

**TRANSFORMATIVE CONSTITUTIONALISM:
BEGINNING OF A NEW ERA IN THE
CONSTITUTIONAL LAW OF INDIA**

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Abstract

The post-colonial world marked a significant transformation in the Asian and the African political and social order so as to ensure to their citizens a better and promising future. India, among various other dominions, emerged as an independent nation tasked with the monumental project of constitution making for establishing a just political and social order for its citizens. Among various contemporaries, the Constituent Assembly of India gifted Indian citizens an indigenous constitution that has endured for more than seven decades while becoming the longest surviving constitution in the post-colonial world with its promise of dispensing justice intact to date. However, the role of transformative process involved therein still remains an underexplored subject in the domain of constitutional jurisprudence. This article identifies, explains and analyzes constitutional transformation in India in relation to the concept of transformative constitutionalism as this has formed the very basis of successful working of the Indian constitution. Through an understanding of the interplay of these core transformative concepts in the Indian experience, the article unveils the secrets of a long-lasting and promising constitution while ensuring real and substantive justice to its people.

Keywords: Transformative Constitutionalism;
Constitutional Jurisprudence; Indian Constitution,
Constitutional Law

1. INTRODUCTION

It is widely known but insignificantly recognized that Indian constitution, at the time of its enactment, had the objective of transforming the existing social and political order of dominion of India, especially to eliminate the injustices of the past and ensure real and substantive justice to its subjects. This fact can be traced back to enactment of the Indian constitution in the year 1950, which was enacted by the Constituent Assembly with a purpose of transforming the existing social and political order through self-governance with a view to eliminate the injustice and oppressions of the colonial era while repealing the erstwhile colonial constitutional enactment i.e. Government of India Act, 1935 so as to *secure to all its citizens: Justice, social economic and political*.

Moreover, the judiciary in India, like various other jurisdictions, is primarily vested with the power and duty to safeguard the constitutional principles by way of interpretation and the law declared by the Supreme Court is binding on all courts in India. Through such power of constitutional interpretation, the judiciary strives to ensure real and substantive justice to the people while adjudicating within the constitutional framework.

While on one hand, constitutional transformation in India has changed the letters of its supreme law, transformative constitutionalism, on the other hand, works on the spirit of the changed constitution which strives to achieve the objective of bringing transformation in the society to *heal the wounds of the past and guide us to a better future*³⁷⁵. In simpler terms, transformative constitutionalism prescribes that the process of enactment or interpretation of a constitution must enable social or political change towards a more egalitarian society for undoing the injustices of the past. The term 'transformative constitutionalism' is known to be coined by American legal scholar, Karl Klare, which he described as '*a long term project of constitutional enactment, interpretation and enforcement committed to...*

³⁷⁵ Pius Langa, "Transformative Constitutionalism," *Stellenbosch Law Review* 17, no. 3 (2006): 352.

*transforming a country's political and social institutions and power relationships in a democratic participatory and egalitarian direction*³⁷⁶.

In view of the aforesaid, this article will analyze the interplay between constitutional transformation and transformative constitutionalism in India and its ultimate objective of achieving justice in the Indian society. This article will also analyze the role and importance of transformative process in constitution making and working so as to ensure real and substantive justice to the people.

2. CONSTITUTIONAL TRANSFORMATION IN COLONIAL INDIA

Although it is difficult to mark any starting point of constitutional transformation in India owing to India's rich constitutional literature of ancient times as even before the British colonization, India had its own constitutional framework through which the Indian governance system operated. However, the current legal and constitutional framework in India owes its origin to British legal system after commencement of British colonization of India. Hence, it would be relevant only to analyze the origin and evolution of the process of constitutional transformation in colonial India in order to understand its existing constitutional framework. For the sake of clarity, the era of constitutional transformation in modern India can be divided into three phases:

- (i) 1600 AD to 1833 AD
- (ii) 1833 AD to 1858 AD
- (iii) 1858 AD to 1947 AD

2.1. 1600 AD to 1833 AD

³⁷⁶ Karl Klare, "Legal culture and transformative constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 146.

The advent of British colonization of India dates back to the year 1600 AD which was marked by issuance of the Charter of 1600 by Queen Elizabeth I which granted exclusive trading rights to the East India Company ("Company") including the territory of the present India. Starting off with trade and commerce in Surat in the year 1608, the Company, slowly and gradually took over the administrative functions of various Indian territories over the two centuries henceforth acting as a full-fledged government for those territories. Progression of the Company in administering the Indian territories increased the maladministration in the Company by its officials due to which the British Parliament passed the Regulating Act of 1773 in order to regulate the administrative affairs of the Company on Indian territory under its direct control. This transition from commercial activities of the Company represents the era of first constitutional transformation in colonial India henceforth resulting into culmination of the functions of the Company into purely administrative. The formal recognition of this constitutional transformation was marked by the Charter of 1833, which was passed by the then British parliament to cease the commercial activities of the Company and to legally recognize it as the political and administrative authority over the Indian territories controlled and administered by it.

2.2. 1833 AD to 1858 AD

The Charter of 1833 allowed the Company to administer and govern its territorial possessions in India for the next 20 years i.e. till the year 1854 AD in 'trust for His Majesty, his heirs and successors'. The central purpose of Charter Act of 1833 was to codify laws in India in order to provide stability and uniformity to administrative affairs of the Company. Since the very purpose of Charter Act of 1833 was not met by the Company within the prescribed period of its validity, hence, the term of Company's rule in India was further renewed by the Charter Act of 1853 (formally known as 'Government of India Act, 1853') without prescribing validity period. Meanwhile the aforesaid constitutional reforms, corruption in the Company grew at

an exponential rate following other evils of maladministration. Further, due to the atrocities of the Company rule over the native Indians, the first war of independence broke out in the year 1857 AD, whereafter, the British Parliament passed the Government of India Act 1858 pursuant to the bill introduced by Lord Palmerston, the then Prime minister of England, to transfer the business of Government of India from East India Company to the British Crown. Thereafter, till the year of independence i.e. 1947 AD, the Indian territories under the control of the Company came under the direct administration and governance of the British Crown.

2.3. 1858 AD to 1947 AD

This period marks the direct rule of British Crown in India which started with the commencement of Government of India Act, 1858. During this period, the British parliament passed various legislations prescribing for legislative, administrative and judicial reforms in the Indian territories for better and effective control over the native Indians. The Act of 1858 was further followed by various legislations namely; Indian Councils Act, 1861; Government of India Act, 1870, Indian Councils Act, 1892; the Indian Councils Act, 1909; Government of India Act, 1915; Government of India Act, 1919 and Government of India Act, 1935, prescribing major constitutional reforms in the dominion of India. Although all the aforementioned legislations have due significance in the process of Indian constitutional transformation, the Government of India Act, 1935 has its special place as it circumscribes within itself all the constitutional reforms which were best suited for effective administration of native Indians. The Act of 1935 also forms a basis for major constitutional institutions established under the Indian constitution that were in place during the colonial rule. The political and administrative machinery under the Act of 1935, for the reason of its being devoid of establishing a welfare state, eventually failed to satisfy the needs of Indian natives due to which it became difficult for the erstwhile British government to gain effective control over the dominion of India. Moreover, for the reason of multiple nationalist movements for

Independence organized in various parts of India and further degradation of Britain's financial, defence and administrative resources after World War II, independence of India became a political as well as administrative necessity for Britain. Eventually, the British Parliament passed the Indian Independence Act, 1947 which began the era of constitutional transformation ingested with the spirit of transformative constitutionalism.

3. TRANSFORMATIVE CONSTITUTIONALISM IN INDEPENDENT INDIA

The Indian experience of constitutional transformation vis-à-vis transformative constitutionalism begins in the post-colonial era through enactment of the Constitution of India, 1950 which was enacted with the objective of transforming the lives of Indian people by eliminating the injustices of the past casted upon them by colonial legislations. Further, the spirit of transformative constitutionalism has been upheld time and again by the judiciary by way of identifying and interpreting the transformative intent in the unvarying letters of constitutional provisions with the purpose of providing real and substantive justice to people in ever-changing times. For sake of clarity, the principle and practice of transformative constitutionalism in India is dealt in detail under the following sub-headings:

- (i) Transformation by new constitution
- (ii) Transformation by judicial interpretation

3.1. Transformation by new constitution

As stated above, the very purpose of constitutional transformation in the colonial era was limited to gain effective control over the dominion of Indian by the British government, however, the same was devoid of the element of transformative constitutionalism. Due to absence of this spirit of transformative constitutionalism in various constitutional reforms of colonial era, a demand for a constituent assembly took considerable pace for enactment of an indigenous constitution which would address express

the will of the people of India and transform their lives by eliminating the injustices of the past.

The demand of independence as well as a constituent assembly by the Indian people was duly addressed by the British government owing to their necessities in post-World War II period. Hence, the British government introduced the Cabinet Mission Plan in the year 1946 in order to discuss the arrangements with the then prominent political leaders of India whereby the transfer of power was to be made from British government to indigenous political leadership. This Plan of 1946 came up with a proposal for formation of a constituent assembly for India which would be tasked with the work of enactment of a constitution for India. Conclusively, the Constituent Assembly of India was established which first met on 9 December 1946 with the objective of framing a constitution of India. While meeting for drafting a constitution for independent India, the constitution makers were well informed of the transformative intent and vision with which the constitution was to be drafted and the same can be best illustrated by quoting one of the members namely, Mr. Mohd. Tahir, who addressed the Constituent Assembly chair in proceedings while stating that, “...Before framing a constitution for a newly born nation or for a country which has attained freedom, the most essential thing, to mind, is to change its past traditions and old constitutions, which were hitherto in vogue, in such a way as to transform the whole mentality of the people of that country. Sir, you know how during the past so many years of their rule in India, Britishers have changed and enslaved the mentality of the people. Therefore, when we frame a new Constitution, it becomes our duty to make it in such a way as to transform our mentality from that of slavishness to freedom. The old mentality reminiscent of British slavery must be uprooted...”³⁷⁷

In support of the aforesaid proposition, it is relevant to refer to a judgment of the Supreme Court delivered on 10 May

³⁷⁷ See Constituent Assembly Debates (India), vol. 4 (1947).

2019, wherein Justice D.Y. Chandrachud remarked that, “There is substantial evidence that the members of the Constituent Assembly recognised that (i) Indian society suffered from deep structural inequalities; and (ii) the Constitution would serve as a transformative document to overcome them.”³⁷⁸

Eventually, the Indian constitution was enacted and adopted by ‘the People of India’ on 26 November 1949 and the same took complete effect from 26 January 1950. The new Indian constitution was enacted with a transformative vision³⁷⁹ which became a constitutional epitome unlike its predecessors which were mere administrative documents in letter and spirit. Although the principle of transformative constitutionalism is inherent in the provisions of the Indian constitution, however, major parts and provisions of the Indian constitution are discussed below which reveals its transformative agenda while infusing the spirit of transformative constitutionalism throughout its scheme:

- (i) **Preamble:** The Preamble establishes India as a sovereign democratic republic. The trinity of liberty, equality and fraternity, as envisaged by Dr. B.R. Ambedkar, the Chairman of the Drafting Committee, lies in the heart of the Preamble of Indian constitution which infuses the spirit of transformative constitutionalism throughout its provisions. Further, an assurance by the Preamble of social, economic and political justice to all the citizens confirms to the ideals of transformative constitutionalism which was absolutely absent in the earlier colonial constitutional documents. As also observed by the Supreme Court, “The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and

³⁷⁸ B.K. Pavitra & Ors. v. Union of India & Ors., 16 SCC 129 (2019).

³⁷⁹ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Noida, IN: HarperCollins Publishers, 2019), xlv.

*spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution...*³⁸⁰

- (ii) **Fundamental Rights (Part III):** The incorporation of fundamental rights in the Indian constitution has radically transformed the relationship of the State and the individual. India people had witnessed the despotic British rule in the colonial era without any law for ensuring them the basic human rights, let alone their enforcement. The constitutional enactments in the colonial era were merely enforced to command obedience of the people and the judiciary established thereunder pronounced judgements to enforce such oppressive legislations. However, Part III of the Indian constitution guarantees to all its citizens the fundamental rights such as right to equality, freedom, right against exploitation and religion among various others. Most importantly, it provides a person's right to move Supreme Court in case of infringement any of the fundamental rights guaranteed under this Part and the same is considered to be the heart and soul of the Indian constitution.
- (iii) **Directive Principles of State Policy (Part IV):** The Indian constitution aims at establishing a welfare state as against the police state as established by the colonial constitutional enactments. This part acts as a guiding light for the State to ensure good governance which should be directed towards the wellbeing of its people. Although unenforceable in a court of law, the directive principles form the foundation of the governance system in India. While emphasizing on the importance of Directive

Principles, the Supreme Court has held that, "...Directive Principles, which are fundamental in the governance of the country, must serve as a beacon light to the interpretation of the Constitutional provisions..."³⁸¹. Among various social and welfare objectives, this part prescribes for separation of judiciary from executive while ensuring judicial independence which marks a major transformation from the justice administration system in the colonial era where the judiciary majorly acted as a mouthpiece of the tyrannical executive will. This spirit of judicial independence runs through the provisions pertaining to Union Judiciary and State Judiciary.

- (iv) **Universal Adult Suffrage (Article 326):** The Indian Councils Act, 1909 introduced the system of communal representation in the colonial era which not only aggravated the communal divide among Hindus and Muslims in India but also officially sowed the seeds of partition of an undivided India. However, this evil was conveniently addressed by the constitution makers and same was removed by provision of a universal adult suffrage whereby each citizen of India, who is of or above the age of 18 years is entitled to vote in elections to the House of the People and state Legislative Assemblies in India. The said provision has truly transformed India in becoming the largest democracy in the world³⁸².

The aforesaid parts and provisions have laid down the founding stones of transformation in the Indian constitution

³⁸¹ Olga Tellis v. Bombay Municipal Corporation, 3 SCC 545 (1985).

³⁸² "India: the biggest democracy in the world," October 2014, At a Glance, European Parliament, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2014/538956/EPRS_ATA\(2014\)538956_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2014/538956/EPRS_ATA(2014)538956_REV1_EN.pdf).

³⁸⁰ Navtej Johar & Ors. v, Union of India, 10 SCC 1 (2018).

which has provided it the character of a Transformative Constitution. Moreover, these further substantiates the hypothesis that enactment of the Constitution of India, 1950 by the Constituent Assembly has ensured the presence of transformative constitutionalism in Indian constitutional law.

3.2. Transformation by judicial interpretation

While highlighting the transformative objective of the Indian constitution, the Supreme Court in a judgement dated 19 September 1975 has observed that, “...*the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy.*”³⁸³ Taking into account the aforesaid observation, on 6 September 2018, a constitution bench of the Supreme Court has further affirmed presence of transformative constitutionalism in Indian constitution by observing that, “...*the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.*”³⁸⁴

Further, while emphasizing upon its role in upholding the transformative vision of the Indian constitution, another constitution bench of the Supreme Court in a judgement dated 27 September 2018 has observed that, “...*True to its transformative vision, the text of the Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of dignity and equality for its citizens.*”³⁸⁵ Furthermore, while addressing the International Judicial Conference, 2020, the president of India, Ram Nath Kovind has duly admired the role of Indian judiciary in bringing social transformation by specifically acknowledging that *the Supreme Court of India has led progressive social transformation*³⁸⁶ in India

through its various judgements directed towards gender justice.

For instance, the Supreme Court in the case of *Navtej Singh Johar & Ors v. Union of India*³⁸⁷, by interpreting the transformative intent in Article 14 guaranteeing right to equality to all sections of society, has declared decriminalization of the offence under Section 377 of the Indian Penal Code while ensuring gender justice to LGBT community by way of social transformation, though the same was not envisaged by the constitution makers while incorporating Article 14 in the Constitution at the time of constitution making. In another instance, the Supreme Court in the year 1997 in the case of *Vishakha & Ors. v. State of Rajasthan & Ors.*³⁸⁸, had issued comprehensive guidelines for safeguarding women against sexual harassment at workplace which popularly came to be known as ‘Vishakha Guidelines’. The impact of this decision was so intensive that later in the year 2013, the Parliament of India came up with ‘Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013’ dealing the rights and protection of women against sexual harassment at workplace. Another landmark instance comes on the issue of protection of marital rights of Muslim women wherein the Supreme Court in the case of *Shayara Bano v. Union of India & Ors.*³⁸⁹ declared prohibition on practice of triple talaq namely, *talaq-e-biddat*. After this judgement of the Supreme Court, the parliament enacted ‘The Muslim Women (Protection of Rights on Marriage) Act, 2019’ while prescribing the practice of *talaq-e-biddat* shall not only be considered as void and illegal but also punishable. While pursuing the transformative object of the Indian constitution, the Supreme Court has accomplished various other transformative objectives such as recognition of right to privacy under Article 21; decriminalization of

³⁸³ State of Kerala & Anr. v. N.M. Thomas & Ors., 2 SCC 310 (1976).

³⁸⁴ Navtej Johar & Ors. v. Union of India, 10 SCC 1 (2018).

³⁸⁵ Joseph Shine v. Union of India, 3 SCC 39 (2019).

³⁸⁶ “Valedictory Address by the President of India, Shri Ram Nath Kovind at the International Judicial Conference,” February 23, 2020, The

President of India, https://presidentofindia.nic.in/writereaddata/Portal/Speech/Document/807/1_sp230220.pdf.

³⁸⁷ Navtej Johar & Ors. v. Union of India, 10 SCC 1 (2018).

³⁸⁸ Vishakha & Ors. v. State of Rajasthan & Ors., 6 SCC 241 (1997).

³⁸⁹ Shayara Bano v. Union of India & Ors., 9 SCC 1 (2017).

adultery by striking down Section 497 of the Indian Penal Code, 1860 *et al* and continues to do so till date.

Hence, as evident, the Supreme Court has time and again acknowledged the transformative purpose of the Indian constitution in order to dispense real and substantive justice to the people of India while preventing redundancy of the constitutional text in ever-changing Indian society.

4. CONCLUSION

The inherent dynamism of the constitutional provisions worked by an active supreme court being conscious of the transformative intent of the Indian constitution has truly transformed the lives of people of India into better than it earlier was in the colonial era and also enabled the constitution to become the longest surviving constitution in the post-colonial world. While analyzing constitutional transformation vis-à-vis transformative constitutionalism in the post-colonial India, it can be conveniently concluded that it is important that the letters of the constitutional text must be enacted with enough flexibility so as to meet the progressive needs of the society, but it is equally important that institutions such as judiciary, which infuses life into the dead letter of the constitutional text, must also recognize such transformative element and bring it into practice so as to provide real and substantive justice to people.

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