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The Concept of Constitutional Transformation and The Sabarimala Judgment

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ABSTRACT

Our whole system of conduct is based on our constitution and everything is supposed to work according to the guidelines and laws laid down by the constitution for its citizens. 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. It's evident that the Constitution transformed the relationship between an individual and a state, it laid down several codes and conduct to be followed by its citizens for the smooth running of a country. But the question is, is the constitution stagnant by nature? The article answers the question with reference to the recent landmark case of *Indian Young Lawyers Assn. v. State of Kerala*.

The Article further explains what constitutional transformation actually means, its relevance in the present time and how it was referred to in many aspects of decision making. The concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times. We can also see that in the post-independence India, many of the practices, rituals, taboos and gender-based inequalities have been variously brought down by progressive social reform movements, legislative developments, etc. Constitutional transformation as an ever evolving aspect and an unavoidable principle in the present scenario.

It also critically analyses the Sabarimala Judgment, how the war of religion and prevalence of gender inequality in the society ended up creating a stir in the legal system of the country. Towards the end of the article, it would like to positively end by suggesting some outlook towards the aspect of Constitutional Transformation and how prominent is its role in the Indian legal system

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MANUSCRIPT

Transformation in a country is something which is expected to be accepted by people from the bottom line of the society to the people in the Frontline. As the topic itself reads - transformative constitutionalism, studying something like this we tend to divide the term! Transformative constitutionalism is a commitment to substantive equality and improving socio-economic conditions or 'the meaning of transformation in juridical terms is as highly contested as it is difficult to formulate',² which simply means transformation of the Constitution for the betterment of the citizens of the country keeping up principal laid down by the Constitution of the respective country.

Taking in account a country like India where the population is counting in million, implication of any new reform is arduous. Especially when it involves the citizen's beliefs, religion, faith, cultures which have been practicing since their birth. Transformative constitutionalism is often seen in the South African jurisprudence where they are considered to be another prominent source of development and progress. It is through this project that the Constitution founded a nation grounded on protecting democratic values and fundamental human rights. Hence, transformative constitutionalism derives its presence from the Constitution. It is a project driven by a commitment to transform the country's social, political, economic and legal culture³ and this aspect of transformative constitutionalism is always taken positively by the crowd and they truly believe in the progress and developmental aspect of the constitution to get more flexible and accommodate all the spheres of the society by ensuring openness and acceptance of new developments in the world order by the Constitution of India.

Gender inequality is considered to be one of the major back falls in a country where men are considered to be superior and women are supposed to work under them and under their guidance rather than acting on themselves and taking a stand for themselves in society. Indian society is known to be or proclaimed to be male dominated where the female population is expected to listen to the make and act on the commands of the male rather than having their own point of you towards anything. Gender inequality in India refers to health, education, economic and political inequalities between men and women in India. Various international gender inequality indices rank India differently on each of these factors, as well as on a composite basis, and these indices are controversial.⁴

²Moseneke "The Fourth Brain Fischer Memorial Lecture: Transformative Adjudication" 2002 18 SAJHR 309 315.

³Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy Vol 5 No 27 December 2014

⁴Dijkstra; Hanmer (2000). "Measuring socio-economic gender inequality: Toward an alternative to the UNDP gender-related development index". *Feminist Economics*. 6 (2): 41–75. doi:10.1080/13545700050076106

There have been many reasons for the inequality faced by women in India mainly because of the patriarchal society we have in India where men are the primary authority figures, occupying roles of political leadership, moral authority, control of property, and authority over women and children. Most of India, with some exceptions, has strong patriarchal and patrilineal customs, where men hold authority over female family members and inherit family property and title.

The parents of the woman essentially lose all they have invested in their daughter to her husband's family, which is a disincentive for investing in their girls during youth. Furthermore, sons are expected to support their parents in old age and women have very limited ability to assist their own parents. The next major reason for gender inequality with reference of son over daughters - Boys are given the exclusive rights to inherit the family name and properties and they are viewed as additional status for their family. In a survey-based study of 1990s data, scholars found that sons are believed to have a higher economic utility as they can provide additional labour in agriculture. Another factor is that of religious practices, which can only be performed by males for their parents' afterlife. All these factors make sons more desirable. Moreover, the prospect of parents 'losing' daughters to the husband's family and expensive dowry of daughters further discourages parents from having daughters. All these are also accompanied by the discrimination against women where women are apartheid from the society and we can take example a study of 1990s survey data by scholars found less evidence of systematic discrimination in feeding practices between young boys and girls, or gender based nutritional discrimination in India. In impoverished families, these scholars found that daughters face discrimination in the medical treatment of illnesses and in the administration of vaccinations against serious childhood diseases. These practices were a cause of health and survival inequality for girls. While gender discrimination is a universal phenomenon in poor nations, a 2005 UN study found that social norms-based gender discrimination leads to gender inequality in India. Then comes the curse of the society or we can see the girls affects the human population of the society adversely ladder dowry system practice is widespread across geographic region, class and religions. The dowry system in India contributes to gender inequalities by influencing the perception that girls are a burden on families. Such beliefs limit the resources invested by parents in their girls and limits her bargaining power within the family.⁵

The payment of a dowry has been prohibited under The Dowry Prohibition Act 1961 in Indian civil law and subsequently by Sections 304B and 498A of the Indian Penal Code (IPC). Several

⁵ Periodic Review: India report 2005, United Nations. Retrieved 28 April 2014.

studies show that while attitudes of people are changing about dowry, the institution has changed very little, and even continues to prevail. There have been very political and social reforms happening in the past two to three decades: protection of human rights and to minimise gender inequality in society but some of them came out well and the rest were wrapped up without any effect.⁶

Any discussion on justice for women would be incomplete without relating it to the Constitution of India. The Constitution of India, rightly described as the “cornerstone of a nation” embodies provisions for social, economic and political revolution in India. It is the foremost document that defines and guarantees equality, justice, liberty and democracy to the citizens of India. The Preamble declares that one of the most fundamental provisions of the Constitution is to secure social, economic and political justice for all its citizens. When the topic of gender inequality is dealt with religion the topic is considered to be more eminent.

Sex differences in religion can be classified as either "internal" or "external". Internal religious issues are studied from the perspective of a given religion, and might include religious beliefs and practices about the roles and rights of men and women in government, education and worship; beliefs about the sex or gender of deities and religious figures; and beliefs about the origin and meaning of human gender. External religious issues can be broadly defined as an examination of a given religion from an outsider's perspective, including possible clashes between religious leaders and laity; and the influence of, and differences between, religious perspectives on social issues. External religious issues can also be examined from the "lens of gender" perspective embraced by some in feminism and/or critical theory and its offshoots.

The creation myths of many religions contain stories about how humans came to have gender. In many stories, man and woman are created at the same time, with equal standing. One example is the creation story in Genesis 1: "And God created the man in his image. In the image of God he created him. Male and female he created them."⁷ Although the sociological study of religion has been slow to abandon its gender-blindness, the studies suggest that this situation is beginning to change. The magnitude of the change should not be exaggerated; at the present time one is likely to find one member of a faculty working on gender, one paper in an edited collection dedicated to the topic, one stream on gender at a conference on the Sociology of Religion, and so on. The belief that attention to gender can and should inform and enrich all study of religion is not yet firmly established. Equally important may be the changes in religion and society which force attention to religion's relations with gender. Whether we are looking

⁶ The Dowry Prohibition Act, 1961, Act 28 of 1961, Act of Parliament, 1961

⁷ Genesis 1:27

at campaigns against homosexuality and abortion, controversies over veiling, attempts to return to 'traditional family values', religiously-inspired terrorism and violence, or radical utopian eco-feminist movements, it is no longer easy to overlook the ways in which contexts of gender change and anxiety have flushed out religion's central and abiding concern with gender roles and relations, and revealed it as one of the key sites in society for the defence or negotiation of unequal distributions of power.⁸

When a question of equality or gender inequality is elected in Indian society, the only landmark case or the most prominent landmark case we look up to is the Sabarimala issue- the boud read "women between the ages of 10 and 50 haven't been allowed" !! From admitting women with age proofs and the state employing police personnel to keep women out of the temple, the clear shades of discrimination colouring the fiasco eventually sparked a national debate. One that is made difficult for this country not only because of its inability and lack of desire to move away from patriarchal believes that shackle women and hold them back from all aspects of public life, but by putting the rights of women, in the flesh, against that of a deity, a man carved in stone. For a country that is deeply and largely religious and places inordinate amounts of importance in culture, tradition, and religious beliefs, acknowledging the rights of real women over a deity's is absurdly, but unsurprisingly proving to be incredibly difficult. Most people in favour of keeping women out of the temple insist this is not a gendered issue and fiercely fight the claim that women are disallowed from entering the temple because of taboos and the ritual impurity associated with menstruation. They believe the roots of the practice aren't in patriarchy, but in legend, which ironically, once again, is patriarchal. It is said that the deity that resides there is celibate, meditating – now for centuries – for the well-being of those who worship him and don't want him to be distracted from his penance by the presence of women, especially when he has promised himself to Malikapurathamma – another deity residing in the temple – the year no new worshippers visit him. It is said women aren't allowed in the temple out of empathy for Malikapurathamma⁹. This claim isn't only severely patriarchal, but isn't the only reason women are banned from the temple's premises. The ritual impurity associated with menstruating women is really the basis for disallowing them entry. Most arguments for keeping women out of the temple's premises are baseless, considering that women's entry to the temple was only legally restricted after a 1991 Kerala High Court ruling. The arbitrary ages of 10 and 50 were decided by the court, and the court's motivation was to

⁸ Boyarin, Daniel. "Gender." In ed. M.C. Taylor. *Critical Terms for Religious Studies*. Chicago: University of Chicago Press, 1998: 120.

⁹ "Sabarimala". Pathanamthitta.nic.in. Retrieved 4 January 2019.

keep impure menstruating women out of the holy premises of the temple. Although the practice was in place before the ruling, there is no evidence yet to suggest that the practice existed before the 1950s.

Although, the argument being presented in court to continue the practice is that the deity should be allowed to remain celibate and permitting women of fertile age to visit the temple will not allow it to be that way. Attorney J Sai Deepak, bizarrely representing the deity, claimed that the deity has the same rights as that of a person and that the temple being his, he is allowed to restrict the entry of women to keep his vow of celibacy. In 1991, the court said, 'customs must be followed'.¹⁰ Though, customs mustn't be followed when their legality and morality is questionable. We collectively, as a country, weaponise culture and tradition to condone sexist practices and to hinder the empowerment of women and to keep them from existing in public life, the same way men do, to the same extent, and with the same sense of entitlement. To penalise women to provide a deity, what men centuries ago decided he must want, is a deeply patriarchal act. There isn't much else to this issue beyond gender and patriarchy. This isn't a religious issue, it is a gendered issue, it is a women's rights issue, and the subjugation and discrimination of women is always justified by stating that it takes root in culture, tradition, or religion and now is the time to put an end to that. Culture, tradition, or religion, none of those come above the rights of women and they shouldn't shape how women are allowed to exist without condemnation and ostracization.

In a democracy of the people, by the people, for the people, a justice system made for them, cannot possibly even consider upholding the rights of a deity instead of those of women. This case isn't about one temple and the legal right of women desiring to visit it being allowed entry, irrespective of mythology, legend, or biological processes. This case is about the conflict between women, religion, and state and what place religion is allowed in a democratic state. This case, if ruled in the favour of women, can be a watershed moment, not just in the history of women's rights and feminism, but for the intersection of religion and law and even in the history of law, questioning its basis in culture. It will go a long way in securing the rights of women from further violations, not just in the name of religion, but tradition as well, and it will allow women space in public life, even if that doesn't not fit our collective, patriarchal idea of how women should be allowed to exist. For any deeply religious country, religion's interference in the proper and fair workings of a state is inevitable, but this ruling can limit the power religion holds and how religion is largely above the law. Above all, it might allow us to

¹⁰ Sabarimala Temple: Even If Tradition Has to Be Respected, Norms Change

realize that religion and state cannot co-exist in a fair manner and for the spirit of democracy to thrive, we must keep religion far away from all affairs of state.

Does all the above evidence suggests that women and men are unequal or they are equal or in front of the religion they hold the same seat?¹¹ If it is all about creating a society by men and women both can easily without any constraints or questioning their gender before entering into any religious platform religion is considered to be one of the major sources to attain enlightenment and peace in life in a country where religion is used as a weapon to create turmoil and nonviolence transformative constitutionalism plays a huge role in it only with the transformation of the constitution and removing the taboo from the roots is left as a solution. Whenever there is a change or amendment in the constitution which should welcome that with open arms because these amendments are important because they protect some of our most important freedoms. It is also necessary because a change in constitution made by the supreme legislative body in the country is known as constitutional amendments.

Influence of the government's affidavit on SC verdict- Consecutive Kerala governments led by UDF and LDF in alternate terms did not stick to one stand, but kept shifting sides in the affidavits it submitted to the apex court. This was also noted by the five-judge bench. But, in November 2016, in the final affidavit, the Pinarayi Vijayan-led government said that it favoured the entry of women of all ages into the temple. When the Constitution is interpreted, there is no role of the government or the parties involved in the case. What is relevant are facts. What the court looked at was if the entry falls under what is written in the Constitution. It is a fundamental right too; only a minority is opposing it. The Constitution can't be interpreted as per people's emotions".¹²

The only conclusion derived from the award declares that constitutional transformation is as important as water is important for fishes without the existence of transformation constitution will become stagnant and thus leading to the stoppage of a country's development in the world competition. Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy."¹³

A country should show its development in many aspects such as technology, army health, education extra, but also with that the development of the Constitution is as important as the others because constitution is considered to be the soul of the nation which should be protected

¹¹Women quietly visit Sabarimala, 'purification' & protest follow Disney Tom | TNN | Jan 3, 2019

¹² The political impact of Sabarimala verdict: How will parties use the judgement? Saritha S Balan.Tuesday, October 02, 2018

¹³ Transformative Constitutionalism: Indian Supreme Court Upholds Constitutional Morality by Reading Down Section 377. Ajita Banerjee 28th September 2018

and the principles should be considered the binding rules of the nation. Moreover for the development of a country is a whole development of women in the society is as important as the sound to be -It is impossible to think about the welfare of the world unless the condition of women is improved. It is impossible for a bird to fly on only one wing.” — Swami Vivekananda.
