Pondering Over the Present and Future of Constitutionalism

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Abstract

Constitutionalism, at its core, brings together the essence and spirit of law with the letter of the law. The epistemological interpretations have been applied more and more flexibly over the years, especially by the Indian courts. Amartya Sen, theorised the 'capability approach' where the efficacy of a state is measured against the concrete capabilities of its people. How far will the Indian state prove efficient in that regard? Have we achieved true transformative constitutionalism? The Indian constitutional machinery, at the nascent stages of attaining and attributing standards of constitutional morality, have been changing further with the onset of technological advancements making the world one global village. Are we ready for a concept like trans-constitutionalism? This is not a research paper; rather, as the title suggests, it is an essay on the ponderings of the author over the concept and changes to constitutionalism.

Keywords- *Capability Approach, Constitutional Morality, Transformative Constitutionalism, Trans-Constitutionalism.*

A modicum of justice is enough. Enough to sustain and satiate the resolve of the masses and their trust in a state machinery. But what if the state machinery is not obligated or unable to provide the same? Amartya Sen, while explaining his theory on Capability Approach[1], states that the competence or efficacy of a system of governance has to be measured and subsequently ascertained by the concrete capabilities of its people. While rooted in harsh practicality, one would find, most states fail if measured upto that standard. In India, fundamental rights in Part III of our Constitution[2] provide the negative rights one would require as a safeguard against arbitrary and discriminatory action by the State. They are almost absolute, resolute in their stance, bearing the staunch beacon of what is just and true. They are also the civil and political rights, enshrined and embodied by the Constitution, the holy grail of justice in India. The International Covenant on Civil and Political Rights (ICCPR)[3] of 1966 became a shining light for the world to follow in delimiting the boundaries of rights that citizens ought to have, rights that form a shield against arbitrary autocratism of state machinery. In the years succeeding the 2nd world war, the world did need some revised and reformed stipulations to look for, look up to. Structure and boundary. Very simple things that the mind craves for, especially when faced with chaos and death and tumultuous destruction around. Structure and boundary, the simulated truths we tell ourselves, the structure we build, the rules we bind ourselves in. Negative rights to ensure a quantum of freedom positively. Then comes Part IV of our Constitution[4]. The policies for governance, yet non justiciable in court. The positive rights to citizens, yet hardly a right if it cannot be enforced in a court.

Rights of healthcare, housing etc. are state mandated and provisioned, explicitly stated in the South African Constitution itself. The Constitution of South Africa, pioneering in 'transformative constitutionalism', has ensured and legitimized positive rights by making them an obligation upon the State. A nation blighted by histories of colonialism and apartheid, makes sure that its citizens do not suffer 'half-rights' or 'hollow rights' anymore.

[1] Amartya Sen, "Equality of What?" in McMurrin (ed.), *Tanner Lectures on Human Values*, Cambridge University Press, 1979; Amartya Sen, "Development as Capability Expansion," *Journal of Development Planning,* 19, 1989.
[2] The Constitution of India, 1950, Part III.
[3] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[4] The Constitution of India, 1950, Part IV.

The Constitution of State itself ushers in and paves the way for social change. In 1998, Karl Klare coined and popularized the term 'transformative constitutionalism'[5]. Indian courts have applied the principle unknowingly yet widely, especially when it comes to broad interpretations of Article 21[6], ushering in a myriad of freedoms under the ambit of right to life and personal liberty. Be it decriminalization of Section 377 of IPC[7] in Navtej Singh Johar[8] judgement, or right to choose one's life partner as a fundamental right in Lata Singh Vs State of Uttar Pradesh[9]; from right to clean water in Bandhua Mukti Morcha[10] to right to sleep in Re Ramlila Maidan case[11]; fundamental rights of incarcerated individuals in DK Basu Vs State[12] to right to livelihood and non-waivability of fundamental rights in Olga Tellis Vs Bombay Municipal Corporation[13], Article 21 encapsulates all aspects of life. In a way, through Article 21, harmonization and reconciliation of unenforceable Directive Principles finds dynamic applicability. Mere 'half rights' of positive freedoms in India finds justiciability under the garb of expanded Article 21. This is how societal change comes; law drags and pulls at the helm and society follows suit. At least in India, transformative constitutionalism has found its ace in Article 21.

Speaking on Klare, the author cannot help but observe how hopeful a person needed to be to put such high hopes on the constitutional applicability, the 'grundnorm' in the truest sense. Kelsen's theory on norms stipulate that society and state is governed by a plethora of norms, out of which the superior one is considered grundnorm from which the rest stems[14]. In India, the Constitution is not the grundnorm, rather, the idea that the Constitution is supreme, and the entire nation abides by it, is the grundnorm. Dr. BR Ambedkar while speaking on the nature and form of the Constitution in the Constituent Assembly Debates, spoke of the Greek historian Grote who propagated an idea of 'constitutional morality' on the same lines; that the essence of constitutional values and ideals enshrined would be so ingrained in the citizenry, that in any

[5] Klare, K. E. (1998). Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights*, *14*(1), 146–188. https://doi.org/10.1080/02587203.1998.11834974
[6] The Constitution of India, 1950, art. 21.
[7] The Indian Penal Code, 1860, sec. 377.
[8] *Navtej Singh Johar Vs Union of India*, AIR 2018 SC 4321.
[9] *Lata Singh Vs State of Uttar Pradesh*, 2006 AIR SCW 3499.
[10] *Bandhua Mukti Morcha Vs Union of India*, AIR 1984 SC 802.
[11] *Ramlila Maidan Vs Home Secretary, Union of India*, (2012) 5 SCC 1.
[12] *DK Basu Vs State of West Bengal,* AIR 1997 SC 610.
[13] *Olga Tellis Vs Bombay Municipal Corporation*, (1985) 3 SCC 545.
[14] Hans Kelsen, "Pure Theory of Law", *The Lawbook Exchange Ltd*., 2005.

ensuing conflict or clash, each of the citizens could blindly put their trust in the constitutional machinery to resolve such conflict. Furthermore, they would be of the belief that the person opposite also believes in the same ideologies and abides by them. Such has to be the dynamism and ubiquitous nature of constitutional morality.[15]

On one hand, South African constitution embodies positive freedoms as inalienable rights enforceable against State. On the other hand, India makes all such apparent rights, non-justiciable, taking away any compulsion or accountability on State to ensure such rights. If we scale the 'concrete capabilities' of people here, as following the 'capability approach', stated earlier, to ascertain the effectiveness of our governance, we would fall really short. The current era, with the onslaught of technology, Artificial Intelligence, and digital reach, where the world has become a global village and individuals are becoming 'global' citizens with the proliferation of information on all sides, questions are raised on sovereignty in state structures and constitutionalism at its core. There is a trend of 'trans-constitutionalism' where the lines are blurring on precedence and statutory premise, especially in application of law in courts. Interpretations are made taking aspects of foreign laws, constitutional provisions and verdicts in consideration.

The use of international conventions and cases in filling gaps and taking inspirations is not a new trend. Right from the inception of the Constitution, certain aspects have been inspired from constitutions of other states, for example, the Directive Principles of State Policy from Ireland, judicial review from United States and fundamental duties from the Soviet Union. Over the years, as it generally happens, even the compendium of the largest written constitution in the world and the whole corpus of legislations, fall short when faced with new challenges and the courts find Indian laws ill-equipped to deal with novel concepts. It is natural that even the largest piece of written constitution cannot possibly cover all aspects, especially the ones that crop up with newer phases and challenges of societal and legal conflict. So, the courts take the help of foreign precedents and statutes as well as customs in rare cases for inspiration and assistance to fill the legislative vacuum.

[15] Constituent Assembly Debates on Nov 4, 1948, Volume VII, 227-229. https://www.constitutionofindia.net/debates/04-nov-1948/ (last accessed 17 June 2025).

The realist school of American jurisprudence focuses on such 'judge made laws' as the actual practical source of law.[16] In practice, law is what judges make of it. And if there is some requirement of filling in gaps of statutory vacuum, courts can exercise some judicial creativity and discretion, without such action becoming ultra vires and an exemplary judicial overreach. So, the author can safely infer that influence of foreign authors, judges, statutes and precedents in Indian judgements is natural in the interest of 'justice, equity and good conscience' as well. For example, to legislate on sexual harassment, Vishaka guidelines[17] and consequently the Prevention of Sexual Harassment (POSH) Act, 2013[18] came from the CEDAW which India has ratified.[19] The Puttaswamy[20] judgement that answered a pertinent question on privacy and its subsistence as a fundamental right, took reference of several foreign precedents and statutes. The Environment Protection Act, 1986[21], the Water (Prevention and Control of Pollution) Act, 1974[22] have been inspired by India being a party to the Stockholm Conference, 1972[23]. These are not new developments. But trans-constitutionalism is a more fluid and dynamic concept.

United States president Donald Trump in the latest election campaign promised the idea of nationalism over globalism where the citizens would be preferred over illegal migrants. It reflects in his strict border policies, and implementation of mass deportation. US had been facing the issues of illegal immigration for a while just like India. However, US can afford to think 'country first'. The narrative and drive for India is different where globalization is our need. As a developing country with the most population, India requires the benefits of globalizing its economy. But does it translate as significantly to its polity, state structure and sovereignty? Ah, sovereignty. The sweet promise of self-determination, at international spheres; the blanket protection against foreign atrocities. The concept of sovereignty in State constitutionalism is fleeting with the plausible erosion of State identity in international sphere. The last of the tenets of national constitutional ideology is reflected upon the court systems.

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[16] Julius Paul, Foundations of American Realism, 60 W. Va. L. Rev. (1957). https://researchrepository.wvu.edu/wvlr/vol60/iss1/3 (last accessed 18 June 2025).
[17] *Vishaka Vs State of Rajasthan*, AIR 1997 SC 3011.
[18] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Act No. 14 Of 2013.
[19] India ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on July 9, 1993.
[20] *Justice K.S. Puttaswamy (Retd) and anr. Vs Union of India and ors*., AIR 2017 SC 4161.
[21] The Environment (Protection) Act, 1986, No. 29 of 1986.
[22] Water (Prevention and Control of Pollution) Act, 1974, No. 6 of 1974.
[23] United Nations Conference on the Human Environment in Stockholm, 1972.

This emergence may prove beneficial for citizens but at a larger level, erosion of State identity proves harmful for developing countries, least developed countries, or countries with smaller geographical terrain. The problem with the incapacity of United Nations, with its so called Big 5 having veto powers that nullify each other, the same problems would seep into establishing an international identity. The bigger and more developed nations having more sway as well as say would directly impact the national identity of smaller ones. Harmonizing both requires the skillset of walking a tightrope, balancing the needs and banes of globalization on one hand and the requirement of continual existence of national identity on the other. On one hand, a 'trans-constitutional' globalized state, in concept, would be far more dynamic in its approach, albeit a far cry from the definition of 'state' in municipal or international law. On the other, it would promote more uncertainty in internal governance and municipal polity. Resultant polarisation of political power may result in a much more overwhelming yet covert situation than the cold war, which would ultimately culminate in an oligarchical power sharing at a global level. The author would like to conclude on a more positive note that constitutionalism of the Indian state is resilient; even with concepts like 'trans-constitutionalism' there would be necessary safeguards to erosion of that constitutional spirit.