

CANADIAN AND INDIAN CONSTITUTION: COMPARATIVE ANALYSIS OF GENDER EQUALITY PROVISIONS

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ABSTRACT

Women have been inherently perceived as an inferior sex for several generations. The discrimination does not restrict itself to any national boundaries, it has been a global issue for several decades. Through the liberal dynamics in societal perception, there have been several initiatives and movements to do away with the long-standing prejudice and disadvantaged position of women. Diverse commonwealth nations have initiated discourse to address the subjugation of women in the modern society. Both, the Indian and Canadian Constitution have been derived from American jurisprudence and are intrinsically comparable. Further, both the constitutions can be distinguished with respect to standards of interpretation. Various provisions, which entail rights and protection towards gender-based discrimination have been incorporated in the modern-day legal system. However, it becomes pertinent to discuss as to how far these legal initiatives have aided the society to be prejudice-free. The objective of this Research paper is to delve into diverse realms of the Indian and Canadian Constitution with respect to Equality provisions. The distinctive ideas concerning the judicial system, the Constitution and the diversity in the socio-cultural perspectives has been analyzed. Further, it initiates a discourse on the text of the provisions and its comparability along with the difference in the standards of applicability.

Keywords: Equality, Constitution, India, Canada, Gender, Discrimination, Legal System

INTRODUCTION

Indian and Canadian legal systems have made several advancements by enlisting equality provisions to address gender-based discrimination. The state of equality has come a long way by leaps and bounds. One of the major objectives of the framers of Indian Constitution is to achieve equality. India has not yet substantially eradicated the evil of gender-bias as the protection given under the constitution still remains underutilised. Canada has taken several initiatives to include specified protection for women. This would mean ancillary protection for the rights of women. The text of equality provisions in both constitutions provide for explicit measures to set a standard of gender-based equality in the modern world. Even though both India and Canada are based on American jurisprudence, upon analyses, it can be concluded that none of the countries have strictly conformed to American standpoint. The Constitutional provisions of India and Canada outpace the Equal Protection Clause of The U.S.A. This clause is purely based on judicial interpretation and does not provide for an ‘*affirmative action*’, whereas the Indian and Canadian Constitution vouch for an ‘*affirmative action*’. By incorporating perspectives from several mandates, India aims to achieve a strengthened societal system with paramount importance to equality protection for women and as Canada sets forth a designated protection for women.

JURISPRUDENTIAL ANALYSIS OF THE CONSTITUTION

Constitution of India

India, the largest democracy of the world adopted one of the lengthiest constitutions in the world in the year 1950. The Indian Constitution was the result of continuous efforts of Indian for achieving Independence from the British unlike the one of United States which resulted from a revolutionary warⁱ. The chief objective of the Indian Constitution is to establish a "sovereign socialist secular democratic republic" whilst assuring "the dignity of the individual."ⁱⁱ Although these words depict India to be an Ideal nation but the reality is far away from it. Regardless of the emphasis of "*secular*" government by the Constitution religion is considered to be of paramount importance in India, be it for a government policy, elections or the lives of the countrymen. Irrespective of the fact how much Indian Constitution emphasized

on protecting the individual, group mentality still penetrates all aspects of life. Regardless of the word “*socialism*” been embedded in the preamble of the Indian Constitution the fortunate and the unfortunate in India are poles apartⁱⁱⁱ.

If we initiate a discourse on whether the religious customs of two major religions in India provide equality to women the answer would be certainly not. The customs & religious texts of both Hindus & Muslims deny equal right to women.^{iv} For instance customs in Islam such as facial veil, prohibition to go outdoors, mandatory black apparel for women, is in open defiance of the secular, constitutional guarantee of equality.^v Furthermore, a foundational tenet of a doctrine of Hinduism requires that “through childhood, a women is under the control of her father; during the youth she is under her husband’s control; in her last days she is under her son’s control; a woman is never suitable for independence.”^{vi} These religious texts undoubtedly put an immense amount of emphasis on the minds of the people.

Out of 1.36 billion people in India, eighty percent belong to Hinduism whereas fourteen percent are Muslims. The personal lives of these people are governed “*majorly*” through their “personal and customary” laws. The major matters that are governed under these personal laws are marriage, divorce, inheritance. As far as the codification is concerned the Hindu personal laws, specifically have been codified by the state and federal government. This codification by the government is itself against the basic principle of “*sovereign*” republic^{vii}. Even though Article 44 of the Constitution^{viii} have made it a mandatory policy for the states to have a uniform civil code governing all of the India, no government has given required status to this law and it has not been written, even today personal laws continue to govern & vary from state to state.

Although on the surface one cannot notice much disparity between Indian political & judicial system with that of United States. India is federal republic comprising twenty-eight states eight union territories.^{ix} Both the countries have bicameral parliamentary system & the operational language is English. The process of judicial review has been adopted by both the countries: a check is kept by Indian courts on the parliament by requiring the laws being enacted by the parliament to be within the spheres of the constitution.^x Whilst many scholars of Indian jurisprudence have opined that this power of judicial review granted to Indian courts is somewhat more limited to that granted to US’ courts.^{xi} It would not be wrong comprehending that the judicial system of India is a single integrated system of state as well as federal courts. The apex court is the Supreme Court of the country whilst each state has its own high court

(similar to the US' state Supreme courts). The Supreme Court has the jurisdiction to adjudicate both the state & union laws, and its judgement, as with the US' Supreme Court, is binding on all lower courts^{xii}.

Constitution of Canada

The Canadian Charter of Right and Freedoms [hereinafter, "the Charter"], formed constitutional fundamental right for twenty-three million Canadians.^{xiii} It went into sense of implement in the year 1982 forming a part of the Constitution Act. The British rule came to an end as S. 2 of the Canadian Constitution states "*No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law.*"^{xiv} This act furthermore paved the way for Canada to become a fully autonomous nation as S. 52(1) of the Constitution states "*The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*"^{xv} The Canadian government is also a federal one with bicameral legislature comprising: The Upper House ie. The Senate & the House of Commons. Canada comprises of ten provinces along with three territories.^{xvi} Likewise United States Canada has also adopted judicial review as a measure to interpret the meaning of its Constitution.^{xvii} The apex court is the Supreme Court whose decisions are binding on all lower courts. Each province of Canada has its own high court with other lower courts.^{xviii}

Although Canada appears to be free from noticeable or overt kind of discrimination based on fundamental or religious beliefs unlike India, yet one cannot assume that women does not suffer discrimination in Canada. As far as earning is concerned women evidently earn sixty-three cents for every dollar earned by men in Canada.^{xix} There exists legislations in Canada that discriminate on the basis of sex. For instance, under Citizenship Act the child of a Canadian father becomes Canadian citizen automatically but in case of Canadian mother the law does not say so (unless the mother is unmarried or divorced). It cannot be argued that Canada has gained momentum to gender equality but women have not achieved equality in Canada. It has been revealed by an intersectional approach that there is no area that has been unequivocally improved for women. Whilst digging deep into the analysis of the key issues it has been found that for: Black & other racialized women, Indigenous women, immigrant women and women with disabilities the improvements have been insignificant.^{xx}

COMPARATIVE ANALYSES OF CONSTITUTIONAL PROVISIONS

Constitution of India: Equality Protection for Women

There have been instances of discrimination based on sex in different aspects of life. It becomes pertinent to analyze how such discrimination varies under different constitutions. Under the Indian Constitution, protection for women's equality has been provided under Article 14, 15 and 16^{xxi} along with the Directive Principles of State Policy and certainly, the Preamble. Notwithstanding, its enforceability in the court of law, Preamble affirms that 'EQUALITY' for all citizens is a goal of paramount importance under the constitution of India. Further, the Directive Principles of State Policy acts as a check and balance regarding the 'code of conduct' that are to be followed during enactment of any^{xxii}. It provides certain directives which protect the interests of women such as to obliterate differences in opportunity and income disparity. It focusses on equality between men women in terms of access to a fulfilling means of livelihood along with equal pay for equal work and health security. The article 14, 15 and 16 entails the fundamental rights under the Indian Constitution and are the focal point of equality protection. The applicable provisions with respect to sex discrimination are mentioned herein under:

Article 14

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

Article 15

(1) “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”.

(2) “No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction

or condition with regard to

(a) access to shops, public restaurants, hotels and places of public

Entertainment or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women”

Article 16

(1) “There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds 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”.

Upon the analysis of the aforementioned provisions, it can be understood that Article 14 is a blanket equality provision. Article 15 prohibits and lays down certain grounds of discrimination, any instance of discrimination which cannot be included under article 15 can be included in article 14. It may be ascertained that this provision is not limited to the citizen of India. Upon a comprehensive comparison of Article 14 with the clauses given by the 14th Amendment in the United States Constitution, various distinctions can be ascertained. The Equal Protection Clause focuses on a negative set about as ‘*equality before law*’ which interprets that disregards any special treatment to any particular section of society. On the other hand, under the Indian Constitution has a positive set about as ‘*equal protection of laws*’ with an aim to deliver equal treatment in equal circumstances^{xxiii}. This is a pertinent difference between the fourteenth Amendment of USA Constitution and Indian Constitution. In USA, with respect to sympathetic classifications, the provisions seek to recompense women for long standing previous discrimination. However, such case works negatively and repudiates benefits to men. Certainly, to end one form of discrimination, it is not wise to give rise to another form of discriminatory practice. Considering the view of Indian constitution, it entails provisions

based on the idea of affirmative action which does not compromise on the standing of one section of the society while it has been able to countermeasure the past discrimination against women. Article 15(3) of the constitution of India establishes such affirmative power of India, for which USA is in privation. The provisions on equality under the Indian constitution transcend the Constitution of USA in terms of limitations and provide forthright protection to the rights of women, thereby, Indian Constitutional provisions have been outright in recompensing past discrimination unlike USA^{xxiv}.

Constitution of Canada: Equality Protection for Women

The Canadian Charter of Rights and freedoms hold provisions on similar lines as that of Indian constitution. Section 15^{xxv} and Section 28^{xxvi} of the Charter are the heart of the equality provisions of the state. These rights are regulated by way of section 1^{xxvii} of the Charter in special situations. However provincial legislatures have overriding power given under section 33^{xxviii} of the Charter which intervenes with the provisions of equal protection. The applicable provisions with respect to sex discrimination are mentioned herein under:

Section 1

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

Section 15

15.-(1) “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability”.

(2) “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

Section 28

“Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”.

Section 33

33.-(1) “Parliament or the legislature of a province may expressly declare in an Act of Parliament or the legislature, as the case may be, that the act of a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this charter”

There are varied equal protection clauses given under the Charter. The four major protections are: *Firstly*, equal benefit of the law, *Secondly*, equal protection of the law, *thirdly*, equality under the law and *lastly*, equality before the law, all given under section 15 of the charter^{xxx}. The correlation of these provisions has severally been a subject of study. The goal of the charter is certainly to not leave any loophole with regards to equality protection and the major objective revolves around a discrimination-free society amongst all categorical differences. The text of section 15 suggests that the provisions be applied ‘*without discrimination*’ with regards to sex^{xxx}. This corresponds to the objective of the Indian Constitution. On the other hand, one key difference that can be highlighted is that Section 15 of the Charter^{xxxi} does not limit itself to the citizens whereas Article 15 of the Indian Constitution is applicable only to citizens.

Under the Canadian Charter distinct grounds have been enlisted on which there is a prohibition on discrimination on the basis of sex. There is no blanket provision which protects equality in inclusivity, however, it has been categorically listed for specific groups. The same does not

correspond with the Indian and U.S.A constitutions. The noteworthiness of such distinction becomes pertinent as it results into interpretation of Canadian Constitution as to be only the protector of specific groups that are entitled under the proviso, overlooking the need for equality protection in an inclusive sense. In comparison, protection given under Article 14 of Indian Constitution and 14th amendment of U.S.A constitution is applicable to all forms of discrimination notwithstanding any specific group.

Further, Section 1 of the Charter^{xxxii} restricts the applicability of Section 15 as "*reasonable limits*" that "*can be demonstrably justified in a free and democratic society*"^{xxxiii}. Evident constraint such as this, have not been enlisted in the Indian and U.S.A Constitution. The relevance of "*non obstante clause*" must be highlighted here as Section 15 of the Charter is restricted by it, whereas, the same is not true for Indian and U.S.A constitution.

Furthermore, Section 28^{xxxiv} of the Charter is not constrained by non obstante clause. This right is limited to its application on the basis of sex and is not inclusive of other rights^{xxxv}. This section does not surpass Section 1 of the Charter^{xxxvi}. In **R. v. Osolin**, it was held that "*The provisions of section 15 and section 28 of the Charter guaranteeing equality to men and women, although not determinative, should be taken into account in determining the reasonable limitations*"^{xxxvii}. Under Section 15(2), the affirmative action approach has been used to ease the condition of every individual irrespective of gender and age. On the other hand, the Indian constitution limits its focus of affirmative action only towards women. Canadian Charter caters to the need of all individuals and groups inclusive of all depressed sections of society and thereby recompense for previous discrimination.

SUGGESTION AND CONCLUSION

"Until all of us have made it, none of us have made it"^{xxxviii}

The Constitution of a country reflects its future and prospects. Legislation plays a significant role to broaden societal perception. Both India and Canada have come a long way to wipe out gender discrimination. In India, the series of legislative changes started before Independence on humanitarian and social grounds. Post-Independence, the course towards achieving a discrimination-free society accelerated. In the contemporary times several movements, policies and work of the organisations has brought us far away from the dearth of Gender

discrimination. However, in order to have an absolute prejudice-free society, persistent efforts become indispensable. Significant attention needs to be paid to the applicability of rights and protection given under the constitution in a practical sense and reach all stratum of society. Policies changes that help educating woman will help them achieve economic Independence and will be considered significant members of the society. Considering the stance in America, women have severally faced discrimination such as unequal pay, lack of consideration for reproductive health amongst others. By leaps and bounds numerous initiatives have been taken up by the government to bring forth necessary policy changes by way of Equal Rights Amendment. In the case of Canada, through the last fifteen years, there has been progress by way of active participation in initiatives. However, there is a long road to travel before women in Canada can be treated with absolute equality. It is suggested that by adopting several strategies, equality can be achieved. Forming systems of collaboration and organizing movements with a specified action plan can be one such useful strategy. The legal system is another significant instrument to bring forth desired change and it has shown persistent results. however, it is inaccessible to some and a slow process. Legal aid clinics ensuring availability of legal services would be a much-needed step towards achieving equality for women in Canada^{xxxix}. Absolute elimination of gender discrimination, which was like an utopian dream, may soon become a realistic pleasure by persistent efforts at a global scale.

ENDNOTES

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^v *ibid*

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- xxix *Supra* note 25
- xxx *ibid*
- xxxi *ibid*
- xxxii *Supra* note 27
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