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Permanent commission to female officers of armed forces in India: Negating all biological stereotypes & towards transformative constitutionalism 2.0

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Abstract--In the past decade, the State via its three organs has unarguably shown an immense enthusiasm for social change, and the most revered of all the media to achieve the same has been ‘judicial review’. In 2020, President Ram Nath Kovind at the International Judicial Conference themed ‘Judiciary and the Changing World’ also applauded the proactive pivotal role of the Supreme court in bringing progressive and dramatic social transformation through radical reforms. One of such instances was where the Apex court exercising its power of judicial review gave a boost to this social revolution, invoked the idea of transformative constitutionalism and tarmacked the road for female officers to permanent commission in the Armed Forces whilst promoting the idea of gender equality and removing gender bias. This article analyses the transformative character of the Indian constitution in the light of the judgements of the Supreme Court in “The Sectt. Ministry of Defence v. Babita Puniya (2020)” and, “Union of India v. Lt. Cdr. Annie Nagaraja (2020)” which endorsed the ‘principle of non-discrimination’ on ground of sex thereby eradicating the gender stereotypes which associate women with ‘weaker sex’.

Keywords---armed forces, transformative constitutionalism, gender equality, judicial review, permanent commission, equal opportunity.

Introduction

“The Indian Constitution, both in text and interpretation, has played a significant

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role in the evolution of law from being an instrument of oppression to becoming one of liberation.” - Apex court in *Joseph Shine v. UOI*. Granville Austin too, whom Prof. Upendra Baxi calls ‘the Sherlock Holmes of the Indian constitutional development’ wrote in one of his works that “*the Constitution of India is first and foremost a social document which embodies the idea of social revolution*”. This revolutionary idea in turn inspires the interpretation of the constitutional text in a manner which calls into question the predominant power structures, concomitantly securing citizenry equality, dignity and upholding constitutionalism. The Oxford English Dictionary records the first use of the term ‘constitutionalism’ in 1832. It is derived from the Latin term ‘*cōstituō*’, which is further made up of two Latin terms ‘*con*’ meaning ‘with’ and ‘*statuō*’ meaning ‘to set up or establish’. Prof. Upendra Baxi classified ‘constitution’ into the context of ‘three C’s’:

- C1 : *the ‘word’ of the Constitution*
- C2 : *Constitutional hermeneutics*: This implies the constitution as interpreted
- C3 : *Constitutionalism*: This indicates the ‘spirit’ of the Constitution providing rationale and perplexity to the document

The concept of constitutionalism is ordinarily viewed annexed to the idea of ‘limited government’, the powers of which are ‘limited’ to subjects, purposes, modes and manners enshrined in *suprema lex* i.e. the Constitution, with a view to preclude it from acting in an arbitrary and tyrannical way. Thinkers like Thomas Hobbes, John Locke, Montesquieu, John Adams, James Harrington, and many others have influenced and shaped the development of modern-day constitutionalism. Indian constitutionalism is transformative. It has transcended itself from the extreme ideals of generally-construed constitutionalism which emphasise on restricting the power of the government. Instead, it revolves around manifest use of powers granted by the Constitution to invoke a positive transformation. The transformative element of the Indian Constitution can be expressed in two ways:

- Transformation of the relationship which exists between the State and its citizens
- Transformation by a thorough reconstruction of State and society itself.

The Indian constitution due to its organic character, has the capacity to remodel itself with the transforming and revamping of cultural, societal, moral and ethical standards. Stating the importance of such remodelling, the apex court in *Joseph Shine v. UOI* said - “it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression”.

Permanent commission: Background

Unlike the Short Service Commission (SSC), which has a fixed serving period, through another mode of induction into Armed forces known as Permanent Commission (PC), an officer in the Armed Forces is authorised to serve till the officer retires. The difference between the two modes of induction is further illustrated by the table below:

SHORT SERVICE COMMISSION	PERMANENT COMMISSION
A tenure of 10 yrs. (extendable by 4 yrs.)	Tenure : Till superannuation
Officer entitled to SSC can choose to opt for PC	Officer who opted for PC cannot switch back to SSC
Officer is not entitled to benefits such as ECHS, Pension	Officer is entitled to benefits like ECHS, Pension

In order to understand the backdrop of the struggle of women officers for grant of permanent commission it is pertinent to take note that the respective regulations of the three Armed Forces provide for the rules for grant of PC. For instance, Rule 203 of *Naval Regulations, 1963* provides for the grant of permanent commission in the Naval force. With regard to the eligibility of the women officers for enrolment in the Armed Forces, the Air Force Act, 1950; the Army Act, 1950 and; the Navy Act, 1957 in toto provide that a female will only be eligible to be inducted in the regular Armed Force in such department, corps, etc. which the Central Government notifies in official gazette. Thus, in order to allow the induction of female officers in the Armed Forces, several notifications were issued by the government over a period of time. To illustrate, in the Navy, at first the entry of women officers was allowed only to the Logistics, Law and Education department, by a notification dated 9 October 1991. Another notification of the Central government dated 31 December 1992, extended the eligible field of entry to the following:

- Regiment of Artillery
- Intelligence Corps
- Corps of Signals
- Corps of Electrical and Mechanical Engineering
- Corps of Engineers

Later, vide another notification dated 6 November 1998, the central government reckoned women as eligible for engagement in all the divisions of the Indian Navy. Finally, on 25 February 1999, the Ministry of Defence took a policy decision and extended the grant of permanent commission to both male and female officers in line with the regulation 203 of Chapter IX of the Naval Ceremonial, Conditions of Service and Miscellaneous Regulations 1963. A similar chronology followed in the other two Armed Forces as well. On 26 September 2008 also, the Defence ministry released a policy letter whereby the grant of PC was extended to SSC officers in all the three branches, but only partially as the benefit could be availed only by the future batches, i.e. those enrolled after January 2009. Also, the grant of permanent commission was restricted to only certain specific branches and cadres. In the year 2019, the Central government again announced a policy circular dated 25.02.2019 granting permanent commission to female SSC officers in eight arms or services, apart from the subsisting branches of Army Education Corps and Judge-Advocate General.

Gender bias, stereotypes and the grant of permanent commission

The aforementioned notifications allowed the induction of females as officers in the Armed Forces, but did not put them on an equal pedestal as their male counterparts. Despite the completion of the requisite period of service as SSC officers, the female officers were not taken into account for the grant of permanent commission as the male officers were; instead they were discharged from service on completion of their tenure. As a result, for years, there was a demand of women in the Armed Forces to consider them eligible for grant of permanent commission at par with their male counterparts.

The most prominent of all the litigations which ensued was *The Sectt. Ministry of Defence v. Babita Puniya*, where in February 2003, in response to a public interest litigation the Delhi High Court upheld the grant of permanent commission to female Short Service Commission officers in the Army and Air Force. The decision of the court was accepted by the Indian Air Force, but Indian Army went in appeal to the Supreme court. Another was the *Priya Khurana case* decided by the Armed Forces Tribunal in year 2016 where the subsequent policy dated 26 September 2008 was held to be invalid in respect of the prospective grant of permanent commission and its restriction to only stipulated branches.

The third was the case of *Union of India v. Ltd. Cdr. Annie Nagaraja* where an appeal before the Supreme Court was made against the decision of the High Court of Delhi allowing the demand of grant of permanent commission to female officers of the Indian Navy in line with the Babita Puniya decision of the same court. The appeal against the decision of the Armed Forces Tribunal in the Priya Khurana case was also clubbed before the Supreme court with the case of Annie Nagaraja. In both of the appeals, the Central government defended its decision to not extend permanent commission to women officers with following arguments which as quoted by the Apex court '*reflected the stereotypical mindset and attitude prevailing in the Armed Forces*' :

- **Physiological and Biological Limitations**

One of the arguments revolved around the physiological and biological differences between man and woman. The Union of India argued that women officers have to deal with pregnancy, motherhood, domestic obligations towards their families and children, and may not be well suited to the life of a soldier in the Armed Forces. In addition to this, in another such argument, the government alleged that physiological limitations of women officers are accentuated by challenges of confinement, motherhood and child care and these differences between men and women hinder a woman's physical capability to engage in combat.

- **Infrastructural Limitations**

The grant of permanent commission was also opposed due to the infrastructural constraints in the Armed Forces. It was asserted by the Union that the employment of women officers is not advisable in conflict areas or border areas as the infrastructure there is very basic. The forward posts are manned with small detachments and restricted communication

facilities which often leads to a feeling of isolation. Also, the members of the Armed Forces in such areas are confronted with minimal facilities for habitat and hygiene and have to make do with primitive and makeshift arrangements.

In addition to these, with respect to women officers enrolled in the Navy, the government also highlighted in the Annie Nagraja case that certain avenues as sea-sailing duties are ill-suited for women officers as there is no return to the base, unlike in the Army and the Air Force. It was also argued that most of the naval vessels deployed by the Indian Navy are of Russian origin which do not have provision for women as sailors and there are no separate bathrooms for women. Moreover, any arrangement is also not feasible to accommodate them, even temporarily.

- **Behavioural Limitations**
The Union added one more point to its list of oppositions of the extension of permanent commission to women by stating that posting of women officers in all-male units has its own peculiar dynamics. It was professed that in such a case 'moderated behaviour' on behalf of male officers would be required in the presence or company of the women officers.
- **Legal Limitations**
Another ground for dissent on behalf of the Union of India to the grant of permanent commission to women officers relied on Article 33(a) of Indian Constitution. Article 33(a) of the Constitution of India empowers the determination of extent to which the fundamental rights conferred by Part III of the Constitution be restricted in their application to the members of the Armed Forces. The extent of such restriction is determined by Parliamentary law.

Grant of permanent commission to women officers and transformative constitutionalism

Transformative constitutionalism detests any kind of regressive approach and therefore the hallmark of a truly transformative Constitution is that it promotes and engenders societal change. The application of the power of judicial review in these cases of *Babita Puniya* and of *Ltd. Cdr. Annie Nagraja*, making the women SSC officers eligible for the grant of permanent commission, the Supreme court has brought in one such societal change by preserving and upholding the principle of gender equality. In the past as well, the idea of transformative constitutionalism has led to the upgrading of cultural, societal and ethical standards, triggering the uprooting of prevailing gender biases. In *Radha Charan Patnaik v. State Of Orissa* Rule 6 clause (2) of the Orissa Superior Judicial Service Rules, 1963 which disqualified married women from being appointed as District Judges was held violative of Article 15(1) by the Orissa High Court. Another instance of constitutionalism infusing societal transformation is the case of *Mary Roy v. State of Kerala* where the patriarchal tradition prevailing in the Syrian Christian community of Kerala was dismissed which prevented the women of the community from inheriting property. In the case of *C. B. Muthamma v. UOI*, Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 was challenged for being violative of Article 15 of Indian Constitution. The rule provided:

- An unmarried female member of Indian Foreign Service must obtain prior permission from the Government in order to enter into a marriage.
- If at any time, after the marriage, it is found that the female IFS member's family life is affecting her work efficiency, she could be asked to resign from the office.

The Supreme court said that the rule contained the essence of masculinity and reflected an attempt made to dominate the weaker sex. The impugned rule was held as unconstitutional as it propagated discrimination of ground of sex and violated Article 15.

- **Doctrine of judicial review**
The power of judicial review has for long proved to be a functional and effective tool in perpetuating the transformative nature of Indian constitutionalism. Judicial review refers to the power of the courts to examine the constitutionality of any law.
J. Marshall in the 1803 US decision of *Marbury v. Madison* underlined the importance of judicial review stating that the legislature has no authority to make laws repugnant to the Constitution and in the case of constitutional violation the court has obsolete and inherent right to declare the legislative act void.
All laws are created and affected by the cause usually rooted in social, economic, political or moral factors important to the society. A gradual change in the societal standards is necessary and mandates change in law as well. Highlighting the role of courts in the ever changing society the apex court in the case of *Joseph Shine v. UOI* mentioned - "*the constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendently grow*".
- **Article 33(a) of Indian Constitution and Fundamental Rights**
Article 33 mentions the power of Parliament to modify the rights conferred by Part III in their application to the members of the Armed Forces. In view of Article 33(a), are the members of Armed forces disentitled to all the constitutional endowments in Part III ? Is a member of the Armed forces any less of a citizen of India than any other Indian citizen ? Can the 'equality of opportunity' to women and men be done away with in the garb of Article 33(a) ?
The constitutional bench in the case of *R. Viswan v. UOI* had observed that "*the constitution-makers were obviously anxious that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the armed force personnel and therefore Article 33(a) empowered Parliament to restrict or abridge within permissible extent, the rights conferred under Part III of the Constitution insofar as the armed force personnel are concerned*". Thus, a mindful inspection of Article 33(a) reveals the following essentials:
 - The restriction of the fundamental rights conferred on the members of Armed Forces must be by a law
 - The restrictions conferred on the fundamental rights of members of Armed Forces could be sanctioned to secure due discharge of military duties and disciplinary decorum.
 Additionally, the past decisions of the Government to stretch the

endowment of PC to female officers in other corps of several arms and services of the Armed Forces vide various notifications incontestably recognise that the anatomical features of a female attach no less weight to her equal constitutional allowances thereby making the refusal to extend the grant of PC to women officers solely a discrimination on ground of sex.

- **Doctrine of equality**

The Apex court in the Babita Puniya case reiterated that the grant of permanent commission to women officers is “*a recognition of the right of women officers to equality of opportunity*” with two facets:

- The principle of non-discrimination on the ground of sex
- Equality of opportunity for all citizens in matters of public employment

Principle of non-discrimination on ground of sex

Article 15(1) of the Indian Constitution embodies the principle of non-discrimination on ground of sex. It provides - “the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. Reflecting upon the submissions put forward by the Union of India, which relied upon the inherent physiological differences between a man and a woman, the Supreme court observed that the assertions “*rest in a deeply entrenched stereotypical and constitutionally flawed notion that women are the ‘weaker sex’ and may not undertake tasks that are too arduous for them*”. Denying equal opportunity to women officers on the ground of different vigours and infirmities of male and female physique and on societal conjectures about women in the backdrop of motherhood, marriage, family, etc. does not constitute a sound and constitutionally valid basis. On one hand these assertions render the contributions made by women officers in the various disciplines of Armed Forces as nugatory and insignificant, on the other, they also cast aspersions on the grandeur of the members of the Armed Forces, both male and female, serving as compeers in a given mission.

Equality of opportunity in matters of public employment

As described by the Supreme court, “*the second facet of the aforementioned right is the equality of opportunity for all citizens in the matters of public employment as enshrined under Article 16(1)*”. The Article 16(1) of Indian Constitution provides that - “there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State”. The decision of the Union of India to not extend the grant of permanent commission to the women officers discriminated against the male SSC officers and seized this ‘opportunity’ straight from the hands of women officers forcing them to retire.

Conclusion

There are plenty of examples of fiercely brave women officers in the Armed Forces who proved their mettle such as Captain Tania Shergill who on 26 January, 2020 became the first Indian woman Parade Adjutant to lead an all-men contingent in New Delhi, or Major Madhumita (Army Education Corps), the first woman officer in the India who received the Gallantry Award (Sena Medal) for fighting Taliban terrorists in Afghanistan, and many more. In both the decisions of Supreme

court, i.e. Babita Puniya judgement and the Lt. Cdr. Annie Nagraja judgement, underlying cause for concern was that the grant of permanent commission was denied, and female officers were discriminated against primarily by citing stereotypes on the ground of physiological differences which reveal as cited by the court - “*the need for change in attitudes and mindsets to recognize the commitment to the values of the Constitution*”.

Also, the decisions of the Apex court reflect that the power vested in the government by virtue of Parliamentary law made under Article 33(a) is not limitless, rather it must be exercised with utmost care and caution and not in a manner so as to reduce the members of Armed Forces to population without rights and India to a military-state for it is one of the elemental attributes of Indian Constitution that an individual by enrolling in the Armed forces does not wholly renounce the rights accorded to him by the Constitution. One of the most important tasks of transformative constitutionalism is the constant development of the constitutional ideals of rights, liberty, fraternity and equality. The approval by the Apex court to the grant of permanent commission to women officers would bring in a radical transformation in the societal standards as it busted the stereotypical and discriminatory society-driven responsibilities of genders and in consequence, endorsed gender equality and defended the equal opportunity for females in the Armed Forces. In spite of the gravity of the stereotypes prevailing regarding gender roles these decisions are nonetheless a step further towards eliminating the gender bias and achieving positive social transformation as assimilated under the Constitution of India in the form of rights under Part III, fundamental duties and directive principles of state policy.

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