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Gender Justice and Transformative Constitutionalism: Reconstructing Equality Under Indian Constitution

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Abstract

Gender justice in India has evolved from a formal commitment to equality towards a more substantive and transformative understanding of constitutional rights. Despite the constitutional guarantee of equality and special protections for women and marginalized communities, deeply entrenched patriarchal structures continue to produce discrimination, exclusion, violence, and unequal access to education, employment, and social opportunities. These challenges demonstrate that constitutional guarantees alone are insufficient unless they are interpreted and implemented through an approach capable of transforming unequal social structures. In this context, **Transformative Constitutionalism** provides a significant framework for reconstructing equality under the Indian Constitution.

This chapter examines the role of transformative constitutionalism in advancing gender justice by understanding the Constitution as a dynamic instrument for dismantling structural inequalities rather than merely preserving existing social arrangements. It traces the development of gender justice through two broad constitutional phases. The first, from the 1970s to the 1990s, primarily emphasized formal equality and non-discrimination in areas such as employment, service conditions, and property rights.

The chapter analyses landmark Supreme Court decisions concerning gender equality, autonomy, dignity, privacy, sexual orientation, and gender identity, and evaluates the increasing significance of constitutional morality in challenging discriminatory practices sustained by social morality. It argues that transformative judicial interpretation has played a crucial role in expanding the meaning of equality and protecting the rights of women and sexual and gender minorities. At the same time, the chapter identifies continuing gaps between constitutional ideals and social realities, particularly in relation to gender-based violence, economic inequality, institutional discrimination, and intersectional marginalization.

The chapter ultimately contends that achieving meaningful gender justice requires a sustained constitutional transformation through judicial interpretation, legislative action, institutional reform, and social change. Transformative constitutionalism can thereby serve as a bridge between formal equality and substantive justice, reconstructing equality as a lived constitutional value grounded in dignity, autonomy, inclusion, and equal citizenship.

Keywords: Gender Justice, Indian Constitution, Constitutional Morality, Substantive Equality, Gender Equality, Fundamental rights.

1. Introduction

Gender justice in India has evolved significantly from a narrow understanding of formal equality towards a broader conception of substantive, inclusive, and transformative equality. In the early decades of constitutional governance, Articles 14 and 15 of the Indian Constitution were primarily interpreted as safeguards against explicit discrimination, particularly in matters of employment, public participation, property, and personal status. Although these provisions established an essential foundation for equality, they did not always address the deeper patriarchal, social, and institutional structures responsible for continuing gender-based disadvantage.¹

The contemporary constitutional discourse marks a significant shift in this approach through the emergence of **Transformative Constitutionalism**. It conceives the Constitution not merely as a framework for limiting State power but as a dynamic instrument for dismantling entrenched hierarchies and transforming unequal social relations. Principles such as constitutional morality, dignity, autonomy, privacy, liberty, and substantive equality have increasingly guided judicial interpretation and enabled courts to challenge discriminatory practices sustained by social morality and tradition.²

Indian gender jurisprudence reflects this transformation. Judicial decisions have progressively recognized women's rights relating to property and inheritance, equal employment opportunities, workplace dignity, reproductive autonomy, maternity benefits, marriage, and freedom of choice. The constitutional understanding of gender justice has simultaneously expanded to include sexual and gender minorities. *National Legal Services Authority v. Union of India*³ recognized the right of transgender persons to gender identity, while *Justice K.S. Puttaswamy v. Union of India*⁴ affirmed privacy, dignity, and sexual orientation as essential components of individual identity. In *Navtej Singh Johar v. Union of India*,⁵ the Supreme Court further strengthened sexual autonomy and equality by decriminalizing consensual same-sex relations.

These developments may be described as “**Gender Justice**” where equality is no longer confined to identical treatment but addresses subordination, stereotyping, exclusion, and structural discrimination. This chapter examines the role of transformative constitutionalism in reconstructing equality under the Indian Constitution and evaluates how judicial interpretation, constitutional morality, and legislative reform can advance gender justice. It argues that meaningful equality requires an intersectional and rights-based approach capable of converting constitutional guarantees into lived realities of dignity, autonomy, inclusion, and equal citizenship.

2. Constitutional Framework OF Gender Justice

The Indian Constitution establishes a comprehensive normative framework for advancing gender justice, equality, and human dignity. Its commitment extends beyond the prohibition of overt discrimination and seeks to create conditions in which women and gender minorities can enjoy substantive equality and meaningful participation in social, economic, and political life. However, persistent patriarchal structures, systemic discrimination, and gender-based violence continue to challenge the effective realization of these constitutional guarantees.

The foundation of gender justice lies primarily in Articles 14, 15, and 16, which collectively guarantee equality before law, prohibit discrimination on grounds including sex, and ensure equality of opportunity in public employment. Article 15(3) enables the State to adopt special measures for women and children, thereby recognizing that treating historically disadvantaged groups equally may require affirmative protection. These provisions provide the constitutional basis for moving from formal equality towards substantive equality.⁶

Article 21, guaranteeing the right to life and personal liberty, has assumed central importance in contemporary gender jurisprudence. Through expansive judicial interpretation, the Supreme Court has incorporated within Article 21 the rights to dignity, privacy, bodily integrity, reproductive autonomy, decisional freedom, and personal choice. This interpretation has enabled constitutional protection to

¹ Constitution of India

² GENDER JUSTICE THROUGH THE LENS OF TRANSFORMATIVE CONSTITUTIONALISM: THE ROLE OF INDIAN CONSTITUTION Indian Journal of Law and Legal Research Volume VI Issue II | ISSN: 2582-8878

³ (2014) 5 SCC438.

⁴ (2017) 10 SCC 1.

⁵ (2018) 10 SCC 1.

⁶ Constitution of India

extend into areas traditionally governed by social conventions and private relationships.

The Directive Principles of State Policy further strengthen this framework. Articles 39(a) and 39(d) promote adequate means of livelihood and equal pay for equal work, while Article 42 requires the State to secure just and humane conditions of work and maternity relief. Similarly, Article 51A(e) imposes a fundamental duty to renounce practices derogatory to the dignity of women. Together, these provisions demonstrate that gender justice is embedded in the constitutional structure and requires a transformative approach that converts formal guarantees into substantive equality, dignity, autonomy, and equal citizenship.⁷

3. Transformative Constitutionalism: An Evolving Concept

Transformative Constitutionalism represents an evolving understanding of the Constitution as an instrument for achieving profound social, political, and legal transformation. The concept is commonly associated with South African constitutional scholarship, particularly the work of Karl Klare, who described transformative constitutionalism as a long-term project aimed at democratically restructuring institutions and social relations shaped by historical inequality. In India, constitutional courts have increasingly adopted this approach to interpret fundamental rights in a manner that advances dignity, liberty, equality, and substantive justice.⁸

A central feature of transformative constitutionalism is the distinction between constitutional morality and prevailing social morality. While social morality may reflect entrenched traditions, customs, and majoritarian preferences, constitutional morality derives from the values and guarantees embedded in the Constitution. In *Navtej Singh Johar v. Union of India* (2018)⁹, the Supreme Court emphasized that the Constitution is transformative because it enables society to move beyond practices and traditions that conflict with constitutional values.

Transformative constitutionalism has particular significance for gender justice. First, it replaces

majoritarian morality with constitutional principles such as dignity, autonomy, equality, and individual freedom. Second, it advances substantive equality, recognizing that apparently neutral laws may perpetuate historical disadvantage and structural discrimination. Third, it treats constitutional rights as dynamic guarantees capable of responding to changing social realities.¹⁰

Thus, transformative constitutionalism enables courts to challenge patriarchal norms, protect bodily and sexual autonomy, recognize diverse gender identities, and expand equal citizenship. It seeks not merely to prohibit discrimination but to reconstruct social relationships and institutions so that constitutional equality becomes a lived reality.

4. Judicial Transformation and the Expanding Dimensions of Gender Justice

The Indian Supreme Court has played a central role in transforming the constitutional understanding of gender justice. The judicial approach has gradually moved from a narrow conception of formal non-discrimination towards substantive equality, dignity, autonomy, privacy, and intersectional justice. This transformation reflects the understanding that constitutional rights cannot remain confined to abstract guarantees but must address social structures and practices that perpetuate gender-based disadvantage.

4.1 Privacy and Autonomy as the New Constitutional Foundation

The decision in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017)¹¹ marked a significant turning point in constitutional jurisprudence. The nine-judge Bench recognized privacy as a fundamental right intrinsic to life and personal liberty under Article 21. Importantly, privacy was understood not merely as freedom from physical intrusion but as encompassing decisional autonomy, bodily integrity, sexual orientation, reproductive choices, and personal identity.

The judgment provided an important conceptual foundation for subsequent gender-rights cases. It established that intimate decisions concerning one's body and identity cannot ordinarily be subjected to majoritarian preferences. Consequently, contemporary

⁷ Constitution of India

⁸ Karl E. Klare, "Legal Culture and Transformative Constitutionalism", 14 South African Journal on Human Rights 146 (1998).

⁹ (2018) 10 SCC 1.

¹⁰ GENDER JUSTICE 2.0: TRANSFORMATIVE CONSTITUTIONALISM IN THE CHANGING INDIA, INTERNATIONAL JOURNAL OF ECONOMIC SOCIAL SCIENCE AND MANAGEMENT LAW, VOL.7, NO.2 (2026)

¹¹ (2017) 10 SCC 1.

gender jurisprudence increasingly places the individual, rather than social convention, at the centre of constitutional protection.

4.2 Decriminalising Identity and Intimacy

The judgment in *Navtej Singh Johar v. Union of India* (2018)¹² represents a landmark development in the constitutional protection of sexual autonomy. The Supreme Court read down Section 377 of the Indian Penal Code insofar as it criminalised consensual sexual relations between adults. The Court emphasized that sexual orientation is an intrinsic component of identity and is protected through Articles 14, 15, 19, and 21. Similarly, *Joseph Shine v. Union of India* (2018)¹³ invalidated the offence of adultery under Section 497 IPC. The Court found that the provision was based upon patriarchal assumptions that treated a married woman as the property of her husband and denied her independent sexual agency.

Both decisions demonstrate a significant methodological shift. The constitutional concern was not simply whether men and women were treated differently, but whether law itself reproduced patriarchal control over sexuality, intimacy, and individual choice. Transformative constitutionalism thus becomes a means of dismantling legal structures founded upon stereotypes and unequal power relationships.

4.3 Equality, Religion and Personal Law

Gender justice has also required constitutional courts to examine discriminatory practices arising within religious and personal-law structures. In *Shayara Bano v. Union of India* (2017)¹⁴, the Supreme Court invalidated the practice of instantaneous triple talaq, with the majority finding the practice constitutionally impermissible. The decision reinforced the principle that personal-law practices affecting fundamental rights cannot remain entirely beyond constitutional scrutiny.

The litigation concerning women's entry into the Sabarimala temple in *Indian Young Lawyers Association v. State of Kerala*¹⁵ further illustrates the complex relationship between gender equality, religious freedom, and constitutional morality. The majority judgment found the exclusion of women of menstruating age inconsistent with constitutional guarantees. The controversy subsequently became the

subject of proceedings before a larger Bench, demonstrating that transformative constitutionalism may encounter difficult questions concerning religious autonomy and institutional limits.

These cases illustrate that gender justice requires a delicate constitutional balance between collective religious freedoms and the individual rights to equality, dignity, and non-discrimination.

4.4 Reproductive Autonomy and the Right to Choose

Reproductive autonomy represents one of the most significant dimensions of contemporary gender justice. In *Suchita Srivastava v. Chandigarh Administration* (2009)¹⁶, the Supreme Court recognized a woman's right to make reproductive choices as an important aspect of personal liberty, bodily integrity, and privacy.

The principle was further developed in *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* (2022).¹⁷ The Court rejected an interpretation of the Medical Termination of Pregnancy framework that would have created an unjustified distinction between married and unmarried women. It recognized that reproductive autonomy cannot depend upon marital status and that constitutional dignity protects a woman's authority over her reproductive life.

The Court's approach reflects a transition from viewing women primarily as objects of protection towards recognizing them as autonomous constitutional agents capable of making decisions concerning their bodies, health, sexuality, and reproductive lives.

¹² (2018) 10 SCC 1

¹³ (2018) 2 SCC 189

¹⁴ 2017 9 SCC 1 (SC)

¹⁵ (2019) 11 SCC 1

¹⁶ (2009) 9 SCC 1.

¹⁷ (2022) SCC OnLine SC 132

4.5 Transgender Personhood and Gender Identity

The transformation of gender jurisprudence is incomplete without recognizing the constitutional rights of transgender persons. In *National Legal Services Authority v. Union of India* (2014)¹⁸, the Supreme Court recognized transgender persons as a distinct constitutional category and affirmed their right to self-identify their gender. The Court grounded this recognition in Articles 14, 15, 16, 19, and 21 and emphasized that gender identity is integral to dignity and personhood.

The significance of *NALSA* lies in its movement beyond a binary understanding of gender. The judgment recognized that constitutional equality must extend to persons whose identities do not conform to conventional male-female classifications. It also emphasized affirmative measures and social-welfare protections for transgender persons.

Subsequent litigation has increasingly focused on converting recognition into effective substantive equality, including access to education, employment, healthcare, public spaces, and social security. The contemporary challenge is therefore not merely recognition of identity but the removal of structural barriers that prevent transgender persons from participating equally in society.

4.6 Marriage Equality and the Institutional Limits of Transformation

The decision in *Supriyo @ Supriya Chakraborty v. Union of India* (2023)¹⁹ demonstrates the institutional limitations of transformative constitutionalism. The Supreme Court declined to judicially create a fundamental right to marry for same-sex couples or substantially modify the Special Marriage Act, 1954 through interpretation. The Court considered such changes to involve significant legislative policy choices.

The judgment is important because transformative constitutionalism does not necessarily imply unlimited judicial power. It demonstrates the tension between constitutional aspirations and institutional competence. While the judiciary has been willing to invalidate laws criminalising consensual intimacy and discriminatory practices, it has also recognized circumstances in which legislative intervention may be necessary to restructure an entire statutory regime.

Thus, *Supriyo* highlights an important boundary of Gender Justice 2.0: constitutional transformation must operate within the institutional architecture of separation of powers while continuing to protect fundamental rights.

4.7 Workplace Equality and the Rejection of Gender Stereotypes

The judicial development of workplace equality demonstrates another important dimension of transformative constitutionalism. In *Vishaka v. State of Rajasthan* (1997)²⁰, the Supreme Court recognized sexual harassment at the workplace as a violation of women's fundamental rights to equality, dignity, and life. In the absence of specific legislation, the Court formulated guidelines for prevention and redressal of workplace sexual harassment, which subsequently contributed to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

In *Anuj Garg v. Hotel Association of India* (2008)²¹, the Court rejected a statutory restriction that prevented women from working in establishments serving alcohol. The Court cautioned against paternalistic forms of protection that exclude women from employment opportunities in the name of safety.

Similarly, in *Secretary, Ministry of Defence v. Babita Puniya* (2020)²², the Supreme Court directed that women officers in the Army be considered for Permanent Commission. The Court rejected arguments based upon assumptions regarding women's physical characteristics, family responsibilities, and societal expectations. These decisions demonstrate that substantive equality requires the law to challenge, rather than reproduce, gender stereotypes.

4.8 Intersectionality: Caste, Disability, Class and Gender

Contemporary gender jurisprudence increasingly recognizes that discrimination does not operate along a single axis. Women may experience gender-based disadvantage simultaneously with discrimination based on caste, disability, class, religion, sexuality, or other social identities. This is the principle of intersectionality.

In *Patan Jamal Vali v. State of Andhra Pradesh* (2021)²³, the Supreme Court highlighted the compounded vulnerability experienced by a woman

¹⁸ (2014) 5 SCC438.

¹⁹ 2023 INSC 920

²⁰ AIR 1997 SC 3011.

²¹ (2008) 3 SCC

²² (2020) 7 SCC 469

²³ (2021) 16 SCC 225

who was simultaneously disadvantaged by her gender, caste, and visual disability. The judgment emphasized the importance of understanding discrimination through overlapping structures of disadvantage.

An intersectional approach is essential for reconstructing equality because the category of “woman” is not socially homogeneous. The experiences of a Dalit woman, a woman with disability, a transgender person, a queer woman, or a woman belonging to an economically marginalized community may differ substantially. Gender justice must therefore address the multiple and intersecting forms of exclusion experienced by individuals.

4.9 Affirmative Action and Substantive Equality for Transgender Persons

The recognition of transgender identity in *NALSA*²⁴ has increasingly generated questions concerning affirmative action and material equality. Constitutional recognition alone cannot ensure equality where transgender persons continue to face educational exclusion, unemployment, homelessness, poverty, and social stigma.

Recent litigation concerning transgender reservation and access to public employment reflects a broader movement from symbolic recognition towards substantive inclusion. The constitutional objective is not merely to recognize transgender persons as equal citizens but also to create conditions that enable them to exercise that equality in practice.

Horizontal reservation, where appropriately designed, may address structural disadvantage while ensuring that transgender persons receive meaningful access to opportunities across existing social categories. Such measures illustrate the transformative principle that equality may require positive State intervention rather than merely the removal of discriminatory laws.

4.10 The Unfinished Agenda: Marital Rape

Despite significant developments, gender justice under the Indian Constitution remains incomplete. The issue of the **marital rape exception** illustrates one of the most contested areas of contemporary gender jurisprudence. The former Section 375, Exception 2, of the Indian Penal Code excluded certain sexual acts by a husband against his wife from the definition of rape. The Bharatiya Nyaya Sanhita, 2023 retains a marital

exception in its rape provision, subject to the statutory age-related qualification.²⁵

In *Independent Thought v. Union of India* (2017)²⁶, the Supreme Court removed the protection of the marital exception where the wife was below eighteen years of age. However, the position concerning adult married women remains constitutionally contested.

The debate raises fundamental questions concerning bodily autonomy, consent, dignity, equality, and the constitutional limits of marriage-based exemptions. It also demonstrates the tension between transformative constitutionalism and legislative policy. The issue remains a significant test of whether constitutional protection of sexual autonomy will extend consistently to married women.

4.11 Gender Justice and the Transformative Role of the Judiciary

The evolution of Indian gender jurisprudence demonstrates that judicial interpretation has frequently operated as a catalyst for constitutional transformation. From *Vishaka Case* and *Anuj Garg* to *NALSA*, *Puttaswamy case*, *Navtej Singh Johar*, *Joseph Shine*, and *X v. Principal Secretary*, the Supreme Court has progressively expanded the meaning of equality and dignity.

The trajectory, however, is neither linear nor uniform. Some judgments have significantly expanded individual autonomy, while others have emphasized procedural requirements, legislative competence, or institutional limitations. This indicates that transformative constitutionalism is not synonymous with judicial activism; rather, it is a continuing interpretive engagement with the constitutional values of equality, liberty, dignity, fraternity, and justice.

5. Conclusion

The evolution of gender justice under the Indian Constitution demonstrates a significant transition from formal equality towards substantive, inclusive, and transformative equality. The constitutional guarantees contained in Articles 14, 15, 16, and 21, supported by the Directive Principles and Fundamental Duties, provide a strong normative foundation for dismantling gender-based discrimination. However, the persistence of patriarchal structures, social stereotypes, violence, and institutional exclusion reveals that formal

²⁴ (2014) 5 SCC438.

²⁵ Section 63, Bharatiya Nyaya Sanhita, 2023

²⁶ AIR 2017 SC 4904

constitutional guarantees alone cannot ensure genuine equality.

In this context, Transformative Constitutionalism offers a powerful framework for reconstructing equality as a lived constitutional value. It enables constitutional interpretation to move beyond existing social arrangements and challenge practices that undermine dignity, autonomy, liberty, and equal citizenship. The Supreme Court's jurisprudence in *Vishaka*, *NALSA*, *Puttaswamy*, *Navtej Singh Johar*, *Joseph Shine*, *Babita Puniya*, and *X v. Principal Secretary* demonstrates how constitutional morality can be used to confront patriarchal assumptions, protect bodily and sexual autonomy, recognize diverse gender identities, and expand the meaning of substantive equality.

The emergence of Gender Justice represents an important stage in this constitutional journey. Equality is no longer understood merely as identical treatment between men and women; it increasingly addresses structural disadvantage, stereotyping, exclusion, intersectionality, and the lived experiences of women, transgender persons, and sexual minorities. The recognition of intersectional discrimination further demonstrates that gender cannot be examined independently of caste, disability, class, sexuality, and other dimensions of social disadvantage.

Nevertheless, transformative constitutionalism remains an unfinished project. Questions surrounding marital rape, effective implementation of transgender rights, workplace equality, reproductive autonomy, and access to education and employment reveal continuing gaps between constitutional promise and social reality. The decision in *Supriyo* also demonstrates that constitutional transformation must operate within institutional boundaries and respect the distinction between judicial interpretation and legislative policy.

Ultimately, gender justice requires more than the recognition of rights; it requires the transformation of the structures that prevent their meaningful exercise. Transformative constitutionalism can bridge the gap between constitutional ideals and lived realities by combining judicial interpretation, legislative reform, institutional accountability, affirmative measures, and social change. Reconstructing equality under the Indian Constitution therefore means creating an inclusive constitutional order in which dignity, autonomy, liberty, and equal citizenship are available to every individual, irrespective of gender identity or social location.

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