

A Study of Constitutional Guidelines with Reference to Social Justice and Gender Egalitarianism in India

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Abstract

Social Justice as a concept in India is related most specifically with equal distribution of rights without discrimination of gender, caste, creed or economic status. The purpose of social justice is to maintain or to restore equilibrium in the society and to envisage equal treatment of equal persons in equal or essentially equal circumstances. In the Indian Constitution it finds place significantly in the Preamble, Fundamental Rights and Directive Principles of State Policy. The leaders of India's freedom movement visualized that in the new dispensation following political freedom, the people should have the fullest opportunity for advancement in the social and economic spheres and that the state should make suitable provisions for ensuring such process. The Fundamental Rights envisaged in Part III of the Constitution of India has a tremendous contribution in rendering social justice to the country at large and till date it thrives to maintain its constitutional goal, in guiding legislation aimed at social welfare for the common good and common interest of the people. Social justice is the keystone of the Indian Constitution. One facet of it is gender equality, which is a composite concept; it is a human right of women. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right.

Keywords: Social Justice, Gender Equality, Fundamental Rights, Human Rights and Women

1. Introduction

As humanity marched toward development, and the concept of social justice and gender equality globally debated, it found a legitimate place in all important international documents. The principles of social justice, gender equality and gender equity have been basic to Indian thinking. The 19th and 20th centuries saw succession of women's movements first around social issues and later around the freedom struggle itself.^[1] A Constitution is the basic document of a country, having a special legal sanctity, which sets the framework and the principal functions of the organs of the government of a State and declares the principles governing the operation of these organs. The Constitution aims at creating legal norms, social philosophy and economic values, which are to be effected by striking synthesis, harmony and fundamental adjustment between individual right and social interest to achieve the desired community goals.^[2] The Constitution is a comprehensive document containing the principles of justice, liberty, equality and fraternity. The Constitution assures the dignity of the individuals irrespective of sex, religion, race, caste or place of birth. As far as women are concerned, the

Constitution contains both positive and negative provisions securing gender equality.^[3] The Constitution of India has an elaborate preamble. The purpose of the preamble is to clarify its sources, goal and objectives.^[4] As revealed in the preamble, the Constitution seeks to secure for all its citizens justice, liberty, equality and fraternity. The object of inclusion of these words in the preamble is to develop human personality and to guarantee the dignity of the individual both men and women. Equal rights to men and women in terms of status as well as opportunity are the basic goals enshrined in the preamble.

2. Social Justice and Gender Equality in Constitutional Jurisprudence

In the modern Constitutional Jurisprudence, enforcement of human rights is a matter of great significance. The incorporation of basic rights or fundamental rights as enforceable rights in the modern Constitutional documents as well as the internationally recognized charter of human rights emanates from the doctrine of natural law and natural rights.^[5]

Speaking about the importance of fundamental rights in the landmark judgment of the Supreme Court in *Maneka Gandhi v. Union of India*,^[6] Bhagavati J. observed:

“These fundamental rights represents cherished by the people of these country(India) since the Vedic times and they calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a ‘pattern of guarantee’ on the basic structure of human rights, and impose negative obligation on the State not to encroach on individual liberty in its various dimensions.”^[7]

In a nutshell, the Supreme Court has displayed judicial creativity of a high order in *interpreting the Fundamental Rights in various cases*. While delivering judgment in *Ajay Hasia*, case^[8] Bhagavati, J. has observed:

“It must be remembered that Fundamental Rights are constitutional guarantees given to the people of India and are not really paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. On the whole, the Supreme Court has displayed a liberal and creative attitude in interpretation of Fundamental Rights and this has had a profound influence on the development of ‘Fundamental Rights’ in the course of time.”

The Constitution is wedded to the concept of equality, and the right to equality is declared by the Supreme Court to be the basic feature of the Constitution. Consequently, either Parliament or any State legislature can transgress the principles of equality. This principle has been reiterated by the Supreme Court thus:^[9]

“Equality is a basic feature of the Constitution of India and any treatment of equals unequal’s as equals will be violation of basic structure of Constitution of India”.

In *M. Nagaraj v. Union of India*,^[10] Constitution bench of the Supreme Court has declared in unequivocal terms that the content of Article 14 got expanded conceptually; and comprises the doctrine of promissory estoppel, non-arbitrariness, compliance with natural justice, eschewing irrationality etc.

The guiding principle of the Article 14^[11] is that all persons and things similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. ‘Equality before the law’ means that amongst equals, the law should be equal and should be equally administered and that ‘like should be treated alike’. Since women are physically weaker than men, they constitute a different class for the purpose of legislation. It means special laws can be made for the better protection of women. At the same time, ordinary laws should not make any discrimination on the ground of sex. Article 14 permits reasonable classification, and prohibits class legislation. Discrimination on the ground of sex is against the mandate laid down in Article 14. The judiciary always struck down the rules discriminating women on the ground of sex.

In *Air India v. Nargesh Meerza*,^[12] the Supreme Court struck down the Air India Regulations relating to the retirement of air hostesses. Regulation 46 provided that an airhostess would retire from the service on attaining the age of 35 years, or on marriage, if it took place within four years of service or on first pregnancy, whichever occurred earlier. Under Regulation 47, the Managing Director had the discretion to extend the

age of retirement by one year at a time beyond the age of retirement up to the age of 45 years if an air hostess was found medically fit. Recognizing that the termination of service on pregnancy was manifestly unreasonable and VIOLATIVE of Article.14 of the Constitution, the Apex Court struck down the regulation.

The Supreme Court in *Lena Khan v. Union of India*,^[13] considered an identical question. Here the age of superannuation of air hostesses employed in India was fixed a 35 years with provision for extension till 45 years, but the air hostesses employed outside India were entitled to continue beyond the age of 45 years. The Supreme Court held that such discrimination was violative of Article 14.

Payment of ‘equal pay for equal work’ has also been justified under article 14. In *Mackinon Mackenzie and Co. Ltd. v. Andrey D’Cota*,^[14] the question was regarding the payment of equal pay for equal work. Their Lordship ruled that where the lady stenographers and male stenographers were not getting equal remuneration, there was discrimination, and, any settlement in that regard did not save the situation. The court further observed that discrimination between male and lady stenographers was only on the ground of sex and that being not permissible, the employer was bound to pay the same remuneration to both of them when they were doing practically the same kind of work. In *Madhu Kishwar v. State of Bihar*,^[15] the Chotanagpur Tenancy Act 1908 was challenged on the ground that it denied the right of succession to schedule tribe women to the tenancy lands, and hence, it was violative of Articles 14, 15 and 21 of the Constitution. The Supreme Court, by admitting the petition, quashed the discriminative provisions and paved the way for tribal women to assert their right to tenancy lands just as men.

3. Defensive Favoritism Against Equality Before Law

A specific application of equality is provided in Article,15. It thus concretizes and enlarge the scope of Article 14. The obligations of the State vis-a vis the concept of equality are laid down in Art.15(1) of the Constitution, which mandates: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

The provision, thus directs the State and its instrumentalities not to discriminate a citizen on grounds of religion, race, caste, sex, place of birth etc. Consequently all laws are to be applied to members of both sexes equally, without any discrimination on the ground of sex. The Article 15(3) specifically provides that the prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth as contained in Article15 (1) and (2) shall not prevent the State from making any special provision for women and children. Thus it would be no violation of Article 15 if institutions are set up by the State exclusively for women or places are reserved for women at public entertainments or in public conveyances. The main object of Article 15(3) is based on ‘protective discrimination’ keeping in view the weak physical position of women. The reason is that “women’s physical structure and the performance of maternal functions place her at a disadvantaged position in the struggle for subsistence, and her physical well-being becomes an object of public interest and care in order to preserve the strength and vigour of the race.”

In *Yusuf Abdul Aziz v. State of Bombay*,^[16] the petitioner challenged the validity of s,497 of Indian Penal Code 1860 on the ground that it was discriminatory and violative of Article 14 and Article 15(1) of the Constitution. It only punishes man

for adultery and exempts the woman from punishment even though she may be equally liable as an abettor. The impugned law was justified on the ground that the discrimination was not based on the ground of sex alone. The exemption in favour of the wife was made for other reasons also, such as, that women in this country were married at a very age and that their husbands could have a plurality of wives. ^[17] When penal provision which punishes only man although woman is equally guilty, was challenged, the operation of Article 15(3) is invoked by the Supreme Court to justify it:

Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provision in the case of women and children by cl.(30 of Article 15; Article 14 and 15 thus read together validate the last sentence of s.497, IPC which prohibits the women from being punished as an abettor of the offence of adultery.

The Court recognized that due to the inherent weakness of women the legislator took a lenient view. The Supreme Court upheld the order of the High Court and observed that the provision complained of is a special provision and it is made for women. ^[18] Therefore, the law is saved by cl.(3) of Article 15.

When the matter relating to 'mother as a natural guardian' was questioned, the Supreme Court held that relegation of mother to inferior position to act as a natural guardian is violation of Article.14 and Article 15 and hence, the father cannot claim that he is only a natural guardian. ^[19]

The scope of Article 15(3) is wide enough to cover any special provision for women including reservation in jobs. Article 16 which guarantee equality in public employment, does not come in the way of such reservation. The two articles must be harmoniously construed. Women are a weaker section of our society for whose upliftment Article 15(3) is made which should be given widest possible interpretation and application subject to the condition that reservation should not exceed 50% limits laid down in *Indra Sawhney v. Union of India*. ^[20] The Court, on the another occasion, has upheld an Orissa Government Order reserving 30% quota for women in the allotment of 24 hours medical store as part of self-employment scheme. ^[21] Thus, the language of Article.15(3) is in absolute terms and does not appear to restrict in any way the nature or ambit of special provision which the State may make in favour of women or Children.

Article 16 is a specific application of the general rule of equality before law laid down in Article 14 and of the prohibition of discrimination in Article15(1), with respect to the opportunity for employment or appointment to any office under the State. Article 16 which is rooted on equality, guarantees to the citizens the right to equality of opportunities in matters of public employment. It is confined to the matters relating to employment or appointment to any office under the State. It says there shall be equality of opportunity for all citizens in matters relating to public employment or appointment to any office under the State. ^[22]

The principle of equal pay for equal work is also covered by equality of opportunity under Article16 (1). ^[23] Further, the Constitution reaffirms that the State shall not discriminate between citizens on the grounds enumerated thus:

"No citizen shall, on ground only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State". ^[24]

Article 16(1) and (2) embody the general rule that the State shall provide equal opportunities for all citizens in matters relating to employment or appointment to any office under the State. These provisions are an extension of the principle of equality before law and of the goal of 'equality of status and opportunities' as set in the preamble of the constitution. The import of these provisions is that a woman has the same rights in matters of employment under the State as a man and the State shall not discriminate against women on this count. It operates equally against any such discriminative legislation or discriminative executive action. If any law is passed or any executive action is taken to prevent the women from taking up employment under the State, such law or executive action could be challenged under Article16(1) and (2). It is noted that the prohibited grounds of discrimination enumerated in Article.16 (2) are only applicable to public employment. They do not operate as Constitutional impediments to private persons or bodies preferring certain classes of persons for appointments. In *C.B.Muthamma v. Union of India*, ^[25] Constitutional validity of Rule 8(2) of the Indian Foreign Service(Conduct and Discipline) Rules 1961 and Rule 18(4) of the Indian Foreign Service(Recruitment, Cadre, Seniority and Promotion) Rules 1961 was challenged before the Supreme Court. The Supreme Court held that the rule was discriminatory against woman and hence unconstitutional and violative of Article14 and 16(1) of the Constitution.

The court further observed that our founding faith enshrined in Article 14 and 16 should have been tragically ignored vis-a-vis half of India' humanity, viz. our women, is a sad reflection on the distance between the Constitution in the book and the law in action. ^[26]

The Constitution empowers the State to make special provisions for advancement of women and children. The legislation or subordinate legislation favouring women as a class is not considered as violative of Articles 14, 15 or 16. Thus, the State has also the power to reserve a few percentage of posts in the State services in favour of women. The Apex Court in a number instances has upheld this protective measure favouring women.

In *T. Sudhakar Reddy v. Government of Andra Pradesh*, ^[27] the petitioner challenged the validity of s.31(1)(a) of the Andhra Pradesh Co-operative Societies Act 1964 and rr.22C. 22A(3)(a) of the Andhra Pradesh Co-operative Societies Rules 1964. These provisions provide for nomination of women members by the Registrar to the Managing Committee of the Co-operative Societies, with a right to vote and upheld these provisions in the interest of women's participation in co-operative societies and opined that will be in the interest of the economic development of country.

In *Government of Andhra Pradesh v. Vijaykumar*, ^[28] it was held that making special provision for women in respect of employment or posts under the State is an integral part of Article (3) and hence this power conferred under Article.15(3) is not whittled down in any manner by Article 16.

The rule is a woman friendly provision and its unqualified endorsement by the Supreme Court how that affirmative action to facilitate induction of more women into public service cannot be torpedoed on the blind plea of equality. Similarly, in *Union of India v. K.P.Prabhakaran*, ^[29] the Supreme Court upheld the decision of the Railway Administration to reserve the posts of Enquiry-cum-Reservation Clerks in Reservation Offices in Metropolitan cities of Madras, Bombay, Calcutta and Delhi exclusively for women. Thus, the State is not barred by Article 16(1) and (2) to give any preferential treatment in favour of women.

In *Vijay Lakshmi v.. Punjab University*,^[30] Rules 5,8 and 10 of Punjab University calendar Volume III providing for appointment of lady Principal in a Women's College or a lady teacher therein was challenged. In this context, the Supreme Court observed:

It can be stated that there could be classification between male and female for certain posts. Such classification cannot be said to be arbitrary or unjustified. If separate college or schools for girls are justifiable, rules providing appointment of lady principal or teacher would be justified.... Hence, it would be difficult to hold that rules empowering the authority to appoint only a lady principal or a lady teacher or a lady doctor or a woman Superintendent are violative of Articles 14 or 16 of the Constitution.

At this juncture, it is also noteworthy to mention the case of *Associate Banks Officers Association v. State Bank of India*,^[31] wherein the Apex Court held that women workers are in no way inferior to their male counterparts, and hence there should be no discrimination on the ground of sex against women. In *Air India Cabin Crew Association v. Yesaswinee Merchant*, the Supreme Court has held that article 15 and 16 prohibits a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. The Constitution does prohibit the employer to consider sex while making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan.

4. Gender Egalitarianism and Fundamental Rights

Article 19(1)(g) of the Constitution declares that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The right under Article 19(1)(g) must be exercised consistently with human dignity. Therefore, sexual harassment at work place amounts to its violation. In *Delhi Domestic Working Women's Forum v. Union of India*^[32] relating to rape and violence of working women, the Court called for protection to the victims and provision of appropriate legal representation and assistance to the complaints of sexual assault cases at the police station and in Courts. To realize the concept of 'gender equality', the Supreme Court has laid down exhaustive guidelines in the case of *Vishaka v. State of Rajatan*^[33] to prevent sexual harassment of working women at their workplace. In this area, the courts have shown more enthusiasm than that the legislative and administrative organs of the Government. The judicial approach appears to have been coloured by prevailing philosophy of the society. The problems of women have always a concern to the interpretation of the Constitution.

The Constitution enjoins that: "No person shall be deprived of his life or personal liberty except according to procedure established by law."^[34] Article 21 is the most cardinal fundamental right in the Constitution of India. In *Maneka Gandhi v. Union of India*,^[35] Bhagavati, J. observed: "The expression 'personal liberty' in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights."

Article 21 has made long strides due to the judicial interpretation received at the deft hands of judges of the Apex Court. Article 21, though couched in negative language, confer on every person the fundamental right to life and personal liberty and it has been given a positive effect by judicial interpretation. "Life", in Article 21, is not merely the

physical act of breathing. This has been recognized by the Courts. It is true that judicial decisions on Article 21 do not embark upon such an analysis in depth. But the judiciary does take note to deal with the wide approach of the right to life. Elaborating the concept of "life and personal liberty" the Supreme Court in *Francis Coralie v. Union Territory of Delhi*,^[36] said that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The right to life includes the right to live with human dignity. In view of the global developments in the sphere of human rights the judicial decisions from time to time have played a vital role towards the recognition of an affirmative right to basic necessities of life under Article 21.

The Constitution does not grant in specific and express terms, any right to privacy as such. Right to privacy is not enumerated as a fundamental right in the Constitution. However, such a right had been devised by the Supreme Court from Article 21 and several other provisions of the Constitution read with Directive Principles of State Policy.

The concept of "privacy" means 'the state of solitude or small group of intimacy'. The concept of privacy has multiple dimensions. The right to privacy is an integral part of the right to life and liberty enshrined in Article 21 of the Constitution. So far as right to privacy of women is concerned, the judiciary has dealt with this aspect in a number of cases.

In *State of Maharashtra v.. Madhukar Narain*^[37] the Supreme Court has emphatically observed "that even a woman of easy virtue is entitled to privacy and that no one can invade her privacy as and when she links. In another case, the Supreme Court held that right to privacy of women would precluded such questions to be put to female candidate as modesty and self respect may preclude an answer".^[38] In instant case, the petitioner, a Probationer Assistant in L.I.C. gave a false declaration regarding the last menstruation period, during her medical examination, since the clauses in declaration were indeed embarrassing if not humiliating like the regularity of menstrual cycle, the term therefore, the number of conception taken etc. The Supreme Court found that such embarrassing questions violate the right to privacy of the lady employees and further directed the corporation to delete such columns in the declaration.

In *Surjit Singh Thind v. KanwaljitKaur*^[39] "the Punjab and Haryana High Court has held that allowing medical examination of a women for her virginity amounts to violation of her right to privacy and personal liberty enshrined under Article 21 of the Constitution. In this case the wife has filed a petition for divorce on the ground that the marriage has never been consummated because the husband was impotent. In order to prove that the wife was not virgin the husband has filed an application for her medical examination. The Court said that the allowing of medical examination of women's virginity violates her right to privacy under Article 21 of the Constitution. Such an order would amount to roving enquiry against a female who is vulnerable even otherwise. The virginity test cannot constitute the sole basis, to prove the consummation of marriage".

Implication of K.S. Puttaswamy case on women's right to privacy. Indian Supreme Court recently pronounced a verdict in Justice *K.S.Puttaswamy v. Union of India*^[40], declaring that the right to privacy is a fundamental right under the Indian Constitution. The said verdict will have a significant impact upon our legal and constitutional jurisprudence for years to come. Undoubtedly, the verdict recognizing right to privacy as fundamental right will have profound impact on the women's right by giving a remedy to aggrieved women for

reaching the court directly to enforce their right to privacy against the State. But this right like any other right is not absolute. For instance Justice sapre observed that “reasonable restriction can be in the form of ‘social, moral and compelling public interest in accordance with law.’” Justice Chelameshwar also held that “in instances where ‘strictest scrutiny’ is required, there can be a compelling state interest to infringe on the right to privacy.”

Moreover, the curse of an evil like ‘Marital Rape’ shall also cease to exist from this verdict as privacy promotes autonomy over body. Sexual assaults cannot be tolerated in the name of institution of marriage and cannot go hidden. The Indian Penal Code can no longer protect the marital rape and stand overruled since the recognition of this right to privacy as a fundamental right. Autonomy over body should take precedence over a broken reading of the institution of marriage.

Women’s right to choose has been specifically strengthened in this judgment. Justice Chalemeshwar said emphatically in this judgment that “the right to terminate life of the fetus sits squarely within the purview of the right to privacy. The divergence here, however, is a matter of degree. The recognition of the woman’s right to her body is significant, as this could potentially form the basis for enlargement of this strictly regulated right in day come. In a nation where misplaced patriarchy manifests rape, an unambiguous declaration in favour of individual privacy of which bodily autonomy is the essence-might just prove to be a major milestone toward securing gender justice for the historically suppressed half of our population”.

Conclusion

The literature goes to show that, after Vedic period women were not provided equal status in every aspect of life when compared to men. This is the era where discrimination started and continued till date in one or other form. To provide equal justice to men and women, issue of gender equality has been debated over for a long time, many reforms are brought to empower women, the legislature also enacted many gender neutral laws but still discrimination remains as one of the biggest challenges. The Indian Judiciary played a positive rule in the above cases in preserving the rights of women in society. Moreover, it was also held that the policy decision of reservation in favour of females within the ambit of right to equality has to be upheld in various cases. These decisions were shows that the Apex Court has assured a woman social justice through the Constitutional provisions.

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