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TRANSFORMATIVE CONSTITUTIONALISM: REFLECTS THE NATION'S ASPIRATIONS A CRITICAL ANALYSIS ON CONSTITUTIONALISM AND TRANSFORMATIVE CONSTITUTIONALISM IN INDIA

AUTHORED BY - DR. KONERU ANURADHA*

“The whole idea of having a constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality.”

The then Chief Justice Dipak Misra¹

Introduction

The Constitution is the legally binding document that is foundational to democracy, the rule of law, human rights, and good governance, which are crucial for the survival and health of a democratic country. Because of this reason in general the Constitutions of the respective nations are considered to be the law of the land. It is the document that embodies not only the structure of government, its organs, their powers and interrelationship between them but also it embodies the ideals, aspirations and the values to which the people have committed themselves. In simple, it depicts the soul of the nation and people's supreme will. That is why the constitution is considered as living and organic document which is capable to promote constitutionalism, which aims for limited government and protection of rights of the men. Constitutionalism not only aspires to fulfill its objectives enshrined in the same, rather it accommodates the changing social needs through process of social transformation. The concept of transformative constitutionalism, therefore, is very significant to be illustrated and defined to understand the role of transformative constitutionalism in protection of rights of the individuals. However, it is a bitter truth that a nation may have a constitution but it is not

¹ Navtej Johar v. Union of India, (2018) 10 SCC 1

essential may have constitutionalism. Even a written Constitution is no guarantee for Constitutionalism. Good example for this is, Nazi Germany had a constitution but that does not mean that it adhered to the philosophy of Constitutionalism be it a negative or positive aspect of it. However, after Second World War almost all the nations of the world have been gradually turning into democratic and welfare nations, where much emphasizes lays on will of the people and protection of rights of the men. This process has been giving scope for establishments of constitutional governments with constitutionalism and transformative constitutionalism.

The meaning of the Constitutionalism

Man with his inventive mind and with his heroic struggle achieved a priceless heritage which has given him a right to govern himself. So that, it enabled him to draft a legal document known to be 'Constitution', to establish his own government, and to organize its powers in such form as "shall seems the most likely to affect his safety, happiness and rights which are naturally inherited by him." For this man down through the ages has searched for the means of establishing limitations upon government and of forcing government to observe these limitations in practice, which paved a way for origin of concept of Constitutionalism. Constitutionalism is a legal device for the prevention of tyranny and for the protection of the rights of man.² In fact, the idea of the constitutionalism is only the name of the trust which man reposes in the power of a document as a means of controlling a government. Constitutionalism not only acknowledges the importance of a strong government, but also acknowledges the requirement for sensible limitations to prevent the misuse of powers and conduct of government officials.

In an occasion James Madison rightly observed that "if angels were to govern men, neither external nor internal controls on government would be necessary. It is true that men are not angels. It is also true that men make up government. So, in framing a government which is to be administered by men over men, it is necessary to oblige it to control itself."³

The idea of constitutionalism has no specific definition or meaning. However, different writers have been trying to explain the meaning of constitutionalism in different ways.

- Prof Upendra Baxi states about constitutionalism as: "*Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and*

² Patterson, C.Perry, "The Evolution of Constitutionalism" (1948). Minnesota Law Review. 934. <https://scholarship.law.umn.edu/mlr/934>

³ The Federalist (Bourne ed.), No. LI, 354.

modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual/associational autonomy. Constitutionalism provides narratives of both rule and resistance."⁴

The Constitution confers powers on various organs of the Government, but there ought to be restraints on those powers. Constitutionalism is a concept that restraints on the powers of the government so there should not be any arbitrary use of its powers.

- Louis Henkin stated that, "*constitutionalism constitutes of independence of judiciary, separation of powers, rule of law, supremacy of law, judicial review, democratic government, fundamental rights, controlling of the police, sovereignty of the people and individual freedom.*"⁵

- Dr D D Basu described constitutionalism as "*constitutionalism necessitates the control over exercise of governmental powers so those powers should not destroy democratic principles on which it is based. These principles include protection of fundamental rights through principles of checks and balance and rule of law. Judiciary must interpret the constitution in such a way so parliament would not wish to legislate contrary to fundamental rights.*"⁶

Basu Further said that, "*The Constitution is a living heritage and, therefore, one cannot destroy its identity as it embodies aspiration to social justice, brotherhood, and human dignity and it is a text which contains fundamental principles of government. Thus Constitutionalism is about limits and aspirations. However, the tradition of written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution.*"⁷

- Professor McIlwain stated that, "*Constitutionalism is a legal limitation on government; it is the antithesis of arbitrary rule; it is opposite to despotic government and to the government will instead of law*"⁸

From the above observations it is clear that the rise of the constitutional governments in a State which existed today evolved from historical revolutions. In modern era, though the framers of

⁴ 540 Henry Schwarz and Sangeeta Ray (EDS), A Companion of 3 Postcolonial Studies (Blackwell Publishing, 2000).

⁵ Michel Rosenfeld (EDS), Constitutionalism, identity, 4 Difference and Legitimacy- Theoretical Perspective, 41-42 (Duke University Press, 1994).

⁶ D.D. BASU, SHORTER CONSTITUTION OF INDIA, 115-16 (Justice A.R. 6 Lakshamanan, Justice Bhagabati Prosad Banerjee & V.R. Manohar, 14th ed., 2009).

⁷ D.D. BASU, SHORTER CONSTITUTION OF INDIA, 115-16 (Justice A.R. 6 Lakshamanan, Justice Bhagabati Prosad Banerjee & V.R. Manohar, 14th ed., 2009).

⁸ C.H. McIlwain, Constitutionalism Ancient and Modern, 21-22 (1987).

the American Constitution made a significant contribution to development of constitutionalism and determined the model for true constitutionalism which has been widely copied by the rest of the world countries had their traces in ancient Greek and Rome. To have clear idea regarding importance of constitutional government it is necessary to have an overview into the history of constitutionalism, which shows the progress and the growth that has been made before ages and the essence of which has been there in today's constitutionalism as well.

Rise of Constitutionalism

The idea of constitutionalism like almost all other social sciences concepts has always been subject to or part of an evolutionary process. Therefore, one cannot point out any specific time or event that led to its creation or emergence, though a succession of such events may have led to shaping and acquisition of an image as an outcome of the totality of those events or processes. Generally, they are shaped in the context of paradigm shifts in social and political structures.

The Contribution of Greece and Rome during ancient period

The concept of Constitutionalism in primitive form began in Greece some twenty three centuries ago. In Greek, constitutional government was not a limited government, but merely the government of any type of State possessing a constitution, and, therefore, could be monarchical, oligarchial, aristocratic or democratic. However, "the doctrine of higher law" provided some standards to a law enacted by respective governments to be a law. They strongly believed that law validity is not a mere matter of force. If this were true, the decrees of the mob would be considered law. Greeks stand point was, what was right was law, and what was wrong was not a law, what was right was discovered from "the law of nature." This idea contributed to the origin of a higher law, a fundamental law to overruling man-made law, which is the basic element in the development of constitutional government. According to this man-made law is only law when made in pursuance of a higher or fundamental law (now a day Constitutional law).

Like above, prominent thinkers like Plato and Aristotle tried to develop Greek constitutionalism from an ethical point of view. However, the Greek constitutionalism got failed because of the fact it did not go beyond the limits of city-state relations.

Later on, the Greek Stoic philosophers contributed their works for the transition from the Greek to the Roman constitutionalism by laying emphasis on “the doctrine of natural law” and the principle of justice common to all men. Rome’s constitutionalism consists of

- 1) The principle of checks and balances,⁹
- 2) The doctrine of popular sovereignty, and
- 3) The principle of a higher law or the doctrine of natural law¹⁰ or the doctrine of a limited government.¹¹

From the above, one can understand that though the traces of the concept of constitutionalism found in Greek and Rome, Greeks did not made proper seminal contribution to the idea of constitutionalism. It is the Roman legal system, which did by recognizing the distinction between *lex* and *jus*. Roman’s strongly observed that any state made rule within the concept of law should required it to inhere the quality of being just or fair. The Roman’s constitutionalism furnished the basis of the American and French revolutions during 18th century and the foundation of modern democracy.

The Constitutionalism during medieval and renaissance period

Though, in this era, the disintegration of the Rome Empire could be witnessed and all the States were divided into small feudal states the Roman’s contribution to constitutionalism made by natural law, which is the basis of the principle of limited government continued. Great philosophers like Gaius, Ulpian, Justinian, Gratian and Christian fathers like Saint Paul and Augustine, Ambrose, Jerome and St. Thomas Aquinas through their works caused for development of natural law doctrine. Along with this the policy of ‘Statelessness’, concept of ‘universalism’ dragged the people towards the concept of ‘Christianity’; therefore the Bible law overtook the Roman law. However, the natural law doctrine, which is the foundation of the principles of constitutional government, had been laid deep in the philosophy of medieval society. More importantly the principle that all authority is derived from the people and laws should be in accordance with will of the people and not arbitrary by the government, which is the basic concept of constitutionalism had its strong roots in the medieval period. However,

⁹ Polybins was imprisoned in Italy for sixteen years, and during this time wrote a history of the Roman Republic in which he made the first exposition of the principle of checks and balances known to political theory.

¹⁰ Cicero was the greatest lawyer of the ancient world and was an exponent of the doctrine of Natural Law. "True Law," he said, in his *De Republica*, "is right reason in agreement with nature; it is of universal application, unchanging and ever lasting . . . we cannot be freed from its obligations by Senate or people . . . and there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is God, over us all, for He is the author of this law, its promulgator, and its enforcing judge."

¹¹ William A. Dunning, *Political Theories, Ancient and Modern* 64-65 (1913).

the great defect of medieval constitutionalism was its lack of any means for the enforcement of its principles except revolution by people. Revolution was the only check against its violation though it is not a legal means. The best example for this was Magna Carta in the year 1214-1215.

At the end of the medieval period and renaissance period new approaches had taken birth such as humanistic, universalism, sovereign national States and scientific approaches started and the idea of constitutionalism was expanded. However, because of monarchy rule, the governments were truly a constitutional, much less democratic. Best examples for these are governments in England, Prussia, Rome, Italy, and France.

Constitutionalism in England and America

Through contributions made by political theorists and jurist the concept of constitutionalism with the concepts of higher law and of a limited government came to America through England. In fact, the real development of constitutionalism developed in Great Britain. Common law which is claimed to have been part of England was responsible in shaping the concept of modern constitutionalism, starting with Magna Carta in 1215 which compelled the King to recognize and be bound by certain rights or claims of the people. Later, it continued to grow through the jurists like Bracton, Coke and many other who drew a distinction between the government and the law. While in the government nobody was above the King, the King had to govern according to law. Bracton also drew a distinction between the legal procedures which the government could prescribe and the rights of the people which were customary and could not be changed by the King. In continuation of this in 17th century, Edward Coke pursued this process by claiming primacy of common law over state made law. Later on because of the civil war and Glorious Revolution the dictatorship of King/Queen and totalitarian system was ended. Gradually the British monarchy had become a constitutional and ceremonial monarch. More importantly, the parliament developed into a representative body exercising parliamentary (popular) sovereignty. It established a system like the King will be answerable not only to God but also to the people through their representatives in Parliament, not personally but through his ministers who were made answerable in law for all their acts.¹²

¹² Prof.(Dr.) Mahendra Pal Singh, Vice Chancellor, "Constitutionalism in India in Comparative Perspective", the lecture delivered in the memory of Dr.D.D. Basu at National University of Juridical Sciences, Kolkata in February 2018. Pgs 645-646.

<https://nujlawreview.org/wp-content/uploads/2020/08/11.4-MP-Singh-CONSTITUTIONALISM-IN-INDIA-IN-COMPARATIVE-PERSPECTIVE.pdf>

In this journey the Petition of Rights Act, 1628, the Bill of rights, 1689, the Act of Settlement, 1701, the Great Reform Act, 1832 and The representation of the people's Act, 1928 (to increase right to vote) and the Crown Proceeding Act 1947 etc and the contributions made by Henry of Bratton¹³, Sir Edward Coke¹⁴, AV Dicey¹⁵ etc paved a way for “*the doctrine of supremacy of law*”, which is the essence of constitutionalism. In fact, the doctrine of supremacy of law influenced the first generation of American lawyers and furnished the legal basis of English and American Whiggism.

Philosophers like, John Locke, James Otis, Sam Adams, Patrick Henry, John Adams, John Dickinson, Thomas Jefferson, Oliver Ellsworth, John Rutledge, James Wilson, Luther Martin, William Patterson, George Wythe, James Madison and Alexander Hamilton and laymen like Franklin and George Mason, and especially the clergymen acted as exponents of the doctrine of natural law/ higher law theory in American legal system. Further, in Declaration of Independence of 1776 states that, “all men are created equal; they are endowed by their creators with certain unalienable rights. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness.” And judicial decisions in Writs of Assistance case, 1761, Marbury v. Madison, 1800 etc. found the essence of American constitutionalism with the certain features like, 1. the inalienable rights of man- the basis for bill of rights; 2. The doctrine of delegated powers; 3. The contract

¹³ Bracton, Henry of Bratton (d. 1268), a judge of the King's Bench in the reign of Henry III in his *De Legibus et Consuetudinibus Angliae* (written before 1256), a collection of about 2,000 common law decisions, says "The King himself ought not be subject to man, but subject to God and the law, for the law makes the King. Let the King then attribute to the law what the law attributes to him, namely, dominion and power, for there is no King where the will and not the law has dominion." (*De Legibus et Consuetudinibus Angliae* (Swiss ed. 1854) 5 b.)

¹⁴ Sir Edward Coke, and his *De Legibus* had a tremendous influence in the development of the supremacy of law. He contended that all authority was derived from law and was, therefore, limited by law. He said natural law was immutable because it could not be repealed. His doctrine of the supremacy of law is the essence of constitutionalism. (*De Laudibus Legum Angliae* (Amos ed. 1825), c.c. 9, 13, 18, 34 at 26-27.)

In the *Dr. Bonham's case*, decided in the Common Pleas in 1610, Coke said: "And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an act to be void." "Common right and reason" is something permanent and fundamental, and, therefore, higher law.

¹⁵ AV Dicey was one of the prominent British Whig jurist and constitutional theorist. In his work 'Introduction to the study of the law of the Constitution (1885) explained three major elements of constitutionalism with the help of 'the doctrine of rule of law'. They are 1. Supremacy of the law, 2. Equality before the law and 3. Predominance of legal spirit.

theory of the State; 4. The concept of popular sovereignty- the basis of a fundamental law; 5. The right of altering, changing or abolishing government- the right of revolution guaranteed by the amendment processes of American constitutions; and 6. By implication, the doctrine of judicial review inherent in a fundamental law based on “the consent of the governed.”¹⁶ Etc.

Constitutionalism in modern period

Though ancient and medieval periods were somewhat golden era for growth of constitutionalism, the first part of the modern era surprisingly partially favoured towards spread of democracy and partially unfavoured and caused for authoritarian form of governments after First World War like Communism in Russia, Nazism in Germany, and Fascism in Italy on other side of the coin, which is against the progress of constitutionalism. However, the League of Nations after WW1 and UNO after WW2 believed that constitutionalism is not just about nationalism and its democracy, it also covers the international aspect like world peace and human rights. Later on, globally different nations in their own efforts caused for the development of constitutionalism in a particular direction. The concepts which got evolved during all this like separation of powers with the principle of check and balances, rule of law, free and fair elections, decentralization of power, federalism and fundamental rights of people etc. have been implemented to protect or safeguard the basic rights of the people. But still, it is no tough to say that there are no precise features of constitutionalism, the world is still struggling hard to achieve the ideal social welfare state.¹⁷

From the above discussion it is evident that maximum principles of constitutionalism have been adopted mostly by the European countries or developed countries. The position of the constitutionalism was still at infant stage in colonized societies, but so far as India is concerned there is enough evidence available on constitutionalism since ancient period.

Constitutionalism in India

The ancient law of India is characterized not by positive law and legality (as no parliament) but by moral authority and duty what is called Dharma. Dharma refers to the totality of duties which is incumbent on individuals and political heads. In classical India, institutions of law and polity were subordinated to an ideally conceived spiritual authority. The concept of ‘Dharma’

¹⁶ Patterson, C.Perry, "The Evolution of Constitutionalism" (1948). Minnesota Law Review. 934. <https://scholarship.law.umn.edu/mlr/934>

¹⁷ Krati Garg, 'Development of Constitutionalism during the English Period', published in online page LexForti Legal : Legal Outsourcing Platform on the date January 15, 2021. https://lexforti.com/legal-news/development-of-constitutionalism-during-the-english-period/#_ftn2

signifies eternal rule, which maintain the world and an integral part of the societies. Ancient documents the Vedas, Upanishads and Puranas etc. explained that every one either it is a common man or kings should bound by higher law (God Law/ Natural Law). If any deviance it causes for sin. King will lose the Kingship and will receive severe punishments after death. If people made any deviation from this ideal path was the cause for the onset of disorder, anarchy, what is called arajakata in the society.¹⁸ Dharma principle directly supported for limited government and commended legal obedience by people. By all this one can understand that ancient dharma concept was directly or indirectly supported higher law supremacy, which in modern days a basic element of the constitutionalism. In medieval period during Mughal Empire, even in the times of Aurangzeb, the kings cared for the welfare of their people and listened and considered to their demands.¹⁹

During British period at the beginning colonizers also cared for peoples traditional beliefs and practices either it may be in the case of Hindus or Islamic. But slowly to strengthen and expand their rule they started ignoring these traditions and cause for unrest in the society. However, during independence struggle more and more people under the banner of All India Congress or Independent of it started making formal demands from the rulers in the form of some kind of constitutional documents, which in course of time through Annie Besant's Bill of Right 1925, Moti Lal Nehru Report of 1928, Karachi Resolution of 1931 and similar continued movements started conceiving the kind of constitution India must have. Some lessons were also learnt in the working of the government of India Acts of 1919 and 1935 and the decisions given by the Federal Court under the latter. Thus, much of the framework of the future constitution of India had been already conceived by the time India formally started the process of making its current constitution towards the end of 1946, which was continued after obtaining independence in 1947.

From all the above details it is evident that, it is not that India conceived and made its constitution only after obtaining independence from the foreign rule. On the contrary, in the light of its past history and precedents in pre-British and British India, a blueprint for the future

¹⁸ Ramashroy Roy, *Beyond Ego's Domain: Being and Order in the Vedas* (Delhi: Shipra Publications, 1999), p. 8. https://www.mids.ac.in/assets/doc/WP_165.pdf

¹⁹ Rohit De, *Constitutional Antecedents in The Oxford Handbook of The Indian Constitution 20-23* (S. Choudhry, M. Khosla & P.B. Mehta ed., 2016). <https://nujlawreview.org/wp-content/uploads/2020/08/11.4-MP-Singh-CONSTITUTIONALISM-IN-INDIA-IN-COMPARATIVE-PERSPECTIVE.pdf>

constitution of India had already been drawn.²⁰

It is the million dollars question before many scholars that, how India had framed a constitution which in spite of India's partition, diversity and immense problems of merging over five hundred Indian States into the Union of India, having immense diversity, poverty, ignorance and many other negative factors and how it has been working reasonably well so far with some major and minor amendments. In fact, the whole credit goes to the kind of constitutionalism its makers had learnt, practiced and incorporated in the Constitution of India and according to which they and their successors as well as the people of this land worked with the keen desire that it must work indefinitely with such adjustments and improvements as are required from time to time.

Here it is important to note that though countries had constitutions they failed to recognize diversities and plurality in the society, which ignored the aspects of constitutionalism once. These kinds of instances of such failure may be found even in the constitutions of very advanced societies while attention must be drawn to increasing diversity in modern times in the process of increasing globalization.²¹ But after realization they have been introducing elements of constitutionalism either through amendments or judicial interpretations or appropriate legislations. This shows that constitutionalism not only aspires to fulfill its objective enshrined in the same, rather it accommodates the changing social needs through process of social transformation. The concept of transformative constitutionalism, therefore, is very significant to define and understand the constitutionalism in protection of rights of the people.

Like above, though India adopted the values of doctrine of dharma and western constitutionalism and incorporated the concepts like democracy, republic state, justice, liberty, equality, fraternity, distribution of powers, rule of law, fundamental rights, directive principles of state policy etc in the constitution with an aim to uphold constitutionalism, still Indian has been trying to put theory into practice. The process of putting constitutionalism theory into

²⁰ Rohit De, Constitutional Antecedents in The Oxford Handbook of The Indian Constitution 23-26 (S. Choudhry, M. Khosla & P.B. Mehta ed., 2016).

<https://nujlawreview.org/wp-content/uploads/2020/08/11.4-MP-Singh-CONSTITUTIONALISM-IN-INDIA-IN-COMPARATIVE-PERSPECTIVE.pdf>

²¹ J. Tully, Strange Multiplicity Constitutionalism in an Age of Diversity (2007). Chapter 6 (in general and its conclusion in particular).

practice in accordance with needs of the society caused for transformative constitutionalism.

Origin and Evolution of Transformative Constitutionalism

The term ‘transformative constitutionalism’ was coined by Prof. Karl Klare, who is a constitutional scholar and professor in University of Columbia in his publication in a South African Journal of Human Rights in 1998. He drew the concept debates and discussions about need of the transformative constitutionalism. Later, the definition and meaning with regards to transformative constitutionalism continues to hold debates and discussions across the world countries wherein the paramount idea of transformative constitutionalism is entail principles of equality, liberty, fraternity and dignity and other main aims of constitution with adaption to the requirement of the society. Here, it is important to note that many nations either developed or developing like USA, England, France, India etc, contained scope and elements of transformative constitutionalism in their constitutions. But they did not use the expression of transformative constitution anywhere in their constitutions. However, for the first time the Constitution of South Africa specifically mentioned transformative process in its 1993 version, though later the constitution has been replaced with 1996.²²

Prof. Karl Klare described transformative constitutionalism 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”²³.

As per Klare the idea of transformative constitutionalism considers constitution as process of evolution which evolves overtime without any formal amendments to accommodate changing social norms and bring social equality especially substantive equality. It envisages a mechanism to bring in social change from an unjust past to a democratic future using the Constitution as a tool to achieve this objective. Justice Pius Langa, the former Chief Justice of South Africa, stated that constitutions drafted by countries with a colonial history are frequently

²² Ms. Nivedita Ghos, Transformative Constitutionalism and rights of Homosexuals in India and South Africa: A comparative Study, CMR University Journal for Contemporary Legal Affairs, Vol.3, Issue2, August, 2021, MNLU, Nagapur. Pgs 4 and 5.

<https://www.cmr.edu.in/school-of-legal-studies/journal/wp-content/uploads/2022/02/08-Transformative-Constitutionalism-and-Rights-of-Homosexuals-in-India-and-South-Africa-A-Comparative-Study.pdf>

²³ Klare, E. Karl., Legal Culture and Transformative Constitutionalism, 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, (1998) p. 146. Cited in Alisha Dhingra, Indian Constitutionalism: A Case of Transformative Constitutionalism, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES, 2(7), (2014) p. 136

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”²⁴.

Thus, the history of transformative constitutionalism hails from the post-apartheid era of South Africa, which at that time, there were many changes around the nation that were fulfilled by the process of transformative constitutionalism. It was then it gained more recognition than ever around the globe. Transformative constitutionalism helps to deliberately put efforts to empower the previously excluded segments of society with the help of protection of socio-economic rights.

The process of transformative constitutionalism can be initiated by countries either through amendments or judicial interpretations or appropriate legislations. But, the process of transformative constitutionalism has frequently been fulfilled by judges of constitutional courts by interpreting constitutional law and made it as living and organic document through judicial activism.

Transformative Constitutionalism in India

Transformative constitutionalism can be traced in India even during colonial ruling. Indian freedom fighters fought and struggled not only against the colonialism but also against the social evils that prevailed in the society since ancient past. Indian social reformers and freedom fighters recognized that law is tool for social change and it is only the way to fulfill needs of the contemporary need of the society. So that, with the help of British Constitutionalism social reformers and freedom fighters introduced transformative constitutionalism through various legislations (without name it as transformative constitutionalism) where in the abolition of sati system, Devadasi system, untouchability, caste discrimination, gender inequality, child marriages, prevention of female infanticide etc introduced and promotion of Hindu widow remarriage, girls education etc promoted.

Later on, Indian Constitution came into force on 26th Jan 1950 with an aim to uphold

²⁴ Pius Langa, Transformative Constitutionalism, 17 STELLENBOSCH L. REV. p. 351-352 (2006). Cited in Vrinda Narain, Postcolonial Constitutionalism in India: Complexities & Contradictions, 25 S. CAL. INTERDISC. L.J. 109 (2016)

constitutionalism by incorporating socialism, secularism,²⁵ democratic and republic system of government, justice, equality, liberty, fraternity etc. so that Indian constitution can be considered to be the mirror of the society and the aspect of constitutionalism is the idea that society can be organized according to some set principles and it can be regulated and taken towards its larger purpose through the constitution. As rightly apex court held in *N. Nagaraj v. UOI*²⁶ that constitutionalism is related to constitutional identity. It is the constitutional identity which is supreme and constitutionalism is also about the continuance of constitutional identity. Constitutionalism is about to check and balances upon the power of government and constitutionalism are about the theory of guided power. The rational of Indian constitutionalism is to empower the State to bring about social transformation. It shows our constitution commitment to a transformation of relations, the relations between individual and State and between individual themselves. This transformative vision of our constitution underlines its working and interpretation.²⁷

Justice Chandrachud rightly opined that transformative constitutionalism refers to infusion of the values of liberty, equality, fraternity, and dignity in social order. The basic purpose of the constitution is to transform the society for better i.e. progressive and inclusive and this objective is a fundamental pillar of transformative constitutionalism. Though constitution is the reflection of the society sometimes there will be collusion between social evils and constitutional spirit in that case society has to be transformed in accordance with constitutional values. It means constitutional morality prevails over societal morality. Thus, transformative constitutionalism is an inevitable as well as significant process that helps to define the essence of democracy and the constitution within it. Changing and adjusting are the only constant in a society where the needs of human beings change. With the changes and needs of people, it is expected that the law will also change with time. The updation of everything in this world is necessary, and it is the universal law that says transformation/ change is the rule of nature.

Need of Transformative Constitutionalism

Transformative constitutionalism is the one of the effective tools for upholding democratic

²⁵ The words socialism and secular concepts introduced in our constitution by 42nd amendment in the year 1976.

²⁶ *N. Nagaraj v. UOI* 2006 SC

²⁷ Livelaw News Network, "Constitution intends to transform society":Justice Chandrachud, posted on 10th Sept 2018.

<https://www.livelaw.in/constitution-intends-to-transform-society-justice-chandrachud-video/>

form of government. It put the phrase “for the people, by the people and of the people” in practice and egalitarianism promised by constitutions will be fulfilled. It has the power to influence social and political institutions by establishing, interpreting, and enforcing constitutional principles to bring about positive political and societal changes.

Some essential elements of Transformative Constitutionalism

There are some essential elements that are required for attaining transformative constitutionalism, such as

The existing principles that explain law by themselves require a commitment to examine for forming transformative constitutionalism.

- 1) Influence on socio-political institutions. The power of socio-political in our country aims to build the relationship towards democracy participation and egalitarianism.
- 2) Socio-economic rights give fair access to vital socio-economic goods and services.
- 3) Judicial activism plays a significant role in the transformation process with the help of judges and enforcing the constitution in a radical manner to attain justice, democracy and peace.
- 4) Adjudicative context, as transformative constitutionalism, depends on the law of the land and courts as their final resort for succeeding in their objectives in the determination of the law.
- 5) Community activism is also one of the important elements which fought for upholding constitutional spirit either by revolutions or by evolution like participation in elections and filing litigations in courts etc.
- 6) [Cultures of rights build a culture of respectful human life and dignity](#)

By incorporating these elements, constitutionalism can be made transformative, and it acts as a tool for achieving the required social and political changes in society.

Transformative Constitutionalism and Judiciary

Though Indian constitution clearly indicates constitutional transformation and contained elements of transformative constitutionalism, it did not use the expression of transformative constitution anywhere in its text like South African Constitution. However, as judiciary is one of the most important pillars to strengthen the democracy of the nations and custodian of the constitution it has been playing pivotal role in transformative constitutionalism by radically interpreting the constitution, as it helps in achieving substantive equality, social justice, and

human rights norms infiltration into private relationships and fostering a culture of justification for public power exercises.

The Supreme Court of India has invoked 'constitutional identity' as a doctrinal device for adjudicating some of the most fundamental legal and political conflicts in independent India to uphold constitutionalism. In the landmark judgment of *Kesavananda Bharati v. State of Kerala*,²⁸ the court deployed this concept, through the device of the basic structure doctrine, to place substantive limits on parliament's power to amend the Constitution. It was held that parliament can amend fundamental rights but should maintain and preserve the basic structure of the constitution. However, this doctrine is not only limited to adjudicating the constitutionality of constitutional amendments but also to perform a range of adjudicative functions alongside two other concepts that invoke the identity of the Indian constitution as the basis for adjudication – 'Constitutional morality' and 'transformative constitutionalism'.

In *Minerva Mills v. Union of India*,²⁹ the apex court by citing Granville Austin words that 'the constitution a charter for social revolution'³⁰ held that since fundamental rights and directive principles are 'a twin formula' for achieving the social revolution envisaged by the framers, neither fundamental rights nor directive principles can be given primacy over the other. Rather, 'harmony and balance' has to be maintained between the two. In fact the balance between these two is an essential feature of the basic structure of the constitution.

Though the court did not use the word transformative constitutionalism in these two cases, court has given importance to social revolution. But now a day's inspired by literature on and from South Africa courts have been adopting the phrase transformative constitutionalism, to capture the idea of the 'social revolution' that is a 'fundamental pillar' of the constitutionalism. The identity of the Constitution is shaped by the transformative ethos, which in turn shapes constitutional practices and culture. Not only does the transformative nature of the Constitution point to the core elements of India's constitutional identity, but this thrust towards social transformative is also part of its constitutional morality.

In recent times in many cases the court held that a restriction on fundamental rights is valid only if it is in furtherance of constitutional morality, and not societal morality or not at the will

²⁸ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

²⁹ *Minerva Mills Ltd v. Union of India*, (1980) 3 SCC 625, 642.

³⁰ Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 1999.

of the government policies.

The apex court in *Justice Puttaswamy (retd) v. Union of India*³¹ clearly held that right to privacy is the integral part of the Article 21 of the Indian Constitution. Though there is no clear expression regarding right to privacy under Indian constitution the Supreme Court in this case by applying the spirit of constitutionalism made certain guidelines to protect privacy of the individual from unlimited access of the government power through 'Aadhar scheme'. By this way court has given scope for 'transformative constitutionalism'.

In *National Legal Service Authority (NALSA) v. Union of India*,³² the Supreme Court recognized that transgender people as the third gender and confirmed their fundamental rights under the Indian constitution.

In *Navtej Singh Johar v. UOI*,³³ the apex court was recognized the rights and conditions of the LGBTQ community and further it held that "the choice of whom to partner, the ability to find fulfillment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation". This right will be protected under Article 14,15,19 and 21 of the constitution. while deciding the matter Justice Dipak Misra stated that "while testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then they said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exist to uphold the constitution (Constitutionalism). Similarly, Justice Chandrachud held that 'no law can be divorced from constitutional morality.

Later on, in *Indian Young lawyers Association and Ors v. State of Kerala and Ors*,³⁴ Justice Chandrachud stated that where there is a conflict between the freedom of religion and constitutional morality, the constitutional morality will prevail. He further said that "liberal constitutionalism depends upon the principle of individual dignity". It clearly indicates that though traditional norms had prevailed once but they should change in accordance with present ideas of justice, liberty, equality and brotherhood by eliminating general prejudice by using

³¹ K.S. Puttaswamy and Anr. vs. Union of India ((2017) 10 SCC 1)

³² National Legal Service Authority (NALSA) v. Union of India (2014 INSC 275)

³³ Navtej Johar v. Union of India, (2018) 10 SCC 1

³⁴ Indian Young Lawyers Assn. v. State of Kerala, (2019) 11 SCC 1

transformative constitutionalism.

In Government of NCT of Delhi v. Union of India,³⁵ the Supreme Court held that constitutional functionaries like the Lieutenant Governor are duty-bound to act in consonance with constitutional morality which provides ‘expectation of behavior that will meet not just the text but the soul of the Constitution. Their actions would be justified only if they are ‘in harmony with the constitutional impulse.’

In Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly,³⁶ the court held that the Speaker of the Legislature has to carry out their functions in consonance with constitutional morality rather than political expediency. Thus, transformative constitutionalism requires justification for all exercises of State power and provides substantive content for valid justification of such exercise.

Thus, transformative constitutionalism structures the court’s understanding of what are the core elements of India’s constitutional identity. It is concern with India’s past, to its present and future. The past (Judicial understanding) is to be upheld or overcome, through the application of Constitutional principles in the context of present ground realities, with the aim of a transformed future where social relations are re-cast in the mould of the Constitution.

Finally it is true that without the commitment of the judiciary to bringing up positive social changes, it would be impossible to carry out transformative constitutionalism. It clearly shows that a proactive and independent judiciary is necessary to get the best outcome from the use of transformative constitutionalism.

Conclusion

Transformative constitutionalism aims to promote social, economic and political changes through the legislations, policies or schemes or interpretation and using the other ways of applying the provisions that are already being mentioned in the constitution. It considers the changing social norms and behavior of society and constitution itself adapts to changing norms. It is only because of transformative constitutionalism the Supreme Court was able to deliver the significant decisions in various cases and made the constitution more dynamic and diverse and inclusive of rights of all sections of society and considering all aspects of human sufferings

³⁵ *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501

³⁶ *Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly*, (2020) 2 SCC 595.

with an aim to establish an egalitarian society. Though governments through legislative activities and judiciary through interpretations strive for transformative constitutionalism it is not sufficient. It is also the citizen's duty to bring and adopt the constitutionalism spirit into reality then only the best outcome of transformative constitutionalism can be enjoyed by the society.

