

GENDER JUSTICE IN THE CONSTITUTION OF INDIA

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1. Introduction

A look at the status of women in India today is a cause for concern. Right from female foeticide, infanticide, child marriage, domestic violence, sexual violence, sexual harassment at the work place to the ghastly treatment meted out to elderly women make any thinking person to wonder at the nature of the society. Participation of women in the decision-making bodies – be they within the home, workplace or community – is marginal, never reaching even 25% of the total population of women in India. At the same time women are seen as the bearers of Indian tradition and culture. Without enabling women to exist as citizens with political and economic power is it possible for them to safeguard the tradition and culture of this country? The status of women in British India and the princely States was worse and the various practices like *sati*, widowhood, child marriage, and female infanticide were all seen as reflective of the backwardness of Indian society and were, therefore, targeted for change. The role of women in the National Movements and the rise of the women's movements during the pre-independence days ensured that the Constitution of India and Independent India would see a change for the better in the status of women.

India attained Independence on 15th August 1947, but it was not till the Constitution of India came into force on 26th January 1950 that the picture became clearer regarding the structure of government and the rights of the citizens of the country. The very fact that a parliamentary democracy in a republic is prescribed guarantees protection of the rights and status of the citizens of India irrespective of their social status. The framers of the Indian Constitution were very realistic in their expectations

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and that explains the various safeguards they built into the Constitution to protect the rights of the marginalized and vulnerable groups in society. The national movement had been characterized by the demand for equality irrespective of birth and status. Questions regarding untouchability, rights of the religious and linguistic minorities and women had gripped the minds of the freedom fighters. They realized that one couldn't demand freedom from colonial rule without ending the exploitative practices and unequal treatment of various sections of the society in the name of culture, history and traditions. This explains the protection that they have guaranteed to these groups in the Constitution. The Fundamental Rights enumerated in Part III of the Constitution are the bedrock on which the democratic and Republican character of the Indian State and society is based.

In this paper an attempt is made to examine the rights guaranteed to women as citizens of India and the protection extended to them in the Constitution, the basic law of India. Effort is also made to examine the protection extended to women since Independence through the various changes made in the laws relating to crime, marriage and divorce laws and also laws relating to property rights. This will enable us to appreciate the extent to which the Constitutional Mandate regarding equality, irrespective of the gender of the individual, has been achieved.

2. The Indian Constitution

The objective of the Constitution, as spelt out in the preamble, is to ensure the citizens of India justice, equality and liberty. How this is to be achieved has been spelt out in Part III, dealing with the Fundamental Rights, and also in Part IV, dealing with the Directive Principles of State Policy. While the Fundamental Rights are justiciable, i.e., enforceable through the judicial system, the Directive Principles are non-justiciable. However, their importance lies in the fact that they are directory in nature and their sanction is political.

There are six groups of fundamental rights, which are available to every citizen of India irrespective of caste, class, race, religion and gender. In this paper we are concerned only with the question of gender. Articles 14-18 deal with the Right to Equality. Article 14 expressly states that *there shall be equal protection of the law and equality before the law*. That is to say that whenever a woman approaches a law enforcement

officer or the judicial court then she should receive the same protection as any man. None of the laws makes a distinction between who commits a crime and against whom. If a stranger beats up a woman or her husband beats her up neither the Constitution nor the law makes a distinction. Under the Indian Penal Code it is still a crime when the husband of a woman beats her up, injures or harms her in any way. When the Constitution guarantees equal protection of the law it simply means that when she approaches a police station to register her complaint the officer on duty has to record it as he would if a wealthy man from the upper caste were to come to the police station to register a First Information Report (FIR) against a stranger who had caused him physical harm or injury. This is what is meant by equal protection of the law and equality before the law. There cannot be a different standard of justice or even denial of justice on the basis of the gender of the complainant. This right to equality is the touchstone against which all the laws and practices in India have to be tested. Any law or practice which is not in consonance with this provision of the Constitution can be challenged in a court of law as it would be unconstitutional and violative of a Fundamental Right guaranteed by the Constitution of India.

Article 15 guarantees *the right against discrimination*. Reading the Right to Equality with this right will necessitate the striking down of any law or practice that is discriminatory in character. This is the context in which the *Vishaka and Others vs. the State of Rajasthan and Others* (1987) case is noteworthy. The Supreme Court declared the offence of sexual harassment at the workplace as violative of the Right to Equality and Right Against Discrimination. However, notwithstanding the right to equality and the right against discrimination, the members of the constituent assembly thought it necessary to provide for *special protection for women* in Article 15(3) of the Constitution. They realized that a mere formal equality and right against discrimination guaranteed in the Constitution would not safeguard the women from being exploited and treated unequally. The members were sagacious enough to realize that thousands of years of discrimination and subordination of women will not be ended by the mere guaranteeing of equality in the Constitution and, therefore, they inserted this article so that the State would be given the space to make laws, policies and programmes for the enhancement of the status of women and enable them to access their rights under the

Constitution. It is in this context that the 74th amendment that provided for reservation for women in the *panchayats* was made possible. Such a special provision takes into consideration the practical reality of the inability of women to participate in the electoral process on an equal footing with the men. The prejudices and biases against women and their abilities hinder the election of women to the local governing bodies or the state and central legislatures. It means that though women are guaranteed equality under the Constitution they are unable to access this right by virtue of their actual position in the society. This protection enables those women who decide to contest for elections and participate in the decision-making processes to really do so. This was made possible by a Constitutional provision itself. *The Right for equality of opportunity in matters of public employment* is also guaranteed in Article 16 of the Constitution.

The second category of Fundamental Rights deals with the Right to Freedom, i.e., from Article 19 to Article 22. Article 19 guarantees *the freedom of speech and expression, to assemble peaceably and without arms, to form associations and unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India and to practise any profession, or to carry on any occupation, trade or business*. This civil right is essential for functioning as a human being in a democratic society. It has been considered as one of the most essential rights along with the Right to Equality. In the context of domestic violence and sexual harassment at the workplace this Fundamental Right of women is most often than not violated. Women are forced to change their jobs or seek transfers on account of Sexual Harassment. Married women subjected to domestic violence find that while the Constitution guarantees them the right to freely move throughout the territory of India their husbands and families don't recognize this right. Article 21 guarantees *the Right to Life*. The Supreme Court has in its interpretation widened the scope of this right by stating that the Right to Life means the right to live with dignity in the *Bandhua Mukti Morcha vs. Union of India* (1984) case. *The Right Against Exploitation* is guaranteed in Article 23. This expressly prohibits the trafficking of human beings.

The other categories of rights deal with more specific issues like religious freedom and cultural and educational rights. However, the most important of all the Fundamental Rights is the Right to Constitutional

Remedies in Article 32. This right guarantees the enforcement of the Rights enumerated in Part III of the Constitution as Fundamental Rights by providing for the right to move the Supreme Court or the High Court through a Writ Petition for enforcement of any one of the Fundamental Rights. The Supreme Court has further strengthened this right through the *Bandhu Mukti Morcha vs. Union of India* case by stating that the Court can allow any member of the public acting *bona fide* to espouse the cause of persons who on account of their poverty or disability are unable to do so.

Thus, it is not only that the Constitution has guaranteed various rights to women as citizens of India so as to protect their interests as human beings and individuals but the Judiciary in the course of its functioning as another wing of the Government has interpreted the Constitutional provisions so as to enable the implementation of the rights. This also facilitates the access to these rights in various cases that have come before the Judiciary in the form of writ petitions filed by individuals or groups.

In addition to the Fundamental Rights, various other provisions of the Constitution in Part IV that deals with the Directive Principles provide directions to the State in formulating policies and programmes in the interest of women. Some of these would be useful for our consideration. Article 38 requires the State to secure a social order in which justice – social, economic and political – is ensured to promote the welfare of the people. It also requires the State to strive to eliminate inequalities in status, facilities and opportunities. Clearly, the intention of those who conceived the Constitution was to ensure that equality would not be only of opportunity but realized in reality. Article 39 puts down the principles of policy to be followed by the State which include that the latter should direct its policy toward securing the right to an adequate means of livelihood, that there is equal pay for equal work, that the health and strength of workers – men and women – are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength. Article 42 requires the State to make provision for securing just and humane conditions of work and for maternity relief. Article 46 requires the State to promote with special care the education and economic interests of the weaker sections of the citizens. Clearly, then, the objective is to strive towards a gender-just society.

Various special programmes and policies that have been formulated by the State since independence have had this objective. The fact that we are still very far from achieving this objective is not due to the lack of vision for an equal society as much as due to the absence of political will due to the failure to change society and the values that are deeply entrenched and which cannot be altered without changes in the processes of socialization which include education, family and the media. In addition to these responsibilities that have been assigned to the State to safeguard the interests of the citizens, through an amendment made in 1976, Part IVA was included in the Constitution. It deals with Fundamental Duties. Article 51A(e) very specifically requires that the citizens of India renounce practices derogatory to the dignity of women.

Thus, even a cursory glance of Parts III, IV and IVA of the Indian Constitution makes it abundantly clear that the makers of our Constitution, the Legislature and the Judiciary have provided a fundamental law that takes into consideration the fact that there can be no distinction made on the basis of the sex of a citizen. This ensures that women will be treated equally under the law and are entitled to every single right as citizens of India. In addition, taking into consideration the historical situation within in which the discrimination that has been practised on the basis of sex has resulted in a subordinate status given to women in society, special provision has been made to ensure that women would be able to access these rights. The framers of the Constitution took into consideration the special needs of women, thus, empowering the State to protect the maternity of women as well even while providing them the right to pursue any employment or profession on par with any man.

However, it must be remembered that guaranteeing a right in law does not ensure the ability to access the right in reality. The fact that the historical subjection of women has not been ended is reverberating within the Indian society in the form of a constant reduction of the number of women in each census. It is falling at an alarming rate, which is a matter of serious concern. Similarly, crimes against women have been on the increase. Incidents of rape, sexual assault, sexual harassment, domestic violence, cheating, etc., have been growing not only in numbers but also in intensity and brutality. The statistics provided by the Crime Bureau of India (CBI) brings out these facts every year. These statistics reveal only the statistics of reported cases. One can easily imagine how much bigger

the numbers would be if one were to take into account the numerous unreported cases. In addition, in the context of an expanding market economy, there has been the increasing objectification of women in the advertisements and the media. Parliament has from time to time either made amendments to the existing law or enacted new laws to address these serious concerns.

Women have enormous responsibilities in relation to their families as the carers and nurturers, though, at the same time, have only very low negotiating power. This results in neglect of their health and nutrition and access to healthcare is also restricted as women are most often unable to go to the primary health centres and hospitals leaving behind their ever-demanding responsibilities at home. It is, however, very important to realize that gender justice cannot be secured merely through laws and the legal system. Enacting gender-just laws will not mean an end to the exploitation of and discrimination against women. Using law and the legal system can only be one of the many remedies to be initiated to change the unequal status of women. Law is one of the means of empowerment of women but it is very essential that we realize the limitations of law: even if we have a Constitution that guarantees equality and various laws to address the different kinds of atrocities against women that does not in reality indicate that women, in fact, now enjoy equality. Society has to be changed and attitudes of the general public have to be altered before equality can become real for women.

3. Central Legislations and Women's Interests

Various legislations have been enacted right from the 1950's. We will make just a quick survey of these laws and then reflect on the reasons why these enactments together with the Constitution have not succeeded in ensuring that gender justice is meted out. To deal with the problems arising from the practice of giving and receiving dowry the Dowry Prohibition Act was passed in 1961 and, subsequently, amendments were made to it in 1983. Further amendments were made to the Indian Penal Code in 1986 by incorporating Section 304B by which a new offence of dowry death was created. In the light of this, anyone who perpetrates dowry death would now be punished with imprisonment for a term which shall not be less than seven years but which may also be extended to an

imprisonment for life. Changes were also made in the Indian Evidence Act in 1983 and 1986 by which the rules relating to evidence in the context of death of a married woman within a period of seven years of her marriage were formulated through sections 113A and 113B. Essentially, the sections refer to the presumption of cruelty or harassment before the death of a woman. In connection with any demand for dowry the Court shall presume that such a person has abetted her suicide (S. 113A) or caused the dowry death (S. 113B). Further, in 1983 Chapter XXA was added by an amendment which included Section 498A. It deals with the crime of cruelty by husband or relatives of husband. The word cruelty has been defined. Two explanations are given: one that defines cruelty in general and another cruelty in the context of unlawful demand for any property or valuable security. This is the first time that law has taken into consideration the problem of domestic violence. While till now the provisions of the Indian Penal Code that deal with injury, harm, wrongful confinement, etc., could have been used to address the problem the law-enforcement officials, lawyers and judiciary could not reconcile themselves to the fact that a husband who commits any of these offences on his wife is committing a crime and, therefore, punishable. The prejudice in the society against a wife seeking such a remedy was clearly reflected in the attitudes of these law-enforcement officers. As a result, in order to guarantee justice and equality to women, it became imperative to specifically address the issue of domestic violence which is so widely prevalent in society. The women's movement in India during the 1970s and 80s forced the Government to take cognisance of these problems and to provide a remedy in law. That is precisely what was attempted through these amendments. However, in reality there has been little change in the attitude of the law-enforcement officials as there has hardly been any perceivable change in the status of women in the society. Thus, women continue to face the same problem of domestic violence. One perceptible change is the recognition that domestic violence cannot be brushed aside as a problem exclusively between a husband and wife. If only the Government would use the media more effectively in driving home the message that wives are not the property of husbands to do whatever they deem it good and that women are valued members of the nation, we might see a reduction in the rate of domestic violence.

There are enactments like the Indecent Representation of Women (prohibition) Act 1986 and provisions in the Indian Penal Code to deal with obscenity like Sections 294 and 509. These try to address the question of objectification of women and sexual harassment of women. There is the Commission of Sati (Prevention) Act of 1987, the Immoral Traffic (Prevention) Act of 1986, etc., which have tried to end some of the traditional practices which have originated from exploitatively according subordinate status to women in the society.

To specifically address the question of female foeticide the Parliament enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention) Act in 1994. This Act basically criminalizes the use of techniques like ultrasound to determine the sex of the foetus. This Act, used together with the Medical Termination of Pregnancy Act 1971, could effectively lead to the ending of the practice of killing female foetuses. However, due to the negligent attitude of the members of the society and the government towards the female members in India there has hardly been any arrest even under this act, let alone any conviction.

To protect the working women, the Maternity Benefit Act was passed in 1961. This enables women who are employed to be able to safeguard the health of the foetus and their own before and after childbirth. This is to ensure that employed women will not face any disadvantage in comparison with their male colleagues with regard to the need for hospitalisation and post-natal care in the context of pregnancy and childbirth. This also ensures that the newborn baby would not in any way miss out on maternal care during this period.

The Equal Remuneration Act of 1976 aims to provide for the payment of equal wages to men and women workers and for the prevention of discrimination against women when the work is the same or of a similar nature. The Factories Act of 1948, through Sections 19 and 42, provides for proper toilet facilities for women employees while Section 48 provides for crèches so that women may be able to look after their young children in a healthy and safe atmosphere. Section 66 provides that no woman is to work between 7 p.m. and 6 a.m. unless the State Government specifically makes rules otherwise in certain specific contexts. The last section has not always worked to the advantage of women when it comes to the question of perks, increment and promotions as men are able to put in that extra work especially in certain industries

like the Information Technology (IT) industry. This is the context within which the State Government of Karnataka wanted to exempt women in the IT industry from this provision of the Factories Act.

With reference to inheritance, succession, laws relating to marriage and divorce, guardianship, custody, adoption, etc., since Independence the State has been endeavouring to enact gender-just laws. However, since the laws relating to these subject matters are considered to be derived from the religious beliefs and practices, it has not been possible to completely ensure equality in these areas. The Hindu Succession Act of 1956 gives male and female heirs equal rights of inheritance in acquired property while with reference to ancestral property daughters have no share except in a few states in Southern India, like Karnataka and Andhra Pradesh, wherein through amendments the State has guaranteed in law, proper share for the female heirs even in the co-parcenary or inherited property. Under the Indian Succession Act that governs Christians, sons and daughters get equal share in the property of their father after giving the wife one-third of the property. In Muslim law women generally inherit half of what their male counterparts do, whether it is ancestral or acquired property. Muslim men and women can bequeath through a will only one-third of their property.

The father is considered to be the natural guardian of the child and only if the father has no objection during his lifetime can the mother act as the natural guardian. This, too, was provided through the interpretation by the Supreme Court of India in the Githa Hariharan case. Through amendments to the personal laws efforts have been made to ensure equal rights in marriage and divorce for men and women. However, there are still a few provisions which continue to deal unequally with men and women.

4. Conclusion

The legislative framework present in the Constitution provides for equality in society between men and women. In order to fulfil this constitutional mandate, the Parliament and the Judiciary have, from time to time, enacted laws and interpreted the existing ones that would guarantee gender justice. However, since law, the legal system and society are closely interlinked it is not possible to enforce the rights provided in law without changes in the

social institutions, values and attitudes. Social change cannot be brought about through law. It is only through the process of sensitising various constituent offices of the government and, more importantly, the members of society as a whole to the rights and concerns of women, can gender justice become a reality. Law is only one method by which the various problems of women can be resolved. While law can empower women at one level it is not possible to completely eradicate the subordination of women or the discriminatory practices merely through the legal system. If it had been so, we should not have to worry about the falling figures of women in the year 2004. After all, we have the Constitution that guarantees various rights to women and various subsequent enactments since its promulgation, both of which have squarely attempted to address various crimes against women. We have to recognize the limitation of law in bringing about change in society and in ending oppression of women; what we need is an enlightenment of the whole Indian society to the spirit of the law in positively advocating the equal treatment of women and men.