

Fundamental Rights Vis A Vis Gender Justice In India

Dr. Sharanjit

ABSTRACT

The Constitution is the supreme law of the land. All other laws derive their force and validity from the Constitution. After the independence of the country, the position of Indian women was not very good, hence the makers of the Constitution incorporated some specific provisions to improve the condition of women. Part III of the Constitution of India guarantees to us fundamental rights. The Indian judiciary particularly the Supreme Court is playing a very significant role in giving a beneficial interpretation to these fundamental rights to ensure gender justice. All around the globe the equality of women has been stressed upon. Article 14 provides that the state shall not deny to any person equality before the law or equal protection of the laws. This article brings women on an equal footing with men. Women and children require special treatment on account of their very nature. Article 15 (3) empowers the State to make special provisions for them. Article 16 (1) guarantees equality of opportunity for all citizens in matters of 'employment' or 'appointment' to any post under the State. Article 21 provides the right to life and personal liberty. It is felt that the right to life and personal liberty of Indian women is often compromised as she has to face abuse, atrocities, discrimination and violence. The construction of male superiority is so deeply embedded in the male psyche in society that its uprooting would need a prolonged ideological struggle. The mindset is behind feticide, infanticide, domestic violence against women, dowry deaths, custodial deaths, rapes, honor killings and other forms of female persecution. Article 23 of the Constitution prohibits traffic in human being and beggar and other similar forms of forced labour.

There is no chance for the welfare of the world, unless the condition of women is improved. It is not possible for a bird to fly on only one wing.

Swami Vivekananda

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Part III of the Constitution of India provides fundamental rights. The fundamental rights are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. As per Justice Bhagwati, "These

Assistant Professor of Law, Dept. of Law, Punjabi University, Regional Center, Bhatinda

fundamental rights represent the basic values cherished by the people of this country (India) 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 the fullest extent”.

In *M. Nagaraj v. Union of India*, the Supreme Court rightly observed that the fundamental rights are not the gift from the state to its citizens. The individuals possess basic human rights independently of any constitution by reason of the basic fact that they are members of the human race.

All around the globe the equality of women has been stressed upon. It is a matter of adulation and admiration that, while the draft of the Universal Declaration of Human Rights contained an article stating, “All men are created equal”, it was Mrs. Hansa Mehta of India, a member of the Commission, who pointed out that “All men” might be interpreted to exclude women. It was after a long debate that the language was changed to say: “All human beings are born free and equal”.

WOMEN AS EQUALS – THE RIGHT TO EQUALITY

Article 14 provides that the state shall not deny to any person equality before the law or equal protection of the laws. This article brings women on an equal footing with men. The significance of this article can be gauged from the fact that in the Indian sub-continent, the patriarchal mindset of the society treats women as inferior to men. The Indian women has to suffer discrimination, subjugation and bias.

The right to work is a very important dimension of the fundamental right to equality as enshrined in the Constitution. The right to work takes within its ambit the right to work with dignity, equal pay for equal work, the right of working women to maternity benefits, right not to be discriminated at the work place only on account of gender, protection from sexual harassment at work place etc.

In *Gayatri Devi Pansari v. State of Orissa*, the court had upheld a Orissa government order reserving 30% quota for women in the allotment of 24 hours medical stores as part of self employment scheme.

To promote the education of girl children the Supreme Court of India in *Environment and Consumer Protection Forum v. Delhi Administration and Others*, held that it is imperative that all the schools must provide toilet facilities. Empirical researches have indicated that wherever toilet facilities are not provided in the schools, parents do not send their children, particularly female children to school. It clearly violates the right to free and compulsory education of children guaranteed under article 21-A of the Constitution.

In *State of Maharashtra and Another v. Indian Hotel and Restaurant Assn. and Others*, the Apex Court has protected the interests of bar dancers and their right to work for earning a living. The Apex Court upheld the Bombay High Court's decision of quashing of the ban on dance bars. The Court also observed that the right to practice a trade or profession and the right to life guaranteed under article 21 of the Constitution of India are by their very nature intermingled with each other, but in a situation like the present one, such right cannot be equated with unrestricted freedom like a run away horse...it would be better to treat the cause than to blame the effect and to completely discontinue the livelihood of a large section of women, eking out an existence by dancing in the bars, who will be left to the mercy of other forms of exploitation. Highlighting that the

discontinuance of the bar dancing led to closure of a large number of establishments resulting in loss of employment for about 75,000 women, the CJI noted that many of these unfortunate people were forced into prostitution merely to survive, as they had no other means of survival.”

In *Air India v. Nargesh Meerza*, the Apex Court while upholding the right to equality rightly struck down the Air India and Indian Airlines Regulations on the retirement and pregnancy bar on the services of air hostesses. Regulation 46 provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if it took place within four years of service, or on first pregnancy, whichever occurred earlier. Under Regulation 47 the managing director had the discretion to extend the age of retirement by one year at a time beyond the age of retirement up to the age of 45 years if an air hostess was found medically fit. The condition that the services of air hostesses would be terminated on first pregnancy was held to be most unreasonable and arbitrary and clearly violative of Article 14 of the Constitution.

In *C.B. Muthamma v. Union of India*, the Supreme Court struck down Rule 8 (2) of Indian Foreign Services (Conduct and Discipline) as being discriminatory and biased against women because this service rule considered marriage as a disability for the appointment to Foreign Service and directed the government to overhaul all service rules to remove strain of gender discrimination. Emphasizing an equality of sexes as enshrined in our Constitution, Mr. Justice V.R. Krishan Iyer observed that:

“Our founding faith enshrined in Article 14 and 16 should have been tragically ignored vis-à-vis half of a sad reflection on the distance between Constitution in book and law in action.”

A rule requiring married women to obtain their husband's consent before applying for public employment was declared unconstitutional in *Moya Devi v. State of Maharashtra*, as it was anachronistic obstacle to women's equality and hence violative of Articles 14, 15 and 16 of the Constitution.

Equal pay for equal work

Equal pay for equal work is another important aspect of the right to equality as enshrined in the Constitution of India. It is worth mentioning that the Indian judiciary has provided content and teeth to the principle of 'equal pay for equal work' which is apparent in its observation that:

“Equal pay for equal work is not mere demagogic slogan. It is a constitutional goal capable of attainment through constitutional remedies by the enforcement of constitutional rights.”

In *State of M.P. v. Pramod Bhartya*, the Apex Court has made it clear that equal pay for equal work is implicit in the doctrine of equality. Article 31(d) speaks of equal pay for equal work for both men and women, it does not cease to be a part of the right to equality as provided by article 14 of the constitution.

Sexual Harassment of Women at Work Place

The plight of working women who had to face sexual harassment at work place came up before the Supreme Court in *Vishakha v. State of Rajasthan*,. In this landmark judgment the Supreme Court had laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work until a legislation was enacted for this purpose. The petition was filed by a social

worker by way of public interest litigation for the enforcement of rights of working women under Articles 14, 19 and 21 of the Constitution and in finding suitable methods for realization of the true concept of 'gender equality'.

Apparel Export Promotion Council v. A.K. Chopra, was the first case in which the Supreme Court applied the law laid down in the case of Vishakha v. State of Rajasthan and upheld the dismissal from service of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by Article 21 of the Constitution.

Right of Women to work in Hotels and Bars

In Anuj Garg v. Hotel Association of India, the question before the Apex Court was whether the prohibition of employment of women in hotels and bars serving liquor violates gender equality. The respondents, the Hotel Association of India, challenged the validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of women in hotels and bars serving liquors as violative of gender equality and therefore is ultra vires of Articles 14 of the Constitution of India. The Government justified the law on the ground of security of women. It cited the example of Jessica Lal murder case and vulnerability of women while working in bars even when restrictions were in force such occurrence could not be prevented and if the restrictions go such incidents may again happen.

A two Judge Bench of the Supreme Court, however, did not agree with their views and held that such restrictions violates gender equality and discriminates on ground of sex and therefore violative of Article 14 of the Constitution of India. The Court laid down that instead of prohibiting women employment in the bar altogether the state should focus on functioning the ways through which unequal consequences of sex differences can be eliminated. It is state's duty to ensure circumstances of safety which inspire women to discharge their duty freely.

Calculation of compensation for housewives who are victims of road accidents

In the case of Arun Kumar Agrawal & Anr. v. National Insurance Co. Ltd & ors, the Apex Court held that the service rendered by a housewife is invaluable and cannot be compared with service rendered by house keeper/servant. The time spent by woman in doing household work as home makers is the time which they can devote to paid work or to their education. The Courts and tribunals should do well to factor these consideration in assessing compensation for housewife who are victim of road accidents.

PROTECTING WOMEN AGAINST BIAS- PROHIBITION OF DISCRIMINATION ON GROUND OF RELIGION, RACE, CASTE, SEX OR PLACE OF BIRTH

Article 15 of the Constitution of India states that:

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –
 - a) access to shops, public restaurants, hotels and places of public entertainment; or

- b) the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
3. Nothing in this Article shall prevent the State from making any special provision for women and children.
4. Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.

Article 15 (3) is one of the two exceptions to the general rule laid down in clauses (1) and (2) of Article 15. It says that nothing in Article 15 shall prevent the State from making any special provision for women and children. Women and children require special treatment on account of their very nature. Article 15 (3) empowers the State to make special provisions for them. The reason is that “women's physical structure and the performance of maternal functions place her at a disadvantage in the 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 race.

Thus under Article 42, women workers can be given special maternity relief and a law to this effect will not infringe Article 15 (1). Again it would not be violation of Article 15 if educational institutions are established by the state exclusively for women. The reservation of seats for women in a college does not offend against Article 15 (1).

In *Government of Andhra Pradesh v. P.B. Vijaykumar and another*, the Supreme Court gave a new dimension to Article 15(3) of the constitution by holding that reservation for women in state employment is also permissible under that provision notwithstanding separate provision in this regard under article 16. In this case an Andhra Pradesh government rule which provided for:

- (i) Preference for women in jobs better suited for them.
- (ii) Preference upto 30% for women for which they are equally suited with men.
- (iii) Direct recruitment to posts reserved exclusively for women was upheld.

The Court held that Article 15(3) was wide enough to cover any special provision for women including reservation in jobs. Article 16 does not come in the way of such reservation. The two articles must be harmoniously construed. Both of them aim at egalitarian society and authorize special provision for the upliftment of the weaker sections. Women are historically and otherwise a weaker section of our society for whose upliftment article 15(3) is made which should be given the widest possible interpretation and application subject to the condition that reservation should not exceed 50% limit as laid down in *Indra Sawhney's* case.

The Apex Court further observed that the insertion of clause(3) of article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result they are unable to participate in the socio-economic activity of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that article 15(3) is placed in article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women.

In *Dr. Neelima v. Dean of P.G. Studies A.P. Agriculture University, Hyderabad*, it has been held that a high caste girl marrying a boy belonging to scheduled tribe is not entitled to the benefit of reservation available to scheduled tribes. "The appellant was born in a Reddy caste which is a forward class and married an Erukala tribe boy one of the scheduled tribes in the State of Andhra Pradesh. After marriage she sought admission to M.Sc. course in the Agriculture University, Hyderabad under reservation quota for scheduled tribes. The Court held that she was not entitled to get the benefit of reservation available to the scheduled tribes.

WOMEN AND RIGHT TO WORK- EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

Article 16 (1) guarantees equality of opportunity for all citizens in matters of 'employment' or 'appointment' to any post under the State. Clause (a) says that no citizen shall, on ground only of religion, race, caste, sex descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of, any employment or office under the State. Clauses (1) and (2) of Article 16 lay down the general rule that no citizen can be discriminated against or be ineligible for any employment or office under the state on grounds only of religion, race, caste, sex descent, place of birth or residence. Art. 16 (1) and (2) applies only in respect of employment or office under the State. Clauses (3), (4 (4-A) (4-B) and (5) of Art. 16 provide for exceptions to this general rule of equality of opportunity.

In *C.B. Muthamma v. Union of India*, a provision in service rules requiring a female employee to obtain the permission of the Government in writing before her marriage is solemnized and denying her the right to be promoted on the ground that the candidate was married woman was held to be discriminatory against woman and hence unconstitutional. The petitioner was denied promotion to Grade I of the Indian Foreign Service only on this ground. However, the Court made it clear that it does not mean that the men and women are equal in all occupations and in all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of gender or the peculiarities of social sectors of the handicaps of either gender may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern.

In *Raghubans v. State*, a government order making women ineligible for the post of a warden in men's jail was upheld as the position of a women would become awkward and hazardous while ensuring and maintaining discipline over habitual offenders.

WOMEN AND RIGHT TO LIFE

Article 21 of the Constitution provides the right to life and personal liberty. The right to life includes all those aspects of life which go to make a man's life meaningful, worth living and complete. In the case of *Francis v. Union Territory*, it was held that the right to life should be taken to mean the right to live with human dignity.

It is felt that the right to life and personal liberty of Indian women is often compromised with due to different reasons. She has to face abuse, atrocities, discrimination and violence. The construction of male superiority is so deeply embedded in the male psyche in society that its uprooting would need a prolonged ideological struggle. The mindset is behind feticide, infanticide, domestic violence against women, dowry deaths, custodial deaths, rapes, honor killings and other forms of

female persecution. What is needed is man's emancipation from the shackles of patriarchy along with women empowerment. A man who tends to enslave women dehumanizes himself too. There is a need to build a counter culture to dismantle the present structure of male hegemony.

Women's Right to Privacy

Right to privacy is implicit in article 21 of the Constitution. In *State of Maharashtra v. Madhukar Narain Mandiker*, it was held that a woman, even if of easy virtue is entitled to privacy and she is entitled to protect her person if there is an attempt to violate it against her wish.

In *Bhabari Prasad Jena v. Convener Secretary, Orissa State Commission for Women and Anr.*, the issue of paternity of a child was in issue before the court. The court held that the use of DNA for ascertaining the paternity of a child is an extremely delicate and sensitive aspect. There is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in matter, DNA is eminently needed. DNA is a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner whenever such a request is made.

In *R. Rajagopala v. State of T.N.*, the Supreme Court has held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. Anything concerning the above matters cannot be published by any person without the consent of the person concerned, whether truthful or otherwise. If a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a subject for comment by press etc.

In *Surjit Singh Thind v. Karamjit Kaur*, the Court observed that although the medical examination of a woman for her virginity would certainly violate her right to privacy and personal liberty under article 21 of the constitution. Such an order would amount to a roving enquiry against a female who is vulnerable even otherwise. Therefore, order of trial court dismissing application filed by husband for getting wife medically examined in order to prove her virginity was proper.

The Offence of Rape

Rape is a crime against the basic human rights and is also violative of the victim's most cherished of fundamental rights namely the right to life contained in article 21 of the Constitution. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, roping in somebody falsely in the crime of rape.

The Supreme Court on 1st January 2013, sought the response of the Centre and all the States with in four weeks to a Public Interest Litigation that has cited about 50 recent incidents of gruesome atrocities against women across the country to seek a better legal system and recruitment of more women in the police as part of the series of steps to deal with gender based crimes. The petition has sought better legal system for women, all-women police stations, recruitment of more women in police, citizen's involvement in policing, steps against female feticide, security for women staying alone, intensified night patrolling, action against panchayats for honour killings, prevention of trafficking of women etc.

In the case of Delhi Domestic Working Women Forum v. Union of India, the Apex Court has said that the National Commission for Women should be asked to frame schemes for compensation and rehabilitation to ensure justice to the rape victims.

In C. Thekkamalai v. State of Tamil Nadu, the victim was criminally assaulted and raped in a police station. A heinous crime of rape was committed by police personnel on duty. The court held that the victim would be entitled to fair and reasonable compensation from the accused who had been convicted by the trial court.

In Gaurav Jain v. Union of India, the Apex Court has issued several directions for rescue and rehabilitation of child prostitutes and children of fallen women. The court observed that it is the duty of the state and all voluntary non-governmental organizations and public spirited persons to come out in their aid and to retrieve such women from prostitution and rehabilitate them with a helping hand to live a life of dignity of person, self employment through provisions of education, financial support, etc.

Reproductive Rights of Women

In Suchita Srivastava and Anr. v. Chandigarh Administration, it was held that the women's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. Reproductive rights include a woman's entitlement to carry pregnancy to its full term, to give birth and subsequently to raise children.

In X v. Govt. of NCT of Delhi and another, in the present case a village teenage girl was brought to a brothel and subjected to forcible sex. The medical examination showed that she was HIV positive and was 19 weeks pregnant. Permission was granted to the woman to get the pregnancy terminated. It was held that to carry a child in her womb by a woman as a result of conception through an act of rape is extremely traumatic, humiliating and devastating.

Honour Killings

Honour killing is an act of taking the life of a family or clan member in order to restore honour of that family or clan. Hence honour killing are acts of vengeance, usually death, committed by male family members against female family members, who are held to have brought dishonour to the family. 'Dishonour' is normally the result of desiring to marry by own choice and refusing arranged marriage, having extramarital and premarital relationship, marrying within the same gotra or outside once caste or marrying a cousin, dress up in a manner which is unacceptable to the family or community, engaging in homosexual acts etc. Honour killings are a gross violation of article 21 and hence the society needs to be sensitized on this issue.

PROTECTING WOMEN FROM EXPLOITATION- THE RIGHT AGAINST EXPLOITATION

Article 23 of the Constitution prohibits traffic in human being and beggar and other similar forms of forced labour. The second part of this Article declares that any contravention of this provision

shall be an offence punishable in accordance with law. Clause (2) however permits the State to impose compulsory services for public purposes provided that in making so it shall not make any discrimination on grounds only of religion, race caste or class or any of them.

'Traffic in human beings' means selling and buying men and women like goods and includes immoral traffic in women and children for immoral" or other purposes.

Prostitution

Prostitution is the act of a female or male, offering her/his body for indiscriminate sexual union, for payment in cash or kind, with a man/woman who is not the husband or wife. Prostitution is the after cause of poverty. Girls and women who have to support themselves and their families, often do not find work that will bring them an income. Prostitution of women take various forms: call girls, cabarets, artistes and even devadasis. In Indian society when other doors of earning are closed to women, many women are forced into prostitution. Some women are trapped into it by well organized social criminals.

In Peoples Union for Democratic Rights v. Union of India, the Supreme Court considered the scope and ambit of Article 23 in detail. The Court held that the scope of Article 23 is wide and unlimited and strikes at "traffic in human beings" and "beggar and other forms of forced labour" wherever they are found.

Even though the Constitution has incorporated significant provisions for improving the plight of women and the judiciary is also playing a very important role in interpreting these articles for promoting the interests of women, but still we have a long way to go. Gender justice has to be made a way of life. As Swami Vivekananda rightly said -The country and the nation which do not respect women have never become great nor they will ever be in future. The principal reason why your race is so much degraded is that you have no respect for those living images of Shakti. If you do not respect the women who are living embodiments of the Divine Mother, don't think that you have any other way to rise.

END NOTES

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