

**TRANSFORMATIVE CONSTITUTIONALISM: EXPLORING THE CONFLICT  
BETWEEN SOCIETAL NORMS AND SAME SEX MARRIAGE**

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**Abstract:**

*Transformative constitutionalism is conceptually based on infusing the values of equality, liberty, and fraternity. The eternal conflict between societal norms and same-sex marriage forms raises fundamental questions on transformative constitutionalism and its impetus in postcolonial societies. The utopian goal of any society is to remove barriers to equality. This study examines the constitutional validity of same-sex marriage, by understanding the genesis of judicial interpretation on same-sex marriage. The analysis encompasses key aspects such as equal protection under the law, due process, privacy rights, and the evolving understanding of marriage as a fundamental human right. This study delves into the nuanced complexities surrounding marriage rights, through an examination of landmark judgments, legislative developments, and sociocultural shifts. Ultimately, this paper advocates for an inclusive interpretation of constitutional principles, emphasizing that the right to marry is not contingent upon sexual orientation. This paper intends to fundamentally answer whether societal norms are in conciliation with same-sex marriage in the light of socio-cultural shifts and whether judicial review can bypass societal norms without legislative intervention. Conclusively this study calls for a re-evaluation of legal frameworks to ensure that all individuals, regardless of sexual orientation or relationship structure, are afforded equal access to the institution of marriage, by the evolving societal norms and constitutional ideals.*

**Keywords:** Transformative Constitutionalism, Same-Sex Marriage, Post-colonial societies, Judicial review

**I INTRODUCTION**

In the ever-evolving landscape of constitutional law and societal values, the concept of transformative constitutionalism takes center stage, challenging the status quo and defending the unification of core values such as equality, liberty and fraternity. At the heart of this evolving legal debate is the contentious issue of same-sex marriage and the fundamental questions it raises about the compatibility of social norms and constitutional principles in post-colonial societies, the concept of transformative constitutionalism in the light of protection of dignity. This study examines the constitutional validity of same-sex marriage and the analysis covers key aspects such as equal protection of the law, due process, rights to privacy and the changing definition of marriage as a fundamental human examines the emergence of legal interpretation on the subject.

The examination of key decisions, legislative developments and changes in socio-cultural paradigms, attempts to provide a comprehensive overview of the complex and nuanced field of marital rights. In essence, the need for a comprehensive interpretation of constitutional principles, and that the right to marry should not depend on a person and their sexual orientation. The study examines whether social norms are compatible with same-sex marriage in light of changing socio-cultural landscapes and whether the judiciary can circumvent social norms without legislative action. This paper calls for a reassessment of the legal framework to ensure that all people, regardless of their sexual orientation or relationship, have equal access to the institution of marriage in accordance with evolving societal norms and constitutional ideals.

It covers the multifaceted dimensions of marriage and highlights mutual consent, legal framework, emotional bonds and social recognition as key elements of this institution. It redefines the role of marriage in today's context, recognizing the evolving priorities of modern couples that emphasize more emotional connections and shared values. The study addresses common objections to same-sex

marriage and adoption rights rooted in religion, traditional values, procreation arguments, and concerns about children. It counters these objections by underlining the principles of inclusion and individual autonomy, emphasizing above all the importance of the child and well-being. Dignity jurisprudence and the protection of subaltern identity within the realm of transformative nature of the constitution and the tussle between judiciary and legislature, underpins the crucial role of judicial review and separation of powers which redefines the role of the judiciary. It navigates the complexities of legal activism and advocates legal pragmatism within the law. The study concludes with a call for a renewed focus on conducting a comprehensive census in India to obtain accurate information about the LGBTQ+ community so that the government can formulate policies and programs to protect their rights. It underlines the need for the government to recognize and respect the rights of this marginalized community, thereby promoting inclusion and equality for all citizens of India.

## **II CONSTITUTIONALISM: A SOCIAL BLEND OF TRANSFORMATIVE ELEMENTS**

### ***A. ON CONSTITUTIONALISM***

The doctrine of constitutionalism has emerged as a result of the South African experience that initially prompted scholars to take note of the concept of transformative constitutionalism. Constitutionalism and its application are not universal; however, modern constitutionalism requires the imposition of limits on the exercise of powers of government, the protection of fundamental rights, and adherence to the rule of law. Oxford Dictionary defines constitutionalism as the “adherence to constitutional principles”. At its core, this doctrine limits the state’s power and obligates it to adhere to the rule of law and protect fundamental human rights. Nicholas W. Barber most realistically puts that ultimately the principle of constitutionalism finds its origins in the ‘characteristic purpose of state’, which is the advancement of the people’s well-being.

The evolution of constitutionalism makes it abundantly clear, that it differs from the purpose of the state in question. Realizing the ideational values of culture, history, and shared beliefs shapes the purpose of the state. The need to understand law and society as an individual unit having a complex web of intertwin relations has an important bearing on constitutionalism. Law is more than the body of rules puts American sociologist Roscoe Pound, it is a social mechanism, a means to further the ends of a society. Pound stressed the need to study law about the whole process of social control. The conflicting interest in a diverse society obligates the jurists to strike a balance between stability and social change. The utopian need to maintain stability in a liberal democracy requires the maintenance of the rule of law and constitutionalism. The role of post-colonial societal institutions is to bridge the gap between the existing laws and social change.

The transformative character of the constitution demands that the constitution express a ‘magnificent goal’ of a deeply-wounded society, Contemporary understanding in the global south of the transformative nature of the constitution<sup>4</sup> signifies basic changes in political structure and constitutional cultures. Upendra Baxi states that the transformative also emerges in the pre-ambulatory assertion that leads to the creation of a ‘fraternal, pluralist, and unprejudiced society, based on social harmony, recognition of human rights and peaceful co-existence are prerequisites to transformative constitutions. The limited hypothesis is that transformative constitutionalism envisages reform in colonial laws; thus, the limited nature of transformative constitutionalism is to abrogate colonial laws and uphold civilizational ethos thereby decolonizing pre- colonial constitutional norms.

### ***B. DIVERSITY IN CONSTITUTIONALISM: A COMPARATIVE ANALYSIS***

#### **Post-Soviet States**

Differences in history and political beliefs brings about diversity in the application of constitutionalism. Post-Soviet comprised of 15 nations that became independent in late 1991 with the disintegration of Soviet Union. History of the region shows that centralism and statism are critical to state building. The belief that vesting of power in a single leader lead’s to a “strong state”. Development of constitutionalism in the Baltic states (Estonia, Latvia, Lithuania) resulted in democratic constitutionalism at its center. The joining of Baltic states in the European Union underpins the need to have strong constitutionalism ideals. The Russian federation justified centralism as natural reflection of Russia’s particular identity. Constitutional court of Russian federation has adopted a

constitutional identity doctrine as a way to reject western notions of constitutionalism. The preservation of state history, ideals and beliefs results in states having differential understanding of constitutional jurisprudence.

### **Germany**

Germany Studies of comparative constitutionalism reveals that the process of constitution making has taken place in successive waves. Twentieth century has shown that almost all constitutions that emerged in postwar, post-colonial and post-conflict context. The core component amongst them is the promise of democratic transition. Germany's written constitution is known as Basic law, history of the region shows that post-war period saw the ideals of democracy as the grundnorm, following the unification of Germany Basic law was adopted as a permanent document. suggest that modes of looking at survival of national constitutions are based on both the way they are designed and the environment in which they unfold. The development of basic law in the backdrop of post-World War II period, 10the basic law created a pragmatic system of checks and balances. Post-war transition in Germany saw the need for peace and stability which could not be secured without realizing the values of democracy.

### ***C. QUESTION OF MORALITY: THE TUSSELE BETWEEN CONSTITUTIONAL AND PUBLIC MORALITY***

Transformative constitutionalism embarks to attain a postcolonial revision of the constitution which recognizes pre-colonial values and sets a balance between acceptable standards of morality and societal values. Understanding law from the lens of evolution establishes that law evolves as a result of changes in language, culture, politics, and economy. Public morality is the result of society embedding in values which govern good from bad, the question of whether societies borrow the distinction of good from bad is the result of societal evolution. The argument of the union on the question of the constitutionality of section 377 of the Indian Penal Code was that the Indian society is yet to demonstrate a willingness to show greater tolerance towards the practices of homosexuality.

The employment of state interest as a ground to enforce public morality was outrightly rejected by the court. Using public morality as the basis to restrict fundamental rights under Article 21 is not a valid justification, as doing so would lead to fundamental rights being left to the popular will of the society which changes its notions of right and wrong in different periods. A balance between societal expectations and constitutional morality in the light of a civilisationally diverse society, to maintain harmony between law and society.

### ***D.SOCIAL JUSTICE ADJUDICATION***

The reconciliation between societal norms and constitution precedes the hypothesis, that societal norms are the popular will of the majority which makes law and society irreconcilable. Mechanism of adjudication on social justice makes the Judge the sole arbiter on the final question of law, the changing nature of society requires a change in law. Bridging of gap between the law and society is an institutional duty of the judiciary which acts through judges adjudicating on the question of societal realities. The question on judicial review and separation of powers in light of transformative constitutionalism will be dealt with subsequently.

## **III DIGNITY JURISPRUDENCE: THE QUESTION OF IDENTITY**

### ***A. SEXUAL SUBALTERN AND IDENTITY***

Recognition of identity within the realm of transformative constitutionalism requires an understanding of sexual subalterns, the subaltern studies emerged as political projects from within history, political science, and sociology, it has exposed how certain voices have been predominately excluded from narratives and telling of history. Section 377 of IPC which was struck down as unconstitutional, which made unnatural sex of any kind illegal as the same goes against the order of nature. The history of this section reveals that the provision was inserted as part of the colonial project of 'cleaning up' native culture in the course of civilizing missions. Therefore section 377 resulted in the 'othering thereby incorporating heteronormative attitudes.

Heteronormativity leads to the moral question of protection of identity within the constitutional bounds. Human history is driven by the struggle for recognition, Philosopher Hegel recognizes moral

agency as the center of the human condition. The concept of dignity emanates from the right of humans to have a choice that gives people a higher status than that of animals as Francis Fukuyama puts it. Fukuyama recognizes the valuation of the inner being above existing social arrangements. The conflict between what an individual regards as a choice the societal expectations results in constitutional recognition of dignity that preserves liberal democratic values.

#### ***B. TRANSFORMATIVE CONSTITUTIONALISM AND DIGNITY***

As Seen above the paper has raised hypothesis on the nature of transformative constitutionalism, whether the transformation is limited to judicial reformation of postcolonial laws and can the judiciary play a role in transforming societal values. The notions of identity within the realm of dignity call for reconsideration of the role of the judiciary to act as a balanced between conflict norms. The doctrine of transformative constitutionalism is a historic bridge between the past of a deeply divided society and a future founded on the recognition of human rights. The primary goal of the doctrine is to transform Indian society well within the spirit of the constitutional values of liberty, justice, equality, and fraternity, which makes it a continuing process. Justice V R Krishna Iyer rightly defines transformative constitutionalism in the Indian context, that interpretation of the constitution requires an understanding of the people for whom it is made. The courts in the past have used this doctrine to expand the notions of dignity jurisprudence thereby creating new human rights in the process. In the celebrated National Legal Services Authority case, the courts recognized the rights of transgender persons and considered the concept of human dignity as a constitutional value.

Former Chief Justice of the Supreme Court of Israel Aharon Barak attributes the importance of human dignity as a constitutional value that provides meaning to the norms of the legal system, Human dignity influences the purposive interpretation of the constitution. In NALSA the court expanded the contours of human dignity and gave primary importance to individualism and democracy, failing to observe these values would ultimately lower the standard of living of people. The standard adopted by the courts is in line with the Kantian criterion of justice which is found in reinterpreting freedom in terms of attainment of individual perfection. According to the authors, the doctrine of transformative constitutionalism should not transcend societal values, if the premise is to sustain democracy by judicial intervention, dignity jurisprudence should not give way to the violation of separation of power.

#### ***IV CONSTITUTIONAL FRAMEWORK OF SAME-SEX MARRIAGE***

In the light of recent Judgment viz Supriyo v. Union of India, the Hon'ble Supreme Court refused to legalize same-sex marriage. Here question arises did the petitioner demand the right thing, did the means justify the end, the answer is no. Right to Marry is not a Fundamental Right under Article 21, right to live with someone of their choice should be or can be contended as a fundamental right where both the major individual wants to live together with free consent. Article 21 is itself very wide and protects many rights. Generally, it confers the right to life to every person here it doesn't mention gender. One individual has the right and freedom to reside with a partner of their choice and establish an intimate or sexual relationship because such rights and freedom are not absolute. The fact that Supreme Court in 2010 held that the act of two major living together cannot be termed as illegal or unlawful, they have the right to life and the right to live with their choice protected under the ambit of Article 21 of the Indian Constitution. The Judgment was gender neutral it didn't restrict to males and females. Here, the interpretation is that if heterosexual couples can be in living relationships, then homosexual couples are too. Various international legal instruments explicitly recognize the entitlement to matrimonial union and the liberty to espouse a person of one's choosing. Notable examples include Article 16 of the Universal Declaration of Human Rights, Article 12 of the Human Rights Act, and Article 23 of the International Covenant on Civil and Political Rights, which pertain to the aforementioned entitlement. Article 16 of the Universal Declaration of Human Rights affirms that individuals of mature age possess the entitlement to enter into matrimony and establish a family, devoid of any restrictions based on race, nationality, or religion.

The volition of the intending spouses must be freely and fully given to effectuate the marital union. Article 12 of the Human Rights Act extends the entitlement to marry to all individuals of marriageable age, 21 alongside the prerogative to initiate a family, by the domestic laws governing this matter.



Furthermore, Article 23 of the International Covenant on Civil and Political Rights obligates the State Parties not only to uphold the rights elucidated in the aforementioned provisions but also to take suitable measures to ensure parity in the entitlements and obligations of spouses in matters about marriage, during the marriage, and at its dissolution. In India, the entitlement to marry is entrenched as a fundamental right, falling within the purview of Article 21 of the Constitution of India, which enunciates the Right to Life and Personal Liberty.

Although not expressly delineated in the Indian Constitution, the judiciary of India has construed that the fundamental entitlement, namely the right to life and personal liberty, inherently encompasses the prerogative of a person of the majority to espouse an individual of their choosing. In the seminal case of *Lata Singh vs. State of UP*, the esteemed Supreme Court decreed that an individual who has attained majority possesses the entitlement to unite in matrimony with a partner of their preference. In the case of *Shakti Vahini vs. Union of India*<sup>23</sup>, the apex court similarly advocated for the rights of two consenting adults in their selection of life partners.

It further underscored that their exercise of free choice in partnering with each other constitutes an invocation of their fundamental entitlements under Articles 19 and 21 of the Indian Constitution. Moreover, in the renowned *Hadiya Case*<sup>24</sup>, the court reiterated that the right to marry an individual of one's choosing is an intrinsic facet of the right to life and liberty. As elucidated earlier, if the Supreme Court can accord recognition to cohabitation akin to a marital union, then it logically follows that if a consenting homosexual couple elects to cohabit for their lifetime, they too should be afforded similar consideration.

## **V ESSENTIALS OF MARRIAGE: CONSENT, LAW, EMOTIONS, SOCIETY**

Marriage is a complex social and legal institution that holds various meanings for different individuals and societies. It encompasses a range of emotional, legal, and social dimensions, each contributing to its significance. From a neutral lens, marriage can be defined as two consenting individuals living together with their freedom of life guaranteed by the constitution.

### **A. BASIS OF MARRIAGE**

1. **MUTUAL CONSENT**-Marriage, regardless of sexual orientation, fundamentally hinges on the voluntary agreement of both parties involved. It signifies a shared understanding and willingness to enter into a committed union, acknowledging the duties and privileges that accompany it. This mutual consent forms the fundamental building block, demonstrating that individuals willingly choose to embark on this journey together.

2. **LEGAL FRAMEWORK**-The institution of marriage, including unions between individuals of the same sex, is underpinned by a comprehensive legal framework that outlines the rights and obligations of spouses. This legal structure encompasses issues such as property rights, inheritance, spousal support, and procedures for dissolution. It establishes a well-defined foundation for the relationship, ensuring transparency and safeguarding the interests of both parties. If this identical legal framework is extended to cohabiting couples, there is a compelling argument for its application to same-sex couples as well.

3. **EMOTIONAL BOND**-In the context of homosexual unions, as in any marriage, there exists a profound emotional connection between partners. This bond symbolizes a deep-rooted commitment, love, and mutual comprehension. It constitutes the emotional cornerstone of the union, sustaining it through the various trials and triumphs that life presents.

4. **SOCIAL RECOGNITION**-Marriage, irrespective of the sexual orientation of the partners, is a socially acknowledged institution conferring formal recognition upon the relationship. It signifies a communal affirmation of the partnership and its importance within the broader community. This recognition carries both symbolic and practical significance, influencing how the couple is perceived and interacts with society. Many things exist in our society that people don't notice, but the law acknowledges them.

5. **SHARED RESPONSIBILITIES**-Partners in a marriage, including homosexual unions, typically share a spectrum of responsibilities. This may encompass financial contributions, household chores,

and the joint upbringing of children. These shared responsibilities cultivate a sense of collaboration, underscoring the cooperative essence of the union.

***B. REORIENTING MODERN MARRIAGE: COMPANION-CENTRIC FOCUS***

The essence and historical foundation of marriage indeed lie in companionship. Traditionally, it served as a union between individuals to provide emotional support, share life's joys and challenges, and build a life together. However, contemporary societal dynamics have witnessed a shift towards smaller, nucleus families. This transformation is characterized by limited time availability for close family members due to various commitments and responsibilities. In this evolving landscape, there has been a noticeable change in the priorities of newer generations of couples. Unlike earlier times, procreation is no longer viewed as the primary or essential purpose of marriage. Instead, couples now place greater emphasis on other aspects of the partnership, such as emotional connection, shared values, mutual respect, and personal fulfillment.

They may opt for marriage for the sake of companionship and the desire to build a life together based on mutual understanding and affection. This shift can be attributed to various factors, including changing societal norms, advances in reproductive technology, and a broader acceptance of diverse family structures. Additionally, increased focus on individual autonomy and career aspirations has contributed to this evolving perspective on marriage. In essence, while procreation remains a significant aspect of many marriages, it is no longer universally considered the sole or paramount objective. Instead, contemporary couples often prioritize companionship, emotional fulfillment, and shared experiences as the cornerstones of their union. This transformation reflects the evolving nature of marriage in response to shifting societal values and lifestyle preferences.

**VI INCLUSIVITY IN SAME-SEX ADOPTION AND MARRIAGE: ADDRESSING OBJECTIONS**

In light of recent judgment, though some jurisdictions may have restrictions on same-sex couples adopting jointly, individuals within a same-sex partnership are typically free to pursue adoption on an individual basis. This means that one member of the couple can legally adopt a child as a single parent, even if their relationship with their partner is not formally recognized by the law. Under the Juvenile Justice (Care and Protection of Children) Act, 2015, irrespective of their sexual orientation, are eligible to adopt a child. Section 56(1) of the Juvenile Justice Act explicitly states that any person can adopt a child if they are eligible to do so under the act and if it is in the best interests of the child. This approach acknowledges the capacity of individuals within same-sex relationships to provide a nurturing and stable environment for a child.

It recognizes that the quality of parenting is not solely determined by the legal recognition of a couple's union but by the individual's ability to provide love, care, and support to the child. Additionally, this approach is often driven by a desire to prioritize the best interests of the child. It acknowledges that having a loving and supportive family environment is of paramount importance, regardless of the specific legal arrangements of the parents. It's worth noting that this practice is also consistent with the principle of individual autonomy. It allows individuals to exercise their right to become parents through adoption, irrespective of their marital status or the legal recognition of their relationship. Ultimately, allowing individuals within same-sex relationships to adopt in their capacity is a step towards inclusivity, recognizing that capable and loving parents can come from a variety of family structures. It provides an opportunity for children to find stable, caring homes and underscores the importance of focusing on the child's well-being above all else.

***A. TRACING SOCIETAL OBJECTIONS***

Objections to same-sex marriage and adoption rights for same-sex couples can stem from both societal and legal perspectives. Below are some of encountered objections:

1. **RELIGIOUS TENETS**-Certain religious factions assert the doctrinal perspective that marital unions should exclusively involve individuals of disparate genders, grounded in their interpretative adherence to sacred texts.

2. CONSERVATIVE IDEOLOGIES-Individuals adhering to conservative or traditional paradigms assert a conceptualization of matrimony as exclusively between a man and a woman, underpinned by enduring societal norms.
3. PROCREATIVE IMPERATIVE-Detractors may contend that the inherent purpose of matrimony is procreation. Given the natural constraints of same-sex couples in conceiving offspring, arguments arise against their entitlement to marital unions.
4. HETERONORMATIVE ASSERTIONS-Objectors posit that the institution of marriage inherently rests on the complementary dynamic between male and female partners. Departing from this normative framework, they argue, is not conducive to societal welfare.
5. CHILD-CENTRIC APPREHENSIONS-Critics articulate concerns regarding the potential ramifications on children raised by same-sex couples, emphasizing potential challenges tied to familial structure or gender role dynamics.

***B. OBJECTIONS TO ADOPTION RIGHTS FOR SAME-SEX COUPLES:***

1. PRESERVATION OF TRADITIONAL FAMILY PARADIGMS-Advocates posit that the optimal upbringing of children is inexorably tethered to familial configurations that adhere to a conventional model, characterized by the inclusion of both maternal and paternal figures—a stance rooted in the preservation of traditional family structures.
2. CULTURAL CONCERNS-Detractors posit that children derive benefit from exposure to gender-diverse role models, thereby fostering a comprehensive developmental environment, an aspect potentially lacking in households formed by same-sex couples.
3. ETHICAL SCRUTINY-Certain stakeholders may proffer ethical and legal reservations against same-sex relationships, grounding their objections in perceived incongruities with prevailing legal principles, as well as the infringement upon constitutional rights or statutory frameworks.
4. APPREHENSIONS REGARDING SOCIAL PERCEPTIONS-Critics express apprehensions pertaining to potential societal ostracism or discriminatory treatment faced by children adopted by same-sex couples, positing that such experiences could adversely affect their overall well-being.
5. CULTURAL CONSERVATION IMPERATIVE-In specific instances, opposition to the adoption of children by same-sex couples may be underpinned by a jurisprudentially nuanced fervor to uphold and perpetuate cultural or societal norms, thereby implicating legal considerations surrounding familial structures and kinship arrangements.

***C. TRACING THE JUDICIAL IMPACT OF UNITED STATES ON INDIA***

The United States' formidable judicial soft power is epitomized by its ability to shape and influence global legal paradigms through the pronouncements of its judiciary, particularly the esteemed Supreme Court. Landmark decisions, particularly in the realms of civil rights and constitutional interpretation, wield considerable sway in international legal circles, serving as catalysts for legal transformations on a global scale. The perceived legitimacy and juridical acumen of the U.S. legal system amplify the dissemination of American legal philosophy, intricately molding international standards and human rights principles. This manifestation of judicial soft power underscores the interconnected nature of legal frameworks, underscoring the United States' pivotal role in orchestrating the evolution of global legal norms well beyond its domestic jurisdiction.

In the 2013 case *United States v. Windsor*, the U.S. Supreme Court issued a seminal pronouncement, declaring unconstitutional Section 3 of the federal Defense of Marriage Act (DOMA), 1996. This provision had defined marriage as a legal union exclusively between one man and one woman. The Court, in a 5-4 decision, determined that DOMA's objective was to impose restrictions and disabilities upon a specific class of individuals, namely same-sex couples. In 2015, the U.S. Supreme Court issued a landmark ruling affirming the constitutional right of same-sex couples to enter into marriage. Massachusetts had previously set the legal precedent by recognizing gay marriage in 2004 through a groundbreaking judicial decision. In the same year, the City of San Francisco granted a marriage license to a lesbian couple. It's noteworthy that legal acknowledgment of same-sex marriage in California did not materialize until 2008. These pivotal legal milestones initiated a decadelong period marked by legal challenges, ultimately culminating in the Supreme Court's definitive decision in *Obergefell v. Hodges* in 2015.

The US decision sparked discussions and debates in India about the rights of LGBTQ+ individuals. It prompted conversations about the need for legal recognition and protection of same-sex relationships. However, it is also essential to note that India's socio-cultural and legal landscape is distinct from that of the United States. While the US decision had an impact on global LGBTQ+ rights movements, progress in India has been influenced by domestic factors, including cultural attitudes, political dynamics, and legal precedents. In India, the journey toward LGBTQ+ rights have been marked by both progress and setbacks.

In 2018, the Supreme Court of India struck down a colonial-era law (Section 377) that criminalized consensual homosexual activity, a significant victory for LGBTQ+ rights. This decision was a culmination of years of activism and legal battles within India. But the recent judgment by Indian Supreme Court doesn't show the influence of 2015 US judgment on India.

## **VII CONCLUSION**

### **A. SUGGESTIONS**

The absence of comprehensive data and information about the LGBTQ+ community in India poses a significant challenge. The delay in conducting the population census, exacerbated by the COVID-19 pandemic, has hindered the government's ability to understand and address the specific needs and rights of this marginalized community. To rectify this situation, the population census must be prioritized and conducted expeditiously.

This step is essential in providing the government with accurate data regarding the size and composition of the LGBTQ+ community. Such information will serve as the foundation for formulating targeted policies and programs aimed at safeguarding their rights. Lastly, by swiftly conducting the census and establishing a dedicated committee, the Government of India can take meaningful strides towards recognizing and upholding the rights of the LGBTQ+ community, promoting a more inclusive and equitable society for all its citizens

### **B. LIMITATIONS TO TRANSFORMATIVE CONSTITUTIONALISM**

The evolution of states from a police state to a welfare state preempts the existence of a constitution, Hans Kelsen and H.L.A Hart argue that the ultimate authority of the society is the Constitution or a set of laws that acts as the "final decider". The despotic tendencies of the state demand the creation of a set of laws that limit the power of the state. Division of the modern state into three parts i.e., Legislature, executive, and judiciary, such a division intends to achieve the notions of the welfare state. Realizing the goal of transformative constitutionalism requires the existence of an independent judiciary, redefining the term 'independent' in the context of the doctrine of transformative constitutionalism, considering the independence of the judiciary in the light of the separation of power is to limit the role of the judiciary, as was mentioned in the previous part the role of the judge is to bridge the gap between the law and society.

The courts in the process of bridging the gap create law, which arises from their inherent power to impart justice. Justice A.K. Sikri, sustaining of liberal democracy requires the protection of dignity which cannot be left to the whims and fancies of the legislature. NALSA redefined the traditional role of the judiciary to interpret law to advance justice for the vulnerable class. The limitations to independence are hit by the 'counter majoritarian' problem as Alexander Bickel puts it. For all practical purposes, democracy is the will of the people which is represented by its majority.

The majoritarian problem affects the moral standing of the legislature which intends to remain in power. The limited hypothesis that proceeds then is the importance of judicial review as a justifiable mechanism for giving effect to those issues relevant to minorities that have been neglected by the legislature as a way to preserve popular opinion. The review mechanism under Article 13 of the Indian constitution gives the power to review legislative and administrative action. The term 'activism' shall be interpreted with the role of the judiciary to bridge the gap between law and society. The shift from the traditional role of courts to interpret law to make law is the activist role of the judge. Justice A.K Sikri highlights the difference between judicial overreach and judicial activism, according to him Judicial activism is to be understood as judicial pragmatism which confines itself within the boundaries of law.



Going by Robert H. Bork's understanding of an activist judge is one who enacts his own beliefs and imposes them upon society. The conflict between the limitations that a judge is bound by the doctrine of separation of power and the expansion of power that a judge seeks at the expense of other branches of the government is the problem of the notion of an activist judge. A post-facto analysis of activism underscores the conflict between the judiciary and the doctrine of separation of power when addressing the question of human rights in the garb of liberal values. In a recent case before the Supreme Court, the contention of the petitioners was the legal recognition of non-heterosexual marital unions. The central issue before the court was whether the judiciary has the power to, "grant recognition to marital unions between non-heterosexual couples, at the outset doctrine of separation of power would debar the judiciary from doing so, and the division of roles and powers between the legislature and the judiciary are logical to societal considerations, the notions of activism cannot allow the judiciary to play in the turf of the legislature.

#### **REFERENCES:**

1. Prof. (Dr.) Mahendra Pal Singh, "Constitutionalism in the Indian Comparative Perspective" 11 NUJS L.Rev. 655 (2018).
2. James A. Gardner, "The Sociological Jurisprudence of Roscoe Pound" 7 Villanova Law Review Part I (1961).
3. Partlett William,, Constitutionalism and State-Building in Post-Soviet Eurasia .
4. Anupama Roy and Michael Becker, Dimensions of Constitutional Democracy India and Germany (2020).
5. Donald P. Kommers, German Constitutionalism: A Prolegomenon 852.
6. Upendra Baxi, Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa
7. Rohit Sharma, "The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment," NUJS Law Review (2009).
8. Ratna Kapur, "Out of the Colonial Closet, but Still Thinking 'Inside the Box': Regulating 'Perversion' and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns" NUJS L.Rev. 381 (2009).
9. Justice A.K. Sikri, Constitutionalism and Rule of Law: In a Theatre of Democracy (2023).
10. Francis Fukuyama, Identity: The Demand for Dignity and the Politics of Resentment (2014).
11. Dr. M. P. Chengappa Vineeta Tekwani, An Analysis of Transformative Constitutionalism with Special Reference to Sexual Minorities in India (2019).
12. Christopher F. Zurn, "Deliberative Democracy and Constitutional Review," Kluwer Law International (2002).
13. National Legal Services Authority v. Union of India, (2014) SCC 438
14. S. Khusbhoo v. Kanniammal, (2010) 5 SCC 600
15. Lata Singh v. State of UP, (2006) 5 SCC 475
16. Shakti Vahini v. Union of India, (2018) 7 SCC 192
17. Shafin Jahan v. Ashokan K.M., (2018) SC 1933
18. United States v. Windsor, (2013) 570 U.S. 744
19. Obergefell v. Hodges, (2015) 576 U.S. 644 20. Supriyo Chakraborty v. Union of India, W.P.(C) No. 1011/2022