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Transformative Constitutionalism And Horizontal Effect Of Fundamental Rights

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INTRODUCTION

Transformative Constitutionalism is a long-term constitutional enactment, interpretation, and enforcement project committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.¹ It implies that the state cannot remain as an unassertive bystander in shaping the society in which individuals exist.² Karl Klare was the first to characterize the South African Constitution as transformative, later echoed in judgments and academic literature.³ South African Constitutional Court has explained one of the purposes of transformative constitutionalism in *Road Accident Fund v Vusumzi Mdeyide* as realizing the fundamental socio-economic rights so that people disadvantaged by their deprived social and economic circumstances can become more capable of enjoying a life of dignity, freedom, and equality.⁴ Transformation in the South African context is not only about the fulfilment of socio-economic rights but also means greater access to education and opportunities through various mechanisms.⁵ Another fundamental goal identified by the South African Constitutional Court is the achievement of equality. It is the commitment to transform their society from a grossly unequal one, to one where equality exists between men and women of all races.⁶ It also means that every decision should be defended not just by reference to authority but by reference to ideas and values.⁷

It has been observed in the South African context that the transformation project involves eradicating systemic forms of discrimination and material disadvantage based on race, gender class, and other forms of inequality so that people can achieve their full human potential.⁸

¹ Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S.AFR.J. on Hum. Rts. 150 (1998)

² *City of Johannesburg v Rand Properties (Pty) Ltd*, 2006 6 BCLR 728 (W) paras 51 - 52

³ Solange Rosa, *Transformative Constitutionalism in a Democratic Developmental State*, 22 Stellenbosch L.REV. 544 (2011)

⁴ 2007 SCC OnLine ZACC 7 ¶125

⁵ Pius Langa, *Transformative Constitutionalism*, 17 Stellenbosch L.REV.352

⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*, 2005 SCC OnLine ZACC 6 ¶74

⁷ *Id.* at 353

⁸ Cathi Albertyn and Beth Goldblatt, *Facing the challenges of transformation : Difficulties in the development of an indigenous jurisprudence of equality*, (1998) 14 S AFR J HUM RTS 248

Gautam Bhatia has expressed similar sentiments concerning our constitution. He remarks that our constitution is transformative in two different senses. In the first sense, it transformed the legal relationship between the individual and the state. In the first sense, it was transformative because it replaces the idea of subjects with citizens. Colonialism is replaced with democracy and popular sovereignty. In the second sense, our constitution is transformative because it seeks to reconstruct state and society itself. In its horizontal avatar, the constitution aims to liberate citizens from multi-layered oppressive structures like caste.⁹ The transformation in this sense could be found in the judgments of Dipak Misra.J and Chandrachud.J. In their opinion, this is made possible by the ability of the constitution to transform and adapt with changing needs of time which provides the constitution the character of a living and organic document.

INDIAN COURTS AND TRANSFORMATIVE

CONSTITUTIONALISM

Dipak Misra in *Navtej Singh Johar*¹⁰ opined that concepts underlying the rights do not change with changing times, but changing times illustrate and illuminate concepts underlying the rights.¹¹ As the second sense of transformative constitutionalism expressed by Bhatia denotes Dipak Misra.J, also suggests that the aim of having a Constitution is to transform the society for the better. He suggests that in understanding the concept of transformative constitutionalism the ideals enshrined in the Preamble to our constitution can be a guide.¹² He falls back on the living tree constitutionalism concept, which argues that realities of the modern world can be accommodated and addressed only by considering our constitution as a living tree, to drive home the point that a Constitution is ever evolving.¹³ He defines transformative constitutionalism as the ability of the constitution to adapt and transform with the changing needs of the time and says that the energetic appreciation by constitutional courts constitutes the lifeblood of progressive societies.¹⁴ He proclaims that the principle of transformative constitutionalism places upon the judicial arm the duty to ensure the supremacy of the constitution, and the country and its institutions has to be steered in a direction where there is better protection of fundamental rights.¹⁵ In the concluding remarks of his opinion he states

⁹ Bhatia, G. (2021) *The transformative constitution: A radical biography in nine acts*. Noida, Uttar Pradesh, India: HarperCollins Publishers India, 14

¹⁰ (2018) 10 SCC 1

¹¹ *Id.* ¶96

¹² *Id.* ¶107

¹³ *Id.* ¶102 & 103

¹⁴ *Id.* ¶108 & 109

¹⁵ *Id.* ¶122

that our constitution has been perceived to be transformative because it should be given a meaningful construction instead of mere literal meaning of its words. Transformative Constitutionalism in his opinion is not confined to the recognition of the rights and dignity of individuals, but it aims at developing an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically, and politically. It results in a society that is dissuaded from any kind of discrimination.¹⁶

Justice Chandrachud does not explain transformational constitutionalism in detail in Navtej Singh Johar. He only states that the constitution, in its transformational role, directs to solve the polarities and binaries of gender.¹⁷ Justice Chandrachud undertakes a detailed discussion on transformative constitutionalism in *Indian Young Lawyers Association*¹⁸ case. He noted that Article 17 indicates the constitution's transformative role and vision since it focuses on discrimination in social structure.¹⁹ After noting that custom, usages and personal law play an important role in the civil status of individuals, he observes that they cannot be granted immunity from constitutional scrutiny because of social transformation vision of our constitution. In his opinion transformative potential lies in supremacy of constitution over all bodies of law and practices that claim continuation of a past which militates against its vision of just society.²⁰ He identifies the individual as the basic unit of the constitution, which in turn demands that existing structures and laws be viewed from the prism of individual dignity. All the guarantees of the constitution is aimed at self-realization of the individual.²¹ So any practice perpetuated by any social and legal structure that goes against this constitutional vision must be remedied by the court. He suggests that the decision in *Narasu*²² detracts from the transformative vision of the constitution. Personal laws must be subject to constitutional scrutiny since no body of practices can claim supremacy over the constitution.²³ From the above discussion we can understand that Indian version of transformative constitutionalism encompasses socio-economic rights and considers even private relationships within its bounds.

¹⁶ *Id.* ¶ 268.4

¹⁷ *Id.* ¶ 615

¹⁸ (2019) 11 SCC 1

¹⁹ *Id.* ¶ 386

²⁰ *Id.* ¶ 394

²¹ *Id.* ¶ 394- 395

²² *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84

²³ *Supra* note 18 ¶ 397

Judiciary and socio-economic rights

Article 37 of the Indian Constitution states that principles contained in part IV of the constitution is not judicially enforceable. *Maneka Gandhi*²⁴ case was a watershed moment in the enforcement of these socio-economic rights. It was held that the right to life should be interpreted expansively which has led to many new fundamental rights being held as part of Article 21 like right to live with basic human dignity,²⁵ right to livelihood,²⁶ right to go abroad,²⁷ right to minimum wages,²⁸ right to education,²⁹ right to free legal aid,³⁰ right to health,³¹ right to food,³² prohibition of bonded labour,³³ right to know,³⁴ right to treatment and medical assistance in medico-legal cases,³⁵ right to safe drinking water³⁶ and right to privacy.³⁷ With the expanded interpretation of Article 21 along with Public Interest Litigation, the court started focusing more on social and economic rights. It began to hold that several of the directive principles were part of the expansive meaning of Article 21, which in turn imposed a duty on the government to implement these rights. Public Interest Litigation is an innovative strategy used by the Supreme Court to provide easy access to justice to weaker sections of society, and social action groups regularly employ it to combat exploitation and injustice against underprivileged sections of the community. The rigid rule of locus standi has been diluted by the court considering the realities of Indian society. Classic examples are *Hussainara Khatoon & Ors v Home Secretary, Bihar*³⁸ *Sunil Batra v Delhi Administration*³⁹, *Upendra Baxi v State of U.P and ors*⁴⁰, etc. The expansion of Public Interest Litigation is attributed to judicial apathy during the emergency. With the advent of PIL Court shifted from a mere constitutional or appellate court to an institution of governance.⁴¹ In *People's Union for Democratic Rights v*

²⁴ AIR 1978 SC 597

²⁵ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608

²⁶ *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545

²⁷ *Supra* note 24

²⁸ *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235

²⁹ *Mohini Jain v State of Karnataka* (1992) 3 SCC 666

³⁰ *Khatri (2) v State of Bihar* (1981) 1 SCC 627

³¹ *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, (1996) 4 SCC 37

³² *People's Union for Civil Liberties v Union of India & Ors*, AIR 2003 SC 2363

³³ *Bandhua Mukti Morcha v Union of India and Ors*, 1984 AIR 802

³⁴ *Dinesh Trivedi v Union of India* (1997) 4 SCC 306

³⁵ *Parmanand Katara v Union of India*, (1995) 3 SCC 248

³⁶ *Narmada Bachao Andolan v Union of India*, 2000 10 SCC 664

³⁷ *K.S. Puttaswamy v Union of India*, (2018) 1 SCC 809

³⁸ 1979 AIR 1369

³⁹ 1978 4 SCC 409

⁴⁰ (1983) 2 SCC 308

⁴¹ Choudhry, S., Khosla, M. and Mehta, P. (2016) "Public interest litigation," in *The Oxford Handbook of the Indian constitution*. Oxford, United Kingdom: Oxford University Press.

*Union of India*⁴² the principal features of PIL were discussed. It was identified as a cooperative or collaborative effort by the petitioner, the state and the court to secure observance of constitutional or legal rights conferred upon vulnerable community sections and achieve social justice. Supreme Court in *State of Uttaranchal v Balwant Singh Chauhal and ors*⁴³ classified the evolution of Public Interest Litigation into three phases. During the initial phase, the Supreme Court was focused on protecting the right to life for the benefit of marginalized sections of society who could not access courts because of poverty, illiteracy, and ignorance. The next phase focused more on protecting the environment, forests and natural resources. The third phase saw the court attempting to ensure probity, transparency, and integrity in governance. However, it is not as if Public Interest Litigation processes have no disadvantages. Courts are often criticized for acting as super-agency. They have been accused of disrupting the framework of separation of powers and are also alleged to have abandoned the cause of the deprived and oppressed for middle-class and elite concerns. Recent studies have argued that social rights enforcement is essentially majoritarian and beneficiaries are middle and upper-class groups rather than marginalized.⁴⁴

Horizontal Effect of Part III Rights

Rights with vertical effects apply only against the government, whereas horizontal rights also apply against private actors. One feature of the Constitution of South Africa is its horizontality. Section 8(2) of the South African Constitution states that a provision of the Bill of Rights binds a natural or juristic person considering the nature of the right and duty associated with the right. The original understanding of Part III rights is that they apply only against the government and not against private individuals. Article 12 defines state as the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 13 states that all laws should be consistent with Part III, and State shall not make any law that takes away or abridges the rights conferred by Part III. Under Article 13(2), what is prohibited is state action of a particular kind. Article 13(2) does not cover individual invasion of individual rights.⁴⁵ The direct horizontal effect is associated with a few rights of Part III like Article 15(2), Article 17, Article 23, and Article 24. The indirect horizontal effect of constitutional rights may

⁴² *Supra* note 28

⁴³ (2010) 3 SCC 402

⁴⁴ David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L J. 189 (2012)

⁴⁵ Seervai, H.M. *Constitutional law of India*, Silver jubilee ed. vol. 1 ¶7.57

result from imposing an affirmative action on the state to protect individuals from certain types of private conduct. For example, in *Indian Council for Enviro-Legal Action v Union of India & Ors*,⁴⁶ it was held that the failure of the state to perform its duties under the Environmental Protection Act, 1986 undermined right to life under Article 21. In *M.C. Mehta v Kamal Nath*,⁴⁷ damages were awarded against a non-state actor's actions for violating the right to clean environment under Article 21. However, fundamental rights have minimal impact on contract law and associated litigation.⁴⁸ In *Zoroastrian Cooperative Housing Society v District Registrar*⁴⁹ the Court upheld the validity of a restrictive covenant that prevented the sale of land to a non-member of the Parsi religion. It rejected the contention that *public policy* mentioned in Section 4 of Gujarat Cooperative Societies Act 1961 should be understood in the context of Article 14 and 15. It remarked that though the constitution has set the goal of doing away with discrimination based on religion or sex, it is to be achieved by legislative action and not by the court declaring it as opposed to public policy. It remains to be seen how transformative constitutionalism will interact with these private power structures since the exact text of the constitution restricts the protection of rights to certain areas. The radical version of transformative constitutionalism would militate against the constitution's text and blur the private–public distinction, which can significantly impact interpersonal relations.

HORIZONTAL EFFECT: CHALLENGES

Horizontal application of rights could be found only in a few countries like South Africa, Ireland, Canada and Germany. The standard argument against the horizontal application of rights is that a Constitution primarily provides law to the lawmaker and not for the citizen. Limiting the application of fundamental rights to the public sphere provides autonomy to the citizens who can decide the rules that will govern them.⁵⁰ It is argued that personal choices should not be subject to the standard of fundamental rights required in state action. Our idea of fundamental rights has been inspired by the United States, a country very close to the vertical position. In the United States, State Action is mandatory for constitutional protection of the Bill of Rights to be attracted.

⁴⁶ (1996) 3 SCC 212

⁴⁷ (2000) 6 SCC 213

⁴⁸ Choudhry, S., Khosla, M. and Mehta, P.B. (2016) "Horizontal effect," in *The Oxford Handbook of the indian constitution*. Oxford, United Kingdom: Oxford University Press.

⁴⁹ (2005) 5 SCC 632

⁵⁰ Stephen Gardbaum, *The Horizontal Effect of Constitutional Rights*, 102 MICH. L. REV. 387 (2003), 394

The insertion of due process clause was one of the hotly contested issues during the drafting of our constitution. In a meeting of Advisory Committee G.B.Pant raised an interesting question about adopting due process. His question was whether future of the country will be determined not by collective wisdom of representatives of people but by the fiats of those elevated to the Judiciary.⁵¹ The same question echoes regarding the horizontal application of rights, forming an intimate part of transformative constitutionalism. Our Founding Fathers and Mothers understood state as an authority with the power to make laws or have discretion vested in it. It was understood as every authority which has been created by law and which has got specific power to make laws, to make rules or make by-laws.⁵² Remember that the text of our constitution does not ask for the horizontal application of all fundamental rights. Similarly, Directive Principles of State Policy are not justiciable and the courts are not charged with the implementation of socio-economic rights. If the drafters of our constitution intended to have a horizontal application of all fundamental rights or if they intended the court to play a role in the implementation of directive principles, they could have expressly spelled it out. Reasonable people can disagree over questions about rights and their scope and range in the private realm. These differences are better resolved in a social decision-making process rather than by an unelected judiciary. Such a position would also counter voters apathy. Fundamental Rights should be understood as assuring a basic set of guarantees which could be raised to any level as desired by the citizens acting through the elected representatives. Judges of Supreme Court can have different moral views and sentiments and horizontal application of fundamental rights, an essential element of transformative constitutionalism, can leave the Judges unchecked and without legal constraints. It can result in a wide variety of outcomes where the framers' intentions are completely ignored. Text of the Constitution has to be understood as a purposeful communication and the goal of the interpretation is to recover the meaning that was being communicated through the text.⁵³ Interpretation of the Constitution should not result in a situation where substantive constitutional change can be introduced by disregarding the amending procedure. Popular sovereignty means that the representatives of the present generation have the right to change the constitution. The judiciary should not usurp popular sovereignty in its course to transform society. Judges may indulge in interpretation to supplement constitutional provisions that are ambiguous, vague, inconsistent, or indeterminate,

⁵¹ Austin, G. (2018) *The Indian Constitution cornerstone of a nation*. New Delhi: Oxford University Press, 107

⁵² (1966) in *Constituent Assembly debates*. New Delhi: Lok Sabha Secretariat, Volume VII, Thursday, 25th November, 1948

⁵³ Huscroft, G. and Miller, B.W. (2011) "The case for Originalism," in *The challenge of originalism theories of Constitutional Interpretation*. Cambridge: Cambridge University Press.

but under the garb of interpreting the constitution, it cannot be amended. A Constitution with a reasonably democratic and practicable procedure for amendment cannot be considered restricted by the dead hand of the past. Article 368 has been drafted as proper machinery for constitutional development. By giving such an article, the drafters of our constitution have protected the Judiciary from direct clashes with the political executive by giving the legislature the final say on the constitution. Courts should also remember that even an unwelcome decision is obeyed because of the legitimacy associated with the institution. Unauthorized incursions by the court can only result in a loss of the court's goodwill. Loss of legitimacy can result in unenforced decisions and other forms of backlash like court packing, change in judicial appointment procedures, or other measures to curb the court's independence. This can result in Courts trying to stay within the tolerance level of the executive to avoid an attack on their independence.⁵⁴

CONCLUSION

The paper argues that society's hotly contested moral questions that deeply divide its reasonable members should be decided democratically. The enumerated rights should only be considered a floor-level guarantee above which democratic decision-making should happen. Transformative Constitutionalism should not be understood as reducing a written constitution to the status of a loose vehicle that expresses indeterminate and nebulous social values because such understanding would elevate unelected judges to the position of constitution-redrafters. Transformative Constitutionalism cannot excuse the court to go for a quixotic adventure.

⁵⁴ Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293 (2018).