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ADOPTION OF TRANSFORMATIVE CONSTITUTIONALISM IN THE INDIAN CONTEXT: AN ANALYTICAL STUDY THROUGH VARIOUS CASES

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ABSTRACT

The constitution is referred to as the 'living law of the land' since it is altered to suit changing circumstances and needs. The spirit of the constitution is still alive due to the judiciary's active role. The constitution tends to embody the ideals, aspirations and values that the people have committed in addition to illustrating how state organs interact and their range of authority. It captures the essence of the country and unwavering will of the people. Because of this, the constitution is regarded as a living text that contributes to the development of democracy. The fundamental tenet of Indian constitutionalism is to give the state the authority to bring about social change. The advancement of transformative constitutionalism sets the way for a stronger defense of fundamental liberties and rights. Disruption of the current social system is part of transformation. By instilling the virtues of equality, liberty, fraternity and dignity, transformative constitutionalism seeks to transform society. To achieve this means is to carry out the constitution's fundamental goal, which is to improve society. One way to think about it is that it attempts to prioritize morality as it is stated in the constitution over morality as it is practiced in larger society. Another way to look at it is that while the constitution's fundamental principles and structure can never change. It still makes adjustments to meet societal demands. The concept of transformative constitutionalism is explored in this Art. along with its implications for the determination of fundamental freedoms and rights.

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In this paper, the necessity of a transformative constitutionalism for the determination of rights is analyzed with reference to various judgments.

KEYWORDS

Constitution, constitutionalism, transformative constitutionalism, fundamental rights

1. INTRODUCTION

The term '*transformative constitutionalism*' refers to the idea of using constitutional measures to bring about change in the social and political institutions of the society. To amend the scars of the past and lead us to a better future is the central tenet of such transformation². According to Karl Klare, "*transformative constitutionalism*" is a long-term constitutional enactment, interpretation and enforcement project aiming at changing a nation's social structures in order to right historical wrongs³. In the context of India '*transformative constitutionalism*', may refer to the constitutional enactment process that gave shape to the transformative vision of Indian constitution with the intention of improving the lives of Indians by redressing the injustices they had experienced in the past. This Art. goes on to analyze the implementation of transformative constitutionalism in the Indian context.

2. CONSTITUTION AND CONSTITUTIONALISM

Constitution is the fundamental law of the land. It establishes the framework for establishing fundamental political principles, functioning and responsibilities of governmental institutions, as well as the fundamental freedoms, fundamental rights, guiding principles, and

² Langa, 2006 p.352.

³ Klare, 1998, p. 146.

obligations of citizens. This framework must reflect the will of the people, and as a result it must have been developed by consensus.

According to Michael Rosenfeld, “*there is no accepted definition of constitutionalism but broadly modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law and the protection of fundamental rights*”.

A democratic system requires the philosophical foundation of constitutionalism. It makes sure that the individual's freedoms comes first and the state doesn't infringe on the citizens freedom it makes sure that the scope of the government is constrained and stops it from changing the democratic system into an authoritarian one. Constitutionalism is an evolutionary school of thought. But a limited government is what constitutionalism emphasizes as its main tenet. While acknowledging the necessity of government, constitutionalism also insists on limiting its power.

Now, with assistance of many provisions of the constitution, it is possible to examine whether or not constitutionalism is present in India. Rule of law, preamble, separation of powers, judicial review are few provisions that can be used to analyze the presence of constitutionalism. There is no exhaustive list of characteristics that can be used to determine whether constitutionalism is valid or even exists, but every characteristic that restricts the power of the executive branch and helps to establish a position of sovereignty in accordance with fundamental constitutional principles may be a significant point in favor of constitutionalism.

a) Landmark Judgments regarding implementation of Constitutionalism

In *L. Chandra v. Union of India*⁴, the Apex court outlined the judicial review process and asserted that it is important to ensure that the

⁴ *L. Chandra v. Union of India* AIR 1997 SC 1125.

law is consistent with the constitution when it is being interpreted. This specific instance underlines the demand for consistency.

It was argued that the amendment should not be recognized legal in the case of *Shankari Prasad v. Union of India*⁵, because it violates the part three of the Indian Constitution. The Supreme Court argued that the Art. 368 give the legislative branch the authority to alter any provision of the Constitution including the fundamental rights. Here, the court exercised its judicial review authority.

Similar to this, in the case *Sajjan Singh v. State of Rajasthan*⁶, the Court adhered to the rule set forth in the *Shankari Prasad v. Union of India* ruling that the parliament has the authority to amend the constitution under Art. 368. However, in the case of *Golaknath v. State of Punjab*⁷, the court reversed their ruling after a new challenge to the modification in Sajjan Singh's case was made. This time, the court ruled that only the mechanism for amending not the power for the parliament is set forth in Art. 368.

b) The Difficulties Judiciary has in Upholding Constitutionality

The Indian Supreme Court has enlarged the areas wherein it can influence public policy and administrative practices, although it is fully cognizant of the limitations on its power. The judiciary is essential to transformative constitutionalism because our current state is the consequence of billions of years of evolution and because our laws must change as people's moral, social, and economic ideals do as time goes on. Since it has been decriminalized in several countries, including India, LGBTQ+

⁵ *Shankari Prasad v. UOI* AIR 1951 SC 455.

⁶ *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845.

⁷ *Golaknaath v. State of Punjab* 1967 AIR 1643, 1967 SCR (2) 762.

people's rights may no longer be guaranteed by the constitution in five years. since was unethical before, but now since constitutionalism operates for and by the people, it is moral. In such circumstances, the judicial branch may issue judgements and pass new legislation. All of this was taken into account by the Supreme Court of India in its decision in the matter of the *State of Kerala v. A. Lakshmi Kutty*⁸, of which ruled that the judges possess a special responsibility to prevent themselves from adopting an overly activist stance and to make assured they stay out of the realms reserved for the other two spheres of government.

3. TRANSFORMATIVE CONSTITUTIONALISM

In general transformative constitutionalism refers to the use of the law to advance non-violently, a fundamental social change. Karl Klare introduced the phrase “*transformative constitutionalism*” in 1998. Transformative constitutionalism is one that enacts new legislation in place of older legislation in order to bring about drastic change. This could also indicate that the statute or constitution has a transformational aim, that is, that a change in the law is made with the intention of having a transformative impact on its area of application rather than a change in the legislation's actual content. There are various components of the Indian Constitution that are frequently said as to transformative. Thus, it is possible to state that transformative constitutionalism envisions a process for bringing about social change from an unjust past to a democratic future utilizing the constitution as a vehicle to accomplish this goal.

India has to contend with social evils including untouchability, caste discrimination, gender inequity and prejudice towards the LGBTQ+ community in addition to colonialism. It has been widespread throughout India since the beginning of time. A new social and political order founded

⁸ *State of Kerala v. A. Lakshmi Kutty* 1987 AIR 331.

on democratic principles was intended to replace and transform India's colonial past throughout the process of creating its constitution. The Indian constitution was written as a moral autobiography, promising a fresh start outright denouncing the country's colonial heritage. The Indian constitution's various clauses serve as examples of its revolutionary intent. People's ideals for liberty, equality, fraternity and justice are expressed in the preamble. It creates a socialist, democratic and a secular state. The fundamental rights, which include the principles of equality, non-discrimination, freedom of speech and expression, mobility and association, freedom of religion and personal liberty are outlined in part 3 of the Indian constitution. Additionally, it eliminates feudal titles and untouchability. Thus, the constitution contains an underlying desire to build a new social order through the use of political authority. Indian constitution was designed to break social hierarchies and usher in a new era of liberty, justice and equality. For the lower classes, who aspired to experience equality in society after its adoption, it was a revolutionary time.

a) Origin of Transformative Constitutionalism

The idea of transformative constitutionalism is not new. It is actually a fairly old idea that originated in South African law. After Karl Klare, a professor from the United States, published his Art. in the South African Journal of Human Rights in 1998, many legal experts took note of the idea and it became the subject of numerous discussions and disputes. He defined transformational constitutionalism as a long-term effort enacting, interpreting and upholding the constitution. He added that this idea is dedicated to democratically reforming a nation's political and social structures, egalitarian orientation and power dynamics⁹.

⁹ Karl Klare, 1998, Legal culture and transformative constitutionalism, South African Journal on Human Rights, 14:1,146-188a.

b) Analysis through various cases

Justice K.S. Puttaswamy v. Union of India¹⁰

In the landmark case of *ADM. Jabalpur v. S.S. Shukla*¹¹, four of the five judges concluded that every aspect of the right to life granted by Art. 21 of the Indian Constitution—which was enforced by Indira Gandhi under the congress regime—could be temporarily revoked in times of crisis. Despite the disagreement of the fifth judge, Justice HR. Khanna, a bench consisting of nine judges of the Apex Court held in its decision of *Justice K. S. Puttaswamy v. Union of India* that individual privacy is unquestionably a basic right under the purview of Art. 21 of the Indian Constitution. Khanna's disagreement was finally resolved after 41 years, and it was later proven that he was right, even after the proclamation of emergency or by suspension order of the President, the fundamental right to life under Art. 21 cannot be suspended.

Kesavananda Bharati v. State of Kerala

The issue of whether or not the parliament has the authority to modify the constitution was the subject of a protracted discussion. Cases like *C. Golaknath and Ors v. State of Punjab and Anr*¹², *Indira Gandhi v. Shri Raj Narain and Anr*¹³ and *Bhim Singh v. Union of India and Others*¹⁴ were handled by the Apex Court. In the process of drafting the 24th and 42nd amendments to the constitution, the scope of judicial review was also discussed. In the case of *Kesavananda Bharati v. State of Kerala*¹⁵, this argument was eventually resolved. The basic structure doctrine was

¹⁰ *Justice K. S. Puttaswamy v. Union of India* AIR 2017 SC 4161.

¹¹ *ADM. Jabalpur v. S. S. Shukla* 1976 AIR 1207.

¹² *C. Golaknath and Ors v. State of Punjab and Anr.* 1967 AIR 1643.

¹³ *Indira Gandhi v. Raj Narain and Anr.* 1975 AIR 2299.

¹⁴ *Bhim Singh v. Union of India and Ors.* 19 (1981) DLT 446.

¹⁵ *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

established and it was declared that while the Parliament could change the constitutionally guaranteed fundamental rights, its core design should be retained and protected as it is.

National Legal Services Authority v. Union of India

The *NALSA v. Union of India* judgement¹⁶, one of the Apex Court's most important decisions, was the initial attempt to publicly acknowledge non-binary sexual orientations and preserve the basic rights of transgender individuals in India. Additionally, the judgement advised the state as well as the federal governments to take responsibility in safeguarding transgender people's rights. Despite the fact that the word transformational constitutionalism is not formally used in the Indian constitution, the Supreme Court observed the capability in its 2014 NALSA verdict. The role of the judiciary is to grasp the constitution's main idea and intended use for the benefit of society. Our Constitution is a living organism, much as social legislation. It bases itself on an ever-evolving social and factual reality.

There are occasions when a shift in the law comes before or even aims to spur societal change. Occasionally, social reality leads to switching in the legislation.

Navtej Singh Johar v. Union of India

Section 377 of the Indian Penal Code, 1860, declared all intimate relationships between two adult individuals of the same sexual orientation, regardless of the fact that it was acknowledged or not, to be against the law prior to the Navtej Singh case. The aforementioned provision was challenged by the petitioner in this case on the rationale in which it contravenes the Art. 14, 21, and 15 of the Constitution of India. It is claimed that this assertion is

¹⁶ *National Legal Services Authority v. Union of India* AIR 2014 SC 186.

supported by the Court's perceptions that the term "sex" under Art. 15 incorporates a person's sexual orientation. In addition to this the Supreme Court reiterated the protection of rights of the LGBTQ+ group in the present instance and switched its verdict in *Suresh Koushal v. Naz Foundation*.

Joseph Shine v. Union of India

Another important ruling that interpreted Art. 21 of the constitution and decriminalized adultery. A previous version of the Indian Penal Code, 1860, Sec. 497, made adultery a crime. A guy who engaged in sexual activity with a married woman without her husband's consent was punished under that specific section. Because it was silent about a married woman's permission, this section was considered to be arbitrary and discriminatory and was therefore overturned.¹⁷

Indian Young Lawyers Association v. State of Kerala

The petitioners brought this issue before the Apex Court as a Public Interest Litigation regarding the restriction on menstruation women entering the Sabarimala Shrine. This restriction, it was claimed violative of Art. 14, 15, 17, 25 and 26. The Court ruled that women of all ages are permitted to attend the temple while assuming the role of constructive interfering with religion.¹⁸

c) Transformative Constitutionalism and Recent Decisions

Xxxxxxxx v. State of Kerala¹⁹

This instance highlighted the suffering two individuals went through while cohabitating. A court battle involved a single mother's estrangement, the biological father's rights, and her love

¹⁷ *Joseph Shine v. Union of India* 2018 SC 1676.

¹⁸ *Indian young lawyers association v. State of Kerala* 2019 11 SCC 1.

¹⁹ *Xxxxxxxx v. State of Kerala* W.P.(C) No. 4262 OF 2022.

for her own child. Anitha, a Hindu, and John, a Christian, fell passionately in love and began to reside apart from the residences of their parents. The birth registration document for the child that she gave birth to had the mother's and the father's names. The case's resolution and important judgement were both based on this birth certificate. Shortly after a while, he seemed broken up with her and moved to Karnataka to begin working on a Malayalam film.

The applicant undertook repeated unsuccessful attempts to contact Him. Out of despair she loneliness, she turned to the child welfare committee, gave them custody of the infant, and signed a deed of surrender permitting the committee to place the child for adoption. Later, Kerala High Court received a writ of habeas corpus. The court therefore extended parental rights and a child's right to preserve his biological parents' identities by applying its interpretation of Art. 21 of the Constitution of India. This is an example of transformative constitutionalism where the right to life has been used to protect the fundamental rights of a kid born out of a relation where both parties live together. Additionally, the court highlighted the legality of a live-in relationship between couple.

Vineeta Sharma v. Rakesh Sharma²⁰

History was changed by the court's decision that both the daughter and the son should be granted coparcenary rights under section 6 of the Hindu Succession (Amendment) Act, 2005. All girls born prior to the amendment now have full coparcenary rights. This important judgement highlights how denying a daughter the chance to participate in coparcenary ownership would be equivalent to denying her fundamental right to equal treatment under Art. 14 of the Indian Constitution.

²⁰ *Vineeta Sharma v. Rakesh Sharma* 2020 9 SCC 1.

4. CONCLUSION AND SUGGESTIONS

Without the judiciary's ongoing support and commitment to bring about meaningful social change, transformative constitutionalism cannot be achieved. In addition to the court, individuals have a critical role in bringing about a fundamental change in the constitution that is in line with the demands of the contemporary situation. Recognizing our ideals and rights while also being mindful of others rights is the first step towards doing this. The evolution of our fundamental rights must continue in a society where maintaining the essential framework of the living constitution is of highest importance in order to keep the social transformation wheel turning.