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Transformative Constitutionalism as on Constitutional Vision

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ABSTRACT

Constitution subject to amendment under Article 368 of The Constitution of India, 1950. The basic foundation of constitution determines the constitutionalism. The amendment subjects to transfer the constitution based upon the transferring constitutionalism. But, Other than parliament the Judiciary with the absolute power under the Constitution enabled to struck down any part of law which is unconstitutional, based on the cases adjudicated by it. The Subjective matters of adjudication conferred with the personal law that decision which further applies to the whole territory of the nation as a binding nature as conferred under Article 141 of the Constitution of India, 1950. The Judicial activism enhance to act as the societal changes conferred as amounts to the Transformative Constitutionalism used the Judiciary as a tool to shift the legal enactment, this further elucidated by adjudications.

Keywords: *Constitutionalism, Judicial activism, Personal rights.*

I. INTRODUCTION

As the constitutionalism is a political sprit or philosophy and it revolves around a political process, when it overlaps with democracy it seeks balance between the state power and individual and collective rights. This constitutionalism needs to transform as the changes occurred in society. This also clarifies that updating the needs of the society. The objective of the independent India was dealt in preamble (was stated in case of Keshavanadha Bharathi). Though the destiny was also changed for the need of the society changed. This essay specifically dealt with the judgements which governs the transformative constitutionalism. The ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution.

II. TRANSFORMATIVE CONSTITUTIONALISM

- Transformation is the diametrical term which opposed something static or stagnant, rather it signifies the change or ability of metamorphose. And the term constitutionalism is the soul of the constitution which it constituted. Constitutionalism is commonly understood to be the idea that there are legal restraints on the exercise of political

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authority. The idea conveys limits on the state action and conformity with the constitution, becomes a guiding principle. The concept of transformative constitutionalism like a pledge or promise and thirst to transform the society as to embrace the letter and spirit of our Indian society which set the objective in the preamble of our Constitution, ideals of justice, liberty, equity, and fraternity. The view of transformative constitutionalism can be understood by recognizing the realities of the current day and in pragmatic angle. The concept of transformative constitutionalism which is the actuality with regard to the Indian constitution as the ability of Constitution to update or transform as to changing needs of the time is a matter of fact. It is this ability of Constitution to transform which gives it the character of a living and organic document. A Constitution continuously shapes the lives of citizens in particular and societies in general. Its exposition and energetic appreciation by constitutional courts constitute the lifeblood of progressive societies.

- The transformative constitutionalism could not come at a more opportune time. It can be enabled with the following objectives the constitution is a problematic document which more confer with the transfer of the power fundamental transformation of social and legal structure. Though, 75% of the constitution transfer from the Government of India Act, 1935 setting west minister system of parliamentary democracy and one more thing was the retention of power to pass ordinance without legislative power which were retender and use as in 1935 Act. As the narrow contest of interpreting the constitution, as the constitutional interpretation must be context in the framing of constitutional text which has the more influenced for judicial interpretation. In this controversial society the problems which are mainly facing the gender-based discrimination, community faith and the other norms like controversies which mainly dealt with the transformation of constitutionalism concepts.
- The reasons for why the constitution to be the transformative document is because of the following points as the constituting period of Indian Constitution which influenced of Britain powers and laws enacted by the English under the colonial rule. During this colonial rule the individual rights and freedom which were restricted by the enacted laws of before independents to show the dominancy of over the Indians. Our Indian Constitution also influenced by the English system by the doctrine and principles. The constitution transformed the relationship between the individual and state from colonial rule and their subjects to citizens of a Republic with full panoply of civil and political rights. The reconstruction of the state and the society itself a reason for this

transformation. This reconstruction was sought to be achieved by restriction put on the private individuals must deal with each other. These restrictions like the prohibitions of access of public road or any common place, abolition of untouchability and prohibition of forced labour. Then it needs to heed the constitution text when using for the broad sense of justice. The project of transformative constitutionalism which operate within the confines of textual and structural constraints. This approach helps to permit an expansive reading of fundamental rights as textual in Articles. The role of the court also plays a vital role which independent to the democratic quotes. The courts especially Apex court to have a view on the value of equality, liberty, fraternity in capacious vision.

- The purpose of having a constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.

III. SCHOLARS VIEW

Our constitution marks a vision of social transformation. It marks a break from the deeply divided past society and the resting social prejudices, subordinations and discriminations which are destroying the dignity of the individual to the future true emancipator vision in nature.

In the view of Prof. Rajeev Bhargava, University of Delhi, points out that Indian Constitutionalism was designed to break the Shackles of traditional hierarches and to user in a new era of freedom, equality and justice. His view on the Indian constitution as the breakthrough of the constitutionalism as the Indian constitution deprives of the rationale for existence not only by disempowering people in people but also by the empowering those who have been traditionally deprived of power.²

In the book of “Constitutional Justice” Professor Guru Gopal, University of Delhi, who state his view on transformative document, with certain apprehensions. He points out that Indian Constitution contains several provisions that could be seen as a definite step forward in creating the background conditions for the realization of social revolution. At the cultural and social level, the Indian Constitution has abolished all feudal titles, facilitating the cultural elevation of those whose worth was withered down to the roots.

Prof. Guru points out that the Constitution of India does not empower the state to intervene in market-driven humiliations. It has failed to penetrate the inner cultural/ moral self of the upper castes. This leads to tension between moral and legal rights. Guru points out that this tension is internal to the constitutional understanding of untouchability which is defined exclusively in

² *Outline of Political Theory of the Indian Constitution* in Politics and Ethics of the Indian Constitution. New Delhi: Oxford University Press authored by Prof. Rajeev Bhargava.

terms of those castes which were considered as defiling. Thus, it fails to capture the site of its source that is the upper castes. The right to be touched falls in the moral realm in which it is entirely up to a upper caste person whether to accede the moral/ cultural need of a untouchable. The Indian Constitution is unequipped to generate the moral vocabulary of love, care and concern. The constitutional provisions are insufficient for achieving cultural goods like recognition and dignity.³

Prof. S.K. Chaube points out the though the Indian Constitution is based on the concepts of equality, freedom and secularism; these concepts were achieved by Europe by 1848. Social revolution at the time of making of Indian Constitution (1948) should have been of a different content than the social revolution in Europe in 1848. Chaube substantiates his argument by pointing to the fact that many resolutions having revolutionary potential were defeated during the process of the drafting of the Indian Constitution. The resolution moved by Masani stated, “No impediments to marriages between citizens shall be based upon differences of religion”.⁴

Christopher Jaffrelot refutes Austin’s argument that the Indian Constitution as “cornerstone of the nation” was intended to promote social transformation. Jaffrelot argues that the Indian Constitution reflects the conservative views of the Assembly, which drafted it. He argues that the Constituent Assembly was not much interested in emancipating the subaltern groups as at defusing their mobilization by making not-very-far reaching concessions. This is reflected in the debates of the Assembly regarding reservations for the lower castes. The reservation policy emanating from the Constituent Assembly Debates did not enable them to send their own representatives for Parliament and the assembly failed to define the „other backward classes“. Jaffrelot asserts that the constitutional arrangement in both these cases turned out to be less-progressive than the pre-1947 situation. He argues that the Constitution has not substantially promoted the emancipation of Dalits in terms of access to political power, notwithstanding its impact in the abolition of untouchability and reservations in educations and job quotas. In terms of political representation, the Scheduled Castes have failed to earn much from the Constitution; rather they have lost the say which the pre-independence arrangement of primary elections gave them in the designation of Scheduled Castes deputies. He points out that Nehru regretted the divisive effect of the social structure at a time when he wanted to build a strong and united India and he was not much concerned by the need to fight caste as a priority objective for achieving

³ Guru Gopal. (2008). Constitutional Justice: Positional and Cultural in Bhargava, Rajeev. (ed.). (2008). *Outline of Political Theory of the Indian Constitution* in Politics and Ethics of the Indian Constitution. New Delhi: Oxford University Press.

⁴ Chaube, S.K. (2000) Constituent Assembly of India: Springboard of Revolution. 2nd edition, New Delhi: Manohar Publications. Pg 175

social change. Nehru believed that economic modernization would eventually eradicate caste and communal feelings and overcome all those legacies of the past that had to be blamed for “backwardness”. According to him, social transformation was not to be promoted by the Indian state but rather it was expected to emanate from economic development and policies of the state.⁵

A *J Van der Walt*⁶ has metaphorically, by comparing 'constitutional transformation' to 'dancing', described the art of constitutional transformation to be continually progressive where one does not stop from daring to imagine alternatives and that the society could be different and a better place where the rights of every individual are given due recognition.

The nature of transformative features inbuilt with the constitutional teleology of social changes as focused on socio-economic rights, judicial activism, innovative legal proceedings and remedies, civil societal behavior and the rights among the private parties.

IV. JUDICIAL INTERPRETATIONS

The view of Judiciary by means of Judgments are been discussed about the Transformative Constitutionalism. Discussing judgements are,

- Navjet Johar Singh V. Union of India, 2018
- Indian Young Lawyers Association V. State of Kerala, 2018
- John Singh V. UOI, 2018

In above three cases, mainly focuses Article 14, 19, 21. These articles states about the equality, liberty, and fundamental rights of citizens. By interprets in broader sense.

1. Navjet Johar Singh V. Union of India

The writ petition was filed on 2016 for the decriminalizing Section 377 of Indian Penal Code, 1860. This code was enacted during the Queen’s period. At that time sexual relationship was meant for procreation of children and led a way to the next generation. In today’s society the sex was treated as the personal liberty this liberty can extent to choose their partner. This case referred as the transforming the natural course of sex as heterosexual to praying to the decriminalizes the Homosexual. Some of the developed and developing countries also recognize the homosexuality and the rights of LGBT.

⁵ Jaffrelot, Christopher. (2008). Containing the Lower Castes: The Constituent Assembly and the Reservation Policy in Bhargava, Rajeev. (ed.). (2008). Pg 249-250

⁶ Van der Walt, Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state, 118 (2) J. S. APR. L. 258 (2001)

The Constitution Bench is about the validity of Section 377 in its application to consensual sexual conduct between adults of the same sex. The constitutional principles which we have invoked to determine the outcome address the origins of the rights claimed and the source of their protection. In their range and content, those principles address issues broader than the acts which the statute penalizes. Resilient and universal as they are, these constitutional values must ensure with a mark of permanence.

The Supreme Court as well as other constitutional courts have time and again realized that in a society undergoing fast social and economic change, static judicial interpretation of the Constitution would stultify the spirit of the Constitution. Accordingly, the constitutional courts, while viewing the Constitution as a transformative document, have ardently fulfilled their obligation to act as the *sentinel on qui vive* for guarding the rights of all individuals irrespective of their sex, choice and sexual orientation.

In this case the argument was advanced to the permission for engaging sex of two adult person of same sex and other sexual activities, be it homosexuals or lesbians, and the ground of difference is supported by social standardization. Such an argument ignores the individual orientation, which is naturally natural, and disrobes the individual of his/her identity and the inherent dignity and choice attached to his/her being.

The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights. It ought to be remembered that the Constitution is not a mere parchment; it derives its strength from the ideals and values enshrined in it. However, it is only when we adhere to constitutionalism as the supreme creed and faith and develop a constitutional culture to protect the fundamental rights of an individual that we can preserve and strengthen the values of our compassionate Constitution.⁷

The Delhi High Court decision on Suresh Kumar Koushal & Anr. V. Naz Foundation & Ors as declared section 377 of IPC as it criminalized consensual sexual acts of adults in private to be

⁷ Navjet johar singh v. Union of India AIR 2018 writ petition 76 of 2016

violation of Article 14, 15, 21 of Our Constitution was overruled in this Judgement.

2. Indian Young Lawyers Association & Ors. V. State of Kerala & Ors.

The importance of transformative constitutionalism stated as Our Indian Constitution is marked by a transformative vision. Its transformative potential lies in recognizing its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative constitutionalism, is a recognition of change. This view demands that existing structures and laws be viewed from the prism of individual dignity. The individual, as the basic unit, is at the heart of the Constitution. All rights and guarantees of the Constitution are operationalized and are aimed towards the self-realization of the individual. This makes the anti-exclusion principle firmly rooted in the transformative vision of the Constitution, and at the heart of judicial enquiry. Irrespective of the source from which a practice claims legitimacy, this principle enjoins the Court to deny protection to practices that detract from the constitutional vision of an equal citizenship.

This case which deals with issue that the denial of entry of women of age of 10-50 because of the mere reason that the menses problem and its question under Article 15 and also 14, and 17 of India Constitution.

The Constitution ensuring the rights guaranteed to every individual, Transformative adjudication must provide remedies in individual instances that arise before the Court. In addition, it must seek to recognize and transform the underlying social and legal structures that perpetuate practices against the constitutional vision. Subjecting personal laws to constitutional scrutiny is an important step in this direction. Speaking of the true purpose of liberty, Dr B R Ambedkar stated that “What are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights.”⁸

Practices, that perpetuate discrimination on the grounds of characteristics that have historically been the basis of discrimination, must not be viewed as part of a seemingly neutral legal background. They have to be used as intrinsic to, and not extraneous to, the interpretive enquiry. The case before us has raised the question of whether it is constitutionally permissible to exclude women between the ages of ten and fifty from the Sabarimala Temple. In the denial of equal access, the practice denies an equal citizenship and substantive equality under the Constitution. The primacy of individual dignity is the wind in the sails of the boat chartered on the

⁸ Parliament of India, Constituent Assembly Debates, Vol. VII, at page 781

constitutional course of a just and egalitarian social order.

In this case, fused stated to illustrate which be prevail the customary practice and the constitutional rights in the faith aspects. As per the preamble, India is a secular state, the issues upon the religious and faith of the citizens was not interpreted by the law. Though the secularism exercised the fundamental rights need to give every citizen in every matter. The biological issues of a woman were not a reason to check their purity.

This also overlooks the wide ambit that was to be attributed to the term 'laws in force' having regard to its inclusive definition and constitutional history. As H M Seervai⁹ stated that

“There is no difference between the expression “existing law” and “law in force” and consequently, personal law would be “existing law” and “law in force ...custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them.” The decision in **State of Bombay V. Narasu Appa Mali**¹⁰, in immunizing uncodified personal law.

The learned Chief Justice rejected the contention that personal law is ‘custom or usage’ stated that “Custom or usage is deviation from personal law and not personal law itself. The law recognizes certain institutions which are not in accordance with religious texts or are even opposed to them because they have been sanctified by custom or usage, but the difference between personal law and custom or usage is clear and unambiguous.”

Learned Justice Gajendragadkar’s opinion was differed from the Chief Justice’s view that custom or usage falls within the ambit of Article 13(1). According to Justice Gajendragadkar, ‘custom or usage’ does not fall within the expression ‘laws in force’ in Article 13(1).

From this statement from the learned Judges the customary laws were not come under the Article 13 of Our Indian Constitution. Hence the customary law was not prevailing than the fundamental rights.

3. Harsh Mander & Anr. V. Union of India & Ors¹¹

In this case, Bombay Prevention of Begging Act, 1959 extended to the territory of Delhi and a writ petition was filed to examine the validity of this Act. In my knowledge that the law enacted by the legislative assembly which cannot be questioned by any of the court. But in this case the court examined the validity of this Act under the purview of judicial review. Hence the question of judicial reviews itself as the transformative of constitutionalism. This review was been placed

⁹ H M Seervai, Constitutional Law of India, Vol. I, at page 677

¹⁰ AIR 1952, Bom

¹¹W.P.(C) 10498/2009 & CM APPL. 1837/2010 decided on 8th August 2018

under the question of constitutionalism. And the court held that Bombay Prevention of Begging Act was Unconstitutional.

4. Supriyo @ Supriya Chakraborty & Anr. V. Union of India¹²

The societal condition of marriage which shifts from the practice of sati to the recognition of transgender marriage till now. This spirit of legal relationship dilemmatic shifts based on the subject of westernization. This shift acknowledges the enhancing rights discussed under the legal recognition of LGBTQ+, if this legal authentication permits then the right to adoption have to granted. This circumference questioned the personal liberty of a couple and the sensitization of child in marginalized society. The pure view of Judiciary in the context of interpretation under Article 21 of The Constitution of India amalgamates the interest effectuate with the implication of private interest associate with the personal liberty.

V. CONCLUSION

The active part of judiciary in the context of Transformative constitutionalism to exercise the function when the constitutionalism on the deciding matter have been undeterminable. This enumerates the transformative constitutionalism with the help of case judgments. Other than this the judicial over ride necessary to prevail or not the judges have the power to interpret the laws not to write the laws. The loops and lacunas of legislative prevails should be subject with the interpretation of the juridical enhancement in interest of societal changes. This institutes the transformative justice towards the enhancement of collective liberty.

¹² W.P (C) 1011/2022 Decided by decided on 17th October 2023.

VI. REFERENCES

- Alisha Dhingra's article on 'Indian Constitutionalism: a case of Transformative Constitutionalism'. Published on Asian Journal on Multidisciplinary studies (2014).
- Gautam Bhatia's book on 'Transformative Constitutionalism' –could have come at a more time. (2019 feb)
- Indian Kanoon for Judgments.
