



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

Position of Gender Law in India

Prof. (Dr). Manju Koolwal

Dean & Principal
NIMS School of law
Former HOD, Dept of Law
&

Former Director, Five Year Law College, University of Rajasthan

Gender jurisprudence is new ordering of society to emancipate and liberate women from the shackles of ancient law, traditions and customs whereby the claims, interest and needs of the women are promoted and readjusted through law with men fold on a footing of equality, dignity and nonexploitation. To Krishna Iyer¹ the female gender is the victim of ancient law and modern law, of mythology and all religions... He clamors for² equality and dignity of Indian Sisterhood and in support the quotes Robert Ingersoll 'There will never be generation of great men until there has been generation of free women –of free mothers. 'the fulfillment of a long struggle of Indian women found its expression in the U.N. Covenant on Human Rights and the mandate of the Indian Constitution. The issue of gender justice has been a pledge of the constitution and a dream of the father of the Nation. The new gender legal theory attempts to bring women at par with men in socio-politico-economic and cultural life and resurrect the male-dominated Indian society into a society of co-equals with equality of status and opportunities free from discrimination and exploitation.

Introduction

Historically speaking the ancient Indian legal theory from the days of Code of Manu downwards like Yajnavalkya, Narda and all Dharmasastras exception to the Veda's project women as unfair, weak and unequal person marring her personality and dignity to a vanishing point of jurisprudence. Whatever be the Vedic lore and mythology concerning women Manu's positive law held the sway which declares:

'As children's women should be under the control of their fathers when adults under the control of their husband, when old under the control of their sons: women should never be independent'.

In Islam country to Quranic concept of equality of women the Shariat Law (Islamic religious law) with its polygamy, veil (Chaddar), confinement of women within the four walls (Chadiwari) unilateral and triple talaq and the Muslim women (Protection the Rights on Divorce) Act. 1986 including Taslima Nasreen episode which started almost quarter century back and still continues. Apart from it the plight of women in Taliban Afghanistan are enough to indicate the retrogressive nature of religious and civil law perpetuating injustice to Muslim women likewise Indian Christian women were recently given some solence of equality in matters of marriage, divorce, inheritance and succession.

¹ State of M.P. V. Ram Krishna Balothia, AIR 1995 SC1198.

² Mary Roy V. Sate of Kerala, AIR 1986 SC 2044

It is evident that the major traditional religions have denied the women blessings of liberty, equality and dignity and are anti-woman in letter and spirit. India is, therefore, a man's society where the misogynist society has tried to crush the spirit of women and has till recent time even in the 21st century have tried extremely hard to keep them resourceless, property less, powerless and prey to all sorts of violence, insecurity and discrimination and above all where the made rule the roost denying gender justice to women with all sorts of Lakshman Rekha around them.

Gender Justice and Constitution of India

A Constitution means a document having a special legal sanctity which sets the frame work and the principal functions of the organs of the government of a state and declares the principal governing the operation of those organs, and economic values which are to be affected by striking synthesis, harmony and fundamental adjustment between individual rights and social interest to achieve the desired community goals.

The constitution of India is an organic and dynamic socio-political and legal written document which is the guiding polestar for the destiny of the world's largest 'Sovereign Socialist Secular Democratic Republic'. It is one of the youngest basic legal documents and also the largest. It is the first and foremost protector of fundamental rights with detailed agenda for people's welfare. People of India (both men & women) adopted, enacted and gave the Constitution of India to themselves.

In India, male domination with a complementary suppression of women has been continuing since pre-historic times. There has been discrimination between the male and female child, between man and woman, women are considered as goods and chattels. They are considered as objects of sense-gratification. The history of suppression of women in India is very long. They have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequality and discrimination" (Justice K. Ramaswamy in *Madhu Kishwar vs. State of Bihar*, (1996) 5 SCC 148]

Discrimination de-empowers because discrimination in any form affects the human capabilities. Any factor that begets the human capability has to be reckoned as a factor of de-empowerment. Discrimination in matters pertaining to person status de-empowers an individual from leading a dignified life.

The frames of the constitution were well conscious of the discrimination and unequal treatment meted out to the fairer sex, from time immemorial. They included certain general as well as specific provisions for upliftment of the status of women. They provided equality of status and of opportunities explicitly at some places and implicitly in all other places on par with men as citizens of India.

It is true that the original Constitution of India did not reflect concerns of Gender Justice adequately as expected. It indeed provided against discrimination on the ground of 'Sex' (Art 15 and 16) but it did not take note of discrimination that is based on gender. Giving women certain rights in order to compensate them for their reproductive function, is not a charity but an obligation. Although clause 3 of Article 15 of the Constitution of India says that the State may make special provision for women, this is a protectionist strategy and not an equalization measure. Women should be provided with affirmative action by the state in order to help them overcome the handicap which they suffered under the patriarchal regime.

As all the fundamental rights are made centric, there is not possibility of getting equality for women.

Though the Indian Constitution provides equality of status and of opportunity of women, discrimination is persisting in one form or the other. Discrimination against women continues to exist even today as it is so deep-rooted in the traditions of Indian society. The root cause for the discrimination of women is that most women are ignorant of their right and the position of equality assured to them under the Indian Constitution and legal system. Enlightened women should fight to bring awakening in other women regarding their rights by bringing awareness about their status in society as they constitute half of the Indian population.

Judicial trends

In India the Constitution and the various legislative measures³ have abolished inequality and atrocities against women yet women continue to suffer injustice. It is the judiciary which has provided crutches to women, in their long march towards a woman's paradise were romanticized. However, gender discrimination is a universal phenomenon despite the works of philosophers' such as Voltaire, Rousseau, Immanuel Kant, Radbruch, Gandhi and Rev. Martin Luther King Jr.

In USA with its Declaration of the Rights of Man 'we hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable Rights, that amongst these are Life, Liberty and Pursuit of happiness'. But discrimination against women existed⁴ and still exist in American Society despite powerful women-liberty-movements, due process of law and equal protection of law under the 14th Amendment. Till 1964⁵ women in USA suffered numerous legal and political disabilities and disabilities and discrimination in employment, education, voting right, wage discrimination, unequal pay, maternity leave with job security etc. comparatively the Indian women have enjoyed greater respectability and political rights. It is especially the constitution which turned tide in favour of gender justice and equality vis-à-vis male despotism. In this leap forward march of women, the Supreme Court made a determined bid to assign the women's grievances against discrimination by upholding their constitutional and legal rights. The case concerning sex discrimination came before the supreme Court as early as 1966 and sadly the cases still continue to be poured. In 1966 former CJI Kailas Nath Wanchoo while keeping a liberal approach following the principles of justice equality and liberty remarked:

'Ordinarily we see no reason for such a rule requiring unmarried women to give up service on marriage particularly which it is not disputed that no such rule exist in other industries. It is also not disputed that no such rule exists in other departments of the respondent company and it is only in one department that the rule is enforce. The reason of the respondent company that there is greater absenteeism in married women than unmarried women and widow is untenable. The only difference in the matter of absenteeism that we can see between married women... and unmarried women and widows is in the matter of maternity leave which is an extra facility to married women which can hardly be a ground for such a drastic rule'⁶

In *C.B. Muthamma*, the Supreme Court intervened to check and remove discrimination against women in India Foreign Service. Muthamma, a senior member of the Indian Foreign Service challenged the validity of rule 8(2) Foreign service (Conduct and Discipline) Rules 1961 which required a woman member to marry only after obtaining the prior permission of the Government and rule (4) stipulated 'No married woman shall be entitled as of the right to be to the service'

The Supreme Court rightly determined this rule to be unconstitutional in nature as it is in defiance of Art.16. The Court was of the opinion that "If a married man has a right, a married woman, other thing being equal stand on no worse footing. This misogynous posture is a hangover of the masculine culture of manacled the weaker sex forgetting how our struggles for national freedom was also a battle against woman's thralldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis half of India's humanity, viz our women is a sad reflection on the distance between Constitution in the book and law in action... We do not mean to universalise or dogmatise that men and women

³ Valsamma Paul v. Cochin University, AIR 1996 SC 1011 at 1020-21

⁴ Kelly, Alfred H, Harbison, Winfred A etc; The American Constitution-Its Origin Development 715 (ed. 6th Tata McGrawhill New Delhi 1986

⁵ Labour Union v. International Franchise, AIR 1966 SC 942

⁶ C.B. Muthanuma v. Union of India, Air 1979 SC 1868 at 1870

are equal in all situations and occupations... But save where the difference is demonstrable, the rule of equality must govern’.

Another landmark case for gender equality for the women was *Nargesh Meerza*⁷ wherein the regulation 46 (1) (c) of Air India employees Service Regulation was challenged as evaluated of articles 14, 15 & 16 of the Constitution for being arbitrary and discriminatory against Air Hostess regulation 46 stipulated that ‘an air hostess shall retire from service of the Air India Corporation upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy whichever occurs earlier.’ The Court struck the said regulation as ‘unconstitutional, void and violative of article 14 and will therefore stand deleted.’

In *Neera Mathur*⁸ the Court reprimanded the Life Insurance Corporation (LIC) which required from a lady candidate information in the nature of declaration about the nature of menstrual period, date of last delivery etc. which are indeed embarrassing if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems... The Corporation would do well to delete such columns in the declaration. ‘Sex and discrimination were also involved in *Uttarakhand Mahila Kalyan Parishad*⁹ Where lady teachers and lady employees doing administrative work and education department of state of UP were receiving less salary as compared to their male counterparts, the court directed the state to equate pay scales and give additional promotional avenues to lady teachers and lady employees.

In the recent time the Supreme Court of India has shined the light at the gender discrimination which was happening in the armed forces wherein initially short commission was also not allowed for women but in landmark case “*Secretary of Ministry Of Defence vs Babita Puniya*”¹⁰ Permanent commission was allowed to the eligible officers, the Supreme Court bench led by Justice D.Y Chandrachud challenged the notions given by the Union and stated that they are entrenched in stereotypical assumptions of ascribed gender roles for women. Moreover, it is a clear violation of their fundamental rights guaranteed under Article 14 of the Indian Constitution. He said that although Article 33 of the Indian Constitution did allow for restrictions on Fundamental Rights in armed forces it is also clearly mentioned that it could be restricted only to the extent that it was necessary to ensure the proper discharge of duty and maintenance of discipline. It was decided that policy decision taken by the union allowing the women officers in Permanent Commission through SSC are subject to some conditions.¹¹

Women Empowerment

Jurisprudential speaking Constitution of India is a National Charter of pregnant with social revolution not a legal parchment abolishing injustice and inequalities not only in respect of Harijan and Girija but also for women who remained and in abject slavery, suffered perpetual discrimination and age-old injustice. Perhaps no Constitution is so much soaked with gender sensitivity and gender justice as the Indian Constitution in conformity with Gandhian ethos and ideal of social and political reforms to uplift women. It aims at gender legality by removing gender inequalities as enshrined in Article 14, 15 and 16. While Article 14 enshrines core

⁷ *Air India v. Nargesh Meerza*, AIR 1981 SC 1829

⁸ *Neera Mathur v. Life Insurance Corp of India*, AIR 1992 SC 392

⁹ *Uttarakhand MAhila Kalyan Parishad v. State of U.P.* AIR 1992 SC 1695

¹⁰ MANU/SC/0194/2020

¹¹ Sehgal, Diganth. "The Secretary, Ministry Of Defence V. Babita Puniya & Ors: A Case Study - Ipleaders". Ipleaders, 2020, <https://blog.ipleaders.in/secretary-ministry-defence-vs-babita-puniya-ors-case-study/#:~:text=of%20a%20jawan.-,Judgment,ascribed%20gender%20roles%20for%20women.&text=The%20order%20given%20by%20the%20Delhi%20High%20Court%20is%20affirmed.> Accessed 31 Mar 2021.

promise of equality, Article 15(3) provides a benign exception to equality rule for the benefit of women.¹² This appears a sort of our atonement to women power and the Indian Vedic Ideal of (Mother being holier than fathers and Gods). Accordingly, a series of legislative measure were enacted to ensure sex equality and to remove legal disabilities which women suffered from medieval onwards. This led to introduction of monogamy, daughter, widow and mother's right to inherit the property along with son, consent of wife for the adoption of a child by a married man, enabling a woman to adopt a child, empowering the wife to claim separate maintenance and appoint a guardian at will. Establishment of family courts, appointment of women as judges and enactment of the National Commission for Women 1990 to ensure a women development, equal status for women and to remove all discrimination against women are some of the landmarks towards women empowerment. Likewise social evils concerning women like Purdah (veil) system, practice of Sati (self-immolation of widow), child marriage, female infanticide, polygamy, dowry, exclusion of women from succession to property etc. have been curbed through legislative measures¹³ to secure equality to women at work measures like equal pay for equal work, maternity benefit, prohibition of employment of women in mines, night work and restrictions on work which is hazardous and unsuitable to their health etc. have been enacted. The Suppression of Immoral Traffic in women and Girls Act, 1956 punishes prostitution and the Indecent Representation of Women (Prohibition) Act, 1956 advertisement and publications containing, indecent representation derogatory to dignity of women is made punishable offence¹⁴. Striking down the provision under IPC in section 497 was a much needed move by the Indian courts as the section was highly unjust, partial and violative of art 14 of the Indian Constitution. Women are not chattels who do not have right, voice or opinion or damsel in distress waiting to be rescued; they can very well make their own decision and live with the consequences.

Fundamental Rights and Directive Principles of State Policy are the 'conscience' of our Constitution, Fundamental Rights are individualistic as they protect the freedom of liberty of individuals. But the Directive Principles are related to the social needs. They guard and advance the interests of "the common man". They lay down the 'roots of State Action'. Directive Principles, though not justifiable, enjoy the sanction of public opinion and are fundamental to the government of the country. While the Fundamental Rights are enforceable by the Court, the Directive Principles are not enforceable in the Courts. However, there is no conflict between the Directive Principles and fundamental Rights and they supplement each another. The Directive Principles prescribe the goal to be achieved. Since the Directive Principles have been embodied in the Constitution, they are fundamental in the governance of the country. It is the duty of the Union and State Government to implement the Directive Principles.

The Directive Principles of State Policy contained in Part IV of the Constitution of India incorporate many directives to the State to apply these principles in making laws in the government of the Country. Though they are not enforceable by any Court, but they are fundamental in providing welfare to the people. Some Directive are explicitly intended to improve the status of women and for their protection. As the word's 'people' and 'citizen' in these directives means both men and women, all the Directives Principles are related to women also.

¹² University of Madras v Shantabai, AIR 1952 Mad 67; Anjali Ray v State of West Bengal, AIR 1952 Cal 825; Dattatraya Motirant v. State of Bombay AIR 1953 Bom. 842; Bombay Bhusan Chakravarty v Gobind Chandra Sharma, AIR 1955 NUC 1780, C.B. Mathamma v Union of India, AIR 1979 SC 1868; AIR India Nargesh Mirza, AIR

¹³ "Vineeta Sharma Vs Rakesh Sharma On 11 August, 2020". 2021. Indiankanoon.Org. <https://indiankanoon.org/doc/67965481/>.

¹⁴ Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Adoption and Maintenance Act., 1956; Hindu Minority and Guardianship Act, 1956; Dowry Prohibition Act, 1961; Family Court Act, 1984; Suppression of Immoral Traffic on Women and Girls Act, 1956

Sex- Discrimination and Personal Law

Amongst the Hindu women Manu's Legal theory which discriminated them in matters of marriage, inheritance, succession, divorce, adoption etc. stand annulled and abolished through a series of legislative reforms the Muslim and Christian women continue to suffer sex discrimination under their respective personal law. They are subjected to inequality and exploitation. In Shah Bano¹⁵ the Supreme Court had merely protected the interest of the Muslim women divorced by her husband who was obligated to pay maintenance to his divorced wife. But the orthodox Muslims vehemently opposed the said verdict and under their pressure, then Government under the leadership of Rajiv Gandhi succumbed to the pressure and passed and implemented "The Muslim (Women Protection of Rights on Divorce) Act., 1986" which in reality diluted the landmark judgment and rendered it insignificant to say the least. It was only in 2019 that the Government passed The Muslim Women (Protection of Right on Marriage) 2019 Act which criminalised the instant talaq and some respite was given to the Muslim women. Likewise, Christian women¹⁶ were denied equality and equal rights in the parental property vis-à-vis male members. They receive 1/3rd share of the predeceased husband if they have children and half of the share if they have no children. No wonder the women weep at such a treatment meted out to them. In the last decade of the twentieth century man's criminality coupled with inaction, non-implementation, non-enforcement and apathy towards gender justice of the legal and constitutional functionaries we hear a mother being molested, a sister being raped and daughter being burnt for dowry etc. It is evident from recent judgments wherein we find a young widow was burnt on her husband's funeral pyre¹⁷, or a young bride¹⁸ was burnt to death for dowry or death of girl child in police custody¹⁹ or violence against women by way of rape²⁰ etc.

According to the Hindu Adoption and Maintenance Act, 1956 under the old Hindu law a female has no capacity to make and adopt to herself, through a widow, under certain circumstances, could adopt a son to her deceased husband, the Hindu Adoption and Maintenance Act 1956 makes a fundamental departure from the old law by empowering a Hindu female though not a married woman to adopt to her self in her own rights²¹

Unfortunately, a woman in our country, belongs to a class or group of society who are in a disadvantageous position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoys equal rights, Women also have right to life and liberty, they also have the rights to be respected and treated as equal citizen which was first recognised by Supreme Court in Ranvir Singh v State of Madhya Pradesh, it was also stated that their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women in them have many personalities combined. They are Mother, Daughter, Sister and Wife... They must have liberty, freedom and of course, independence to life the roles assigned to them by Nature so that society may flourish as they alone have talents and capacity to shape the destiny and character of men anywhere and every part of the world'

In India the expression woman conjures the benign Vedic hallow of Motherhood with manifold identifies each holier than the other. Such an ideal is vividly reflected by Swami Vivekananda who says' the ideal women in

¹⁵ Moh. Ahmad Khan v. Shah Bano, AIR 1985 SC 945

¹⁶ Mary Roy v. State of Kerala, AIR 1986 SC 1011; Ammine E.J. V. Union of India AIR 1995 Ker. 252.

¹⁷ Burning of Roop Kanwar (Rajasthan) Indian Express Oct. 13, 1996

¹⁸ Paniben v. State of Gujrat, AIR 1992 SC 1817

¹⁹ Saheli a Women's Resource Centre v. Commissioner of Police, AIR 1990 SC 513

²⁰ State of Maharashtra v. Narayan Mardikon, AIR 1991 SC 207

²¹ Bodhisatta Gautam v. Subhra Chakraborty, AIR 1996 SC 922

India is the mother first and mother last. The woman calls up to the mind of a Hindu Motherhood. On the other hand, in West the woman is a wife'

Conclusion

The patriarchal misogynistic culture of the world is changing step by step but still it has a long way to go to say the least. It is only in the 2020 that the supposedly world leader U.S.A, the country of freedom, liberty and equality appointed there first female vice President Kamala Harris. The difference between what is written in the Constitution and what is practised is quite stark! Women have always been pulled back and berated for having an opinion and taking a stance be it in U.S.A or India. However, the wheel of time has changed and women have somewhat claimed back their rightful rights.

It is no secret that women around the globe have been considered as weaker sex who are ruled by their emotions but if the global development is taken into account from past years it would be seen that countries with women as their leader have fared brilliantly well as opposed to country who have male as their leader for example compare the growth of New Zealand and United Kingdom and how well they have tackled the outbreak of Covid 19 in their country.

With the change in the society and culture and when women are being more educated and aware of their right be it related to their property rights, rights as a married, unmarried, divorced and widowed women, right to equal pay etc. (along all religious group)

It is only because of women exercising and demanding back their right, the Courts in India have vehemently supported them even though at times government has not and shrunk back from their responsibility as enshrined in the Constitution of India.

True gender justice can only be achieved when the society is cleansed with the misogynistic mindset and they welcome changes and accept and believe in the equality amongst all the genders.