

Rejuvenating Indian constitution: A perspective of section 377 and Sabrimala verdict

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Abstract

Role of Indian Judiciary in keeping the constitution alive as a living tree document has been profound. The Indian constitutionalism is post-colonial regime, which admires transformative society. There has been a history of struggle for catering fundamental rights and freedom to every citizen. The constitutional courts have played a pivotal role in breaking social and rigid structures and establishing new interpretations, with the help of constitutional morality in place of public morality. Constitutional morality ensures that every group of however minor they might be, are provided with state protection and autonomy. Court has adopted broader interpretation and not restricted itself to narrow cannon of interpretation. This would help to understand the relationship between state and citizen as well as nuance in the society created. The Indian judiciary has constructed a paradigm shift from stereotypical actions to novel ideas of a transformative constitution, such an approach will be beneficial for the future of democracy because it will help in establishing democratic politics. This article examines the stance of Indian judiciary in adopting the transformative approach for creating an egalitarian society. The landmark judgment of Sabrimala and Navtej Singh Johar has been analyzed in order to conclude that the Indian judiciary is not limited to constitutional originalism.

Keywords: transformative constitutionalism, section 377, sabrimala verdict, constitutional morality

Introduction

The concept of transformative constitutionalism has been derived from the theory of constitutionalism which does not have any restricted or any codified definition but taken as a concept pertaining to evolution. Professor Upendra Baxi rightly defines it as an imagery which differs from the people in power to the people under power accompanied by the normative concepts created by the epistemic communities^[1]. A certain trace to history cannot be made regarding the emergence and acceptance of this concept, however, it can be understood as practice developed due to the occurrence of certain repetitive chain of events^[2]. The evolution of the concept signifies the major revolutions with respect to social and political structures. Michael Rosenfeld explains that contemporary constitutionalism demands for restricting government power by following the rule of law and protecting the fundamental rights^[3]. The doctrine of a transformative constitution is envisaged in this evolutionary aspect of constitution.

The doctrine of transformative constitutionalism is a contemporary concept recognized by several democracies across the globe majorly global south. The doctrine has been considered as a very essential part of the comparative laws in recent times. The doctrine has proved to be effective in the post-colonial era. There have been several interpretations of the doctrine of transformative constitutionalism. Uday Mehta has beautifully described the Indian Constitution as a 20th-century constitutionalism and differentiated it from the 18th-century constitutionalism of

US. The motive of the US constitutionalism was just to break or restrict the governmental power, however, the Indian approach was quite novel and relevant which aimed at detaching the government from the history of tyranny based on practices of caste and religion^[4]. In other words, Indian constitutionalism was based on the very concept of breaking social hierarchies and establishing an egalitarian society incorporated with practices of equality, liberty and, justice^[5].

The Indian approach towards the transformative constitutionalism has been envisaged in the theory laid down by Professor Karl Klare. He recognized a transformative constitution as a process that is time-consuming and aims towards interpretation, legislation and, implementation in order to rejuvenate the country's social as well as political structures. Additionally, changing the dominating relationship in a democratic and egalitarian society^[6].

The constitution-makers were quite inclined towards framing a constitution that aspired towards the scrupulous reconstruction of the state as well as societal framework^[7]. Indian Constitution has been a charter that reflects the concept of transformative constitution effectively in its provisions though not expressly. The contemporary interpretation of the Constitution has made it a 'living tree'^[8]. This indicates that the constitution of India is an evolving document and not a restricted one. Which in turn means that

¹Zoya Hasan, India's Living Constitution: Ideas, Practices And Controversies, 31 (E. Sridhan & R. Sudarshan Eds., 2004).

² Mahendra Pal Singh, *Constitutionalism In The Indian Comparative Perspective*, 11 Nujs L. Rev.1 1,2 (2018).

³ Michel Rosenfeld, *Constitutionalism, Identity, Difference And Legitimacy* 3 (Michael Rosenfeld Ed., 1994).

⁴ Uday Mehta, *The Oxford Companion To Indian Politics*, 25-27 (Niraja Jayal & Pratap Bhanu Mehta Eds., 1 Ed. 2010).

⁵ Outline Of Political Theory Of The Indian Constitution In Politics And Ethics Of The Indian Constitution, 15 (Rajeev Bhargava Ed., 2008).

⁶ Supra 2, 15.

⁷ Gautam Bhatia, *Transformative Constitution: A Radical Biography Of Nine Acts*, Xxiv (2019).

⁸ Justice K.S. Puttaswamy V. Union Of India, (2017) 10 S.C.C. 1 (India).

the role of judges plays an important role in making it living. This can be done through a pragmatic vision which indicates that the court has a duty towards updating the constitution with changing times ^[9]. This approach of the transformative constitution is completely in cohesion with Professor Karl's theory. On expanding the theory of Karl, it must be considered that the judges bear the responsibility of maintaining constitutional values, like equality and liberty. There has been a history of struggle in granting complete enjoyment of fundamental rights under equality and liberty principles of the constitution. There have been distinguished discrimination in the country on the basis of gender and sexual orientation of certain people. Despite, the fact that constitution itself recognizes equality and liberty as an important aspect of democracy. The judiciary in India has been quite accessible to the people through devices like PIL and

expanding scope of fundamental rights. The case of Navtej Singh Johar v. Union of India and Indian Young Lawyers Association v. State of Kerala have been landmark judgement in gaining the transformative approach to a traditional biased society by breaking of social hierarchies with the help of equality and fraternity principle. This article is an investigation into the role of the judiciary in recognizing the fundamental rights of the marginalized group of people consisting of LGBT community and women with the help of the transformative approach.

1. Indian Regime of Transformative Constitution: Trinity of Liberty, Equality and Fraternity

In India, the judges are very much prone to the transformative interpretation of the constitution and take responsibility towards fulfilling the pragmatic approach of Indian constitution makers.

The constitution-makers had recognized the trinity of liberty, equality and fraternity as the founding pillars of the constitution. Dr. B.R. Ambedkar mentioned the concept of trinity in his closing speech to the constituent assembly, wherein he mentioned that a social democracy is based on principles of liberty, equality and, fraternity. He considered these three principles as one and termed it as a trinity. Liberty and equality cannot be separated from each other, additionally, these two cannot be separated from fraternity. This is because if liberty overpowers equality than systems like patriarchy and authoritarian constitutionalism will prevail. On the other hand, fraternity is essential to bridge the gap in order to make equality and liberty a natural course of things ^[10].

Constitution of India is itself a plethora of transformative features such as universal adult franchise, preamble starting with 'we the people of India' ^[11], right to equality, community rights and many more that make sure that the participation of people in the democracy is fulfilled. The complete participation of people basically revolves around the concept of trinity laid down by Ambedkar. The harmonious co-existence in a society can be only achieved through restoring these three in some or the other way.

The consideration of the Indian Constitution as a living tree

goes hand in hand with the journey of its evolution. The evolution, in turn, goes hand in hand with the interpretation of judges with respect to the constitutional guidelines. An established chain of functioning can be seen while deducing the transformative approach. The living tree is indicative of expanding the scope of article 21 as well as increasing the powers of the judiciary beyond the scope regarded by constitutional framers. Though the transformative interpretation of the constitution is not limited to any specific functionary of state, however in India and many other countries across the world, the judiciary is only authoritative of such interpretation, in other words, it is an integral part of such interpretation ^[12]. The constitutional courts have often used the constitutional principles of liberty, fraternity and equality to give their opinion for cases. While these three go hands in hand they have also played quite significant roles in judicial interpretation. Taking into consideration the equality and fraternity aspect of trinity laid down by Ambedkar, the paper describes the transformative constitutionalism practiced by Indian Apex court though the analysis of two landmark equality and fraternity judgment of 2018.

2. Homosexuality and Right to Equality

2.1 Validity test of Section 377 in Post-Colonial Era

The foundation for the future of transformative constitutionalism under right to equality was very well established in the homosexuality judgment of 2018. The Delhi High Court judgment in Naz Foundation was replaced scrupulously. Decriminalization of homosexuality was the need of the hour for the highly marginalized LGBT community. The five-judge bench in the case gave a concurring opinion for decriminalizing section 377 of IPC through four distinct opinions, however, all of them were favoring each other on the common grounds of their reasoning which was driven by the concept of constitutionalism. This judgment was a remarkable juncture for the LGBT community to possess a constitutional identity, from the old colonial sodomy law ^[13].

The rigidity laid down in section 377 has impacted the LGBT community's excess to justice and denial to full citizenship to the country. The court has emphasized on the concept of constitutional morality over the concept of public or social morality. This was a paradigm shift initiated by the court in order to advance the rights of the LGBT community which were at stake in the judgment of the Nazi foundation. The court precisely takes the stance against the reasoning laid down in Suresh Koushal ^[14], that however minor a community is, providing them with their fundamental rights is very important. This can be seen in the identification of the right to privacy under Article 21 for the LGBT community. Additionally, providing the community with rights under article 14 and 19 are also distinctively granted to the community, in the light of the rationale laid down in Shafin Jahan ^[15] and Shakti vahini ^[16], which empowers an

⁹ Supra 7, Xxxviii.

¹⁰ Parliament Of India, *Constituent Assembly Debates*, Vol. Xi, Speech Of Dr B.R. Ambedkar, (Nov. 25, 1949) <http://164.100.47.194/Loksabha/Writereaddata/Cadebatefiles/C25111949.Html>, Visited On Nov. 1, 2019.

¹¹ India Const., Preamble.

¹² Supra 7, Xxxvii.

¹³ Arundhati Katju, *One Year After Freedom: How Are Lgbts Faring Today, Since 377 Was Struck Down By The Supreme Court*, Times Of India (Sept. 6, 2019, 2:00am), <https://timesofindia.indiatimes.com/Blogs/Toi-Edit-Page/One-Year-After-Freedom-How-Are-Lgbts-Faring-Today-Since-Section-377-Was-Struck-Down-By-The-Supreme-Court/>.

¹⁴ Suresh Koushal V. Naz Foundation, (2014) 1 S.C.C. 1 (India).

¹⁵ Shafin Jahan V. Asokan K.M., (2018) 5 S.C.C. 422 (India).

¹⁶ Shakti Vahini V. Union Of India, (2018) 7 S.C.C. 192 (India).

individual to choose their partner.

Justice Dipak Mishra mentions that the constitution molds the lives of people as well as societies, the active appreciation would do justice to the constitution, a passive and mild approach will make it dead and stale, instead of making it vibrant, novel and pragmatic ^[17]. Moreover, the purpose of having a constitution is to transform society from the medieval stereotypical society to an egalitarian democracy ^[18]. This is again indicative of Justice Misra's vision of breaking social hierarchies which are narrow and traditional legalism and paving a path towards a spacious and more social society ^[19]. The judgment mentions that it is when the court stays attached to the constitutionalism as major faith and develops a culture to protect the fundamental rights of people (LGBT community).

The article by Michael Kirby and Ramesh Thakur mentioned that constitutionalism is modern version of the concept of Raj dharma, which was a historic concept that accommodated concepts of religion, responsibility, duty and, law, the opinion is an accumulation of immense textual analysis, political history, ancient and modern histories and doctrinal application, hence it deserves application of transformative constitution ^[20]. In light of this, it can be understood that the pronounced judgment is a responsible and apt decision on the part of Indian court in order to achieve an equal and fair societal structure.

2.2 Transformative doctrines of progressive rights and non-retrogression

The doctrine of progressive rights ^[21] has been elaborated in the judgment in order to address the dynamic and living character of the constitution. In the case of Government of NCT of Delhi, the ideology of developing constitutional culture was laid down which mentioned having a reasonable coherence with changing time and trends in order to make the constitution living and dynamic.

The doctrine of non-retrogression is also pondered upon that indicates that no law/policy made by state should deprive an individual of enjoyment of their rights ^[22].

These two doctrines were neglected in Suresh Koushal ^[23] which was restored in present case, according to Justice Chandrachud expressed that neutrality of 377 is just superficial, its actual purpose of this colonial law was to deprive the LGBT community of actual participation in democracy by considering them useless and unusual and subject them to sanction and tyranny exercised by state. The deprivation was also with respect to health benefits, Justice Chandrachud expressed that if further deprivation of community from health service would prevail then it will prove to be highly destructive ^[24]. Consequently, the decriminalization of 377 was the need of an hour to take affirmative action in order to restore harmony in society and provide these people their autonomy to lead their manner of

life ^[25]. In other words, through the concept of equality court wanted to remove democratic politics but establish an actual democracy ^[26].

In the light of the Yogyakarta Principle, the meaning of sexual orientation has been explained, which elaborates sexual orientation as a device of sexual attraction, the attraction is a natural and biological process. Here the court tries to break the public misconception of homosexuality as an unnatural and lustful act.

2.3 Constitutional morality: A device of purposive interpretation

The court has precisely focused on constitutional morality in order to save the people of the LGBT community from the suppressive and harsh colonial sodomy law ^[27] (section 377 was derived in the IPC during the colonial rule). The colonial rule is often attributed to the era of Victorian morality, which was a concept of 19th-century, according to which carnal intercourse with men, women, or an animal was against nature and hence it was a crime. In other words, anything other than penal-vaginal intercourse was unnatural. Public morality was clearly against the homosexuality, moreover, the sodomy law of section 377 was merely a reflection of majoritarian public consideration, with respect to this the supreme court mentioned that public morality cannot be considered as the allowable purpose of legislation while deciding the validity of article 14 for the case of homosexuality. The purpose of the court in Naz foundation was to link public morality to the legitimate purpose, however, this linkage was broken in Navtej Singh Johar ^[28]. According to B.R. Ambedkar and constitutionalism of south Africa explained constitutional morality as a derivative of constitutional value and not a derivative of majority public opinion. Ambedkar also elaborates that any legislation, judgment or interpretation of the law by which a citizen is disabled or punished under the effect of discrimination than such law or judgement should be disabled. In light of this, it can be understood that the court made the right decision by understanding constitutional morality and eventually giving effect to transformative constitutionalism ^[29].

The constitution of India has an elaborate explanation of equality, under the right to equality code falling under Article 14-16. The major intention of invoking such a code by the constitution-makers was to eradicate the social and institutional disparity created by them over time. The constitution has guaranteed equal protection of law and non-discrimination which means that the constitution would protect the citizens against any irrational and unjust law.

²⁵ Devika, [Day 3] Section 377/ Constitution Bench Heading Towards The End Of Social Stigm Against Lgbtq, The Scc Online Blog (July 12, 2018), <https://www.scconline.com/blog/post/tag/navtej-singh-johar/>.

²⁶ Rahul Bajaj, Gautam Bhatia On An Introduction To A Transformative Constitution, University Of Oxford, Faculty Of Law (Jan. 29, 2019), <https://www.law.ox.ac.uk/current-students/graduate-discussion-groups/south-asian-law-discussion-group/blog/2019/01/gautam-0>.

²⁷ Ajita Banerjee, *Transformative Constitutionalism: Indian Supreme Court Upholds Constitutional Morality By Reading Down Section 377*, Oxford Human Rights Hub (Sept. 28, 2018), <https://ohrh.law.ox.ac.uk/transformative-constitutionalism-indian-supreme-court-upholds-constitutional-morality-by-reading-down-section-377/>.

²⁸ Supra 7, 53-54.

²⁹ Id. 62.

¹⁷ Navtej Singh Johar V. Union Of India, (2018) 10 S.C.C. 1 (India), 66.

¹⁸ Id., 65.

¹⁹ State Of Kerala And Another V. N.M. Thomas And Others, A.I.R. 1976 S.C. 490.

²⁰ Michael Kirby & Ramesh Thakur, *Navtej Johar, A Verdict For All Times*, The Hindu, (Dec.31, 2018), <https://www.thehindu.com/opinion/op-ed/navtej-johar-a-verdict-for-all-times/article25866598.ece>.

²¹ Supra 17, 111.

²² Id., 117.

²³ Supra 14.

²⁴ Supra 17, 366.

The constitution provided a promise to grant full citizenship (in terms of morality) which in turn intended to provide liberation to its citizens. Justice Indu Malhotra precisely describes that law discriminating on the basis of inherent qualities of a person would be ipso facto negating Article 14. The major vitality of homosexuality judgment vested in discrimination, dignity, inclusiveness and equality principles. The remarkable judgement has established the future of transformative constitutionalism to fulfill the actual motive of articles 14 and 15.

3. Anti-Exclusion Principle and Freedom of Religion

3.1 Sabrimala verdict: A milestone of women empowerment in India

In the series of landmark judgments passed by the supreme court in 2018, one of the major feminist judgements was Sabrimala^[30]. The apex court was driven by constitutional jurisprudence, influenced by transformative constitutionalism. A four-judge constitutional bench presided over the case, with one dissenting and three concurring opinions. The tool of constitutional morality was used by judges to pave a way for the transformative constitution. The usage of constitutional morality was done with a purpose to induce proper interpretation of article 14 and 25 of the Indian constitution.

The restriction of women to worship place has been a highly discriminating practice and an issue that has prevailed since years. Several recent endeavors had tried to challenge this largely followed history. However, the courts have quite optimistic about empowering women's rights. Justice Chandrachud has precisely explained that constitution is transformative in dual nature. Primarily, creating governing bodies in order to remark an independent republic which would be a transition from the colonial rule. Moreover, protecting those who were deprived of their claim to fundamental rights and establish an equal society through equal protection of law^[31].

Further, he mentions that patriarchy, as well as caste, are not the State and nor an individual's agencies for discriminating certain people^[32].

The prohibition of women from entering the Ayyappa temple was, was considered discriminatory in nature. It was discrimination on the basis of gender and the right to equality and fraternity. This implied that the practice was violating article 14,15,17.

3.2 Controversy over Article 25 of Constitution

The test for validity of the practice was to be decided under the article 25. The court precisely reasoned that it is essential to identify the importance of religious practice. In the absence of such practice will the religion be altered or not? Subsequently, the court mentioned that permitting entry of women into Sabrimala temple won't alter the religion. Moreover, for validating a practice it must be considered that such practice has been followed for years without any hindrance. In the light of this, the fact that

Devoswom board permitted women (age 10-50, menstrual age) entry in the temple before it prohibited it and hence court understands this practice as a social stereotype and not an integral part of religion^[33]. The purpose of article 25 was to allow religious practice and not any social belief. The court reasoned that without such practice there won't be any threat to Lord Ayyappa's followers.

Court also argued that following a religious practice for a long time is not the only test of accepting it, any distinct group of Ayyappans has not been recognized which indicates that all the Hindus can go to temple. Consequently, the Sabrimala temple was religious and public institution and no distinct followers exist so no discrimination can be imposed on anyone^[34]. The practice was negating the purpose of section 3 of Kerala Hindu Places of Public Worship, the followers weren't granted a term of religious denomination and hence it would fall under ambit of Hindu temple, according to section 3, all Hindus are permitted to worship place including women^[35]. The reasoning by court justifies the nature of prohibition was a social cause. The judgment that is establishing a guideline expressing that the practice is against freedom and dignity of women and hence is invalid.

The Indian constitution has been ambitious enough to restore the concepts of religious freedom, the neutrality of the state as well as reconstruct justice. This also explains that the freedom of religious practices can be controlled by state in financial, secular and political activities. In the Sabrimala issue, the essential religious practice test was based on essential to religion which meant that it was not mentioned in the constitution and hence religious denomination has no role to play (in the present case no particular denomination is present)^[36]. The categorization of Justice Malhotra with respect to article 25 is proved wrong by the concurring opinion by explaining its true interpretation. the judicial interference was valid through constitutional morality was an approach to justify transformative approach of the constitution^[37].

Justice Chandrachud has explained the validity by mentioning that the doctrine of multiplicity and acknowledging of group autonomy should be analyzed only within constitutional limits. Whenever the freedom of community becomes unjust towards individual dignity and autonomy court has to use its power to counter the invalidity. Hierarchy and exclusion were driving force in the Sabrimala issue which is vested in social and institutional stereotypes, which is invalid^[38]. He attributed the

³³ Id. 31.

³⁴ Id. 32.

³⁵ Aayush Khurana, *The Bar On Women To Enter Places Of Worship: A Violation Of Fundamental Duties*, 9 Ijpslir 11, 12 (2019), <http://www.tjprc.org/publishpapers/2-52-1545651026-02.Ijpslirjun20192.Pdf>.

³⁶ Sanskriti Prakash & Akash Deep Pandey, *Transformative Constitutionalism And The Judicial Role: Balancing Religious Freedom With Social Reform*, Manupatra, (Last Visited Nov. 10, 2019, 6:00 Pm), http://docs.manupatra.in/newline/articles/upload/Ab27d7aa-C3b3-4538-Ba67-0100e7a0f797.1-G_Constitution.Pdf.

³⁷ Pramod Kumar, *Supreme Court Judgement On Sabrimala Disappointing, Will Have Problematic Repercussions*, The Indian Express (Set. 28, 2018, 6:25 Pm), <https://indianexpress.com/article/opinion/supreme-court-judgment-on-sabarimala-disappointing-will-have-problematic-repercussions-5378213/>.

³⁸ Gautam Bhatia, *What Is A "Review"?*, Indian Constitutional Law And Philosophy (Nov. 14, 2019), <https://indconlawphil.wordpress.com/tag/sabarimala/>.

³⁰ Indian Young Lawyers Association And Others Vs State Of Kerala [2018 Sc Online Sc 1690].

³¹ Gautam Bhatia, *What Is A "Review"?*, Indian Constitutional Law And Philosophy (Nov.14, 2019), <https://indconlawphil.wordpress.com/2018/09/29/The-Sabarimala-Judgment-Iii-Justice-Chandrachud-And-Radical-Equality>.

³² Rahul Ranjan, *Transformative Constitutionalism And The Sabarimala Judgement* (Indian Young Lawyers Assn. V. State Of Kerala 2018), 1 Jltclp 30, 31-32 (2018).

discrimination in Sabrimala as an integral part of untouchability mentioned in Article 17. The profound approach of Justice Chandrachud has established a transformative approach towards constitutionalism^[39].

The Thick role usage of religious practices through the practice of religious grouping in Indian society infuses a liberal approach towards the essentiality of article 14. The constitution does not accommodate such an arbitrary practice. The reformist approach of constitution completely rejects the liberal neutrality and hence it's on the part of the judiciary to show that what kind of reform does the constitution intend to infuse by rejecting liberal neutrality. The apex court has precisely explained this through its three-step tests. This test was the guiding force for differentiating essential and inessential practices. The court has supported essential religious practice test for rendering effect to the equality code of the constitution^[40].

The Judgement has been revolutionary decision, which favored constitutional morality in order to interpret law correctly. The judgement explained the correct meaning of religious practices which were misinterpreted under the backup provided by article 25, the ERP test significantly justified article 14 and principle of fraternity. The judgment has eloquently used transformative interpretation of article 25, this strong intellectual approach textual interpretation will drive a better future to establish perfectly democratic and egalitarian society.

Conclusion

The phenomenon of transformation has been followed since the mythological times of Hindu religion. Lord Krishna has mentioned in Mahabharat, that transformation is essentiality of time and in order to break social hierarchies, abuses, and discriminatory practices the war of Mahabharat was initiated. Establishment of a novel, just and fair society was the purpose of this war. I would like to draw an analogy of this to the concept of constitutional morality. The concept of constitutional morality is such a device within the framework of the Indian constitution that helps in catering to the true transformative purpose of constitution. However, the critics of constitutional morality often consider this device as judicial activism adopted by the constitutional courts. As aptly mentioned by Gautam Bhatia, in India the judiciary is a legally recognized institution to interpret the constitution and hence it is just fulfilling its duty to interpret the constitution. In order to provide every citizen with equal and fair participation to democracy.⁴¹ Though the judiciary is a supreme adjudicator yet it precisely restricts itself to just give effect to democratic politics and not interfere autonomy of other governmental institutions.

This article has scrupulously analyzed the role of Indian judiciary by adopting transformative constitutionalism as a device of interpretation. The doctrine of constitutional morality and purposive interpretation has been opposed by the doctrine of constitutional originalism. the transformative approach is not frozen like originalism. It does not superimpose the virtual intention of constitution-makers or original literal meaning. The Indian constitution-makers believed in creating an ever-lasting constitution, in the light of this vision they framed constitutional provisions in such a

way that could meet the demands of future prospects. The theory of transformative constitution is to revive those original vision of constitution drafters by analyzing the history and the democratic struggle of the constitution-makers. the drafters who had suffered a century of colonial rule and suppression. Thus, it can be inferred that the transformative constitution is guided by the vision of establishment of a complete democracy and full social citizenship that the constitution -makers saw. The court is just reestablishing this vision of constituent assembly by using transformative constitution. The Indian judiciary has developed mechanisms like PIL, enlarging the scope of FR by including certain DPSP in part 3 with the help of article 21 and following writ of mandamus strictly. These are the approaches of the judiciary that prove transformative character vested in judiciary.

The insight of transformative constitutionalism in the equality and fraternity judgments of 2018, was remarkable. The apex court beautifully drove an analogy to the history and made them valid in current times. In order to break the influence of public morality from the judicial interpretation a third way of constitutional morality and purposive interpretation were recognized. In other words, in order to provide complete participation to women as well as the LGBT community complete excess to the fundamental rights guaranteed by the constitution the court underwent an elaborate understanding of the equality and liberty code of the constitution. This interpretation was done with an aim to achieve democracy in all sense and eradicate the remains (section 377, gender discrimination) of the colonial empire. The homosexuals, as well as women in the age of menstruation, possess certain innate and biological traits that are begotten from nature, referring to this provision of nature as an unusual and lustful or impious and sinful act is completely wrong. This kind of discrimination is not just. The two verdicts have effectively argued to break this notion and tradition by mindful reasoning driven by constitutional morality in order to save the unfair patriarchy and establish a complete democratic society providing complete social citizenship to each citizen. Conclusively, the judgments have laid the foundation of transformative constitution for successful present as well as future prospects.

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³⁹Supra 7, 168.

⁴⁰ Supra 7, 166.

⁴¹ Supra 26.

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