



Transformative Constitutionalism: A Conceptual Journey from South Africa to India

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Abstract : Transformative constitutionalism is based on the fundamental goal of transforming society for the better, i.e., making it more progressive and inclusive, and this aim is a fundamental pillar of transformative constitutionalism. When it comes to realizing constitutional goals, transformative constitutionalism takes a rational approach that prioritizes protecting individuals' fundamental rights and freedoms. Transformational constitutionalism is built around the judiciary because it places faith in the law as a tool for social and political change. As a result, courts act as catalysts for change because they have the authority to interpret and apply the law, which makes them the most important element of the system. South African jurisprudential experience was the first to draw the attention of legal scholars to the concept of Transformative Constitutionalism, which emerged as a result of that experience. In South Africa's case, the desire to right historical wrongs from the apartheid era played a role in the country's acceptance of the concept of Transformational Constitutionalism. In the Indian constitution, various provisions are used to demonstrate the constitution's transformative intent. Liberty, equality, fraternity, and justice are some of the aspirations of the people expressed in the Preamble of the Constitution.

IndexTerms – Constitutionalism, Transformative, Constitution, Fundamental Rights, Supreme Court

I. INTRODUCTION

A constitution is a document that embodies the will of the people in which they have expressed themselves. It establishes the fundamental framework for describing fundamental political principles, as well as the structure, powers, and responsibilities of the various government institutions. This framework expresses the will of the people while also defining the powers and limitations of the various government organs and agencies. In the event when the government acts arbitrarily in the exercise of its powers, limitations can indeed be imposed on the exercise of those powers, for which the judiciary has an important role to play through the practice of constitutionalism. Constitutionalism refers to the concept of limited government or the restriction of the exercise of arbitrary powers by the government. Constitutionalism recognizes the necessity of a powerful government, but it also recognizes the need for reasonable restrictions to prevent abuse of power.

The mere fact that a country has a constitution, does not imply that it is also governed by constitutional principles in every instance. Baxi defines constitutionalism as follows: "Constitutionalism, as most people understand it, provides for the establishment of structures, forms, and apparatuses of governance, as well as for the legitimation of authority." However, constitutionalism is not solely concerned with governance; it also serves as a contested space for ideas and practices relating to justice, rights, development, and the autonomy of individuals in associations. In constitutionalism, we can find narratives of both rule and resistance." As a result, constitutionalism as a concept conveys legal restraints on the exercise of state power as well as adherence to the constitution, to the rule of law, and, as a result, to the will of the majority of the population. Prior to being able to comprehend the ideology of Transformative Constitutionalism in its entirety, it is necessary to first comprehend, what the principles of Constitutionalism are all about. Upendra Baxi distinguishes between the interactive multimedia meanings of constitutional provisions as texts, constitutional law, and theory/ideology ("constitutionalism"), each of which has a different interactive meaning. According to him, "the imagery of constitution/constitutionalism varies depending on who is ruling and who is being ruled, and depending on the perspective of the epistemic communities that develop empirical and normative theories/images of constitutions."

Constitutionalism has a great deal to do with government and governance. However, it also provides a platform for the flourishing of ideologies and practices alike, encompassing narratives on rights, overall development, equal rights, and the autonomy of the individual, among other things. The narratives for both rule and resistance are thus provided by this medium of communication. The concept of limited government is depicted in this illustration, which refers to restrictions placed on the government's ability to exercise its arbitrary powers. Fundamentally, it acknowledges the necessity of a powerful government while also emphasizing the importance of reasonable restrictions in order to prevent the misuse of such power. Constitutionalism, according to Louis Henkin, consists of the following elements:

- government based on the constitution;
- separation of powers;

- sovereignty of the people and democratic government;
- constitutional review;
- independent judiciary;
- minimal state subject to a bill of individual rights;
- civilian control of the military; and
- no state power, or very limited and strictly delimited state power, to sue or imprison people or bring legal action.

II. 'TRANSFORMATIVE CONSTITUTIONALISM' - CONCEPT:

In the course of researching the South African Constitution and the freedom movement, the concept of transformative constitutionalism was hatched. South African jurisprudential experience was the first to draw the attention of legal scholars to the concept of Transformative Constitutionalism, which emerged as a result of that experience. Let's take a look at what "Transformative Constitutionalism" is all about. This concept is a fusion of two concepts: transformation and constitutionalism, respectively. In layman's terms, "transformation" is the process of bringing about change in a systematic manner—change for the better. 'Constitutionalism,' on the other hand, is defined as "the practice of adhering to a constitutional form of government." That government can be legally limited in its powers, and that its authority or legitimacy is dependent on adhering to these limitations. This is a political concept often affiliated with the political theories of John Locke and the founding fathers of the United States .

Prof. Karl Klare's work on Transformative Constitutionalism, titled the Legal Culture and Transformative Constitutionalism, which was published in 1998 in the South African Journal of Human Rights, paved the way for further discussion on the subject. The Constitution, according to Professor Klare, "is a long-term project of constitutional enactment, interpretation, and enforcement committed to the transformation of a country's political and social institutions as well as power relationships in a democratic, participatory, and egalitarian direction."

Achieving transformative constitutionalism means infusing the values of liberty, equality, fraternity, and dignity into the fabric of society as a whole. Transformational constitutionalism is based on the fundamental goal of transforming society for the better, i.e., making it more progressive and inclusive, and this aim is a fundamental pillar of transformative constitutionalism. The Constitution will continue to evolve in response to changes in society, but the essence of the constitution will never change, even if it does so in a more refined form with the passage time. It is envisaged that constitutional reform will serve as a mechanism to bring about social change from such an unjust past to a democratic future, and that constitutions will be used as a tool to achieve this objective. It is essential that this concept is understood in countries that have suffered under colonial rule or apartheid because all of these countries have written their constitutions in order to bring about change, establish a system of good governance, and protect the rights and freedoms of the individual citizens. Justice Pius Langa, the former Chief Justice of South Africa, stated that constitutions drafted by countries with a colonial history are frequently viewed as "a historic bridge between the past of a deeply divided society marked by strife, conflict, untold suffering and injustice, and a prospect founded on the recognition of human rights, democracy, and peaceful coexistence... ". In order to heal the wounds of the past and guide us to a better future, a constitution is an admirable goal to have. The core idea of transformative constitutionalism, in my opinion, is that we must change...'

When it comes to realizing constitutional goals, transformative constitutionalism takes a rational approach that prioritizes protecting individuals' fundamental rights and freedoms. Transformational constitutionalism is built around the judiciary because it places faith in the law as a tool for social and political change. As a result, courts act as catalysts for change because they have the authority to interpret and apply the law, which makes them the most important element of the system.

III. THE SOUTH AFRICAN EXPERIENCE IS AS FOLLOWS:

As a result of apartheid's intentional and persistent marginalization, exploitation, and oppression of black people, as well as the remnants of colonialism and the pervasiveness of patriarchy in South Africa, severe patterns of social, economic, and political vulnerability and deprivation have been concretely shaped in the country, and its aftereffects continue to do so. Both a commitment to ensure that the wrongs of South Africa's apartheid past are never repeated and an undertaking to eradicate the legacy of that past permeated the country's political transition to majority rule and democracy, as well as its accompanying legal transition from parliamentary sovereignty to constitutional supremacy. South Africa's first truly democratic Constitution, and specifically South Africa's first truly democratic Constitutions, were to play a pivotal role in the consolidation of these resolutions. The process of bringing constitutional democracy to South Africa was resolved through a negotiation process dominated by the generally opposing concerns of the ruling, white-minority National Party and the African National Congress , which were both members of the African National Congress. The fundamental compromise reached by the parties was a temporary governing arrangement to facilitate democratic elections and the abolition of apartheid in order to facilitate democratic elections. An additional provision of this agreement, the Interim Constitution, included a set of thirty-four mandatory principles (the "Thirty-four Principles"), which the negotiating parties agreed would govern the terms of the final Constitution, which would be drafted by the newly elected Constitutional Assembly. The Constitutional Court was established by the Interim Constitution, and it was tasked with the responsibility of certifying the final constitutional text.

The proposed draft was rejected on a number of grounds, and the Constitutional Assembly was forced to amend it in order to comply with the Court's ruling in this case. After the Constitutional Court approved the amended text on December 4, 1996, the amended text went into effect on February 4, 1997, the date on which it was approved. It follows that the Supreme Court played a critical role in ensuring that Venezuela's democratic transition was successful, and that it had a significant impact on the final text of the country's Constitution. There were several novel aspects to the South African Constitutional Court, not the least of which was the extraordinary role it played in the drafting process. The Interim Constitution brought an end to the era of parliamentary supremacy in South Africa and gave the courts of the country extremely broad judicial review authority.

The interim Constitution of 1993 and the final Constitution of 1996 of South Africa serve as excellent examples of how to address historical injustices and crises while also instilling hope for a better future . They crafted delicately-balanced mechanisms to put an end to an immoral and oppressive legal and political regime and usher in a more inspiring future. They were successful. In order to achieve this, a democratic regime founded on freedom, multiculturalism, equality, equity, and respect for human dignity and human rights had to be established. A Constitution that would not only limit government powers in the traditional sense, but also institute social and political transformation as a means of providing legitimacy to the new constitutional and political order, was required.

Africans can look forward to better prospects for constitutional democracy and the protection of fundamental rights. This all is because of transformative constitutionalism. What becomes clear is that transformative constitutionalism takes a more pragmatic approach to the realization of constitutional rights and freedoms as well as fundamental freedoms and rights of expression and association. According to Justice SM Mbenenge of the South African High Court, Professor Karl Klare's writings were referenced, and he explained South African Transformative constitutionalism as follows: "Judges, other officials, and institutions play a role in transformative constitutionalism in South Africa." Rather than simply administering constitutional values such as human dignity, equality, and freedom to all citizens, judges have the responsibility to ensure that constitutional provisions are applied in ways that "improve the quality of life for all citizens and liberate the potential of each individual."

In South Africa's case, the desire to right historical wrongs from the apartheid era played a role in the country's acceptance of the concept of Transformational Constitutionalism. "This is a magnificent goal for a constitution: to heal the wounds of the past and guide us to a better future," Justice Pius Langa, a former Chief Justice of South Africa, has stated "The core idea of transformative constitutionalism, in my opinion, is that we must change."

There is little doubt that South Africa today is in a better position than it was during the apartheid era in terms of the protection of human rights, the rule of law, and constitutionalism. Among the landmark decisions of the South African Constitutional Court are *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* (striking down laws criminalizing sex between consenting males); *Minister of Home Affairs v Fourie & Others* (validating same-sex marriages); *Du Toit v Minister of Welfare and Population Development & Others* (affirming this same rights of a lesbian couple to jointly adopt a child); *S v Makwanyane and Another* (striking down the death penalty); *Government of the Republic of South Africa & Others v Grootboom & Others* (affirming the right to adequate housing for the most vulnerable in the society); and *Economic Freedom Fighters v Speaker of the National Assembly & Others*; *Democratic Alliance v Speaker of the National Assembly & Others* (ordering President Jacob Zuma to refund public funds used to improve his private Nkandla home in violation of the Constitution) and others, are outstanding, and illustrate this point.

IV. INDIAN EXPERIENCE

In India, people struggled not only against colonialism, but also against social ills such as untouchability, caste discrimination, gender inequality, and discrimination against the LGBTQ community. It was with the goal of overthrowing and changing India's colonial past, as well as bringing about a new social and political order founded on democratic values, that the country embarked on its constitution-making process. The Indian constitution was written as a 'moral autobiography,' in which a new future was promised while the colonial past was explicitly rejected.

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It brings about the establishment of a secular, democratic, and socialist state. Among the fundamental rights protected by the Indian Constitution are the principles of equality and non-discrimination as well as freedom of expression and movement as well as freedom of religion and personal liberty. Part III of the Indian Constitution outlines the Fundamental Rights, which include the principles of equality and non-discrimination as well as freedoms of expression, movement and association, as well as personal liberty. The untouchability of people, the use of feudal titles, and beggary are also abolished. As a result, the constitution contains an implicit commitment to the establishment of a new social order through political power.

Since then, the law has developed around the Indian constitutional ideals of equality, liberty, and fraternity, which are based on the principles of natural justice. The Supreme Court, seeking legitimacy after the defeat of the Congress government in the post-Emergency period, articulated the jurisprudence of Public Interest Litigation as a means of recovering from the defeat.

Justice PN Bhagwati proclaimed that the adversarial system of the Commonwealth Nations was unsuited to Indian conditions, because it was based on "self-identification of injury and self-selection of remedy". Also due to widespread illiteracy among the populace, Adversarial system would not ensure access to the justice system.

As PIL cases progressed through the court system, the Court's attention was drawn to very specific causes, almost all of which affected constituencies that were particularly marginalized. When the Court attempted to justify its admittedly risky steps to improve the situation of these constituents, it frequently cited the fact that the vast majority of these groups would not have easy access to justice. As an example, a number of these early cases (particularly those involving Justice VR Krishna Iyer, who had a particular interest in improving prison conditions after having been incarcerated himself) were concerned with the rights of prisoners. Prisoners, without a doubt, were a category of citizens who were severely handicapped in their ability to pursue the rights that were due to them. According to the Supreme Court, those accused of criminal offenses have affirmative rights to legal representation and a speedy trial, among other protections. On the negative side, prisoners were found to have constitutional protections against the following practices: solitary confinement, bar fetters, handcuffs, delayed execution, custodial violence, and public hanging, among other practices. Migrant workers, pavement dwellers, children, and people suffering from mental illness were among the other groups whose issues were addressed in early PIL cases. These groups all fit into a broader category of cases that were the focus of the initial phase in which PIL cases were filed, because each of these groups faced unique challenges in expressing its grievances through the regular channels of democratic politics and gaining access to justice.

Recently, the jurisprudence surrounding Transformative Constitutionalism has grown significantly, particularly in relation to the rights of LGBTQI communities, as a result of a series of court decisions. Transformative Constitutionalism, according to the Supreme Court of India in one of its most celebrated recent decisions, *Navtej Johar v. Union of India*, is considered to be one of the objectives of adopting a constitution in and of its own right. The goal is to have a constitution that guides the nation through the process of transforming itself from a medieval and hierarchical society to an egalitarian democracy, in order to embrace the ideals enshrined in the Preamble to the Constitution of the United States of America. A constitutional court's job is to protect its citizens from humiliation and discrimination, and the court cannot do so by providing a static interpretation of the rights to liberty and equality while remaining a silent spectator to the struggle for the realization and attainment of those rights, as was held in the case.

The Supreme Court's decision in *Navtej Johar* was preceded by the Court's decision in *Justice KS Puttuswamy v. Union of India*, which dealt with the same issue. This decision played a significant role in establishing the right to privacy as a fundamental right under Part III of the United States Constitution. However, while the specific contours of privacy must still be tested in specific factual scenarios, the judgment has set the stage for the initiation of discourse rights that flow from the right to privacy, such as the

right to be forgotten. These discourse rights will have a significant impact on how the criminal justice system operates in the future

A recent Supreme Court decision, *BK Pavitra II*, recognized the Constitution's transformative potential in addressing historical caste-based inequities. In this case, the Court upheld the validity of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts of the Civil Services of the State) Act 2018. In this instance, Transformative Constitutionalism was invoked in order to justify affirmative action in order to make up for historical wrongs that had occurred. "There is substantial evidence that the members of the Constituent Assembly recognized that I Indian society suffered from deep structural inequalities; and (ii) the Constitution would serve as a transformative document to overcome these inequalities," wrote by Justice DY Chandrachud. In order to address these disparities, reservations for SCs and STs in state legislatures and state services are being considered."

Some of the Supreme Court's decision in 2018 like *Sabrimala*, addresses the need for course correction in the face of historical wrongs. This decision can be seen in light of this theme. Justice Chandrachud's said that, "Our conversations with the Constitution must be completely overhauled to evolve both with the broadening of the content of liberty and dignity as well as with the expanding role of the Court as an enforcer of constitutional doctrine. Individual dignity is achieved through the application of the values of liberty, equality, and fraternity, which are the fundamental principles that must guide any analysis in this area... .. The Constitution must be allowed to speak as only it can, in a forthright manner as a compact of governance for today and the future, if we are to truly emerge from the gloomy shadows of a society that has subjugated groups of our citizens for centuries under the weight of discrimination."

Similar observations can be found in the Supreme Court's 2018 decision on decriminalizing adultery. Despite acknowledging the error of treating women as the property of men, which served as the foundation for former Indian adultery law, the Supreme Court stated that "the hallmark of a truly transformative Constitution is that it promotes and engenders societal change." A free citizen being treated as if he or she were someone else's property is incompatible with the ideal of dignity... Constitutional values give meaning to the letter of the law by infusing it with meaning. The text of the Constitution has been interpreted time and time again in order to challenge hegemonic structures of power and to secure the value systems of dignity and equality for its citizens, which is consistent with its transformative vision."

Transformative constitutionalism is motivated by an objective to continuously seek better ways to transform society in ways that continuously improve the lives of people. It is informed by a desire to continuously, seek better ways to transform society in ways that continuously enhances the lives of people. When faced with the situation, the courts would seek to interpret laws in a way that promotes, protects, and ensures that citizens' constitutional rights and freedoms are fully realized. There is no single agreed-upon definition of transformative constitutionalism, just as there is no single agreed-upon definition of judicial activism. However, the courts use their judicial power and interpretive prowess to articulate a progressive approach to how the laws can be applied to better serve the people.

REFERENCES

- [1] Ph.D. Scholar, Faculty of law, university of lucknow
- [2] Upendra Baxi, *Postcolonial Legality*, in Henry Schwarz and Sangeeta Ray, (eds.), *A Companion to Postcolonial Studies* 540, 544. Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. (2016) p. 122
- [3] Madhav Khosla, *The Indian Constitution* (Oxford University Press, New Delhi, 2012), p. 14. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, *Asian Journal of Multidisciplinary Studies* 2(7) (2014) p. 135.
- [4] Baxi, Upendra. "Outline of a "Theory of Practice" of Indian Constitutionalism", <http://upendrabaxi.in/documents/Outline%20theory%20of%20practice%20of%20indian%20constitutionalism>
- [5] Baxi, Upendra. "Postcolonial Legality: A Postscript from India." *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 45, no. 2, 2012, pp. 178–194. JSTOR- www.jstor.org/stable/43256851.
- [6] *Constitutional Fathers--Constitutional Sons* Louis Henkin, <https://core.ac.uk/download/pdf/217207337.pdf>
- [7] *Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape** Justice SM Mbenenge. <http://www.saflii.org/za/journals/SPECJU/2018/13.pdf>
- [8] Klare "Legal Culture and Transformative Constitutionalism" 1998 SAJHR 146-188 as cited by Justice SM Mbenenge, *Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape*, <http://www.saflii.org/za/journals/SPECJU/2018/13.pdf>
- [9] Pius Langa, *Transformative Constitutionalism*, <https://www.sun.ac.za/english/learning-teaching/ctl/Documents/Transformative%20constitutionalism.pdf>
- [10] A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *International Journal of Constitutional Law*. [https://heinonline.org/HOL/LandingPage?handle=hein.journals/injcl1&div=51&id=&page=Kibet, Eric, & Fombad, Charles \(2017\). Transformative constitutionalism and the adjudication of constitutional rights in Africa. African Human Rights Law Journal, 17\(2\), 340-366. https://dx.doi.org/10.17159/1996-2096/2017/v17n2a1](https://heinonline.org/HOL/LandingPage?handle=hein.journals/injcl1&div=51&id=&page=Kibet, Eric, & Fombad, Charles (2017). Transformative constitutionalism and the adjudication of constitutional rights in Africa. African Human Rights Law Journal, 17(2), 340-366. https://dx.doi.org/10.17159/1996-2096/2017/v17n2a1)
- [11] D Moseneke 'A journey from the heart of apartheid darkness towards a just society: Salient features of the budding constitutionalism and jurisprudence of South Africa' (2012) 101 *Georgetown Law Journal* 749. <https://scholarship.law.georgetown.edu/hartlecture/1>.
- [12] 1999 (1) SA 6 (CC).
- [13] [2005] ZACC 19.
- [14] 2003 (2) SA 198 (CC).

[15] (CCT3/94) [1995] ZACC 3

[16] (CCT11/00) [2000] ZACC 19.

[17] [2016] ZACC 11.

[18] State of Kerala and Anr. v. N.M. Thomas and Ors., (AIR 1976 SC 490)

[19] Indira Jaising, 'For me, it now means personal liberty': Indira Jaising explains Transformative Constitutionalism.
<https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism>

[20] MH Hoskot v State of Maharashtra MANU/SC/0119/1978.

[21] Hussainara Khatoon v Home Secretary, State of Bihar MANU/SC/0084/1980.

[22] Sunil Batra v Delhi Administration MANU/SC/0184/1978

[23] Prem Shankar Shukla v Delhi Administration MANU/SC/0084/1980.

[24] Charles Sobhraj v Supt Central Jail MANU/SC/0070/1978

[25] TV Vatheeswaran v State of TN MANU/SC/0383/1983

[26] Sheela Barse v State of Maharashtra MANU/SC/0382/1983.

[27] AG of India v Lachma Devi MANU/SC/0059/1985. `

[28] Bandhua Mukti Morcha v Union of India AIR 1984 SC 802

[29] Olga Tellis v Bombay v Municipality AIR 1985 SC 180.

[30] Lakshmikant Pandey v Union of India AIR 1984 SC 469.

[31] Upendra Baxi v State of Uttar Pradesh (1983) 2 SCC 308

[32] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

[33] Justice K.S. Puttaswamy v. Union Of India (2017) 10 SCC 1

[34] Ibid.

[35] (2017) 4 SCC 620

[36] 2018 SCC online SC 1690

[37] Joseph Shine v. Union of India (2017)

