

## Transformative Constitutionalism and Indian Judiciary vis-à-vis LGBT Rights

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Transformative constitutionalism is the ability of the constitution to adapt and transform with the changing needs of times which gives it the character of a living and organic document. In so evolving, the foundational principles, which form the essence of the constitution, remain unchanged. A manifestation of the same is in the pragmatic and progressive interpretation of the constitution by the Hon'ble Supreme Court [hereinafter Sup.Ct.] whereby it has held that the members of LGBT community are entitled to the full range of Constitutional rights including the liberties protected by the Constitution and must be treated in society as human beings without any stigma attached to any of them.

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## I. Introduction

The Constitution of India, 1950 [hereinafter 'Constitution'] is a sovereign legal document. It lays down fundamental principles as well as rules of governance for India; can be compared to '*grundnorm*' of Kelson or '*rules of recognition*' of Hart, and thus is the touchstone of all laws and actions – executive or individual. It is also the very basis of socio-economic transformation of the society. It is an organic document which keeps evolving with ever-changing circumstances, though without losing its identity. However, the fundamental tenets of the Constitution do not change. As has been aptly remarked by the Hon'ble Supreme Court of India [hereinafter 'Sup. Ct.']:<sup>1</sup>

Our Constitution is organic in nature. Being a living organ, it is ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding.

The Constitutional Courts play an important role in realizing the evolution of this living instrument. In fact, the judiciary must strive to breathe life into the Constitution through its dynamic and purposive interpretative approach and not render it a collection of mere dead letters:<sup>2</sup>

[I]t is but [sic] the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally.

Purposive interpretation in turn serves as a tool for social transformation:<sup>3</sup>

It represents a break from a history marked by the indignation and discrimination attached to

certain identities and serves as a bridge to a vision of a just and equal citizenship.

Assigning a static interpretation without recognizing the need of changed situations and times would be failing the Constitution. The transformative and evolving nature of the Constitution, especially the fundamental rights part, must be realized:<sup>4</sup>

Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expressions used. The connotation of the expressions used takes its shape and colour in evolving dynamic situations.

It is duty of Courts to realize the constitutional vision of equal rights in consonance with the current demands and situations and not to read and interpret the same in accordance with the standards of equality that existed decades ago. The judiciary cannot remain oblivious to the fact that society is constantly evolving and many a variation may emerge with the changing times. There is a constant need to transform constitutional idealism into reality by fostering respect for human rights, promoting pluralism, bringing harmony, that is unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny. The courts are required to adopt such interpretation which would give the ideals set out in the Preamble to the Constitution aided by Part III and Part IV a

meaningful and living reality for all sections of the society.<sup>5</sup>

## II. Transformative Constitutionalism: An Insight

‘Constitutionalism’ is ‘a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law.’<sup>6</sup> And the term ‘transformative constitutionalism’ embodies the idea that the government, while being limited in its authority, favours such interpretation of the Constitution as would suit the genius of the people with the changing times to ensure transformation in the society. It is the ability of the Constitution to adapt and transform with the changing needs of the times which gives it the character of a living and organic document.

Evidently, the rationale basis of Indian Constitutionalism is to empower the state to bring about social transformation.<sup>7</sup> Our Constitution is transformative and there is an unmistakable emphasis on its commitment to the transformation of relations – the relations between individuals and the State, and between individuals themselves. As has rightly been emphasized by the apex court:<sup>8</sup>

... the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy. Its provisions can be comprehended only by a spacious, social science approach, not by pedantic, traditional legalism.

One of the most important purposes of this transformation is to ensure that, by the realization of fundamental socio-economic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy.<sup>9</sup>

This transformative vision of our Constitution underlines its working and interpretation. The whole idea of having a Constitution is to guide the nation towards a resplendent future. It continuously shapes the lives of citizens in particular and societies in general by infusing values of liberty, equality, fraternity and dignity in the social order. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.

The concept of transformative constitutionalism hinges primarily on the idea of constitutional morality which the Hon’ble Sup. Ct. comprehensively elaborated in *Govt. of NCT of Delhi v. Union of India and Ors.*:<sup>10</sup>

Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document. When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to the citizenry remains unperturbed.

Constitutional morality refers to the morality having roots in the constitutional norms and the conscience of the Constitution. Constitutional morality as a normative value advocates the principle of constitutional justness without subjective exposition of generosity.<sup>11</sup>

It must be understood that the concept of constitutional morality:<sup>12</sup>

... is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and

literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State.

However, the virtue of constitutional morality, emphasized Dr. B.R. Ambedkar, is not a natural sentiment and has to be cultivated.<sup>13</sup> Its content is founded on the five principal precepts which emerge from the Preamble.<sup>14</sup> The *first* among them is the need to ensure justice in social, economic and political dimensions. The *second* is the postulate of individual liberty in matters of thought, expression, belief, faith and worship. The *third* is equality of status and opportunity amongst all citizens – the term ‘equality’ postulates a right to be free from discrimination and to have the protection of the law in the same manner as is available to every citizen. The *fourth* is the sense of fraternity amongst all citizens which assures the dignity of human life. Added to these four precepts, the *fifth* is the fundamental postulate of secularism which treats all religions, languages, regions, races and so on, equally.

Cultivation of constitutional morality would ensure that the interpretative process would respond to ensure conflict resolution with the exigencies of the situations at the core.

### III. LGBT Community and Legal Discrimination

#### Section 377 of IPC: A Backgrounder

The Buggery Act, 1533 was an Act of the Parliament of England – the country’s first civil sodomy law – that was passed during the reign of King Henry VIII. This law defined ‘buggery’ as an

unnatural sexual act against the will of God and man. It criminalized the offence of buggery (anal intercourse) committed with mankind or beast. The 1533 Act was repealed and replaced by the Offences against the Person Act, 1828 which broadened the definition of unnatural sexual acts, and allowed for easier prosecution of rapists, as also homosexuals and remained in force until 1861 when it was repealed. This Act is considered to be the inspiration for section 377 of the Indian Penal Code [hereinafter ‘IPC’].

During the rule of the East India Company, the then Parliament established the Indian Law Commission and in 1833, Thomas Babington Macaulay was appointed as chairman of the Commission and tasked with the drafting of the penal law for India. His draft, submitted in 1837, was substantially different from what was finally passed as section 377 of IPC in the year 1860 and brought into force in 1862, after at least twenty-five years of revision. It was the Committee of Sir Barnes Peacock which finally sent the draft equivalent of section 377 of IPC for enactment.<sup>15</sup>

#### Dichotomy in Law

##### *The issue of ‘consent’*

The word ‘consent’ means (a) permission; or, (b) agreement.<sup>16</sup> In the context of the instant discussion, it would mean that an act would be (i) legal if performed with the consent of the parties involved; and, (ii) illegal, and a crime, if committed without the consent of the parties involved.

However, not in all cases or class of cases is the presence of ‘consent’ sufficient to qualify an act as ‘legal’. One such instance is that of section 377 of IPC, as it stood before Sept. 06, 2018.

Section 377 of IPC made consensual penetrative acts (by homosexuals, bisexuals and transgender)

punishable. However, consensual heterosexual penetrative (non penile-vaginal) acts within the meaning of section 375 of IPC (after the 2013 Amendment), which include anal and oral sex, are not punishable.<sup>17</sup> This created a dichotomy in the law.<sup>18</sup>

#### *The order of nature*

The determining factor for acts of persons to fall within the teeth of section 377 of IPC was the expression 'against the order of nature'. It is interesting to note that the definition of the expression 'against the order of nature' is nowhere to be found either in the IPC or any other penal statute. However, the phrase was used to connote all sexual acts which were not intended for the purposes of procreation. As such, the only natural implication to follow is that if coitus was not performed exclusively for the purposes of procreation, then the same would fall within the ambit of section 377 of IPC despite it being performed by consenting heterosexual adults.

#### **Section 377 of IPC was violative of the Fundamental Rights**

The Hon'ble Sup. Ct. of India tested the validity of section 377 of IPC to determine if continuation of the same could be allowed. After the long drawn arguments before the court, it was determined that section 377 of IPC treated different persons, i.e., the LGBT persons and heterosexual persons, differently. This discrimination on the basis of sexual-orientation, which is an intrinsic and core trait of an individual, was held to be violative of the fundamental right to equality (Article 14 of the Constitution) of persons, could not withstand the test of constitutional morality, and as such could not form a reasonable classification based on an intelligible differentia.<sup>19</sup> Further, section 377 of IPC was also found to be partially within the teeth

of the doctrine of manifest arbitrariness,<sup>20</sup> which is another facet of Article 14 of the Constitution, insofar as it criminalized consensual sexual acts between adults in private, was not based on any sound or rational principle, since the basis of criminalization was the 'sexual orientation' of a person, over which one has 'little or no choice'. Additionally, the phrase 'carnal intercourse against the order of nature' in section 377 of IPC (see the discussions under the sub-heading '*The order of nature*') as a determining principle in a penal provision, was too open-ended, giving way to the scope for misuse against members of the LGBT community.

Section 377 of IPC was also found to be partially violative of Article 15 of the Constitution of India. While Article 15 of the Constitution prohibited the State from discriminating against any citizen on grounds only of religion, race, caste, sex, or place of birth, section 377 of IPC discriminated on the basis of 'sex' which also includes within its ambit 'sexual orientation'.<sup>21</sup> The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.

Additionally, the court recognized that the restriction imposed by section 377 of IPC amounted to an unreasonable restriction as public decency and morality could not be amplified beyond a rational or logical limit. Further, the restrictions could not be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression (Article 19(1)(a)) and choice of the LGBT community.

And finally, the Hon'ble Sup. Ct. also emphasized that the right to life and personal liberty (Article 21 of the Constitution) affords protection to every

citizen or non-citizen, irrespective of their identity or sexual orientation, without discrimination. The court recognized that sexual orientation is innate to a human being and is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality. LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21. Also, the court recognized that consensual carnal intercourse among adults whether homosexual or heterosexual, in private space, does not in any way harm public decency or morality. As such the Hon'ble Sup. Ct. declared section 377 of IPC as being partially violative of Article 21 of the Constitution.

#### IV. Concluding Remarks

The Constitution [of India] is not merely an amalgam of parchment guarantees against state excesses but rather a document embodying a vision of a fair, inclusive and progressive society. It seeks to transform society in accordance with the changing times and needs, consistent with the fundamental principles and ethos of the Constitution. The Constitution being a transformative document enables thoroughgoing reconstruction of the state and the society pursuing the object of a broader sense of justice though within the confines of textual and structural constraints as spelt out because discrimination of any kind strikes at the very core of any democratic society. Transformative constitutionalism thus aims to maintain the blend of change and continuity of order.

As discussed above, the Sup. Ct. in *Navtej Singh Johar* (supra) declared unconstitutional section 377 of IPC which criminalized voluntary sexual intercourse among same-sex individuals thus ending discrimination on the basis of sexual preference and / or sexual inclination. In so doing, the Sup. Ct. viewed the Constitution as a 'great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy.'

It is through this armoury of expansive dynamism that the courts have, over time, been able to give an all-inclusive interpretation to the fundamental rights enshrined in Part III of our Constitution. This is borne testimony by the decisions of the constitutional courts which have evolved views for extending the protection of fundamental rights to those who have been deprived of the enjoyment of the same. If not for such an approach adopted by the courts, our Constitution and its progressive principles would have been rendered ineffective and the dynamic charter would be reduced to a mere ornate document without any purpose or object.

#### Notes

<sup>1</sup> *Saurabh Chaudhri and Ors. v. Union of India and Ors.*, (2003) 11 SCC 146, para 72.

<sup>2</sup> *Ashok Kumar Gupta and Another v. State of U.P. and Ors.*, (1997) 5 SCC 201, para 52.

<sup>3</sup> *Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors.*, (2018) SCC OnLine SC 1690, para 290.

<sup>4</sup> *Video Electronics Pvt. Ltd. and Anr. v. State of Punjab and Anr.*, (1990) 3 SCC 87, para 36.

<sup>5</sup> See *Ashok Kumar Gupta and Anr. v. State of U.P. and Ors.*, (1997) 5 SCC 201.

<sup>6</sup> Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South 1* (University of Georgia Press, 1<sup>st</sup> edn., 1989).

<sup>7</sup> See *M. Nagaraj v. UOI*, AIR 2007 SC 71.

<sup>8</sup> *State of Kerala and Another v. N.M. Thomas and Ors.*, AIR 1976 SC 490, para 131.

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<sup>9</sup> *Road Accident Fund and Anr. v. Mdeyide*, 2008 (1) SA 535 (CC).

<sup>10</sup> (2018) 8 SCALE 72, para 58.

<sup>11</sup> *Id.* at para 61.

<sup>12</sup> *Navtej Singh Johar and Ors. v. Union of India and Ors.*, (2018) 10 SCALE 386.

<sup>13</sup> See Constituent Assembly Debates, VII, 38, Dr. B.R. Ambedkar.

<sup>14</sup> *Indian Young Lawyers Association v. The State of Kerala*, Writ Petition (Civil) No. 373 of 2006 (Under Article 32 of the Constitution of India), decided on 28.09.2018.

<sup>15</sup> For a comprehensive understanding, see *Navtej Singh Johar and Ors. v. UOI through Secretary, Ministry of Law and Justice*, (2018) 10 SCALE 386.

<sup>16</sup> Cambridge Dictionary, available at :<https://dictionary.cambridge.org/dictionary/english/consent> (Last Visited Mar. 3, 2019).

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<sup>17</sup> *Supra* note 15. Section 375 of IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words 'subject to any other provision of the IPC'. This indicates that section 375 of IPC was not subject to Section 377 of IPC.

<sup>18</sup> *Ibid.*

<sup>19</sup> See *National Legal Services Authority v. Union of India & Ors.*, (2014) 5 SCC 438; The Hon'ble Sup. Ct. granted equal protection of laws to transgender persons. There is, therefore, no justification to deny the same to LGBT persons.

<sup>20</sup> See Nariman, J. in *Shayara Bano v. Union of India & Ors.*, (2017) 9 SCC 1.

<sup>21</sup> The term 'sex', as it occurs in Article 15 of the Constitution has been given an expansive interpretation by the Hon'ble Sup. Ct. in *National Legal Services Authority v. Union of India & Ors.*, (2014) 5 SCC 438, to include 'sexual identity'. See also *Navtej Singh Johar and Ors. v. UOI through Secretary, Ministry of Law and Justice*, (2018) 10 SCALE 386.

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