



## TRANSFORMATIVE CONSTITUTIONALISM: THE SAGA OF SOCIAL TRANSITION

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### Introduction:

Law prevailed amidst man since the origins of society as the natural outcome of it, wherein; Natural law was the genesis of law. Some orderly civilizations supported peace and recognized natural rights although, there existed some civilizations that believed in authoritarian establishment. Natural law became the underlying principle for preserving justice and securing freedom of the inhabitants. Thus, law and social advancement turned out to be adjacent aspects. Law is an immensely broad concept that includes a wide array of notions, out of which justice is the most fundamental ingredient. The rationale behind law will fail without the achievement of justice. Therefore, there has to be a direct nexus between man-made law and justice.

In the present modern society where democracy and liberty prevails and where individuals are aware of their rights and duties, the society can progress only if social change is embraced. For this constant evolution to succeed, the law of the state has to support this growth and ensure social stability. In other words, it is mandatory for the law to be in a constant state of transformation simultaneous to the transition in society.

**The concept of ‘Transformative Constitutionalism’:**

The fundamental law of a sovereign nation exists in its Constitution. This Constitution encompasses the basic principles to which internal life in this country is to be confirmed. All Constitutional democracies in the world indicate to “the brooding spirit of law”, the spirit being, justice for all. The “brooding spirit of law” and its qualities inspired the founding fathers to infuse its eternal aroma into the Indian Constitution and to thus, constitute India into a Sovereign, Socialist, Secular and Democratic Republic. Indians, having been dominated and oppressed by the colonials for over a hundred years imagined and conceptualized a cluster of essential rights. These rights took the form of fundamental rights and other legal rights in the Constitution that enabled independent India to secure to all its citizens; justice, liberty, equality and fraternity. The Constitution makers drafted this document and conferred it the status of the Supreme Legal Document of our country. Considering the dynamic and transitional society of India, the Constitution was drafted in such a distinct manner that an amending power was incorporated within its provisions for any future alterations. Therefore, the Constitution of India is characterized as both rigid and flexible at the same time. In the wise words of S.K. Kaul, J.,

*The Constitution was not drafted for a specific time period or for a certain generation, it was drafted to stand firm, for eternity. It sought to create a Montesquian framework that would endure in both war time and in peace time and in Ambedkar’s famous words, “if things go wrong under the new Constitution the reason will not be*



*that we had a bad Constitution. What we will have to say is that Man was vile”.*

For a constitutional democracy to advance in all spheres, the law governing that nation must adapt and evolve gradually. A law that does not amend with the changing times will be as futile as a lifeless branch on a tree that is not only dormant but also restricts the growth of that tree. The Constitution of India has been in force since the last 69 years governing the state functions and guarding the rights of individuals. These rights and privileges are aimed at transforming an individual's personality and to do so, they have to be in consonance with its consistent fluctuations. The human nature itself is contrary to the notion of stability. It seeks a better life, it desires for social advancement and it craves towards harmony. Therefore, it is the duty of the constitutional courts in particular and the judiciary in general to interpret the provisions of the Constitution in such a broad manner that its real intent of justice extends to all sections of the society. Guided by a logical inference it may be settled that the Constitution has two facets, one, the ability of this document to transform which confers it the status of an organic document, and second, its ability to continuously shape the lives of individuals in the society. This innate essence is perceived as ‘Transformative Constitutionalism’.

#### **Contemporary developments in India:**

Recent judgments involving the most crucial aspects of social life wherein the Supreme Court observed the principles of transformative constitutionalism:

1. Right to Privacy Case
2. Section 377 Case

3. Sabarimala Case
4. Triple Talaq Case

#### **(i) The Right to Privacy Case<sup>1</sup>:**

The Right to Privacy case was a subordinate issue arising out of the Aadhar Card case, wherein the validity of the compulsion imposed by the Government of India to have an ‘Aadhar Card’ to avail benefits of governmental schemes. The issue dealing with the sphere of privacy was recommended to a larger bench that, upheld the right to privacy as a fundamental right of an individual. In the words of Dr. D.Y. Chandrachud, J.,

*But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decision on how life should be lived are entrusted to the individual.... the duty of the State is to safeguard the ability to take decisions - the autonomy of the individual - and not to dictate those decisions.*

The bench observed privacy to be an intrinsic and inalienable right of a citizen and therefore, embedded it under the protective cloak of Article 21 of the Constitution of India. This would reshape the following aspects: (i) privacy involving the person, (ii) informational privacy and (iii) the privacy of choice. Therefore, the words of the Constitution come alive only when interpreted in a broad cannon.

#### **(ii) The Section 377 Case<sup>2</sup>:**

<sup>1</sup>Justice K. S. Puttawamy(Retd.) &Anr. v. Union of India &Ors., (2017) 10 SCC 1.

<sup>2</sup>Navtej Singh Johar&Ors. v. Union of India &Ors., (2018) 10 SCC 1.



This judgment upheld the rights of the LGBT community by quashing Section 377 of the Indian Penal Code, so long as it criminalizes consensual sexual acts between consenting adults. The Bench extensively referred to the concept of ‘Constitutional morality’ while deciding the issue. Constitutional morality refers to the paramount reverence to the provisions of the constitution while ensuring the prominence of free speech and expression because; it is this free expression that is the cornerstone of democracy. In this case, Deepak Misra, C.J., observed:

*The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition with identity and privacy of human beings constitute the cardinal four corners of our momental constitution forming the concrete substratum of our fundamental rights.*

The ideals of transformative constitutionalism were broadly discussed to arrive at a desirable conclusion while interpreting the constitution regarding the validity of Section 377 of the Indian Penal Code. Both the fundamental aspects of transformative constitutionalism were dealt with, wherein the bench agreed that the purpose of having a constitution is to transform the society to a better place and secondly, it is the ability of the Constitution to transform that gives it the status of a living and an organic document. Interpreting the values imbibed in the constitution regarding equality and liberty, the Apex Court upheld the equal status of the citizens belonging to the fewer sections of society that still lived in the shackles of preposterous social norms. The ideal behind

this concept of transformative constitution is to ensure justice for individuals throughout the evolution of society. The changing times should not be a barrier to interpret this supreme document. In the words of Justice Brennan, “For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope up with current problems and current needs”.

### (iii) The Sabarimala Case<sup>3</sup>:

The Right to worship case, also known as the Sabarimala Case is presumably the most controversial case in recent times. The constitutional validity of Rule 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules that bars women of a certain age group to enter a religious place and the exclusionary practice based upon biological factors exclusive to the female gender was challenged. The Petitioners argued that the said practice was discriminative in nature thereby violating the very core of Articles 14, 15 and 17 of the Constitution of India. The Constitutional Bench upheld the rights of the Petitioners by a 4:1 judgment. While determining the validity and nature of the issue, the then Chief Justice of India, Deepak Misra, stated, “In the theater of life, it seems, man has put the autograph and there is no space for a woman to even put her signature”. He further held that this denial of the right to worship of the aggrieved individuals violated Article 25(1) of the Constitution.

<sup>3</sup>Indian Young Lawyers Association &Ors. v. The State of Kerala &Ors., W.P(C) No. 373 of 2006.



Such activity practiced by a section of the society since 100s of years was believed necessary to be stopped. This felt ‘necessity’ was due to the changing social fabric that introduced a much more liberal approach towards certain rigid religious practices. Whether the said practice is socially moral or not, will differ depending on the present society. What was considered socially or morally acceptable earlier may or may not be considered appropriate in the future. But it is an obligation on the judiciary to interpret the Constitution extensively enough to ensure justice for every individual regardless of the prevalent era. These obligations will be justly met by observing the principles of transformative constitutionalism.

**(iv) The Triple Talaq Case<sup>4</sup>:**

The only fundamental foundation of a secular nation is to respect the religious beliefs and ideals of all the sections of the society. The judiciary in India has adhered perpetually by the said notion. It was this landmark case that changed the way in which the citizens perceive personal laws. The Petitioner in this case belonged to a religious denomination that practiced a certain form of divorce method wherein the husband could divorce his wife by pronouncing the word ‘Talaq’ thrice. It was this practice that kept women within the restraints of their husband’s whims. While dealing with the issue at hand, the majority Bench held that the said practice is against the basic ideals of the Holy Quran and therefore, violates the personal law, i.e., Shariat. What was argued to be a matter of personal law was brought into consideration

of the Constitution of India and what was argued to be a timeless practice in the religion was declared to be against the prevailing constitutional guarantees.

It is indeed brilliant how an individual governed by his/her own personal law may claim for violation of a right that is equally available to all the citizens of this nation. The Constitution is bound to ensure fairness and justice for the said violation regardless of the practices followed in the religion. In the cases of both the religious denomination where their practice was challenged to be against the provisions of the Constitution, it was held that the judiciary may interpret the Constitution in such an extensive manner so as to cater the violations unconstitutional.

**Conclusion:**

It is a widely accepted notion that the judiciary of this nation may, at times of necessity, interpret and read the divine words of this Constitution in such an extensive manner so as to cater the needs and prayers of the prevalent society. It is the nature of society to develop and advance and at the same time it is the uniqueness of this eternal document to adapt these transitions and safeguard the essential rights of the individuals. From right to privacy to the right to worship, from right to equality to right against undesirable religious practices, these recent times have proven that the Constitution will at times of concern, transform itself to be a part of this society and guide it towards prosperity. It is this ideal that makes the Constitution of India as a perfect example of a transformative constitution.

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<sup>4</sup>ShayaraBano v. Union of India &Ors., (2017) 9 SCC 1.