

Constitutional Provisions in The Context of Transgender Rights in The Indian Scenario

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Abstract

Indian constitution is very much humble and soft spoken for human being. It is considered as holy epic for Indian democracy. The opening term in our Preamble, “we, the people.....,” is widely understood to encompass not just man and woman, but also third gender. Transgender persons, like men and women, are a part of India’s population. As a result, the phrase “WE” in the Preamble encompasses transgender people, and the Preamble attempts to guarantee that they are protected by the essential ideas espoused therein. The Preamble promises to provide justice, liberty, and equality to its citizens. Only when everyone in society receives his due is justice conceivable. A fair society is one in which everyone has equal rights and opportunities. Individual liberty are not subjected to unreasonable restrictions. Furthermore, there is no bias or discrimination. As a result, equality and liberty are linked. Equality cannot exist without liberty, and liberty without equality is useless.

Keywords

Discrimination, Enjoyment, Human Individuality, Harassment.

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Introduction

“Man is born with a title to absolute freedom and unrestricted enjoyment of all the rights and privileges of the law of nature,” according to Locke, “and he has by nature a power to safeguard his property—that is, his life, liberty, and estate—against the assaults and efforts of other men.”

Human rights have been seen as inalienable for the development of human individuality since the period of natural law. The protection of these intrinsic rights has been emphasized by natural law philosophers. It is self-evident that every person born as a human enjoys the privilege of exercising these rights. They are available to all members of the human family from the moment they are born. These rights must be protected and safeguarded by the state. Individuals are protected by the idea of human rights from state-sponsored harassment. Human rights are divided into two categories:

- a) Civil and political rights and
- b) Economic and social rights.

They are protected by our Constitution in the form of Fundamental Rights in Part III and State Policy Directives in Part IV. The aim behind preserving these rights is that everyone should have certain basic liberties. Furthermore, the legislature has taken them out of the hands of political majorities by enshrining them in our Constitution. It was critical to include them in the Constitution so that they could not be broken, tampered with, or modified by the government for political reasons. As a result of this reasoning, several written constitutions, including India's, have incorporated them. Because they are part of the Constitution, they may only be curtailed, suspended, or repealed via constitutional amendment rather than legislative change. This manifestation of basic rights serves two purposes: first, it is justiciable in the sense that any injured individual can seek redress from the State in a court of law. Second, it restricts and limits the government's ability to take administrative or legislative actions that infringe basic rights. Any regular legislation cannot deprive someone of their basic rights, otherwise, it will be considered unconstitutional. Fundamental rights represent the current democratic worldview. The impact of international human rights documents such as the Universal Declaration of Human Rights and subsequent covenants such as the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights on the inclusion of human rights in the Indian Constitution is significant. The preservation of human rights is critical for an individual's total personality development, which leads to the growth of the nation as a whole.

Fundamental Rights Sunder Part III of Indian Constitution

Our Constitution incorporates equality. Even the Preamble stresses equality as a fundamental aspect of the Constitution. Any modification that reduces equality is null and void. Equality cannot be violated by the federal or state legislatures.

The opening term in our Preamble, “WE, THE PEOPLE.....” is widely understood to encompass not just man and woman, but also the third gender. Transgender persons, like men and women, are a part of India’s population. As a result, the phrase “WE” in the Preamble encompasses transgender people, and the Preamble attempts to guarantee that they are protected by the essential ideas espoused therein. The Preamble promises to provide justice, liberty, and equality to its citizens. Only when everyone in society receives his due is justice conceivable. A fair society is one in which everyone has equal rights and opportunities. Individual liberty is not subjected to unreasonable restrictions. Furthermore, there is no bias or discrimination. As a result, equality and liberty are linked. Equality cannot exist without liberty, and liberty without equality is useless.

Part III of the Indian Constitution enumerates all of the essential rights that everyone has. Fundamental freedoms and liberties play a significant part in the development of an individual’s personality. Articles 14, 15, 16, 19, and 21 of the Constitution guarantee all members of society the right to equality, equality against discrimination, freedom with reasonable constraints, and the right to life and personal liberty. As used in these articles, the terms “person” and “citizen” imply not only binary gender but also transgender people. These clauses, as well as those dealing with education and forced labor, have been thoroughly explored as follows:

Right to Equality

Indian democracy is built on the principle of equality. Articles 14-18 of the Constitution contain the right to equality. Article 14’s main goal is to provide equality of status and opportunity for all people, whether citizens or non-citizens, as stated in the Constitution’s preamble. Article 14 lays forth fundamental principles for combating discrimination, with more specific provisions pertaining to this found in Articles 15-18. Article 14 refers to the genus, whereas Articles 15 and 16 refer to the species.

Article 14 (Equality Before Law)

It’s worth noting that most written constitutions use the term ‘equality before the law,’ but the United States Constitution contains the phrase ‘equal protection of the law.’ However, Article 14 of the Indian Constitution incorporates both terms.

Article 14 has two ideas. The first notion, ‘equality before the law,’ is expressed negatively. It suggests that no one has an advantage or privilege over

another. Without regard to their rank or status, all people must be treated equally and according to the regular laws of the state. No one is exempt from the law. It comes from the English language. Dicey's rule of law is comparable to this. No one is above the law, regardless of their position or status, and they are always subject to the law of the nation and answerable to courts of law.

Article 14 is intended to safeguard a comparable group of people against discrimination. The government is therefore entitled to classify people, but it must be acceptable in order to provide equal treatment or treat everyone equally.

In the words of the Supreme Court of India:

“The differentia, which is the basis of the categorization, and the Act are two separate entities, and there must be a connection between them.”

In *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, the Hon'ble Supreme Court stated, “Equality must become a live reality for enormous masses of people.” Those who are unequal in reality cannot be treated with the same standards; this may be legal equality, but it is not true equality. The presence of talents, not only the absence of impairments, is required for equality of opportunity to exist. It's not only a question of legal equality. De jure equality must eventually be justified by de facto equality.” The Hon'ble Supreme Court took a dynamic approach to the equality principle under Article 14 in *E.P Royappa v. State of Tamil Nadu*, defining it to be “founding forth, a way of life” and hence not amenable to restricted interpretation.

The Supreme Court ruled in *R.D. Shetty v. International Airport Authority* that Article 14 prohibits the government from acting arbitrarily and ensures equity and equality of treatment.

Sexual assault is particularly common among transgender people; they are forced to have anal or oral sex and are even raped. They experience discrimination in many aspects of society, including job, education, and social duties, as a result of their non-recognition. They have significant difficulties utilizing bathroom facilities because there is no specific toilet for them and they must use male toilets, where they are sexually assaulted and mistreated. Article 14 prohibits discrimination based on sexual preferences or gender identity.

Article 15 (Prohibition of Discrimination)

These three Articles of the Indian Constitution (14, 15, and 16) are the core parts of the constitutional code of equality assurance and are complimentary to one another. While Article 14 addresses equality for all people, including aliens, Article 15 is restricted to citizens despite its broad reach.

Article 15 stems from Article 14. It encompasses all of the government's actions. Article 15 does not provide protection to non-citizens. Though Article 14 allows for fair categorization, Article 15 states the conditions for which discrimination is prohibited.

The term "discriminate against" refers to a prejudiced distinction with regard to anything. It contains a positive bias component. Discrimination against one individual entails discrimination against another. Article 15 allows for categorization and even reservation for some members of society, but any reservation based on banned criteria (such as religion, sex, caste, place of birth, or race) would be in violation of Article 15. (1).

Although Article 15(1) bans categorization based on caste, there is an exception to this general norm in Article 15(4). Although Article 15(2) mentions free access to public spaces, transgender people face discrimination in this area. They have limited or no access to public locations such as restaurants, restrooms, and shopping malls.

Article 16 (Equality of Opportunity in Matters of Public Employment)

The Constitution's provision of casteless and classless equality is covered by Articles 14 to 16. Article 16 is another example of how Article 14 might be used. Article 16 guarantees basic equality in the spheres of employment and appointment to any State position. It is a distinct and crucial provision for the development of a more equal society. The notion of equality is fluid, and it cannot be confined to specific customary boundaries.

Article 16 does not exclude the government from establishing selection criteria for certain positions. Article 16 is more comprehensive than Article 15 since it includes seven banned discriminatory reasons.

Discrimination based on gender is prohibited under Articles 15 and 16. It acknowledges the historical truth that sex prejudice existed and that it must be addressed. To protect just those persons (who do not correspond to the standard understanding of binary gender) from society's indifference, the constitution authors classified sex as a forbidden basis of discrimination. Gender and biological characteristics make up sex.' Gender qualities include one's image, and profound psychological, and emotional identity, while biological aspects include genital, primary, and secondary sexual characteristics. As a result, the term sex in Articles 15 and 16 does not refer just to males and females, but also to those who do not fit into the binary gender categories of male and female.

Article 16(1) gives effect to the provisions of Article 14. Both articles allow

for logical categorization. And discrimination is going to occur wherever there is a categorization.

Article 16(4) of the Constitution allows for reservations in government services in favor of individuals from underrepresented backgrounds.

1.7 ARTICLE 19 (PROTECTION OF CERTAIN RIGHTS REGARDING FREEDOM OF SPEECH ANDEXPRESSIONETC)

Article 19 guarantees the most fundamental liberties (1). They are regarded as a natural right that every citizen possesses. Non-citizens do not have access to these rights. These liberties are restricted rather than unlimited, as is the case in any civilized community, because unrestrained authority leads to oppression and unbridled liberty leads to anarchy and disaster.

It is clear from the Supreme Court's ruling in *A.K. Gopalan v. the State of Madras* that "Man as a rational person wishes to do many things, but in civil society, his desires must be controlled, regulated, and harmonized with the exercise of comparable desires by other individuals." However, the restrictions put on these liberties must be sensible and acceptable. There must be a direct relationship between the imposed restriction and the desired outcome. Restriction can sometimes lead to an outright ban. To be fair, the limits must adhere to the provisions of Article 14. The phrase 'in the interest of' has a lot of meaning. These provide the government the authority to limit the exercise of this right even before it occurs. The restriction might also be enforced ahead of time. The state has the power to limit not just acts that may cause harm, but also acts that may have such an impact.

Article 19, it can be curtailed in the interests of public order, sovereignty, and integrity (3). Article 19(1) empowers citizens to organize an organization or union (c). In a democracy, the freedom to organize an association is essential because, without it, political parties cannot emerge, and the parliamentary system of governance cannot function effectively. However, under Article 19, this right might be limited for the sake of public order, morality, or India's sovereignty and integrity (4).

Article 21(Right to Life and Personal Liberty)

The most crucial human right is Article 21. Any act or omission that endangers human life must be addressed immediately. The goal of Article 21 is to keep the state out of the realm of personal liberty. It serves as a repository for all human rights. The state must establish an atmosphere for its residents in which people of many faiths may coexist. Though written in a negative tone, Article 21 discusses two vital rights: life and personal liberty. These rights have also been given due consideration by the judiciary. The right to life and personal liberty are

two broad concepts that encompass a wide range of rights. All other political and social order is subordinate to these two traits. As a result, the state prioritizes this right over other aspects of daily life.

For over three decades, Article 21 has been dormant. It came to life with the Supreme Court's decision in the Maneka Gandhi case. The phrase "life" has taken on new meaning. Only through following a legal method can a person's right be taken away, and that procedure must be fair, just, and reasonable.

Right to Life

The Supreme Court interprets the term "life" in Article 21 in a liberal and wide manner from time to time. The term 'life' refers to more than only animal existence; it also refers to the quality of life. A decent degree of comfort and dignity is implied by the right. Without a doubt, it refers to the right to live a decent life as a member of civilization.

The Hon'ble Supreme Court said in Sunil Batra v. Delhi Administration that "the right to life encompasses the right to live a healthy life as well as the right to enjoy the capabilities of the human body in their prime circumstances." It would also include the right to safeguard one's tradition, culture, legacy, and everything else that gives significance to one's existence. It encompasses the right to live and sleep in peace, as well as the right to relaxation and health." As a result, the right to life encompasses the right to defend everything that gives life meaning. Transgender people must therefore be given protection in order to recognize their gender identity and live and sleep in peace. They can also live a dignified life. They have the right to enjoy their abilities at their peak, and they cannot live a healthy and pleasant life if they reject their gender identification.

Right to Privacy

Privacy simply implies "the right to be left alone." The right to privacy is part of the fundamental right to life and liberty. Private connections might originate from contract marriage, trade, or politics, and no one has the right to intervene in the private affairs of others. Even this right, however, is not unrestricted. It can be restrained to avoid crime, disruption, or medical danger.

Right to Personal Liberty

The term 'personal liberty' has sometimes been construed broadly. It protects a person's body against unlawful detention, arrest, and imprisonment, as well as all of the rights that make up a man's personal liberty that is not protected by separate sections of Article 19. (1).

Article 21A (Right Education)

Education is important in molding an individual's personality, which in turn shapes the nation's destiny. Education is a fundamental and vital human right that is required to enjoy all other human rights. It is a powerful instrument in the hands of economically and socially marginalized populations to enable them to rise out of poverty and participate fully as citizens.

Article 23 (Right Against Exploitation)

Indian traditional society has always been structured by a hierarchical structure in which exploitation has always existed in some form or another. It became critical to have certain safeguards in place to prevent such abuse. As a result, Article 23 protects people from exploitation by prohibiting human trafficking and forced labor. This right guarantees that an individual's intrinsic dignity is protected. In other words, everyone has the right to make their own decisions, and no one may force someone to labor against their will or without pay. This right is available to all citizens, regardless of gender, caste, religion, or other factors. It guarantees that no one is forced to labor under oppressive conditions.

Conclusion

Our Constitution, being a living constitution, may be updated to reflect the changing character of society. Constitutional democracy's principal goal is to bring about progressive and inclusive social transformation. Our Constitution is considered transformational in the sense that its provisions do not need to be strictly construed, but rather must be read in light of its true design and purpose, as well as current societal needs. It should not only recognize an individual's rights and dignity, but also provide a favorable atmosphere for the full development of personality. The right to life is protected by the constitution, as is the right to live in dignity. The State must recognize the importance of each individual as a member of society in order to protect dignity. It's worth noting that the stereotyped idea of binary gender impacted the writers of the Constitution while formulating the provisions of this Grundnorm. In several articles, such as Article 39 of the directive principles of state policy, they have employed the particular terms man and woman. The moment has come to revise the Constitution to reflect current societal demands. All constitutional clauses should include the terms transgender in addition to male and woman. Within the constitutional framework, the transgender people should be explicitly recognized and acknowledged. Only until transgender people have legal recognition can they live a decent life. Furthermore, dignity is founded on the liberty of decision and action. Human dignity is based on the acceptance of a person's bodily and spiritual

unity, regardless of how useful he is to society. Individual dignity is mentioned in the Indian Constitution's Preamble.

For peaceful coexistence in society, it is critical to safeguard an individual's dignity. A breach of dignity may have a significant influence not just on a person's personal harmony, but also on society as a whole. This chapter responds to the research topic, "How far are transgender people in India given rights equal to other genders?" It is very obvious that prejudice stems from a lack of legal acknowledgment of identity. They lack legal identification since their sexual orientation or gender identity does not fall within rigid binary standards. It even indicates that, despite Articles 14, 15, 16, 19, and 21 of the Indian Constitution guaranteeing equality, transgender people are still not treated equally to other Indians after 73 years of independence. They are not explicitly excluded nor explicitly included in these Articles under the terms person or citizen. These provisions are only words for transgender people. It is proposed that the usual binary gender idea in society be broadened to include the transgender community as well as men and women. It's important to understand that being transgender isn't a choice, but rather a natural sexual variation over which one has no control. The refusal to acknowledge their identification or reject their legal existence is nothing more than a punishment. How can a person be punished for something he had no control over? Furthermore, by denying them legal status, the government exacerbates an already serious situation. Rather, the government must offer them with a remedy.

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