

# Transformative Constitutionalism: A Study of the Constitutional Developments in India and Their Role in Social Transformation

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**Abstract:** The Central theme of the Research paper is the concept of Constitutionalism, Transformative Constitutionalism and Constitutional morality. Some landmark judgments which have massive transformative potential are also discussed in the research paper. Doctrinal research is done while writing this research paper. The Research paper throws light on the transition and paradigm shift from "Public morality" to "Constitutional morality" as reflected through some judicial decisions. Further, the challenges to major transformation in India are also discussed in the Research paper to identify barriers and provide a balanced analysis. This research paper will contribute by delving deep into the concept of Transformative Constitutionalism but it is also an attempt to throw light on the transformative nature of the Constitution of India. The Research paper also discusses that the balance between three branches of the Government is imperative if any major social change is to be brought.

**Key Words:** Transformative Constitutionalism, Constitutionalism, Constitutional morality, Public morality.

## 1. INTRODUCTION:

The concept of Transformative Constitutionalism is significantly important because it reflects the fact that the Constitution is not only a mechanism for limiting the powers of Government but it has true potential to dismantle the existing unequal social structures, protect the rights of disadvantaged and marginalized groups, respond to the changing needs of society and bring substantial positive changes in the society. In the present Research paper, the author has tried to study the changing Constitutional developments in our society as well as the relation between Constitutional law and social change. The Research paper throws light on different concepts like "Constitutionalism", "Constitutional morality" etc.

## 2. RESEARCH METHODOLOGY:

The Research Methodology which is adopted for this Research paper is Doctrinal in nature. Different literature is reviewed which includes Judicial decisions, articles, research papers etc. to develop the conceptual framework for the research paper and to clearly understand the meaning of Transformative Constitutionalism, Constitutional morality etc. The present research paper is developed using the Doctrinal research methodology. The author has tried to study the development, evolution and contemporary relevance and significance of the concept of Transformative Constitutionalism and how it develops and emerges through the interaction between Constitutional provisions, Constitutional interpretation through Judicial decisions etc. Some of the Judicial decisions have been discussed in the research paper to examine the Interpretive approach taken by Judiciary and the Constitutional reasoning behind it. A comparative perspective is also employed by the author to understand the development of Transformative Constitutionalism in different Constitutional context and how the Constitution of other Countries has responded to the structural inequalities in their Countries. The author has also tried to draw attention towards the gap between recognition of rights and their full realization in the society.

## 3. OBJECTIVES OF THE STUDY:

1. To review the existing literature regarding the Transformative Constitutionalism in India.
2. To critically analyze the Judicial decisions reflecting the transformative nature of the Constitution of India.
3. To discuss the transition from “Public morality” to “Constitutional morality”.
4. To discuss the challenges in the process of transformation in India.

#### 4. LITERATURE REVIEW:

The author in this research paper has reviewed some of the existing literature related to the research topic so as to understand the concept of Transformative constitutionalism, the role of Constitutional law in the process of transformation in India, to identify the research gaps in this research area. The existing literature is also reviewed to understand how the concept of Transformative Constitutionalism evolved and got developed, to examine how the process of transformation was shaped through Judicial interpretation.

#### 5. PRINCIPLE OF CONSTITUTIONALISM:

Constitutionalism means the principle which puts limits on the governmental powers by ensuring that the government does not act arbitrarily. It travels beyond the notion of ‘legality’ ensuring that the governmental action is not only according to the already existing laws but those laws should also have some Constitutional basis. Here, it is important to think that merely having Constitution in any Country does not mean that the same Country also follows Constitutionalism if the basic tenets of Constitutionalism like fundamental rights, independence of judiciary and Constitutional principles are not followed in that Country. We know that apart from some Countries, almost every other Country in the world is having a written Constitution. However, we have to understand that having a Constitution does not always guarantee that the Country also follows the Principle of Constitutionalism. This makes Constitutionalism more significant (Bazezew 358)<sup>1</sup>.

#### 6. TRANSFORMATIVE CONSTITUTIONALISM <sup>2</sup>:

Karl Klare (150) in his works defines Transformative Constitutionalism as;

*“By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law”*

#### 7. THE CONCEPT OF CONSTITUTIONAL MORALITY:

Constitutional morality implies that the core principles of the Constitution and the Constitutional values should be followed. It helps us to understand that the spirit of the Constitution is equally important like that of the Constitutional text ensuring a more inclusive, egalitarian and democratic society where the individual freedom and liberty will be balanced with the public welfare (Shukla)<sup>3</sup>.

#### 8. MOVEMENT FROM “PUBLIC MORALITY” TO “CONSTITUTIONAL MORALITY” THROUGH JUDICIAL INTERPRETATION:

“Public morality”, a concept which encompasses the moral standards laid down by society has for a very long period influenced the limits and boundaries of Fundamental rights in India (Sharma 447-450)<sup>4</sup>.

#### JUDICIAL APPROACH:

In the present Research paper, the author is going to discuss some landmark judgments reflecting a significant and decisive shift from “Public morality” to Constitutional morality”.

The Supreme Court of India in NATIONAL LEGAL SERVICES AUTHORITY (NALSA) Vs. UNION OF INDIA AND OTHERS, ((2014), 5 SCC 438) dealt with the urgent and important issue of recognizing Transgender as “third gender” and observed that the transgender persons are equally entitled to equality and equal protection of law enshrined under art. 14 and right to life and liberty, right to live with dignity as guaranteed by art. 21 of the Constitution of India, 1950. In this case, the Bench dealt with 2 important questions. The first central question was to assign legal recognition to Transgender as Third gender which will help them to claim their Constitutional and legal rights and also to protect and preserve their distinct socio- cultural identity. Second thing was the Court acknowledged that Transgender persons

have a right to determine their Self- identity and that they can identify themselves as male, female or third gender. Further, Transgender persons are equally entitled to Constitutional protection accorded to them (Jha 49)<sup>5</sup>.

It is pertinent to note here that NAZ FOUNDATION VS. GOVT. OF NCT OF DELHI, 160 (2009) DLT 277 marks the significant and thoughtful shift in the interpretation of article 15 of the Constitution of India, 1950 which prohibits discrimination on the ground of religion, race, caste, sex, or place of birth. Hitherto the interpretation of art. 15 was overshadowed by art. 14 of the Constitution of India, 1950 which provides “equality before law and equal protection of law”. This paradigm shift as witnessed in Naz foundation case has challenged the Conventional way of reading the Constitutional text. This reinterpretation of art. 15 will also guarantee “Substantive equality” as against “Formal equality” as Art. 15 has immense potential of social transformation. “Formalistic approach of equality” is inadequate looking at the rich social fabric of our Country. This shift towards “Substantive approach” will certainly help in realizing the true transformative potential of Indian Constitution (Pillai 366)<sup>6</sup>.

The Delhi High Court, in NAZ FOUNDATION V. GOVERNMENT OF NCT OF DELHI, (160 (2009) DLT 277) held that Section 377 of Indian Penal Code was unconstitutional to the extent that it criminalized consensual homosexual acts between adults in private. The Court observed that such criminalization violated constitutional guarantees, particularly Article 14 (equality), Article 15 (non-discrimination), and Article 21 (life and personal liberty). However, in SURESH KUMAR KAUSHAL & ANR. VS. NAZ FOUNDATION & ORS. (2014) 1 SCC 1, the Supreme Court overturned the Delhi High Court's decision of Naz Foundation case. The Supreme Court upheld the Constitutional validity of Section 377 of Indian Penal Code. It becomes imperative to discuss the reasoning given in Suresh Kaushal's case in which the Court observed that the intention of legislature should be considered while interpreting a statute as it reflects the object and purpose behind that legislation (Yadav and Sonwani 199-200)<sup>7</sup>.

It is right to discuss about another landmark Judgment of NAVTEJ SINGH JOHAR VS. UNION OF INDIA, ((2018) 10 SCC 1) which overruled Suresh Kumar Kaushal (2014) case observing that s. 377 is unconstitutional as far as it deals with consensual sexual acts between the adults of same sex in private. It was a welcome step as the Court not only decriminalized homosexuality but also laid emphasis on the fact that even the LGBTQ+ people are also entitled to Constitutional protection. In this case, Constitutional morality was given importance under which Constitutional protection is to be given even to sexual minorities whose behaviour may not be supported by majority opinion. Further, the Judgment relied on the concept of Transformative Constitutionalism which believes that the Constitution of India has immense transformative potential. It is pertinent to note that the Constitution of India is a transformative document. We have many provisions in our Constitution like fundamental rights, directive Principles of state policy, provision for abolition of untouchability which carry immense potential of transformation. The Constitution is an instrument of social change. It not only preserves the existing social fabric but it also transforms the age old discriminatory social structures. It also accords Constitutional protection to the marginalized sections of the society who had been discriminated against for a very long time (Maloo and Katiyar)<sup>8</sup>.

## **9. TRANSFORMATIVE CONSTITUTIONALISM: CHALLENGES & IMPLEMENTATION GAP**

Indian Judiciary has tried to bring major transformation through many progressive judgments. However, the implementation gap is the main obstacle that is stalling the process of transformation. It requires coordination between three branches ie. Legislature, Executive and Judiciary. Even if Judicial directives are issued but if there is no proper Institutional compliance of those directives then it is difficult to bring behavioural or social change. Other hurdles are established administrative practices, rigid procedures, state's incapacity to provide infrastructure or institutional mechanism for implementing the changes brought through these Judicial decisions. Another challenge is India's socio-economic diversity (Balaguru 19)<sup>9</sup>.

### **BRIDGING THE GAP AND WAY FORWARD <sup>10</sup>:**

Singh in his work discusses that:

1. The concept of Constitutional morality has become a part of interpretive framework in India though it is not explicitly mentioned in the Constitutional text. We find this concept in the writings and speeches of Dr. B.R. Ambedkar. It is used by Judiciary to move beyond formalism and to interpret the laws in tune with the Constitutional values and ethos.
2. Institutional reforms can be developed so as to remove the uncertainty revolving around the use of the concept of Constitutional morality in Constitutional adjudication by ensuring that the affected parties are given fair

hearing, Courts can hear the experts and government authorities which will help the Courts to make better informed decisions.

3. Structured dialogue between Judiciary and legislature should be there so that balance can be struck between Judiciary's role of protecting the Constitutional rights and role of legislature to enact laws.
4. Judiciary should consider the social realities and social context while interpreting the Constitutional text so as to make the process of Constitutional adjudication meaningful.
5. Courts can consider the decisions given by Foreign Courts which will further improve Judicial reasoning in Constitutional adjudication.

Transformation is not possible only through Judicial intervention but it requires legislature to perform active role of policy making keeping in mind the Constitutional commitment to dignity, liberty, equality etc. and also the International human rights standards. Further, Transformative Constitutionalism can be an effective tool of social transformation only when we bridge the gap between law and reality. The existing laws and policies should be periodically reviewed and the gaps can be filled to ensure that its benefit should reach the intended beneficiaries. Thus, it is important to note here that Judiciary can identify the problem. However, it is the responsibility of the legislature to formulate policy or prepare legislative framework and executive to implement it. Therefore, balanced approach will make the process of transformation more sustainable. Further, only Constitutional guarantee or legal recognition is not enough unless and until the people in our society are aware about their rights and they have ability to claim those rights. Institutional mechanism should also be in place to implement those policies then only social change is possible (Gautam and Kumar 7447-7448)<sup>11</sup>.

The Constitution of India has the potential to transform the society by responding to its changing needs. It is the Supreme Law of the land and every ordinary law in India derives its validity from it. It consists of fundamental rights, directive principles of state policy etc. which reflect the Constitutional commitment towards preserving the core Constitutional values of liberty, equality, dignity. The concept of Transformative Constitutionalism as applied by Judiciary in India tries to transform the existing society in line with the Constitutional values. Further, while delivering the judgments, Courts should take into account the social context while remaining anchored with the Constitutional Principles and ethos. In this way, Constitutional adjudication can be done even while considering the pluralistic nature of our society. It will also help in achieving the transformative objectives of the Constitution (Khan and Ali 1421)<sup>12</sup>.

## **10. EMPOWERMENT OF WOMEN AND TRANSFORMATIVE CONSTITUTIONALISM IN INDIA:**

The women in India have Constitutional protection. These Constitutional guarantees are then supplemented by different legislative measures so as to ensure equality, non discrimination, dignity etc. The Constitutional protection is reflected through various Constitutional provisions. Further, various laws like Protection of Women from Domestic Violence Act, 2005, the Sexual harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 are there which give robust Institutional support for the Constitutional guarantees. The Judiciary in India also played an important role in transforming the lives of women in India through various progressive judgments like Joseph Shine vs. Union of India, (2019)3 SCC 39, Indian Young Lawyers Association & Ors. vs. the State of Kerala ((2019) 11 SCC 1). All these developments substantiate the same fact that Constitution is not only the document for Governance but it can also dismantle the existing inequalities and bring major social change (Muthukumar)<sup>13</sup>.

## **11.ROLE OF JUDICIAL REVIEW & PIL IN CONSTITUTIONAL TRANSFORMATION:**

It is pertinent to note here that the concept of Public Interest Litigation can be described as a distinctive feature of Transformative Constitutionalism where a public spirited person or group can approach the Court where Public interest is involved. Further, Judicial review empowers the Judiciary to declare any law as unconstitutional if it goes against the Constitutional provisions. Thus, it is also an instrument through which the Constitutional Principles can be enforced. The PIL and Judicial review made the Constitutional remedies accessible particularly where the rights of disadvantaged groups are involved and thus, significantly contributed towards bringing transformation in India. The way forward would be to combine the efforts from all the three branches ie. Judiciary, Legislature and Executive (Joshi)<sup>14</sup>.

Further, if we talk about the Jurisprudence in India revolving around women, LGBTQ+ community, sexual minorities, transgender rights, we realize how the Judiciary has interpreted the Constitutional rights in accordance with the changing notions of dignity and equality laying down Constitutional standards through which transformation can be brought. Through various progressive judgments, Judiciary has tried to protect the transformative promises of the

Constitution. However, such major social transformation requires strong and intensive efforts not only from Judiciary but also from legislature, executive, civil societies etc.(Chengappa and Tekwani)<sup>15</sup>.

## **12. TRANSFORMATIVE CONSTITUTIONALISM IN SOUTH AFRICA:**

The experience of South Africa is significant here as the concept of Transformative Constitutionalism mainly evolved there in the background of long history of apartheid and racial discrimination. The South African model shows the Constitutional transition from unjust society to dismantling the inequalities in that society and establishing a democratic structure. The South African model thus, is the example to show that the transformative constitutionalism not only addresses the vertical discrimination but also the horizontal discrimination. We find some similarities between South Africa and India in achieving equality in society but the Constitutional approach to achieve it is different. The distinguishing feature is that Constitutional transformation in India mainly occurs through state obligations, Judicial interpretation and Statutory intervention. Further, in South Africa, the horizontal application of certain rights is recognized by their Constitution and discrimination even by private persons is prohibited (Sharma and Tyagi)<sup>16</sup>.

## **13. ART.142 OF THE CONSTITUTION OF INDIA AND ITS TRANSFORMATIVE POTENTIAL:**

In the discussion of transformative constitutionalism, art. 142 of the Constitution of India becomes relevant because it gives remedial powers to the Supreme Court to make necessary orders to impart "Complete justice". The purpose of Transformative Constitutionalism is not achieved only by recognizing a right but some practical remedy should also be provided for the enforcement of that right. Here, art.142 comes into picture where the Supreme Court can provide an effective remedy and bring Constitutional transformation. The Supreme Court's Jurisprudence on art. 142 of the Constitution makes it clear that the provision is to be used to provide effective and equitable remedies depending on the facts and circumstances of the case and not to supplant the existing substantive law. In this way, in India, transformative jurisprudence is mainly developed through PIL, Art.142 and Judicial interpretation (Hailbronner)<sup>17</sup>.

We have a written Constitution in India. The elaborate amendment procedure is also provided under art. 368 of the Constitution but Constitutional development has also happened through Judicial interpretation of the concepts of equality, liberty, dignity, privacy etc. Thus, we have to understand that the Constitution whether contained in a single document or developed through Judicial decisions and Constitutional conventions, it should be able to adapt and respond to the changing needs of society. The UK and India demonstrate two different approaches to rights' protection. In UK, the parliamentary sovereignty combines with Judicial interpretation whereas India has a strong Constitutional framework placing the legislation under the supremacy of Constitution and strong form of Judicial review (Kundu)<sup>18</sup>.

In a discussion on transformative constitutionalism, it is necessary to focus on the Constitutional experiences of the United States and the countries like India and Africa. The American constitutionalism places heavy emphasis on individual liberty and limited government. However, if we see the Constitutional projects of the Countries like India and South Africa, we find that the individual rights are protected with positive commitments of the state to dismantle structural inequalities and creating conditions for full realization of such rights (Somwal 11-12)<sup>19</sup>.

In this way, the Jurisprudence emerging through various landmark Judicial decisions demonstrates the potential of the Constitution and our legal system to address the historically entrenched forms of discrimination and inequalities. The Transformative constitutionalism ensures that the Constitutional commitment of liberty, equality, dignity should produce meaningful change in the lives of the vulnerable sections of our society (Saha 455)<sup>20</sup>.

## **14. CONCLUSION:**

In this way, Transformative constitutionalism acts as a vehicle of social transformation, it reflects the Constitution's potential to respond to the changing needs of society. Transformative constitutionalism ensures that formal equality will convert into substantive equality. However, this requires efforts so that legal recognition of rights will convert into actual enjoyment of rights, Judicial decisions and laws will be effective only when they change the lived experiences of the intended beneficiaries, Constitutional literacy is to be promoted, Institutional reforms should be brought through which the conditions of the marginalized sections of our society will change.

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