

**ROMANTIC PATERNALISM VIS-À-VIS EGALITARIANISM THROUGH
TRANSFORMATIVE CONSTITUTIONALISM – ANALYSIS OF STATE
INTERVENTIONS AND JUDICIAL INTERPRETATIONS**

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ABSTRACT

The family domain is, among other social groups and institutions, a space in which the violation of women's rights goes unnoticed and unattended. In a family, a woman is expected to assume various roles and responsibilities. The degree to which women are liberated to make decisions and exercise autonomy is influenced by the disparate power distributions between men and women, which are enhanced at the family level. The major areas of concern are (a) social conditioning (b) male chauvinism and (c) the patriarchal and patrilineal framework of society, involving the belief that women depend heavily on male household members, and (d) the male household head's exercise of authority and (e) discriminatory marital property arrangements. Reliable data from many countries point out that women tend to be the largest group of claimants in family-related court cases. Even if several Constitutional provisions influence women's rights, a thorough examination of governmental interventions, policies, etc., remains vital to ascertain how they promote or undermine women's rights, gender relations, and familial ties. In areas like male guardianship, divorce, child custody and maintenance, and property division, there is pervasive legal discrimination against women in marriage, family life, and property. Surprisingly, the discrimination women face is due to the patronizing legislation, masquerading as 'women-empowering' legislation. The ideology of 'romantic paternalism' in actuality places women in a cage rather than in an elevated position. There are some provisions in the Indian Constitution as well as certain legislations enacted by the State, which, at first appear to empower and serve the interests of women, but a very minute analysis will point out that they are patronizing, condescending and supercilious by nature themselves, as they attribute gender-specific characteristics and qualities and are arrived at, based on gender-stereotypes. The objective of this paper is to illuminate the legislations that purport to empower women and their societal impact (i.e., patronisation). Thus, this work argues for inclusive family norms and true women empowerment in the legislation

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through transformative constitutionalism.

Keywords: Marriage And Family, Empowerment Of Women, State Interventions, Judicial Precedents, Romantic Paternalism, Transformative Constitutionalism.

INTRODUCTION

Marriage and family are universal sociological institutions that have existed since time immemorial in human society. They govern a man's sexual life. Marriage is a socially acceptable way of establishing a family of procreation. The family domain is, among other social groups and institutions, a space in which the violation of women's rights goes unnoticed and unattended. In a family, a woman is expected to assume various roles and responsibilities. They are also expected to discharge these duties as constructively and efficiently as possible. The degree to which women are empowered to make decisions and exercise agency is strongly affected by the disparities in power distributions between men and women, which are amplified at the family level.

The male-dominated and patrilineal structures of society — which include the idea that women are dependent on men in the household, the exercise of male hegemony in the home, inheritance norms that give preference to men over women, and unfair and inequitable property divisions between spouses — are major causes for concern. Unfortunately, the State interventions, at first look, appear to 'empower women', but on a very close, minute analysis, they will point out that they are developed or implemented on the basis of condescending and patronizing notions about women. The work argues that these *patriarchally patronizing provisions* in the enactments, together with the approval of the gender stereotypes by the judiciary, are the unexpected reasons for the lack of women's rights in their individual lives as well as in their marital and familial lives.

RESEARCH METHODOLOGY

The methodology used in this research paper is strictly doctrinal. The paper is a purely descriptive analysis of the framework of law regarding the empowerment and protection of women that exists in India, vis-à-vis the patriarchal mindset of the stakeholders involved, including State interventions and judicial precedents, along with an understanding of other countries' jurisprudence. The paper has been written after analysing information collated from various sources, including books, journal articles, legislations, and judicial precedents.

RESEARCH OBJECTIVES

The paper aims to provide in-depth and precise literature on the existing legal framework to protect women, how they are condescending in nature, and how the judicial interpretations add to the woes of a patriarchal society. The research will also analyse how the concept has evolved across the world, and also try to address the problem by elaborating on the concept of transformative constitutionalism.

RESEARCH QUESTIONS

1. Is the current legal framework in India aimed at ‘empowerment of women’? Conversely, do women in India need empowerment? [the problem of romantic paternalism]
2. Are State interventions and judicial interpretations, in reality, aimed at empowering women?
3. How does transformative constitutionalism address the problem of ‘romantic paternalism’?

REVIEW OF EXISTING LITERATURE

Conflict in Marital Relationships in India

Negative behaviours, interactions, disagreements, fights, and other situations that erode the quality of a relationship, ranging from physical, mental and emotional cruelty, harassment and sexual intimidation, torture and assault, separation, divorce etc., are considered conflicts in relationships. Couples may be complaining about personal traits and behaviours, as well as verbal and physical abuse, as sources of conflict. Research indicates that one of the main areas of contention amongst married couples is childcare.¹ Notwithstanding the evolving roles within families, the wife still appears to bear the primary duty and obligation of providing regular care for the child. Participants in a survey stated that marital disputes resulting from a “working wife” were somewhat common.²

¹ Sudarshan, R and Bhattacharya, S (2009). Through the Magnifying Glass: Women’s Work and Labor Force Participation in Urban Delhi.

² Kalliath, P, Kalliath T and Singh V (2011). When Work Intersects Family: A Qualitative Exploration of the Experiences of Dual-earner Couples in India.

In India, the importance of extended families in a couple's lives need not be emphasised, despite the absence of studies. In addition to fulfilling the duties of a spouse, one must also perform the obligations of one's parents and family, which include taking care of the home and kids. Each of these is important in causing, encouraging, stopping, or ending the conflicts. Generally speaking, coping mechanisms to ward off conflicts include spirituality and belief in God, having an optimistic attitude towards life, and also the strength and support obtained from others such as friends and colleagues. Therefore, when examining the marriage and family relationships in the collectivistic Indian society, the societal processes and institutions are very important.

According to a study, couples are experiencing real stress as a result of the unparalleled stress of juggling the very demanding roles of work and home in recent years.³ The interface between home and the workplace is evident, particularly for couples with two careers because of the great level of dedication and accountability that each of these spheres demands.⁴ Family and work-life responsibilities must always be negotiated because the expectations and demands arising out of these two spheres are typically incompatible.

Disagreements are unavoidable in close personal relationships like marriage and family. Nonetheless, arguments alone may not always indicate or cause marital discord or strife. Conversely, arguments are a normal aspect of relationships in highly successful long-term marriages. As a result, marital contentment does not always equate to a lack of conflict but rather to a higher proportion of positive behaviour than negative. The existence of conflicts can sometimes strengthen a marriage; nevertheless, disagreements can sometimes have a negative impact and improper conflict resolution can exacerbate marital problems.

The major cases which upheld the rights of women in the familial sphere are highlighted here. In *Roxann Sharma v. Arun Sharma*⁵, the Court ruled that the mother is entitled to the custody of a child under the age of five unless the father provides clear and convincing evidence of how the mother maintaining custody will compromise the child's care and interests. In the case of *Lata Singh v. State of U.P. & Anrs.*⁶, the Supreme Court steadfastly upheld a woman's freedom to choose, meaning she may marry a man who was not a member

³ Ochsner, T (2012): The Impact of Dual-Career Marriage on Role Conflict and Marital Satisfaction.

⁴ Lewis, S C and Cooper, C L (1987), Stress in Two-earner Couples and Stage in the Life-cycle. *Journal of Occupational Psychology*, 60(4): 289-303

⁵ *Roxann Sharma v. Arun Sharma*, 2015 8 SCC 318.

⁶ *Lata Singh v. State of U.P. & Anrs.*, 2006 5 SCC 475.

of her caste.

Romantic Paternalism by the Judiciary

The practice of stigmatizing an individual by attaching particular features or characteristics to them based on their membership in a particular social group is known as judicial stereotyping. The ideal victim complex serves as an example of the larger discriminatory culture that restrains courts. Such gender stereotyping is an outrage to not only the dignity of women, but also that of men, and erodes the general public trust in the judicial process.

In the case that went in history became the representation of the “ideology of Romantic Paternalism”, *Muller vs. Oregon*⁷, the Supreme Court of the United States of America (SCOTUS) decided how many hours a person could work. Curt Muller, the proprietor of a laundry, was penalised for breaking an Oregon regulation limiting women’s work hours to ten hours. Muller filed an appeal against the fine. The National Consumers’ League, a progressive organisation dedicated to upholding minimum wage laws and maximum working hour laws, submitted only two pages of legal arguments. Close to a hundred pages of statistics and expert opinions from social scientists argued that women were not mentally, emotionally, or psychically capable of working more than ten hours at a time. Surprisingly, the SCOTUS ultimately concluded that Oregon could impose restrictions on the number of hours that its female citizens could work because it had a stake, i.e., a vested interest, in their welfare. Because of their unique status as mothers and wives, women deserved further safeguards, the Court stated in its ruling. The Court ruled that the laws of Oregon and other states having comparable legislation were a reasonable means of ensuring that women can fulfil their roles as mother and wife.

The decision of the Gujarat HC in the *Goolrokh v. Burjor*⁸ case, prima facie smacks of patriarchy. According to the Gujarat High Court, when a woman marries, her religious identity combines with her husband’s under the Special Marriage Act, of 1954⁹. In this case, a Parsi woman, who had married a non-Parsi man, was denied permission to attend the funeral ceremony of her parents by a local Parsi Trust. All laws in effect shall be void to the extent that they conflict with the provisions of Part III, as stipulated by Article 13(1) of the

⁷ *Muller vs. Oregon*, 208 U.S. 412 (1908).

⁸ *Goolrokh M. Gupta v. Burjor Pardiwala*, 2012 SCC OnLine Guj 2058.

⁹ Special Marriage Act, 1954.

Constitution.¹⁰ In the event that the discriminatory practice of barring Parsi women who married outside of their religion is deemed to be a custom, it may be invalidated due to established legal precedents indicating that traditions fall outside the ambit of Article 13(1). The HC made use of the “archaic doctrine of coverture” which states that, in marriage, the religious identity of a woman merges with that of her husband. These conclusions are repugnant to the object of the Special Marriage Act, which was essentially enacted to enable persons to enter into inter-religious marriage without losing their respective religious identity.

The High Court was unable to identify any legal provision that could be used to justify the belief that a woman who marries outside her religion has altered her religion. This kind of reasoning plainly violates Article 25 of the Indian Constitution¹¹, which guarantees freedom of religion. It disrupts the woman's fundamental personality. What happens to women when men marry into a different faith and their religion stays the same? It violates numerous international commitments in addition to the constitutional guarantees.

In *Abhishek Chouhan v. State of M.P.*¹², the victim was a minor girl who was raped by the accused; she alleged a false promise to marry, following which she committed suicide. The Madhya Pradesh HC while denying bail to the accused, noted that unmarried girls in India, regardless of their religious beliefs, avoid having sex with boys for fun, unless it is accompanied by a commitment to marry in the future. The Court took note that this could happen in India only in exceptional circumstances since it goes against the basic ethos of our civilization. It could be argued that this thought is itself patriarchal.

The Court, in the above case, said that the general notion in the society is that unmarried young girls do not engage in sexual activities, outside the societal institution of marriage; however, this could not be true and should not have been generalized. This could result in an unanticipated adverse situation, wherein a large number of young unmarried women consenting to sexual intercourse initially, could at a later point in time, throw the allegation of rape, under the pretext of ‘false promise to marry, against the man. This could result in a lot of crimes, in effect committed by young unmarried women, going unnoticed, and unfortunately being charged on innocent men. Each case should be tried on the fact-

¹⁰ Indian Constitution, Article 13(1).

¹¹ Indian Constitution, Article 25.

¹² *Abhishek Chouhan v. State of M.P.*, 2021 SCC OnLine MP 1475.

situations it poses, and no generalization regarding the innocence of young married women should be drawn, as it can have adverse consequences on the criminal justice system in the country.

In the case of Tarun Tejpal's acquittal in a sexual assault case, for example, the Mapusa District and Sessions Court in Goa shamefully resorted to victim blaming and shaming. The Court noted that in certain images, the girl appeared happy and outgoing, which defied expectations that she would be reticent or disturbed after the alleged sexual assault. The Goa bench of the Bombay HC made a strong statement against the lower court, by noting that the court was, in essence, laying down a manual for the behaviour of victims of sexual assault. The lower court's order smacks of a paternalistic view towards women's sufferings.¹³

In *Rakesh v. State of Karnataka*¹⁴, while permitting bail to a rape accused, under the pretext of false promise to marry, the Karnataka High Court said that it was "*unbecoming of an Indian woman*" for the complainant to have fallen asleep following the alleged rape. The court expressed doubts about the veracity of the prosecution's case and wondered about the reasons for (i) not calling for help when the accused got into her car, (ii) voluntarily consuming alcohol with the accused, and (iii) postponing filing a complaint until the following morning. This clearly indicates the way the judiciary belittles the 'consent' aspect in a rape case, and proceeds to decide the case on the basis of stereotypes and beliefs that the victim should have raised the alarm or not slept after being raped.

Due to the pervasiveness of patriarchy in society, judges have also frequently acted paternally and minimised the agency and autonomy of women in situations besides sexual assault. In the well-known *Hadiya case* (love-jihad case), the father of the woman filed a Habeas Corpus petition, and the Kerala High Court strangely declared the marriage of two consenting adults null and void.¹⁵ This decision fuelled majoritarian tensions surrounding inter-faith marriage in India before the Supreme Court intervened and set aside the HC's

¹³ Photos Showed Her To Be Cheerful, Not Traumatized, No 'Rape-Victim' Behaviour : Goa Court In Tarun Tejpal Case, <https://www.livelaw.in/top-stories/fast-track-court-in-go-a-tehelka-magazine-tarun-tejpal-rape-case-174721>, accessed on 25 May, 2024

"The Judgement Appears To Provide a Manual On How Rape Victims Should Behave." Bombay High Court Issues Notice On State's Appeal Against Acquittal Of Tarun Tejpal In Rape Case – <https://www.livelaw.in/top-stories/tarun-tejpal-acquittal-rape-case-bombay-high-court-state-appeal-rape-victim--175067>, accessed on 25 May, 2024

¹⁴ *Rakesh v. State of Karnataka*, Criminal Petition No.2427 of 2020.

¹⁵ Kerala HC Nullifies Marriage of Muslim Convert in Her Father's Habeas Corpus Petition – available at <https://www.livelaw.in/kerala-hc-nullifies-marriage-muslim-convert-fathers-habeas-corpus-petition-read-judgment/>, accessed on 25 May, 2024.

order.¹⁶

Gender stereotyping by the judiciary, which is a systemic prejudice, discourages women from pursuing legal action out of concern that they will be retraumatized. Additionally, it is likely to cause underreporting of crimes against women. The victims' trust in the legal system is weakened, for example, when absurd bail requirements are imposed, such as community service requirements for the accused or judicial penalties for compromises between the offender and the victim under the pretext of marriage. It puts up enormous obstacles in the way of women getting justice and holding sexual assaulters accountable. Gender stereotyping effectively conveys a message to the public that the criminal justice system condones the commission of acts of gender-based violence, consequently downplaying its gravity.

Section 20(3) of the Hindu Adoptions and Maintenance Act, 1956¹⁷ –

Section 20(3) of the HAMA¹⁸ goes as follows: *“The obligation of a person to maintain his or her aged or infirm parent or daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property”*.

Although this clause gives unmarried daughters maintenance, it is founded on the false premise that an unmarried woman cannot support herself and must always rely on her parents, particularly the father.

A patriarchally patronizing judgment was given regarding this provision in Ramesh Gajanan Rege v. Gauri Ramesh Rege¹⁹. The Bombay HC upheld the constitutional validity of the aforesaid provision. Given the unique status and the distinctive position of the daughter, especially the unmarried daughter, in Hindu society, the Court noted that unmarried boys and unmarried daughters constitute two entirely distinct classes. All unmarried daughters are eligible for the benefit under this clause, regardless of whether they have reached majority, and also including the ones who are not even Indian citizens and are residing in a

¹⁶ SC Sets Aside Kerala HC Judgment Annuling Marriage Between Hadiya And Shafin Jahan – available at <https://www.livelaw.in/breaking-sc-sets-aside-kerala-hc-judgment-annulling-marriage-hadiya-shafin-jahan/>, accessed on 25 May, 2024.

¹⁷ Hindu Adoptions and Maintenance Act, 1956.

¹⁸ Section 20 (3) of Hindu Adoptions and Maintenance Act, 1956.

¹⁹ Ramesh Gajanan Rege v. Gauri Ramesh Rege, 2015 SCC Online Bom 2436.

foreign country. This judgment stands as testimony to the fact that Indian courts are still patronizing, and continue to consider unmarried daughters as a separate class, requiring special treatment and entitlement to benefits from the father. Courts still fail to duly note that unmarried daughters are capable of living alone, even if they are well-educated and hold respectable status in society due to their profession/occupation.

Section 125 – Maintenance Provision under the Criminal Procedure Code, 1973²⁰

In India, the wife's claim to maintenance is acknowledged by statute as well as by custom. It would not be unreasonable to argue that the mere emergence of these rights is evidence of the suffering that women have been subjected to as a result of the patriarchal structure in India. The entire world is witnessing a shift moving away from this patriarchal mindset and towards a more gender-neutral attitude. Women are becoming educated, finding work, starting their own businesses, and excelling in their fields. The Indian judiciary has also accelerated the transition to gender neutrality with its outstanding rulings. However, as regards maintenance under the CrPC, the Courts usually tend to adopt a paternalistic view, reinforcing gender stereotypes and traditional beliefs.

The judgement in *Anuj Garg and Ord v Deepak Kumar Garg*²¹ effectively lowers women's standing to that of mere dependents. The fact that women in India are socially and economically disadvantaged cannot be disregarded when it comes to their situation. Agreed, India continues to work towards establishing a more egalitarian society. Having said that, it is impossible to ignore the fact that attitudes and approaches have evolved. Numerous women have accomplished outstanding achievements in their fields and do not require financial assistance from a man to support them.

Section 125 of the Code of Criminal Procedure – According to this section, only a dependent wife who is unable to maintain herself can claim maintenance from the husband, whereas there is nothing in this section that speaks about maintenance for husband from wife. This provision is patronizing in nature, i.e., it states that only the wife is dependent on the husband and only she can claim maintenance; the husband is never dependent on his wife; he can provide maintenance to his wife but can never seek the same from her, as it is assumed that she will not be in a position to provide him maintenance. It is evident that even if the wife

²⁰ Section 125, Code of Criminal Procedure, 1973.

²¹ *Anuj Garg and Ord v Deepak Kumar Garg*

describes herself as an educated woman, she is under no “obligation” to take care of or maintain herself. This section can be easily exploited by the wife. There are a slew of judgements reflecting on the same idea.²² It is represented in the following case:-

In *Alphonsa Joseph v. Anand Joseph*²³, the wife was denied interim maintenance by the Family Court. The Petitioner-wife filed an appeal with the Kerala High Court in opposing this. The High Court overturned the Family Court's decision and stated that the wife's income may not always be a valid justification for rejecting her maintenance request. It further said that the woman has a legal right to live as respectably and dignifiedly as she would have if she had been living in her husband's home. This case shows that even though the wife was educated enough to work and sustain herself she decided not to work and sought maintenance from the husband. The Court, without looking into the rationality, looked at the patronizing legality and granted her maintenance. In *Arun Vats v. Pallavi Sharma*²⁴, the Delhi High Court went to the extent of saying that “capable of earning” is different from “actual earning”. Judgments like these, though appear to serve the interests of women, can actually increase the exploitation of the husband by the wife.

Article 15(3) of the Constitution²⁵

Article 15(1) of the Constitution states that “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” This specific Article leads to a few queries and interpretations, summed up as follows:

1. Is it presumed that all classifications made “on the grounds of sex” are unconstitutional under Article 15(1)?
2. Article 15(3) says that “Nothing in this article shall prevent the State from making any special provision for women and children,” in addition to Article 15(1). Thus, Article 15(3) acts as a non-obstante provision in the Constitution. The definition of the term “special provision” is the primary inquiry. Do these two phrases give the State a carte blanche to enact any law that concerns women?

Resultantly, could it not be argued that the phrase “special provisions” under Article 15(3)

²² *Sunita Kachwaha v. Anil Kachwaha*, (2014) 16 SCC 715.

²³ *Alphonsa Joseph v. Anand Joseph*, 2018 SCC Online Ker 5012.

²⁴ *Arun Vats v. Pallavi Sharma*, 2019 SCC Online Del 11817.

²⁵ Indian Constitution, Article 15(3).

refers to discrimination in some manner and can only be used to support a deviation from Article 15(1), (i.e. to sustain a statute that would otherwise be found wanting on the yardstick of Article 15(1))?

In addition, the Supreme Court has ruled that Articles 15(4) and 16(4) are components of Articles 14-15-16's equality scheme as opposed to exceptions to it.²⁶ Therefore, the following queries come up:

- a) Is there an exception to Article 15(1) in Article 15(3)? If not, how exactly do Articles 15(1) and 15(3) relate to one another?
- b) Specifically, under Article 15(3), what standard of proof does the government have to meet to defend a statute that would otherwise be discriminatory?
- c) Does the term "special provisions" specified in Article 15(3) apply to laws that the State asserts have been adopted for the sake of women but that women themselves object to as being burdensome or discriminatory? How will the Court decide on this kind of claim?

TRANSFORMATIVE CONSTITUTIONALISM

Jurisprudence of Transformative Constitutionalism

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Described 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," American academic Karl Klare (1998) coined the term 'transformative constitutionalism.'²⁷

Simply put, a transformative Constitution could mean that new legislation is passed to replace an old one to drastically alter the law, or it could mean that the act or constitution "has a transformative purpose." By defending each person's fundamental rights and freedoms, transformative constitutionalism adopts a more practical strategy to achieve constitutional aims. The judiciary is the central component of transformative constitutionalism since the theory views the law as a tool for socio-political change, and

²⁶ Indra Sawhney v. Union of India, 1992 (Supp) 3 SCC 217.

²⁷ Karl Klare, "Legal Culture and Transformative Constitutionalism", 14 South African Journal of Human Rights. 146, 150

because courts have the authority to interpret and apply the law, they serve as a catalyst for this change.

The goal of transformative constitutionalism is to establish new tenets for a progressive society. Enabling the State to establish the prerequisites for a fair and compassionate society is the fundamental goal of the Constitution. Social justice is at the very core of transformational constitutionalism. Transformative constitutional jurisprudence demands that the State impose social fairness and social regulation.

Though the definition of transformative constitutionalism remains a topic of debate due to differing international experiences, the fundamental components that characterise or distinguish transformative constitutionalism are the State's and courts' central roles in emancipation projects and the ongoing advancement of the Constitutional ideals of liberty, equality, and fraternity. These are the tenets upon which society should be built, and the State has to be actively involved in establishing a society anchored in them. Understanding the people for whom the Constitution was written—their finer ethos, dissatisfaction, and aspirations—as well as the constraints it sets for the morally righteous treatment of social disabilities—is essential to interpret the visionary document for transformative change.

Transformative constitutionalism has two main tenets: (a) achieving substantial equality via the identification and eradication of all types of prejudice and (b) realisation of entire human potential within beneficial social interactions. The focus of this jurisprudence is on the interactions between an individual and society, also termed “positive social relationships”, rather than restricting the interactions of an individual with the State.

Although it is hard to precisely define, the core idea of the jurisprudence on transformative constitutionalism is that, rather than presuming that formal equality exists in the society, it seeks to change a hierarchical society into one that is more egalitarian. As a catalyst, rather than an impartial arbiter, transformative constitutionalism allows the state to modify society while controlling its excesses. Put differently, unlike in the liberal tradition, it aims to effect societal change as well as limit the authority of government. It may also strive to eschew rigid legal and judicial procedures to promote social reform.

The text, history, and structure of the Indian Constitution highlight a dedication to transformative goals, including strong opposition to societal hierarchies, among other things. To accomplish those goals, nevertheless, the Supreme Court has used several strategies to

get beyond the limitations imposed by the legal system and procedure, ranging from judicial directions to weakening '*locus standi*' requirements in public interest lawsuits.

Judicial Precedents Enlightening Transformative Constitutionalism

Anuj Garg v. Hotel Association of India²⁸ was one of the first cases that offered a comprehensive discussion of the "*strict scrutiny*" doctrine applied in India. Three distinct modes of review were used by the Supreme Court, which included: proportionality review, strict scrutiny, and intermediate scrutiny. This case represents progress in the recognition of gender equality and the abolition of obsolete cultural norms embodied in many statutes that uphold patriarchal ideals. Section 30 of the Punjab Excise Act, of 1914²⁹, was contested in this particular case. This clause barred the employment of women, and men under the age of 25, in any area of a business where alcohol or other intoxicating substances were being consumed.

The Court noted that the contested provision was a pre-constitution statute, meaning that it had been in place prior to the Indian Constitution's guarantee of sex equality in Articles 14 and 15.³⁰ One of the few arguments made was that the law was necessary to protect women's 'security', but the Court rejected this argument, ruling that the law amounted to "invidious discrimination perpetrating sexual differences" and overturned it. In terms of transformational constitutionalism, this ruling is perhaps among the most progressive ones, because it upholds the fundamental rights protected by the Constitution and clarifies the jurisprudence surrounding sex equality.

The case of Vishakha v. State of Rajasthan³¹ represents the Supreme Court's strongest declaration of systemic discrimination. The Court noted that sexual harassment prevented women from entering the workforce. In addition to undermining women's access to employment prospects, it violates the Constitution's guarantee against discrimination. The recommendations formulated in the *Vishakha* case formed the basis and the source for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.³² The inclusion of "indirect discrimination" in the definition of equality under the

²⁸ Anuj Garg & Ors. v. Hotel Association of India & Ors., (2008) 3 SCC 1.

²⁹ Section 30, Punjab Excise Act, 1914.

³⁰ Indian Constitution, Articles 14 and 15.

³¹ Vishakha v. State of Rajasthan, (1997) 6 SCC 241.

³² Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Constitution is strengthened by the acknowledgement of workplace harassment. Examining the long-term effects of decisions or acts is necessary to prevent indirect discrimination. Rather than the intention, the emphasis is on the outcome of supposedly unbiased criteria.

Legislative amendments have also been brought to the fore, to inculcate a sense of egalitarianism in criminal trials. The defence is no longer entitled to present evidence to cast doubt on the veracity of a rape victim's statement and claim that she is typical of “immoral character” due to the removal of Section 155(4) of the Indian Evidence Act in 2003.³³ Following the adoption of Section 53A by the Criminal Law (Amendment) Act, 2013, courts are also prohibited from depending on a woman’s prior sexual history when determining whether or not she gave consent.

In *Aparna Bhat v. State of Madhya Pradesh*³⁴, the Supreme Court noted that, in the face of widespread violence based on gender, women encounter numerous barriers when attempting to obtain justice. Her pain is further exacerbated by the families’ insistence on informal negotiations and the participation of self-identified community leaders in mediation to resolve disputes amicably, which is aimed at ‘preserving their purity and virginity’. Unfortunately, the widespread acceptance of sexual harassment and stalking in popular culture, especially in the film industry, adds fuel to gender stereotypes. It promotes social mores that foster misogyny, which in turn gives offenders immunity. Despite claims that it was limited to an urban elite circle, the Me Too movement’s call for more accountability by women marked a much-needed backlash against the entrenched biases.

Judicial stereotyping is also seen via an intersectional lens courtesy of the *Aparna Bhat* ruling. According to Justice Ravindra Bhat, women face discrimination for a number of reasons, including caste, class, ability, sexual orientation, and tradition, in addition to their gender. As a result, prejudice resulting from judicial stereotyping is multifaceted and cannot be reduced to a single element. Nevertheless, the ruling does not provide any more explanation or insight on the matter. The Supreme Court recently addressed the lack of intersectionality jurisprudence, in the case of *Patan Jamal Wali v. State of Andhra Pradesh*³⁵, acknowledging that the victim of sexual violence had multiple disadvantaged identities due to the intersection of gender, caste, and disability.

³³ Section 155(4), Indian Evidence Act.

³⁴ *XYZ v. State of M.P.*, (2021) 16 SCC 179.

³⁵ *Patan Jamal Wali v. State of A.P.*, (2021) 16 SCC 225.

The judiciary in India, led by the Apex Court, has interpreted the Constitution, in recent decisions, as a text that embodies a vision of a society that is more equitable, inclusive, and forward-looking, rather than merely a set of theoretical protections against State overreach.

In *Navtej Singh Johar v. Union of India*³⁶, Section 377 of the Indian Penal Code, 1860 (IPC)³⁷, which made voluntary sexual relations between people of the same sex illegal, was ruled unconstitutional by the Supreme Court. The Court expressed its opinion that the Constitution is a “great social document, almost revolutionary in its aim of transforming a mediaeval, hierarchical society into a modern, egalitarian democracy.” The Constitution strives to be a roadmap for the country’s transition from a medieval, hierarchical society to an equitable democracy, embodying the values contained in the Preamble. It was ruled that the Constitutional court, whose duty is to shield its citizens from discrimination and humiliation, cannot interpret the rights of liberty and equality statically and turn a blind eye to the fight for the achievement of those rights.

The Supreme Court also overturned an age-old custom and mandatory tradition in the Sabarimala temple in Kerala that prevented menstruating women from entering the temple.³⁸ Justice D.Y. Chandrachud presented a vision of the Constitution as having a transformative quality, promising full citizenship to those who had been previously disadvantaged and marginalised and establishing autonomous institutions of governance.

In the case of *Joseph Shine v. Union of India*³⁹, the SC struck down the criminalisation of adultery under Section 497 of the IPC.⁴⁰ Due to its blatant discrimination against women, Section 497 of the IPC was deemed to be unconstitutional. The Court limited the offence of adultery as a civil wrong that can be applied by both the woman and the husband to end a marriage, even though it shielded women in adulterous relationships from punishment. In addition to domestic abuse, which is illegal as well, adultery presently serves only as one of the grounds for divorce. The insulting concept that a wife is her husband’s *personal property, or chattel*, was the foundation for Section 497 of the IPC. Section 497 prohibited punishment for the woman in an adulterous connection. It also guaranteed that under Section 198 of the CrPC, only the husband could bring a case against the man who was having an

³⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. <https://indiankanoon.org/doc/168671544/>

³⁷ Section 377 of the Indian Penal Code, 1860.

³⁸ *Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.*, (2019) 11 SCC 1.

³⁹ *Joseph Shine v. Union of India*, 2018 SCC Online SC 1676.

⁴⁰ Section 497 of the Indian Penal Code, 1860.

adulterous relationship with his wife.

The SC held that such a testosterone-etched depiction of ‘stolen property’ was both obnoxious and disgusting, as well as in violation of the concept of equality propounded under Articles 14 and 15 of the Constitution. The Justice Malimath Committee had proposed in 2003 to make Section 497 gender-neutral, meaning that a wife could file a criminal case against another woman who had a sexual relationship with her husband. However, the Court prudently chose not to pursue this option, acknowledging the realities of a predominantly patriarchal society. This would have continued to support a misogynistic view of adultery and marriage, but it has now created a level playing field where an extramarital relationship can lead to the dissolution of marriage.

A petition was filed in *Sanuja. B v. Kerala State Beverages Corporation Ltd.*,⁴¹ contesting the constitutionality of some of the provisions of the Kerala Abkari Shops Disposal Rules, 2002 that forbade women from working in any capacity in toddy or foreign liquor stores. The State Government’s order was overturned by the Court, which ruled that it was unconstitutional and unsustainable that every citizen had a right to an equal opportunity to be considered for employment, and that any restriction on that right based on a person’s sex would violate Articles 14 and 15. This cleared the way for the petitioners to be appointed to their respective jobs.

Recently, in the case of *M. Sameeha Barvin v. Govt. of India*,⁴² the Madras HC directed the Respondent authorities to streamline the policy to ensure the fair treatment of disabled women athletes. In this case, the petitioner, who was an athlete girl with a disability, had overcome the psychological trauma of speech and hearing impairment. Despite these disabilities, the petitioner had performed exceedingly well in the State and National level sporting events. Unfortunately, she was not allowed to take part in the 4th World Deaf Athletics Championship, 2021, though she had qualified in the selection test held at the national level.

The order delves into a detailed discussion of the idea of “intersectional discrimination” that is faced by these athletes due to their gender and disability. The Court made an elaborate intellectual discussion of the jurisprudence regarding intersectional discrimination and

⁴¹ *Sanuja.B v. Kerala State Beverages Corporation Ltd.*, 2016 SCC Online Ker 28105.

⁴² *M. Sameeha Barvin v. Govt. of India*, 2021 SCC OnLine Mad 6456.

transformative constitutionalism. The Court noted that when it comes to getting support and encouragement to compete at competitive levels in sports and achieve laurels, women with disabilities frequently experience double prejudice because of their disability and gender.

The reason given by the selection authorities to reject her was that they were '*not inclined to send a lone female member to the event and therefore, they have preferred male members for the event*'. Despite the interim order directing the Respondents to make arrangements for the Petitioner to travel to Poland, the Court noted that the disabled athlete was unable to easily compete in the Championship held in Poland. The Court noted that the actions of the State and Central offices of the Sports Council of the Deaf were inappropriate and their uncooperative attitude made things worse. The Court emphasised that justice and fairness must be fundamental to all human endeavours, including athletics, and it published a set of guidelines that are covered here. The Court placed reliance on the SC's decision in *Patan Jamal Vali v. State of Andhra Pradesh* (supra) and *Anuj Garg v. Hotel Association of India* (supra).

The single of the Madras HC, Justice R. Mahadevan, noted that the Respondents had arbitrarily discriminated against the petitioner by denying her the opportunity to travel with her male counterparts on the basis that she was a woman and that her disability, an intersectional disadvantage, was an added-risk. Because of these factors, the justification appears to be that she is at risk of being assaulted or unsafe, whether it be sexually or otherwise. This reasoning effectively feeds the troubling misconception that women are alluring sexual objects.

The Court cited several other decisions⁴³ to explain the concept of 'indirect discrimination'.⁴⁴ Facially neutral criteria, being protective, can lead to indirect discrimination, when they ignore the unspoken consequences of a rule, practice, or criterion. The Court therefore directed the authorities to allow disabled sportswomen to compete with "dignity and respect" at all levels of competition. These authorities include the Ministry of Youth & Sports, Sports Authority of India, All India Sports Council of the Deaf, and Tamil Nadu Department of Welfare of Differently Aabled Persons. The Court further ordered that these athletes and one of their accompanying family members get sufficient financial support. The athletes who demonstrate merit were also ordered to be given priority in the

⁴³ Ministry of Defence v. Babita Puniya & Ors., (2020) 7 SCC 469.

⁴⁴ LT. Col Nitisha v. Union of India, 2021 SCC Online SC 261.

selection process and will receive free medical care and training facilities. Furthermore, the Court mandated the Government to make provisions for disabled-friendly clothes, prosthetics and other materials. Another directive of the Court called for properly compensating disabled female athletes and treating them in a manner commensurate with men, as well as educating male peers about ensuring equality between them and their female counterparts.

INFERENCES AND CONCLUSION

There are two ideas that provide a tangible embodiment of the idea that the Constitution is a transformative instrument. First, it changed the dynamic between the State and the individual from one of the colonial rulers and their subjects to one of the citizens of a republic enjoying the full range of civil and political rights. Second, the Constitution's ability to facilitate a comprehensive reconstruction of the State and society at large. In order to achieve this reconstruction, it was necessary to establish limitations on how private individuals interact with one another. For example, untouchability was abolished, and forced labour was prohibited. Within the textual and structural parameters and boundaries outlined in the Constitution, transformative constitutionalism functions.

In contrast to public interest litigation, which judges use in arriving at socially acceptable decisions, the transformative constitutionalism approach allows for an expansive interpretation of fundamental rights – but only to the extent that it is compatible and consistent with the wording of the Constitution. In order to pursue a comprehensive vision of a democratic framework where the forces of democratic politics play out, the judiciary should embrace a transformative view of the ideals of liberty, equality, and fraternity. This concept views the Constitution as transformational not because of its unique historical setting or specific socio-economic objectives, but rather because it foresees a society that is constantly subject to contestation and change – a society that is constituted by change. A transformative Constitution is one that encourages and creates social change. It is incompatible with the concept of dignity to view a free person as someone else's property. The wording of the Constitution has repeatedly been interpreted to oppose hegemonic power structures and safeguard the principles of equality and dignity for its citizens, true to its vision of achieving the transformative principles enshrined in the Preamble.

The fact that a woman's position within the patriarchal social structure makes it difficult for

her to obtain justice makes crimes against women even more distressing. Gender inequality grows worse through caste prejudice, social status inequality, and economic hardship. Historically, women have been seen as beneficiaries of public policy, rather than as active participants in it. The State is largely oblivious to the unique aspects of women's challenges and conditions because of these condescending tones. In a society where the majority of people live under a patrilineal, patriarchal, and patrifocal structure, prejudice begins at the lowest social stratum.

The greater desirability of the son and the transferability of the daughter following marriage are strongly co-related with discrimination between the sexes in the distribution of limited resources in a variety of domains, including nutrition, healthcare, and education. Naturally, there is some institutionalised discrimination against women. Law, medicine, and politics are professions that are mostly viewed through patriarchal systems, and they are still dominated by men. Even though the number of women participating in these institutions has increased, and there is a lot of talk about women-led development, the ability of women to handle leadership roles is still questioned across spectrums.

What is even more ironic is that those who are accused of sexual offences against women are the ones who get to debate legislative functions, which makes it nearly impossible to assess the actual circumstances in each woman's life. Also, it is imperative for judges to exercise caution and restraint regarding their personal biases to prevent any dehumanising impact on women who attempt to assert their rights in court. Because it taints the impartiality of a trial, the judiciary must take care not to reinforce gender stereotypes. A strong mistrust of judicial institutions results from dictating to victims of assault how they should act in certain circumstances or from casting doubt on the maturity of adult women due to biases. Furthermore, gender stereotyping has a crippling effect on women from underprivileged minorities because it hastens their further marginalisation.

Women have endured generations of marginalisation and disregard. We must remember that women also contributed equally to the freedom struggle in India and the drafting of the Constitution. They have just as much influence over India's future and independence as anyone else does. They also play a reproductive function, which means that the idea of a family and their place in it is centred on raising the children and taking care of the family. Their ability is in no way diminished by the fact that they took care of the family. Upon seeing that women could become independent and assert authority through education, the

patriarchal society perceived a threat to its dominance. This misguided perceived challenge to power stems from decades' worth of ingrained cultural assumptions. Transformative changes to marriage and family life are therefore necessary, which will not only increase societal security but also grant women respect dignity, and safe spaces. Men will also gain from women's liberated and altered attitudes. Thus, the world will stand to benefit.

