**Continuities, Breaks and Transformations: Registers of Transformative Constitutionalism in India**

Jhuma Sen[[1]](#footnote-1)

Transformative Constitutionalism has come to signify many things, except for what it *is*. While it has been increasingly framed as a response to the constitutionalism of the Global North, as a sort of ‘postliberal reading’ of the Constitution in the Global South, I argue that this framing obfuscates more than it clarifies. This in turn defeats the purported emancipatory project of transformative constitutionalism and therefore for constitutional scholars to have any comprehensive engagement with this project, it is imperative to understand what transformative constitutionalism is, and *how* best*,* to borrow the most enduring albeit limited definition of transformative constitutionalism from Karl Klare’s 1998 pioneering article about the same, ‘large-scale social change’ could be induced ‘through non-violent political processes grounded in law’ and to map, if there are ways to devise a model or framework of understanding this relationship between constitutional content and legal methodology. I try to pursue all three objectives in this paper, by locating what transformative constitutionalism project has meant for India as an analytical category in constitutional law scholarship, as well as in the judicial vocabulary of late, which is trying to device a model of transformative constitutionalism by drawing from that scholarship as well as sister jurisdictions in the Global South.

Transformative constitutionalism, stripped to its core meaning signifies a constitutionalism that commits to social and political change that will build a future. An exercise in excavating the meanings of transformative constitutionalism throws up abundant metaphors. Justice Langa[[2]](#footnote-2), while acknowledging that ‘there is no single stable understanding of transformative constitutionalism’, uses the metaphor of the ‘bridge’ in the Epilogue to the interim Constitution as the common agreement to understand transformative constitutionalism. Transformative constitutionalism for Langa, is a permanent ideal, in which change is unpredictable but the idea of change is constant. Needless to state, constitutional courts, scholar and lawyers in different jurisdictions have had different approaches to this ‘change’, and while some have taken a collaborative approach, following the South African experiment, others have taken a more traditional legal approach. The question ‘what kind of change is a desirable goal for transformative constitutionalism’ is however a more complex one and the answer must be rooted in the particular constitution as well as the political and social agenda of that society.

This paper, accordingly is broadly divided in four parts: in the first part, I briefly map the journey of transformative constitutionalism across the world; in the second part, I trace the iterations of transformative constitutionalism in India, in the third part, I map how the Indian judiciary is trying to *read* transformative constitutionalism in a series of judgments of late, by sometimes borrowing from other legal systems and cultures and in the fourth part, I try to devise a workable model of transformative constitutionalism drawing from both. Finally, in the concluding part, I test the invocations of transformative constitutionalism by probing some other recent pronouncements by the apex court, where the moral readings of constitution were compromised by the same court, and occasionally by the same judges.

In doing so, I also intend to test the ‘transferability’ of constitutional ideas, in this case, the components that make up ‘transformative constitutionalism’ as a method through constitutional borrowing, transplants and migration, which have received a significant focus with judicial application of foreign sources in constitutional adjudication in three recent Supreme Court judgments namely, Joseph Shine *versus* Union of India, Navtej Johar *versus* Union of India and Indian Young Lawyers Association *versus* Union of India.

**KEYWORDS:** Transformative Constitutionalism, India, South Africa, Constitution, Global South, Constitutional Law

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2. Langa, Pius. "Transformative constitutionalism." Stellenbosch L. Rev. 17 (2006): 351. [↑](#footnote-ref-2)