TRANSFORMATIVE CONSTITUTIONALISM AND THE JUDICIAL ROLE: BALANCING RELIGIOUS FREEDOM WITH SOCIAL REFORM

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INTRODUCTION

Constitutions are, *stricto sensu*, documents that contain provisions governing the interrelationship of the various organs of the state, and provide for checks to prevent abuse of power by them. However, the significance of a constitution is much more than just that. A constitution is a living organic document embodying the will of the people. Constitutional drafting is often a landmark moment in a nation's history. This is especially so in the case of countries having a history of being colonized. The constitution in such countries contain not just restraints on state power, but also provisions that 'echo the aspirations of the nation' to bring about a transformation in the order of things as they exist.[1] The Indian Constitution, originating from the same historical background, is considered a transformative document.

The judiciary has been given the power to breathe life into the letters of the law by interpreting constitutional provisions. In recent years, the judiciary in India has come under attack by many scholars for 'over-reaching' or playing an 'activist' role. However, such a criticism proceeds on the assumption that there is a 'proper role' of the judiciary which it has overreached. Scholars have been grappling with the question of the proper role of judiciary in modern times, when the state itself has transformed from a police state to a welfare socialist state displaying transformative constitutionalism. The paper focusses on the judicial behavior in India with respect to religious questions and how the court has tried to balance religious freedom with the constitutional aspiration of social reform, that has in effect, led to the dilution of secularism in India due to an interventionist judiciary, much

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[1] Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES 2(7), (2014) p. 135.

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beyond the constitutionally permitted limits of intervention.

TRANSFORMATIVE CONSTITUTIONALISM

A constitution, apart from laying down the interrelationship between the state organs and their scope and powers, embodies the ideals and aspirations and the values to which the people have committed themselves. It mirrors the soul of the nation and the people's supreme will. That is why the Constitution is considered an organic document that helps in shaping democracy.

The mere fact that a nation has a constitution does not imply that it also necessarily has constitutionalism. Baxi defines constitutionalism thus:

"Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance."[2]

Klare defines transformative constitutionalism as:

'a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'[3]

Therefore, constitutionalism as a concept conveys legal restraints on the exercise of state power and adherence to the constitution, to the rule of law and thereby, to the people's will.[4]

Constitutions that have been made by states having a colonial history are often seen as 'a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future

[2] Upendra Baxi, *Postcolonial Legality*, in Henry Schwarz and Sangeeta Ray, (eds.), *A Companion to Postcolonial Studies* 540, 544. Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. (2016) p. 122

[3] Klare, E. Karl., *Legal Culture and Transformative Constitutionalism,* 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, (1998) p. 146. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES, 2(7), (2014) p. 136.

[4] MADHAV KHOSLA, THE INDIAN CONSTITUTION (Oxford University Press, New Delhi, 2012), p. 14. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES 2(7) (2014) p. 135.

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founded on the recognition of human rights, democracy and peaceful co-existence...'[5] Transformative Constitutionalism envisages a mechanism to bring in social change from an unjust past to a democratic future using the Constitution as a tool to achieve this objective.

INDIA AND TRANSFORMATIVE CONSTITUTIONALISM

India had grappled with not just colonialism, but also social ills such as untouchability, caste discrimination, gender inequality which has been prevalent in India since ancient times. The Indian constitution-making exercise was motivated by the need to overthrow its colonial past and to bring about a new social and political order, based on democratic values. The Indian constitution was constructed as a 'moral autobiography', which promised a new future while explicitly rejecting the colonial past.[6]

Various provisions under the Indian constitution exemplify the transformative goal of the constitution. The Preamble contains the aspirations of the people, with the cherished goals of liberty, equality, fraternity and justice. It establishes a secular, democratic, socialist state. Part III of the Constitution provides Fundamental Rights against the state, including the ideals of equality[7], non-discrimination[8], freedom of speech and expression[9], movement, association[10], freedom of religion[11] and personal liberty[12]. It abolishes untouchability,[13] feudal titles and *begar*.[14] Thus, the quest for the establishment of a new social order through political power is implicit in the constitution. Bhargava believes that the Indian constitution was 'designed to break social hierarchies' and open up a new chapter of freedom, equality and justice.[15] It was a revolutionary moment, especially for the deprived classes, who hoped to receive equal treatment in society after its adoption.[16]

[5] Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. p. 351-352 (2006). Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. 109 (2016)

[6] *Supra note* 2 at p. 110.

[7] CONSTITUTION OF INDIA, 1950, Article 14.

[8] CONSTITUTION OF INDIA, 1950, Articles 15, 16.

[9] CONSTITUTION OF INDIA, 1950, Article 19(1)(a).

[10] CONSTITUTION OF INDIA, 1950, Article 19.

[11] CONSTITUTION OF INDIA, 1950, Article 25.

[12] CONSTITUTION OF INDIA, 1950, Article 21.

[13] CONSTITUTION OF INDIA, 1950, Article 17.

[14] CONSTITUTION OF INDIA, 1950, Article 23.

[15] RAJEEV BHARGAVA (ED.), OUTLINE OF POLITICAL THEORY OF THE INDIAN CONSTITUTION IN POLITICS AND ETHICS OF THE INDIAN CONSTITUTION, (Oxford University Press, New Delhi, 2008), p. 15. Cited in Alisha Dhingra, *Indian Constitutionalism: A Case of Transformative Constitutionalism*, ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES 2(7), (2014), p. 135.

[16] Kamal Kumar, *Outline of Political Theory of the Indian Constitution in Politics and Ethics of the Indian Constitution*, IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE, 19(3), (2014), pp. 29.

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TRANSFORMATIVE CONSTITUTIONALISM AND THE JUDICIAL ROLE: LOCATING THE 'PROPER'

The judicial organ of the state is tasked with the interpretation of the law. It ensures that a document as old as the constitution continues to hold relevance in modern society. In most postcolonial states that display transformative constitutionalism, the judicial role is not just confined to strictly interpreting the text as it is, but rather, the interpretation of the text must be in a way that furthers the constitutional ideals and goals, in a manner that resonates with the new changed society.

Yet, the judiciary cannot deviate too far away from the written mandate of the constitution. Thus, the judiciary has the twin role of upholding constitutional values by creatively interpreting the text while remaining within the ambit and respecting the constitutionally mandated separation of powers without overreaching its jurisdiction and venturing into forbidden fields.

When criticisms are levied on courts for being 'too activist', too interventionist or too powerful, the question arises as to what the role of the judges 'ought to be'. This question has been the subject of controversy since long. Even judges themselves have very different conceptions of what is the role of a judge, especially in case of a forward-looking transformative constitution.

Judiciary is said to be activist when the courts venture into areas that come within another organ's jurisdiction, such as in cases of judicial legislation. It may also occur 'when courts strike out a law that may be 'arguably constitutional', when courts creatively interpret a provision in sensitive issues, when the court deviates from a line of precedents and violates the doctrine of stare decisis, when it adjudicates upon polycentric issues etc.'[17] Again, the role of the judiciary in such cases is also debatable – whether the court should strictly adhere to the law as it is, or try to creatively interpret it to tackle the sensitive nature of the issue and bring it in line with the changed society. Should it be 'a transformative actor, a protector of constitutional rights, a facilitator of the democratic process, an organ of the state that adheres strictly to a separation of powers, or an institution that is above politics and

[17] Oscar Sang, *The Separation of Powers and New Judicial Power: How the South African Constitutional Court Plotted Its Course*, ELSA MALTA LAW REVIEW, Ed III, 2013, p. 99.

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populism?'[18] All these situations call for the need to find the 'proper' role of the judiciary in a democracy.

Transformative constitutionalism requires that the judiciary comes up with a jurisprudence that resonates with that transformative vision. It requires an understanding of the constitution – its history and the struggle of marginalized groups. In this way, postcolonial constitutionalism is a demonstration of the judiciary taking rights seriously through taking human suffering seriously.[19]

The Indian judiciary has had a mixed record of upholding constitutional values and aspirations. By inventing the PIL mechanism and expanding the rule of locus standi through epistolary jurisdiction and *suo moto* cognizance of matters, the Supreme Court has tried to reach out to the common man. Through judicial creativity, it has expanded the scope of fundamental rights, most notably, Article 21 and has even read most of the Directive Principles into Part III.[20] Through continuing mandamus, it has assumed power to monitor the implementation of its orders.

Yet, this expanded role of the Supreme Court has been subject to criticism. Scholars have termed the Supreme Court as being an *imperium imperio*[21]. Judicial engagement beyond a point, it is often argued, may lead to judicial tyranny and transform the judiciary from being the weakest (since it has neither sword nor purse) to the strongest organ (by a very weak system of checks on the judiciary) amongst the three.

In effect, the Supreme Court in India has displayed inconsistency in its approach to constitutionalism. While in some cases, the Supreme Court displays a zealously activist approach[22], in others, it simply gives up all its responsibility and adheres to the strict letter of the constitution[23].

[18] VILHENA, BAXI AND VILJOEN (EDS.), TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (Pretoria University Law Press, Pretoria, 2013).

[19] Upendra Baxi, *The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India*, in C. Raj Kumar and K. Chockalingam (eds) HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT 3, 15. Cited in Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. (2016), p. 124.

[20] *See* Maneka Gandhi v. Union of India, AIR 1978 SC 597.

[21] Gadbois, *Supreme Court Decision Making*, (1974) 1 BANARAS LAW JOURNAL 10.

[22] *See for example* Maneka Gandhi v. Union of India, AIR 1978 SC 597; Vishakha v. State of Rajasthan, AIR 1997 SC; Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461; Bandhua Mukti Morchha v. Union of India, AIR, 1984 SC 802; NALSA v. Union of India, (2014) 5 SCC 438.

[23] *See for example* Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1; A. K. Gopalan v. Union of India, AIR 1950 SC 27; ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

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A contentious issue that this paper seeks to analyse is the way the Indian judiciary has dealt with the conflict between protecting religious freedom on the one hand, and upholding the constitutional aspiration of social reform on the other. By entering into the realm of religion, and sitting in judgement over what constitutes religion and what a religious text means through the formulation of the controversial Essential Religious Practice Test by the court, it has, in trying to balance the two conflicts, undermined secularism and further restricted the constitutional freedom of religion, much beyond what was constitutionally envisaged.

RELIGIOUS FREEDOM AND SOCIAL REFORM: A BALANCING ACT

The Indian society is a faith-based polity with different religions coexisting. The Indian constitution was drafted in the backdrop of Partition, due to which, the framers kept in mind one of the objectives as fostering trust and respect for all religions. Due to the deep religious entrenchment in the daily lives of the people, the constitution was not made to follow the 'strict wall of separation' model of secularism. Instead, it was one of 'principled distance'[24] and 'equal respect and tolerance for all'. However, the religions at that time, especially Hinduism, was fraught with social ills such as child marriage, sati, caste discrimination, untouchability etc. that needed to be abolished, in order to secure a new egalitarian social order.

Article 25 provides for the freedom to freely profess, practice and propagate religion subject to public order, morality and health. Article 25(2)(b) however makes an exception to the general rule – the State can make a law that provides for social reform or which throws open Hindu religious institutions of public nature to all classes and sections of Hindus. These two provisions, in practice, have often come into conflict with religious groups opposing legislations on grounds of violation of Article 25 and the state defending them as being a social reform legislation. So, the Indian constitution maintained three approaches to religion: 'religious freedom; state neutrality towards all religions; and reformative justice whereby religious freedom would be curtailed on grounds of public order, health, morality and religious practices and institutions could be

[24] Rajeev Bhargava, *The Distinctiveness of Indian Secularism*, T.N. SRINIVASAN (ED.) THE FUTURE OF SECULARISM (Oxford University Press, Delhi, 2006), p. 20.

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regulated by the state in economic, financial, political or other secular activities'.[25]

The judges in India have to balance religious freedom, social justice and individual liberty.[26] If social reform had to be brought about, state intervention in religious affairs to some extent was required. But with every application of the ERP test by the Supreme Court, the freedom of religion gets further undermined, especially in term so of an individual's right to practice religion.

THE 'ESSENTIALLY RELIGIOUS' AND 'ESSENTIAL TO RELIGION' CONUNDRUM

Initially, the court began by stating that practices that were 'essentially religious', i.e. religious by their very nature, were protected under the constitution from intervention by the state. Only the religious denomination itself had the right to decide as to what were the essential rites and ceremonies of their religion and the state could only intervene in such practices, if they were against public order, health or morality or in violation of other provisions of part III[27]. Also, the state could legislate for social welfare or reform. The state could only regulate activities that are economic, commercial or political, though associated with religious practice. *Ratilal v. State of Bombay*[28] also reiterated the same.

According to the present understanding of the ERP test, only those practices are protected under the constitution from state intervention, which are 'essential to religion' and which are so fundamental to it, that any change to those practices would change the very character of religion itself. It is submitted that this requirement of the practice having to be 'essential to religion' is not one that is mentioned in the Constitution, nor can the Constitution be reasonably interpreted to mean so.

After assuming the power to decide as to which practices were 'essential to religion', the court further began to expand its powers by giving itself the power to interpret religious texts and adding additional tests to determine essentiality of religion, thereby undermining religious freedom, and secularism as a whole.

[25] *Supra note* 18.
[26] *Supra note* 18.
[27] The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282.
[28] AIR 1954 SC 388.

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Through *Ram Prasad Seth vs State of Uttar Pradesh*[29], the Allahabad High Court confused 'essentially religious' with 'essential to religion' which truly crystallised the ERP test. This opened religion to the scrutiny of courts. The subsequent judgements began to interpret essential not as a qualification to the nature of practice, i.e., religious or secular, but rather connoted it to mean important to religion. The string of cases that followed since then are all examples of overreach by the courts. The courts have ventured into religious questions which the constitution forbids under Article 25.

INTERPRETING RELIGIOUS TEXTS

It was in *Venkataramma Devaru v. State of Mysore*[30] where the Supreme Court actively went into the interpretation of religious texts to hold that untouchability was not an integral part of the Hindu religion. The active intervention of the judiciary in matters of religion was criticized, especially since the court could have simply confined itself to holding untouchability unconstitutional on the basis of Article 17 and Article 14. A more sensible approach was followed in *Adhitayan v. Travancore Devaswam Board*[31] where the court held that appointment of only Brahmin priests was a violation of Article 17. Even in *Shah Bano* case[32], the court could have easily adjudicated upon the case based on the provisions in the Criminal Procedure Code rather than going into interpreting Verse 241 of the Quran. In the Shah Bano case, Justice Chandrachud, a non-Muslim, secular jurist trained only in secular law interpreted significant Islamic law principles, upon which there is no consensus even among trained Islamic legal scholars.

In *Sastri Yagnapurushadji and others v. Muldas Bhudardas Vaishya*[33], the petitioners claimed that they were not Hindus and hence, the temple entry legislations would not apply to them. The court went into a detailed exposition of the tenets of Hinduism and concluded that the *satsangis* were in fact Hindus. It further went on to hold that their views on temple entry were based on a mistaken and false understanding of the teachings of their founder Swami Narayan and superstition and ignorance. So, the court effectively tutored a religious group as to what their religion actually meant, which the judges were clearly ill-equipped to do, being untrained in theology.

[29] AIR 1957 All 411.
[30] AIR 1958 SC 255.
[31] AIR 2002 SC.
[32] AIR 1985 SC 945.
[33] AIR 1966 SC 1119.

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The same was done by the Supreme Court recently, in *Nikhil Soni v. Union of India*[34], where the Rajasthan HC banned *santhara* on the ground that it does not constitute an essential religious practice and is hence, not protected under Article 25.

THE TEST OF OBLIGATION

It was this confusion that later got followed in *Qureshi v. State of Bihar*[35], where the Supreme Court held that slaughter of cows was not an essential practice of Muslims in Eid and was not 'obligatory' as they did have the option of slaughtering other animals. Again, the **test of obligation** got added here by the Supreme Court, further reducing the scope of religious freedom.[36] Similarly, in *Fasi v. SP of Police*[37], a police officer challenged a regulation that disallowed him from keeping a beard as violative of his freedom of religion. The court disregarded the evidence from Quran provided by the petitioner and instead relied on the argument that there are many Muslims who do not have beards and the petitioner himself did not have a beard earlier and thus, it is not essential. This shows the utterly whimsical approach of the courts to questions of religion.

Again, in *Ismail Faruqui v. Union of India*[38], the court was called upon to adjudicate on the issue as to whether or not the state can acquire a land over which the Babri Masjid stood. The court went into adjudicating upon whether or not praying in a mosque is an essential tenet of Islam and held that praying in a mosque was not essential as it could be done even in the open. Thus, it is not protected under freedom of religion.

This test of protecting a practice only if it is 'obligatory' and 'absolutely essential' severely curtails the freedom of an individual to practice his religion in his own way. As long as his way does not go against public order, health or morality, or is not violative of other fundamental rights, the practice must be granted protection.

THE TEST OF RATIONALITY

Justice Gajendragadkar in the *Durgah Committee, Ajmer v. Syed Husssain Ali*[39] held that certain practices may merely stem from superstition. Such practices need to be scrutinized carefully and rationally. An added

[34] 2015 Cri LJ 4951.
[35] AIR 1958 SC 731.
[36] M Mohsin Alam, *Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution*, ASIAN LAW, Vol. 11, (2009) p. 39.
[37] (1985) ILLJ 463 Ker.
[38] AIR 1995 SC 605.
[39] AIR 1961 SC 1402.

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test of rationality was introduced by the Supreme Court.[40]

Values such as 'rationality' and 'morality' are highly subjective. A judge has his own personal belief systems which shape his thinking. Only because a judge's idea of 'morality' or 'rationality' is different from that of a religious group, does not make the practice immoral or irrational. In fact, giving such powers to a few judges would lead to the imposition of their own ideas and elitist and majoritarian cultural values on the community, thus destroying diversity.

THE TEST OF ANTIQUITY

In *Acharya Jagdishwaranand v. Commissioner of Police, Calcutta*[41], the court held that *tandava* was not an essential practice of the Ananda Margi faith as it began in 1966 whereas the faith began in 1955. So, the court effectively added another **test of antiquity** to determine essentiality.

In *Bal Patil v. Union of India*[42], the court held that Jainism is not a separate religion but merely a "revolutionary movement within Hinduism", even when the two religions differ on the very basic principle of belief in God, and yet, the court found this difference to be insignificant. Many scholars criticised the judgement and held that law has no business in delineating the scope of religion.

So, the current position is that it is not enough to merely prove that a practice is religious, but to also prove that it is obligatory, rational and antique.

CONCLUSION: A NEED FOR RESTRAINT

The ERP test has been criticized variously by scholars and practitioners alike. The judges are trained in law and not in theology. They can never be competent to deliver informed judgements about religions. There is a looming danger that the court may arbitrarily use its power in its drive to modernize the Indian state. It makes the entire process arbitrary and subjective as per the judge who adjudicates upon the matter. Another argument is that the freedom of religion is a right guaranteed to an individual and not the community. Such adjudication violates the rights of those individuals who opt to practice their religion through varied practices. The judges may bring in their own ideologies and threaten diversity of religious belief in doing so.

Justice Iacobucci said: *"the State is in no position to be, nor should it become, the arbiter*

[40] *Supra note* 34.
[41] AIR 1984 SC 512.
[42] (2005) 6 S.C.C. at 690.

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of religious dogma"[43]. That could involve a secular ideology dictating to a religious one, with a government or courts re-educating believers to show them their 'errors'.[44] Such a practice which allows courts to decide the contents of religions makes the state an insider into religion. And this transformation has given the judiciary a political role in 'secularism adjudication' – not only does it legitimise state intervention, it carries out the internal critique itself.[45] Even the widest and most liberal reading of the constitution does not allow for the tests of rationality, antiquity or obligation to be applied to define the scope of religious freedom.

It is one thing to shape religion in terms of secular public standards, and a whole other thing to 'attempt to grasp the levers of religious authority and to reformulate religious tradition from within'.[46] While transformative constitutionalism does require the judiciary to play an active and creative role to further the constitutional aspirations, and in the Indian case, to bring in social reform, the ERP test is a clear example of judicial overreach.

This is not to say that all kinds of religious practices must be allowed, howsoever violative they may be of constitutional rights. The best way would be for the judiciary to bring in social reform by testing religious practices on secular values such as equality, liberty and justice rather than becoming an internal critic of religion by itself. This would help in balancing the preservation of religious freedom on the one hand, and the constitutional aspiration of social reform on the other.

[43] Syndicat Northcrest v. Amselem, (2004) 2 SCR 581 (Canada).
[44] ROGER TRIGG, EQUALITY, FREEDOM AND RELIGION, p.45, (Oxford University Press, New York, 2012).
[45] *Supra note* 34 at p. 41.
[46] *Supra note* 43 at p. 284.

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