpreted Article 25 in the light of constitutional morality of the Constitution, which fundamentally deals with the *individual’s* freedom of religion. In his interpretation, he argues that entering the Sabarimala shrine is a part of Article 25 the individual woman’s fundamental right “to profess, practice and propagate religion”.

Thus, denial of rights to worship to any particular section within a religion or denomination could amount to a violation of Article 25. Prohibiting women between the ages of ten and fifty from entering Sabarimala, therefore, amounts to a violation of their freedom of religion. This interpretation of freedom of religion under Article 25 transforms in one fell swoop a provision that has often been used by religious groups to preserve unjust discriminatory practices into a weapon of reform and transformation. In her dissenting judgment, Justice Indu Malhotra gives preference to group rights in the centre of constitutional morality. She interpreted constitutional morality on the basis of principle of “secularism”, and non-intervention; where ‘judicial restraint’ must

be observed in religious matters. Constitutional morality, in her account, is not geared to a transformative project. Reform and change are none of the constitution’s business¹⁰. *In earlier cases* judges adopted a cautious approach leaving it to the followers of a religion to determine what its essential practices were¹¹. Over the next few decades, however, the judiciary came to adopt a more rigorous standard paving way for transformative constitutionalism.

Shayara Bano v. Union of India¹²

In the above case, the judiciary has tried to play a role of reformer rather than transformer by declaring triple *ṭalāq* as unconstitutional by majority of 3:2. However, two judges of the bench said that the practice does actually form an essential part of the religion of Muslims and therefore observed that they cannot interfere in the present matter as it is being protected by Article 25. The Court further stated that the Muslim Personal Law (Shariat) Application Act of 1937 does not constitutionally protect practices deemed “anti-Qur’anic,” and asserted that the practice of triple *ṭalāq* cannot be protected under the Indian Constitution. In support of its opinion, the Court cited global advances in Islamic

¹⁰ Arjun Sengupta, “The Sabarimala Verdict: Whose Morality, Whose Freedom?”, [https:// www. newsclick. in/ sabarimala-verdict-whose-morality-whose-freedom](https://www.newsclick.in/sabarimala-verdict-whose-morality-whose-freedom) March 9 2019 8:38 A.M IST

¹¹ See *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt (1954)*, but also *Durgah Committee, Ajmer v. Syed Hussain Ali (1962)*

¹² WP(C) No.118 of 2016 Triple Talaq

family law in “even theocratic Islamic states” which adopted reforms.¹³

It further suggested India’s parliament “to consider legislation” for handling the issue.

Hadiya case,¹⁴ A non-Muslim woman converted to Islam and married a Muslim man. Earlier the Kerala High Court, had annulled Hadiya's marriage on imaginary apprehensions, the Court converted a simple matter of annulment of an illegal marriage into alleged Islamic propaganda and *Love Jihad on basis of apprehensions crediting the political propaganda*. On 8 March 2018, Hadiya's marriage was restored by the Supreme Court; by doing so the court delivered homilies to the fundamental right to choose a religion and marriage partner¹⁵.

In **Shakti Vahini v. Union of India**¹⁶, the court held that ‘Right to Choose Life Partner Is a Fundamental Right, Consent of Family, Community are not essential for Marriage between two Adults’. The Court also struck down social limitations against marital unions through khap panchayats and held that if it is prohibited in law, law shall take note of it when the courts are approached and no one has the authority to take law into own hands.

¹³ [https://shariasource.blog/2017/09/11/shayara-bano-v-union-of-india-etc-supreme-court-of-india-judgment-on-constitutionalism-of-triple-%E1%B9%ADalaq/March 9 2019](https://shariasource.blog/2017/09/11/shayara-bano-v-union-of-india-etc-supreme-court-of-india-judgment-on-constitutionalism-of-triple-%E1%B9%ADalaq/March%209%202019)

¹⁴ *Shafin Jahan v. Asokan K.M* CRIMINAL APPEAL NO.366 OF 2018(Arising out of S.L.P.(Crl.) No.5777 of 2017)

¹⁵ Satya Prasoan, Disha Chaudhry & Jai Brunner “10 cases that shaped India in 2018”, March 1 2019 <https://blog-iacl-aidc.org/2019-posts/2019/3/1/10-cases->

Thus, Judiciary demonstrated the manner in which it can act as a catalyst for transformative Constitutionalism.

Transformation involves a disruption of the existing social structures.

In **Joseph Shine v. Union of India**¹⁷, the Supreme Court held Section 497 of IPC and Section 198 (2) of CrPC to be violative of Articles 14, 15(1) and 21 and therefore unconstitutional. The Supreme Court struck down Section 497, IPC that criminalised adultery for man in case of absence of consent but not for woman. This archaic law was struck down as it was held to be discriminatory, arbitrary and violative of a woman's dignity and agency¹⁸.

In **Puttaswamy & Anr. v. Union of India**¹⁹, the judgment has established that privacy is a constitutionally protected right which emerges from Article 21 of the Indian Constitution. The court held that the absence of an express constitutional guarantee of privacy does not necessarily warrant that there is no protection of privacy under the framework of protected guarantees under Article 19 and 21. The Court further

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¹⁶ (2018) 7 SCC 192

¹⁷ 2018 SCC OnLine SC 1676.

¹⁸ See Sowmithri Vishnu v. Union of India *But also* Rupesh v. Charandas, 2018 SCC OnLine Bom 6292

¹⁹ WRIT PETITION CIVIL NO 494 OF Decided :24 August 2017 *But also See MP Sharma (1954) and Kharak Singh (1963)*

cautioned that privacy is not an absolute right, Thus, an invasion of privacy must be fulfilled on the basis of a law which stipulates a procedure which is fair, just and reasonable.' He further said that an invasion of life or personal liberty must meet the following:

- legality, which postulates the existence of law;
- need, defined in terms of legitimate state aim; and
- proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

The present judgment has re-shaped the ambit of fundamental rights through transformative constitutionalism. It is time for the Indian government to revisit its data protection mechanism, by balancing individual's right to privacy and the interests of the state.²⁰

In *Navtej Johar & Ors. v. Union of India*²¹, the Supreme Court **declared Section 377 of the Indian Penal Code to be**

unconstitutional as far as it penalizes consensual sexual relationships between same-sex adults. The judgment has, in effect, decriminalized homosexuality in India; by reading down provisions of an archaic law introduced in 1860, and upheld the constitutional rights of all citizens, irrespective of their gender identity or sexual orientation²². The rights to equality, dignity and liberty of LGBTI individuals were upheld, rejecting majoritarian notions of morality. This idea of a transformative Constitution was observed in the judgment, complementing the idea of a progressive realization of rights for the LGBTI community. The judgment gave preference to constitutional morality over social morality and norms, and ensured that the lives of LGBTI citizens were not pushed into obscurity by a repressive, colonial law. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored²³." Similarly, in other cases also Judiciary has tried to strike a balance in constitutional morality and social morality

²⁰ Nidhi Singh, "Defining the Right to Privacy in India in light of, Justice KS Puttaswamy & Anr. v. Union of India (2017)" (OxHRH Blog, 5 October 2017) <<http://ohrh.law.ox.ac.uk/defining-the-right-to-privacy-in-india-in-light-of-justice-ks-puttaswamy-anr-v-union-of-india-2017>> March 10 2019 4:41 P.M IST

²¹ [(2018) 10 SCC 1];

²² Ajita Banerjee, "Transformative Constitutionalism: Indian Supreme Court Upholds Constitutional Morality by Reading Down Section 377" (OxHRH Blog, 28 September 2018)

<<http://ohrh.law.ox.ac.uk/transformational-constitutionalism-indian-supreme-court-upholds-constitutional-morality-by-reading-down-section-377>> March 9 2019 8:10 .M IST

²³ Vivan Eyben "The section 377 judgment has also brought in Transformative constitutionalism" 07 Sep 2018 <https://www.newsclick.in/section-377-judgement-has-also-brought-transformative-constitutionalism> March 9 2019 9:50 A.M IST

through its judgments and headed on towards 'transformative constitutionalism'.

State Of Maharashtra & Anr v. Indian Hotel & Restaurants Assn. & others etc.etc²⁴

The case was before Supreme Court against ban on dance bars by Government of Maharashtra in the name of social morality. The then Chief Justice of India Altamas Kabir and Justice SS Nijjar sympathetically commented on the plight of the dancers: "Depriving a person of their right to dance and earn a livelihood violated the fundamental right to freedom of speech and expression and most importantly, violated Article 21, the right to life, which includes the right to livelihood. The courts cannot endorse such blatant injustice towards women who are at the lowest rung of the dance bar industry... Even a bar dancer has to satisfy her hunger, provide for her family and meet her day-to-day expenses." The Supreme Court also struck down a condition by which dance bars could not be within the radius of one km from an educational institution or a religious place as unreasonable²⁵

Critical appraisal of role of judiciary in transforming constitutionalism

The values that are identified as fundamental by the Judiciary in administering justice are considered as judicial values. The courts being the intermediately between the people and the other organs of the state, is vested with power to scrutinize legislation and administrative actions on the anvil of the constitution and the law in matters brought before him.²⁶ Since the time of independence the Indian judiciary has transformed itself from a weak organ to the most powerful one, by applying its creativity, judiciary has justly and fairly handcuffed the elements that are detrimental to Constitutional morality and judicial values. All the three organs of government are equally important to protect the constitutional spirit. Yet the role of Judiciary is more crucial than others as it holds the responsibility of interpreting and protecting the constitution. In doing so the judges have to interpret the constitution liberally and at the same time they have to exercise power of judicial review in order to undo past social-injustices. The judiciary has fairly adopted pragmatic approach in cases brought before it according to changing nature and needs of the society. Yet in some cases, biasness or political confrontation is

²⁴ CIVIL APPEAL NO.5504 OF 2013

²⁵ Priyanka Mittal, Abhiram Ghadyalpatil, "*SC order gives Maharashtra dance bars fresh lease of life*"

Updated: 18 Jan 2019, 08:58 AM IST [https:// www.livemint.com/Home-Page/w4wug1AgOThCXBjoWUfrZM/SC-relaxes-stringent-](https://www.livemint.com/Home-Page/w4wug1AgOThCXBjoWUfrZM/SC-relaxes-stringent-restrictions-on-Maharashtra-dance-bars.html)

[restrictions-on-Maharashtra-dance-bars.html](https://www.livemint.com/Home-Page/w4wug1AgOThCXBjoWUfrZM/SC-relaxes-stringent-restrictions-on-Maharashtra-dance-bars.html) March 10, 2019 9:02 A.M IST

²⁶ Minu Elizabeth Scaria, "*Constitutional Morality and Judicial Values*", [http:// www.legalserviceindia.com/article /1186-Constitutional-Morality-And-Judicial-Values.html](http://www.legalserviceindia.com/article/1186-Constitutional-Morality-And-Judicial-Values.html) March 10 2019 9:10 A.M IST

witnessed especially though temporarily on basis of caste as in Hadiya's case. Sometimes social morality is ignored in upholding constitutional morality as in case of Sec 377 Judgment. Sometimes judiciary through its judgments tries to usurp the powers of other organs of government by rewriting the Constitution by giving innovative interpretations of the Constitution or by suggesting considering legislation as in Shayara bano case.

Conclusion and Suggestions

India is a pluralistic society whereby various social groups despite cultural variations co-exist in peaceful harmony. Many a times owing to peaceful ignorance the people are seldom bothered about their constitutional rights and legal rights. Since ages, many types of social discriminations were willfully accepted by society in the name of social morality. Though constitution guarantees certain basic fundamental rights essential for human existence; the courts earlier used to go by strict interpretation of constitutional law. However, the trend is shifting, instead of 'strict interpretation' the courts are interpreting in a liberal manner with positive and pragmatic approach towards goals of

constitutional morality; by way of transformative constitutionalism. Thus, now it is clear that in the context of transformative constitutionalism, the judiciary enjoys a pivotal position given the prominence of the law and its constitutional mandate to interpret and enforce fundamental rights. Hence, it is suggested that, judges in the context of transformative constitutionalism must be more pro-active in realizing the purpose of constitution through pragmatic approach but while doing so equilibrium needs to be maintained between constitutional morality and social morality as well as religious morality. If the transformation comes in the society from within it will be readily acceptable rather than the one through legal regime. Judiciary must not try to overreach its sphere by judicial adventurism merely for promoting political agenda as in Hadiya's case. Rather judiciary needs to build faith among people that constitutional morality is being given preference over social morality for the purpose of upliftment of society for protection of right to equality, freedom from discrimination and not as an encroachment on one's personal laws as in case of 'Sabrimala' and 'Shaya Bano' case.

“When you speak of transformative constitutionalism, you speak of infusion of the values of liberty, equality, fraternity and dignity in the social order”.

- Justice Chandrachud