

JUSTICE TO WOMEN: CONSTITUTIONAL PERSPECTIVE AND JUDICIAL APPROACH BY MOHD. FAISAL¹& KARTIK JOSHI²

Abstract: Gender inequalities throughout the world are among the most all pervasive forms of inequality. Gender equality concerns each and every member of the society and forms the very basis of a just society and hence, the issue of ‘gender justice’ is of enormous magnitude and of mammoth ramification engulfing an all – embracing and illimitable canvas. In spite of special constitutional guarantees and other legislations, crimes against women in the form of child marriage, rape, dowry, practice of sati, trafficking of the girl child, prostitution, domestic violence, and sexual harassment are on the increase. Despite the regression in the social and moral values, there is still a ray of hope in the midst of the darkness surrounding the realization of women’s rights. Time and again the Indian Judiciary has played a pro – active role by their positive interpretation of the various constitutional provisions for women upholding, the validity of various legislation and laying down exhaustive guidelines to realize the concept of ‘gender justice’ and ‘gender equality’. The present paper tries to foreground the different aspects of the above mentioned theme along with the analysis of the exhaustive guidelines of the judiciary in its various decisions to realize the concept of ‘gender justice’ and gender equality. **Keywords:** Women, Violence, Constitutional Provisions, Judicial Approach, Justice

1. Introduction.

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LAW MANTRA THINK BEYOND OTHERS

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Swami Vivekanand had aptly remarked:

“Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind”.

Being conscious of the need of the time, the framers and founding fathers of the time, the framers founding fathers of our compassionate Constitution incorporated certain sacrosanct ideals in the form of comprehensive rights of women so as to metamorphose the abstract ideals into a concrete form, which would enable the upliftment of the status of women in the male – dominated chauvinistic society.

The crucial question that arises for deliberation is: Have the woman been able to reap the benefits provided for them under the constitution of India? The answer, unfortunately, is not encouraging. There is still a long way to go to achieve the goals enshrined in the constitution. In sprit of special constitutional guarantees and other legislation crimes against women n the form of child marriage, rape, dowry, practice of sati, trafficking of girl child, prostitution, domestic violence, and several harassment are on the increase. The review of the disabilities and constraints on women, which stem from socio – cultural institution, indicates that the majority of women and opportunities guaranteed to them by the constitution. Justice K Ramawamy has also stated:

“Indian women have suffered and suffering discrimination in silence. Self sacrifice and self denial are the nobility and fortitude and yet they have been subjected to all inequalities, indignities, inequality and discrimination”³.

Despite this regression in the social and moral values, there is still a ray of hope in the midst of the darkness surrounding the realization of women’s rights. Time and again the Indian judiciary has played a pro – active role by their positive interpretation of the various constitutional provisions for women upholding, the validity of various legislations and laying down exhaustive guidelines to realise the concept of ‘gender justice’ and gender equality.

2. Constitutional safeguards for Women and the Liberal Interpretation of these provisions by the Judiciary.

³Madhu Krishwar v. State of bihar, AIR 1996 SC 1864

LAW MANTRA THINK BEYOND OTHERS

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Our constitution, the fountainhead of all laws and the Organic law of the land, recognizes equality of sexes and prohibits discrimination on the basis of sex. It also provides legislation to be made to confer more rights on women by making special provisions.

The preamble of the Constitution is “a key to open the minds of the makers of the constitution which may show the general purposes for which they made the Constitution”⁴. It declares the rights and freedoms which the people of India intended to secure to all citizens⁵. The Preamble begins with the words “We, the People of India” which includes men and women of all castes, religions, etc. It wishes to render “Equality of status and of opportunity” to every man and woman. The preamble again assures “dignity of individuals” which includes the dignity of women. On the basis of the Preamble, several important enactments have been brought into operation, pertaining to every walk of life – family, succession, guardianship and employment – which aim at providing and protection the status, rights and dignity of women.

2.1. Fundamental Rights Guaranteed to Women under the Constitution.

Part III of the Constitution, consisting of Articles 12 to 35, relating to Fundamental Rights, is considered the ‘heart’ of the Constitution. As per Justice P.N Bhagwati:

“These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to fullest extent”⁶.

2.1.1 Article 14 – Equality before law.

Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws within the territory of India. The first expression ‘equality before law’ which is taken from the English Common Law, is a declaration of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. The second expression, ‘the equal of protection of the laws’ is the essence and core of the right to equality under which the State is under an obligation to take necessary steps so that every individual, man and woman alike, is given equal respect which he or she is entitled to as a human being.

⁴ Berubari Union and Exchange of Enclaves, R, AIR, 1960 SC 845, 856.

⁵ Sir Alladi Krinshnaswami, “Constituent Assembly Debates”, Vol 10, 41.

⁶ Maneka Gandhi v. Union of India, AIR 1978 SC 597

LAW MANTRA THINK BEYOND OTHERS

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Though Article 14 permits reasonable classification, yet classification based on sex is not permissible⁷. In the case of *Air India v. Nagesh Meerza*⁸, the Apex Court, while dealing with the fixation of different ages of retirement for male and female employees and the provision preventing the female employees from having child, expressed the view to the effect that the retirement of air hostesses in the event of marriage taking place within four years of services does not suffer any irregularity or arbitrariness but retirement of air hostesses on first pregnancy is unconstitutional being violative of Article 14 and 16 of the constitution. It was considered that such a provision was callous, cruel and an insult to Indian womanhood. Therefore, such disability violates the equal protection of law and opportunity which is the cornerstone of our Constitution and legal system.

Payment of equal pay for equal work has also been justified under Article 14. Unequal pay for martially equal work cannot be justified on the basis of an artificial classification between the two kinds of work and employment⁹. In the case of *Mackinnon Mackenzie and Co. Ltd. v. Andre D' Casta*¹⁰, the question involved was getting of equal pay for equal work. Their Lordships ruled that when lady stenographers and male stenographers were not getting equal remuneration, that was discrimination and any settlement in that regard did not save the situation.

In *Madhu Kishwar v. State of Bihar*¹¹, the Chotanapur Tenancy Act, 1908 was challenged on the ground that the Act denied the right to succession to scheduled tribe women to the tenancy lands and hence, it violates Articles 14, 15 and 21 of the Constitution. The Supreme Court, by admitting the petition, quashed the discriminative provisions of the Act and paved a way for tribal women to entitle their rights to tenancy lands along with men.

Article 14 has also been invoked to prohibit sexual harassment of working women on the round of violation of the right of gender equality¹². Article 14 indeed contains important provision for protecting the rights of women and the interpretation of the Article by the judiciary enables the establishment of equality between the sexes.

⁷ Chirta Ghosh v. Union of India, AIR 1978 SC 597

⁸ AIR 1981 Sc 1829; 1981 Lab IC 1313

⁹ State of M.P. v. Pramod Bhartiya, AIR 1993 Sc 286

¹⁰ AIR 1987 Sc 1281; 1987 Lab IC 1961

¹¹ AIR 1996 SC 1864

¹² Vishaka v. State of Rajasthan, AIR 1997 SC 3011; Apparel Export Promotion Council v. A. K. Chopra, AIR 1999 SC 625

2.1.2 Article 15 – Prohibition of discrimination on ground of sex.

Article 15 embodies the general principles of equality before the law. A specific application of the same principle is provided in Article 15. Article 15 concretises and enlarges the scope of Article 14. Article 15 (1) prohibits the state from discrimination on the grounds of religion, race, caste, sex, place of birth or any of them. In other words, all laws are to be applied to members of both sexes equally, and there is an express prohibition of discrimination on the ground of sex. A law which deprived female properties to hold and enjoy her property on the ground of her sex was held violative of Article 15¹³.

Article 15 (2) provides that no citizen shall, on the ground only of religion, race, caste, sex, place of birth or nay of them, be subjected to any disability, liability, restriction with regards 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 pubic resort, maintained wholly or partly out of State funds or decided to the use of the general public.

Article 15 (3), which empowers the State to make special provisions for them. The main object of Article 15 (3) is based on ‘protective discrimination’ keeping in view the weak physical position of women. The reason is that ‘women’s physical structure and the performance of maternal functions place her at a disadvantaged position in these struggle for subsistence, and her physical well – being becomes an object of public interest and care in order to preserve the strength and vigour of the race¹⁴’. In the case of *Dattatraya v. State of Bombay*¹⁵, the Bombay High Court held that the State can establish educational institution for women only.

When the matter relating to mother as natural guardian was questioned, th Supreme court held that relegation of mother to inferior position to act as a natural guardian is violative of Articles 14 and 155 and hence, the father cannot claim that he is the only natural guardian. The guardianship right of women has undergone a sea change by this interpretation given by the Apex Court¹⁶.

¹³ A cracknel v. State, AIR 1952 ALL 746

¹⁴ Muller v. Oregon, 52 L. Ed. 551

¹⁵ AIR 1952 SC 181 : 1952 SCR 612

¹⁶ MRs. Gita Hariharan v. Reserve Bank of India with Dr. Vandana Shiva v. Jayant Bandhopadhyaya, AIR Sc 1149

2.1.3 Article 16 – Equality of opportunity in matters of public employment.

Article 16 is an instance if the application of the general rule of equality before law laid down in Article 14 and the prohibition of discrimination in Article 15 (1) with respect to the opportunity for employment or appointment to any office under the State. Explaining the relative scope of Articles 14, 15 and 16, Das, J. Said:

*“Article 14 guarantees the general right of equality; Article 15 and 16 are instances of the same right in favour of citizens in some special circumstances”*¹⁷.

Article 16 (1) and (2) embody the general rule that the State shall provide equal opportunities for all citizens in matters relating to employment or appointment to any office under the State. There shall be no discrimination on the grounds of religion, race, sex, caste or place of birth in providing employment. These provisions are an extension of the principle of equality before law and of the goal of ‘equality of status and opportunity’ as set in the Preamble of the Constitution.

In the case of *Miss C. B. Muthama, IFS v. Union of India and Others*, the constitutional validity of Rule 8 (2) of the Indian Foreign Services (Conduct and Discipline) Rules, 1961 and Rule 18 (4) of the Indian Foreign Services (Recruitment, Cadre, Seniority and Promotion) Rules, 1961 was challenged before the Supreme Court. The Petitioner complained that under the guise of these rules, she had been harassed and as shown hostile discrimination by the Chairman, UPSC from the joining stage to the stage of promotion. The Hon’ble Supreme Court held that these Rules are in defiance of Article 14, 16 and 21 and Krishna Iyer, J. Pronounced:

*“that, our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a vis half of India’s humanity, viz; our women, is a sad reflection on the distance between the Constitution in the book and the law in action”*¹⁸.

2.1.4 Article 19 (1)(g) – Freedom of Trade and Occupation.

Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation on trade or business. The Right

¹⁷ *Gazula Dasartha Rama Rao v. State of A.P.* AIR 1961 Sc 564

¹⁸ *Uttrakand Mahila Kalyan Parishad v. State of U.P.* , AIR 1992 SC 1695

LAW MANTRA THINK BEYOND OTHERS

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Journal.lawmantra.co.in

under Article 19 (1)(g) must be exercised consistently with dignity. Therefore, sexual harassment in the exercise of this right at work place amounts to its violation. In the cases of *Delhi Domestic Working women's Forum v. Union of India*¹⁹, relating to rape and violence of working women, the Court called for protection to the victims and provision of appropriate legal representation and assistance to the complainants of sexual assault cases at the police station and in Court. To realize the concept of *Vishaka v. State of Rajasthan*²⁰ to prevent sexual harassment of working women at their workplace. The Court held that it is the duty of the employer or other responsible person to prevent sexual harassment of working women and to ensure that there is no hostile environment towards woman at their working place. These guidelines were framed to protect the rights of working women to work with dignity under Article 14, 19 and 21 of the Constitution. Their Lordship also observed:

“Each incident of sexual harassment of women at workplace results in violation of fundamental rights of ‘Gender Equality’ and the ‘Right to Life and Liberty’²¹”.

2.1.5 Article 21 – Protection of Life and Personal Liberty.

In view of the global development in the sphere of human rights the judicial decisions from time to time have played a vital role towards the recognition of affirmative right to basic necessities of life under Article 21. In the case of *State of Maharashtra v. Madhukar Narayan Mandikar*²², the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. This article has also been invoked for the upliftment of and dignified life for the prostitutes. The Supreme Court has placed emphasis on the need to provide to opportunities to prostitutes for education and training so as to facilitate their rehabilitation. Right to life is recognized as a basic human right, 1948, the Declaration on the Elimination of all Crime against Women and the Declaration and Covenants of Civil and Political Rights and the Covenants of Economic, Social, and cultural Rights to which India is a party having ratified them. The right to life enshrined in Article 21

¹⁹ (1995) 1 SCC 14

²⁰ AIR 1997 SC 3011

²¹ Id.,

²² AIR 1991 SC 207, 211

of the Constitution also include the right to live with human dignity and rape violates this right of woman²³.

2.1.6 Article 23 – Right against exploitation and prohibition of traffic in human beings.

For centuries women have been humiliated, exploited, tortured and harassed in all walks of life – physically, mentally, and sexually. To safeguard and protect women against exploitation, Article 23 (1) of the Constitution of India prohibits traffic in human beings and beggar and other similar forms of forced labour. “Traffic in human beings” means selling and buying human beings as slaves and also includes immoral traffic in women and children for immoral or other purposes²⁴. To curb the deep rooted social evil of prostitution and to give effect of this article, the Parliament has passed The Immoral Traffic (Prevention) Act, 1956²⁵. This Act protects the individuals, both men and women, not only against the acts of the state to take all measures to abolish these evils practices. Another evil practices of the Devadasi by the State of Andhra Pradesh by enacting the Devadasis (Prohibition of Dedication) Act, 1988. The Supreme Court has also held that traffic in human being includes Devadasis and speedy and effective legal action should be taken against brothel keepers²⁶.

2.2. Fundamental Duties towards woman enshrined in the Constitution.

Article 51 – A under Part IV – A of the Constitution of India lays down certain fundamental Duties upon every Citizens of India, which were added by the Forty – Second Amendment of the Constitution in 1976. The larger part clause (e) Article 51 – A, which related to women, gives a mandate and imposes a duty on Indian citizens “to renounce practice derogatory to the dignity of women”. The duties under Article 51 – A are obligatory on citizens, but it should be invoked by the Courts while deciding cases and also should be observed by the State while making statues and executing laws.

2.3. Reservation for Women in Election to Local Bodies.

²³ Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 922; Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988

²⁴ Raj Bahadur Singh v. Legal Remem – Brancer, AIR 1953 SC 522

²⁵ Formerly known as Suppression of Immoral Traffic in Women and Girls Act, 1956.

²⁶ Vishal JEet v. Union of India, AIR 1990 SC 1412

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)

Journal.lawmantra.co.in

The Parliament has succeeded in its efforts to provide for reservation of seats for women in election to the Panchayat and the Municipalities. Reservations of Seats for women in Panchayat and Municipalities have been provided in Articles 243 D and 243 T of the Constitution of India. Part IX and IX A have been added to the Constitution by the 73rd and 74th Amendment Acts with Articles 243, 243 A to 243 D and Articles 243 P, 243 ZG. According to Article 243 D (3), “not less than one-third, (including the number of seats reserved for women belonging to the Schedule Castes and the Schedule Tribes) of the total number of seats to be filled up by direct election in every Panchayat, shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat, Article 243 T (3) of the constitution provides similar provisions for reservation of seats for women in direct election in every Municipality”. Therefore, reservation of 33% of seats for women candidates to hold office and perform all public functions at the Panchayat and Municipal level is within the constitutional mandate.

As an extension the 73rd and 74th Amendment to the constitution, the Constitution (81st Amendment) Bill was introduced in the Parliament way back in 1996 to reserve one – third of seats for women in the Lok Sabha and the State Assemblies. However, this bill not yet been brought in to shape due to political overturns.

3. Conclusion.

The issue of Gender Justice has been gaining ground in many area for some centuries. Though the traditional view of gender injustice has been given quite a quietus and treating as an event of bygone days, yet the malady still remains, sometimes pouncing with ungenerous monstrosity giving a free play to the inferior endowments of nature in man thereby making the whole concept a ridicule anaesthetizing the entire edifice built in last few decades. It is realized that despite the constitutional safeguard and the active support towards the cause of women, changes in social attitudes and institutions cannot be brought about very rapidly.

Women upliftment is a big task ahead of us. It has multifarious dimension. The issues relating to women need to be addressed with exceptional sensitivity taking into consideration all the surrounding factors. Law, in this respect may prove to be useful and forceful instrument. By and large, the reasons of law have been positive and constructive in this direction. The legal steps taken however are not sufficient. Much more needs to be done in this field. In addition to this, it could be said that law can do part of the task for its

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)

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inherent limitation. For the better and total results, the society needs to work at various other levels to complete the task.

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