

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 3

2022

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A Critical Analysis of Gender Justice under the Indian Constitution

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ABSTRACT

In India, the notion of gender justice is not a new phenomenon. Women have been subjected to gender inequality and differences in every aspect of their lives. In the era of modernization, women still face discrimination in various fields. They are often subjected to inequality in multiple areas and still face issues such as sexual harassment, forced prostitution, dowry, and many more. Transgender people are also subjected to utter discrimination and are deprived of their fundamental human rights as a third gender. However, The Constitution of India laid down specific provisions and laws to eradicate the concept of gender inequality between men, women, and the third gender in socio-economic, political, legal, and another aspect of life. The paper seeks to critically evaluate the constitutional provision relating to gender equality and analyse the general issues and problems faced by women and the third gender in society.

I. INTRODUCTION

The concept of gender justice refers to the right to equality and all other human rights which apply to both men and women equally. Gender inequality refers to a specific gender regarded as a minority group attributed to such gender and is passed to successive generations through customs and practices. It is noteworthy that the position of a woman in India has changed from time to time.

The Constitution of India has played a significant in protecting women from discrimination and ensuring gender justice in the present times. It has made an effort to address the issues related to women's issues and lay down provisions to eradicate the problem of inequality in every aspect.

However, the concept of discrimination against women and the third gender is still prevalent. The framers Indian Constitution has laid down specific articles intending to provide equality to males and females as their fundamental human right. As a human being, every individual has the right to be treated equally, irrespective of gender. However, the bitter fact is that women have been enslaved and subjected to discrimination in Indian society. The Constitution of India

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has laid down various provisions to eradicate gender inequality between men and women to provide them with equal opportunities. However, in practicality, women in the 21st century are still subjected to discrimination and are often deprived of their basic fundamental rights. It may be noted that in the present era, the third category of gender has evolved, known as the Transgender. Thus, the absence of equality and upliftment of the third gender may disrupt the very notion of gender justice among the individuals in a society.

II. THE CONCEPT OF GENDER JUSTICE AND THE CONSTITUTION OF INDIA

The concept of "gender justice" refers to Gender Justice, which refers to equality between the sexes. The term justice in this sense means more balanced behaviour, an end to violence, and equal distribution of social necessity.² Therefore, justice based on gender is broadly dependent upon economic, social, cultural, political, educational, and environmental factors being correlated. These preconditions need to be satisfied to achieve gender justice.

The United Nations has established a strong mandate for gender justice in a globalized world. The focus on gender equality and gender justice has been there since the inception of the UN. In 1946, an independent body was formed to work on the advancement of women. The Commission on the Status of Women worked from its inception to collect and compile data on women's situation worldwide, raise awareness and promote human rights with regard to protection of women. The Decade for Women 1976-1985 and four world conferences on women between 1975 and 1995 contributed significantly to raising awareness and commitment to gender equality and gender justice. In 1995, the Beijing Declaration and Platform for Action was framed for guiding work at a national level.³

The framers of our Indian Constitution most notably **Dr B.R Ambedkar** who was a member of the Drafting Committee has made a significant contribution in bringing about the notion of gender justice in the provisions of the Constitution, Dr Ambedkar raised provisions relating to equality of women in the Indian Constitution. Even before drafting the Constitution, Dr Ambedkar through his works expressed his great concern towards the women mass in India and advocated equality amongst all the individuals. He measured the progress of a community in the light of the progress of women who are regarded as the weaker sections of the society. It is important to note that Gender equality and Gender justice are basic human rights, declared by the General Assembly of United Nations, through the Universal Declaration of Human

² Upashana Mukherjee, Comparative Study on Gender Justice, Symbiosis Law School (Apr 12, 2021, 1: 30 PM), <http://www.legalserviceindia.com/article/I358-Gender-Justice.html>

³ *Ibid*

Rights, 1948 and also granted by our Constitution under Articles 14, 15 (1), 16 and 21.⁴ Both Gender equality and Gender justice are complementary to each other. The notion of gender equality is that all persons should be treated equally by the State or other authorities, irrespective of their sex, whether they are men or women. The Indian Constitution has provided a foundational basis to the principle of gender justice in India, which has led to the upliftment of weaker sexes and have also paved the way for the enactment of legislation.

The notion of gender equality is enshrined in the Constitution of India which forms the very basis of democracy. The inclusion of gender justice in the constitutional interpretation is also evident from the writings of **Uday S Mehta** in his famous book, "**Constitutionalism**" where he has advocated about the facets of gender justice in India.⁵ Furthermore, our Indian Constitution has guaranteed various rights for women who are generally regarded as the weaker sections of the society in India. These rights are evident by Part III of the Constitution which deals with Fundamental Rights, and Part IV of the Constitution, which deals with Directive Principles of State Policy (DPSP).

The Constitution grants the equality of sexes and empowers the state to take protective and discriminatory measures for the redressal of cumulative disadvantages on account of the old patriarchal society and the existing traditions, meets, and belief.⁶ The Preamble of our Constitution itself reflects the ideals and aspirations of the people of the country as it starts with the statement, "We the People Of India....." which without any doubt indicates men and women irrespective of caste, community, religion, gender and so on.⁷ Thus, one must note that the values identified in the Preamble is Justice, Liberty and Equality. It is for the state to ensure that all the ideas and values identified in the Preamble is to be made applicable in the process of the making of the government.

III. THE ISSUE OF GENDER JUSTICE

To be precise, the term Gender is basically a socio-cultural term which contains in itself the socially ascribed roles, attributes and behaviours given to a man and a woman in the society. According to **Manu**, a woman should remain under eternal bondage. He said that a woman must be in the custody of her father when she is a child, she must be under the custody of her

⁴ Ankita Chakraborty, Gender Justice under Indian Constitution, *International Journal on Legal Developments and Allied Issues* at 20

⁵ Legislations for enabling gender justice in India, Gender Justice, (Apr 15, 2021, 2:00 P.M), <https://www.geographyandyou.com/legislations-for-enabling-gender-justice-in-india/>

⁶ Dipa Dubey, Gender Justice and Work Security, (Apr 15, 2021, 2:30 P.M), <https://www.youtube.com/watch?v=gtkanECqX5I>

⁷ Dr J.N Pandey, *Constitutional Law of India* 31 (56th ed. 2019)

husband when married and must be under the custody of her son in old age or as a widow.⁸

Since time immemorial our Indian society being patriarchal in nature, has witnessed gender discrimination of women in all the aspects of life, whether be it social, economic, political or any other aspect. In India, a woman has been discriminated from the very inception of birth through female infanticide which is still prevalent. Even before birth, female feticide and sex-selective abortion, battering during pregnancy, coerced pregnancy, and many more are very common in India.

Indian women face different kinds of discrimination, violence, and physical abuse as compared to their male counterparts. Offences such as rape, sexual harassment at the workplace, domestic violence, eve-teasing, prostitution molestation, outraging the modesty of the women, dowry-related violence are increasing in number at an alarming rate.⁹ These inequalities based on gender between male and female has evolved the idea of gender justice in India through our Constitutional interpretation.

The Constitution hence embarks on the concept of gender justice with an object to provide equal roles, opportunities, and status to both genders through formulation and interpretation of different constitutional articles mainly Fundamental Rights which shall be discussed in this paper.

IV. THE CONSTITUTIONAL INTERPRETATION RELATING TO GENDER JUSTICE

The Preamble of our Indian Constitution enshrines the concept of social, political and economic justice for all the country's citizens. The Preamble of the constitution connotes about social justice, which should be understood in the light of ensuring the abolition of all sorts of inequalities that may result from inequality in status, sex wealth, status, class, caste, sex, race, title and so on. Economic justice ensures economic viability to every person irrespective of caste, creed, sex, status, etc. Political justice ensures that unnecessary distinction between men and women in political matters should not be allowed. In other words, the Preamble ensures the dignity of an individual by guaranteeing equal fundamental rights to all the individuals irrespective of the gender.

The notion of gender justice can be seen in the Fundamental Rights enshrined in Part III of the Indian Constitution which is applicable to all the citizens of India irrespective of sex. While the Constitution does not use the word 'gender', the interpretation of it by the Court has been

⁸ Ankita Chakraborty, Gender Justice under Indian Constitution 16, *International Journal on Legal Developments and Allied Issues*

⁹ Dr.N.K.Chakarbarti and Dr. Shachi Chakrabarty, *Gender Justice*, R. Cambay & Co. Private Ltd(1st ed 2006)

secretly or overtly, a gendered one which shall be discussed as follows:

(A) Right To Equality

The Constitution under Article 14 and Article 15 enumerates the right to equality and non-discrimination to all individuals irrespective of gender. Art-14 specifically the state shall not deny to any person equality of Law or equal protection of Law within the territory of India. Then, Article 15 (1) provides that there shall be no discrimination by the state against any citizens only on the ground of race, sex, religion, caste, place of birth or any one of them. In other word Article 15(1) prohibits gender discrimination.¹⁰

However, there are certain fundamental rights contain specific provisions to protect women's rights. In addition to this, one must understand that the principle of Equality does not mean that the same Law should be made applicable to everyone, rather it talks about equality of treatment under equal circumstances.

Since, the principle of equality believes in the notion of "likes should be treated alike", Article 15(3) positively discriminates in favour of women and permits the state to make special provisions.

(B) Equality Of Opportunities

Similarly, Article 16 of the Indian Constitution talks about equality of opportunity in the case of public employment. Equal employment opportunity here means equal access to jobs and conditions of work. It also contains the essence of equal evaluation of performance.¹¹ It must be noted here that Article 16 talks about employment or appointment to any office under State only. Matters relating to work mean all matters prior to or subsequent to the employment's employment.

However, **Eileen Kaufman**, in the book, "**Women and Law**," states that the Indian Supreme Court for safeguarding the constitutionally guaranteed protective discrimination rights of the women, in turn upholding a limited equality. While making claims such as the problem of stereotyping and religious rights subverting the rights of women, she says that the protectionist view of the Court has brought women out of the clutches of age-old discriminatory practices.¹²

(C) Other Rights

In addition to all the constitutional provision concerning the notion of gender justice in India,

¹⁰ P.M. Bakshi, *The Constitution of India*, 31 (11th ed. 2011)

¹¹ *Ibid*

¹² Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and the Indian Supreme Courts*, *Equality Jurisprudence Georgetown Journal of International Comparative Law*

Article 23 prohibits explicitly traffic in human beings. Based on this Article, the legislature, on a positive note, has passed the Suppression of Immoral Traffic Act, 1956, now renamed as Immoral Traffic Prevention Act, 1956 which aims at abolishing prostitution and other forms of trafficking. Along with this, the Andhra Pradesh legislature has enacted the Devadasis (Prohibition of Dedication) Act, 1988, to prohibit the practices of dedicated women to deities and temples.¹³

V. THE ROLE OF DIRECTIVE PRINCIPLES OF STATE POLICY ON ENSURING GENDER JUSTICE UNDER THE CONSTITUTION

In India State has played an important role in enriching the ambit of gender justice through certain constitutional provisions mentioned in Directive Principles of State Policy (DPSP) under the Constitution.

The Constitution under Article 39(d) directs the State to secure equal pay for equal work for both men and women. As a result, the State gave effect to this provision by enacting the Equal Remuneration Act, 1976. Furthermore, Article -39(e) of the Constitution explicitly directs the State not to abuse the health and strength of workers, both men and women. Article 42 requires the State to make provisions for securing just and humane work conditions and for maternity relief. Therefore, on the basis of article 42 the parliament has enacted Maternity Benefit Act, 1961. Article-44 directs the State to secure the citizens of India with a uniform civil code throughout the territory of India. The importance of common civil code was contented that chief Justice Leila Seth, who contended that a common Civil code would ensure that the harmful customary practices which are regarding to the issue of dignity of women can be broken down with a Uniform Civil Code.¹⁴ Thus, through these provision mandated under the Constitution one can understand the effort made by the framers of the Indian Constitution to achieve the notion of gender justice in India, although the term has not been explicitly used or defined in the Constitution.

VI. THE GENDER JUSTICE AND THE FUNDAMENTAL DUTIES

As far as gender equality and justice is concerned, it is not only the responsibility of the States to protect women from discrimination, but it is also a fundamental duty of every individual to ensure that the dignity of women is protected.

¹³Ankita Chakraborty, Gender Justice under Indian Constitution International Journal on Legal Developments and Allied Issues, at 22

¹⁴ Ankita Chakraborty, Gender Justice under Indian Constitution, International Journal on Legal Developments and Allied Issues, at 22

The Constitution under Article 51 A (e) states that it shall be the duty of every citizen of India to promote harmony and a spirit of brotherhood amongst all the people of India transcending religious, linguistic, regional and sectional diversities, to renounce practice of derogatory to the dignity of women.¹⁵

Although these principles are strictly not justiciable in nature, through judicial activism the Supreme Court of India, has infused dynamism into these non-justiciable provisions and issued directions to the state to implement them.¹⁶ The 73rd and 74th Amendments to the Indian Constitution in the year 1993 have served as a major breakthrough towards enhancing the women's participation in the democratic process ensuring the applicability of gender justice in India.

VII. JUDICIAL TRENDS: THE CONSTITUTIONAL INTERPRETATION OF GENDER JUSTICE

As mentioned above, the Indian Constitution guarantees all such rights to women which are given to men. Women thus enjoy the Right to Equality, the Right to freedom, the Right against exploitation, the Right to freedom of religion, Cultural and Educational Rights, and the Right to Constitutional remedies. Thus, it is essential to analyze the judiciary's attitudes on the constitutional interpretation of gender equality and gender justice toward the protection of women and whether the judiciary has been successful in achieving the notion of gender justice in reality.

Thus, in the light of the above discussion, it was rightly observed in the landmark case of **Nargesh Meerza vs Air India**¹⁷ that a woman shall not be denied employment merely on the ground that she is a woman. This leads to violation of her fundamental rights under Article 14 of the Constitution. In this case, an air-hostess of Air India challenged the service rules of Air India where air hostesses were barred from getting married within a period of 4 years from the date of their joining. The rule further stated that the airhostesses shall lose their jobs if they become pregnant and also that they will retire at the age of 35 years, further exception can only be made if managing director extends the term by 10 years at his own discretion. The Apex Court held that even though the first provision is reasonable, the second and third provisions are cruel, arbitrary and unconstitutional in nature.

¹⁵ MP Jain, *Indian Constitutional Law*, LexisNexis (7th ed 2015)

¹⁶ Sree Krishna Bharadwaj, *Laws protecting women from Gender Discrimination In India: A Critical Analysis*, *Indian Journal of Research*, Vol 4 Sept 2015, at 75.

¹⁷ 1981 AIR 1829, 1982 SCR (1) 438

In the case of **C.B Muthamma vs Union of India**¹⁸, a writ petition was filed before the Apex Court which challenged Rule-8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 on the basis that it was violative of Article 15 of the fundamental rights guaranteed in the Constitution of India. In this rule, it was stated that an unmarried woman member before getting married must take the permission of the Government and even after marriage she might be asked to resign the office any time if it is found that her family life is affecting her work efficiency. The Apex Court in this case declared the rules relating to seniority and promotion in Indian Foreign Service to be unconstitutional and violative of Article-15 of the Indian Constitution. Along with this, the Court held that the rule contained was an attempt to dominate the weaker sex.

Similarly, in the year 1998, in the case of **C Rajkumari V Commissioner**¹⁹ a question was raised before the Andhra Pradesh High Court pertaining to the fact whether the beauty contests which indecently represents a women's body, figure and form is violative of Article 15 of the Constitution. The Court held that if any beauty contest degrades women body or a part of a body in such a way that it is indecent and is injurious to public morality then such beauty contest would be violative of the provisions of Indecent Representation of Women (Prohibition) Act, 1986 and also unconstitutional as it violates Article 14, Article 21 and Article 51A of the Constitution.

In the case of **Suchita Srivastava and another Vs Chandigarh administration**²⁰, the supreme Court gave a wider interpretation to the notion of gender justice by contending that women's right to make reproductive choice is a part of personal liberty conferred under Article-21 and that may include procreation as well as abstaining from procreation. The Court further stated that a woman has the right to refuse to participate in any sexual activity.

The framers of the Constitution have broadened the notion of gender justice through the implementation of **Article 23** which prohibits forced labour in any form including beggar and traffic in human beings. In **Neeraja Chowdhary Vs State of Madhya Pradesh**²¹, **Justice Bhagwati** held that women and children cannot be compelled to work under unhygienic conditions because it is a kind of bonded, labour which is prohibited under Art-21 and Art-23 of the Constitution.

¹⁸ 1979 AIR 1868, 1980 SCR (1) 668

¹⁹ Ankita Chakraborty, Gender Justice under Indian Constitution, International Journal on Legal Developments and Allied Issues, at 24.

²⁰ 1990 AIR 1412, 1990 SCR (2) 861

²¹ AIR 1972

In the case of **Randhir Singh vs Union of India**²², the Apex Court talked about the doctrine of equal pay for equal work. It was held that the doctrine is applicable in the case of both men and women. Art-39(d) of the Indian Constitution provides that there shall be equal pay for equal work for both men and women. But Article-37 on the contrary says that directive principles are not enforceable in nature. But when fixation of pay scales of government employees is based on unreasonable classification which violates Art-14 and Art-16 of the Constitution, the courts are allowed to enforce the doctrine of equal pay for equal work. Thus, the Court held that the principle of equality is enshrined in the provisions of the Equal Remuneration Act, 1976.

In the year 2018 a landmark judgment was passed in the case of **Joshep Shine V Union of India**²³ which broadened the ambit gender justice through constitutional interpretation striking down a 158-year-old colonial-era law on adultery as unconstitutional as violative of Article 14 and Article 15(1) of the Constitution. In case of an offence of adultery, the Indian Penal Code, 1860 punishes only the male counterpart and exempts the woman from punishment. The petitioner argued that this section is violative of the principle of Right to Equality because even though, in case of adultery, a woman is equally liable as that of her male counterpart, she is exempted from the eyes of Law. The Supreme Court's verdict on decriminalizing adultery is a positive step towards gender inequality and gender justice.

Furthermore, in the case of **Dattatreya Motiram vs State of Bombay**²⁴, Chief Justice Chagla held that "the State cannot discriminate in favour of women against men, but it could not discriminate in favour of men against women." Similarly, in the case of **Balan Nair vs Bhavani Amma**²⁵, the Kerala High Court observed that Article 15 (3) and Article 39 aim at assisting women and children in distress. The State is very much empowered to make special laws for women to bring about freedom and equality for women and to protect their dignity. Through the judicial pronouncements, it is evident that the Court tried its best to be more considerate to women. However, time and again it has looked upon woman in the light of men.

VIII. THE EMERGING ISSUE OF TRANSGENDER IN THE CONTEXT OF GENDER JUSTICE UNDER THE INDIAN CONSTITUTION

It is important to note that with the changing generations, the term "gender" and "gender justice" has also broadened its aspects to a new category or community of gender known as

²² AIR 1984 SC 1099

²³ AIR 2017

²⁴ AIR 1953

²⁵ AIR 1987 Ker 110

then Tran genders or the LGBT Community. Transgender people are individuals whose characteristics and behaviour differ from stereotypes about how men and women are supposed to be. In other words, Transgender encompasses anyone whose identity or behaviour falls outside of stereotypical gender norms.

As far as interpretation of gender justice is concerned, the Constitution of India has laid down several provisions under the Constitution which identifies the context of Transgender within the scope and the ambit of interpretation of the term gender though not explicitly defined under the Indian Constitution.

On April 15th, 2014, after years of unjust gender discrimination, the transgender persons were given a separate identity, after Supreme Court, in the landmark judgment of **National Legal Services Authority v. Union of India & Ors** recognized the third gender category before the eyes of Law. The Court broadened the constitutional interpretation and busted the binary gender structure of man and woman. The Court granted equal rights and protections to transgender persons under the constitutional principles of Article 14, 15 and 16.²⁶ Thus, interpretation of the term "person" under Article 14, which deals with Equality before Law, does not restrict itself to the dual concept of man and woman. In other words, Hijras or transgender persons also fall under the admits of the expression 'person' and are entitled to equal protection of laws in all spheres of State activity.

Furthermore, **Articles 15** and **16** of the Constitution are used to broaden the scope of the term "sex" to include "psychological sex" or "gender identity" and hence held that no person could be discriminated on the basis of sexual orientation. The Court even made an effort to protect one's gender expression which is majorly reflected through dresses, actions, behaviour and similar forms.²⁷ The Supreme Court laid emphasis on the importance of right to dignity by recognizing a person's gender identity and widening the ambit of **Article 21** of the Indian Constitution.

The Preamble to the Constitution mandates Justice- social, economic, and political equality of status. Every individual is entitled to right to equality enshrined in the constitution of India. Article 15 lays down provisions on the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 21 ensures the right to privacy and personal dignity to all the citizens. Article 23 prohibits trafficking in human beings as beggars and other similar forms of forced labour, and any contravention of these provisions shall be an offence

²⁶ National Legal Services Authority v. Union of India & Ors, (2014) 5 SCC 438

²⁷ Akansha Mishra, The Third Gender Rights-The Battle for Equality, *Christ Law Journal*, Vol 5 2016 at 14

punishable in accordance to Law.

IX. CONCLUSION: UNLEASHING THE REALITY

To conclude, it is evident from the above discussion that the Constitution of India has broadened the interpretation of gender justice although the term gender justice has not been explicitly defined or mentioned in the Constitution. However, in the Indian Constitution, the concept of gender equality and gender justice can be widely understood through the way the Constitution has interpreted certain articles with respect to fundamental rights to every person and citizen of our country. Certain Indian Constitutional provisions has positively reflected the notion of equality and justice not only between men and women but has broadened the ambit to the third category of gender known as the third gender or the LGBTQ. The Constitution has given a positive special status to woman in certain provisions which has no doubt uplifted the status of women at par with the men in the society as able citizens of the country. The Constitutional recognition of gender equality has also led to the enactment of various legislations by the legislative body such as, Maternity Benefit Act, Dowry Prohibition Act, Equal Remuneration Act, Child Marriage Restraint Act, Medical Termination of Pregnancy Act, Protection of woman from domestic violence Act, Protection of women against sexual harassment at workplace and many more. As far as transgender people are concerned, they have been constitutionally recognized as third gender under the Constitution and has been given all the fundamental rights like the other sexes.

However, the questions arise as to what extent these fundamental rights as to gender equality guaranteed to the all the person irrespective of the sex is applicable in reality. In addition to this, women enjoy the benefits of special provisions under the Indian Constitution which raises the question of gender neutrality in India. One must not forget the fact that men too are subjected to violence, abuse and discrimination, as the exploitation of men are also day by day.

The notion of equality mentioned in the Constitution of India irrespective of the sexes is far to achieve in real context where women are still treated as the vulnerable sections of the society dominated patriarchy. Despite of the constitutional provisions mentioned to ensure gender equality and justice to women and transgender people, they are still subjected to violence, abuse, crime and discrimination at an alarming rate. Till date women and transgender rights are violated every now and then. There is an urgent need for the people at large to understand the notion of gender justice and gender equality in a wider concept which is very essential for the well-being of the individual to avail certain fundamental rights which interprets the notion of gender justice under the Indian Constitution.