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Transformative Constitutionalism: Comparative Study of United States, India and South Africa

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ABSTRACT

The concept of transformative constitutionalism, which aims to promote principles of equality and dignity through enforcing rights that lead to social change, has become increasingly popular in the legal and political discourse of many countries. This article provides an analysis of how this approach is implemented in three different nations: the United States, India, and South Africa. However, each country faces unique challenges associated with their approach towards transformative constitutionalism, shaped by factors such as historical contexts, politics, and the law-making bodies at both the federal and state levels, and not just the courts. The paper examines these aspects along with judicial interpretations related to promoting transformational values within each jurisdiction. Through critical examination, including the review of relevant cases under close scrutiny, similarities and differences in the implementation efforts are noted over time spent studying them comparatively side-by-side, considering various provisions that are considered part-and-parcel thereof, including successes and limitations. Ultimately, it is important for scholars to actively collaborate in ongoing dialogue to keep idealistic goals alive despite setbacks faced while implementing policies that aim to deliver socio-economic justice.

Keywords: Transformative Constitutionalism, Comparative Study, US, India, South Africa.

I. INTRODUCTION

"Equality is the soul of liberty; there is, in fact, no liberty without it." - Frances Wright³

The term 'Transformative constitutionalism' has become prevalent in recent judgments of the Supreme Court of India. Interestingly, this term is not explicitly mentioned in the Indian Constitution or in the constitutions of most other jurisdictions. Typically, constitutions are regarded as a set of rules that govern the relations between different branches of government and place restrictions on the state's authority to prevent abuse. However, constitutions go

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³ ONGIS Blog, '150+ Awesome Quotes about Equality [Women, Race, LGBTQ, and More]' (5 March 2023) <https://blog.ongis.com/diversity-and-inclusion/equality-quotes/> accessed 5 March 2023.

beyond that, encompassing provisions that not only limit state power but also promote positive change. The constitution comprises not just provisions that limit the authority of the state, but also encompasses provisions that “echo the aspirations of the nation’ to bring about a transformation in the order of things as they exist.”⁴ The constitution is not a stagnant or straightforward set of regulations, but rather a dynamic document that adapts and develops alongside society. It is not fixed or unchanging, but rather reflects the changing needs and priorities of society. The constitution evolves in tandem with society, adjusting to its requirements and shifting circumstances.

The term transformative constitutionalism includes within it three terms, namely: first one is “**Transformative**”, second one is “**Constitutionalism**” and third one is “**Transformative Constitutionalism**”. Dictionary meaning of word transformative is “*causing a major change to something or someone, especially in a way that makes it or them better.*” i.e. *bringing change through structured method*”⁵. The definition of the term constitutionalism as found in a dictionary is “*adherence to or government according to constitutional principles.*”⁶ It is worth emphasizing that constitutionalism is distinct from the Constitution itself. The Constitution is a written instrument that outlines the regulations that guide the operations of the government, delineating its framework and functioning.

When both these terms combine together they give rise to single term that is Transformative Constitutionalism. The judiciary consistently employs transformative constitutionalism as a mechanism to make societies more equitable and remedying Centuries old discrimination against women and the marginalized. It is a comprehensive concept that arises from our individual experiences and is not confined to a single, standardized definition of term transformative constitutionalism and this term has been interpreted differently by various jurists because of their personal in their own country but there are certain the key elements that constitute term transformative constitutionalism. This term has been evolved by judiciary.

The genesis of the term transformative constitutionalism can be traced back to the post-apartheid era in South Africa. A former judge in South Africa asserts that the basis of transformative constitutionalism can be found in the preamble of the South African Interim Constitution. In the case of India, to understand the perspective of the framers of the Indian Constitution and the

⁴ Alisha Dhingra, 'Indian Constitutionalism: A Case of Transformative Constitutionalism' (2014) 2 Asia Pac J Multidiscip Res 135.

⁵ Cambridge Dictionary, s.v. 'transformative' <https://dictionary.cambridge.org/dictionary/english/transformative> accessed 5 March 2023.

⁶ Merriam-Webster, s.v. 'constitutionalism' <https://www.merriamwebster.com/dictionary/constitutionalism> accessed 5 March 2023.

origin of the principle of transformative constitutionalism, we need to examine the discussions in the constituent assembly.

In the context of creating an equitable society, it implies the absence of any form of discrimination, encompassing not only vertical discrimination, but also horizontal discrimination present in our society. Horizontal discrimination denotes discrimination that exists within private realms. And Indian Constitution has many provisions that take care of elimination of horizontal discriminations prevalent in Indian society or that may arise in future. For example the preamble of the Indian Constitution Starts with the word “WE THE PEOPLE OF INDIA....”⁷ The framers of the Indian Constitution espoused a comparable ideology, as evidenced by the inclusion of Article 15(2) and Article 17 in the Constitution, both of which aim to eradicate long-standing horizontal discrimination present in our society

In US Constitution the term transformative constitutionalism is not expressly used anywhere but there are some progressive judgments delivered by the US Supreme Court from which we can derive that US Supreme Court made its efforts to remove deep rooted historical inequalities existed in US society. Moreover in order to complement such progressive judgments US legislature introduced Constitutional amendments from time to time in order to achieve goal of equitable society in US. For example, 13th Constitutional amendments and 14th amendment.

In this paper we will try to find out which part claim is much better and what are the precautions that should be kept in mind by the Supreme Court while delivering such progressive judgments.

II. ORIGIN AND MEANING OF TERM TRANSFORMATIVE CONSTITUTIONALISM

(A) Origin Of T.C.

Origin of the term transformative constitutionalism is to be traced after the end of apartheid (mean a policy or system of segregation or discrimination on the ground of race) in the Republic of South Africa. As per the former judge of South Africa, foundation of T.C. can be traced into the preamble of South African Interim constitution, which read as:

*“A historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.”*⁸

It means transformative constitutionalism is seen as bridge in South Africa that will help South

⁷ Indian Const. Preamble

⁸ Justice Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stellenbosch L Rev 351 [hereinafter "Justice Pius Langa"].

African citizen to heal the wounds of past that is full of injustices, discriminations, segregation policies, inequalities that were deep rooted in the society and move toward a better future where there will exist a more equitable society and developmental opportunities will be provided to all irrespective of color, race, class, belief or sex.

In the case of Road Accident Fund v. Mdeyide African court explain the purpose of having transformative constitutionalism in the constitution their country:

*“ One of the most important purposes of this transformation is to ensure that, by the realization of fundamental socio-economic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy”.*⁹

If we have to trace the origin of principle of transformative constitutionalism in India then we must refer to constituent assembly debates to understand the mindset of Framers of Indian Constitution when they were drafting Constitution of India. At the time of making Indian Constitution all the members of constituent assembly seems to have agreed on the point that there exist deep rooted structural inequalities which is inherent part of our Indian society/culture and constitution of India will be the document that will serve as a transformative documents and help Indian society to overcome such deep rooted structural inequalities. One such step toward the goal of equitable society was to make provision for the reservation of ST and SC in the constitution itself.¹⁰

From the above constitutional assembly debates it can be said that makers of constitution of Indian had a the consensus at the time of making of constitution that our constitution should not be read as a static document rather it is a living document that should transform itself with change in society needs so that it does not loss it's relevancy. In order to understand the concept of transformative constitutionalism in Indian context we must refer to point of views expressed by Dr. B.R Ambedkar, which read as:

*“We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life.”*¹¹

⁹ Navtej Singh Johar v Union of India [2018] 10 SCC 1.

¹⁰ B K Pavithra v. Union of India, (2020) SCC Online SC 822.

¹¹ Indira Jaising, 'For me, it now means personal liberty', conference on Transformative constitutionalism: Exploring Ideas and Possibilities in its theory and Practice, SCROLL.IN (30 July 2019) <https://scroll.in/article/931512/for-us-it-now-means-personal-liberty-indira-jaising-explains-transformative-constitutionalism> accessed 5 March 2023.

(B) Meaning Of Transformative Constitution

The term transformative constitutionalism includes three terms:

- Transformative
- Constitutionalism
- Transformative constitutionalism

Transformative – Dictionary meaning of word transformative is “*causing a major change to something or someone, especially in a way that makes it or them better.*” i.e. *bringing change through structured method*”¹².

Constitutionalism – Dictionary meaning of word constitutionalism is “adherence to or government according to constitutional principles.”

The Constitution and constitutionalism are two distinct concepts. The Constitution is a document that governs the structure and workings of the government, while constitutionalism is an ideology that defines a way of life, values, beliefs, and ideals of a nation. Constitutionalism is a goal that a nation strives to achieve and the constitution is a means to that end. Constitutionalism includes the constitution but is broader than just the document. A country can have constitutionalism even without a written constitution, as in the case of the UK, and a written constitution does not guarantee constitutionalism, as seen in Germany under Hitler's rule. Constitutionalism emphasizes that the constitution and body of laws determine the authority and power of government organs and is sometimes regarded as a synonym for limited government. The constitution acts as a defense mechanism over and above the power of the government to prevent the government from overlooking the goals and aspirations of its citizens.

Transformative Constitutionalism-

When both these terms combine together they give rise to single term that is Transformative Constitutionalism. There is no single definition of this term. It has been interpreted differently by different jurists and scholars in various jurisdictions because of their different experiences in their country but there are certain the key elements that constitute transformative constitutionalism are as follow:-

- Transformative constitutionalism is a tool to attain sustainable equality in the society by recognizing every form of discrimination that existed in past or that

¹² Ibid., at 4.

may arise in future and taking steps toward eliminating such discriminations.

- An important element of transformative constitutionalism is the active role of states (including courts) in achieving constitutional ideals such as liberty, equality, and fraternity. The state aims to establish a society founded on these constitutional ideals.
- Not restricting application of this principle only to the interaction between state and its subjects rather this principle should be given wide application by extending its application to private sphere as well.

United States scholar Professor Klare also define Transformative Constitutionalism 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.”*¹³

III. INDIAN JUDICIAL APPROACH

The Supreme Court of India has been delivering progressive judgments over the last few years to eliminate historical inequalities against Dalits, women, and marginalized communities. The court has reinterpreted the Indian Constitution as a transformative document that can make society more equitable. The concept of transformative constitutionalism has been used by the judiciary to eliminate discrimination. The Supreme Court of India plays a dual role as a protector of fundamental rights and as a guardian of the Constitution. Article 32 of the Indian Constitution, titled "Right to Constitutional Remedies," ensures that fundamental rights are available to all citizens, not just mentioned in the Constitution.

*“This article guarantees the right to move the Supreme Court by appropriate proceedings and Supreme Court has been empowered to issued directions or orders or writs including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari.”*¹⁴

Therefore, the Supreme Court of India possesses extensive power, and the right to constitutional remedies cannot be suspended unless done so by the constitution itself. It was even noted by Dr. B.R. Ambedkar during the debates of the constitutional assembly that the right provided under Article 32 is fundamental in nature. “the heart and soul of the Indian constitution”. In the case of Prem Chand v. Excise Commissioner AIR 1963 SC 996, Justice P.B. Gajendragadkar

¹³ Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African J. on Hum. Rts. 146.

¹⁴ Indian Constitution art 32

emphasized the significance of Article 32 of the Constitution by stating the following:

*“The Fundamental Rights to move this court can, therefore, be appropriately described as the cornerstone of the democratic edifice raised by the constitution. This is why it is natural that this court regards itself as the Protector and Guarantor of Fundamental Rights.”*¹⁵

The Supreme Court of India has been given a wide range of power through Article 32 of the Constitution, which allows for constitutional remedies that cannot be suspended except by the Constitution itself. This has enabled the Court to make changes to laws in order to achieve the constitutional goal of an equitable society, free from all forms of discrimination, including both vertical and horizontal discrimination.

Horizontal discrimination refers to discrimination that exists in the private sphere. Recent judgments, such as Navtej Singh Johar, Joseph Shine, Sabarimala, and NALSA, have helped to achieve this goal. The use of the word "WE" in the Constitution, as seen in the preamble, must be interpreted to reflect the same spirit and sense that existed during the constituent assembly debates. It is our responsibility to not judge or prejudice anyone based on their caste, sex, race, religion, sexual orientation, and other such factors, but rather to tolerate and respect each other's beliefs, choices, and thoughts.

The framers of the Indian Constitution incorporated Article 15(2) and Article 17 to eliminate deep-rooted horizontal discrimination that has existed in Indian society for a long time. Both of these articles provide for the enforcement of rights guaranteed under Part III of the Constitution against private actions as well.

Abolition of Untouchability has been dealt under Article 17 of constitution of India, which read as follow:

*"Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law."*¹⁶

Article 17 of the Indian Constitution does not provide a specific definition for the term "Untouchability." Rather, the term is used in a broader sense that includes all forms of discrimination based on factors such as sexual orientation, race, religion, and gender. The primary objective of including Article 17 in the Constitution was to eliminate all types of discrimination that had existed in Indian society in the past, as well as any that may arise in the

¹⁵ Prem Chand v. Excise Commissioner, AIR 1963 SC 996.

¹⁶ Indian Constitution art 17

future.

Therefore, the framers of the Indian Constitution intentionally chose not to provide a specific meaning for the term "Untouchability."

Article 15(2) of constitution deal with Abolition of discrimination existed in private sphere, which read as follow

“ No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

- (a) access to shops, public restaurants, hotels and places of public entertainment; or*
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.”¹⁷*

(A) Navtej Singh Johar Judgment Analysis

Law has a significant impact on various aspects of human life, including gender justice and the rights of marginalized communities such as homosexuals. Achieving justice in society involves gender justice and is an important sustainable goal that the international community aims to achieve by 2030. Experts argue that achieving equality in rights should be the prime target of any country to achieve economic development, as economic development has a direct correlation with equality in rights. People work to their full potential and are happier when there is an environment without discrimination, and their hard work is fully rewarded.

There are various data available to support this aspect for example in 2013 there was a report published by World Bank on *“Gender equality and development”*. As per this report if an individual makes any achievement in political or social or legal status then it in turn translate game for whole society¹⁸. For example if a person from lower section of society able to achieve good status in the society because of it hard work then he will spend money on health, education, food security etc. for betterment of his family and in that manner with the growth of this person whole society and economy of that country will be benefitted, similar is in case of woman and homosexuals¹⁹.

¹⁷ Indian Constitution art 15 cl 2

¹⁸ Abdoulaye Mar Dieye, 'UNDP's Third Gender Equability Strategy (2018-2021)' UNDP Blog (5 March 2023) http://www.undp.org/content/undp/en/home/news-centre/speeches/2018/undp_s-third-gender-equality-strategy--2018-2021-.html accessed 5 March 2023.

¹⁹ Rae Abada Chiongson, Deval Desai, Teresa Marchiori and Michael Woolcock, 'The Role of Law and Justice in Achieving Gender Equality: World Bank Report 2012 – Gender Equality and Development' (2012) World Bank, <http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Chiongson-law-and-justice.pdf>.

Most of the scholars have agreed on the point that if we want to achieve good and sound democracy in any country then in that direction first step will be the securing or guaranteeing basic human rights to the people of that country. Moreover every person should have the knowledge as well as awareness that they have been granted rights by the state and constitution and it is the duty of the state to protect those rights of individuals. Human rights are not only restricted to local level rather in present 21st century human rights has crossed the local boundaries and it has been recognized at international level through various instruments like Universal Declaration of human rights, ICCPR, ICESCR, Optional protocol one that deals with individual complaint with respect to inhuman treatment and optional protocol second that deals with abolition of death penalty²⁰.

It is a harsh reality of our society that despite so much technological advancement as well as advancements in social field in 21st century still there are reported cases of discrimination with LGBT community people and even in many cases they are denied basic human and fundamental rights has been denied to the people of LGBT Community. Moreover there is no one in the democratic institution to represent their cases before public authorities in right manner. And India is not an exception to the above because in India there was a provision in Penal Code that criminalizes their sexual orientation and sexual intercourse even though done in private manner with the consent of both adults. But this 150 year old provision was partially abolished by the Apex Court in 5judges bench decision as it criminalizes sexual intercourse between consenting adults as well²⁹. This is not only case with India rather in many countries of the world homosexuals are penalized for their act of Sodomy.

a. Transformative constitutionalism

The phrase 'Transformative constitutionalism' is not specifically mentioned in the Indian constitution. It is a wider concept that is inherent in our subjective existence. The Chief Justice of India Dipak Misra observed this in the Navtej Singh Johar case.

“The Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended only by a spacious, social- science approach, not by pedantic, traditional legalism. The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society

²⁰ Dr. Shilpa Jain and Prof. (Dr.) G.I.S Sandhu, From Monochrome to Rainbow: The 377, 5 CASIHR J. Hum. Rts. 7-12 (2021) <https://www.rgnul.ac.in/PDF/56f7eec5-90a4-45f1-b1a4-3580d033585b.pdf> [hereinafter Dr. Shilpa Jain and Prof. (Dr.) G.I.S Sandhu].

*for the better and this objective is the fundamental pillar of transformative constitutionalism.*²¹”

One of the interpretation that can be derived from this judgment is that Supreme Court of India itself recognizes the fact that constitution of India main purpose is to bring transformation in the society for betterment And not to just follow the views that majority section of society considered right in their mind-set and imposing those views on the minority section of the society that is, even masculine minorities like homosexuals or LGBT communities. In the eyes of constitution everyone is equal and there is no difference between majority section and minority section of society. S.C. in order to support their reasoning refer to the preamble of Indian constitution that states that goal of Indian society is to transform in such a manner that equality, liberty, justice and fraternity prevail in every sphere of life of this country. Therefore it can be said that vision of framers of Indian constitution is to transform Indian society as a place where there is no discrimination on the basis of sex, religion, region, caste, creed etc. through the mechanism of Indian constitution is very well mentioned in the preamble of Indian constitution²². From the reading of various articles and preamble of Indian constitution it can be said that constitution has been drafted in such a manner that meaning of it articles can be molded as per the needs of society and changing circumstances of country.

This characteristic of constitution to transform with the passage of time makes it a document that is living and organic. While interpreting section 377 I.P.C which is in center of entire controversy in this case Supreme Court of India is of the view that since 1860 when the Indian Penal Code was first come into effect end till era of 21st century lot has been changed in the mind-set of Indian society and it can be said with that our society have transformed more progressively and not in a backward direction. And this can be proved from the instances that minorities from sexual point of view have been recognized as well as accepted through judgments. For example NALSA judgment that recognizes transgender right to life and dignity and that they also have right in various fields of life be it government jobs, appointments, elections etc²³. But when it comes to protecting from falling within ambit of section 377 I.P.C which penalizes sexual intercourse between consenting adult as well, law does not recognize this them as a separate identity and did not protect their rights as well, moreover law impose point of view of majority section of society on them and make arbitrary behavior with them.

As per the five judges bench criminalization of sexual intercourse between consulting adult by

²¹ Navtej Singh Johar v Union of India [2018] AIR SC 4321

²² Rajat Maloo and Vanshika Katiyar, “Navtej Singh Johar- a Constitutional Analysis” (2020) 5 RGNUL Stud. Res. Rev. 1.

²³ National Legal Services Authority v. Union of India and Ors., (2014) 5 SCC 438.

the way of section 377 of I.P.C is nothing but an attempt to deprive people of LGBT community from their basic fundamental right of life and dignity which is guaranteed to them under article 21 of Indian constitution²⁴. Moreover such arbitrary discrimination has no rational Nexus with the objective of this section. The basis of this reasoning of Supreme Court drives from the principle of transformative constitutionalism which is the mandate of Indian constitution.

It is true that constitution has the power to bring transformation in society is a way in which constitution contact and express its thought to rest of the society.

“Essentially, Constitution plays the important role of questioning the existing notions about the dominance of sexes and genders. It plays a transformative role as well as directs the society’s attention towards resolving the polarities of sex and binary nature of gender.”²⁵

This is not a first case where Apex Court referred to the concept of transformative constitutionalism. There are other judgments like Joseph shine versus U.O.I case where Apex Court acknowledges the power of constitution to bring transformation into the society. As per many scholars one of the basic objectives of law is to guide the individual in their conduct into the society. Apex Court through the judgment Navtej Singh Johar judgment tries to bring change in the old prevailing status quo in the society with the help of principle of transformative constitutionalism and vision of our famous of Indian constitution enshrined in the preamble of Indian constitution which envisage society where there is an equality, justice, liberty, fraternity in true sense.

Decriminalizing such conduct will only solve one problem of these LGBT community people but they have to continue to live their lives with that discrimination existed in the private sphere and this is the same concern which was expressed by the people of LGBT community after this judgment of Supreme Court²⁶. It would be better that legislature must come up with any penal provision or fresh regulation that would prohibit such kind of discrimination that exist in private sphere against them and provide protection to the people of LGBT community against any such discrimination that is his later must penalize any such conduct that leads to decriminalization with LGBT community in private sphere as well as by the government institutions. Then only equality will prevail in real sense in our society or the word “We” enshrined in the preamble of Indian constitution can be achieved in true sense and transformative constitutionalism mandate can be achieved in real sense²⁷. No doubt it is a first step in the direction of achieving

²⁴ Indian Constitution, art 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

²⁵ Ibid., at 16

²⁶ Ibid., at 16

²⁷ Indian Constitution Preamble

transformative constitutionalism in ever society but we should keep in mind that this will not be our last step in this direction.

IV. INDIA

(A) Is Indian Judiciary by giving such progressive judgments overreaching the ‘Proper role’ that has been assigned to them in a democratic Set up?

The term transformative constitutionalism has been evolved by judiciary. *“The judiciary has been given the power to breathe life into the letters of the law by interpreting constitutional provisions. In recent years, the judiciary in India has come under attack by many scholars for ‘over-reaching’ or playing an ‘activist’ role”*. One of the main assumptions behind such criticism is that there is a ‘proper role’ that has been assigned to judiciary in a democratic setup which it is overreaching.

The ultimate authority in a society lies with the people, who have entrusted their power to the state in order to work for the betterment of the people. Elected representatives have real power and are accountable to the people. However, the judiciary is not accountable to the public, as its authority comes from the Constitution and not from electoral representation.

The constitutionalism model developed by Marshall is applicable in countries with a written constitution, and it consists of two essential components.

1. Countries having written constitution have the rule of legitimacy of constitution. That is constitution constitute the Supreme law of the land. All government organs be it judiciary, executive, legislature received their power from the constitution itself. That is, there legal existence, scope and force will be define by the constitution.
2. The Marshallian Model of constitutionalism has two important elements, the second being that the constitution serves as the basis for determining the legitimacy of government actions and decisions. The constitution is the ultimate source for deciding whether a government action or decision is lawful or not, and any government action must meet the conditions set forth in the constitution to be considered legitimate.

The government institutions are seen as the trustees or agents of the sovereign people, and if their actions or decisions violate the rights of the people or any conditions set forth in the constitution for legitimacy, the courts may exercise their power of judicial review to check the validity of such actions or decisions. If a court finds that such actions are invalid or unconstitutional, it may declare them as such. *“Then court is not exceeding its power rather it*

actually upholds the will of the people.”²⁸ Ultimately the constitution is a means through which the will of the sovereign people is articulated.

The Indian Constitution does not explicitly grant the Supreme Court final authority to interpret the entire Constitution. While the court can declare laws or orders that violate the Constitution void, this power is not clearly stated. In contrast, the US Constitution's supremacy clause gives exclusivity and finality to the federal Supreme Court in interpreting the entire Constitution. In India, conflicts arise between the legislature and judiciary over establishing supremacy, and the judiciary developed the basic structure theory to defend its authority to interpret the Constitution from judgments.

“It is a cardinal principle of our Constitution that no one, howsoever highly placed and no authority however lofty, can claim to be the sole judge of its power under the Constitution or whether its actions are within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations.”²⁹ (Emphasis Applied)

Another important point to be noted that

“Judicial review of the constitutionality of governmental action and decision can be accepted as legitimate provided that judicial decision to invalidate such action or decision is justified by the will of the original people, as expressed in the written constitution. For this reason, the model necessarily entails some version of what American scholars have called 'originalism'. It postulates that the reasons on the basis of which the courts may legitimately determine the legal validity of governmental action and decision must have been somewhat 'intended' by the original people.”³⁰

In essence, when the court examines the validity of government actions, it must consider two things: the constitution and the intentions of the constitution makers when they drafted the provision in question. This approach, known as originalism, is highly regarded as it justifies the court's power and involves historical inquiry into the drafting process. Furthermore, such decisions are binding and set precedents for future courts to follow.

²⁸ Tremblay, L.B., 'Two Models of Constitutionalism & the Legitimacy of Law: Dicey or Marshall' (2006) 6 Oxford University Commonwealth Law Journal 79.

²⁹ ⁸²*Minerva Mills Ltd. v Union of India* 1980 AIR 1789

³⁰*Ibid.*, at 26

For example “new interpretation to the term *Procedure established by law*”³¹ has been given by the Apex court in the *Maneka Gandhi v. U.O.I* case. “Now procedure through which person is deprived from his/her personal liberty cannot be any and every procedure rather it must be non-arbitrary, reasonable, fair, principle of natural justice followed in every procedure. While framing the constitution framer of Indian constitution had rejected the American concept of due process because of it is elastic and uncertain. However, by *Maneka Gandhi Judgment* this concept of due process has been brought back in India.³²”

In this case, the Supreme Court did not exceed the written text of the Constitution. Instead, the court carefully examined the constitutional assembly debates to find justifications and provide a better interpretation of the original text. This approach is highly praised.

The interpretation of the Constitution that leads to progressive judgments is binding and cannot be overruled by a larger bench in the future. Those who argue that such judgments are overreaching the proper role of the judiciary in a democratic setup must consider that as the state's role has transformed from being a policing state to a welfare state over time, the judiciary, which plays a dual role as the protector of fundamental rights and the guardian of the Constitution, should also interpret constitutional provisions in a way that turns the ideals of the welfare state mentioned in the Constitution into reality. According to South African judge SM Mbenenge:

“This definition makes judges, other functionaries and institutions role-players in transformative constitutionalism. Indeed, judges are custodians of constitutional values such as human dignity, equality and freedom, and bear the obligation to ensure that constitutional provisions are applied in ways that ‘improve the quality of life of all citizens and free the potential of each person.’”³³

The Court in the *Suresh Koushal* case followed a textualist approach, looking for justification in the text of the constitution and statutes rather than history or debates. This approach has been criticized by scholars. The case did not recognize sexual orientation as a separate class, and the Delhi High Court relied on foreign judgments because it did not find justification in the constitution. However, a larger bench in the *Navtej Singh Johar* case overruled this interpretation, recognizing the importance of the right to equality and non-discrimination on the

³¹ Indian Constitution art 21

³² ⁸⁵*Maneka Gandhi v. Union of India* AIR 1978 SC 597

³³ Emmanuel, M., "Constitution Day 2019: Transformative constitutionalism and the Indian Supreme Court", BAR & BENCH, (Mar. 05, 2023), available at: <https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism>

basis of sexual orientation in the Indian Constitution.³⁴

V. US

(A) Here we will understand how US judiciary interpret laws and what amendments made in US constitution in order to achieve goal of equitable society in US (i.e. eliminating Horizontal discrimination) and at the same time we will examine the current scenario in the US. Is there still exist horizontal discrimination in society?

*Dred Scott v. Sandford*³⁵ (1857) was a significant case in US Supreme Court history where the court refused to recognize citizenship rights of African American slaves, considering them as the property of their masters. The court interpreted the word 'citizen' in the US Constitution to mean only white people, thereby denying rights and privileges to black people. The case also took into account the 5th constitutional amendment containing the concept of the due process clause. However, after this judgment, the 13th Constitutional amendment was introduced, granting voting, equality, and citizenship rights to African American slaves, and abolishing slavery within and beyond the United States.

Another landmark judgment of US Supreme Court was *Plessy v. Ferguson*³⁶, 1896, the US Supreme Court delivered a landmark judgment that declared racial segregation laws constitutional. These laws segregated society on the basis of color and promoted "separate but equal treatment." The controversy began when Homer Plessy, a mixed-race person, violated the separate car act of 1860 in Louisiana, which enforced separate railroad accommodations for black and white passengers. Plessy challenged the law, claiming it violated the 14th Amendment of the US Constitution. The Supreme Court of Louisiana rejected his claim, and the US Supreme Court upheld the Louisiana law, stating that it did not violate the 14th Amendment. The court argued that the law did not promote the feeling that black people were inferior to white people and that it was within the legislature's inherent power to pass laws that promote health, safety, police, and morale in society.

But this decision was overruled in future in the case of *Brown v. Board of Education*.³⁷ It is important to note that this judgment is 9 judges bench judgment of Apex court. In this case Apex Court held that "SEPARATE BUT EQUAL TREATMENT" which was approved in *Plessy case* is unconstitutional. It is Binary opposition and it is wrong. Court also held that "*It is inherently discriminatory in nature because it is inherent nature of being too intermingle with*

³⁵ *Dred Scott v. Sandford* 1856 U.S. LEXIS 472

³⁶ *Plessy v. Ferguson* (1896) U.S. LEXIS 3390.

³⁷ *Brown v. Board of Education* (1954) U.S. LEXIS 2094

each other. But such kinds of segregation policies prevent us from doing so". This racial segregation in public schools is in violation of fourteenth US constitutional amendment.

14th amendment clearly states that if any person is within the US jurisdiction then US states will not deny such person equal protection of law.

*Shelley v. Kramer*³⁸ In 1945, an African American couple, the Shellys, attempted to purchase a home with a restrictive covenant that prohibited the sale or lease of the property to anyone of the "Negro or Mongolian Race." The Marcus Avenue Improvement Association and the Co-Owner's Homes Association filed a lawsuit to enforce the covenant. The trial court ruled in favor of the Shellys, but the Supreme Court of Missouri overturned the decision and ordered the covenant to be enforced. The Shellys appealed to the US Supreme Court, which found the covenant to be unenforceable. The court held that state enforcement of restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment. The justices noted that private parties could enter into such agreements, but courts could not enforce them. The case is considered a landmark in US history because it established that state-sponsored discrimination through restrictive covenants was unconstitutional.

Issue before the court is: if any racially restrictive land use covenant is made by the private parties then in such cases can suit be filled by the private parties before courts in order to enforce such covenants?

The Supreme Court held that racially restrictive covenants enforced by state institutions are unconstitutional and violate the 14th amendment's promotion of equality. However, the 14th amendment only applies to state action and not private action. Private parties can be sued to enforce such covenants, but the court did not grant relief to Shelly in this case, making the covenant enforceable.

In *Bostock v. Clayton County*³⁹ (2020) case, United States Supreme court in its latest judgment held that the word "sex" used in Civil Right Act include sexual orientation as well. Therefore employer cannot remove his employee from his job only because of his / her employee belongs to LGBT community. It is a horizontal dimension and this should be stop.

Most recently we all must have seen or heard news regarding the death of George Floyd African American in U.S.A. by police officers that wide spread protest in US. All this reflected racism existed in our society.

Another example of such discrimination is on social media platform where Facebook's system

³⁸ *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S. Ct. 836

³⁹ *Bostock v. Clayton County* (2020) U.S. LEXIS 3252

allows advertisers to put such kind of filters in their ads so that their ads are not made visible to black, Hispanic and others ethnic affinities. This is horizontal discrimination that transformative constitutionalism tries to prevent. Facebook policy has been critic because it violate Fair Housing Act made by the legislature of US with intention of preventing discrimination in the society with respect to housing ads that promotes horizontal discrimination in the US society on the basis of race, religion, caste, color etc.

All this matter came into limelight when Pro Publica, which is a news agency that made investigating journalism for the protection of public interest and to prevent horizontal discrimination that has been promoted in the society by the Facebook through its rental ads.

*“But in their investigation they discover that facebook system not only allows advertisers to target users by their interests or background but it also gives advertisers option to exclude specific groups named as “Ethnic Affinities”. It means ads will be exclude people based on race, gender and other sensitive factors are prohibited by federal law in housing and employment”.*⁴⁰

According to facebook they will develop such a mechanism in future that will identify such discriminatory ads in future and eliminate such ads from their system.⁴¹

But in reality is entirely different. In 2018, report was published in New York Times that shows that case has been filed against the Face book by the fair housing groups alleging that facebook system still permit it advertisers to post ads that promotes discrimination in the society. And the only change that can be noticed in the last 2 years in facebook ads system is that now word “Ethnic Affinity” is substituted by “*Multicultural Affinity*” and now it is a part of “*Behaviors*” rather than “*Demographics*”.⁴²

Horizontal discrimination is not something that is prevalent in Indian alone rather this phenomenon existed worldwide, in every country be it U.S.A, Germany, Europe. It is more visible in era globalization, big corporate. To eliminate these issues, it is essential that we acknowledge our responsibility to refrain from discriminating against individuals based on their caste, sex, race, religion, sexual orientation, and so on. It is critical that we show tolerance towards one another, respect each other's beliefs, choices, thoughts, and preferences, and interact with each other in a respectful manner. By focusing on these fundamental values, we

⁴⁰ Angwin, J. and Parris Jr., T., 'Facebook Lets Advertisers Exclude Users by Race', ProPublica, (Mar 05, 2023), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>

⁴¹ Ibid.

⁴² Bagli, Charles V., 'Facebook Vowed to End Discriminatory Housing Ads. Suit Says It Didn't' (27 March 2018) The New York Times, accessed 05 March 2023, <https://www.nytimes.com/2018/03/27/nyregion/facebook-housing-ads-discrimination-lawsuit.html>.

can work towards creating a society that is fair and just for all.

From the above analysis it can be said that in US Constitution the term transformative constitutionalism is not expressly used anywhere but there are some progressive judgments delivered by the US Supreme Court from which we can derive that US Supreme Court made its efforts to remove deep rooted historical inequalities existed in US society. Moreover in order to complement such progressive judgments US legislature introduced Constitutional amendments like 13th and 14th amendment from time to time in order to achieve goal of equitable society in US. But at the same time most recently we all must have seen or heard news regarding the death of George Floyd African American in U.S.A. by police officers that wide spread protest in US and discrimination is on social media platform where Facebook's system allows advertisers to put such kind of filters in their ads so that their ads are not made visible to black, Hispanic and others ethnic affinities. All this reflected racism existed in US society.

Similarly we have some judgments like *Plessy v. Ferguson*⁴³ where US Supreme Court declared Racial Segregation laws constitutional. But at the same time we have *Brown v. Board of Education* judgment that declared as Racial Segregation laws unconstitutional. Again we have *Shelley v. Kramer* where courts fail to prevent horizontal discrimination. All these suggest that are inconsistency in the judicial decision. Therefore there still existed discrimination in US despite efforts made by the judiciary and legislature.

VI. SOUTH AFRICA

(A) Understanding of South African judiciary and legislature approach to eliminate horizontal and vertical discrimination in their society through mechanism of T.C. and how this approach is different from approach adopted by the Indian and US judiciary and legislature?

The Journey of South African constitution starts from 1994. Before that South Africa was a country where there was a supremacy of parliament and no law made by the parliament can be challenged in the court of law, even though such laws violate basic human rights of citizens of South Africa. It is after 1994 when interim constitution was adopted in the South Africa many changes were made in the constitution of the country as well as in the lives of people. For example country moves in the direction of adopting constitutional supremacy instead of parliamentary supremacy, freedom of speech and expression was granted to all irrespective of any discrimination made on the grounds of race, caste, sex, religion, region, place of birth etc.,

⁴³ *Plessy v. Ferguson* (1896) U.S. LEXIS 3390

government moves toward federal system instead of unitary system, respect for basic human right has been recognized by the constitution of South Africa⁴⁴.

The Constitutional Court of South Africa ensured the final draft of the constitution complied with 34 principles adopted by the interim constitutional assembly. The framers of the South African constitution shared a similar mindset to those of the Indian constitution, seeking to eliminate inequalities and discrimination, establish complete democracy, and ensure a supreme constitution instead of parliament. The US also sought to eliminate historical inequalities against African Americans through amendments and legislation like the Fair Housing Act. All three countries aimed to achieve equality in both vertical and horizontal manners, regardless of race, region, color, religion, or sex. The constitutions of South Africa and India share many similarities in their aspirations towards creating a more just and equal society.

Meaning of Transformative constitutionalism in South Africa

Transformative constitutionalism is regarded as a means of reconciliation in South Africa, which can assist its citizens in recovering from the past that is marked by injustices, discriminations, segregation policies, and deep-rooted societal inequalities. It can facilitate the country in moving towards a better future, where there will be greater equality and equal access to developmental opportunities for all individuals, regardless of their color, race, class, belief, or sex⁴⁵.

a. Two essential features of Transformative constitutionalism as per South African constitution

To have such a constitutional law whose main purpose is to achieve two things:-

1. First one is elimination of past discriminatory practices and disadvantages suffered by the marginalized section of society.
2. Second one is providing equal rights and protection of law to every section of society without any discrimination on the ground of caste, creed, sex, religion, region etc.

This same thing is mentioned in preamble of South African constitution 1966. It is important to note that similar thing is mentioned in preamble of Indian constitution as well but not as expressly as South African constitution have. For example Indian preamble have used the words

⁴⁴ Teshome, M., Transformative Constitutionalism in South Africa, RESEARCH GATE, (Mar 05, 2023) https://www.researchgate.net/publication/260460449_Transformative_Constitutionalism_in_South_Africa [hereinafter "MartaTeshome"]

⁴⁵ Langa, P., "Transformative Constitutionalism", 17 Stellenbosch L. Rev. 351 (2006).

like justice which means achieving justice socially, economically, politically, culturally; the term “equality” is also used; preamble of Indian constitution starts with a word “We the people of India” which includes the sense of belongingness and aim of achieving goal of equal society one day.⁴⁶

b. Essence of Transformative Constitutionalism adopted by South African Constitution

As per many scholars is the equality that framer for South African constitution makers wants to achieve. But their constitution aims to achieve equality in the South African society through the process of substantive equality and not by the merely by achieving formal equality⁴⁷. Substantive equality required major structural changes in the society of South Africa as well as in the state.

*“This includes the reallocation of power and resource to all peoples; dismantling of the established systematic domination and economic inequality caused by discriminative provision of opportunities to the people. It also demands the empowerment of vulnerable and disadvantage peoples who suffered past discrimination through different measures like affirmative action. In addition to the understanding of substantive equality in the context of social vulnerability, transformation can be realized when the social and economic condition of disadvantaged people is improved. Furthermore, substantive equality should be understood in lights of subjection to past discrimination and disadvantage, the impact of measures on vulnerable groups and providing remedial measures to such groups in order to bring them to equality.”*⁴⁸(Emphasis applied)

First step that need to be taken in achieving substantive equality in South Africa is that economic as well as social condition of disadvantage or marginalize people of the society must be improved.

Second one is that concept of substantive equality must be understood in the light of what the discrimination and disadvantages suffered by the people of South Africa and what are the impacts of any progressive decision taken by the state that is, welfare schemes implemented by the state with respect to vulnerable groups. Moreover examination needs to be done with respect to remedial measures provide to such group in order to bring them equally.

⁴⁶ Rapatsa, M., "Transformative Constitutionalism in South Africa: 20 Years of Democracy", 5 Mediterranean Journal of Social Sciences 888 (2014).

⁴⁷Ibid at 35

⁴⁸ Ibid., at 37

(B) Objectives Of Transformative Constitution In South Africa

The term transformative constitutionalism used in South African constitution has the certain basic objectives attached to it which the framers of South African constitution wanted to achieve in their society through the goal of transformative constitutionalism.

1. Establishment of substantive equality in the South Africa-

In order to achieve the goal of T.C. in South African society through the mechanism of substantive equality, four important characteristics that substantive equality must possess has been laid down by the constitutional court in South Africa.

To address deep-rooted historical inequality and domination in South Africa, the first step is to understand the group's grievances. Then, the social and economic conditions of the individual and their group must be examined. The effects of inequality on their lives should also be evaluated, and steps must be taken to uplift and remove inequalities against them to achieve equality in society.

This goal of establishing substantive equality is not only the right that has been guaranteed by the South African constitution but also a value which their constitution and the new society desire to achieve in future one day. South African constitution section 9(2) expressly mentioned Substantive equality goal that framers of South African constitution want to achieve instead of formal equality.⁴⁹

2. Achievement of social and economic transformation-

As per scholars in South Africa substantive equality cannot be achieved unless steps should be taken to eliminate deep rooted social inequalities as well as economic inequalities in the country. In order to achieve the goal of equal society in South Africa it is necessary that “the provision of equal access to social and economic rights should be assisted by the remedial measures which aimed at uplifting the people who disadvantaged in the past.”⁵⁰

As per section 29(1) of constitution 1996 of South Africa it is the responsibility of state to achieve social and economic transformation through right to education to everyone, in emergency medical treatment should not be refused to any person, basic nutrition must be granted to everyone as a right, everyone is entitled to shelter and basic health care services and social services. Emergency medical treatment should not be refused to any person, basic nutrition must be granted to everyone as a right, everyone is entitled to shelter and basic health

⁴⁹Constitution of South Africa, 1996, sec. 9(2)

⁵⁰Ibid., at 37

care services and social services⁵¹.

3. *Changing legal culture of the country-*

It means that even if we take steps toward achievement of substantive equality as well as social economic transformation then also it is not sufficient to achieve our the ultimate goal of transformative constitutionalism in the Country unless steps are taken to modify the legal culture prevailing in the country. It means there must be steps taken to shift from culture of authority to the culture that is inclined toward achieving justification.

In other words every decision of judge must we base not only on law as well as authority rather it must also incorporate rights and values enshrined in the constitution.

*“Section 36 of South African constitution expressly stipulates the shifting of the legal culture from culture of authority to culture of justification. This section states that rights can be limited only when they are justified in an open and democratic society based on human dignity, equality, and freedom. The value of the constitution must justify the limitation of the rights in order to be restricted by law.”*⁵²

4. *Regulation of private relations with the help of constitutional law-*

It means South Africa constitution not only focuses on elimination of vertical discrimination that prevail in South African society but framers of constitution also interested in elimination of horizontal discrimination in order to achieve equality in real sense in this South African society .

Section 9⁵³, Section 8⁵⁴ and section 39 of South African constitution 1966.

*“Interpretation of Bill of Rights (1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”*⁵⁵

We can find similar provisions in Indian constitution too, Framers of Indian constitution also interested in elimination of horizontal as well as vertical discrimination prevailing in the society. In India we have provisions like article 15, article 16, preamble of Indian constitution that will

⁵¹ Constitution of South Africa 1996, sec. 29 (2).

⁵² Ibid., at 37

⁵³ Constitution of South Africa 1996, sec. 9.

⁵⁴ Constitution of South Africa 1996, sec. 8.

⁵⁵ Constitution of South Africa 1996, sec 39

help in elimination of horizontal discrimination prevalent in private sphere of Indian society⁵⁶.

VII. HOW TO ACHIEVE TRANSFORMATIVE CONSTITUTIONALISM

After making analysis of objectives of transformative constitutionalism, now the next question arises how it is possible to achieve transformative constitutionalism in any society or what will be the right method to ensure that equality prevails in true sense in any society and discrimination's will be completely eradicated from the society?

After making analysis of various writings of scholars of South Africa on the topic of transformative constitutionalism in S.A. can easily find out that Scholars of South Africa are divided into two approaches that will help in achieving real equality in South Africa through the means of substantive equality. Some scholars are in favor of one approach whereas some scholars are in favor of another approach which are as follow:-

- According to first approach, scholars believes that equality can be achieved through the means of inclusion that is *“This means it include the disadvantaged group to the rights which they have excluded in the past. Nancy Fraser describes the inclusionary effect as remedies aimed at correcting inequitable outcome without disturbing the underlying framework that generates them.”*⁵⁷
- According to second approach, scholar believe that equality can be achieved through the transformation process only that is,

*“Transformatory approach has an objective of addressing inequalities by way of restructuring the condition which create the disadvantage and discrimination. This approach involves inspection of inequality in lights of group’s context and social and economic conditions that shapes the group’s status and strives to dismantle the entrenched disadvantage on the basis of new norms and rules which have not been used to discriminate the group. Moreover, the remedy that are provided for inequality should aimed at eradicating the past norm and structure which create the disadvantage.”*⁵⁸

The scholars and constitutional court of South Africa prefer the approach of striking at the root cause of inequality to eliminate it for good. For instance, Section 9 of the South African constitution expressly recognizes non-discrimination on the grounds of sexual orientation. In contrast, the Indian constitution does not have an express mention of eliminating discrimination based on sexual orientation, and courts have to confer it through the interpretation of various

⁵⁶ Ibid., at 36

⁵⁷Ibid., at 37

⁵⁸ Ibid

articles. This approach makes the task of courts more challenging. In the Navtej Singh Johar case, it took 150 years for the courts in India to recognize discrimination based on sexual orientation and take a step towards eliminating it. The South African approach of addressing such issues directly in the constitution is a positive step towards eliminating discriminatory practices.⁵⁹.

The Indian judiciary's approach to achieving transformative constitutionalism is not fully transformative as they tend to focus more on granting individual or group rights rather than assessing the impact of inequalities and directing the legislature to eradicate them. In contrast, the United States legislature has taken steps to eliminate inequalities, such as the 13th Amendment which granted voting, equality, and citizenship rights to African American slaves and abolished slavery both in the US and other areas under its jurisdiction.

If we talk about South Africa then there is a case named National Coalition for gay and lesbian equality versus Ministry of Justice. It is a landmark judgment of constitutional court of South Africa which was delivered in 1998, in this judgment court struck down Section 28 of sexual offence act and various other laws that criminalizes and prohibit consensual activities that took place between consulting men. While delivering this landmark judgment constitutional court of South Africa base it decision on principles and values mentioned in their constitution. In this case constitutional court evaluated the validity of Section 28 of sexual offence act and other laws in the light of provisions of the constitution and Supreme Court of South Africa found that these laws are not in consonance with bill of Rights mentioned in the Interim constitution of S.A. and infringes right to privacy, right to equality, right to dignity off homosexual's community⁶⁰.

The South African Constitutional Court adopted a transformative approach to achieve equality through examining social, historical, and economic inequality suffered by marginalized groups, assessing the impact of such inequalities, and directing the legislature to eliminate discriminatory practices in the future. In some cases, however, the court's approach has been criticized for not fully achieving transformative constitutionalism. For example, in cases involving the right to social recognition in sexual orientation cases, the court applied a formal equality approach instead of a substantive equality approach, which received criticism from scholars who argue that this approach will not strike at the root cause of inequality in society. However, the court's decision to strike down laws that promote horizontal discrimination on the

⁵⁹Bhatia, G., *The Transformative Constitutionalism* (Haper Coll., 1stedn., 2019)

⁶⁰National Coalition for Gay and Lesbian Equality v Ministry of Justice (1999) 1 SA 6 (CC) Para 20.

basis of sexual orientation has been viewed as a positive step towards achieving equality in South Africa.⁶¹ As per many scholars constitutional court of South Africa in this case

“Court did not acknowledge the difference of gay and lesbian people for granting equality right rather court applies sameness of these people and granted equal rights to them like others poster that have been used to discriminate. Moreover norms and the rules that have been used to discriminate and disadvantage these people that is heterosexual norms of marriage are used to entitle right two same sex couples relationship. So the basic feature of transformative approach that is difference is missed to be applied by the courts in order to extend right to couples in the same sex couple relationship”.⁶²

VIII. CONCLUSION AND SUGGESTION

We have come miles in transforming the constitution but there still many more miles to cover. Transformative constitutionalism basic idea is to remove horizontal discrimination existed in our society on the basis of sex, caste, sexual orientation etc. This can be prevented by enhancing public sphere/ public reason. That is our inherent capacity to reason. Self- realization relates to an individual’s capacity to reason (which is inherent in human nature, and because of this capacity we can say that we are in existence) that asks question to the self, INCLUDING, (IT MEANS THAT THE LIST OF THESE QUESTIONS IS NOT EXHAUSTIVE),

- “Is this my real identity or real self? And by what understanding I’m defining my ‘self?’”
- ‘Am I being consumer and consumed only?’”
- “Am I being institutionalized by any structure?”
- “Am I a commodity for the Artificial intelligence society?”
- “Am I tolerant while understanding another person’s subjective existence?”
- “Am I judgmental?”
- “Am I imposing my subjective existence (which can never be defined in an objective manner) on others?”
- “Am I considering ENVIRONMENT’S (which includes human, flora and fauna, biodiversity) interest while living my own lifestyle?”

⁶¹National Coalition for Gay and Lesbian Equality v Ministry of Home Affairs (2000) 2 SA 1 (CC).

⁶² Ibid., at 37

- And so on.

This individual quest serves the interest of pluralist society guaranteed under constitutionalism. However, the inherent capacity to reason of an individual being has been blocked by the powerful forces or organizations since the time of antiquity. Currently, it is being blinded by the big corporate, totalitarian regimes, and artificial intelligence. For example Google and Facebook encroaching our right to privacy and Alex app of Amazon selling our voices. We are forced to agree to terms and conditions given by play store and app store. This should be change and uniformity should be brought for all apps. This problem of discrimination in our society whether will be vertical or horizontal will prevail unless we pursue the objective of constitution.

Initially Panopticon model i.e. idea of complete surveillance, implemented in jails for prisoner reforms. But now a day state extended this panopticon model in the entire state. For example we have CCTV cameras installed everywhere. But main question is how much surveillance is needed? Excessive surveillance is restriction on individual freedom, discourage people to raise their voices against government policy, there is always a fear in people that if they raise their voices against government they will be arrested or put in jail. Their freedom can be curtailed by government. These things will have a serious effect on one's self-realization, capacity to reason and violate constitutionalism.

(A) Suggestion

India - The Supreme Court should bear in mind that giving progressive judgments in the name of transformative constitutionalism should not lead to a deviation from originalism. The preferred approach is to look at the text of the constitution, as well as the historical context in which the provision in question was drafted. Such decisions have a binding effect and serve as precedents for future courts. Instead of achieving equality through inclusion, as in the case of NALSA, the second approach of achieving equality through transformation should be followed. Merely recognizing inequality and granting rights will not completely eliminate difficulties. Further steps must be taken to ensure inclusion of marginalized groups in society and prevent future discrimination. The root cause of inequality must be addressed to achieve true equality.

USA - Whenever a case come before the U.S apex courts with respect to discriminatory practice against any individual or any group then courts are very proactive in elimination of such discriminatory practices but we hardly find any case where Court take a step that will strike at the root cause discrimination and making sure that such kind of discrimination do not raise it ugly head again in the society. S.C must follow second approach of achieving equality through

the process of transformation, instead of achieving equality through the process of inclusion as it done in many of its cases.

South Africa- South African understanding of T.C. is abroad as compared to India and United States and they want to achieve equality through structural change in the society instead of merely recognizing inequality and granting rights to groups/individuals. In other words Constitutional Court follow second approach of achieving equality through the process of transformation, instead of achieving equality through the process of inclusion.

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