

Constitutional Protection to Feminism Movement

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ABSTRACT

“Gender” means socially constructed roles of man and woman, which are ascribed to them according to gender marker. Thus, gender roles depend on concrete socio-economic, political and culturological context and experience influence of various factors according to race, ethnic origin, class, sexual orientation and age. Gender roles widely differ within each culture and cultures. Unlike the individual’s biological gender, the gender role can be changed. This concept implies the views, conditioned by culture, about the intellectual potentials of man and woman, their personal features and behavior. Gender, as a construct, is formed by the society, as a social model of man and woman, which determines their role and position in all the spheres of the public life.

1. Constitutional Framework of Gender Equality in India

The issue of gender equality was much discussed during the drafting of the Constitution. Nehru and his law minister B. R. Ambedkar were explicitly and deeply committed to the abolition of inequalities based on caste and sex. Our Constitution, the origin of all laws and the Organic rule that everyone must follow, recognizes equality of the genders and prohibits discrimination on the basis of sex. It additionally provides legislation to be made to give more rights on ladies by making exceptional procurements. It must be borne at the top of the priority list that without gender equality, human rights stay in the inaccessible domain. In the greater part of the countries, ladies are credited an auxiliary part. This secondary part must be transformed to the essential one to carry ladies at an equal stratum with men. To accomplish in this way, an alternate standpoint in law must be seen. For this reason, different procurements have been engrafted in our Constitution. The Constitution of India, one of the greatest documents ever produced came into force in the year 1950 guarantee justice, liberty and equality to all citizens.

Gender equality is always escaped the constitutional provisions of equality before the law or the equal protection of law. This is because equality is always supposed to be between equals and since the judges did not concede that men and women were equal. Gender equality did not seem to them to be a legally forbidden inequality. The Constitution not only grants equality of treatment to women but also calls upon the state to adopt measures favoring women neutralizing the socio-economic, educational and political disadvantages that they face. The constitutional provisions guaranteeing formal gender equality¹ have been the subject matter of litigation in the courts. The following are the various provisions in the constitution which ensures equality between men and women.

The Preamble contains the essence of the Constitution and reflects the ideals and aims of the people. The Preamble starts by saying that,² “We the people of India,....in our Constitution Assembly... do hereby adopt, enact and give to ourselves this Constitution” . The source of the Constitution is thus traced to the people, which people do we talk, it does not

mean that only the male and female are included in the term of people but it includes the third gender also, irrespective of caste, community, religion or sex. We shall interpret the Constitution for the welfare of the humanity who has adopted it as it is without excluding any one. The makers of the Constitution were not satisfied with mere territorial unity and integrity. If the unity is to be lasting, it should be based on social, economic and political justice. Such justice should be equal for all. The Preamble contains the goal of equality of status and opportunity to all citizens. This particular goal has been incorporated to give equal rights to women and men in terms of status as well as opportunity to promote among them fraternity assuring the dignity of individual and the unity of nation.³ The Supreme Court has emphasized that the words “fraternity assuring the dignity of the individual” have “a special relevance in the Indian context....because of the social backwardness of certain sections of the community...who had been looked down upon in the past”⁴

Part III of the Constitution, comprising of Articles 12 to 35, identifying with Fundamental Rights, is considered the „heart“ of the Constitution. The fundamental rights are viewed as central because they are most vital for the achievement by the person of his full intellectual, moral and spiritual status. According to 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 the fullest extent” . The following are the various fundamental Rights provisions in the constitution which ensures equality between men and women:-

Article 14 — Equality before Law : —

Article 14 guarantees equality before law and equal protection of law with in the territory of India. This Article stands for absence of any discrimination by law or in their administration. It is an essential feature of Indian Constitutionalism and a basic idea of the “Rule of Law” as

propounded by A.V. Dicey, that everyone is equal before the law.

“Article 14 does not restrict the word ‘person’ and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression ‘person’ and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.”

2. Right to education:

The right of Social Equality and Equal Access to Public Areas is clearly mentioned under the Article 15 of the Constitution of India. Art 15 prohibits discrimination on the basis of religion, race, caste, sex, place of birth. It is a guarantee against every form of discrimination. But today, it seems that there is a wide gulf between theory and practice.

The women in India have always been considered subordinate to men. Article 15(1) and 15(2) of the Indian Constitution prevent the state from making any discriminatory law on the ground of gender alone. The Constitution is thus characterized by gender equality. The Constitution insists one quality of status and it negates gender bias. However, the State has the right to make any special arrangement for women and children or for the development of any socially or educationally backward class or scheduled castes or scheduled tribes. In the given case the transgender community can be considered as social backward class of people and special provisions can be made. by the state for their upliftment, but, no such action is been taken by the Government. This shows the breach of duty that has been casted upon the government by the Constitution of India.

When the matter relating to mother as natural guardian was questioned, the Supreme Court held that relegation of mother to inferior position to act as a natural guardian is violation of Articles 14 and 15 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 Court.

ARTICLE 16 PROVIDES FOR EQUALITY OF OPPORTUNITY IN MATTER OF PUBLIC EMPLOYMENT

Article 16 provides for equality of opportunity in matters of public employment. Secondly no citizen shall, on grounds of religion, race, cast, sex, decent, place of birth residence or any of them, be eligible for, or discriminated against in respect of any employment or office under the state. It also allows the state to make reservations in favour of the SC, ST and Other Backward Classes.

Reservations of seats for women in local bodies or in educational institutions have been upheld. The Supreme Court in Govt. of A.P. v. P.B. Vijayakumar, held that reservation to the extent of 30% made in the State Services by the Andhra Pradesh Government for women candidates was valid. The Division Bench of the Supreme Court emphatically declared that the power conferred upon the State by Article 15(3) is wide enough to cover the entire range of State activity including

employment under the State. The power conferred by Article 15(3) is not whittled down in any manner by Article 16.

ARTICLE 19(1)(g)—FREEDOM OF TRADE AND OCCUPATION

Article 19 (1)(g) of the Constitution guarantees that all citizens have the right to practise any profession or to carry on any occupation or trade or business. The right under Article 19(1)(g) must be exercised consistently with human dignity. Therefore, sexual harassment in the exercise of this right at the work place amounts to its violation. In the case of Delhi Domestic Working Women’s Forum v. Union of India relating to rape and violence of workingwomen, 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 Courts. To realize the concept of „gender equality”, the Supreme Court has laid down exhaustive guidelines in the case of Vishaka v. State of Rajasthan 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 women at their working place. These guidelines were framed to protect the rights of working women to work with dignity under Articles 14, 19 and 21 of the Constitution.

3. Right to life and personal liberty:

Article 21 of the Indian Constitution provides right to life and personal liberty. This right is available to all the persons whether they are foreigners or citizens of India, is interpreted by the Supreme Court as the right to life with dignity and not mere animal existence.

So, how can this right denied to eunuch who has been a part of Indian society since ages. Further Article 21 of the Indian constitution provides that right to health and medical care is a fundamental right.

In Vishaka v. State of Rajasthan ,the Supreme Court, in the absence of legislation in the field of sexual harassment of working women at their place of work, formulated guidelines for their protection. The Court said that "Gender equality includes protection from sexual harassment and right to work with dignity which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose."

Constitution under Article 14 provides for equality before law and equal protection of laws.⁵ However, Article 14, which, per se, prohibits discrimination between and among equals, permits class legislation through classification to give differential treatment Classification must pass the test of

intelligible differentia and nexus with the objective to be achieved. In that sense, men and women can be reasonably classified and classed separately and separate and different provisions can be made for each class.⁶

To give more strength to equality clause, constitution specifically forbids state under Article 15(1) from discriminating in all state actions, on the grounds only of religion, race, caste, Sex or place of birth. There is prohibition against discrimination but not against preferential treatment. Constitution of India specifically permits the state to make 'special provisions' for women and children under Article 15(3).

The purpose is to improve and strengthen the status of women by affording them the opportunities to participate in the socio-economic activities of the state. According to Sujata V. Manohar, J. the insertion of Article 15(3) is recognition of the fact that for centuries women of this country has been socially and economically handicapped and thus are unable to participate in socio-economic activities on the footing of equality. Without removing these inequalities existing in the social system, the enforcement of equality under Article 14 will be a distant dream.⁷

Besides Articles 14 and 15(1), 38, 39 and 40 lay down the public policy and constitutional philosophy to accord social and economic democracy to women as assured in the Preamble of the Constitution. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing.

It is argued that employment among women would help improving their economic status, which in turn would facilitate more concentration on other social and political matters of the society. Thus to promote large-scale employment amongst women, creation of job opportunities and appropriate working environment become crucial. This is a society-building task in which law has a role to play, though a limited one.⁸

In India, various legal measures have been taken to promote and protect women 'employment. They afford protection at two levels: at the time of employment and post-employment. The focus of the discussion is limited to critically examining three such measures. One is the reservation. In this respect the executive steps and judicial response will be scrutinized. Another is the general discrimination against women based upon sex in employment. The third issue would be a specific instance of sexual discrimination in the form of different wages to men and women.

Women reservation preference is based on the premise that conventional role structure, historical social status and unequal educational facilities have confined women to domestic affairs only. She is not equipped and encouraged to go out for employment. This hinders their economic independence and makes them dependent on other family members. This dependence leads to subordination and exploitation.⁹ Thus women are promoted through reservation of seats or preference to their candidature, to take up employment and become independent. This legal measure

attempts to remove the anomalies created by social in signification.¹⁰

At the post-employment level sexual discrimination exists in very subtle way. It results in discriminatory treatment on the basis of sex that may manifest in different forms such as differential wages or working hours or service conditions etc. This differential treatment is usually justified on the ground that women constitute a class apart from men. Sexual discrimination proves counterproductive for promotion of women employment.¹¹

Unequal wages for same or similar work is a form of sexual discrimination. Equal wages for equal work for both men and women is purported to protect women, who choose to take up employment, from economic discrimination and exploitation at work places. It is presumed that women are weak and thus less efficient and so should be paid lesser wages than men. This is a glitch,¹² which results in exploitation and mental harassment and discourages women to take up jobs. In India, Equal Wages Act 1976 was enacted to ensure that there is not discrimination of wages on the ground of sex for same or similar work. Recent Delhi High Court judgment reflects the ineffectiveness of this Act even after 28 years of its existence.¹³

There are fewer and fewer cases litigated in courts under the Equal Remuneration Act. This must not lead us to believe that wage differentiation has been eradicated. The real problem, actually, is not in wage differentiation but in artificial classification in the nature of work to show that it is not 'same or similar',¹⁴ to justify different wages for men and women. Also the traditional occupational segregation based upon the division of labour makes the classification of 'different work' easier. In such a scenario, the contention of doing 'same or similar work'¹⁵ as men and a consequent claim of equal wages cannot technically be raised under the statute.

Feminism is a movement that is affecting, in its own way, the theoretical and structural foundations of law and legal system. The notion that law is an autonomous, neutral and universal institution influenced, a great deal, the feminist movement, in its earlier days. Since it is neutral and universal, its neutrality and universality must cover both man and woman, was the argument. The universality and gender neutrality of law was made a ground for demanding same rights for both men and women.¹⁶ This kind of feminism was called as liberal feminism, under the aegis of which, women won most of their legislative and judicial victories including suffrage, equal pay, benefits, access to employment and education etc.

Despite the identity of rights, the subordinated position of women and consequent oppression, continued. The radicalists among the feminists gained the ground by arguing that the formal rights such as of equality or freedom only perpetuate, than remove, the traditional structural inequalities pre-existing in the society. According to Catherine MacKinnon, The problem with neutrality as the definition of principle in constitutional adjudication is that it equates substantive powerlessness With substantive power. She argues that the liberty principle, of John Stuart Mill, could be legitimate only if the genders were

actually equal before the law or if the liberties are evenly distributed. But they are not.

4. Conclusion :

It seems that, feminist jurisprudence, irrespective of the difference of opinion reflected in different schools, stresses

upon the need to re-look at the problems not merely concerning women but also more related to men, in a different perspective. For that we must come out of our traditional understanding of the concepts in their technicalities and relate it with dialectics in the society.

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- [5]. This is a formal declaration. which. in substance, guarantees not the right to equality but only the right not to be denied equality before law and equal protection of laws.
- [6]. There is a very common phrase traveled from US that equality clause prohibits class legislation but prelims classification Here I am using this phrase to indicate the situation ex-post classification. I.e., the result of classification is essentially the formation of separate classes. According to A. M. Bhattacharjee, i.e. the class does not cease to be a class even if the same is the result of reasonable, classification. A.M. Bhattacharjee, Equality, Liberty and Property, Eastern Law House, Calcutta, 1997, p. 41.
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