



## Examining Gender Justice Vis-à-vis Constitutional Values of Indian Constitution in Context of John Rawl's Principle of Justice

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### Abstract

The Constitution of a nation is not only the repository of rights of an individual but also contributes to realizing the objective of a just society. A just society means a society, where the rights of each individual are respected without any discrimination. Constitutional Courts must ensure that law and society serve the ultimate goal of shaping the lives and identities of each individual. We may have some deeply rooted practices or overprotective measures for the women in society; However, it cannot be the basis to deprive women of their basic constitutional rights i.e. rights of agency, autonomy, and dignity. The Hon'ble Supreme Court of India in *Joseph Shine v. Union of India*; while recognizing such rights based on the imbibed constitutional value of the constitution upheld the women's fundamental rights of her agency, autonomy, and dignity and turned down the sec.497 of Indian Penal Code. This verdict is a significant contribution of the Supreme Court of India to the cause of Gender Justice. In this article, the author has critically analyzed the basic concept of 'Gender Justice' within the perspective of John Rawls' principles of Justice and also examined the attempt of the Supreme Court of India's (through its verdict in *Joseph Shine v Union of India*) in contributing to Gender Justice by using content analysis approach of research.

**Keywords:** Gender Justice, Constitutional Values, Fundamental Rights, Adultery, Constitutional Courts

"A woman feels keen, thinks as clearly as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom to develop her personality to the full as a man. When she married, she does not become the husband's servant but his equal partner. If his work is more important in the life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above or under the other. They are equals."

-Lord Denning

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### 1. Introduction

Discrimination or deprivations on the sole basis of gender is unthinkable in any just society and cannot be allowed in any society which claims to be just or fair. Negating any such discrimination or deprivation is the basic core of the concept of 'Gender Justice'. 'Gender Justice' is the essence of any civilized society. No society can claim itself prosperous and progressive if gender justice is anyhow neglected or not ensured to its citizen.

It is the fundamental responsibility of any society to provide and facilitate every individual (men or women) to enjoy the rights and liberties provided to them by the virtue of being human and a citizen of a civilized nation. Any civilization cannot deprive or discriminate against individuals on the sole basis of sex or gender, men or women. Men and Women both are equally capable, responsible, and important for the development and progress of any society and nation. Our father of nation Mahatma Gandhi so once said, "Women are the companion of men, gifted with equal mental capacity. Ignoring them will be a big mess for the civilization."

The Constitution of a nation is not the only repository of rights of an individual but also contributes to realizing the objective of a just society. A just society means a society, where the rights of each individual are respected without any discrimination. The Constitution is a living document that imbibes in itself the dream of a just equalitarian society wherein every individual enjoys its right of equality, privacy, liberty, dignity, and freedom and thereby grows to its full potential. It has also a fundamental duty to triumph over deep-rooted social prejudices and injustices in society. Every constitution imbibes in it certain constitutional values, which reflect the aspiration and vision of the people for their nation. 'Gender Justice' is one of that aspiration and vision; has to be intact and functioning in the working of the constitution and thereby protecting the rights of the people as guaranteed by the constitution.

### ***1.1 Gender Justice: Meaning & Context***

"Gender justice is about more than simply questioning the relationship between men and women. It involves crafting strategies for corrective action toward transforming society as a whole to make it more just and equal, and it means a place in which women and men can be treated as fully human. Moreover, it implies moving away from arbitrary to well-reasoned, justifiable, and balanced that is, 'fair social relations.'" (Anea Gheaus, 2011)

Gender Justice is not only limited to women's rights, it also includes men if they are victims of discrimination and deprivation on the sole basis of their sex. Gender justice advocates equal treatment for both genders; whether it is burden or preference.

According to John Rawls, "constitution ought also to provide space for autonomous adjudication as actualizing their exemplar-ship of public reason" (Rawls, 1971). This means constitutional courts of a nation have a duty to ensure that no social institutions, customs, and values should negate gender justice and should have a detrimental impact such as curtailing or restricting the rights guaranteed by the constitution. The Constitution is considered as a living document; because it has the basic responsibility to show the right direction in the actualization of the 'constitutional essentials'. Gender Justice being one of such constitutional essentials ensures that each individual (irrespective of its sex) is provided with the opportunities and atmosphere "to prosper and develop socially, economically and politically". Therefore in the present article the concept 'Gender Justice' would be critically analyzed with the context of its significance in realizing the goal of a Just Society.

### ***1.2 Rationale of the study***

Constitutional courts are duty-bound not to lose sight of some social institutions, customs, and values that have an impact of curtailing women's rights of autonomy and dignity (thereby denying gender justice) while interpreting any provisions of the existing law. Courts must also ensure that law and society serve the ultimate goal of shaping the lives and identities of each individual (irrespective of their sex). We may have some values such as patriarchal social values and legal norms. However, it cannot be allowed to deprive one sex of their basic constitutional rights i.e. rights of agency, autonomy, and dignity. While recognizing such duty on its part; the Supreme Court of India in *Joseph Shine v. Union of India* held that section 497 of Indian Penal Code 1860 was unconstitutional and thereby upheld the women's fundamental rights of her agency, autonomy, and dignity.

In this article, the authors have critically analyzed the basic concept of 'Gender Justice' within the perspective of John Rawls' principles of Justice and further examined the attempt of the Hon'ble Supreme Court of India's (through its verdict in *Joseph Shine v Union of India*) in contributing to Gender Justice.

### ***1.3 Main focus, limitation, and scope of the study***

Although 'Gender Justice' is not limited to the only recognition of Women's rights, but it also contributes to providing such ambience; which is necessary for the overall development and growth of each individual (irrespective of their sex). It further ensures that society is inherently dynamic and cannot be allowed to be regressive in its approach. It can also ensure the atmosphere wherein every individual is provided with adequate liberty and opportunities to develop "one socially, economically and politically" in its true sense. However, in this present study; the authors shall restrict and mainly focus on critical analysis of the concept 'gender justice' with the perspective of John Rawls' principles of justice and would further examine the contribution of the Supreme Court's Verdict in *Joseph Shine v. union of India* to gender justice.

### ***1.4 The organization of Article***

The authors have divided this paper into three parts, in the first part the concept, significance, and relevance of 'Gender Justice' have been discussed. In the second part, the researcher has discussed the critical analysis of gender justice within the perspective of John Rawls's theory of Justice. In the third part, the researcher has critically examined the Supreme Court's verdict in *Joseph Shine v. Union of India* ((2019) 3 SCC 39) and its contribution to gender justice while delineating constitutional morality through transformative constitutionalism and upholding the dignity, privacy, and autonomy of the women in *Joseph shine* case.

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## **2. John Rawls' principles of Justice & Gender Justice**

### ***2.1 Basic Principles of Justice***

John Rawls's theory of justice sought for the realization of a just society, where each individual is guaranteed fundamental equality. His vision regarding the community was of a legitimate community founded on two basic principles of Justice: (1) the principles of basic equality ensuring the basic liberty for every individual of the society (2) the principles of differences, where any inequalities concerning liberty could only be justified if it results into benefit for the least advantaged.

Rawls said that he aimed to present a conception of justice which 'generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant' (Rawls, 1971)

Rawls believed that justice has an essence in its fairness. Therefore, he stated that "Justice is the first virtue of social institutions..... Laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust." (Rawls, 1971)

Rawls states that justice and truth are the first virtues of human activities that can never be compromised. The rights secured by justice are not subject to political bargaining or the calculus of social interests. He further mentions that injustice is tolerable only when it is necessary to avoid an even greater injustice (Rawls,1971).

While reiterating the role of a major institution such as social institution, political institution and legal institutions; he said that the primary subject of justice is the basic structure of society, or more exactly, how the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.

## **2.2 Analyzing Gender Justice within principles of Justice**

Gender Justice is the concept that is based upon the idea that discrimination or deprivation of any kind cannot be permitted on the sole basis of the sex of an individual. It violates the fundamental rights and core of the constitutional essentials. It amounts to deprivation of liberty of an individual just to follow the deep-rooted social norms, customs, and mind set up; which cannot stand the test of justice as propounded by John Rawls.

The basic liberty of an individual can only be imagined when their identity is established or recognized. When a woman is denied its autonomy, agency, and liberty just for the reason of her being a woman; it cannot withstand the test of fairness and justice.

### **2.2.1 Feminist criticism of John Rawls Theory of Justice**

Feminist criticizes John Rawls's theory of justice for his failure to deal with sexism in the private relationships between men and women and thereby excluding the sexual contract from the scrutiny of justice undermines the hypothesis of justice (Taina Bien-Aime,1990). They state that mere laying out the criteria for the principles of justice for the public sphere is insufficient. It must be applied in private spheres as well where women must be recognized as independent persons and integral parts of the society (Taina Bien-Aime,1990).

In the present article, the authors would critically examine the Hon'ble Supreme Court's verdict in *Joseph Shine v. Union of India* ((2019) 3 SCC 39 ) within the perspective of the role of justice as propounded by John Rawls in his work 'Theory of Justice'. This verdict could be seen as an attempt by the Hon'ble Supreme court of India to contribute to the cause of Gender Justice.

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## **3. Supreme Court's Verdict in Joseph Shine v. Union of India: An attempt to contribute to Gender Justice**

### **3.1 Context of this verdict and Gender Justice**

The Hon'ble Supreme Court of India, in this case, recognized the autonomy, privacy, and dignity of women, which was compromised by Section 497 of the Indian Penal Code, 1860. Section 497 could be one of the best examples of denying gender justice to individuals belonging to a particular sex. It amounts to denying one's right to personal liberty, autonomy, and agency. Hon'ble Supreme Court in this verdict held section 497 as unconstitutional and against the basic values of the Constitution. This verdict could be understood as the contribution towards the cause of Gender Justice.

It is also pertinent to mention that the Hon'ble Supreme Court has adopted some constitutional mechanisms such as 'transformative constitutionalism' and 'constitutional morality to interpret the rights involved; however, from the researcher's point of view, it seems like an attempt to bring the criteria of Justice (as laid down by John Rawls in his principles of Justice) into the private spheres of the society through these mechanisms.

### **3.2 The Verdict**

In the Joseph Shine case, the Hon'ble Supreme Court was examining the constitutionality of section 497, the Indian Penal Code, and penalizing adultery. Which read as under "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offense of rape, is guilty of the offense of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case, the wife shall not be punishable as an abettor ."

In this case, the basic issue was whether the provision under section 497 is discriminatory, arbitrary, and violative of the privacy, liberty, dignity, and autonomy of women guaranteed under the Constitution of India?

The Supreme Court held that:

"1. Section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. It denies substantive equality, as it perpetuates the subordinate status ascribed to women in marriage and society. it violates Article 14 of the Constitution "

"2. Section 497 is based on gender stereotypes about the role of women and violates the nondiscrimination principle embodied in Article 15 of the Constitution "

"3. Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution".

“4. Section 497 is unconstitutional”.

### **3.2.1 Right to equality of Women and Section 497**

While upholding the status of equality for women; the Hon'ble Supreme court observed that "under section 497, women are treated as subordinate to men as it lays down that when there is connivance or consent of the husband, there is no offense ". This amounts to treating the wife as a chattel and dependent on the will of the husband. It also raises a question of an individual's autonomy about taking her/his decision on his/her own.

The Hon'ble Court also observed that after marriage like men, women's existence as an individual cannot be restricted; it is discriminatory and antithesis to the principle of equality. Social expectations for men and women are not the same concerning 'purity' or 'chastity'. Women are expected to be faithful and men do not have such requirement as 'fidelity'; this further adds to the discrimination based on the sex of an individual. It is a reflection of the deep-rooted patriarchal mind setup that was prevalent when the penal provision was drafted. This cannot stand the test of reasonability and 'constitutional morality in any progressive society. This also violates Article 14 of the constitution for being manifestly arbitrary and unreasonable.

The core of the 'constitutional values' is to guide the constitution towards the realization of the objectives where every citizen of the nation enjoys equality of status and opportunity (irrespective of its sex). The court also mentioned that existing statutory reflects the dominance of the one sex upon others in past, however, this cannot be allowed forever. This may be 'common morality cannot be called in consonance with the concept of 'Constitutional morality. The court explained the relevance of 'constitutional morality by mentioning that it poses an obligation on the court to protect the guaranteed rights of every individual, community, and section of the society.

### **3.2.3 Right against discrimination of Women and Section 497**

Article 15(3) of the constitution imbibes the notion of 'protective discrimination. However, it could not be justified for the deep-rooted paternalistic notions of "protection". The court observed that section 497 presumes that women have no sexual agency and thereby provide protection against the punishment under the same. Hon'ble Court held that "Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women ".

Right to life denotes to live with dignity. Life without dignity would amount to mere animal existence. The constituent assembly drafted the constitution with a vision to have a just society. In such a just society, constitutional values and morality could be ensured by emphasizing, liberty and dignity of an individual as a basic right. Dignity forms the very core of an individual's identity fundamental rights guaranteed by the Constitution.

Autonomy and dignity of an individual form the identity of an individual, without which the overall growth and development of an individual cannot be imagined. Unreasonable restrictions in these rights would further come under scrutiny under 'transformative constitutionalism' as it will lead to a regressive approach not progressive as required.

### **3.2.4 Right to life and personal liberty of women and Section 497**

Hon'ble Supreme court of India observed that; denial of dignity to women by considering it subordinate and as property of men is itself violative of the right of life guaranteed under the constitution. Further "privacy of the body entitles an individual to the integrity of the physical aspects of personhood ". Right to life cannot be realized under Article 21 if the right to dignity, privacy, liberty, and sexual autonomy is excluded from its ambit; therefore, it is an unreasonable denial that would amount to a violation of Article 21 and hence unconstitutional.

The autonomy of the individual could be ascertained by one's ability to make his /her own decisions on important matters of his/her life. Although the right to privacy has not been explicitly mentioned in a constitutional provision, however, it cannot be isolated from the right to life with personal liberty. It is privacy that combines many other rights in itself such as dignity and liberty. The right to equality is a guarantee against State action which is arbitrary and unreasonable. In this case, it is pointed out that the state cannot take away the right of equality of women based on deep-rooted social perceptions against particular sex. Article 15(3) which delineates protective discrimination cannot be understood as to taking away her rights. Rather it has an intention to provide her more rights so that she could be in a position of equal competition with men.

The unreasonable interference by the State in an individual's personal space is itself violative of the core of the basis of providing rights to an individual. Violation of privacy is violative of the rights guaranteed against arbitrary action of State; irrespective of its being physical or mental. Privacy of the body and mind ensures an individual's identity and integrity of the physical and mental aspects of personhood. One's integrity and privacy entitle him/her to enjoy the freedom of thought and expression, the freedom to believe in what is right and wrong, and the freedom of self-determination.

In any nation, it is very significant and crucial to assure his/her existence with dignity. This is a prerequisite for the development of his/her potential. Right to life does not denote mere animal existence but existence with personal liberty and dignity. Privacy is a subset of dignity and liberty. Similarly, sexual autonomy is also contributed to the recognition of an individual's identity. Hon'ble Supreme Court also observed that "the individual is the focal point of the Constitution because it is in the realization of individual rights that the collective well-being of the community is determined"

### 3.3 Critical examination of the verdict within the perspective of John Rawls theory principles of Justice

As per John Rawls "The rights secured by justice are not subject to political bargaining or the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice"

Common morality could be understood as the so-called calculus of social interests; however, it cannot deny the rights of a women's equal liberty being the essentials of Justice. Therefore, the verdict of the Court that Section 497 violates the right of equality aligns with the basic principles of justice which state that no individual could be deprived of its basic right of equal liberty. Treating a woman as the property of her husband is detrimental to the very idea of an individual's identity and autonomy. In such situations, Constitutional Morality has to come into the picture which would ensure justice, which cannot be compromised as per John Rawls.

Autonomy and dignity of an individual form the identity of an individual, without which the overall growth and development of an individual cannot be imagined. As per Rawls, the "principles of Justice are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation ". When a woman is denied her autonomy and dignity, she is deprived of her rights and dignity. When an individual is burdened with duties and burdens just for the sake of appeasing the practices or mind set up created out of deep-rooted social evil cannot stand the test of fairness and hence amounts to injustice.

As per Rawls "the primary subject of justice is the basic structure of society, or more exactly, how the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation " since legal institutions such as constitutional courts are duty-bound to distribute fundamental rights and duties in such a manner which may lead to the realization of social cooperation. In this verdict, Hon'ble Supreme Court has attempted to impart his part of duty by upholding the core of the constitutional values and basic principles of justice which sought to ensure basic equal liberties for each individual (irrespective of its sex).

## 4. Conclusion

The Idea of a just society cannot be imagined, when half of the population is not given due credit and respect for their contribution to the society at large. Gender or Sex cannot be justified grounds for discrimination or deprivation under the principles of Justice. Principles of justice cannot be isolated from social justice. Each individual of the society must be bestowed with his/her part of rights, liberty, and dignity without any discrimination. The concept of 'Gender Justice' sought equality, liberty, and autonomy for each individual (irrespective of his/her sex).

Constitutional values demand that it must be reflected from every statutory enactment, to realize the core of constitutionalism within a constitution. Constitutionalism reflects the ideological core or the spirit of the constitution which guides the statutory enactment of a nation to infuse the spirit of the law and in consonance with its transformative vision of the constitutional text. The Constitutional court is the major institution (as stated by John Rawls) that must interpret the constitution to challenge hegemonic structures of power and to ensure values of dignity and equality for its citizens.

It is very pleasant and satisfactory that in recent times the constitutional courts have evolved a jurisprudence of rights, which recognizes and priorities the right to autonomy, dignity, liberty, and individual choice. Similarly, another significant right to sexual autonomy and privacy has also been granted the stature of a right protected under the constitution as a fundamental right. In confronting the sources of gendered injustice which has been neglected for a long time, now has been recognized as the rights and freedoms promised in our Constitution. Therefore holding statutory provisions such as section 497 of the Indian Penal code as unconstitutional sets the example of upholding constitutional morality against common morality and thereby contributing to the cause of Gender Justice.

Women form the section of the society, who had been victims of some deep-rooted social phenomenon and mind set up which is detrimental to their identity, autonomy, and existence with dignity. Hon'ble Supreme Court has reassured us that constitutional courts are always there to interpret and protect the constitutional value of our constitution, which is the result of the innumerable sacrifice of our forefathers.

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