DOES THE INDIAN CONSTITUTION REQUIRE TRANSFORMATION?

by

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ABSTRACT

The Indian constitution requires a transformation. The supreme legal document framed and adopted over seventy years ago needs a contextual, if not structural, reform in order to ensure that the liberties, rights, and protections it offers is relevant. This transformation that I propose is not necessarily about finding faults in the manner in which the Constitution is drafted but more so as a precautionary and prohibitory cause to avoid the scenario wherein the nation's most crucial document becomes obsolete to protect the citizens and/or fails to offer them the due recognition that they deserve. From the outset, the Indian Constitution is one of the most detailed and prudently scrutinised constitutions in the world. It has seen over a hundred amendments within the first three quarters of its century making it flexible, too. However, it is not bereft from the need of a reform to, mainly but not limited to, its context and scope.

*Due to the aforementioned reasons, I find it appropriate to write this essay on the topic, "**The changes our Constitution needs- A reformative Approach."***

Keywords: Transformation, Contextual, precautionary, prohibitory, obsolete, recognition, detailed, scrutinised, flexible, context and scope and reformation.

Introduction

The Constitution of India was drafted keeping in mind the needs of the country that was still reeling from the sublime after effects of the independence struggle. The demands of the general populace were exceedingly met, the vicious communal and sectarian divide was dissipated with the Freedom to freely practice, propagate and profess any religion and the political structure of the country was constructed and formalised. These and many more such freedoms and rights of the citizens saw an epochal incidence. Just as crucial and necessary it was for the framers, drafters and esteemed advocates of that era to be robust in their decision-making and prudent in their adoption of the myriad aspects of law from other countries, it is more important than ever for today's esteemed judicial members to initiate a transformative step that would ensure the relevance, supremacy and continuance of people's trust in the document as the natural guardian and protector.

The Indian Constitution is not flawed or malignant instead it is seen to be lacking in the protection or implantation of such issues of national importance that are pervasive in most walks of life apart from the Constitution itself. A reformation is different to an amendment or even a series of consequent amendments because it will incorporate a seismic shift Having said this, it is difficult for the citizenry to collectively concur on what is considered as a necessary transformation or if we need one at all. To solve this lacuna, we may consider the threshold of required transformation as something that shows "legacies of injustice" [1]

A legacy of injustice would amount to such grave misgivings that cannot and should not be ignored. There are several such injustices, some subtle yet some pedantic, that are causing a hindrance to the people of the country. The Constitution is not only comprised of the texts we find written in it; it is a smaller part of the larger picture which includes everything from conventional legal customs to the unspoken, unwritten laws in the form of Judge made laws and precedents that directly affect and are affected by the Constitution. Hence, it is safe to assume that the existence and supremacy of the latter is because of the former and not despite it.

This essay, therefore, shall be covering such changes that are necessary to complement and support the growth trajectory of the country. These changes would tantamount become a reformation. These reformations would serve as a foundation to bring about social and cultural changes, too. As is so often seen that the legalese is required to step in to dissipate and discourage the continuance of any social evil. Finally, it shall also serve as a global precedent of the assertiveness, awareness and boldness to reform a document as judicially holy as a Constitution.

The manner in which these reforms are to be introduced into the constitution is through a series of amendments after detailed speculation from a parliamentary committee and enough time given for all the parties in the Houses to debate and scrutinise the Bill before it is put to vote. A reform should be one done in spirit of development and not autocracy.

Reforms in laws regarding and pertaining to gender

[1] Gautam Bhatia, The Constitution of India was not just a founding document. It had a radically transformative vision, Scroll.in, (Mar. 04, 2019, 08:30 AM), https://amp.scroll.in/article/914555/the-constitution-of-india-was-not-just-a-founding-document-it-had-a-radically-transformative-vision

Gender, as defined by, Merriam Webster is "the behavioural, cultural, or psychological traits typically associated with one's sex."[2] Therefore, we can surmise that an individual's gender is a product of their feelings, emotions and orientations.

The Indian Constitution recognises the importance of gender and protecting the individuals from discrimination on the basis of the same, as seen in Article 15. However, with changing times and a larger-than-ever focus on the concept of gender neutrality and fluidity, the Constitution has to undergo certain changes.
Primarily, we can take precedence from the 2014 landmark case National Legal Services Authority v. Union of India [3] wherein the Supreme Court recognised the "third gender" of individuals collectively referred to as the transgender persons. This case, along with another landmark case of Navtej Singh Johar[4] laid the foundation of the acceptability and indoctrination of the practices and existence of such individuals who do not conform to the male-female boundaries.

In the NALSA case, the Supreme Court included the right to dignity, comprising of the right to one's gender identity, as a crucial part of Article 21. It also furthered the scope of the word "sex" in Articles 15 and 16 to include "gender"[5]
These instances are not unrelated, all of these cases whereby there is an addition to the scope of Article 21 or a betterment in the understanding of an explicitly mentioned term indicates a reformation.

Gender based reforms are also needed in the field of recognising gender parity. The Constitution is the 'mother of all legal documents' in India and it sets the undertone of all the other statutes, Acts and Ordinances that are directly or indirectly a product of the Constitution. Articles 243D (3) and 243T (3) certainly help in ensuring the parity in a highly patriarchal field is maintained. Its efficacy on the ground level is highly debatable but the mere mention of such a clause would bring about a parity and lessen the disastrous polarisation.

Finally, the grave misgiving that most of the students and/or experts ignore is the language of the Constitution. By language, I do not mean to demean the English language but more the context and the content of the document. There are several instances throughout the Constitution where one may find the words "man" or "he" or "him" to describe and refer to a third-person entity.
This issue of misrepresenting more than half of our country's population by denoting a term applicable to and used by less than half of the population is a jarringly discernible error.

While there is a visible departure from the deplorable habit, as seen in Articles 243C, 243D, 243R, 243S, etc. there are still several Articles whose context requires to be altered. [6]

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[2] Merriam-Webster, https://www.merriam-webster.com/dictionary/gender (last visited Jan 5, 2021)
[3] National Legal Services Authority v Union of India AIR 2014 SC 1863
[4] Navtej Singh Johar & ors. Versus Union of India thr. Secretary Ministry of Law and Justice AIR 2018 SC 4321
[5] Centre for Law & Policy Research, https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/ (last visited Jan 5th, 2021
[6] Rhythm Buaria, Why the Language of Laws should be Gender Neutral, LiveWire, Nov. 25, 2020 https://livewire.thewire.in/gender-and-sexuality/why-should-the-language-of-laws-be-gender-neutral/

India would certainly be one of the first major countries in the world whose Constitution comprises of gender neutral and a more acceptable, appreciative and inclusive democracy.

The Immoral Traffic Prevention Act (ITPA)

The Immoral Traffic Prevention Act (ITPA) 1956, is the crucial piece of legislation which defines the act of prostitution and penalises certain aspects about the same. The passing of the Act and its subsequent implementation heralded a new epoch in India; one that created a Socio-legal grey area. The Act was a result of United Nations International Convention for the Suppression of Traffic in Persons and of Exploitation of others, 1950, of which India is a signatory.

The ITPA was not only the foremost Act which defined prostitution thereby recognising its existence but also the Act which laid down several penal offences for the solicitation of or profiteering from it. It aimed at abolishing traffic in women and girls and penalised brothel-keeping, pimping, and the solicitation in a public place.

The most pressing problem with ITPA is its assumption of prostitution being a tool for sexual exploitation or abuse of persons for commercial gain, per Section 2(f). The Act fails to represent the consensual activity and does little to stem the victimisation of the prostitutes thereby creating an evil façade of those who willingly partake in it.

The criminalisation of brothels and penalisation of brothel-keeping has had a tawdry impact mainly due to the perceived biases against the women. These biases and stigma manifest itself in a holistic lack of justice. A survey found that 87% of 3000 surveyed sex workers experienced abusive language and/or were threatened by law enforcement agencies.

Furthermore, ITPA lacks any discernible provisions to protect the prostitutes who are transferred, often without their consent, to a rehabilitation facility having deplorable infrastructure along with the usual deep-seated prejudices against the people engaged in sex work. The Act does not have any explicit safeguards to protect the sex workers who are purportedly rescued and consists of no methods to compensate or prioritise their physical and mental health. Partly due to the pervasive discrimination and partly due to the lack of considering any type of sex work as a serious job, these inequalities are faced by the prostitutes at a much stronger and more severe level.

Without state support and proper defence to the rights and freedoms of the prostitutes, they are often marginalised. We find them to form communities, often living in one single area of a town or a city that is viewed by people with a disgust and a scorn. ITPA had a dual purpose that it should have resolved. Firstly, give sex workers and prostitutes due recognition and a legal framework that incorporates their rights and adequate measures to defend the same. Secondly, it should have also made certain social developments in creating the platform to incorporate prostitution as an activity and not a dishonourable and disreputable system.

Lastly, ITPA does very little to dissipate and discourage the falsely popularised notion of prostitution being immoral. Morality is a virtue that can not be subject to limitations and desires. Prostitution as an act involves both the sex worker and the one who makes use of this service for their pleasure, these social roles are not restricted by the confines of gender or age or preferences. However, when one reads the context in which ITPA is written, the glaring

blame of immorality is levied on those who partake in this service without due consideration that it could purely be the result of the person's own choice and volition.

Difficulty of process of implementation in a country like India, rigidity of constitution, two tier verification of passing of bills, etc

In November, 2021, the Chief Justice of India, NV Ramana remarked that the "legislature does not conduct studies or assess the impact of the laws that it passes, which sometimes leads to big issues."

Having noticed the scale of legislative and social jurisprudence regarding the legalisation of prostitution in some of the foreign countries, the poignant reality remains that India still has a terribly grey legal area, as expounded in this essay previously. The reasons for this are, but not limited to, the social incoherence on matters involving sex and sex work, the false narrative and the pseudo-traditionalism of labelling prostitutes as "impure" and "immoral" and the political parties fearing an upheaval and subsequent loss of votes from the conservative populace should they introduce or second a Bill that aims to legalise prostitution.

Legalising prostitution should not only benefit the ones partaking in the service but also should address the issues directly and indirectly related to prostitution. A comprehensive Bill which aims to criminalise the soliciting of children as sex workers, penalise the exploitation of the prostitutes who are hired for their services and give the sex workers their fundamental rights should ideally have been tabled in the Parliament by now but due to several obstacles, it has seemed a rather bleak possibility.

To further Mr. NV Ramana's sentiment about the legislature, we do notice the increasing lack of willingness from any incumbent political party/ies to initiate and partake in debates about the Bill in question. Several of these Bills are rushed through the Houses of Parliament in a whiff without any meaningful debate or conversation about, if any, across party lines. The wariness exhibited by the Opposition can so easily be trampled upon when any party enjoys a big enough majority.

This is, therefore, one of the major transformations in the Constitution that this essay points at and that is the right of an individual to practice any profession, or to carry out any trade or occupation, trade or business, as per Article 19(1)(g) should include the sex workers and the prostitutes in a form where there is a legal promotion of their rights as well as penal protection from any abuse or deviant behaviours. The society will learn to stop viewing morality and ethics from the lens of fecundity and chastity when the Legislature and the most crucial legal document give it the status it deserves.

For the protection, preservation and perseverance to achieve social acceptability of prostitutes and prostitution, as a social institution, we need a strong and didactic approval from the legislature for the lowest ebbs and the darkest corners of the society to understand the reality behind the risqué.


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