Transformative Constitutionalism

Priya Shekhawat
Sharda University, Greater Noida
Uttar Pradesh, India

One must, however, distinguish between the State and the Constitution and understand that the State is a creature of the Constitution. Another thing to which I wish to point attention to is that it has always amazed me that there is no definition of "government" in the Constitution. This came home to me when I was arguing the case of Government of NCTD versus Union of India in the Supreme Court of India. The Constitution does, however, describe States in Schedule 1 and "Union" in Article 1 when it says, "India that is Bharat shall be a Union of states".

Note however that this definition is a territorial one in that it describes territorial units and does not actually use the word "State" in the manner mentioned above. What Article 1 does do is to explain that India is a Federation. The Supreme Court however, in my opinion, does not quite tell us what federalism is in the Indian context. It is sometimes described as quasi-federal, sometimes as federal state with a strong centre and more recently we talk about "cooperative federalism". All these expressions have a loose meaning in the context of a one-party state that we have moved towards. Take a look at the map of India on social media – India is orange! Hence we have a host of confusing expressions: "State" "Government" and "Union"; the only unambiguous expression being "Constitution".

The question that we must ask is- Could the modern state be anything else but all-encompassing in nature? The answer to this and other similar questions lies in the experiences of the American Independence movement as compared to various independence movements in the global South. In the global South, independence struggles, especially in India, have come to acquire central importance as a matter of choice. Such movements across the global South have not only faced an external enemy in the form of colonial power but at the same time, they have also fought internal enemies, of much bigger proportions, in the form of extreme poverty, socio-economic inequality, hierarchies of caste, race, gender and much more. A state that actively takes up the task of eradicating internal inequalities has been of primary consideration for the constitution framers. In achieving this, the constitution has also been the tool with which we the people have fought these internal enemies.

ORIGINS OF TRANSFORMATIVE CONSTITUTIONALISM

The origin of transformative constitutionalism is traced to post-apartheid South Africa. A former Chief Justice of South Africa traces the core of transformative constitutionalism to the preamble of the Interim Constitution of South Africa which reads:

"A historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".

While transformative constitutionalism, with regard to its meaning, continues to draw debates in the face of different experiences across the world, key elements that define or differentiate transformative constitutionalism are the central role of the State (Courts included) in fulfilling the project of emancipation and constant development of the Constitutional ideals of liberty, equality and fraternity.

It is these principles on which the society must sustain itself and the State must play an active role in constituting a society based on those principles. In India, the principal proponent of this view in the judiciary has been Justice Krishna Iyer, a judge who has had an abiding influence on my own work. Reflecting on the need to interpret the constitution as a transformative document, he remarked:

"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 mlecha, the bonded labour, the hungry, hard-working half-slave, whose liberation was integral to our independence. To interpret the Constitution rightly we must understand the people for whom it is made — the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities."

Therefore, two key aspects of the term transformative constitutionalism emerge:

1. It envisages attainment of substantial equality by recognizing and eliminating all forms of discrimination as they may have existed or may develop in the future;
2. It calls for a realization of full human potential within positive social relationships – the use of the term "positive social relationships" instead of limiting it to an individual's interactions with the State is indicative of the pervasive nature of transformative constitutionalism in the private sphere as well.

Differentiating this understanding of transformative constitutionalism from constitutionalism, Michaela Hailbronner invites us to think of what transformative constitutionalism is not. Citing US constitutionalism as not transformative constitutionalism, he contends that

"U.S. constitutionalism does not entrust the federal state with the task of bringing about a more just and equal society. Its conception of law is "reactive," to borrow from Mirjan Damaska, and its constitutionalism represents, in Somek's useful terms, 'Constitutionalism 1.0" with its emphasis on liberty"[v]

Therefore, US constitutional experience is often understood as different from the project of transformative constitutionalism as envisaged by the global South, in which states play an activist role. This is because of the highly divisive hierarchies and acute lack of resources persisting in countries like India and South Africa that the

Constitution sought to outrun. They also prevented us from developing any notion of a nation in the first place, as Dr Ambedkar contended, since the distinctions based on caste belied any existence of fraternity, and hence a nation.

India's constitutional moment was said to be a shift away from old practices and hierarchies. More recently and over 70 years since the Constitution came into force, the full court of the Rajasthan High Court has resolved that advocates ought not to address Judges as " My Lord", given the mandate of Article 14[vi]. The Court led by the Chief Justice Ravindra Bhatt has given us a classic example of what transformation from colonialism to republicanism could mean, even if it be in language; language, after all, is the most powerful tool of transformation.

TRANSFORMATIVE CONSTITUTIONALISM AND THE JUDICIARY

The jurisprudence around the constitutional ideals of equality, liberty, and fraternity began developing after the emergency. Recovering from the defeat of the Congress government in the post-emergency period, the Supreme Court, in search of legitimacy, articulated the jurisprudence of Public Interest Litigation.

Justice Bhagwati declared that the adversarial system of the commonwealth was unsuited to Indian conditions, it was based on "self- identification of injury and self-selection of remedy". Given the vast illiteracy of the people, this would not ensure access to justice.

I have elsewhere pointed out that it is no accident that one of the pioneers of the PIL, as articulated in S P Gupta, Justice Bhagwati was also one of the authors of the ADM Jabalpur judgment. This limitation which is at the origin of PIL must be remembered as a major limitation on PILs itself. More recently it is very clear that PIL can be an instrument of oppression perhaps more deadly than any other since it is so heavily dependent on the "discretion" of judges.

And that brings me to the point out that the rule of "discretion" is contrary to the rule of law in that it introduces the rule of predominantly men and occasionally women. I am aware that no law can be implemented; no executive authority can function without "discretion" as a legal concept in decision-making. But India lacks a theory of "abuse of process" making it possible for decisions to degenerate to favouritism; face law and not case law and targeting of dissenters, under the cover of law. This must be remedied forthwith. Power cannot be used for a colleterial purpose in the name of "discretion". India lacks a theory of responsibility for wrongdoing. India lacks command responsibility for wrongdoing. What it has in fair measure, is impunity for ddecision-makers

NO ECONOMIC AND SOCIAL RIGHTS WITHOUT CIVIL AND POLITICAL RIGHTS

We at the Lawyers Collective too thought when we argued Olga Tellis and the Bombay Hawkers Union cases that economic rights is what we need to work on – it was a magic wand that would remove poverty. I have since

then realized that my generation took its civil and political liberties for granted. We were Midnight's Children and we inherited civil and political liberties. Life has come full-circle. Freedom and independence can no longer be taken for granted, leaving us free to work on economic rights. For many including me and Anand Grover, for cartoonists and poets, students, Dalits and farmers, for the accused in the Bhima Koregaon case, the fight for liberty has just begun all over again.

Battling to maintain its legitimacy in the eyes of the public, in the years following the emergency, the judiciary has now reached an ambivalent space, still opening the doors to PIL when it wishes to and closing them tight when it wishes to.It is also not surprising that it was during this phase that the affirmative action policies came into picture through the Mandal Commission. Based on the idea of achieving substantive equality, and subject to wide-ranging debates, reservations in educational institutes, and now in promotions also, as approved by the Supreme Court in B K Pavitra II have been single-handedly responsible for ensuring whatever little diversity in different walks of life we see today. Highlighting this importance of reservations, Justice Chandrachud in *B K Pavitra* remarked:

"There is substantial evidence that the members of the Constituent Assembly recognized that (i) Indian society suffered from deep structural inequalities; and (ii) the Constitution would serve as a transformative document to overcome them. One method of overcoming these inequalities is reservations for the SCs and STs in the legislatures and state services."

LGBTQI MOVEMENT AND THE DEMAND FOR PRIVACY

In recent times, the jurisprudence around transformative constitutionalism has developed strongly, especially in relation to the rights of the LGBTQI communities, through a series of judgments. In what has to be considered one of the most celebrated judgments that has been delivered by the Supreme Court in recent times, in Navtej Johar vs. Union of India, the court held that 'Transformative Constitutionalism' is considered to be one of the objectives of adopting a Constitution itself. The purpose of it is to have a Constitution which guides the nation of transforming itself from a medieval and hierarchical society to an egalitarian democracy to embrace the ideals enshrined in the Preamble to the Constitution. It was held that as a constitutional court whose job it is to protect its people from humiliation and discrimination, it cannot provide a static interpretation to the rights of liberty and equality and remain a mute spectator to the struggle for the realization and attainment of rights.

Highlighting what lays at the core of transformative constitutionalism, Justice Dipak Misra remarks:

"The rights that are guaranteed as Fundamental Rights under our Constitution are the dynamic and timeless rights of "liberty" and "equality" and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature. The argument does not lie in

the fact that the concepts underlying these rights change with the changing times but the changing times illustrate and illuminate the concepts underlying the said rights."

I believe that every generation has the right to decide for themselves what the Constitution means for them, to interpret the Constitution after their own aspirations.

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