An Analysis of Transformative Constitutionalism with Special Reference to Sexual Minorities in India

Dr. M. P. Chengappa[1]
Vineeta Tekwani[2]

Abstract

The philosophy of transformative constitutionalism is not a new one. The sources of these values can be traced back to the South African constitutional model. In reality, the philosophy that underpins this ideal of Transformative Constitutionalism can hardly be ascribed to or affiliated with anyone's constitutional document. It seeks to utilise constitutional guarantees as well as the constitutional machinery to transform the society it governs into a more progressive one – to make it more inclusive in every regard, and egalitarian in its outlook. This is sought to be done largely through the pursuit of what scholar's term as "substantive equality," which pursuit practically manifests itself through the enforcement of socio-economic rights – especially those protecting the interests of the minorities – as well as through affirmative action measures.

This paper seeks to establish a deep understanding of how the concept of Transformative Constitutionalism has evolved. Further, this paper aims at is not merely a general understanding of Transformative Constitutionalism and the roles it would set out for the Legislature as well as the Judiciary if truly inculcated in Indian Constitutionalism, but also a specific study at how this ideal is currently being used, as well as how it might be used in the future, to shape the debate on gender-identity and gender-equality issues in India especially with reference to sexual minorities in India.

Key Words: *Transformative Constitutionalism, Sexual Minorities and Gender Justice*

1. Introduction

The aim of this research paper is to study the social injustice caused by the discrimination towards sexual minorities, which is deep-rooted in the very fabric of Indian culture. The authors seek to analyse this in the backdrop of the aspiration of the Indian Constitution to achieve equality and to transform India into an egalitarian society. Further, the authors will try to discuss how far the Indian Constitution has such transformative capabilities, as well as the possible ways it can seek to reform the way the construct of gender is viewed and interpreted by the people of India at large.

---

[1] Assistant Professor of Law, West Bengal National University of Juridical Sciences (WBNUJS)
[2] LLM (Corporate and Commercial Law), West Bengal National University of Juridical Sciences (WBNUJS)

Post the adoption of the Indian Constitution, it has several times been referred to as a "charter for social revolution", thereby suggesting how it was not merely an attempt to govern the new age Indian polity, but also how it was a reflection of the desire of the Indian people, through the Constituent Assembly, to transform the Indian society from what it had been during its colonial struggles to the kind of modern, egalitarian society that is aimed to become.

In this journey of transformation, there exist several focal points for a political society, one of the most important of which is gender equality and equal rights for sexual minorities. While India has seen several women play important roles in not only attaining freedom but also in areas of governance, science, and technology, art, culture, etc., it cannot be denied that gender inequality has always been one of the issues most deeply plaguing Indian society. Further, the struggle for emancipation on part of sexual minorities including Transgender people and the LGBT community at large can also no longer be ignored in this day and age. Therefore, it becomes imperative to discuss how far, if at all, the aims of transformation inherent in the Indian Constitution have resulted into attaining substantive equality for such sexual minorities, which term encompasses, here, both women and the LGBT Community, and how it may further be used to achieve for them the position of dignity and respect that they deserve as members of the Indian society.

2. Transformative Constitutionalism in the Indian Context

"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 mleccha, the bonded labor, 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."[3]– Justice V R Krishna Iyer

In order to fully understand the ideology of Transformative Constitutionalism, it is imperative to first understand what the principles of Constitutionalism mean. Upendra Baxi makes a distinction between the three interactive meanings of constitutions as texts, constitutional law, and theory/ideology ("constitutionalism").[4] He further states that "the imagery of constitution/ constitutionalism varies from the perspective of those who rule and those who are ruled and of the epistemic communities which develop

[3] Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India(1981) 1 SCC 246 : 1981 SCC (L&S) 50 at page 264<https://indiankanoon.org/doc/1111529/>

[4] Baxi, Upendra. 'Outline of a "Theory of Practice" of Indian Constitutionalism', http://upendrabaxi.in/documents/Outline%20of%20a%20theory%20of%20practice%20of%20indian%20constitutionalism.pdf

empirical and normative theories/ images of constitutions".[5] The constitutional text depicts not merely a document, but also a moral and a legal system which lays down the powers and limitations with respect to governance, where such a system should be able to reflect the will of the people themselves and should, thus, ideally be the product of popular consent. Constitutionalism, on the other hand, has largely to do with governance. However, it also provides for the site wherein ideologies and practices alike may flourish, encompassing discourses on rights, overall development, equal rights as well as the autonomy of the individual. It, thus, serves to provide the narratives for both, rule as well as resistance.[6] It depicts the notion of a limited government, i.e. limitations imposed on the exercise of arbitrary powers of the government. It essentially recognizes the necessity of a powerful government while also emphasizing on reasonable restrictions so as to avoid the misuse of such power.

However, the philosophy underlying the Indian Constitution is not simply to control the power in the hands of the state – rather it is to channelize the empowerment of the state in the right direction so as to enable social transformation.

The American academic Karl Klare coined the term "transformative constitutionalism" which signified "a long term project of constitutional enactment, interpretations, and enforcement committed to... transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction."[7] Thus, at its core, the ideology of Transformative Constitutionalism holds a promise and an aspiration to transform, here the Indian society, so as to embrace, in letter as well as in spirit, the constitutional ideals of justice, liberty, equality and fraternity as set out in the Preamble. This expression is, thus, best understood through a pragmatic lens and staying in touch with current day realities.

This notion of transformative constitutionalism is typically traced back to South African Constitutional Law. In the words of the former Deputy Chief Justice of South Africa, Dikgang Moseneke, "it is perhaps in keeping with the spirit of transformation that there is no single

---

[5] Zoya Hasan (Upendra Baxi Pg. 31-63), *India's Living Constitution* (Permanent Black 2006)

[6] Baxi, Upendra. "Postcolonial Legality: A Postscript from India." *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 45, no. 2, 2012, pp. 178–194. *JSTOR*, www.jstor.org/stable/43256851.

[7] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights.

understanding of transformative constitutionalism"[8]. Broadly speaking, however, a Constitution may be said to be of a transformative character if one of the primary goals driving it is the transformation of its society. As Justice Pius Langa further points out[9], such transformation would have a strong societal and cultural basis, and offers the following words from the Epilogue to the Interim Constitution of South Africa as being that basis for the South African brand of Transformative Constitutionalism – *"a historic bridge between the past of a deeply divided society, characterised 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."*[10] Here, it is essential to understand that the transformation that is aimed at is not merely meant to secure basic social, economic and political rights, but seeks to ensure the holistic and larger aim of elimination of grassroots inequalities in terms of access to means, opportunities, education, livelihood, justice, etc. As the former Chief Justice of South Africa, Chaskalson, commented, "so long as these conditions continue to exist, the aspiration (of substantive equality) will have a hollow ring".[11]

In pursuit of the ideal of transformative constitutionalism, aside from the legal and economic transformation sought to be achieved, a different conception of the process of transformation that has been offered is that this process should not be seen as having any definite end – meaning thereby that if transformation is viewed as a "temporary event", then what is envisaged is that there will come a point when the transformation shall be achieved, whereby the process would end. However, the alternative conception would suggest viewing this process of transformation as a continuing one – not envisioning the other side as a concrete destination to be reached, otherwise, "in this vision of transformation, there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the two places between which we have chosen to choose."[12]

A close comparison between this concept of transformative constitutionalism developed under the aegis of the South African Constitution, and the Indian Constitution and its underlying philosophy tells us that in a manner very similar to the South African effort, through their

---

[8] Justice Pius Langa, "Transformative Constitutionalism", https://www.sun.ac.za/english/learning-teaching/ctl/Documents/Transformative%20constitutionalism.pdf

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

Constitution, to reform and repair a society that had suffered the long ordeal of apartheid and colonial rule, the Indian Constitution represents a similar struggle on part of the framers to create a bulwark against the kind of oppression and exploitation that the Indian people had suffered on account of not just colonial rule but also a society deeply divided on the grounds of caste and class.

Broadly speaking, Constitutions of most states are enacted during a revolutionary movement, and in the backdrop of constraints. It is for this reason that the enactment of a country's constitution is generally looked at as the beginning of a new era for that country, and thus, to that extent, as having a transformative aspiration. Postcolonial constitutionalism, especially, democratises a country's Constitution, ensuring a ground-up understanding of the Constitution not just as "a history of power but a future of social justice, which includes in its transformative praxes the struggle of disempowered groups; and one that recognises that constitutionalism is a constant work in progress.[13] The Indian Constitution, however, is especially known for being a transformative moment in India's history, since it was the culmination of a long, hard struggle for social and political self-determination, and as a marker of transition from a colonially-ruled society to a modern, democratic nation. The Indian Constitution has, thus, been characterized as a manifesto for social revolution with an explicit transformative agenda[14] - drafted at a time when the ideals and aspirations of human rights were compelling to the leaders of the newly independent nation.[15]

This post-colonial Indian state was, thus, highly conscious of the necessity to address several looming issues, such as poverty, illiteracy, as well as historical wrongs such as untouchability and gender inequality.[16] As in other postcolonial societies, law was understood to be the primary agent of social change. Recognising the importance of law reform as a catalyst for social change and the significance of rights in remedying the harsh inequities of colonial India— with its divisions of class, caste, gender, and religion—the Constitution emphasised the importance of universal human rights, principles of equality, and non-discrimination.[17] It is because of this very reason that a number of historically exploitative practices, rituals, taboos as well as gender-based inequalities have been brought down by

[13] Baxi, Postcolonial Legality, Supra: 4.
[14] Austin, Granville. (1972). The Indian Constitution: Cornerstone of a Nation. New Delhi: Oxford University Press.
[15] B. K. Pavitra & Ors Vs Union of India &Ors, CA No. 2368 of 2011 https://indiankanoon.org/doc/18096795/
[16] Baxi, Upendra, (2008), Outline of a 'Theory of Practice' of Indian Constitutionalism in Raj
[17] Austin, Supra: 12.

progressive social reform movements, legislative developments and, more importantly, through bold and innovative judicial interpretations.

Throughout the length and breadth of the extensive documentation that is the Indian Constitution is reflected in a philosophy aimed at creating a strong, united yet diversified nation, grounded firmly in the ideals of freedom, equality, and fraternity. In keeping with this philosophy, the framers of the Indian Constitution set out to elaborate and elucidate these principles in Part III and Part IV of the Constitution, dealing with Fundamental Rights and Directive Principles of State Policy respectively. These deal extensively with not just the rights of citizens and the corresponding duty that befalls the State, but also the considerations that the State must keep in mind while framing legislations. Thus, it only makes sense to turn towards these to become the bulwark against the issue of gender injustice. Guaranteeing core civil and political rights such as the right to freedom of speech and expression, life and personal liberty, and equality before law, Part III of the Constitution appears to place the autonomous, self-determining individual at the heart of the Constitutional order. Nonetheless, the rights guaranteed by Part III are not absolute. They are subject, in many cases, to "reasonable restrictions".

Article 14 of the Constitution, aims clearly at achieving the dual goals of equality and equity, by guaranteeing to all persons not just "equality before the law" but also "equal protection of the laws". While the former is a negative concept, implying that all persons shall be equal in the eyes of the law in that the State shall not accord to any person any special privileges before the law, the latter is a positive concept which implies that "all persons in similar circumstances shall be treated similarly both in terms of the privileges conferred as well as in terms of the liabilities imposed"[18]and is aimed at achieving equity among people by protecting those situated similarly from discrimination. Article 14, thus, effectively implies that differential treatment for people differently situated is not only permissible but also required.

This fundamental right of equality is further strengthened by Article 15, which provides, in Clause (1) that "the state shall not discriminate against any citizen on the grounds of only religion, caste, sex, place of birth or any of them". Thus, what Article 15(1) – just like Article 14 – prohibits is not discrimination based on a reasonable differentia, but such discrimination which is made *only* on the grounds mentioned therein, for no reasonable purpose or objective. Clause (2) of Article 15 further prohibits any discrimination or disability being imposed, with respect to access and enjoyment of public spaces and amenities, solely on the grounds mentioned

[18] 'Legal Aspect of Equality', https://shodhganga.inflibnet.ac.in/bitstream/10603/130521/7/07_chapter%202.pdf

therein. However, a further reading of Article 15 brings us to Clause (3), which states, "Nothing in this Article shall prevent the State from making any special provision for women and children". Thus, while 15(1) and 15(2) guarantee to all citizens protection against discrimination and disabilities which may be imposed by the State in the use of public spaces, 15(3) clearly states that if any such law, even if it is discriminatory on the face of it, is made in favor of women and children, then the same shall not be considered to be in violation of the fundamental right set out in 15(1) and 15(2). Kapur and Cossman[19] have referred to this usual approach, of considering 15(3) an exception to the fundamental right enshrined in 15(1), as the "exceptional approach", which is based on the concept of "formal equality" which considers equality in terms of individuals being similarly situated in the eyes of law, thereby regarding any differential treatment as being exceptional to the idea of equality. They have, however, evolved an alternative view of 15(3) – termed as the "holistic approach"[20] – basing it on the feminist notion of substantive equality. They state that, taking into account the substantive inequalities prevalent in the society, it is essential at times for even individuals similarly situated in the eyes of law to be treated differently, thereby rendering 15(3) not an exception to the ideal of equality, but rather an essential tool in eliminating the already existing substantive inequalities and ushering in the kind of equality envisaged by the Constitution.

A similar reading can be applied to Article 16 of the Constitution as well. Article 16(1) provides that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State", with Article 16(2) further stating that "no citizen shall, on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state". Article 16(4), however, confers upon the state a wide discretionary power in terms of allowing progressive discrimination by stating that nothing in Clauses (1) and (2) "shall prevent the state from making any provision for the reservation of posts in favor of any backward classes of citizens which, in the opinion of the state, is not adequately represented in the services under the state". Carrying forward the same "holistic approach" suggested by Kapur and Cossman[21] for the interpretation of Article 15(3), Article 16(4) also appears to be not an exception to the rights enshrined under 16(1) and (2), rather a tool to achieve the bigger goal of equality, as broadly envisioned by Article 14.

---

[19] Ratna Kapur and Brenda Cossman, "On Women, Equality, and the Constitution"
[20] Ibid.
[21] Supra Note 19.

Along with Article 14, 15, and 16, other fundamental rights enshrined in Part III, such as Article 17 dealing with the prohibition of untouchability – as already pointed out in the Sabarimala judgment[22] – and Article 21 guaranteeing the right to life, also aim at securing for all women in India the right to equality, formal as well as substantive, and protection from discrimination, at home and in society. Further, the Directive Principles of State Policy, in laying down the considerations to be weighed and kept in mind by the State while drafting laws, also puts the responsibility on the State to create a society based on the constitutional aspirations of freedom, equality, and fraternity. Article 38(1) confers a duty on the state to safeguard public welfare by creating a social order governed strongly by and in which "justice, social, economic and political, shall inform all the institutions of natural life". Moreover, Article 38(2) specifically directs the State to focus its endeavors towards minimizing income inequalities as well as "inequalities in status, facilities, and opportunities".

Article 39 lays down two specific areas where in the state must enact laws to ensure gender equality. Clause (a) of Article 39 states that the state must ensure that all citizens – "men and women alike" – have equal right to "adequate means of livelihood". Further, Clause (d) directs the state to ensure that the right to "equal pay for equal work, for both men and women" is secured, and Clause (e) directs the state to ensure that the "health and strength" of male and female workers alike are not exploited on the account of them having to participate in vocations unsuitable to them for any reason because of economic necessity. Article 42 requires the state to draft provisions specifically aimed at "securing just and humane conditions of work" and aimed at guaranteeing maternity relief. One of the most important directive principles of state policy that has often been pushed for by feminists is Article 44, which directs the state to enact and provide for a Uniform Civil Code to all citizens throughout the territory of India. The reason the enactment of a Uniform Civil Code is of such special concern and importance to feminists all over the country is that the immense diversity in the Indian society, especially religious diversity, hinders women belonging to certain sects from enjoying several personal rights that might be enjoyed by women belonging to other religions and sects. Several examples of this can be given – for instance, Hindu women did not enjoy equal inheritance rights for the longest time, Muslim personal law still does not recognise any formal maintenance provisions, nor does it recognise adoption as valid, etc. All of these dissimilarities in personal law can be dealt with under a Uniform Civil Code. Of more importance is the way Article 46 has been

[22] Indian Young Lawyers Association &Ors v The State of Kerala, 2018 SCC Online SC 1690<https://sci.gov.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf>

framed, in so far as it states that it is the duty of the state to promote "the educational and economic interests of the weaker sections of the people, and, in particular, of Scheduled Castes and Scheduled Tribes" and to prevent "social injustice and all forms of exploitation"– the very fact that "weaker sections of people" are used as distinct and separate from "Scheduled Castes and Scheduled Tribes" is reflective of the fact that such weaker strata of the society do not include just the backward classes, and a comprehensive understanding of the Constitution would require us to understand as this expression being inclusive of women and sexual minorities as well.

As all the above instances point out – and what this paper does not seek to contend – is that it is not so that the Indian constitution does not envisage equality. It does push for substantive equality though, through the various provisions mentioned above, as well as the various statutory provisions enacted under the guidance and direction of the above-mentioned provisions. Instances of such statutory provisions include:

(1) Provisions dealing with rape, outraging of a woman's modesty, adultery (now scrapped), etc. under the Indian Penal Code.

(2) Provisions under the Equal Remuneration Act 1976 and the Maternity Benefit Act 1961.

(3) Provisions under the Criminal Procedure Code stating that while a woman may be arrested by a male officer, she can only be physically patted down and searched by a female officer, or that summons may only be served upon an adult male member of the family, and not upon an adult female member.

(4) Reservations in educational institutions as well as in-state employment made in favour of women, etc.

3. Emancipation of Sexual Minorities: Role of the Judiciary

Despite the aspirations of the Constitution to transform Indian society into a more inclusive and egalitarian one, as discussed above, the harsh reality remains that substantive equality is still a distant dream for women as well as the LGBT Community in India.

This cruel reality is evidenced by the Justice Verma Committee Report which states the following[23]:

> "On the Gender Inequality Index—inequalities in reproductive health, empowerment, and economic activity—India has been ranked 132nd among the 148

[23] Justice Verma Committee on Amendments to Criminal Law, <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

> countries for which data is available. Only 10.9 percent of the parliamentary seats are held by women, and 26.6 percent of adult women have reached a secondary or higher level of education, compared with 50.4 percent of their male counterparts. For every 100,000 live births, 200 women die of causes related to pregnancy, and female participation in the labor market is 29 percent, compared with 80.7 percent for men."

According to the National Crime Records Bureau[24], India, 24,206 cases of rape were reported in 2011, which means that once in every 21 minutes a woman gets raped somewhere in India. Only 26% of these cases resulted in conviction, a 0.2% decline from 2010. Domestic abuse also remains a serious problem in India. The World Bank reports that in 2006, 47% of women were physically abused by their husbands, 21% of whom were beaten for simply "burning the food" and 31% for "arguing." Indian women have higher illiteracy rates than men (26% versus 12%, respectively, among those ages 15 to 24 years) and dramatically lower levels of labor force participation (29% versus 81% for those 15 years and older in 2010). These statistics are startling, especially when one considers that India is the world's largest democracy and has experienced considerable gains in economic prosperity. However, the irony is that while the legal existence of the transgender as well as the LGBT community at large has only been recognized in the past couple of years, the statistics bode much better for them than they do for women, as mentioned above.

While popular acceptance of the LGBT community is still a way off, data has shown that the opinions of Indians towards the LGBT Community have become less rigid over time. For instance, according to a periodical survey conducted by the World Values Survey (WVS) in over a 100 countries, the share of respondents from India who believed that "homosexuality is never justifiable" fell from 89% to 24% during the time period from 1990 to 2014, with the sharpest decline being registered during the 90s.[25]

In this regard, thus, the feminists argue that equality, constitutionally speaking, can be classified into formal equality and substantive equality[26]. While formal equality has been guaranteed to women in India under Article 14, the operation of this formal equality is inadequate in so far as substantive

---

[24] *National Crime Report Bureau, 2011*<http://ncrb.gov.in/StatPublications/CII/CII2011/Statistics2011.pdf>

[25] 'Homosexuality in India: What data shows', *Livemint.com* <https://www.livemint.com/Politics/nLQiPpl5UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html>

[26] Rajeev Bhargava and Upendra Baxi, *Politics And Ethics Of The Indian Constitution* (Oxford University Press 2008).

inequalities between men and women – and especially with reference to the LGBT Community - continue to persist. These substantive inequalities can be understood using what feminists refer to as the Substantive Model of Equality[27].

According to the definition given by Paramanand Singh[28], this substantive model of equality takes into account, not just the formal equality as conferred upon women by law but also factors such as social, economic and political inequalities faced by them as well as the measures necessary to rectify these inequalities. Paramanand Singh further goes on to describe how this substantive model of equality, by looking into these above-mentioned factors, lays emphasis on not just the like or unlike manner that individuals are situated in, but also on the "disadvantage" suffered by certain individuals as compared to the advantages enjoyed by others, that would go on to become what creates differences between these two sets of individuals. This view has been substantiated by Kapur and Cossman[29] as well, who stated that while an insight into formal equality alone does not allow recognition of substantive inequalities, the substantive model of equality aims at "eliminating individual, institutional or systematic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society." This same observation has also been reflected in the words of D.D. Basu when he states that while the Constitution, especially in Parts III and IV, aims at equality and "justice, social, economic and political", it is also true that in the face of "glaring inequalities of income, social injustice, and exploitation, inequality of status and opportunity... there is no room for equality before the law"[30].

In this light, as well as keeping in touch with the feminist understanding of the term "equality", a clear picture emerges of how "sex" as a concept has historically denoted "disadvantage", having been the ground for ages worth of discrimination, subordination and social exclusion for women and other sexual minorities. In such a scenario, the need arises for a radical change in the way these social, economic, cultural and political factors are viewed as separate from the formal equal status granted to women and unrecognized LGBT people in society. This radical change must, then, come in the form of sexual minorities being recognized as a distinct unequal class. Unlike the people of scheduled and backward classes being treated as an unlike class of people, however, the unequal status should be conferred on sexual minorities specifically because of how, while they have formally been granted the status of equals, persistent substantive

---

[27] Ibid.
[28] Ibid.
[29] Supra:19; Ratna Kapur and Brenda Cossman, "On Women, Equality, and the Constitution"
[30] Supra: 43.

inequalities have kept them from enjoying the same social, economic, political and cultural advantages that have been enjoyed by their male, heterosexual counterparts.

The reason offered by the framers of the Constitution themselves for according a special status on people belonging to scheduled and backward classes is their historic struggle for social emancipation, as also pointed out by Justice D Y Chandrachud in his judgment in the Sabarimala case[31]. The framers of the Constitution, by conferring such status of being an unequal class of people, basically aimed at recognising the fact of the way these backward classes had been historically discriminated against, as well as the fact that such discrimination is deeply rooted in our society and would have continuing effects, which responsibility is on the State to rectify through affirmative action. This responsibility falling squarely on the State is also reflected in the words of Articles 14 and 17[32] of the Indian Constitution. Following the analogy drawn by Justice Chandrachud, a marked similarity can be seen in the case of women and sexual minorities, in so far as the discrimination and social exclusion faced by them, and their struggle to break free from the same have existed in our society for ages, and are deep-rooted issues which can only be resolved through affirmative action on part of the State.

The judiciary has, thus, played a key role in bringing about the radical change required in terms of the status of socio-political rights in the country, and especially in how women and the LGBT community are viewed in the Indian society and legal community. In fact, several sobriquets such as "activism", "over-activism", "judicial overreach", etc have been doled out by journalists and law-makers alike, on the role that the Indian judiciary has performed, especially in terms of changing non-justiciable social rights into Fundamental rights, checking government abnormalities by setting up investigative committees, and for supposedly interceding in the jurisdiction of parliament and the executive. The Judiciary has stepped in, not exclusively but to guide the assigned authority to play out their obligations and has additionally taken over the usage of the program through non-statutory advisory groups shaped by it. These accusations of over-activism have been countered by others who argue, and rightly so, that the Supreme Court has used the power of judicial review sparingly to challenge government policies, for failing to ensure the actual delivery of these rights, and for being ad hoc in its approach. At best, the Court's judgments have had an indirect effect on public policy; the government has adopted the Court's suggestions only when it was ready to do so.

---

[31] Supra: 26.
[32] Supra, http://www.legislative.gov.in/sites/default/files/COI-updated-as-31072018.pdf

Focus must be drawn on the milestone Vishakha's judgment[33] on harassment against women, which brought about the Indian Parliament's establishment of enactment tending to the Sexual Harassment Act in 2013. This case exhibits law's transformative potential, while at the same time underscoring the truth of relentless rights infringement in contemporary India. Vishakha's specific importance lies in its accentuation on connecting sacred assurances of gender balance with universal human rights to react to women's encounters of sexual harassment and sexual assault in the work environment. Because of the lacunae in local enactment on this issue, the Apex Court perceived its standardizing job to fulfil this felt and urgent social need, while also looking towards CEDAW to help bring the Indian regime in line with international standards.

The Preamble states the aims and aspirations of the Constitution, including to ensure "justice, social, economic and political" as is witnessed in the various provisions discussed above. This has been pointed out in several instances recently as well. For instance, the judgment in the Sabarimala case, with Justice Chandrachud drawing a link between untouchability and gender discrimination, a similar link has been drawn between Justice Chandrachud's rationale for the judgment and the historical dissenting opinion given by Justice Harlan in the US Supreme Court Case on the Civil Rights Act of 1875[34]. In an 8:1 ratio, with the concurring judgment holding that the 13th Amendment to the USA Constitution did not give the Congress the right to "reshape the social rights" of men formerly enslaved, it was Justice Harlan who recognised that the institution of slavery intended to be abolished by the 13th Amendment cannot be viewed as merely slavery itself, or its necessary ingredients – what needs to be understood is how deeply rooted the institution is, and that merely by formally abolishing slavery, the emancipation of former slaves cannot be ensured – for that purpose, it is essential that the state, having set them free, actually ensures, through affirmative action, that they are not still being robbed of those essential freedoms – social and cultural – that are inevitably tied to the enjoyment of a dignified life. Justice Harlan, in opening the way he did, understood that while slavery was the worst form that racial discrimination could manifest itself in, there also existed other, although lesser, manifestations as well, and that unless these manifestations were also not struck down, a race that had been set free by the 13th Amendment would actually never enjoy freedom in the true sense of the word. Gautam Bhatia[35]

---

[33] Vishakha & Ors. V State of Rajasthan, AIR 1997 SC 3011

[34] 'About the Civil Rights Cases of 1883', https://www.thoughtco.com/1883-civil-rights-cases-4134310

[35] Gautam Bhatia, "'I send my soul through time and space/ To greet you. You will understand…': On Sabarimala and The Civil Rights Cases", https://indconlawphil.wordpress.com/tag/transformative-constitution/

links this to the philosophy reflected in Justice Chandrachud's judgment by noting how similar it is to Justice Harlan's understanding of slavery when he pointed out that "fundamental rights were framed in the backdrop of fundamental wrongs", in so far as 'in order to understand the scope of fundamental rights, therefore, you must first ask yourself: what were the fundamental *wrongs* that a Constitution intended to redress and to transform?'[36] This link drawn by Gautam Bhatia rings even more true in light of the fact that, as Justice Chandrachud pointed out, while caste-based discrimination and gender discrimination might be two different manifestations, they are both manifestations of the same notions of purity and pollution ingrained in our society – while some castes are seen as more pure and some are seen as inherently polluted, men denote purity and women and sexual minorities denote pollution, and – going a step further, to the actual discrimination spoken of in the Sabarimala case – even when women are seen as pure, menstruation in women is seen as a mark of pollution in them, thereby allowing for widespread discrimination on such grounds. Hence, Justice Chandrachud's judgment goes a long way in showing how, at the heart of our Constitution, lies the aim of transforming our society, and leading it away from the manifestations of these notions of purity and pollution and paving the way for substantive equality amongst people, the first step for which is to recognise that the law needs to transform and adapt so as to strike at not just the surface issue, but also the deep-set root cause of the same.

Recent trends show that India has finally begun its long-needed journey up the steep path of deconstructing rigid gender roles and identities, with the end goal being the attainment of gender equality. Latest judgments in the Navtej Singh Johar Case[37] on the decriminalisation of Section 377 and in the Joseph Shine (Adultery) case[38] have made references not just to the transformative aims and aspirations of the Indian constitution but also to the need for us to transform the way we, as a society, view the constructs of sex and gender. Important to note is the way the 5 judge bench has handled the judgment in the Navtej Singh Johar case, declaring Section 377 of the IPC, in so far as it applied to consensual sexual conduct between adults in private, unconstitutional, thereby overruling its decision in the *Suresh Koushal v. Naz Foundation*[39]. *In doing so, it relied upon its judgment in the case of* National Legal Services Authority v. Union of India[40], reiterating that

---

[36] Ibid.

[37] Navtej Singh Johar & Ors v Union of India, AIR 2018 SC 4321 https://sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

[38] Joseph Shine v Union of India, 2018 SCC Online SC 1676

[39] Suresh Koushal v Naz Foundation, (2014) 1 SCC 1

[40] (2014) 5 SCC 438

gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity[41]. Further, it relied upon the decision in K. S. Puttuswamy v Union of India[42], holding that denying the right to privacy to the LGBT Community on the ground that they only form a minority of the population would violate fundamental rights. It also held that Section 377 imposes an unreasonable restriction since consensual sexual conduct in private "does not in any way harm public decency or morality"[43], and the prevalence of Section 377 would cause a chilling effect, violating the right to privacy under Art 19(1)(a)[44]. The Court also declared that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state" [45] and sodomy laws violate the right to equality under Art. 14 and Art. 15 of the Constitution by targeting a segment of the population for their sexual orientation. Further, the Court also relied upon its decisions in *Shafin Jahan v. Asokan K.M.*[46] and *Shakti Vahini v. Union of India*[47]to reaffirm that an adult's right to "choose a life partner of his/her choice"[48] is a facet of individual liberty. Chief Justice Misra and J. Khanwilkar relied on the principles of transformative constitutionalism to hold that the constitution must guide the society's transformation from an archaic to a pragmatic society where fundamental rights are fiercely guarded. He further stated, "constitutional morality would prevail over social morality"[49] to ensure that human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majoritarian government.J. Chandrachud stated that not only must the law not discriminate against same-sex relationships, it must take positive steps to achieve equal protection and to grant the community "equal citizenship in all its manifestations".[50] J. Malhotra concluded her opinion by stating that history owes an apology to members of the LGBT community and their families for the delay in providing redress for the ignominy and ostracism that they have suffered through the centuries.

However, progressive steps till now have been few and far between, and we still need to take a lot of inspiration from countries like South Africa and Sweden if we want to shape an informed debate about the role of women in the Indian society.

---

[41] Supra: 35, [p. 156, para. 253(i)]
[42] K.S. Puttuswamy v UOI (2017) 10 SCC 1
[43] Supra: 35, [p. 165, para. 253(xvi)]
[44] Supra: 35, [p. 224, para. 83]
[45] Supra: 35, [p. 142]
[46] Shafin Jahan v Asokan K.M. 2018 (5) SCALE 422
[47] Shakti Vahini v UOI (2018) 7 SCC 192
[48] Supra: 35, [p. 72, para. 107]
[49] Supra: 35, [p. 79, para. 121]
[50] Supra: 35, [p. 270, para. 7].

At the same time, it is important to admit and acknowledge that in a society like ours, there lie plenty of hurdles to stop us from achieving this goal of transformation. For instance, as Gautam Bhatia further points out[51], it is not merely that the task of adjudicating a battle between cultures is much more difficult than a mere constitutional issue that pits individual interests against state interests, but also that "these conflicts often represent deep, long-standing and irreconcilable divisions in society, touching issues of personal belief and conviction"[52]. Owing to this, the legislature, the judiciary as well as the political parties at large, generally tend to adopt an approach that only deals with problems on the surface, without actually delving into the underlying cultural ramifications. This problem solving approach, coupled with the patriarchal outlook of the Indian society has rendered it so that even the few pro-women judgments that have been pronounced over the years have had a very sexist and condescendingly "protective" view of women, in nature as well as in language[53] – all belittling women to weak creatures in need of male protection, thereby only reinforcing the way women are treated.

4. Conclusion

At the very outset, the main aim of this research paper was to understand the transformative aspirations of the Indian Constitution, as well as how far these can practically be utilized for the emancipation of sexual minorities in India. This is having due regard to the long history of oppression, discrimination, and subjugation suffered by them at the hands of the deeply patriarchal Indian society.

However, this paper is not intended as a feminist or LGBT propaganda, nor does it contend that the Indian Constitution does not envisage equality. Rather, it has sought to discuss how several social and cultural peculiarities in the Indian context, such as severely ingrained caste-based discrimination alongside immense poverty and illiteracy, especially in women living in rural India, have only worsened the gender-inequality concerns for the Indian society. Through an understanding of how the situation has failed to progress in a manner that sexual minorities can be said to be substantively equal to their male, heterosexual counterparts in the Indian context, this paper contended that the Constitution of India, following the precedent of progressive discrimination for the benefit of unequal classes, should prescribe for more such laws to be made in favour of sexual minorities. That this aim is already envisaged in the Indian Constitution can

[51] The Hindu, "The Narrow and The Transformative", <https://www.thehindu.com/opinion/lead/the-narrow-and-the-transformative/article24555861.ece>

[52] Ibid.

[53] Supra: 43.

already be seen in the way that, not only in the Fundamental Rights enshrined in Article 15, 16, 17 and 19, but especially the Directive Principles of State Policy, under Articles 38, 39, 42, 44, and 46, women have already been set out and talked of separately, reflecting the understanding of the framers of the Constitution that in a deeply divided society such as ours, there might come times when a mere grant of formal equality, as the feminist understanding points out, might not be enough in face of the prevailing substantive inequalities. Further, recent judgments dealing with the rights of sexual minorities reflect the progressive way the judiciary has approached this issue as a pivotal one, as well as the way Transformative Constitutionalism is finally being used as a tool in chiselling gender equality jurisprudence in the right direction in India.