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## TRANSFORMING CONSTITUTIONAL MORALITY: A FEMINIST PERSPECTIVE FROM INDIA

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Mr. Tushar Verma, B.A. LL.B. 3rd Year, Asian Law College, Noida

### ABSTRACT

In India, constitutional morality has emerged as a key that assists in the resolution of the conflicts between the old social traditions and the ideals of liberty, equality, dignity and justice. This paper examines constitutional morality through a feminist jurisprudential viewpoint, where the notion of neutrality in the interpretation of the Constitution has led in the past to give greater precedence to the male experience and relegate women and gender minorities to the fringes of legal interpretation. Feminist jurisprudence challenges the facade of lack of prejudice by revealing the extent to which even statutes that appear to be equal actually deny the fact that their structure does not comply with gender inequalities. The paper goes in the direction of judicial shift toward formal equality to substantive equality and dignity based reasoning of the Indian constitutional cases. The case law analysed is Navtej Singh Johar v. Union of India, Joseph Shine v. Union of India, Shayara Bano v. union of India, and Indian Young Lawyers Association v. State of Kerala--we depict how constitutional morality has been applied as a counter-majoritarian strategy to untrample patriarchal rule of the law and denial of social practice. Such choices represent the era of change in the idea of paternalistic protection to a realization of personal autonomy, freedom of choice in decision-making, and agency. The paper goes on to state that feminist constitutional morality needs to transcend mere symbolism to positively make a difference by addressing intersectional discrimination which is influenced by gender, caste, classes, religion and sexuality. Finally, the paper places feminist constitutional morality as crucial towards re-conceptualising the Indian Constitution as a living document, which aspires towards transformative justice, seeks to dissent against hierarchy, majoritarian moral disposition, and structural hierarchy.

**Key Words:** - Occupational Health, Right to Health, Tea Garden Workers, Hazardous Working Conditions, Labour Rights.

## INTRODUCTION

Constitutional morality is a term frequently employed in the legal rhetoric<sup>1</sup>; however, it is not fixed or abstract. In India, it portrays a continued adherence to the values which the Constitution entails, liberty, equality, dignity and justice, and often conflicts with the ancient, patriarchal social morality. It is a hard, straightforward question by feminist law theorists: what morality was historically safeguarded by the Constitution?

Over decades, constitutional discussions dealing primarily with women and other gender minorities have dealt with women and different gender minorities as largely the safeguarded objects of concern, rather than as persons with independent rights. Neutrality in laws and rulings in fact fostered strong gender stereotypes on family, sexuality, work and honor<sup>2</sup>. The fake neutrality of the feminist theory of law demonstrates that constitutional morality is to be understood according not just to the text but to be an active ethical regime, capable of pushing down rooted status quos in the chain of power<sup>3</sup>.

This is a feminist perspective that has been taken over by Indian constitutional courts in the past couple of years<sup>4</sup>. They have made constitutional morality a counter-majoritarian weapon against social prejudice by making it clear that dignity, decision-making autonomy, and substantive equality are all aimed at combating social prejudice rather than legalizing it. This action places emphasis on the symbolic inclusion but turns it into legitimate change, in which the Constitution is being used as a means of trans-formation which re-creates the traditional structures that have historically constrained women.

The current blog discusses feminist interpretation of constitutional morality in India that is beyond inclusion into transformation. Considering the changing judicial rulings and aiming at constitutional morality through a feminist prism, it claims that a complete adoption of constitutional morality may be a future tool of gender justice in the 21st century.

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<sup>1</sup> Dr B.R. Ambedkar, *Constituent Assembly Debates*, Vol. VII (25 November 1949) 38–40; *Manoj Narula v. Union of India*, (2014) 9 SCC 1 (SC).

<sup>2</sup> Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination* (1984) *Feminism Unmodified* 32–45.

<sup>3</sup> Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Oxford University Press 2018) 67–71

<sup>4</sup> Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) 112–118.

## THE POLITICS OF FEMINIST JURISPRUDENCE AND THE NEUTRALITY OF CONSTITUTIONALISM

The traditional interpretation of a constitution usually boasts of neutrality, objectivity, and universality. Feminist jurisprudence in effect counters this assertion by revealing the culpability of the constitutional norms that are perceived to be neutral in the past to have privileged the male experiences as opposed to women and gender minorities<sup>5</sup>. What seems disarming in appearance often works exclusionary in reality. Feminist theorists claim that constitutionalism has taken the male subject as the norm of the constitutional citizen, such that women have only become visible when exceptional or protective.

Neutral constitutionalism views equality as one obtained through treating all the people in a similar manner. This formalistic conception is disapproved by feminist jurisprudence which insists that structural disadvantage is perpetuated by the same treatment in conditions of deep-seated inequality. According to Catharine MacKinnon, in many cases, being neutral means not opposing the status quo, and letting the hierarchies reinstate themselves with the pretext of equality. Since unpaid work in caring activities to reproductive choices, the realities of women in life remain habitually shut out of constitutional argument that asserts to be objective and value neutral<sup>6</sup>.

This criticism is echoed in the judicial trends in India which accept substantive equality and lived-experience. *Navtej Singh Johar v. Union of India* (2018)<sup>7</sup> and *Joseph Shine v. Union of India* (2019)<sup>8</sup> is indicative of a shift to a rights-based, dignity-based approach of constitutionalism and away from neutral constitutionalism. These rulings realize that interpretation of the constitution cannot be a socially blind action in the face of social realities that are highly unequal.

The concept of feminist jurisprudence therefore reformulates constitutional morality in such a way that it is considered to be value-based and transformative. It demands that the Constitution should not simply avoid being discriminatory but should serve to smash patriarchal institutions.

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<sup>5</sup> Katherine T. Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 829, 836–840.

<sup>6</sup> Catharine A. MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 Yale Law Journal 1281, 1284–1287.

<sup>7</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (SC), paras 119–121.

<sup>8</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (SC), paras 72–75.

That way, it reveals that neutrality is not non-partisan, but a decision, one feminist constitutionalism does not allow.

## **JUDICIAL FEMINISM: RIGHTS AND DIGNITY AS INTERPRETATIONS OF MORALITY**

Judicial feminism, however, is not obligatory that every court state explicitly the feminist ideology, it is represented in the interpretive decision-making choices that anticipate dignity, independence and substantive equality. The Indian constitutional system has developed this style by a rights based concept of constitutional morality where personal liberties are valued more than social impositions. The more courts are becoming aware that majoritarian beliefs cannot be used to draw up morality whereby they continue to reify gendered hierarchies.

In *Navtej Singh Johar v. Union of India*, The apex court believed that constitutional morality had to take precedence over social morality, the apparent connection between sexual autonomy and human dignity and decisional privacy. This was the clear shift in how people had been thinking of morality as collective virtue to interpreting it as the defense of the individual rights. Similarly, in *Joseph Shine v. Union of India*, The Court, which issued a blow to the adultery law claiming that the law lacked patriarchal inclinations and that women had the same constitutional position as men, The apex court overturned the law. The case did not view dignity as the mere empty rhetoric, but it was a constitutional restraint on state authority as it relates to intimate relationships.

The further aspect of judicial feminism comprises in the fact that the Court insists that the normative foundation of fundamental rights should be based on dignity<sup>9</sup>. This interpretative move opposes paternalism and recognizes agency to those historically controlled by the law as a protectionist. With this kind of jurisprudence, constitutional morality becomes an Enfranchising one, or that which inscribes law interpretation and directs legal nature with maturity directly corresponding to lived beings instead of looted legacies.

## **THE FEMINIST CHANGE AGENTS CASE LAWS**

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<sup>9</sup> Upendra Baxi, 'The Future of Human Rights' (Oxford University Press 2002) 145–148.

The jurisprudence has been instrumental in promoting feminist change in the Indian constitutional law to reconsider the rights in terms of dignity, autonomy, and substantive equality. In *Shayara Bano v. Union of India* (2017)<sup>10</sup>, Supreme Court struck down the institution of instant triple talaq, understanding that equality and non-arbitrariness insurance confirmed by the constitution can not be overturned by use of personal legislation. Likewise, *Indian Young Lawyers Association v. State of Kerala* (2019) (the Sabarimala case)<sup>11</sup> has revived the opinions that constitutional morality should always come first before exclusionary religious practices especially when these practices strengthen gender discrimination.

The implication of these rulings is a move toward active adjudication and constitutional transformation where courts not only take the standpoint, but go against patriarchal systems of law and custom. Through lived experience foregrounding and constitutional values, the judiciary has assisted in re-defining citizenship and inclusion of women. The case laws therefore serve not only as a system to resolve disputes but also as a tactician that helps to transform constitutional morality towards achieving gender justice.

### **BRIGHT FUTURE OF FEMINIST CONSTITUTIONAL MORALITY IN INDIA**

It is not possible to expand the feminist constitutional morality in India to the future not only through the progressive decisions of the courts but the constant desire to transform the constitutional values into reality. Daggers have threatened patriarchal norms with courts applying the ideas of dignity, autonomy, and substantive equality, but the investment of constitutional morality is yet to be fulfilled unless courts move past the occasional decision. Feminist constitutionalism should transform corrective decision into an interpretive methodology which determines law, government and social policy.

Feminist constitutional morality should take into consideration link, i.e. the ways in which gender is intertwined with caste, class, religion, sexuality, and disability to provide layerable exclusion<sup>12</sup>. Jurisprudence of the future should, therefore, not entail reduction to the notions of simplicity of equality, but it should address structural and systemic discrimination. Also

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<sup>10</sup> *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (SC), paras 101–105.

<sup>11</sup> *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1 (SC), paras 215–218.

<sup>12</sup> Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics' (1991) 43 Stanford Law Review 1241, 1244–1246.

paramount is judicial restraint coupled with sensitiveness: judicial courts must comprehend their counter-majoritarian status but avoid paternalism, which substitutes agency with protection.

Constitutional morality also relies on constitutional culture to have a transformative effect of feminist constitutional morality. The constitutional values, which should be embedded in legal training programs and issues discussed publicly and in institutions, must encourage gender justice to be regarded as a devotion to the Constitution but not as an intrusion of the courts. Finally, the feminist constitutional morality sees Constitution as a living one- the one which does not only recognizes the differences but also demolishes hierarchies<sup>13</sup>. Its future will be determined by a continuing demand that it has a continual reminder of the fact that morality in a constitutional democracy must not be determined by tradition, majority will, but rather by an undying devotion to dignity, equality and freedom to all.

## CONCLUSION

Feminist jurisprudential approach to constitutional morality presents feminist constitutionalism as a revolutionary principle of constitutionalism instead of a rhetorical phrase of the juridical expression. As the paper has stated, feminist legal approaches to constitutional morality question the pretention to objectivity in constitutional interpretation as well as reveal how legal traditions have entrenched patriarchal values in the name of objectivity. Indian constitutional courts have made ambiguous practices by foregrounding dignity, autonomy, and substantive equality focusing on the role of constitutional morality as counter-majoritarian as a form of guaranteeing gender justice.

The judicial rulings in the cases of *Navej Singh Johar v. Union of India*, *Joseph Shine v. Union of India*, *Shayara Bani v. Union of India* and *Indian Young Lawyers Association v. State of Kerala* are evidence of change that shows that formal inclusion has now been replaced by transformative constitutionalism whereby lived realities clarify constitutional meaning. Nonetheless, it is up to the future of feminist constitutional morality to apply it consistently outside the exceptional cases. It seeks an intersectional approach taking into consideration structural inequalities and opposing paternalistic interpretation of protection. In a sense, feminist constitutional morality reinstates the position of the Constitution as a living document, that is,

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<sup>13</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 (SC).

one which actively dismantles hierarchies, but makes justice, dignity, and equality realised not just in theory but in practice as well.