

In Search of Transformative Constitution

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Abstract

When India attained freedom, the Constitution was “burdened” with a number of responsibilities. Part of the burden came from the fact that India had suffered unimaginable injustices at the hands of British colonialists and the Constitution of India was expected to remedy the ills of the past. It was supposed to be a constitution geared towards the alleviation of social and economic disadvantage. The fight for bringing a culture of justification to the fore instead of a culture of authority was hard to achieve but common people tried hard to reduce this gap between authority and the citizen by invoking the Constitution in their fight against state injustices. It was also supposed to be a Constitution that identified pluralism as a value and recognized minorities as full citizens. Recognizing past injustices and the partition violence was not considered necessary by the Constituent Assembly, consequences of which are well in front of us in the form of the Citizenship (Amendment) Act, 2019. The Constitution had all the features of a transformative constitution. However, as modern states tend to control individual and group freedoms and attain strong neoliberal tendencies, what is the future of transformative constitutionalism? This article examines all such questions.

Introduction

The Constitution of India was formed alongside a profoundly transformative vision. At the conclusion of the Constituent Assembly Debates in India, Dr. B.R. Ambedkar made an important remark. He said, “On 26th January 1950, India will be an independent country.”¹ Even though India had gained independence much before, it was a reaffirmation of the fact that India’s real freedom lay in a guarantee of a state based on the principles of democracy. It was from this date that India “would have a government of the people, by the people and for the people.”¹² He also wanted Indians to transform their political democracy into social democracy. Social democracy, according to him meant “a way of life which recognizes liberty, equality and fraternity as the principles of life.”³ These principles of liberty, equality and fraternity, warned Ambedkar, were not to be treated as separate items in a trinity and “a union of trinity

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¹ Constituent Assembly Debates (CAD), Vol. XI, 25 November 1949, https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25.

² Constituent Assembly Debates (CAD), Vol. XI, 25 November 1949, https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25.

³ Constituent Assembly Debates (CAD), Vol. XI, 25 November 1949, https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25.

in the sense that to divorce one from the other is to defeat the very purpose of democracy.”⁴

India’s constitutional founding was a historical moment for a number of reasons. Pandit Jawaharlal Nehru, India’s first Prime Minister, felt that India’s constitutional revolution matched the American, French, and Russian revolutions in historical meaning (Khosla, 2019). Even though Western thinkers had given warnings that India was not fit for democracy (Muzafar, 2020), yet India chose the path of democratic politics based on the ideals of rule of law, social justice and individual freedom. The path towards democracy was seen as a way of education and transformation by many people, so were the provisions of the new Constitution. Every word in the Constitution had a meaning and a transformative intent behind its incorporation. The other aspect of India’s revolution was the abrupt transformation that it brought along with it. India had suddenly moved from being a colony of Great Britain to a free nation. This transition from a system of political exclusion to one which respected human dignity was in itself an extraordinary achievement. The Constitution was supposed to be transformative in the sense that it had to educate people about basic human freedoms and make citizens conscious of their rights. It may not have been intended by the makers to be a people’s constitution, but it eventually went on to become one with the participation that citizens showed and invoked it in the courts of law, as Rohit De demonstrates in his fascinating book, *A People’s Constitution*, on the historical account of constitutionalism in India.

Looking at the constitution as a transformative document was a part of the discourse on constitutionalism in other jurisdictions as well. The goal of founding an equal society on the basis of transformative constitutionalism has been a part of the debate in South Africa (Langa J., 2006). In the South African case, there was a different shift: the society had moved from apartheid to post-apartheid state. The shift was basically one from “a culture of authority” to “a culture of justification” (Mureinik, 1994). The culture of justification meant “a culture in which every exercise of power is expected to be justified...” The transformative intent of the South African constitution was visible uniquely in other ways as well as it recognized past injustices and called for reconciliation, while as the Indian constitution failed to recognize the injustices done during the partition and the consequences of it can be felt today by the Indian society (Gaubha, 2017). In the South African case, it was felt that “a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice...”⁵ was necessary for “a future founded on the recognition of human rights, democracy and peaceful co-existence...”⁶ It has thus been a goal of the constitution “to heal the wounds of the past and guide us to a better future”.

Economic transformation and substantive justice have been identified to be core areas of transformative justice as they lend agency to human beings and lead to their independent existence. Historically, the control over resources has belonged to a few, and the majority of the population has been forced to lead a life of penury. So, for political democracy to exist, it is important to have social and economic democracy.

In recent times, however, the threats to the transformative constitution have grown manifold. As privacy threats increase, the takeover of humans by machines in administrative tasks also takes place. When humans are seen as ‘data entities’, the vision of a transformative constitution loses its essence and meaning. Along with that, the rise of neoliberalism together

⁴ Constituent Assembly Debates (CAD), Vol. XI, 25 November 1949, https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25.

⁵ Constitution of the Republic of South Africa, Act 200 of 1993.

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with authoritarianism poses a huge challenge to a rights-based theory that has traditionally been developed by people the world over.

The Meaning of Transformative Constitutionalism

What are the contours of transformative constitutionalism? Does the interpretation remain confined to the text of the Constitution? How does history play its role in defining what is transformative and what is not? Does it remain confined to the original intent of the makers of the Constitution? These are important questions that will help us a long way in defining the true meaning of transformative constitutionalism.

Karl E Klare defines transformative constitutionalism as “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”. Thus, as the above definition tells us, transformative constitutionalism shares some of the historical commitments as political developments around the world kept telling us what should be deemed transformative. Or as Ruti Teitel also makes an important point: “As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative”.

In the Indian scenario, as Indians had got rid of British colonialism, it was important for them to develop for themselves a theory that kept historical conditions of some people in consideration. For example, Article 17 of the Constitution of India abolished “untouchability” and its practice in any form as historically certain marginalized groups of people had become targets of the historically dominant narratives of those who controlled the societal and political setups which usually culminated in the perpetuation of injustice done to those subordinate groups. The violence done to them was usually systemic and had an impact on how these groups were treated in the society which in turn placed them at a disadvantage with respect to other individuals or groups of citizens. Even though “untouchability” continues to be practiced in many different forms in India, the intent behind the incorporation of the untouchability clause was to protect the interest of the backward classes and the Constitution was to give them the required “solace”.¹ The provision proposed to protect Dalits “from perpetual subjugation and despair, from perpetual humiliation and disgrace”.

Thus, it can be said that the vision behind the incorporation of Article 17 was to transform the society by keeping the historical conditions of some people in consideration. However, transformative constitutionalism does not seek to engage in a purely historical inquiry, rather it intends to understand their meaning in their historical interpretation while taking the constitutional text and its principles as starting points. On this, former South African Chief Justice Pius Langa has said the following powerful words: “The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves, and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.”⁷

⁷ Constituent Assembly Debates (CAD), Volume VII, 29 November 1948, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29

Transformative constitutions also embrace “notions of participatory democracy, social, and economic equality, protection of culture, openness, and transparency” (Rosa, 2011). For a constitution to be progressive, it was necessary to have safeguards in place that discouraged the concentration of wealth in a few wealthy people only who could then control society and manage its politics hampering the progress of those wanting to develop their lives and standards. Socio-economic rights were thus incorporated in progressive constitutions to prevent the control of means of production and give everyone a basic opportunity to develop themselves. In the Indian Constitution, ‘Directive Principles of State Policy’ (DPSPs) were incorporated to set ‘framework values’ for developing India as an economic and social democracy as without these two values, the idea of having a political democracy was meaningless. Thus, the achievement of substantive equality and social justice are at the heart of the idea of constitutionalism and transformation actually means a social and economic revolution to bring about equality.

Transformative constitution was set to redefine and regulate power in a post-colonial society like India which had a direct impact on democratic values. It was not only meant to be a document ‘frozen in time’ but had to be given broad definitions as the ‘living tree’ doctrine also suggests. Thus, originalism served as a guide to constitutional interpretation, but the evolving trend of rights also has to be redefined to adjust to changing societal needs.

The Judicial Transformation

The courts in India (and elsewhere) have viewed the Constitution(s) as transformative and have been able to develop a theory of political and socioeconomic rights over time. The interpretation has not been confined to statist narratives and has even travelled beyond the scope of formal equality and the conception of a liberal constitution. It is not at all necessary that the vision of a transformative constitution can be found in judgments constituting dominant meanings and narratives. As Gautam Bhatia has put it brilliantly, “From the detritus of the Indian constitutional canon- the dissenting opinions, the overruled high court judgments, and the ignored or marginalized Supreme Court decisions- there shines forth the vision of the transformative Constitution, and the trinity of liberty, equality, and fraternity”. When a court takes this duty upon itself to transform society and views the Constitution as a transformative document, it goes a long way in imparting public education in society as well. There are numerous judgments where the Indian courts have laid down the vision of transformative constitutionalism (Emmanuel, 2019) as guidelines for the State and its functionaries to respect human dignity and build a ‘culture of justification’ rather than one of brute power, arbitrariness, and authority.

Constitutional morality, inclusion, and human dignity have been understood to be core constitutional values (*Naz Foundation*). Laws that are based on stereotypical reasoning and have the effect of disadvantaging women and other groups in the society have been deemed to be opposed to the ideas of transformative constitutionalism (*Anuj Garg*).

Similarly, equality has been understood to mean taking into account historical and social circumstances that impede an individual’s access to live a dignified life (*N.M. Thomas*). More importantly, compensating for such historical wrongs is a part and not an exception of the equality clause under the constitutional scheme.

The interpretation that the Supreme Court of India or different high courts have given to legal concepts and constitutional philosophy is largely progressive but is amenable to an

executive invasion as well. With right-wing political influence, there is no guarantee that the constitutional interpretation stays true to its purpose. During the last few years, in particular, many scholars have highlighted this problem of the liberal constitutional interpretation within the Indian jurisdiction.

Destroying the Constitution

Over the last few years, there has been a rise of strongmen around the world. The situation in India is no different. With the increase in authoritarianism, and strong executive and neoliberal states, a shift is seen in the working of the courts and the vision of transformative constitutionalism also receives a huge jolt. The mode of democratic decline in India, however, has been incremental and systemic as executive accountability has been eroded. Minorities are subjected to subordination and unequal treatment willfully. The erosion may be new but the disregard for such rights that constitute a violation of a transformative vision of the constitution has been somewhat old. It is clear from the record of the higher judiciary that the imperative of upholding civil liberties, socio-economic rights, and environmental protection has been subordinated to agendas such as the "war on terror", "development" and satisfying corporate interests. Far from remaining faithful to the motives that resulted in the institution of public interest litigation, the Supreme Court has tended to act against the interests of the socio-economically backward. The question of fascism has also been pushed to the forefront of many people's minds and neoliberalism "aims to marketize and rationalize politics." As the free-market economy rises (Kim, 2019), economic inequalities also increase. This rise in economic inequalities hampers other rights of citizens like the right to education and substantive equality. Colonization of resources by strong states perpetuates economic oppression and the colonized and occupied people are forced to homogenize with the 'national' identity of their oppressor. Modern bureaucracies which are inherently oppressive store information and reduce citizens to 'slices of data' with disregard for the right to privacy and consequently the vision of transformative constitutionalism. What citizens are facing today is a marketplace of data management and as technology frames governance, the state becomes less accountable (Fourcade and Gordon, 2020).

What the rise of these global ills suggests is that the concept of rights that has been developed historically will receive the biggest blow. When elected politicians and appointed executive officials do not take the text of the Constitution seriously, they not only deny the vision of the Constitution but also deny the historical conditions in which it was framed and the conditions of the people for which it granted extra protection. It also puts an end to the process of reconciliation that a transformative constitution was supposed to provide between different groups of people who had stood in hostility with each other in the past due to some circumstances that were political or historical in nature. The social and economic revolutions that the Constitution was a source of became a target for politicians to vilify and concentrate wealth in the hands of a few and basically enforce poverty. What people face is a 'culture of authority' and an end to their transformative hopes of seeing a transformative society. Similarly, participatory governance and multiculturalism also face a backlash when demagogues bat for political homogeneity - a fascist project aimed at oppressing minorities and people who have different identities.

Thus, to sum up, as we have progressed in our so-called modern life, we have continuously lost our rights in one way or the other. In a situation of blatant authoritarianism,

a transformative vision of a constitution is a great way of stopping a nation from self-destruction.

Rethinking Transformative Constitutionalism

In the face of a strong state with its autocratic and neoliberal tendencies nakedly visible, it is important to rethink transformative constitutionalism. When human freedoms are seen through a cost-benefit analysis, it is in a number of ways a setback to the idea of transformative constitutionalism which always saw the constitution as a charter providing rights rather than selling or putting rights to economic analysis. In some ways, there is also a need to go back and see the spirit and the vision of transformation as it was originally envisaged to correct past injustices and base a society on true equality and mutual respect. Writing in the *South African Journal of Human Rights* in 1998, Albertyn & Goldblatt make the point that the movement from the one side of this bridge to the other will "require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships."⁸

There is also a need to not only involve the fulfilment of socioeconomic rights, but also the broader rights of even greater access to education and opportunities through affirmative action. However, the story does not end here. Access to equal justice, legal education, legal culture, maintaining the separation of powers are the other challenges that the idea of transformative constitutionalism faces. The state and government powers must also be limited, and parameters should be established within which citizens' rights are predictably secured. The standards of the 'rule of law' should be established to strengthen the constitutional order.

Prof. H Kwasi Prempeh says in the South African context that on the one hand, a new intellectual consensus on the virtues (and inevitability) of democracy and constitutionalism has emboldened civil societies and judiciaries, and campaigns for presidential term limits – among other factors – are digging foundations for constitutional order. On the other, lingering executive dominance, strongly centralized states, and intransigent bureaucracies are undermining these foundations. This is true in the Indian case scenario as well where bureaucracy seems to dominate the overall political project thereby hampering the process and growth of transformative constitutionalism. There is thus a need "to harmonize judicial method and legal interpretation with the Constitution's substantively progressive aspirations." We also need to reconcile the need of having a developmental state with that of a welfare state to address the issues of mass poverty.

⁸ *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd & Others v. Smit NO & Others* [2000] ZACC 12

Conclusion

Thus, to engage with transformative constitutionalism in the age of “rampant consumerism” and large-scale liberalization of the economy is not easy at all. While we need to go back to the culture of parliamentarianism in one way, we also need to reject the concept of ‘formal equality’ and merit. We also need to think about policies and politics on a deeper level where we could get an understanding of why marginalized groups need more protection than the other politically dominant groups. It may trigger a clash where other people feel they are being treated unequally but they also need to understand the historical conditions of those who have been historically denied their rights. We need to have critical insights into subjects that are in discussion. The Supreme Court also has a public duty in this manner to see the Constitution of India as one that represented a historical moment in the long tradition of India’s rights jurisprudence and represented a shift where the Constitution had to remain a protector of the various communities that India inhabited. The Constitution must always be interpreted along transformative lines with the notion of a socioeconomic democracy taking precedence over the ‘developmental state’.

ⁱ Constituent Assembly Debates (CAD), Volume VII, 29 November 1948, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29.