

Transformative Constitutionalism and Rights of Homosexuals in India and South Africa: A Comparative Study

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Abstract

Vulnerable sections of society are discriminated mercilessly by the mainstream and there are number of flaws in the existing laws as well. Homosexuals are vulnerable and discriminated around the globe, though number of countries have dismantled discriminatory laws and against the concept of basic human values and rights, but some of the countries still having that attitude and no specific provisions to protect sexual minorities from the scourge of discrimination. The present paper analyses the concept of transformative constitutionalism in respect to protect the rights of homosexuals in India and South Africa. The philosophy of transformative constitutionalism can be traced from the South African constitutional system significantly in case of rights of sexual minorities. Both, India and South Africa were British Colonies, full of inequities in the society which needed to be remedied in post-colonial era. The paper analyses question how far transformative constitutionalism has successfully played role in realizing rights of homosexuals in India and South Africa? This paper provides an insight into role of judicial system in both countries to progressively realize rights of homosexuals through transformative constitutionalism.

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Introduction

Vulnerable sections of society are discriminated mercilessly by the mainstream and there are number of flaws in the existing laws as well. Homosexuals are vulnerable and discriminated around the globe, though number of countries have dismantled discriminatory laws and against the concept of basic human values and rights, but some of the countries still having that attitude and no specific provisions to protect sexual minorities from the scourge of discrimination. The present paper analyses the concept of transformative constitutionalism in respect to protect the rights of homosexuals in India and South Africa. The philosophy of transformative constitutionalism can be traced from the South African constitutional system significantly in case of rights of sexual minorities.

Both, India and South Africa were British Colonies, full of inequities in the society which needed to be remedied in post-colonial era. Homosexuality was criminalized in both of the countries. India adopted its constitution in 1950¹ and South Africa adopted its constitution in 1996.² South Africa was first country of the world which has enumerated “sexual orientation” as ground of discrimination and protected sexual minorities from scourge of discrimination by the mainstream, whereas the apex court decriminalized homosexuality recently in 2017 in its significant judgment of *Navtez Singh Johar v. Union of India*. The paper analyses question how far transformative constitutionalism has successfully played role in realizing rights of homosexuals in India and South Africa? Part II of the paper will analyze the concept of transformative constitutionalism and its need to accommodate unequal sections of society such as homosexuals. Part III will analyze the transformative constitutionalism and homosexual rights in South Africa and role of constitutional courts in adjudication of these rights. Part IV will provide an insight of role of transformative constitutionalism and interpretation of constitution to accommodate

¹ The Constitution of India, 1950.

² The Constitution of Republic of South Africa, 1996

homosexuals' rights in India through judicial activism of higher courts. Part V will provide conclusion on the basis of above-mentioned discussion.

Transformative Constitutionalism: Meaning and Concept

The constitution does not only lay down the structure of government, its organs, their powers and interrelationship between them. It also embodies the ideals, aspirations and the values to which the people have committed themselves. It depicts the soul of the nation and people's supreme will. That is why the constitution is considered as living and organic document which shapes the democracy. A nation may have a constitution but it is not essential may have constitutionalism. Prof Upendra Baxi states about constitutionalism as:

“Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual/associational autonomy. Constitutionalism provides narratives of both rule and resistance.”³

The Constitution confers powers on various organs of the Government, but there ought to be restraints on those powers. Constitutionalism is a concept that restraints on the powers of the government so there should not be any arbitrary use of its powers. According to Louis Henkin, constitutionalism constitutes of independence of judiciary, separation of powers, rule of law, supremacy of law, judicial review, democratic government, fundamental rights, controlling of the police, sovereignty of the people and individual

³ 540 HENRY SCHWARZ AND SANGEETA RAY (EDS), A COMPANION OF POSTCOLONIAL STUDIES (Blackwell Publishing, 2000).

freedom.⁴ Elements of constitutionalism signified by Louis Henkin can be divided into two categories one concerns with power concerns and power lodging and other deals with protection of protection of rights. this paper will focus more on protection of rights of sexual minorities in South Africa and India through transformative process. Professor McIlwain defines constitutional as follows, the constitutionalism has very significant element that is legal restraint on the government. It is anti-thesis of arbitrary law and opposes despotic rule, the government o will instead of law.⁵ Dr D D Basu says that constitutionalism necessitates the control over exercise of governmental powers so those powers should not destroy democratic principles on which it is based. These principles include protection of fundamental rights through principles of checks and balance and rule of law. Judiciary must interpret the constitution in such a way so parliament would not wish to legislate contrary to fundamental rights.⁶ Dr Basu Further states, “*Constitutionalism is about limits and aspirations. The Constitution embodies aspiration to social justice, brotherhood, and human dignity. It is a text which contains fundamental principles. ...The tradition of written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution. The Constitution is a living heritage and, therefore, you cannot destroy its identity.*”⁷

Constitutionalism not only aspires to fulfil its objectives enshrined in the same, rather it accommodates the changing social needs through process of social transformation. The concept of transformative constitutionalism, therefore, is very significant to be illustrated and defined to understand the role of transformative constitutionalism in protection of rights of sexual minorities.

⁴ MICHEL ROSENFELD (EDS), CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY-THEORETICAL PERSPECTIVE, 41-42 (Duke University Press, 1994).

⁵ CHARLES MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN, 21-22 (The Lawbook Exchange, 2005).

⁶ D.D. BASU, SHORTER CONSTITUTION OF INDIA, 115-16 (Justice A.R. Lakshamanan, Justice Bhagabati Prosad Banerjee & V.R. Manohar, 14th ed., 2009).

⁷ *Id.*

The term ‘transformative constitutionalism’ was coined by prof. Karl Klare, describing it 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.*”⁸

The Epilogue of the Constitution of Republic of South Africa provides that constitutionalism is a bridge between historic injustice, strife and conflict on the one side and establishment of democratic setup based principle of equality of rights for all South African people irrespective of class, race, belief or sex.⁹

The concept of transformative constitutionalism considers constitution as process of evolution which evolves overtime without any formal amendments to accommodate changing social norms and bring social equality especially substantive equality. Transformative Constitutionalism envisages a mechanism to bring in social change from an unjust past to a democratic future using the Constitution as a tool to achieve this objective. The process of transformative constitutionalism has always been fulfilled by judges of constitutional courts interpreting it as living and organic document through judicial activism. Both the Constitution of India and the Constitution of South Africa contain elements of transformative constitutionalism. The Constitution of India, contains elements but do not use the expression of transformative constitution anywhere in its text whereas the Constitution of South Africa specifically mentions transformative process in its 1993 version, though later the constitution has been replaced with 1996.

South Africa: Transformative Constitutionalism and Rights of homosexuals

South Africa adopted its Constitution in 1996 where it has declared itself as “a society based on democratic values, social justice

⁸ Karl Klare, “*Legal Culture and Transformative Constitutionalism*”, 14 S. AFR. J. HUM. RTS. 146,

⁹ The Constitution of Republic of South Africa, 1993. (Act of 200 of 1993) which has been replaced by the Constitution of South Africa, 1996.

and fundamental human right”, with express mission of “improve the quality of life of all citizens and free the potential of each person.” Substantive justice is goal of the constitution makers. South Africa has been striving to transform itself vigorously protecting civil and political rights and also addresses fundamental elements of justice as well. The constitution has expensively relied on principles of dignity and equality and trying to bring social equality without any kind of discrimination.¹⁰ The South African Constitution mainly focus on transformation of historical injustice to equality and justice through democratic process. The substantive equality demands change in the entire state structure from redistribution of power to resources following in line with egalitarian system. The equality can be achieved in transformative process only by eliminating systematic discrimination based on the unequal grounds of color, race, religion caste and gender prevalent in the society. transformative constitutionalism requires the development should give opportunities to all peoples to realize their full potential.¹¹ Transformation is a social and economic revolution, which requires to eliminate inequality in the society.

South African society having great disparities among the people. People live in deplorable condition and poverty. There is huge unemployment, inadequate social security, inadequate food and water and so on. The constitution has been adopted to transform disparity ridden society to human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹² The social justice has enumerated in the preamble and it is duty of the state to provide all social benefits to disadvantaged communities so that bring social equality ion the society.

¹⁰ Eric C Christiansen, “*Transformative Constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice*”¹³ “*Journal Of Gender, Race And Justice*” (2010).

¹¹Albertyn & Goldblatt “*Facing the Challenge of Transformation: Difficulties in the Development of an indigenous Jurisprudence of Equality*” 1998 14 SAJHR 248.

¹² Soobramoney v. Minister of Health, 1998 (1) SA 765 (CC).

Substantive justice and equality in case of LGBTI community is very significant. South African Constitution is the first constitution of the world which has addressed sexual orientation as ground of discrimination and protection enhanced to sexual minorities legally.¹³

Transformation is not only required in field of social benefits, rather sexual minorities are discriminated around the globe and to consider sexual minorities equal to mainstream transformation of society is need of the hour. The constitutional court has dealt with various matters related to equality of gays and lesbians. There are various cases decided by the constitutional court to implement principle of equality and conferring social benefits to gays and lesbians. These decisions have been analysed as follows:

*The National Coalition for Gay and Lesbian Equality v. the Minister of Justice*¹⁴ was the first case came before the constitutional court of South Africa, where it has decriminalized consensual same sex activities between adult gay men. Justice Ackerman considering the nature of sodomy laws held that these laws are against the equality, dignity and privacy as enumerated in the Constitution of South Africa. The consideration of human beings lesser than a human just because of their relation to a particular group violates the principle of equality. These institutionalized practices make their lives undignified and they are excluded from the mainstream of the society. Justice Sachs in his concurring opinion stated, “Although the Constitution itself cannot destroy homophobic prejudice it can require the elimination of public institutions which are based on and perpetuate such prejudice. From today a section of the community can feel the equal concern and regard of the Constitution and enjoy lives less threatened, less lonely and more dignified. The law catches up with an evolving social reality.”¹⁵

For transformation of society from equality perspective it is required not to confuse equality with uniformity because uniformity is

¹³ The Constitution of South Africa, 1996, s. 9(3).

¹⁴ (1998) ZACC 15.

¹⁵ *Id.*, at para 130.

enemy of the equality. Equality means equal concern and respect for difference. Equality does not mean elimination of differences rather to accept those differences and by giving regard to the people with their self. There cannot be homogenization of behaviour, rather considering everybody's self as worthy.¹⁶ In the 1999 *National Coalition of Gay and Lesbian Equality (Immigration case)*,¹⁷ the Court ruled that the equality protections required that a —partner, in a permanent same-sex life partnership be entitled to treatment equal to that of a married heterosexual spouse for the purposes of immigration law. The court invoked the comparative jurisprudence to decriminalize homosexuality and said that these criminal prescriptions are against a political minority, that is unable to rely on political power to secure welfare legislation.¹⁸

In *Satchwell v President of the Republic of South Africa & Another*¹⁹ the Court dismantled the practices and discrimination arising in social benefits in employment and post-employment to same sex couples. The court said that provisions of the Judges' Remuneration and Conditions of Employment Act, 1989²⁰ especially sections 8 and 9 are violative of the principle of equality as contained in section 9 of the Constitution. The Act just confers the benefits to heterosexual spouses not to permanent same sex couples who are supporting each other. The court said these provisions protects spouses narrowly and discriminatory in nature.

In another case regarding adoption of children by gay couples, *Du Toit & Another v Minister of Welfare and Population Dev. & Others*²¹ there was conflict of adopting second child by a gay parent was prohibited. The court held that denial of second-parent adoption rights to gay couples was a violation of their constitutional rights to equality and

¹⁶ *Id.*, para132.

¹⁷ 1999 (2) SA 1 (CC).

¹⁸ *Id.*

¹⁹ (2002) 6 SA 1 (CC).

²⁰ (Act No. 88 of 1989).

²¹ 2003 (2) SA 198 (CC).

dignity in addition to being a violation of the “best interests of the child” standard required by the child welfare protections in the constitution.

In *Minister of Home Affairs and Another v. Fourie*²² the court throughout its jurisprudence for sexual minority freedom, by highlighting the importance of concepts such as dignity, equality and liberty. The court dismantled the stereotyped assumption of the society regarding same-sex marriage. The court considered that sexual orientation has explicitly been added as a ground of non-discrimination so lesbian and gays are entitled to the right to dignity and equality. The court considered that same-sex couples have equally right to establish a family as heterosexual couples have. It is not required to place them under the same act as heterosexuals marry, rather must be recognized alternatively.

The court said where the law fails to recognized same-sex relations, it indicates that same-sex persons are lacking in inherent humanity to found their families and same needs to be protected or respected. Rather failure serves an indication of perpetuating existing stereotyps and gender disparities. These prejudices are gross violation of their human dignity.²³

The capacity to choose life partner enhances individual liberty and personal autonomy. The court dismantled the traditional notion of marriage that is based on procreation of children, excluding all those couples which are somehow unable to procreate either because of physical issues or get married after certain age and unable to conceive.²⁴ The court considered another aspect of marriage law that is religious nature of marriage and accommodating same sex couples would violate somewhere freedom of religion and will be against the notion of faith and religious definition of marriage. The court held that extending marriage benefits to same sex couples would not violate fundamental religious freedom. The court held that the constitutional rights of same-sex couples cannot be ignored just by invoking faith of religious believers. Rather

²² 2006 (1) SA 524 (CC).

²³ *Id.*, para 15.

²⁴ *Id.*

both sets of rights can be accommodated under the principle of diversity.”²⁵

The court invoked comparative approach to realize rights of same-sex marriage including international human rights, and also invoked pluralistic aspect of marriage laws. Therefore, religious beliefs of some should not determine the rights of others, rather it must be able to accommodate diversity in unity, and eliminate the practices that reinforce unfair discrimination against marginalized sections of society.²⁶ the Fourie judgment led to legalization of same sex marriage and resulted into a legislation called the Civil Union Act, 2006²⁷. This Act does not repeal or modifies the Marriage Act, 1961, rather it gives choice to heterosexual couples whether to choose The Civil Union Act or the Marriage Act and enter into marriage, whereas homosexuals have choice to marry under the Civil Union Act only.

The constitutional courts in south Africa have interpreted the constitutional principles very pragmatically to realize rights of sexual minorities in South Africa. The court invoked the principles of equality, dignity and liberty to transform the society from unequal to equal. Same sex couples were discriminated because the marriage definition was traditional and confined to procreation purposes only. the court dismantled the definition of marriage and considered that religious tradition related to marriage cannot take right to marry from same sex persons away, rather accommodated another way through recognizing same-sex unions and conferred benefits to same sex couples which are available to heterosexual couples. The court has also allowed same sex married couples to adopt children with consideration of principle of best interest of the child. The transformative constitutionalism in South Africa has changed the lives of sexual minorities to such an extent they are able to enjoy free, equal and dignified life. The courts are striving to progressively realize rights of sexual minorities so that equal society can be established as envisioned by the constitution.

²⁵ *Id*, para 98.

²⁶ *Id*, para 136

²⁷ Act No. 17 of 2006.

Transformative Constitutionalism and Homosexual Rights in India

India was a colonial state and got independence in 1947, post-colonial development in the form of constitution has significant changes. The constitution of India not only striving to achieve social justice and bring equality in caste ridden society, rather there are number of other disparities and inequities in existence in the state that need to be eliminated. The Post-colonial India was requiring consciously to address various impending issues like illiteracy, poverty, untouchability and gender inequality.²⁸ Law is a primary source of social change. India has emphasized on the universal human rights and principles of equality and non-discrimination. Due to complex social structure, there are number of inequities are existing because of rituals, customs and other practices specially to suppress a specific gender.

Throughout the Constitution, the philosophy of strong and diversified society is visible based on ideals of equality, dignity, liberty and justice. These ideals have further been reinforced into part III and part IV which not only reflect the rights of the citizens but also duties of the state to protect its citizens and fulfil ideals enshrined in the preamble of the Constitution. Part III of the Constitution makes individual as autonomous, self-determining at the centre of the constitutional order by conferring civil and political rights like right to freedom of expression, personal liberty etc. Although, rights enshrined in the said part are not absolute in nature subjected to “reasonable restriction” for peaceful and harmonious society..²⁹

Article 14 of the constitution striving to achieving dual goal of equality and equity. It guarantees “equality before law” and “equal protection of laws”, former is somewhat negative concept whereas later is positive one. The principle of equality requires that state must

²⁸ 92-110 UPENDRA BAXI, *OUTLINE OF A ‘THEORY OF PRACTICE’ OF INDIAN CONSTITUTIONALISM* (Oxford University Press 2008).

²⁹ Dr. M P Chengappa and Vineeta Tekwani, “*An analysis of Transformative Constitutionalism with special reference to sexual minorities in India*”, 10(2) “*Indian Journal of Law and Justice*”, 162-178 (2019).

consider all as equal and all obligations and rights bestowed equally. Though there is concept of positive discrimination, which is required to uplift the non-equals in terms of social status. Article 14 of the constitution enunciates the general rule of equality. Article 15 and 16 are further elaboration of principle of non-discrimination and general equality.

Article 15 (1) contains grounds of discrimination as “*the state shall not discriminate against any citizen on the grounds of only religion, caste, sex, place of birth or any of them*”.³⁰ Clause (2) of article 15 further prohibits any discrimination or disability being imposed, with respect to access and enjoyment of public spaces and amenities, solely on the grounds mentioned, whereas clauses 3 and 4 of article 15 contain positive discrimination, clause 3 provides that state can create any laws for protection and welfare of women and children and clause 4 provides state can enact specific laws for the upliftment of socially and economically backward classes. These are exceptions to clause 1 and 2 of article 15. Article 16 provides equality of opportunity in case of public employment. Clause (2) of article 16 contains grounds of discrimination but also in clause 3 and 4 of the article signifies the positive discrimination and creates reservation for backward classes, SCs and STs.³¹ Article 17 prohibits untouchability and imposes obligation on the state to criminalize if there is violation of the article and untouchability is not confined to casteism merely, includes all types of untouchability that may be arising from gender, sex etc as pointed out in Sabrimala judgment.³²

Transformation of society into equal and modern society is possible only if all provisions are interpreted in modern sense including directive principles of state policy. Social status of people can be changed if all the social and economic rights are enhanced to them without any kind of discrimination. Article 38 contains provisions for social order and public welfare. Article 38(1) imposes an obligation on the state to

³⁰ The Constitution of India, Art 15(1).

³¹ *Id*, Article 16

³² *Id*, Art 17.

safeguard public welfare by creating a social order governed strongly by and in which “justice, social, economic and political, shall inform all the institutions of natural life”. Moreover, Article 38(2) specifically directs the State to focus its endeavours towards minimizing income inequalities as well as “inequalities in status, facilities, and opportunities”.³³ Article 39 (a) provides that state should treat men and women equal for livelihood and article 39 (d) provides everyone has the right to equal pay for equal work. For social equality it is also requires that state must strive to provide working and humane conditions. The discrimination based on sexual orientation has not been incorporated expressly in the constitution but has been interpreted and made inclusive as ground of discrimination.

Indian Judiciary and Sexual Minorities

The constitution of India is living and organic document that changes over time and adapts according to changing circumstances, and striving to establish substantive equality in the society. so far as sexual minorities are concerned, Indian society discriminates the LGBT persons on the basis of their orientation and also subject to violence and torture. The constitution envisions formal equality as well as substantive equality.³⁴ So far as the formal equality is concerned, it has been enumerated under Article 14 of the constitution but substantive equality is not visible especially in reference to sexual minorities. These substantive inequalities can be understood using what feminists refer to as the Substantive Model of Equality.

Parmanand Singh states that substantive model of equality not only takes formal equality into consideration, rather other in other areas such as social, economic, political inequalities are required to be ironed out. He further describes that how the substantive model of equality, by taking socio-economic and political factors into consideration not only emphasises like or unlike structures in which individuals are placed,

³³*Id*, Art 38.

³⁴ Catharine A. MacKinnon, “*sex equality under the constitution of India: problems, prospective and personal laws*” *International Journal of Constitutional law*” 4(2) April 2006 181-201.

rather takes “disadvantages” suffered by them in comparison to those who enjoyed the advantages conferred by the other individuals, and that creates the differences in society, like haves and have nots..³⁵ This view has further illustrated by Ratna Kapur and Cossman by saying that when formal equality becomes unable to accommodate substantive equality then substantive equality model requires “*eliminating individual, institutional or systematic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society*”..³⁶ The preamble, part III and IV aim at eradication of inequality and bring justice social, economic and political, which is only possible if these objectives and ends are interpreted liberally and broadly by the judicial system.

The feminists view the concept of equality that how historically it has been constructed and denoted “disadvantage”, having been the ground for ages worth of discrimination, subordination and social exclusion for women and other sexual minorities. It requires a radical change because social, political and economic equality has not been considered part of formal equality and specifically sexual minorities are kept away from this benefit..³⁷ LGBT community has suffered more loss because substantive criminal laws have taken their liberty away by way of criminalising homosexuality which was grave violation of sexual minorities rights.

It can be said that LGBT community has been considered as untouchable and socially excluded which is violation of articles 14 and 17 and definition of untouchability has been examined by the court not confined to mere caste and allied issues..³⁸ Judiciary has played very significant role in interpreting the constitution and realizing the rights of homosexuals which were under the criminal shadow.

³⁵ PARAMAND SINGH, EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA 45-47 (Deep and Deep Publications, 1982).

³⁶ RATNA KAPUR AND BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 20-35 (Sage Publications 1996).

³⁷ *Supra* note 29

³⁸ *Id.*

The Indian courts have started invoking the concept of transformative constitutionalism in its recent judgments such as *Joseph Shine v Union of India*³⁹ and *Navtej Singh Johar v. Union of India*,⁴⁰ former deals with decriminalization of adultery whereas later specifically deals with the research question in respect to decriminalization of homosexuality in India, though there are other judgments which impliedly invoked the principle of transformative constitutionalism but not expressly used the terms like *Naz Foundation case*⁴¹ and *NLSA judgment*⁴² respectively.

Apart from living and modern interpretation of the constitution, the court has invoked comparative jurisprudence.

The court in *Joseph Shine v Union of India*⁴³ transformative constitutionalism requires judiciary must choose progressive approach for interpretation of the law and a person cannot be just relegated to sexual property of another person as it was a case in the past. Criminalization of adultery which was a colonial law and has even repealed in England in 1960s, casts the society in colonial rule and violation of articles 14 and 21 of the Constitution. The court held “*This Court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.*”⁴⁴ Further the court considered that constitutional values like human dignity and equality must be able to accommodate liberal aspect of life and societal change, subordination of women under institution of marriage render them less equal. Social structure required to be changed, if two persons are unable to be happy in a relationship then social institutions and

³⁹ AIR 2018 SC 1676.

⁴⁰ 2018 (10) SCC 1.

⁴¹ *Naz Foundation v. NCT Delhi*, 160 Delhi Times Journal 277.

⁴² *NLSA V. Union of India*. 2014 (5) SCC 438.

⁴³ *Supra* note 39

⁴⁴ *Id*, para55

practices cannot supposed to consider women as an object to save the family prestige.

In, *Naz Foundation v. NCT Delhi*,⁴⁵ Delhi High Court, adopted comparative jurisprudence approach to decriminalize homosexuality. The court considered articles 14, 15, 19 and 21 of the constitution in such a way to realize personal autonomy of an individual. The court interpreted that section 377 of the Indian Penal Code is a colonial legislation and the same laws have been repealed in Britain itself, so why being an independent country, it should retain a colonial law which creates a class which is not rational and against the democratic constitutional values. Section 377 is violative of fundamental rights like privacy, dignity, liberty and autonomy which are inherent in an individual being a human person. The court considered that for testing a validity, constitutional morality is required not public morality and state has nothing to do with private sexual life of citizens. Drafters of the Constitution visualized free democratic state and adopted principle of constitutional morality. The court opined that:

*The fundamental rights are conferred on individuals without any discrimination to bring social revolution that will lead to establish socially egalitarian society where all citizens are free from any social or state coercion and personal liberty will not be confined to a few. Since, the constitution recognises the principle of diversity, the criminalization or stigmatization of same-sex orientation goes against the principle of constitutional morality.*⁴⁶

In, *NALSA V. Union of India*⁴⁷ the court stated that gender identity is an intrinsic facet of human life. “Gender identity refers to each person’s deeply felt internal and individual experience of gender, which

⁴⁵ *Supra* Note 41.

⁴⁶ *Id*, para 80.

⁴⁷ *Supra* Note 42.

may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category." The court referred the concept of living and organic character and constitution requires dynamic interpretation. It requires to identify the intricate and modern realities of life. The judiciary is guardian of the constitution and it must address and recognize issues of transgender community and protection of human rights in vibrant democratic setup.⁴⁸ The constitution contains both liberal and substantive democracy with rule of law as fundamental pillar. The constitutional morality is based on human dignity and equality of all persons. Rule of law requires protection of individual rights without any discrimination. The rule of law is social justice which is based on public order. The main purpose of law is to ensure proper social life. Although, social life is not a goal in itself but it permits an individual, as a means to live a dignified life and develop his personality. Substantive rule of law makes a balance between individual rights and social interests.⁴⁹ The court after considering all aspect of personal liberty and concept of individuality, recognized transgender as third gender and realized their rights. another significant judgment which is attribute of transformative constitutionalism for LGBT rights is *Navtez Singh Johar v. Union of India*⁵⁰ it is most significant judgment in rights of homosexuals in India, the apex court held that constitutional courts are fulfilling their obligations to act as *sentinel on qui vive* for protecting rights of all individuals irrespective of their sex, choice and sexual orientation. The court considered that equality is one of the significant goals to be achieved for egalitarian society and existence of inequalities on the basis of disabilities or sexual orientation become the biggest hindrance in the social and economic

⁴⁸ *Id.*

⁴⁹ *Id.*, para125.

⁵⁰ *Supra note 40.*

rights.⁵¹ The aim of equality is not to recognize individual dignity but also to ensure equal opportunity to develop one's personality according to his choice. The court considered section 377 is colonial in nature and colonial era had over, society has changed progressively, so keeping such legislation is itself violation of democratic principles of constitution and conscience of constitution. Choosing a life partner has been already signified the court in *Shafin Jahan v. K M Ashokan*⁵² the court also stated that state is obliged to accord the acceptance of individual choices. If the freedom of expression is curtailed by the state for the sake of social structures, will destroying the individualistic conception of personality. The social morality and values are not supposed to be placed above the constitutional morality. The personal liberty is both a human and constitutional rights. the freedom of choice cannot be deprived which is ingrained in the central position of fundamental rights.⁵³

The recognition of sexual orientation and interpretation of term "sex" in art. 15(1) inclusive of sexual orientation. In *Justice K. S Puttuswamy v. Union of India*,⁵⁴ nine Judges of Supreme Court assembled to determine the issues whether the right to privacy is constitutionally protected values or not. The court held *Life and personal liberty are inalienable rights. both of these rights cannot be separated from human dignity. Individual dignity, equality among the people and quest for liberty are founding stones of the constitution.*⁵⁵

Privacy is the constitutional core of human dignity. privacy has both a normative and descriptive function. Privacy includes the preservation of personal intimacies, the sanctity of family life, marriage sexual orientation etc. it denotes the right to be left alone.⁵⁶ It will impact

⁵¹ *Id.*, 101.

⁵² 2018 SCC 343.

⁵³ *Id.*

⁵⁴ 2017 (10) SCC 1.

⁵⁵ *Id.*, p. 261.

⁵⁶ Daniel J Solove, "Conceptualizing Privacy", California Law Review, Vol. 90 (4) (2002).

the interplay between Privacy and transparency and between Privacy and free speech; it will impact State surveillance, data collection, and data protection, LGBT rights, the legality of food banks, the legal framework for regulating artificial intelligence, as well as many other issues that we cannot now be foreseen or anticipated. For this reason, the judgment(s) deserve to be studied carefully, and debated rigorously.

The judgment of the Court adopted the three concepts of privacy as Robert Post “three concepts of privacy” where he relates to privacy to the creation of knowledge secondly privacy to dignity and thirdly privacy to freedom.⁵⁷ The Court discussed the concept of privacy as core of human personality and elaborated in terms of autonomy, human dignity especially from the perspective of sexual orientation. The Court observed that privacy is an integral part of right to life and personal liberty and considered that it must be extended to all human beings with discrimination on the basis of sexual orientation. The court also observed the scope of Art. 14, 15, 19, 21 of the Constitution in light of international human rights regime. The court considered that transformative process must consider all aspects of individuality to realize rights of homosexuals. If any aspect goes unconsidered then that later will become hinder in realizing their rights in equal terms to heterosexual couples.

Decriminalization of homosexuality has opened the door for homosexuals to get married, adopt children, and enjoy all other civil and political rights at par with heterosexual couples, though, these still will be challenges in courts for equality and confined legal definitions, but the transformative approach will further help them to realize their rights.

Conclusion

Transformative constitutionalism has brought significant changes in post-colonial India and South Africa especially in respect to realizing the rights of vulnerable communities and expanding jurisprudence of human rights especially of homosexuals. Transformative

⁵⁷ Robert C Post, “*Three Concept of Privacy*” Georgetown Law Journal , Vol. 89 (2001) PP. 2085-2098.

constitutionalism considers the changing social norms and behaviour of society and constitution itself adapts to changing norms. The South African constitution has added “sexual orientation” as ground of discrimination when it was enacted whereas Indian constitution inserted term “sex” which initially confined to binary gender norms and was interpreted so. But as society is changing the interpretation of constitution is becoming more dynamic and diverse and inclusive of vulnerable sections of society and considering all aspects of human sufferings. The apex court of India has interpreted the expression “sex” inclusive of sexual orientation and decriminalized homosexuality and made them free to enjoy their human rights which were somewhere under the shadow of criminal law. on the other hand, South African constitution which adopted recently, has introduced all those discriminatory grounds which were challenged before the courts around the globe especially sexual orientation. Courts of both of the countries are striving to progressively realize rights of homosexuals and establish an egalitarian society.