

# Constitutional and Legislative Perspectives of Gender Justice and Its Evolving Nature

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## Abstract

Justice is purpose and function of law assigned to it by the state. Injustice on gender basis calls for justice in general and gender justice in particular. However justice is not a static concept as it is evolved and gets changed over the time. Justice in its broadest sense comprises of all state actions to regulate selfish actions of people and thereby to treat equals equally on proportionate basis. Administration of justice is concerned with harmonization of individual assertions and rights with the community interests. At any point of time the balance is struck at that point of time where the society accepts it through its legitimate institutions. Gender equality has never received optimum attention of the society as the women are regarded as the champions of family and community interests. Assertion of rights by women has led to sea change in the socio-legal life of all societies across the world. Gender sensitivity and self assertion by women have led to changes in law through legislative instruments, policy documents and precedents. It is apparent that the law influences society is in turn influenced by the society. With the marginalization of women in their roles and treatment the society has been responsible for gender injustice. The law has responded to it by new protective legislations, welfare measures and inventive decisions. Hence the society has positively impacted the law. But the inverse question viz., whether the changes in law are positively changing the society in line with desired goals is moot question. Hence gender injustice cannot be alleviated by law alone. There has to be socio-economic movement changing the mindsets of different role players. In this paper an attempt is made give the conspectus of justice, gender justice and the state actions towards elimination of gender injustice. Suggestions are made to establish nexus between law and society through desired goals set for state and for the society.

**Keywords-** Justice, Gender Justice, Gender Inequality, Corrective Justice, Distributive Justice.

## I. Introduction

As a matter of natural right every human being is entitled to human dignity which is one of the most supreme attributes of the society. The Constitution of India ensures that every citizen irrespective of caste/creed/sex/origin is not deprived of human dignity. Gender inequality refers to unequal treatment of human beings based on sex. Gender discrimination arises out of differences in socially evolved gender roles. Women and their status are integral part of society indicating the level and type of development. Female feticide, domestic violence, unequal property rights etc have made the women exploited lot even today. Discrimination is widespread and omnipotent in the fields of health, education, employment, political representation and in other broader perspectives of social life. Indian society can be described as hypocritical as regards the way in which it treats women. It is harsh reality that women have been ill-

treated in and out of the home. Domestic violence, dowry deaths, female feticide, deprivation from property rights, sexual harassment at work place, etc are the menace. But the in the same society women goddesses are worshipped and women are treated as symbol of patience and respect which can be seen in rivers being named after women. Thus respect and atrocity are together meted out to women. Women are also deprived of economic resources and they are made to depend on man economically. This is also because women in our country are brought up under the mindset of subjecting themselves to slavery. Lack of education, financial subordination, etc has placed her in the second position. In order to ameliorate the condition of women large number of laws has come right from the colonial days. These legislations are in the areas of sati, widow remarriage, female infanticide, property rights to women, dowry prohibition, child marriage etc.

The Constitution of India also lays down certain provisions which directly deal with gender issues in terms of rights to women. Articles 14, 15(3), 39(a), 39 (e), read together provide that the State cannot deny any person the equality before the law and equal protection of laws within the territory of India. It is also explicitly provided that state shall not discriminate against the citizens on the grounds only of religion, race, caste, sex, place of birth or any of them. The State is also obliged to make special provisions for women and children. Equality of opportunity has also been incorporated in article 16 of the Indian Constitution which prevents discrimination on the basis of religion, race, caste and sex.

The Indian Judicial system has rendered a great service to the gender justice. It has effectively intervened in the issues of women related issues. The early example of such a step is that the Supreme Court held that an employment clause requiring women employee to obtain permission from employer before undergoing marriage was held to be discriminatory against women and hence was declared unconstitutional.<sup>1</sup> The Supreme Court also struck down the provision of rules which stipulated termination of service of an air hostess on her first pregnancy as it arbitrary and abhorrent to the notions of a civilized society.<sup>2</sup> The supreme court also held that the stridhan property of a married woman is her absolute property and it has to be placed in her custody, and she should enjoy complete control over it.<sup>3</sup> In *Vishaka and others V state of Rajasthan*, the Supreme Court held that sexual harassment of working women at her work place of an employment amounts to violation of rights of general equality right to life and liberty which is clear violation of Article 14 15 and 21 of the Constitution.

In spite of having so many enactments dealing with women issues and large number of ratios laid down by the courts, the rate of women related crimes are on high. The discrimination against women is still prevalent and is unfavorable to the desired social environment. Continued gender injustice is hampering the social and economic progress leading to unfavorable impacts on image of the country at international level. Women are very productive and they can contribute to national income in a better way if they are not exploited and are not made the victims of injustice.

## II. The Concept of Justice and its Temporal Dynamism.

Emergence of the concept of justice can be traced back to the advent of state. One of the functions of state was to avoid tyranny and injustice for which it evolved the device of law to ensure justice. The very purpose of law is justice and peace. Understood in its broadest sense justice is administered by the state

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<sup>1</sup> *C.B.Muthamma V.Union of India*, in this case the validity of the Indian Foreign Service Rules of 1961 was challenged which provided that a female employee to obtain a written permission of the Government in writing before her marriage is solemnized and at any time after a marriage a women member of the service may be required to resign from service.

<sup>2</sup> *In Air India V Nargesh Mirza*

<sup>3</sup> *Pratibha ranu V Suraj Kumar*

through legislating, executing and adjudicating. In popular sense the need for justice arises when there is injustice. Injustice arises when there is a wrong. To redress this wrong courts come into picture with their function of adjudication. The term 'justice' is derived from 'Jungere' which means to bind or tie together. Justice connotes regulation of selfish actions of people for securing fair distribution, equal treatment of equals, proportionate and just rewards. Justice aims at harmonizing the individual interests with the collective interests. The concept of justice is evolving and is temporal in nature. As it operates in the society, the changes in society influence its evolution. Justice regulates mutual relations, it is governed by values and traditions, it monitors the human behavior, it enforces equality, it attempts at harmonization, it is based on liberty, it accommodates individual assertions and its dimensions are wide and ever changing.

### III. The concept of gender justice and its evolved meaning.

Gender justice implies encompassing of all gendered experiences that are a part of life in a society for everyone, and gender justice aims at liberating people from them if they are unjust. Since women happen to be one of the prominent minorities in India, and globally seen as a vulnerable group, gender justice is usually understood in terms of being just to them, sometimes at the cost of others. Justice is understood in two ways by the scholars i.e., corrective and distributive justice. Corrective justice refers to protection of law against actual or threatened interactional injuries to one's person or property. On the other hand distributive justice refers to the overall division of resources among the people in just and fair manner. In India the women are victims of injustice from both the points of view. Crimes against women, deprivation of their rights etc has led to injustice which needs effective corrective mechanism. In terms of distribution of wealth also women are second fiddle to man. Hence there is need to streamline both the corrective and distributive justice delivery systems to cope with gender justice.

### IV. The Constitutional Provisions Ensuring Gender Justice.

The preamble which contains aims and aspirations of the people provides for justice, liberty and equality and dignity to all individuals. Taken in this sense gender inequality is against the spirit of constitution. The Preamble to our Constitution imposes the duty upon state to secure social, economic and political justice, equality of opportunity and of status and dignity of person to everyone<sup>4</sup> The object of justice and equality is to be ensured to all including women who constitute around 48.4 percent of the total Indian Population.<sup>5</sup> Just and equality are to be read as integral part of the constitution for the better appreciation of the Constitutional ethos. The Preamble is "a key to (unlock) the mind of the makers' which may (reveal) the general purposes for which they made the several provisions of the constitution."<sup>6</sup> In the light of *Keshvananda*,<sup>7</sup> the Preamble is now very much part of the Constitution and the Parliament in the exercise of its constituent power cannot "emasculate, destroy or completely abrogate" the 'fundamental' 'basic' or 'essential' features of the Constitution. Hence justice as enshrined in the preamble is part of basic structure of the constitution.

The Directive Principles though stated to be mere directives in the initial days, they are now given the shape of basic duties by virtue of their interpretation as some fundamental rights by the courts

<sup>4</sup> *Madhu Kishwar and Others v. State of Bihar and Others*, AIR 1996 SC1864.

<sup>5</sup> <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=IN> (Last visited on 27.03.2023)

<sup>6</sup> *In re Berubari Union & Exchange of Enclaves*, AIR 1960 SC 845

<sup>7</sup> *Keshavananda Bharathi v. State of Kerala* AIR 1973 SC1461.

in India. These Directive Principles guide the Legislature and the Executive in the exercise of their powers. They are considered as “instruments of instructions” and have been declared under the Constitution as “fundamental in the governance of the country”.

The Courts have been focusing towards the contents of these Directive Principles while interpreting a statute. Directive Principles are now regarded as a “dependable index of a public purpose”. Justice Mathew has put it pithily in *Keshvananda*: .....

.....In building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to Directive Principles.....Economic goals have an uncontestable claim for priority over ideological ones on the ground the excellence comes only after existence. It is only if men exist that there can be Fundamental Rights.<sup>8</sup>

Incidentally, it has to be pointed out that the Supreme Court has, however, in *Minerva*<sup>9</sup> ruled that our Constitution is based on the “bedrock of balance” between the Directive Principles are to be achieved, it should be “without abrogating the Fundamental Rights”. At this juncture, it is pertinent to refer to some of the Directive Principles and the Fundamental Rights in our Constitution that seek to promote Gender Justice.

1. Equal pay and adequate livelihood to men and women with the dignity of freedom of childhood to children’s and promote justice on basis of equal opportunity.<sup>10</sup>
2. Maintain Uniform Civil Code<sup>11</sup> throughout India with an objective to harmonies discrimination against cultural practices and discrimination against vulnerable groups which is reinforced after *Keshvananda Bharathi*.
3. Provided the spirit of promoting harmony and brotherhood amongst the people and to practice derogation of the dignity of women.<sup>12</sup>

Article 38(1) to commence with, enjoins the State of promote the welfare of the people, obviously, men and women, alike, by securing a social order in which justice-social, economic and political shall inform all the institutions of national life. Further, it directs the State to minimize the inequalities in income and to endeavour to eliminate inequalities in status.<sup>13</sup> Article 39 requires the State to secure for its citizens the right to adequate means of livelihood, irrespective of sex. Parity in distribution of ownership and control of material resources of the community to subserve the common good and equal pay for equal work for both men and women is avowed object. The directive provides that health and strength of workers, irrespective of their gender, should not be abused and that citizens should not be forced by economic necessity to enter avocations unsuited to their strength. In determining, whether the work done by men and women is of similar nature, the Court should take a broad view and also strike down any discrimination made on the basis of sex.<sup>14</sup> The State, further, within its limits of economic capacity, has to make provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness, disablement and in other cases of undeserved want. Under Article 42, the State is mandated to make provisions for securing just and humane condition of work and for maternity relief. In India various Social Security and Welfare Legislations aim at promoting the

<sup>8</sup> *Keshvananda Bharathi*, *supra* note 7.

<sup>9</sup> *Minerva Mills v. Union of India* AIR 1980 SC 1789

<sup>10</sup> Article 39

<sup>11</sup> Article 44–

<sup>12</sup> Article 51A(e)

<sup>13</sup> Article 38 (2) of the Constitution of India.

<sup>14</sup> *Mochinnon Co. v. Audrey*, AIR 1987 Sc 1281

mandate of Article 42 and it is to be seen how this issue is taken care of in the new labour code.<sup>15</sup> Under Article 43, the state is required to secure through suitable legislation or otherwise to all workers a living wages, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. The state is also bound to secure workers' participation, including women workers, in management in industries through enactment of laws or in any other way.<sup>16</sup>

Equality is very much the basic structure of Indian Constitution and it is described as the pillar on which rests security the foundation of our democratic republic.<sup>17</sup> Article 14 guarantees all persons right to "equality before the law" and "equal protection of the laws". The expression "equality before the law" connotes rule of law and it ensures that there is no special privilege in favour of any one and that all are equally subjected to the ordinary laws of the land. "Equal protection of the laws" denotes equality of treatment in equal circumstances and implies that among equals the law should be equal and equally administered. This part of Article 14 mandates the state to maintain equality when it facilitates certain services to the people. In other words the like should be treated alike and unequals should be treated unequally. Article 15(1) expressly prohibits gender discrimination whereas Clause(3) of the same article enjoins the State to positively discriminate in favour of women to make special provisions to ameliorate their social, economic and political status and for securing parity.<sup>18</sup> The cumulative effect of Articles 14 and 15 is that the State is empowered to provide for protective discrimination in favour of women and children.<sup>19</sup> Moreover, Article 16(1) confers right to equality of opportunity to all citizens in matters of employment or appointment to any public office. Hence women cannot be discriminated and considered ineligible to hold public offices in general. Article 14 sets out the fundamental right to equality in general way and Articles 15 and 16 will be the "species" of it. They do not supplant but supplement to each other. Further, the constitution also guarantees to all citizens' right to practice any profession and to carry on any occupation, trade or business.<sup>20</sup> Of course the freedoms enumerated under Article 19(1) are not absolute and there can be "reasonable restrictions" on these rights.<sup>21</sup>

Article 21 provides that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. The Supreme Court in one of the landmark decisions has declared:

...The sweep (of this right) is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for e.g., by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. A equally important facet of that right is the right to livelihood because, no person can live without the means of living... If the right to livelihood is not treated as a part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood.....<sup>22</sup>.

<sup>15</sup> For ensuring workers' right to minimum wages, the Central Government has amalgamated 4 laws in the Wage Code, 9 laws in the Social Security Code, 13 laws in the The Occupational Safety, Health and Working Conditions Code, 2020 and 3 laws in the Industrial Relations Code.

<sup>16</sup> Article 43 (A) of the Constitution of India.

<sup>17</sup> E.P.Royappa v. T.N. AIR 1974 SC 555.

<sup>18</sup> For Example section 497 of IPC, before it is being decriminalised.

<sup>19</sup> Article 15(3)

<sup>20</sup> Article 19(1)(g)

<sup>21</sup> Reasonable restrictions provided under Article 19 (2) to (6).

<sup>22</sup> *Olga Tellis vs Bombay Municipal Corporation*, AIR 1986 SC 180

The right as provided by the constitution and as interpreted by the courts confers this basic right on women also. In its expanded horizon life includes all that give meaning to a person's life including culture, heritage and tradition with dignity of person.<sup>23</sup> By virtue of dynamic interpretation of this article every woman is now entitled to elimination of obstacles and discrimination based on gender for human development.<sup>24</sup> After this case, the Supreme court is now regarded as the watchdog to protect the essence of the constitution and safeguard the intention of the constituent assembly who made it. The court opined that any legislation or section should be just, fair and reasonable and in its absence even the established or prevailed law can be considered arbitrary. The judges mandated that any law which deprives a person of his personal liberty should stand the test of Article 21, 14 as well as 19 of the constitution. Also, principles of natural justice, fair trial etc are sheltered under article 21 and therefore, no person is deprived of his voice to be heard inside the court. After this case to declare any state action or legislation invalid, the "golden triangle" i.e, articles 14, 19 and 21 must be invoked.

Further, Constitutional duty is imposed upon every citizen of India under Article 51-A© 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 women.

In the ultimate analysis, the Constitutional philosophy and the resultant public policies coupled with postulates of the preamble guarantee social and economic democracy to women.

Undoubtedly they are the core foundation for economic empowerment and social justice to women for the stability of political democracy. That is, "they frown upon gender discrimination and aim at elimination of obstacles that come in the way (of women) for enjoyment of social, economic, political and cultural rights on equal footing".<sup>25</sup>

The State, under Article 51(c), shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. Article 253, read with entry 14 of the Union List of Seventh Schedule of the Constitution confers power on Parliament to legislate irrespective of the scheme of distribution of powers, to implement a treaty or a decision made at an international conference. This Article empowers the Parliament to make any law, for the whole or any part of the territory of India, for implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Conferment of this power on the Parliament is evidently in line with the power conferred upon it by Entries 13 and 14 of List I. The opening words of the Article "Notwithstanding anything in the foregoing provisions of this Chapter" mean that this power is available to Parliament notwithstanding the division of power between the Centre and States effected by Article 246 read with the Seventh Schedule. In the light of this Article, it is evident, the situation similar to the one arising in Canada by virtue of the 1937 decision afore-mentioned, may not arise.<sup>26</sup>

At this juncture, the pertinent question is whether the parliament is bound to alter or bring fresh laws in consonance with the treaty obligations. This query is substantially answered by the Indian Parliament as it has brought many positive discrimination laws for women in the recent past.

<sup>23</sup> *Madhu Kishwar and others v. The State of Bihar and others*, AIR 1996 5 SCC 125

<sup>24</sup> *Ibid*

<sup>25</sup> *Ibid*

<sup>26</sup> <https://legalaffairs.gov.in/sites/default/files/Treaty-making%20power%20under%20our%20Constitution.pdf> (Last visited on 27.03.2023)

## V. Judicial Response to Gender Justice

Right from the inception of constitution Indian judiciary is consistent in protecting the rights of women and it has been instrumental in bringing out much protective legislation in this regard. The Apex Court has evolved the doctrine of equal pay for equal work.<sup>27</sup> Article-39(d) of the Indian Constitution provides that there shall be equal pay for equal work for both men and women but these directives are not enforceable.<sup>28</sup> For the reason that fixation of pay scales of government employees is based on unreasonable classification violating Art-14 and Art-16 of the Constitution, the courts have evolved the doctrine of equal pay for equal work. In 2018 the Supreme Court has delivered a landmark judgment by which broadened the ambit gender justice through constitutional interpretation by which it struck down law on adultery as unconstitutional. The same is held to be violative of Article 14 and Article 15(1) of the Constitution.<sup>29</sup> Under section 497 of the Indian Penal Code, 1860 the accused is punished if he indulges in sexual intercourse with a married woman without the consent of her husband. The issue whether the act would amount to adultery is solely based on the existence or non existence of husband's consent and the woman concerned has no say in this. The Supreme Court's verdict on decriminalizing adultery is hailed as a positive step towards gender inequality and gender justice.

## VI. Conclusion

The Right to equality enshrined under Indian Constitution is sound enough to take care of gender justice but the same requires a socio-legal effort on large scale to make gender equality a reality. Though there are laws and policies towards gender equality, in reality there is dismal picture of discrimination towards women and the LGBTQ community. Denial of equality to women and the LGBTQ community has raised the need for gender justice and this has made India's position precarious at international level. Indian judiciary has been proactive in ameliorating the gender injustice but the task of achieving gender justice does not require the efforts of law alone. The society needs to change its mindset. The Court has addressed certain issues, such as the issue of sexual harassment at workplaces, denial of right in property, acid attack, rape, etc. which are not only discriminatory but also really inhumane but as regards the working of legislations like the one for protection of women from domestic violence, the society needs to follow the law. Law needs to influence and impact the society to overcome these menaces.

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<sup>27</sup> *Randhir Singh vs Union of India*<sup>2</sup>

<sup>28</sup> *Article 37*

<sup>29</sup> *Joseph Shine vs. Union of India, AIR 2018 SC 4898*