

Role of Judiciary in Protection of Right to Gender Equality in India : A Critical Study



Anand Kumar

Research Scholar,
Deptt. of Law's,
Punjab University,
Chandigarh

Abstract

Discrimination based on sex is a well known feature in ancient as well as contemporary India. Many of inequalities based on sex in the Hindu Law have been removed by the enactments which were passed in 1955-56. Still some inequalities are in existence under Hindu as well as under Muslim law's. The existing legal frame work relating to the protection of gender equality reveal that a little has been done to implement Constitutional mandate of gender equality. Legitimate demands for gender equality and justice of Indian woman can no longer be ignored. Hence the Role of Judiciary becomes important because he has to satisfy quarry of women regarding implementation of right to gender equality. The purpose of this research is to identify the provision laid down in the Indian Constitution and other legislation relating to gender equality. It also determines the nature extent of gender equality, in India and identifies the problems which are being faced by women while performing his duties toward society. This research also highlights the judicial activism with regard to Protection of women rights in India.

Keywords: Rights, Judiciary, Elimination of Discrimination, Protection, Inadmissibility

Introduction

Men and women both are equal by nature. Difference between men and women is a scientific difference but inequalities in status of both sexes are result of human mind. In most societies before the twentieth century, law recognized and maintained inequalities in the society. The right to equality as a human being or as a member of community did not find recognition. Thus inequalities are both social and legal. But in twentieth century, in many democratic and socialistic countries the legal inequalities does not exist, even though there might be social inequalities is in practice¹ Legal inequality based on gender in India is removed by Art.14 and 15 of Constitution of India but social inequality is still in existence in various part of society in different forms either in the name of custom or tradition.

Objectives

The objective of this research is to identify the role played by Indian judiciary for the implementation of various provision laid down in the Indian Constitution for eradicating legal and social inequalities based on sex existing in India. This research also studies the role played by Indian judiciary with regard to the interpretation various legal term`s inclusively and enlarging the scope of gender equality in India.

Hypothesis

The Judiciary has played a significant role in widening the scope of Right to Gender Equality, but the Executive has been failed in its duty to implement the judicial pronouncements. The role of the legislature in the concerned area is also passive to some extent.

Limitation

The proposed Research the primarily based on laws framed by the legislature in India in The light of constitution of India regarding the implementation right to gender equality and the role played by Indian judiciary. This study is limited to the various judgment of Indian Supreme Court and high Courts.

Kinds of Gender Inequalities

According to Nobel Laureate Prof. Amartya Sen (2001), there are seven types of gender inequalities at present in India. Here is a brief explanation of all the types of gender inequality.²

1) Mortality Inequality

In this, Inequality between women and men directly involves matters of life and death, and takes the brutal form of unusually high mortality rates for women and a consequent preponderance of men in the

total population, as opposed to the preponderance of women found in societies with little or no gender bias in health care and nutrition.³

2) Natality Inequality

In this kind of inequality a preference is given to boys over girls. It is ardent in many of the male dominated societies and these manifests in the form of parents wanting their newborn to be a boy rather than a girl. With the availability of modern techniques to determine the gender of foetus, sex selective abortions has become common in India.⁴

3) Employment Inequality

In terms of employment as well as promotion at work women often face greater handicap than men. This is clearly exemplified as men getting priorities in getting better work opportunities and pay scale than their female counterparts.⁵

Ownership Inequality

In many societies ownership of property can also be very unequal. Since ages the traditional property rights have favored men in the most parts of India. The absence of claims to property can not only reduce the voice of women, but also make it harder for women to enter and flourish in commercial, economic and even some social activities⁶

5) Special Opportunity Inequality

Even when there is little difference in basic facilities including schooling, the opportunities of higher education may be far fewer for young women than young men. Indeed, gender biasness in higher education and professional training can be observed in India.⁷

6) Basic-Facility Inequality

Even when demographic characteristics do not show much or any anti-female bias, there are other ways in which women can have less than a square deal.⁸

7) Household inequality

There are often enough, basic inequalities in gender relations within the family or the household, which can take many different forms. Even in cases in which there are no overt signs of anti-female bias in, say, survival or son-preference or education, or even in promotion to higher executive positions, the family arrangements can be quite unequal in terms of sharing the burden of housework and child care.⁹

Right to Gender Equality under International Law Universal Declaration of Human Rights, 1948¹⁰

Following are the prohibition of discrimination based on race, sex, language and religion in the Charter of the United Nations.

Article 1 : of the Universal Declaration proclaims that "All human being are born free and equal in dignity and rights",¹¹

Article 2 : "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."¹²

Remarking : Vol-2 * Issue-2*July-2015

With regard to the right to equality, article 7 of the Universal Declaration stipulates that: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."¹³

Convention on the Elimination of All Forms of Discrimination against Women, 1979¹⁴

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women describes "discrimination against women" as meaning "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹⁵

Constitutional Provision Relating to Gender Equality

The constitution has been primary empowering document. A supreme statement of equality and power balance, the constitution of India provides for equality before law and equal protection of law's¹⁶ Art. 15(3)¹⁷ empowers the state to make special provisions with regard to women and children. The approach is reformist and welfares. The policies the affirmative action to be taken by the Government directly conflicts with gender issues in the family. The constitution accepted the principle of gender equality. But in absence of well-formulated action plan and time frame certain equality clauses are still only in black letter of law. Art. 25 to 25, which embody the right to freedom of religion as interpreted and legislated in the form of personal laws deny equality to women in personal, economic, sexual, social, educational and cultural level.¹⁸ Moreover, most of the issues having been related to the directive principal of state policy, which does not having time frame, and not being justifiable really does not help the cause of women.¹⁹

Article 14 Equality Before Law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.²⁰

Article 15, Prohibition of discrimination on rounds of religion, race, caste, sex or place of birth.²¹

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.²²
2. Nothing in this article shall prevent the State from making any special provision for women and children.²³

Art.39. Certain principles of Policy to be Followed by the State²⁴ :-The state shall, in particular, direct its policy towards securing—

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (d) that there is equal pay for equal work for both men and women.

Art. 42, The State shall make provision for securing just and humane conditions of work and for maternity relief²⁵.

Art. 44 Uniform civil code for the citizen.²⁶

Fundamental Duties²⁷

Parts IV-A which consist of only one Article 51-A was added to the constitution by the 42nd Amendment, 1976. This Article for the first time specifies a code of eleven fundamental duties for citizens.

Article 51-A (e) is related to women. It states that;

"It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religion, linguistic, regional or sectional diversities; to renounce practices derogatory to the dignity of women"

Role of Judiciary in the Protection of Right to Gender Equality

The reason for gender injustice can be attributed to unequal power equation in gender relations. Patriarchal society, considered women's household work as economically insignificant, male child preference in society, lack of legal awareness in women and so on aggravated the differential status to the disadvantage of women. Neither the term 'gender justice' nor struggle for it is new. What has intensified these days is awareness on gender justice. It is being increasingly realized that crimes against women are to be handled with greater sensitivity and women as seekers of justice, to be treated with extra care.²⁸

Special provision for women and children

*Partap Singh v. Union of India*²⁹: The benign constitutional provision in clause (3) of article 15 of the Constitution overrides clause (1) of article 15 of the Constitution which provides that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. *Yusuf Abdul Azia v. State of Bombay & H. Laljee*³⁰, A special provision made for women is saved by clause (3). Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. Also, special provisions referred to in clause (3) need not be strictly restricted to beneficial measures.

Reservation for Women

Union of India v. K.P. Prabhakaran,³¹ *Rajesh Kumar Gupta v. State of U.P.*³²

Thus, reservation of certain posts exclusively for women in any sphere is valid. Also, reservation of 50 per cent of any category of posts for women is not to be considered arbitrary as it is protected by article 15(3).

Government of A.P. v. P.B. Vijaya Kumar,³³ Not with standing separate provision in this regard in article 16, under article 15(3) also, reservation for women in State employment is permissible. The clause is wide enough to cover any special provision for women including reservation in jobs. It is aimed at securing the upliftment of weaker sections of society and women, historically and otherwise, are a weaker section. Article 15(3) should, therefore, be given the widest possible interpretation and application.³⁴ Article 15(3) Constitution of India provides that the state can make special provision for women and children. In

Remarking : Vol-2 * Issue-2*July-2015

*Union of India v. K.P. Prabhakaran*³⁵, where Supreme Court observed that reservation of certain posts exclusively for women is valid and to be considered arbitrary under article 15(3), this article covers every sphere of state action for the welfare of women. Directive Principles of State Policy under part IV of constitution of India concerned with women directly and have made State responsible for taking necessary steps for providing special bearing on their status include Article 39(a) that the citizen, men and women equally, have the right to an adequate means for livelihood³⁶.

Equal pay for equal work³⁷

Article 39(d) provides for equal pay for equal work for both men and women³⁸ *Union of India v. M. Akhtar*³⁹ court observed that for application of "equal pay for equal work", equality clause should be invoked in respect of people who are similarly situated in all respects. In case of *Daily Rates Casual Labour v. Union of India*⁴⁰, It was observed by the court that the doctrine of "equal pay for equal work" is equally applicable to both men and women even the daily wagers are also entitled to the same wages as other permanent employees in the department employed to do the identical work.

Honour and dignity of women

Directive principle of State Policy under part - iv Constitution of India provides certain provision for the honour and dignity of women. Article 42 The state shall make provision for securing just and humane conditions of work and maternity relief⁴¹. Further under part iv –A fundamental duties is also added for citizens. Article 51 A (e) provides that it shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities to renounce practices derogatory to the dignity of women⁴². No legal-conscious citizen will forget the case of *Rupan Deal Bajaj v. K.P.S. Gill*,⁴³ which is the latest in the series upholding the dignity of women. In *Pragati Varghese v. Cyril George Varghese*,⁴⁴ the full Bench of the Bombay High Court has struck down Section 10 of the Indian Divorce Act 18 under which a Christian wife had to prove adultery along with cruelty or desertion while seeking a divorce on the ground that it violates the fundamental right of a Christian woman to live with human dignity under Article 21 of the Constitution. In *Gaurav Jain v. Union of India* (1997 (8) SCC 114) 4.10, the condition of prostitutes in general and the plight of their children in particular was highlighted. The Court issued directions for a multi-pronged approach and mixing the children of prostitutes with other children instead of making separate provisions for them. The Supreme Court issued directions for the prevention of induction of women in various forms of prostitution. *It said that women should be viewed more as victims of adverse socio-economic circumstances than offenders in our society.*

Rights Relating to Maternity Benefits

In case of *C.B. Muthamma v. Union of India*⁴⁵ a writ petition was filed by Ms Muthamma, a senior member of the Indian Foreign Service, complaining that she had been denied promotion to Grade I illegally and unconstitutionally. She pointed out that several rules of the civil service were

discriminatory against women. At the very threshold she was advised by the Chairman of the UPSC against joining the Foreign Service. At the time of joining she was required to give an undertaking that if she married she would resign from service. Under Rule 18 of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, it was provided that no married woman shall be entitled as of right to be appointed to the service. Under Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961, a woman member of the service was required to obtain permission of the Government in writing before her marriage was solemnized. At any time after the marriage she could be required to resign if the Government was confirmed that her family and domestic commitments were likely to come in the way of the due and efficient discharge of her duties as a member of the service. On numerous occasions the petitioner had to face the consequences of being a woman and thus suffered discrimination, though the Constitution specifically under Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth and Article 4 provides the principle of equality before law. The Supreme Court through V.R. Krishna Iyer and P.N. Singh, JJ. Held that:

"This writ petition by Ms Muthamma, a senior member of the Indian Foreign Service, bespeaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality. The credibility of the Constitutional mandates shall not be shaken by governmental action or inaction but it is the effect of the grievance of Ms Muthamma that sex prejudice against Indian womanhood pervades the service rules even a third of a century after Freedom. There is some basis for the charge of bias in the rules and this makes the ominous indifference of the executive to bring about the banishment of discrimination in the heritage of service rules. If high officials lose hopes of equal justice under the rules, the legal lot of the little Indian, already priced out of the expensive judicial market, is best left to guess."

Commenting further on the discriminatory rules the Court said

"Discrimination against woman, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries. The same risk is run by government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the service is likely to come in the way of efficient discharge of duties, a similar situation may arise in the case of a male member. In these days of nuclear families, intercontinental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species."

Expressing its opinion on Rule 18 of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, the Court observed:

"At the first blush this rule is defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacled the weaker sex forgetting how our struggle 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. And if the executive as the surrogate of Parliament makes rules in the teeth of Part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable."

Striking down the rules as violating the principle of equality, it was said:

"We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable the rule of equality must govern."

Matrimonial Rights of Women and common civil code

The Supreme court agreed with the premise that "gender equality" is one of the basic principle of constitution of India. Accordingly Supreme Court Interpret Sec. 6 of Hindu Adoption And Maintenance Act 1956, in case of *Githa Harihern v. Reserve Bank of India*⁴⁶ that the mother could act as natural guardian of a minor during the father life time if the father was not in actual charge of the affairs of the minor.

In *Pargati Varghese v. Cyril George Varghese*⁴⁷ Bombay High Court held that the Sec 10 of Divorce Act , 1869 is a discriminatory on the ground of sex and is thus violative of Art. 15(1). Further a Christian women cannot seek divorce on the ground of cruelty and desertion is also discrimination on the bases of religion and is thus violative of Art.14 and 15(1).

In a historic judgment, *SarlaMudgal v. Union of India*⁴⁸, It is matter of regret that art. 44 of the constitution of India has not been given effect to. Parliament is still to step in the framing a common civil code in the country. The government should again look at art.44 and endeavor to secure for the citizens a uniform civil code throughout the territory of India. *Lily Thomas v. Union of India*⁴⁹ in this case court clarified that there is no direction in any case from the Supreme court to enforce a common civil code.

Maintenance and personal law`s

In another significant judgment in *Daniel Latifi v. Union of India*⁵⁰ in this case validity of Muslim

Women (Protection of Right and Divorce) Act 1986 was challenged. On the ground that the act was discriminatory on the bases of religion when compared with Sec 125 CrPC. Cort held that the husband is bound to make "a reasonable and fair provision" court thus interpreted that the scheme contained in the impugned Act is equally, if not more, beneficial to muslim woman than S. 125 CrPC.

Succession

In *Madhu Kishwar v. State of Bihar*⁵¹ the Supreme Court dealt with the validity of the *Chotanagpur Tenancy Act, 1908 of Bihar which denied the right of succession to Scheduled Tribe women* as violative of the right to livelihood. The majority judgment however upheld the validity of legislation on the ground of custom of inheritance/succession of Scheduled Tribes. Dissenting with the majority, Justice K. Ramaswamy felt that the law made a gender-based discrimination and that it violated Articles 15, 16 and 21 of the Constitution. In his dissenting judgment he said:

"Legislative and executive actions must be conformable to and for effectuation of the fundamental rights guaranteed in Part III, Directive Principles enshrined in Part IV and the Preamble of the Constitution which constitute the conscience of the Constitution. Covenants of the United Nations add impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order."

In *Sarita Samvedi v. Union of India*⁵², the Supreme Court held invalid a provision of the Railway Board Circular dated 27th December, 1982 which restricted the eligibility of a married daughter of a retiring official for out-of-turn allotment of a house, to situations where such a retiring official had no son or where the daughter was the only person prepared to maintain the parents and the sons were not in a position to do so. This was held to be discriminatory on the ground of sex. Reservations of seats for women in local bodies or in educational institutions have been upheld.

Conclusion and Suggestion

An analytical study of judgment of Indian judiciary shows that the judiciary has adopted considerate and sympathetic attitude towards the women rights available under the constitution of India. Various decision of supreme court of India force the government to make the laws on that particular points for example decision in case of *Shahbano Bagum* result in the codification of Muslim Women (Protection of Right and Divorce) Act 1986. *vishaka v State of Rajathan*⁵³ lead to the enactment Sexual Harassment of at work place Act 2004. Recent judgment in *damini rape case of Delhi* forced the government to revise laws relating to Rape in India. There is no doubt that the judicial system in India is impartial but some people feels the following problems should also to be considered to make justice delivery system more effective:-

- (1) The gender insensitive attitude of judges, lawyers and other court official.

Remarking : Vol-2 * Issue-2*July-2015

- (2) The fact that the court tends not to believe the evidence of women and end up blaming the victims of violence for their plight.
- (3) The enormous time and money that court proceedings cost.
- (4) Revealing one's personal problems in public would be very traumatic.

Suggestion

Following are the Suggested changes in the judicial system to make it more gender sensitive:-

1. The attitude of the Judges Lawyers and the court personal should be sensitive and sympathetic to women and their circumstances.
2. The judicial procedure should be made faster and the court cases should not be unnecessarily delayed.
3. Free legal assistance.
4. The attitude of the Police and the Hospital personal should be sensitive and sympathetic to women and their circumstances.
5. The interest of the society may be a good justification for making protective discrimination in favour of women.

References

1. Dr.S.C.Tripathi: Women and Criminal law, First Edition 2010, Central law publications, Allahabad-2.
2. Dr.Nirmal Kant Chakrabarti: Gender Justice, First Edition 2006Dr.ShanchiChakrabarty: R.Cambray and Co.Pvt. Ltd. Kolkata
3. B.Sivaramaya: Inequalities and the Law Esteren Book Co. Lucknow 1984
4. SantapSanhari Mishra: Human Rights an introduction, First edition 2007, The Icfai University Press.
5. O.P.Mishra: Law relating to women and Child, Central law agency, Allahabad,2003.
6. CharuWalikhanna: Eastern book corporation, 2009.
7. V.N.Shukla: Constitution of India, Eastern Book Company, Lucknow, 2006.
8. R.K.Dinkar&S.S.Dinkar: Violence law and women's right in South Asia, Eastern book corporation,2010
9. D.D. Basu: Human Rights in Constitutional Law, Wadhwa, Nagpur, 2003.
10. P.M. Bakshi: The Constitution of India, Universal law publishing Co. Delhi, 2011.
11. M.P.Jain: Indian Constitutional Law, Wadhwa and Company, Nagpur, 2007.

Foot Notes

1. Sivaramayya B,"Inequalities and the Law,"p.1 Eastern Book Company Lucknow 1984
2. Priti Jha, Niti Nagar." *A Study of Gender Inequality in India*" Available at <http://www.ijip.in> website assed on 13 August 2015
3. ibid
4. ibid
5. ibid
6. ibid
7. ibid
8. ibid
9. ibid
10. Charter of united nations, 1945. Cited in Das, P.K., International Law Documents (1st Edition)

ISSN No. : 2394-0344

- 2003 Universal Law Publishing Co. Pvt. Ltd., pp. 34.
11. Ibid.
 12. Id at 35.
 13. Ibid.
 14. Available at <http://www.un.org/womenwatch/daw/cedaw/> website assed on 11 Jan. 2014.
 15. Ibid
 16. Art.14 Constitution of India 1950.
 17. Art.15 (3) Constitution of India 1950.
 18. Chakrabarti Gangotri," Emerging Necessities of Gender Balance in Law," cited in Dr N. K., Dr Shachi, "Gender Justice," p.25 1st Ed. 2006 R. cambray & co. Pvt.Ltd. Kolkata p. 25
 19. Id at p.25
 20. Bassu. D.D."Constitutional law of India" 8th ed reprint 2009 Lexis Nexis Butterworths wadhwa Nagpur, p 33.
 21. id at 63
 22. ibid
 23. ibid
 24. ibid
 25. Id at p. 221
 26. Id at p. 222
 27. Id at p.227
 28. P. Sathisvam"Judicial and Gender Justice" cited in Chakrabarti Dr N. K., Dr Shachi, "Gender Justice," p.7 1st Ed. 2006 R. cambray & co. Pvt.Ltd. Kolkata
 29. AIR 1985 SC 1695: (1985)4 SCC 197: (1985) Supp 2 SCR 773

Remarking : Vol-2 * Issue-2*July-2015

30. AIR 1954 SC 321: (1954)1 SCR 930: (1954)56 Bom. LR 1179
31. (1997)11 SCC 638;
32. AIR 2005 SC 2540: (2005)5 SCC 172: JT 2005 (6) SC 12.
33. AIR 1995 SC 1648: (1995)4 SCC 520: (1995) Supp 1 SCR 462
34. *Gayatri Devi v. State of Orissa*, AIR 2000 SC 1531.
35. 1997,11SCC 638
36. Bassu. D.D."Constitutional law of India" 8th ed reprint 2009 Lexis Nexis Butterworths wadhwa Nagpur, p216
37. Id at 218
38. Id at 218
39. AIR2008 SC 435
40. (1988) SC 122
41. Supra note 37 at p 221
42. Jain,M.P., "Indian Constitutional Law," Lexis Nexis Butterworths Wadhwa.Nagpur 6th Ed,2010, p1521
43. 1996 AIR 309, 1995 SCC (6) 194
44. AIR 1999 Ker 345
45. (1979) 4 SCC 260)
46. AIR1999SC1149
47. AIR 1997 Bom 349
48. AIR 1995 SC 1531
49. AIR 2000SC1665
50. AIR 2001 SC 3958
51. (1996) 5 SCC 145
52. 1996 (2) SCC 380)
53. AIR 1997SC 3011