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+91 70421 48991
editor@ijlar.com
www.ijlar.com

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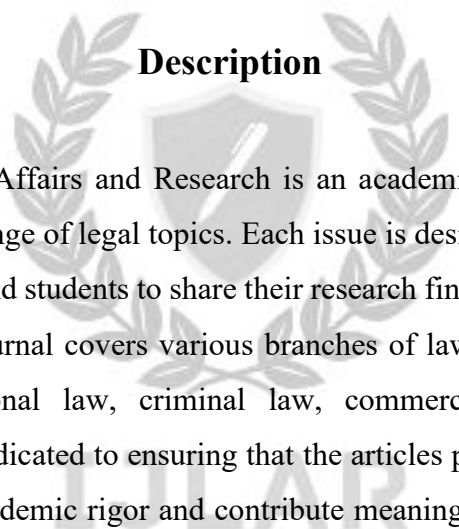
Introduction

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

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Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

The logo is a circular emblem featuring a shield in the center. The shield contains a stylized quill pen. The shield is flanked by two olive branches. The entire emblem is surrounded by a laurel wreath. The text 'IJLAR' is written in a serif font across the bottom of the emblem.

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

TRANSFORMATIVE CONSTITUTIONALISM: A PATH TO GENDER JUSTICE.

AUTHORED BY - MADHURIMA G¹

ABSTRACT

Transformative constitutionalism is a legal philosophy that perceives the Constitution as an instrument with which the Constitution is used to generate an equal society by breaking down the existing systems of oppression and establishing meaningful equality. This paper aims at examining the concept of transformative constitutionalism particularly in relation with gender justice in India as well as analyzing the manner in which the Indian courts have interpreted the Constitution in a progressive way in an attempt to fix the systemic discrimination against women and sexual minorities and thereby safeguard their constitutional rights.

This journey is to examine the development of gender-based jurisprudence in India starts with the examination of the foundational landmark decisions on workplace gender equality and personal law and progresses to the examination of landmark decisions on questions of reproductive rights, sexual identity and LGBTQIA+ rights. The decisions of Vishaka v. State of Rajasthan, Navtej Singh Johar v. Union of India, NALSA v. Union of India and Justice K.S. Puttaswamy v. Union of India are discussed to highlight how Indian Supreme Court has chosen to apply constitutional ethics instead of social ethics in the interest of upholding dignity and equal rights of the individuals. The article examines the role of the constitution in ensuring the gender equality, among various articles of the constitution of India and it highlights on the role of Article 14, 15, 21 in ensuring gender equality and also notes the continuing imbalance between the judicial pronouncements and the actual ground level implementation. The end of this article is that although transformative constitutionalism has made significant strides in the fight for gender equality in India, there are certain structural constraints to the realization of gender equality that are yet to be addressed, such

¹ 2nd year LL.M. (Criminal Law), School of Law, Sathyabama Institute of Science and Technology (Deemed to be University), Chennai.

as lack of legislative tracking, patriarchal norms in society and imbalanced access to justice. The paper calls for continued political will, comprehensive legislative reform, and meaningful involvement of civil society as complements to judicial activism as ways to achieve gender equality as mandated by the Constitution.

Keywords: Transformative Constitutionalism, Gender Justice, Substantive Equality, Constitutional Morality, LGBTQ+ Rights.

Introduction

The notion of constitutionalism holds paramount significance together with the notion of the Constitution. While a Constitution presents the framework of governance and its powers, constitutionalism ensures that these powers are exercised lawfully. It is possible that the country has a Constitution but lacks constitutionalism if power is exercised freely. Therefore, the aim of constitutionalism is to prevent arbitrary power through adherence to the rule of law.

Constitutionalism aims to preserve freedom of individuals, as well as respect for their dignity and observance of the rule of law by controlling the exercise of state powers by constitutional limits. The principle of constitutionalism rejects the idea of arbitrary and absolute power and proposes that the powers of government must be subject to checks and balances, and various forms of accountability. By restricting the application of state power, constitutionalism protects basic rights and ensures democratic rule. In addition to the provision on governmental establishment, constitutions aim to result in progress and social justice.²

Transformative Constitutionalism

The idea of transformative constitutionalism can be traced back to the examination of the Constitution of South Africa and the freedom movement in general. It was Karl Klare who in his seminal work, *Legal Culture and Transformative Constitutionalism* (1998), expressed this thought in the South African context. Transformative constitutionalism is a “long-term project,” he says,

² Ashish Pathak, “Transformative Constitutionalism: A Pragmatic Approach to Social Inclusiveness,” July 1, 2022, available at: <https://articles.manupatra.com/article-details/TRANSFORMATIVE-CONSTITUTIONALISM-A-PRAGMATIC-APPROACH-TO-SOCIAL-INCLUSIVENESS> (last visited on April 16, 2026).

one that will affect both political and social institutions through the enactment, interpretation and enforcement of the Constitution over time.³ His way of thinking is that transformative constitutionalism is about the process of developing democracy through continual development and enhancement over time. Justice Pius Langa also considered constitutionalism to be capable of changing society, by correcting its past missteps and ensuring a better future for everyone. For Pius transformative constitutionalism was a matter of providing the 'conditions' for meaningful social change. The concept of transformative constitutionalism has its origins in South Africa but it may be relevant in other constitutional democracies, such as in India.

Constitutional Foundations of Gender Equality in India

At the very core, Transformative constitutionalism is a deep dedication to transform Indian society in an effective manner and not just 'in words' to the ideals of justice, liberty, equality and fraternity enshrined in the Preamble of the Constitution of India.⁴ It is the Constitution which provides a fundamental right to all citizens, which include the right to equality (Art. 14), the right to life and personal freedom (Art. 21) and protection against discrimination on the grounds of sex (Art. 15). However, the continued presence of structural discrimination and violence towards women has sometimes presented obstacles for the realization of these rights. The idea of gender justice has evolved jurisprudence in the Supreme Court of India, with the principles of constitutionalism as a starting point.⁵

The Constitution of India aims to establish a Welfare State and thus the state has to ensure the welfare of the people. This is reflected in the Directive Principles of state policy which direct the state towards social and economic justice and also make India a democratic welfare state. The Constitution provides various rights for women, such as affirmative action, the right to freedom, protection from exploitation and opportunities for their full participation in the political process.

³ Sharanya Ghosh, "Transformative Constitutionalism," *iPleaders*, October 20, 2020, available at: <https://blog.iplayers.in/transformative-constitutionalism/> (last visited on April 16, 2026).

⁴ Rahul Ranjan, "Transformative Constitutionalism and the Sabarimala Judgment," *LiveLaw*, June 1, 2019, available at: <https://www.livelaw.in/lawschool/articles/trans-formative-constitutionalism-and-the-sabarimala-judgment-145396> (last visited on April 17, 2026).

⁵ Smriti Chandra, "Gender Justice through the Lens of Transformative Constitutionalism: The Role of Indian Constitution," 6 *Indian Journal of Law and Legal Research* 6768 (2024).

It is the policy to give equal rights to men and women to work, equal wages for equal work, opportunity to earn a decent livelihood for their dignity.⁶

The State is responsible for promoting gender equality and social justice by focusing on the advancement and welfare of women which is detailed under Part IV of the Constitution (Article 39(a) - equal means of livelihood for both genders, Article 39(d)-equal pay for equal work for men and women, Article 42- Just and humane conditions of work and maternity relief, Article 44- Uniform civil code) Furthermore, Article 15(3) which gives the State the authority to enact special protective legislation for women and children, to address historical disadvantages and promote substantive equality.⁷ The 73rd and 74th Constitutional Amendment Acts provided for the reservation of seats for women in local self-government institutions thus ensuring their active participation at grassroot level in governance. These constitutional principles provide a robust normatively based framework but it is through judicial interpretation, especially the Supreme Court of India, that these guarantees have found a little concrete work in the cause of the promotion of gender justice.

Shift towards substantive equality over formal equality

Formal equality is based on classical liberalism, in which everyone is treated equally, irrespective of social and personal differences. It is based on the notion that fairness is attained by applying the law consistently and treating everyone equally. This strategy, however, has drawn a lot of criticism for neglecting to take into consideration ingrained structural disparities.⁸ Laws that focus only on legal equality may continue existing discrimination because they fail to consider historical injustices and unequal social conditions. Formal equality basically focuses on treating all people equally without any regard to their social background or historical disadvantages. The principle of formal equality does not take into account structural discrimination and systemic obstacles that members of the underprivileged groups are facing. At the same time, substantive equality aims at achieving equality in practice. Sandra Fredman says substantial equality aims at: (i) redressing

⁶ Dr. Sweety Phogat, "Directive Principles of State Policy and Women in India," 6 *International Journal of Creative Research Thoughts* 1057 (2018).

⁷ The Constitution of India, art.15(3)

⁸ Himanshu Singh, "Gender Equality Through the Constitutional Lens: Evaluating the Efficacy of Legal Mechanisms in Ensuring Substantive Justice," 3 *International Journal of Legal Studies and Social Sciences* 213 (2025).

disadvantage (ii) tackling violence, prejudicial attitudes, stigma and stereotyping (iii) boosting participation and (iv) adapting to difference in order to create change in structures.⁹

This has been incorporated into the Indian Constitution under Articles 15(4), 15(5) and 16(4) which enable the state to take special measures for the socially and educationally backward classes, Scheduled Tribes and Scheduled Castes. In *Indra Sawhney v Union of India*,¹⁰ The Supreme Court of India gave a nod to Additional Backward Class reservation and added conditions to maintain equality and merit. Recently, in *Navtej Singh Johar v Union of India*,¹¹ The Court clearly ruled that decriminalization of homosexuality under Section 377 IPC is only possible if “true equality” can be achieved which requires sensitivity to lived circumstances and enhancement of human dignity, which is rooted in substantive equality.

Landmark Judgments and Transformative Constitutionalism in Action

Vishaka v State of Rajasthan is an important case in the development of transformative constitutionalism in the context of gender justice. The topic of workplace sexual harassment was the subject of this case and in India at that time it was not a legally recognized issue. The Supreme Court of India has given a definition of sexual harassment that it violates women’s fundamental rights to equality, life and personal liberty. When there is no legislative law, the court gave Vishaka Guidelines on how to prevent sexual harassment at work and how to address it. This judgment marked a significant advancement in Indian gender jurisprudence that sexual harassment is a type of gender violence and thus in line with the principles of transformative constitutionalism.¹²

The Court, in *Medha Kotwal Lele v Union of India*, a sequel to *Vishaka*,¹³ expressed its concern on the failure to implement the Vishaka Guidelines and provided further guidance to ensure that the Vishaka Guidelines are implemented effectively by the public and private entities. The ruling affirmed employer’s and state authorities’ affirmative duty to prevent, prohibit and rectify workplace sexual harassment.

⁹ Sandra Fredman, “Substantive Equality Revisited,” 14 *International Journal of Constitutional Law* 727 (2016).

¹⁰ AIR1993SC477

¹¹ AIR 2018 SUPREME COURT 4321

¹² AIR 1997 SC 3011

¹³ AIR ONLINE 2012 SC 632

Likewise, a Delhi trial court in one of the landmark decisions that came in the wake of the, MeToo movement acquitted journalist Priya Ramani in criminal defamation case filed by former Union Minister M.J. Akbar. The Court recognised that the constitutional right of dignity and freedom of expression is respected if women are allowed to speak about her experiences of workplace harassment after a considerable time. It also said that the right to reputation won't silence the Sexual harassment survivors.

In the case of *Anuj Garg v. Hotel Association of India*,¹⁴ The Indian Supreme Court took the ideals of non-discrimination and gender equality into the hospitality field. In the ruling, the Court said that employment opportunities should not be denied to women in the hotel industry on the grounds of discrimination, or for other reasons that violate the Constitution. In *Anuj Garg*, the Court laid the foundations of substantive equality and non-discrimination in employment law, which has had a significant effect in the recognition of women's rights in India.

The Indian Supreme Court, in the case of *National Legal Services Authority v Union of India*,¹⁵ case that struck down a colonial-era law that banned consensual same-sex intercourse, for a violation of equality, dignity and freedom of speech. The Court recognized the lack of respect for LGBTQ+ persons lived experiences and autonomy in the law. In the course of acknowledging LGBTQ+ rights in India, this decision marked a monumental step towards a new understanding and interpretation of the role of the Constitution in advancing gender justice, social inclusion and human dignity.

In *Suchita Srivastava v Chandigarh administration*,¹⁶ the supreme court of India said that a woman has the right to make decisions on her body including to become a mother or not. The Court stated the importance of the right to bodily autonomy and dignity, and that issues related to reproduction were part of personal liberty.

¹⁴ AIR 2008 SUPREME COURT 663

¹⁵ (2014) 5 SCC 438

¹⁶ (2009) 9 SCC 1.

In the case of *K S Puttaswamy v Union of India*,¹⁷ the Supreme Court had also upheld the fundamental right to Privacy in the Indian Constitution.

The Sabarimala Case was filed before the Supreme Court of India under Article 32 of the Constitution of India, which prohibits the entry of women, aged 10-50 into Sabarimala Temple. This restriction violated the petitioner's fundamental rights to equality and religious freedom, they claimed. The Court addressed the issue of the practice being discriminatory, whether it was an essential religious practice, and whether the temple was a religious denomination. It found the exclusion to be discriminatory and that it was contrary to Article 14 and 15. The Supreme Court ruled the restriction illegal and allowed women of all ages to have access to the temple. It is considered a significant step towards gender justice, and the adoption of transformative constitutionalism in India.¹⁸

Gender discriminatory practices under personal laws

Before the codification of Hindu laws the legal and social status of the women is determined by the old religious scriptures and through customs. Under classical Hindu law, enshrined in the Smritis and expounded by the post-Manu authors like Vijnaneshwara, women were under constant guardianship by the father, husband and son. Divorce was not recognized and marriage was seen as a sacrament (sanskara), which was not dissolvable.¹⁹ Women's right in property, mainly with regard to stridhana, was largely limited and stridhana was also restricted. The Mitakshara coparcenary system did not allow women to inherit family property by birth, thus further adding to their economic dependency and social subjugation. The Hindu Code Bills that codified the Hindu personal law are responsible for a major transition, such as the Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act and the Hindu Adoptions and Maintenance Act. These laws aimed to bring uniformity instead of various customs in the light of the modern concepts. In fact, the Hindu Marriage Act made monogamy an essential provision of a legal marriage, and introduced divorce grounds, including cruelty and desertion, thereby

¹⁷ AIR 2017 SUPREME COURT 4161

¹⁸ *Indian Young Lawyers Association v State of Kerala* (2018 SC 1690)

¹⁹ Aleena Henry & Laxmi Priyaa N.P., "Women and Personal Laws in India: A Constitutional Study of Gender Justice and Social Transformation," 8 *Indian Journal of Law and Legal Research* 5395 (2026).

allowing the women to get out of abusive marriages. However, despite these developments, social stigma and financial dependency remained and continued to restrict access to such treatments for women. Economic security is always a central and crucial component of substantive equality. Under the Hindu Marriage Act 1955 and Hindu Adoptions & Maintenance Act 1956, the husband is obliged to keep his wife, while she is married and, in certain cases, after her marriage. In *Chaturbhuj v Sita Bai*²⁰, the Supreme Court of India clarified that maintenance is a legal right it is not a charitable act which is geared towards the prevention of destitution and therefore, the constitutional protection of dignity as enshrined in Article 21. Likewise, the 1956 Hindu Minority and Guardianship Act gave the father the first claim to the natural guardianship of the minor, which is a patriarchy assumption. In *Githa Hariharan v Reserve Bank of India*²¹, however, the Court took a progressive stance and held that the mother can also be regarded as a natural guardian even during father's lifetime. This decision was a significant step towards women's equal parenting rights. However, the original Hindu Succession Act (1956) not recognized women's birthright to inherit the ancestral property and continued to uphold the Mitakshara coparcenary system. But the original Hindu Succession Act of 1956 restricted the right to property by not allowing women to inherit ancestral land on birth and maintaining the Mitakshara coparcenary system, The Hindu Succession (Amendment) Act has granted equal rights to daughters in terms of coparcenary rights. In *Vineeta Sharma v. Rakesh Sharma*²², the Supreme Court said that daughters have equal rights over the ancestral property from birth, irrespective of whether their father was alive when the amendments came to effect. This was a pivotal move towards the realisation of gender equality, by attacking the economic underpinning of patriarchy.

Under Muslim Law

In Islamic law the women who got divorce from her husband had a right to get maintenance only during iddat. This was contested in *Mohd Ahmed Khan v Shah Bano Begum*²³, where Supreme Court of India held that a divorced women in Muslim community is entitled for maintenance under Section 125 of the Criminal Procedure Code, irrespective of religions. As a result the Muslim

²⁰ AIR 2008 SUPREME COURT 530

²¹ AIR 1999 SUPREME COURT 1149

²² AIR 2020 SUPREME COURT 3717

²³ 1985 AIR 945

Women (Protection of Rights on Divorce) Act was passed which was perceived to be restrictive of women's rights, in the case of *Danial Latifi v Union of India* the Court ²⁴ interpreted the Act to mean that the divorced wife was entitled to a "reasonable and fair provision" future that would reflect the values of the constitution and "the dignity and equality" of women.

In *Shayara Bano v Union of India*²⁵, the apex court considered the issue of triple talaq and ruled that talaq-e-biddat is illegal because it is discriminatory and violation of Article 14. The Court emphasized that the constitutional morality has priority over religious practices in violation of fundamental rights. As a result the Muslim Women (Protection of Rights on Marriage) Act, 2019 was passed made triple talaq illegal.

Under Christian Law

A prime example of the gender disparity in the early days of the Indian Divorce Act 1869 was its legal provisions and penalties. Before this amendment husband could obtain divorce from his wife by proving the adultery alone, but wife as to prove adultery along with additional grounds such as cruelty, desertion, etc. The same was put to test in *Ammini E J v. Union of India*²⁶ the court struck down the discriminatory provision which governed divorce were in violation of Article 14 and Article 21 of the Indian Constitution, The Court ordered the legislature to enact the necessary changes but, as a result, the legislature enacted changes that made the grounds for divorce gender neutral, thus promoting equality in marriage.

As far as succession law is concerned, Christian Personal Law is regulated by the Indian Succession Act. In some places, however, discriminatory traditions persisted, like the Travancore Christian Succession Act of 1916 which in the former princely State of Travancore restricted women's rights to inheritance, This injustice was corrected in *Mary Roy v State of Kerala*²⁷ where the Supreme Court of India held that the Indian Succession Act was equally applicable to Christians in Kerala and women had equal rights of inheritance. This judgment is considered to be a milestone decision in this area of law that provides for gender equality in personal law.

²⁴ (2001) 7 SCC 740

²⁵ AIR 2017 SUPREME COURT 4609

²⁶ (1995) 1 KER LJ 624

²⁷ (1986) 2 SCC 209

The Implementation Gap: From Judicial Pronouncements to Ground Reality

There are legislations in place to support gender parity, but a lot of structural, socio-cultural elements are present that prevent actual gender justice. Patriarchal attitudes have been around here for a long time, and the society and institutions continue to push men into the “usual place” where they are placed and push limits on women that are mostly patriarchal in nature, which makes these opportunities provided by the laws on gender equality less effective. When women are not adequately represented in decision making bodies, decisions may not consider different viewpoints, especially those concerning gender. Beyond non-representation, there are other challenges in implementation of these protections, including administrative inefficiency, lack of knowledge about legal protections, and low accountability. Include that caste, class and religion and disability also contribute to gender discrimination and create more complex systems of oppression and marginalisation, not sufficiently recognised within the existing system²⁸. Finally, barriers to women’s access justice, such as limited resources available to access courts, delays in justice create numerous barriers for women in rural and low income communities. Despite all these strides towards gender equality, there are many intrinsic challenges that need to be fixed for realising the rights as enshrined in the Indian Constitution.

The Way Forward:

1. Comprehensive Legislative Reform

Judiciary rulings like Vishaka, NALSA, and Navtej Singh Johar have greatly improved gender justice in India. But judicial actions cannot be a front for holistic legislative changes. The Sexual Harassment of Women at Workplace Act, 2013 and the Transgender Persons (Protection of Rights) Act, 2019, were passed after the judicial pronouncements, but both have faced criticism on their effectiveness. The long awaited UCC envisaged under Article 44 of the Constitution has not come to fruition and gender discrimination in personal laws continues to exist to a large extent, especially in the laws of Muslims and Christians. There is therefore a strong need for Parliament to pass strong, inclusive and reviewed laws both on gender based discrimination in all spheres of life (workplace, family, education, public life) which would help to achieve the constitutional goals of substantive equality.

²⁸ Supra note 7 at 215

2. Role of Political Will in Gender Justice

Political will to enact legislation is essential for it to have an impact. However, 16 years of political inaction was one of the biggest structural impediments to gender justice in India as shown in the difference between the Vishaka (1997) and the eventual enactment of the POSH Act (2013). The State shall ensure that it provides sufficient resources for gender justice infrastructure, such as fast track courts, enabling legal assistance mechanisms and effective support systems for the victims of gender based violence. Political institutions too, should show the spirit to stand up against the stereotypes of the masses which often militate against gender reforms, and that constitutional morality, as expressed in the Navtej Singh Johar judgement, trumps popular morality.

3. Civil Society Engagement and Grassroots Mobilisation

It is in India that civil society organizations have played an important role in the advancement of gender justice in the past. The Vishaka case was a product of civil society action and activism, suggesting that mobilisation at the grassroots is a precondition to judicial transformation. While awareness among women of their legal rights is still very low in rural and marginalised communities, NGOs, legal aid clinics and women's rights organisations should keep working on bridging the gap between rights, as guaranteed in the Constitution, and what these women actually experience in their lives.

4. Intersectionality and Inclusive Constitutional Interpretation

Last but not least, the struggle for gender equality needs to be a multi-faceted one that acknowledges the multiple disadvantages faced by women in intersectionality with caste, class, religion, disability and sexuality. NALSA v. Union of India, which recognizes transgender persons as being discriminated against in multiple ways is an embryonic form of intersectional understanding in the Indian Constitutional interpretation. It will be imperative for future legislative and judicial works to take heed of this and make sure that constitutional rights of equality are truly inclusive for the most marginalised women, disabled women and sexual minorities in the current justice system.

The promise of transformative constitutionalism can only be realised if there is a judicial activism coupled with legislative resolve, political commitment, and engagement of civil society and an intersectional understanding of equality which reinforce each other in a sustained and collective effort to foster constitutional justice.

Conclusion

Analysis of the Concept of Constitution as a Document for Social Change as well as the amendments made in the constitution of India to empower women's political participation in the country through Articles 14, 15, and 21, and the Directive Principles of State Policy clearly shows that the Indian constitution was drafted as a document for change, not just governance.

The observations in this article on landmark judgments reflect the extraordinary ability of the Supreme Court to call on principles of 'constitutional morality' and not 'social morality' for the cause of gender justice. The Court had gone on to extend the right to equality to those who had not been accorded its protection in the past, in *Vishaka v State of Rajasthan* (sexual harassment in the workplace), *NALSA v Union of India* (transgender persons dignity and identity), and *Navtej Singh Johar v Union of India* (consensual same sex relations). The progressive application of personal laws as each case of *Shah Bano*, *Shayara Bano* and *Vineeta Sharma* has evolved and expanded the judicial interpretation of private law practices that discriminate based on religion.

However, there are structural weaknesses involved in the Indian approach of transformative constitutionalism. The fact that the gap between court rulings and on the ground reality manifest in the failure to enact legislation necessary for better implementation, insufficient enforcement, entrenched gender based norms, and unequal access to justice shows that the courts are not alone in being able to implement the transformative vision of the Constitution. The failure to pass the *Vishaka* and the POSH Act has been nearly 16 years, the criticism of the Transgender Persons Act, and the continued marginalisation and multi-dimensional discrimination faced by women from marginalised communities all indicate that judicial activism is not enough on its own to bring about change.

Thus, the requirement of the Constitution for gender equality calls for a multi-pronged approach. Comprehensive legislative reform, political will, civil society engagement and an intersectional equality understanding are not an add on to judicial activism, they are its partners. Transformative constitutionalism is not a goal, but a journey and a journey that will require ongoing commitment of all arms of government, civil society and the public.