

Transformative Constitutionalism – Examining the robust role of the Judiciary in recent times

Aditya Mehrotra¹

Abstract

The Constitution is referred to as the "living law of the country" since it is always changing to meet the needs of time. The function of the judiciary as an activist has kept the spirit of the Constitution alive. India's Constitutionalism is based on the idea of empowering the State to bring about social change. Increased protection of basic rights and freedom is possible thanks to transformative constitutionalism. Existing social systems are disrupted during transformation.

The concept of transformative constitutionalism is examined in this article, as well as its consequences for the adjudication of basic rights and freedom. Further, the importance of transformative constitutionalism for judicial adjudication of rights is discussed in this article. The purpose of this paper is to examine the significance of transformative constitutionalism and to analyze the progressive judgments by the Supreme Court in recent times and conclude with the idea of transformation and its outlook today.

¹ 3rd Year, Symbiosis Law School, Pune, adityamehrotra922@gmail.com

Introduction

A V Dicey defines the Constitution² as "*any regulations that impact the distribution or exercise of sovereign authority in the State, directly or indirectly.*" The Indian Constitution, which is the world's longest written constitution, was approved on November 26, 1949³. The constitution has not been a stale document over its seven decades of existence; rather, it has played a transformational role.

Constitutionalism is linked to constitutional identity, as stated in *M. Nagaraj v. UOI*⁴. The greatest value is constitutional identity, and constitutionalism is also about maintaining constitutional identity. Constitutionalism is concerned with the concept of checks and balances on government authority, as well as the philosophy of directed power. Indian constitutionalism is based on the idea of empowering the State to affect social change.

Transformative constitutionalism is frequently evident in South African law⁵, where it is recognized as another important source of development and advancement. The Constitution establishes a country based on the protection of democratic ideals and fundamental human

² Loughlin, M., 2021. *AV Dicey and the Making of Common Law Constitutionalism*.

³ India.gov.in. *Constitution of India, National Portal of India*.

⁴ Nagaraj v. Union of India, (2006) 8 SCC 212.

⁵ Langa P "Transformative Constitutionalism" 2006(17) *Stellenbosch Law Review* 351.

rights via this endeavour. As a result, the Constitution is the source of transformational constitutionalism.

Transformation in a country is something that is supposed to be embraced by everyone from the lowest to the top of the social hierarchy. Transformative constitutionalism is a commitment to substantive equality and improving socio-economic conditions, or *"the meaning of transformation in legal terms is as highly contested as it is difficult to formulate,"* which simply means changing the Constitution for the betterment of the citizens of the country while adhering to the principles established by the respective country's Constitution. In a country like India, where the population is in billions, the implication of each new change is difficult to comprehend. Especially when it comes to citizens' views, religions, faith, and cultures, which they have been following since birth.

Ethos of Transformative Constitutionalism and its Aftermath

It was in 1934 when Roy introduced the notion of forming a constituent assembly⁶. Pt. Jawaharlal Nehru also said in 1938, that India's Constitution will be drafted without external intervention. As a result, the British government ultimately agreed to this demand in 1940, which became known as the "August Offer of 1940"⁷. This momentous work of establishing a

⁶ Constitutionofindia.net. 2021. *Constitution of India*. [online] Available at: https://www.constitutionofindia.net/historical_constitutions/constitution_of_free_india_a_draft_m_n_roy_1944_1st%20January%201944 [Accessed 4 January 2022].

⁷ Constitutionofindia.net. 2021. *Constitution of India*. [online] Available at: https://www.constitutionofindia.net/blogs/this_month_in_constitution_making_august_1940_britain_makes_august_offer_acknowledges_india_s_demand_for_constituent_assembly [Accessed 4 January 2022].

constitution for independent India was completed in two years, eleven months, and eighteen days, thanks to the tireless labour of 389 members of the constituent assembly⁸. However, as the 73rd Independence Day approaches, we must consider to what extent Nehru's ideal of "Wiping out every tear from every eye"⁹ has been realized.

The Indian Constitution was written to overcome the country's colonial history as well as societal evils, and to usher in a social shift that exemplified a transformative movement. Its survival was dependent on its shift from a medieval, hierarchical civilization to an egalitarian democracy. This is where the Constitution went in a new direction.

After the Emergency, jurisprudence based on the constitutional ideals of equality, liberty, and fraternity began to emerge. In pursuit of legitimacy after the Congress government's loss in the post-Emergency era, the Supreme Court established the jurisprudence of Public Interest Litigation.

The Commonwealth's adversarial system¹⁰, according to Justice PN Bhagwati, was inadequate to Indian conditions since it was based on *"self-identification of damage and self-selection of remedy."* This would not secure access to justice, given the widespread illiteracy of the population. It's worth noting that Justice Bhagwati, one of the early proponents of Public

⁸ 164.100.47.194. *Lok Sabha*. [online] Available at: <http://164.100.47.194/loksabha/constituent/facts.html> [Accessed 4 January 2022].

⁹ JL Nehru, Freedom at midnight speech, 14th August, 1947.

¹⁰ Jaising, I., 2019. *'For me, it now means personal liberty': Indira Jaising explains Transformative Constitutionalism*. [online] Scroll.in. Available at: <https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism> [Accessed 4 January 2022].

Interest Litigation¹¹ as expressed in SP Gupta¹², was also one of the architects of the ADM Jabalpur¹³ decision.

From Justice Krishna Iyer to Justice Chandrachud, The journey of Transformative Constitutionalism has come a long way. It is therefore not unexpected that affirmative action measures were introduced by the Mandal Commission during this time. Reservations in educational institutes, and now in promotions as well, as approved by the Supreme Court in BK Pavitra¹⁴, have been single-handedly responsible for ensuring whatever little diversity we see today, based on the idea of achieving substantive equality and subject to wide-ranging debates.

D.Y. Chandrachud, J. wrote in BK Pavitra, highlighting the importance of Transformative Constitutionalism:

- (i) the members of the Constituent Assembly recognized that Indian society suffered from deep structural inequalities; and
- (ii) the Constitution would serve as a transformative document¹⁵ to overcome them, *“Reservations for SCs and STs in legislatures and state agencies are one means of resolving these inequities.”*

¹¹ Economic and Political Weekly. 2018. *A Judge as a Philosopher*. [online] Available at: <https://www.epw.in/journal/2017/27/web-exclusives/judge-philosopher.html> [Accessed 4 January 2022].

¹² SP Gupta v. Union of India, (1982) 2 S.C.R. 365.

¹³ ADM Jabalpur vs Shivkant Shukla (1976), 2 SCC 521.

¹⁴ B.K. Pavitra vs Union of India, (2019) 16 SCC 129.

¹⁵ *Id.* At. 9.

a) **Thrust of the Supreme Court Judgment on Privacy – Pioneering the Transformation Debate**

A Nine-Judge bench of the Supreme Court of India specifically acknowledged the primacy of decisional autonomy in any discussion of privacy in *Puttuswamy v Union of India*¹⁶. Sexual and reproductive autonomy was recognized as basic rights protected by the right to privacy in the ruling.

It stated: *"The protection of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation are at the heart of privacy. Individual autonomy is protected by privacy, which recognizes an individual's ability to regulate important parts of his or her life."*

This was ground-breaking since, in the past, India's reproductive health laws and policies had failed to prioritize women's rights. Instead, they were focused on demographic goals like population control, while simultaneously undermining women's reproductive autonomy through discriminatory policies like spousal permission requirements for reproductive health care. The *Puttuswamy* decision puts into question several current Indian legislations.

For example,¹⁷ if pushed to its logical conclusion, the right to privacy envisioned in the ruling might fundamentally overturn the framework that governs abortion, the Medical Termination

¹⁶ Justice K.S Puttuswamy v Union of India, (2017) 10 SCC 1.

¹⁷ Aggarwala, S., 2019. *Decisional Autonomy as Central to Privacy: Reproductive Rights in India* — IACL-IADC Blog. [online] IACL-IADC Blog. Available at: <https://blog-iacl-aadc.org/2019-posts/2019/6/14/decisional-autonomy-as-central-to-privacy-reproductive-rights-in-india> [Accessed 4 January 2022].

of Pregnancy (MTP) Act of 1971¹⁸. It's important to remember that the Act authorizes abortion only as a population control strategy, not as a right. Though the case law had recognized a basic right to procreate or abstain from procreating through the use of contraceptives up until the Puttaswamy decision, neither statute law nor court decisions had recognized the right to abort. The MTP Act forbids abortions unless a doctor certifies that the pregnancy must be terminated for medical reasons (section 3 and section 5 of the Act)

Only registered medical practitioners are allowed to terminate a woman's pregnancy under Section 3¹⁹ of the Act if they believe, in good faith, that continuing the pregnancy would endanger the woman's life or gravely injure her physical or mental health, or that the child would be severely handicapped by physical or mental abnormalities.

After 20 weeks, section 5²⁰ of the Act takes effect, which allows abortion only if the medical practitioner considers it is urgently essential to preserve the woman's life. At any point of the pregnancy, a mother cannot choose to terminate her kid on her own. Abortion as an "intimate decision" is undermined by transferring the decision to terminate from the woman to her doctor.

If the legal system does recognize the right to abort, as Chelameswar, J.'s view in the Puttaswamy ruling did²¹, it will have to decide how far the state can intervene in the exercise of that right.

¹⁸ Medical Termination of Pregnancy Act, 1971, Acts of Parliament, 1971 (India).

¹⁹ Section 3, Medical Termination of Pregnancy Act, 1971, Acts of Parliament, 1971 (India)

²⁰ Section 5, Medical Termination of Pregnancy Act, 1971, Acts of Parliament, 1971 (India)

²¹ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 at para 38.

When does the state's interest in safeguarding the fetus' life takes precedence over a woman's right to privacy and bodily integrity? Is it possible for the government to prescribe what constitutes a valid basis for aborting a child? Should a woman have the right to abort a female embryo if she does not wish to carry the baby to term?

Similarly, the right to privacy will shape ongoing discussions in India over the legality of paid surrogacy. The Surrogacy (Regulation) Bill, 2016²², which was enacted by the Lok Sabha in December 2018, forbids paid surrogacy and places restrictions on who is eligible to seek and give altruistic surrogacy services. Allowing uncompensated surrogacy but not paid surrogacy argues that women's natural duty is to give birth.

To sum it up, The Puttuswamy decision demonstrates the important and developing role that India's court may play in addressing the legal and practical impediments that prevent women and girls from exercising their reproductive rights. While litigation has its drawbacks, such as long timelines and difficulty enforcing decisions, the Indian courts' strong recognition of reproductive rights as fundamental rights has the potential to create a mandate for the government to move away from population control approaches, confront discriminatory stereotypes that limit women's authority, and instead focus on women's rights to dignity, autonomy, and bodily integrity in reproductive hegemony²³.

²² PRS Legislative Research. 2016. *The Surrogacy (Regulation) Bill, 2016*. [online] Available at: <https://prsindia.org/billtrack/the-surrogacy-regulation-bill-2016> [Accessed 4 January 2022].

²³ Indian Constitutional Law and Philosophy. 2017. *The Supreme Court's Right to Privacy Judgment – I: Foundations*. [online] Available at: <https://indconlawphil.wordpress.com/2017/08/27/the-supreme-courts-right-to-privacy-judgment-i-foundations/> [Accessed 4 January 2022].

The legal protections expressed in the aforementioned verdict serve as a powerful call to action for the court to continue to defend and enforce women's reproductive rights defined as both reproductive health and autonomy in future litigation, notably for underrepresented communities.

b) Indirect Discrimination and D.Y. Chandrachud, J. – A Transformative Approach

Legal equality is founded on the idea of equal application of the law, but it does not take into consideration substantive equality. Substantive equality examines how various groups vary from one another in terms of their attributes. As a result, equitable application of the law may result in indirect discrimination against a group. As a result, substantive equality attempts to account for these variations in the implementation of the law.

Consequently, Chandrachud, J has highlighted the sensitivity of prejudice by evoking the concept of indirect discrimination. Legislation that appears to be neutral on the surface may appear to be non-discriminatory to the uncritical eye, yet it may be oppressive to some groups.

Chandrachud J. finds, based on advancing gender equality rulings such as Anuj Garg²⁴, that:

²⁴ Anuj Garg & Ors vs Hotel Association of India, (2008) 3 SCC 1.

The effect of a provision challenged as being ultra vires the ban of discrimination based on sex exclusively under Article 15(1)²⁵ is to be judged, not by the state's goals in adopting it, but by the effect it has on affected persons and their basic rights.

Discrimination based on a specific interpretation of the function of sex, whether direct or indirect, would not be distinguished from discrimination forbidden by Article 15 solely based on sex.

The phrases "*direct or indirect*" are essential because this is the first time the Supreme Court has officially recognized the idea of indirect discrimination (i.e., when seemingly neutral regulations, such as S. 377²⁶, have a disproportionate impact on a group of people).

Chandrachud J. brings together the facially neutral S. 377²⁷'s indirectly discriminatory character, the effects test, the ban of "*sex*" discrimination under Article 15(1)²⁸ in a case involving "*sexual orientation*," and the role of social context to the inquiry in this way. This is how the debate goes:

1. Discrimination based on gender is prohibited under Article 15(1)²⁹.
2. Discrimination based on gender stereotypes and the dichotomy between "*man*" and "*woman*" are the foundations of sex discrimination.

²⁵ Constitution of India 1949, Article 15, Clause 2.

²⁶ *Id* At. 32.

²⁷ *Ibid*.

²⁸ *Id* At. 40.

²⁹ *Ibid*.

3. It is these gender preconceptions that serve as the foundation for criminalizing same-sex relationships.

4. Section 377³⁰ may be phrased neutrally, yet it has a disproportionately negative impact on the LGBT population. As a result, it is implicitly discriminatory based on sexual orientation.

a. 5. Section 377³¹ breaches Article 15(1)³² of the Constitution since the foundation of indirect discrimination is prejudicial to gender roles (the background social environment).

c) Notable Recognition of ‘Indirect Discrimination in Lt. Col. Nitisha v.

Union of India – An Ode to Transformative Constitutionalism

In the Nitisha case³³, the Supreme Court reasoned that gathering statistical information is one approach to check for indirect discrimination. It did clarify, however, that the lack of statistical data cannot be used to invalidate indirect discrimination allegations.

In Orsus and Ors v. Croatia³⁴, the European Court of Human Rights found that indirect discrimination might be shown without statistical proof while considering the claims of fifteen

³⁰ *Id* At. 32.

³¹ *Ibid*.

³² *Id* At. 40.

³³ Lt Col Nitisha and Ors v Union of India, SCC OnLine SC 261.

³⁴ Orsus and Ors v Croatia, 15766/03.

Croatians of Roma heritage who claimed racial discrimination and segregation in schools with Roma-only classrooms.

To efficiently evaluate the existence of indirect discrimination in the current case, the Supreme Court of India used a two-stage approach from *Fraser v. Canada*³⁵, a decision by the Supreme Court of Canada.

First, the courts must examine the facts to determine if the policy in question has a disproportionate impact on a certain segment of society. Because such evidence may be difficult to come by, the Court declared that evidence provided by the claimant group will also qualify as solid proof.

Once the information has been gathered, the courts must determine whether the policy impacts a specific group disproportionately. Social isolation, economic exploitation, psychological suffering, bodily injury, and political marginalization are all examples of negative consequences. The historical disadvantage that the claimant group has suffered as a result of any erroneous policy by other dominant groups is an effective technique to determine indirect discrimination. The discriminator's aim can be inferred from the historical narrative³⁶.

Importantly, as we've seen, Chandrachud J.'s formulation was sufficiently precise to address more complicated issues as they arose. Of course, the proof will be in the eating, but for now,

³⁵ *Fraser v Canada*, 2020 SCC 28.

³⁶ Supreme Court Observer. 2021. *Court Recognises Indirect Discrimination & Strikes Down Army's Gender Discriminatory Promotion Practices - Supreme Court Observer*. [online] Available at: <<https://www.scobserver.in/journal/court-recognises-indirect-discrimination-strikes-down-armys-gender-discriminatory-promotion-practices/>> [Accessed 4 January 2022].

Lt Col Nitisha's case³⁷ represents a significant step forward in the Indian Constitution's acceptance, identification, and articulation of indirect discrimination.

Conclusion

While the definition of Transformative Constitutionalism continues to be debated in light of various experiences around the world, key elements that define or distinguish Transformative Constitutionalism are the central role of the State (including courts) in completing the emancipation project and the constant development of the Constitutional ideals of liberty, equality, and fraternity. The State must play an active role in forming a society based on these ideals if the society is to survive.

To end the essay with the quote of Justice Krishna Iyer, a judge who has had a lasting impact on my work has been the leading proponent of this viewpoint in India's court.

"The authentic voice of our culture, voiced by all the great builders of modern India, stood for the abolition of the hardships of the pariah, the mleccha, the bonded labour, the hungry, hard-

³⁷ *Id* At. 48.

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

working half-slave, whose liberation was integral to our independence," he said³⁸, reflecting on the need to interpret the Constitution as a transformative document.

³⁸ Upendra Baxi, The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India, in C. Raj Kumar and K. Chockalingam (eds) Human Rights, Justice, & Constitutional Empowerment.