
SUBSTANTIVE EQUALITY AS A TOOL OF TRANSFORMATIVE CONSTITUTIONALISM: A FEMINIST REINTERPRETATION OF CONSTITUTIONAL MORALITY IN SHAPING CONTEMPORARY INDIAN JURISPRUDENCE

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ABSTRACT

The Constitution of India was envisioned not merely as a treatise of governance, but as an emancipatory manifesto designed to dismantle deeply entrenched social hierarchies. However, traditional Indian jurisprudence has frequently defaulted to a paradigm of formal equality, often inadvertently perpetuating patriarchal and systemic inequities through ostensibly neutral legal frameworks. While the Constitution guarantees equality under Articles 14, 15, and 16, judicial engagement has evolved from formal non-discrimination toward a substantive, dignity-oriented framework. This paper explores this shift through the lens of Sandra Fredman's model of substantive equality as the primary operational tool of Transformative Constitutionalism. Simultaneously, the Supreme Court has invoked constitutional morality to invalidate discriminatory practices and resist majoritarian social norms; yet, its normative foundations remain insufficiently theorized from a feminist perspective. Drawing upon the anti-subordination framework of Catharine MacKinnon, this paper argues that constitutional morality must be understood as a structural commitment to dismantling systemic hierarchies of gendered power rather than merely enforcing abstract neutrality. Through a feminist reinterpretation of application of constitutional morality, the paper investigates how the Court utilizes Constitutional values to override regressive societal morality, ultimately analysing that for constitution to fulfill its transformative promise, substantive equality must be consistently applied to unmask discrimination and thereby reshaping the future of Indian legal theory.

Keywords: Transformative Constitutionalism, formal equality, Substantive Equality, Constitutional Morality, feminist perspective, regressive societal morality

1. INTRODUCTION

The framing of the Indian Constitution is historically often attributed to its founding fathers, a narrative that has marginalized the profound contributions of the Constituent Assembly's women members, who were sometimes dismissively referred to merely as 'ladies'¹ by their male peers². In reality, the eleven women who ultimately signed the Constitution including figures like Hansa Mehta, G Durgabai, Renuka Ray, Amrit Kaur, Dakshayani Velayudhan, and Purnima Banerjee operated as a cohesive and formidable feminist authorial voice³. They actively shaped the constitutional imagination by translating the demands of the pre-independence women's movement into foundational equality provisions. One of the most direct influences of the women members was their insistence on integrating 'sex' as a prohibited ground for discrimination. Through persistent interventions, particularly within the Sub-Committee on Fundamental Rights, they ensured that the category of 'woman' (abstracted through the word 'sex') was explicitly protected in Articles 15(1), 15(2), 16(2), and 325 of the Constitution⁴. Furthermore, these women shaped the discourse surrounding affirmative action by forcefully rejecting paternalistic and chivalric models of representation. For instance, Renuka Ray vehemently opposed the suggestion of separate electorates for women, arguing that Indian women would not tolerate such isolating reservations. Instead, they advocated for substantive 'special provisions' to address systemic disadvantages, an advocacy that heavily impacted the framing of Articles 15(3) and 16(4). The women in the Constituent Assembly fundamentally altered the conceptual vocabulary of the Constitution. Drawing from the All-India Women's Conference (AIWC) and the 1939 report⁵ of the National Planning Committee, they successfully shifted the legal understanding of 'sex' from a biological destiny to a socially constructed category. While several male members argued that men and women were 'naturally' different and complementary and therefore constitutional equality was a flawed premise, women members argued that these differences were actually socially induced disabilities⁶. To remedy these socially constructed disabilities, they advocated for a comprehensive civil code to dismantle patriarchal customs, arguing that to be without a code

¹ GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (2nd ed. 1999).

² Achyut Chetan, *Gender in the Making of the Constitution: Proposals for a Feminist Inquiry into Indian Constitutional History*, 18 NAT'L L. SCH. J. 4, 24–25 (2024)

³ Id at 44

⁴ Achyut Chetan ed., *Founding Mothers of the Indian Republic* (2023)

⁵ K.T. Shah ed., *Report of the Sub-Committee on Woman's Role in Planned Economy* 32 (1947)

⁶ GOV'T OF INDIA, *TOWARDS EQUALITY: REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN INDIA* (2012)

was ‘to be without justice’⁷. During the debates on the Hindu Code Bill, they pushed for rights related to adoption, female inheritance, and divorce to reconfigure the traditional, patriarchal Indian home into an egalitarian space aligned with constitutionalism. The women members did not treat gender justice as merely an abstract legal concept; they grounded constitutional equality in the empirical, lived realities of Indian women. Operating within a highly gendered physical assembly where they often had to shout from the backbenches to be heard, they utilized both the assembly’s constitution-making and legislative capacities to raise intersectional issues. Dakshayani Velayudhan demanded scholarships for Dalit girls, successfully highlighting the intersection of caste and gender⁸. Annie Mascarene advocated for railway safety and specific provisions for breastfeeding mothers, drawing the assembly’s attention to the female body and maternal labor⁹. Begum Aizaz Rasul pushed for equal employment opportunities in the police and defense forces, challenging the gendered division of professional labor.¹⁰ Furthermore, during the volatile debates on recovering abducted women post-Partition, Durgabai and Purnima Banerjee centered the crucial issues of women’s consent and affective bonds, refusing to let women be treated merely as passive markers of community or national honor¹¹. Through these multifaceted efforts, the founding mothers of the republic ensured that the Indian Constitution was embedded with mechanisms to actively challenge patriarchy and accommodate the substantive realities of women’s lives.

2. EQUALITY AS A TOOL OF TRANSFORMATIVE CONSTITUTIONALISM

The most ubiquitous and simplest statement of the original concept of equality originates from the Aristotelian formula that ‘likes should be treated alike’. This approach, known as the formal model of equality or the equal treatment principle, is premised on the idea that treating everyone uniformly is the essence of fairness. Under this formal paradigm, any differential treatment among individuals or groups who are considered to be the same constitutes discrimination. The focus is entirely on procedural consistency, typically manifesting as prohibitions against direct discrimination or disparate treatment, while assuming that individuals can and should be judged purely on their individual merit, devoid of their race, gender, or other social characteristics. In the context of women, this formal approach insists on gender neutrality, assuming that

⁷ Durgabai Deshmukh, *Constituent Assembly (Legislative) Debates* (Mar. 1, 1949), reprinted in 14 DR. BABASAHEB AMBEDKAR: WRITINGS AND SPEECHES pt. 2, 398, 399 (1987).

⁸ Dakshayani Velayudhan, *Constituent Assembly Debates*, vol. 4, 2,429 (Mar. 19, 1948).

⁹ Annie Mascarene, *Constituent Assembly Debates (Legislative)* [CAD(L)], vol. 2, 668, 670–71 (Feb. 18, 1949).

¹⁰ *Id.*

¹¹ Purnima Banerji, *CAD(L)*, vol. 7(2), 665 (Dec. 15, 1949).

individuals can and should be treated purely on their individual merit, disregarding their sex. However, feminist critiques reveal that this formal model is inherently flawed because it conceals a 'male norm'; under the standard of sameness, women are measured according to their correspondence with men, effectively forcing them to assimilate into societal structures designed by and for men. Furthermore, formal equality fails completely when there is no appropriate male comparator such as in cases of pregnancy and it ignores the antecedent structural disadvantages and gender-role stereotypes women face, thereby entrenching inequality rather than alleviating it.

However, this original formal model has drawn significant criticism; it fails to acknowledge that when individuals suffer from antecedent disadvantages, treating unequals as equals simply entrenches and widens existing disparities¹². The framers of the Indian Constitution inherited a society deeply fractured by stratification, most notably through the caste system and gender bias, which operated as a complex structure of graded inequality. Recognizing that centuries of systemic segregation and oppression had erected structural and institutional barriers, the framers designed a constitutional Equality Code (Articles 14, 15, and 16) that intertwined formal equality with affirmative State measures. Article 14¹³ guarantees equality before the law and equal protection of the laws, while Article 15¹⁴ forbids discrimination on specific grounds such as race, caste, sex, religion, and place of birth. Article 16(1)¹⁵ guarantees equality of opportunity in public employment. Rather than viewing Article 15(3) as a mere exception to the rule of non-discrimination, the constitutional framework treats it as an integral component of the equality provision that enables the State to enact special, positive discrimination measures to protect and uplift women. However, to correct historical imbalances, the Constitution incorporates enabling provisions namely Articles 15(4), and 16(4) which permit the State to execute affirmative action and special protective measures for women, children, and socially and educationally backward classes. Consequently, the Indian Constitution envisages equality not just as a formal rule of blindness to difference, but as a dynamic tension where the State is empowered to mitigate social stratification and implement policies to achieve substantive, material equality. In India, the concept of substantive equality is deeply embedded in both the constitutional text and subsequent judicial interpretation. The Supreme Court of India has operationalized this by striking down discriminatory employment

¹² Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. CONST. L. 712-738 (2016).

¹³ India Const. art. 14

¹⁴ India Const. art. 15

¹⁵ India Const. art. 16

rules that penalized women for marriage or pregnancy. For instance, in *C.B. Muthamma v. Union of India*¹⁶, the Court struck down rules requiring female foreign service officers to resign upon marriage, and in *Air India v. Nergesh Meerza*¹⁷, it invalidated regulations terminating air hostesses on their first pregnancy. Furthermore, substantive equality is manifested in the enforcement of equal pay for equal work in the private sector (*Mackinnon Mackenzie case*¹⁸) and the protection of working women's right to privacy and dignity regarding pregnancy (*Neera Mathur case*¹⁹). Positive discrimination measures under Article 15(3) such as Wages Code, 2019 that Prohibits gender discrimination in wages and recruitment (Section 3); OSHWC Code (Occupational Safety, Health and Working Conditions) that allows women to work night shifts with consent, ensuring safety, the 73rd and 74th Constitutional Amendments (which reserve one-third of seats for women in local self-governing bodies), and 106th Amendment Act, 2023 (Nari Shakti Vandan Adhiniyam) mandates 33% reservation for women in the Lok Sabha, State Legislative Assemblies, and the Delhi Assembly further cement substantive equality by addressing structural barriers to women's political and economic participation.

2.1 SUBSTANTIVE EQUALITY THROUGH A LENS OF SANDRA FREDMAN'S MODEL

Sandra Fredman is a highly influential figure in modern feminist legal theory and human rights law. As a Professor of Law at Oxford University and the founder of the Oxford Human Rights Hub, her primary relevance to the feminist perspective lies in her pioneering work on Substantive Equality. Sandra Fredman rejects the reduction of substantive equality to a single formula such as equality of results, equality of opportunity, or dignity because these single-axis models fail to address the complex reality of discrimination. Instead, she conceptualizes substantive equality through a comprehensive four-dimensional analytical framework tailored to address the systemic wrongs experienced by marginalized groups, particularly women:

1. **'Redressing Disadvantage'**²⁰: This dimension corrects socio-economic maldistribution. For women, disadvantage goes beyond simple income poverty; it includes power imbalances within and outside the family, and the socio-economic

¹⁶ *C.B. Muthamma v. Union of India*, AIR 1979 SC 1868, (1980) 1 SCR 668

¹⁷ *Air India v. Nergesh Meerza*, AIR 1981 SC 1829, (1982) 1 SCR 438

¹⁸ *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa*, AIR 1987 SC 1281

¹⁹ *Neera Mathur v. Life Insurance Corp. of India*, AIR 1992 SC 392

²⁰ Fredman, *supra* note 12 at 728

constraints that prevent genuine choice, such as being forced into insecure part-time work due to societal assumptions that women are the primary child-carers

2. **‘Addressing Stigma, Stereotyping, Prejudice, and Violence’²¹**: This dimension targets recognition harms. It recognizes sex as a social construct and aims to eliminate the humiliation, sexual harassment, and gender-based violence that negate the very identity and dignity of women.
3. **‘Enhancing Voice and Participation’²²**: This dimension counters the political and social exclusion of women. It promotes parity in participation and decision-making, acknowledging that women are often vulnerable to having their interests overlooked in the political process, and champions measures like political quotas to ensure their voices are heard
4. **‘Accommodating Difference and Achieving Structural Change’²³**: Rather than requiring women to assimilate into a male norm, this transformative dimension demands structural changes to institutions. For example, workplaces must be fundamentally restructured to accommodate participative parenting and pregnancy, removing the detriment attached to biological and social differences without attempting to eliminate the differences themselves.

Today, her four-dimensional model has moved far beyond academia. It is actively utilized by international bodies like UN Women and the CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) committee to evaluate whether state policies ranging from public utility regulations to climate change frameworks, are genuinely working to dismantle patriarchal structures or merely paying lip service to equality. Fredman’s four-dimensional concept intricately matches the Indian constitutional approach to women’s equality. First, regarding the redressing of disadvantage, the Indian State utilizes Article 15(3) to enact positive discrimination, providing maintenance rights, maternal health protections, and employment reservations to correct systemic socio-economic imbalances specifically affecting women. Second, Indian jurisprudence actively targets stigma and stereotyping. This aligns with Fredman’s second dimension and is evident when the Supreme Court struck down employment

²¹Fredman, supra note 12 at 729

²²Fredman, supra note 12 at 730

²³Fredman, supra note 12 at 732

rules that treated pregnancy as a disqualification (calling it an open insult to Indian womanhood) and when it established the Vishaka guidelines to combat the sexual harassment of women at workplaces, recognizing it as a violation of gender equality and the right to life. Third, India fulfills Fredman's participative dimension explicitly through the 73rd, 74th and 106th Constitutional Amendments. Finally, the demand for structural change is evident as Indian courts challenge traditional employment conditions designed around male lifecycles. By insisting that a woman's biological imperatives and domestic roles cannot act as impediments to her professional advancement, the Indian constitutional framework aligns with Fredman's goal of structurally accommodating difference rather than forcing women to conform to a male standard.

Fredman's multidimensional approach aligns perfectly with Catharine A. MacKinnon's Dominance Approach (rooted in Radical Feminism), which argues that gender inequality is not a matter of sameness or difference but a profound imbalance of power, where men systematically dominate women sexually, economically, and politically.

3. MACKINNON'S DOMINANT APPROACH AND CONSTITUTIONAL MORALITY IN SHAPING GENDER EQUALITY

Catharine A. MacKinnon's anti-subordination framework, primarily articulated through her Dominance Theory, fundamentally challenges traditional legal paradigms that rely on formal equality and abstract neutrality²⁴. MacKinnon argues that the conventional approaches to equality namely the sameness approach (which demands women be treated exactly like men) and the difference approach (which seeks special protections for women due to perceived dissimilarities) are both inherently flawed because they unreflectively adopt a male standard as the universal benchmark²⁵. By measuring women according to their correspondence with men, these models fail to address the systemic realities of patriarchy and conceal the substantive ways in which man has become the measure of all things²⁶. Instead, MacKinnon reconceptualizes the issue of gender inequality not as a matter of biological or psychological difference, but as a profound disparity in political, economic, and social power. Within this framework, gender itself is understood as an inequality of power a socially constructed status

²⁴Amanda J. Albert, *The Use of MacKinnon's Dominance Feminism to Evaluate the Advancement of Women Lawyers as Leaders Within Large Law Firms*, 35 HOFSTRA L. REV. 291 (2006).

²⁵CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 8 (1989).

²⁶Maria H. Morales, *Perfect Equality: John Stuart Mill on Well-Constituted Communities* 143 (1996).

rooted in the systemic domination of women by men, designed to keep hierarchies in place²⁷. When this dominance approach is applied to the concept of constitutional morality, it necessitates a radical departure from interpreting the law through the lens of abstract neutrality. Historically, the legal system and the State have operated from a male standpoint, transforming male dominance into an invisible, legitimized status quo while masquerading as objective and neutral²⁸. According to MacKinnon, the liberal State coercively constitutes the social order in the interest of men as a gender, embedding male power into individual rights²⁹. For instance, the right to privacy has often been used to shield domestic violence, forced maternity, and exploitation within the family from public scrutiny, allowing the private sphere to remain a site of unaccountable male domination. Therefore, an abstractly neutral application of constitutional law merely perpetuates these existing power imbalances, effectively granting the State an unreviewable privilege to ignore systemic gender-based disadvantages and maintaining a male norm.

In the Indian context, the judiciary has increasingly utilized constitutional morality as a transformative tool to dismantle such entrenched norms. The tension between constitutional morality and regressive societal morality lies at the heart of India's post-colonial legal evolution. Constitutional morality, a concept rooted in the Constituent Assembly debates and subsequently expanded by the Supreme Court of India, acts as a counterweight to popular or social morality, ensuring that the fundamental rights and dignity of individuals are not martyred at the altar of majoritarian prejudices. Constitutional morality, a concept introduced in the Constituent Assembly debates by Dr. B.R. Ambedkar, requires strict adherence to constitutional principles of liberty, equality, fraternity, and dignity, acting as a bulwark against the arbitrary impulses of majoritarianism. In landmark decisions like *Navtej Singh Johar v. Union of India*³⁰, which decriminalized homosexuality, the Supreme Court established that constitutional morality requires the State to preserve the heterogeneous nature of society and protect marginalized communities from the oppressive dictates of social morality³¹. Similarly, in *Joseph Shine v. Union of India*, the Court struck down the archaic, gendered offence of

²⁷ Katherine T. Bartlett & Rosanne Kennedy eds., *Feminist Legal Theory: Readings in Law and Gender* 241 (2018).

²⁸ Wayne Morrison, *Jurisprudence: From Greeks to Post Modernism* 490 (Special Indian ed. 2011)

²⁹ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, (1982).

³⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCALE 386

³¹ Mahendra Pal Singh, *Observing Constitutional Morality*, SEMINAR (2019), https://www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm

adultery, recognizing that the law treated women as the chattel of their husbands and reinforced outdated notions of male dominance and female subjugation within marriage³². These judgments reflect a substantive application of constitutional morality that aligns with MacKinnon's anti-subordination goals by dismantling laws that legally enforce patriarchal ownership and dictate traditional gender roles. Transformative constitutionalism, driven by this robust conception of constitutional morality, demands a structural commitment to achieving substantive equality rather than settling for mere formal equality³³. Substantive equality recognizes that treating structurally unequal groups identically only serves to widen the disparity, as equal treatment applied to individuals suffering from antecedent disadvantage entrenches existing hierarchies. It necessitates correctional measures and positive discrimination to eliminate the systemic, historical, and institutional disadvantages faced by women and other minorities. As MacKinnon posits, equality must involve substantive changes to the State's relationship with women and women's relationship with men, seeking to empower women on their own terms rather than forcing them to assimilate into a masculine baseline. Synthesizing MacKinnon's anti-subordination framework with constitutional morality transforms the Constitution into a dynamic instrument designed to eradicate the ideological and material foundations of patriarchy, fostering a truly egalitarian society where power is equitably distributed³⁴. The concept of transformative constitutionalism has generated a rich and vibrant scholarly debate regarding how constitutions can and should be used to restructure societies scarred by historical injustices. Eminent legal scholars, jurists, and judges conceptualize this paradigm not merely as a framework for governance, but as a dynamic mechanism for profound social, economic, and political emancipation. The term was originally propelled into mainstream legal academia by Karl E. Klare, particularly in the context of South Africa's transition from apartheid. Klare defined transformative constitutionalism as a long-term project of constitutional enactment, interpretation, and enforcement committed to fundamentally transforming a country's political and social institutions, as well as its power relationships, in a democratic, participatory, and egalitarian direction³⁵. Professor Upendra Baxi offers a highly nuanced, post-liberal, and materialist reading of transformative constitutionalism. He views it as a redemptive project whose ultimate test lies in the effective

³² Utsav Mandal, *Feminist Jurisprudence & Indian Perspective*, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023)

³³ Smriti Chandra, *Gender Justice Through the Lens of Transformative Constitutionalism: The Role of Indian Constitution*, 6 INDIAN J. L. & LEGAL RSCH. (2024)

³⁴ Hilaire Barnett, *Introduction to Feminist Jurisprudence* (1998).

³⁵ Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998), <https://www.tandfonline.com/doi/abs/10.1080/02587203.1998.11834974>

implementation of human rights, particularly socio-economic rights for the marginalized³⁶. He crucially warns of the structural adjustment of judicial activism, where courts might abdicate their transformative duties regarding socio-economic rights in deference to neoliberal economic policies and undeclared emergencies. In the Indian context, the vehicle for achieving transformative constitutionalism is frequently the doctrine of constitutional morality. It is not a natural sentiment but a disposition that has to be cultivated, constitutional morality demands a paramount reverence for the forms of the constitution and the peaceful resolution of conflicting interests³⁷. Modern jurists, such as former Chief Justice Dipak Misra and Justice D.Y. Chandrachud, have expanded this concept, describing it as the guiding spirit necessary to achieve social transformation and a mechanism to espouse a pluralistic, inclusive society. Through the lens of gender equality, constitutional morality is utilized as a structural commitment to dismantling systemic hierarchies. The Indian judiciary has aggressively deployed it to override regressive social morality or public morality, which has historically been weaponized to subjugate women and sexual minorities³⁸. The Court has also begun to use substantive equality to unmask 'indirect discrimination,' where facially neutral laws perpetuate structural inequities. In *Lt. Col. Nitisha v. Union of India*³⁹, the Supreme Court analyzed the criteria used by the Army to grant Permanent Commissions to female officers⁴⁰. Although the medical fitness standards applied to women were formally identical to those applied to men, they were inherently discriminatory because women were forced to undergo these tests at a much older age due to years of prior exclusion from permanent commissions. By rejecting this formalistic application of rules, the Court highlighted that true equality requires an assessment of the systemic realities and historical delays that disproportionately disadvantage women. Furthermore, in cases like *Hotel Priya v. State of Maharashtra (2022)*⁴¹, the Court struck down gender-based limitations on the number of female performers in orchestra bars, rejecting the state's paternalistic justification of "protecting" women, which ultimately restricted their right to livelihood and equality under the guise of morality

³⁶ Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013).

³⁷ *Supra* note 24

³⁸ *Naz Found. v. Gov't of NCT of Delhi*, (2009) 6 SCC 712, 2010 Cri. L.J. 94

³⁹ *Nitisha v. Union of India*, (2021) 15 SCC 125

⁴⁰ Gauri Kashyap, *SCO Explains: Indirect Discrimination in the Army*, SC OBSERVER (Apr. 30, 2021), <https://www.scobserver.in/journal/sco-explains-indirect-discrimination-in-the-army/>

⁴¹ *Hotel Priya, a Proprietorship v. State of Maharashtra & Ors.*, 2022 LiveLaw (SC) 186

4. THE LIMITS OF CONSTITUTIONAL MORALITY: A CRITICAL FEMINIST APPRAISAL

While the use of constitutional morality to advance gender equality is a hallmark of transformative constitutionalism, feminist legal scholars raise critical concerns regarding ‘legal paternalism’. When the State or judiciary overrides societal or religious morality, it sometimes risks imposing a top-down, secular-liberal understanding of dignity that ignores the lived experiences and agency of women⁴². This phenomenon is acutely visible in cases involving religious practices, such as the Sabarimala Temple entry case⁴³ and the Karnataka Hijab ban⁴⁴. The limits of constitutional morality are acutely visible in cases involving women's religious practices, where judicial reasoning often commits ‘epistemic violence’. This occurs when courts deny women's capacity to be knowers of their own experiences and systematically dismiss their articulated understanding of their own practices as misguided. In the Sabarimala Temple case, the Supreme Court utilized an ‘anti-exclusionary principle’ derived from constitutional morality to strike down the custom restricting women of menstruating age from entering the temple. While celebrated as a victory for gender equality, the majority judgment largely ignored the voices of the Ayyappan women who actively supported the tradition and understood it not as biological discrimination, but as a specific devotional relationship with a celibate deity. The Court dismissed the testimonies of these women as products of ‘false consciousness,’ assuming that women defending traditional practices must be too indoctrinated by patriarchal forces to recognize their own oppression. This assumes there is only one correct, secular-liberal way to be a liberated woman, entirely dismissing alternative conceptions of identity and faith. Similarly, the Karnataka Hijab ban case illustrates coercive legal paternalism. The State and the courts upheld the ban on the hijab in educational institutions under the perceived notion that the hijab is an instrument of systemic social oppression. In its rush to protect the dignity of Muslim women, the State effectively told these women that it knew better than they did, ignoring the fact that it was the Muslim women themselves who were fighting for their individual choice and autonomy to wear the hijab. By forcing women to choose between their religious identity and their right to education, the State weaponized constitutional ideals against the very women it claimed to liberate. This affects equality

⁴² Prarthana Gupta, Legal Paternalism under Transformative Constitutionalism: A Feminist Analysis, SCC TIMES (Jan. 27, 2026), Legal Paternalism under Transformative Constitutionalism: A Feminist Analysis | SCC Times

⁴³ Indian Young Lawyers Ass'n v. State of Kerala, AIR Online 2018 SC 243 (India).

⁴⁴ Resham v. State of Karnataka, (2022) 1 HCC (Kar) 43

profoundly. By framing the issue solely through a secular-liberal understanding of dignity, the courts failed to engage with how these women understood their own relationship with their faith. When courts dismiss women's articulated views as 'false consciousness,' women are doubly silenced: first by their exclusion from decision-making, and second by having their expressed views invalidated when they do speak. This violates the core tenet of substantive equality, which requires enhancing voice and participation rather than imposing an abstract, universal standard from above.

Another critical limit of constitutional morality is its historical inability to fully penetrate the private sphere of the family and marriage. Feminist legal theory, notably Catharine MacKinnon's dominance approach, argues that the liberal State coercively constitutes the social order in the interest of men by relegating women's exploitation to the unregulated 'private' realm. Historically, the Indian judiciary has exhibited a profound reluctance to introduce constitutional law into the home⁴⁵. This limitation is anchored in the legacy of the 1952 *State of Bombay v. Narasu Appa Mali*⁴⁶ judgment, which held that religious personal laws are not laws in force under Article 13 and are therefore immune from fundamental rights scrutiny. By shielding personal laws governing marriage, divorce, and inheritance from the rigors of constitutional morality, the legal system leaves women as prisoners within discriminatory plural legal frameworks. Furthermore, the retention of the marital rape exception in the Bharatiya Nyay Sanhita (BNS) demonstrates a stark failure of transformative constitutionalism. By refusing to criminalize non-consensual sex within marriage for adult women, the law upholds the patriarchal ideology that marriage constitutes perpetual consent, prioritizing the sanctity of the family institution over a woman's bodily autonomy and dignity.

5.CONCLUSION

The foundational equality codes of the Indian Constitution, which successfully withstand contemporary feminist scrutiny, were profoundly shaped by the 'founding mothers' of the republic. Operating in an overwhelmingly masculine and gerontocratic Constituent Assembly, these women introduced a cohesive feminist authorial voice that vehemently rejected chivalric and paternalistic models of protection. The foresight laid a structural foundation that perfectly aligns with modern substantive equality, transitioning the discourse away from the rigid formal

⁴⁵ Catharine A. MacKinnon, *Feminist Jurisprudence*, in Patricia Smith ed., *Feminist Jurisprudence* 3 (1993).

⁴⁶ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84

equality of the 'sameness' approach toward acknowledging and dismantling systemic historical disadvantages. Building upon this egalitarian foundation, the Indian judiciary has aggressively utilized 'constitutional morality' as a primary engine of transformative constitutionalism to eradicate deeply entrenched hierarchies and social inequities. 'Transformative constitutionalism' functions as a dynamic process aimed at restructuring society's political and social power dynamics in a democratic and egalitarian direction. In this pursuit, constitutional morality acts as a judicial compass, ensuring that fundamental rights are interpreted through the conscience of the Constitution rather than being held hostage by majoritarian or regressive 'social morality'. However, a critical feminist analysis reveals that the deployment of constitutional morality is not without severe limitations, as it frequently devolves into coercive legal paternalism. When the State or the judiciary overrides religious or societal norms under the guise of 'protecting' women who have not sought such intervention, it infantilizes them, reinforcing the patriarchal stereotype that women are weak subjects incapable of making reasoned choices. This approach inadvertently replaces traditional religious patriarchy with a new form of State institutional patriarchy. The problem is compounded by 'epistemic violence', a phenomenon where courts systematically dismiss women's articulated understanding of their own lived experiences as mere products of patriarchal indoctrination or 'false consciousness'. To resolve this paradox and ensure that constitutional morality fulfills its genuinely emancipatory promise, the legal framework must pivot decisively toward an intersectional application of substantive equality. The solution lies in abandoning a one-size-fits-all, top-down secular-liberal imposition and instead adopting context-sensitive judicial reasoning that respects women as autonomous moral agents. Furthermore, a bottom-up approach to justice must be cultivated, enhancing women's grassroots participation and ensuring that judicial interventions amplify, rather than erase, the diverse voices and subjective realities of marginalized communities. By balancing the transformative capacity of the law with a profound regard for female agency and religious freedom, the legal system can move beyond mere formal protectionism to dismantle the structural foundations of inequality without falling into the trap of paternalistic overreach.