

Is Gender Equality Need of The Hour? A History Based Legal Analysis

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Abstract: Constitution of India recognises that there shall not be any prejudice against any citizens on grounds only of religion, race, caste, sex, place of birth or any of them. The state shall not deny any person equality before law or the equal protection of law within the territory of India. Moreover considering the status of the women in India, the constitutional framers have, as a protective discrimination, inserted a clause namely Article 15 (3) in the Constitution of India. Of which, the State can make any special provisions for the welfare of the women in India. In many cultures of ancient times, women had to encounter the difficulties of the rule and regulations made for men and by men who ruled the government, public life and the society. In simply speaking, in the ancient history women lacked many of the legal rights given to their male counterparts. According to a scholar Bonnie Smith, 'women had no public voice, could not vote, hold public office or serve in the military'. In supporting this view, Section 12 of the Army Act, 1950 states that 'No female shall be eligible for enrollment or employment in the regular army, except...' According to the Air India Employees Service Regulation 46 and 49, men were required to retire at the age of 58, while the women at the age of 35. In addition, the Air Hostesses services could be terminated if they were pregnant for the first time, married within 4 years of service or reached the age of 35.

In this background, the author aspires to analyse the women's rights in the past, and the connected legal reforms for the betterment of the status of the women in India. In addition to that the author intends to make an equilibrium approach towards the gender equality keeping in mind the recent developments in the status of the women.

Key Words: Denial of Legal Rights, Gender Equality, Legal Reforms, Women in Ancient History, Women Empowerment.

1. INTRODUCTION:

Every human society is consistently categorised by social diversity. Gender based diversity is one among them¹. In ancient history, women were considered with due respect and dignity. During this ancient time, there were women sages and they were highly valued. In the Royal family, women were given admiration and even made noteworthy involvement to decision making and managerial functions. They have played a *sine-qua-non* function in politics as well². Per contra, in the family of the weaker sections, the birth of the girl children were not welcomed and male children were appreciated. Sati and child marriages were unknown to this period³. Dowry system was also not known to this period. Monogamy was the general practice, though the polygamy was also in practice⁴. But, in the Rig Vedic period though the women were respected and admired, the discrimination started to exist. Initially the discrimination was relating to acquirement of education and other rights and abilities. Child marriage, Widow burning (sati), the Purdah and Polygamy further worsened the status of women⁵. The epics and Puranas were equated women with property⁶.

During the Jain and Buddhist period too, women were to lead to liberal and honourable life but their economic status were deteriorated and they were prohibited from political participation⁷. With Manu's codification of law

¹ P. Srivastava, Status of Women in India: Ancient, Medieval and Modern | sociology, <https://www.sociologydiscussion.com/status-of-women/status-of-women-in-india-ancient-medieval-and-modern-sociology/13526> accessed 1 May 2021

² Naresh Rout, 'Role of Women in Ancient India, Odisha Review' (2016), PL. 42-47.

³ Bhaswati Pal, 'The Saga of Women's Status in Ancient Indian Civilization', (2019) 23 (3), *Miscellanea Geographica – Regional Studies on Development*, PL. 1

⁴ P. Srivastava, Status of Women in India: Ancient, Medieval and Modern | sociology, <<https://www.sociologydiscussion.com/status-of-women/status-of-women-in-india-ancient-medieval-and-modern-sociology/13526>> accessed 1 May 2021

⁵Naresh Rout, 'Role of Women in Ancient India, (2016), Odisha Review', PL. 42-47.

⁶ *ibid*

⁷ Bhaswati Pal, 'The Saga of Women's Status in Ancient Indian Civilization', (2019) 23 (3), *Miscellanea Geographical – Regional Studies on Development*, PL. 1

regulating society, the women right's to education was completely detached. Further, with the implementation of various constraints on women's right to access education during the era of *Dharmasastras*, *Manusmriti*, a number of issues began to emerge⁸. Although the prevalence of *sati* increased in the society, the act of women's remarriage was strictly forbidden and women were absolutely dispossessed of in getting any share of their husband's property. The Manu while codifying the duties of women, states that '*in childhood a female must be subject to her father, in youth to her husband, when her lord is dead to her sons; an women must never be independent*'⁹. After this period and with the introduction of (during the) *Bramanical* age, women's position was reduced to a subordinate and unsatisfactory one as a result of competing social and religious beliefs. According to *Mánusmṛiti* (200 BC–200 AD), a women's primary responsibilities in any carnal copulation was to submit to male power and 'the concept of women as chattel or a commodity for a man's enjoyment was borne out in the introduction to Manu's Codification of Societal laws'¹⁰.

2. WOMEN DURING THE INDEPENDENCE PERIOD:

Development of a nation depends on the development of women in that nation. Women play a key role in bringing a greatest transition in our society. They are not only contributing their life for the welfare of their family but also had a major role to bring a social change in the society. In India, the struggle for women's equality began from twentieth century during the time of independence. Famous leaders like Raja Ram Mohan Rai, Mahatma Gandhi, Dr. B.R Ambedkar etc encouraged women to enter into public sphere to protect and uphold their rights which was deprived by the patriarchal society in India. To fortify this view, it is pertinent to mention here that in 1947, when India got freedom from Britishers, during this struggle for freedom, women played an important role. While all of the leaders were men, women entered into the picture and played a dynamic role in changing not only the history but also the society as a whole, through their pains in diverse walks of life such as education, politics and freedom movement.

Women took an equal role in all forms national liberation struggles, including the non-violent movement backed by Mahatma Gandhi and the Indian National Congress. Netaji Subash Chandra Bose was able to setup the Rani of Jhansi Regiment of the Indian National Army because of women's enthusiasm for taking part in the armed revelation. Women's participation in the freedom movement was very extensive. *Smt. Kasturba Gandhi, Madam Bhikaji Cama, Sarla Devi, Muthu Lakshmi Reddy, Aruna Asaf Ali, Sucheta Kriplani, Durga Bai Deshmukh, Priti Lata Waddedar, Captain Lakshmi and Janaki Davar of INA, Jahanara Shahnawaz, Randhabai Subbarayan*, etc., are some of them out of the many¹¹. This led to the legal changes in the various sectors such as education, employment, inheritance, family law etc.

Legislation based on the equal rights paved the way for the feminist struggle for equal rights from the suffragette movement and the right to vote, employment rights, property rights, rights leading marriage and divorce to child-care and medicine affects the very values of society, affecting not just the way we vote, but the way we work, live and function as a family, the way we access education, healthcare and justice¹².

3. WOMEN AND THE CONSTITUTION OF INDIA:

The Constitution of India is preceded by a resolution to secure to all its citizens...**EQUALITY** of status and of opportunity;¹³ And accordingly Part III of the Constitution of India does not confer fundamental rights but it confirms their existence and gives them protection¹⁴. Article 14 of the Indian Constitution states that, '*The State shall not deny to any person equality before law or the equal protection of laws within the territory of India.*' Under Article 15, it has guaranteed that '*The state shall not discriminate against any citizens on the grounds only of religion, race, caste, sex, place of birth or any of them*'¹⁵. Further, the said article articulates that '*Nothing in this article shall prevent the State from making any special provisions for women and children*'¹⁶. The Constitution of India guarantees that '*There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State*'¹⁷ and '*No citizens shall on grounds 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*'¹⁸.

⁸ *ibid.*

⁹ *Ibid*

¹⁰ Monika Sexena, 'Ganikas In Early India: Its Genesis and Dimension', (2006) 34, Social Scientist, PL 2.

¹¹ Chandrakala. S. Halli. and Dr. Shridhar. M. Mullal, "Status of Women In India" Status of Ancient, Mediaeval And Modern', (2016) 2 (2), Imperial Journal of Interdisciplinary Research, PL. 297.

¹² Ashima Obhan & Vrinda Patodia, Women Centric Changes in India, (5th April, 2019) <<https://www.mondaq.com/india/human-rights/795312/women-centric-changes-in-indian-law>> accessed 3 May 2021

¹³ Constitution of India, 1950, Preamble

¹⁴ See: M. Nagaraj and Ors Vs Union of India, (2006) 8 SCC 212.

¹⁵ Constitution of India, 1950 Art 15 (1).

¹⁶ *ibid* Art 15 (3).

¹⁷ *ibid* Art 16 (1).

¹⁸ *ibid* Art 16 (2).

Article 21 of the Constitution of India states that, 'No person shall be deprived of his life or personal liberty except according to the procedure established law'. Moreover, Part – IV through its Directive Principles of State Police vide Articles 39(a), (d), 42 direct its policy towards 'securing equality in having the adequate means of livelihood and equal pay for equal work for both men and women'. Besides, Part IV-A of the Constitution of India under the heading fundamental duties directs that, 'it shall be the duty of every citizens of India... to renounce practices derogatory to the dignity of women¹⁹'.

4. WOMEN AND THE DISCRIMINATION IN INDIA: A BATTLE FOR RIGHTS

Though the Constitution of India recognises that there shall not be any prejudice against any citizens on grounds only of sex, place of birth or any of them, In ancient cultures, women had to combat the detriments of the rules and regulations made for men and by men who reigned the government, public life and the society. In simply speaking, in the modern history too, women lacked many of the legal rights given to their male counterparts.

Some of the examples are as follows:

Section 12 of the Army Act states as follows:

'No female shall be eligible for enrolment or employment in the regular Army, *except in such corps, department, branch or other body forming part of, or attached to any portion of, the regular Army as the Central Government may, by notification in the Official Gazette, specify in this behalf*²⁰'.

According to this provision, a female would be entitled for enrolment or employment only in such corps, departments, branches or bodies that are part of or attached to the regular Army upon and to the extent informed by the Central Government.

In *Secretary, Ministry of Defence Vs Babita Puniya & Ors*²¹, The Supreme Court of India, has held that 'Women Short Service Commission (SSC) officers shall be entitled to exercise their options for being considered for the grant of Permanent Commissions (PCs) on the same terms as their male counterparts'. The fact of the case was that the women engaged on SSC in the Army sought parity with their counterparts in obtaining PCs and the quest for equality of opportunity in Indian Army was heeded by the Hon'ble Apex Court of India.

In *Lt. Col. Nitisha & Ors Vs Union of India & Ors*²², the Court observed as under:

'We must recognise here that the structures of our society have been created by males and for males. As a result, certain structures that may seem to be the 'norm' and may appear to be harmless are a reflection of the insidious patriarchal system. At the time of Independence, our Constitution sought to achieve a transformation in our society by envisaging equal opportunity in public employment and gender equality. Since then, we have continuously endeavored to achieve the guarantee of equality enshrined in our Constitution. A facially equal application of laws to unequal parties is a farce, when the law is structured to cater to a male standpoint..... It is not enough to proudly state that women officers are allowed to serve the nation in the Armed Forces, when the true picture of their service conditions tells a different story. A superficial sense of equality is not in the true spirit of the Constitution and attempts to make equality only symbolic. As such, in this case the Apex Court of India rule that *'the evaluation criteria set by the Army constituted systemic discrimination against the petitioners. The administrative requirement imposed by the Army authorities while considering the case of the women SSCOs for the grant of PC, of benchmarking these officers with the officers lowest in merit in the corresponding male batch is held to be arbitrary and irrational and shall not be enforced while implementing the decision of this Court in Babita Puniya*²³ ;

In *Anne Nagaraja & Ors Vs Union of India & Ors*²⁴, Delhi High Court ruled that 'the petitioners (women officers) along with the male officers had undertaken the same kind of training but nevertheless were denied permanent commission although the men were granted the permanent commission with no special merit except for the fact that they belong to the male sex, the Court held that the policy decision of the Government was irrational, arbitrary and clear case of discrimination.'

In *Anjitha K. Jose Vs State of Kerala*²⁵, the Kerala High Court held that 'a girl is having equal freedom similar to boy'. In this case, the Court dealt with the Hostel Rules which barred girls from going first and second show movie.

¹⁹ ibid Art 51A.

²⁰ Women were eligible for appointment as officers in the specific branches / cadre of the army are Army postal Service, Judge Advocate General's department, Army Education Corps, etc, See: SRO 11 source: *Secretary, Ministry of Defence Vs Babita Puniya & Ors*, Civil Appeal No.9367-9369 of 2011.

²¹ [2020] 7 SCC 469.

²² Writ Petition (Civil) No 1109 of 2020, Date of decision: March 25, 2021.

²³ [2020] 7 SCC 469.

²⁴ W.P(C) No: 10498 of 2015, Date of Decision 05.01.2018

²⁵ W.P(C) No: 40645 of 2017, <<https://www.livelaw.in/news-updates/discriminatory-hostel-rules-143640>> accessed 3 May 2021

While partly allowing the petition filed the petitioner the Court, further stated that it is for the girl students to decide whether to go or not for the first and second show movies²⁶.

The judiciary in *Mohini Jain Vs State of Karnataka*²⁷, struck down the discriminatory provision under section 5(1) of the Karnataka Educational Institution (Prohibition of Capitation Fee) Act, 1948. It fixed higher tuition fees and other fees to be collected from the student outside the state of Karnataka and hence Mohini Jain challenged the provision as it was violative of Article 14 and Article 21. The Court held that '*right to education flows from Article 21 of Indian Constitution and therefore it is a fundamental right under Indian Constitution*'. The judiciary has reiterated the importance of access to education especially for the girl children through its various judicial pronouncements in India. Though the directive principles of state policy imposed a duty upon the state to provide the employment and educational opportunities to all irrespective of sex, there exists a series of discrimination in the cases of employments in India.

In *C.B. Muthamma Vs. Union of India*²⁸ and *Air India Vs. Nargesh Mirza*²⁹, Apex Court of India struck down the discriminatory service conditions provided against the women employees which curtails their right to employment and right to life assured under Indian Constitution. Also, in *Vishaka Vs State of Rajasthan*³⁰, the Apex Court observed that '*equality in employment can be seriously impaired when women are subjected to gender specific violence such as sexual harassment in workplace*'. Therefore, the Court issued guidelines to ensure that women are safe in the workplace.

The above cases illustrates that, though the Constitution of India vide Article 14 safeguard every citizen of India, the right to equality before the law or the equal protection under law and the doctrine of equality before law implies that there is no discrimination in law, the women in India all along struggling in their way to get equal rights and equal opportunities on par with their counter parts. One step ahead, in the matter of *Supreme Court Advocate on Record Association Vs Union of India*³¹, the Supreme Court's Women Lawyers Association submitted a representation to the attention of the Constitution Bench alleging gender bias and discrimination against women in appointment to the High Courts and Supreme Court³².

5. GENDER EQUALITY: AN EQUILIBRIUM APPROACH IN TWENTY FIRST CENTURY IS NEED OF THE HOUR

It is no doubt that the women were struggled and are struggling for their equal rights in the male dominating society and achieved considerable success in achieving their goals. The State Governments (*Both Central and State Governments*) have enacted a number of legislations and provisions for safeguarding the rights and interest of the women in India. Yet, the menaces against the women are continuing. Be that in one side, on the other hand, now men in the digital age are also suffering in the hands of the women who misuse the provisions of law that are enacted for the welfare of the women. For example, in *Arnesh Kumar Vs State of Bihar*³³, The Apex Court of India observed that women are increasingly misusing the provisions of anti-dowry laws to harass their husbands and in laws. In yet another case³⁴, the Delhi based Court dismissed a women's complaint of domestic violence against her husbands and in-laws mentioning that she misused the legal provisions as a tool to extort money from him for unjustified personal gain and imposed an exemplary cost of Rs.1,00,000/- on her so that like-minded people are dissuaded from resorting to such malafide practices³⁵. The Court further noted that the imposition of cost is in furtherance of the principle that wrongdoers should not get benefit out of frivolous litigations.

In *Loha Vs District Educational Officer, Srivilliputhur*³⁶, The Madurai Bench of the Madras High Court, held as follows:

'Now-a-days, filing cases under the Domestic Violence Act³⁷ by female members has become a common one and a neutral and unprejudiced law is needed to protect the genuine victims of domestic violence, irrespective of gender. The notable flaw in this law is that it lends itself to such easy misuse

²⁶ The counsel for the petitioner argued that the Hostel Rules violated Clause 3.2 (13) of the "*U.G.C (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015*"

²⁷ [1992] AIR 1858

²⁸ [1979] 4 SCC 260

²⁹ AIR [1981] SC 1829

³⁰ [1997] 6 SCC 241

³¹ W.P(C) No: 13 of 2015

³² After Complaint of Gender Bias, SC Promises more Women Judges in Apex Court, <<https://www.livelaw.in/after-complaint-of-gender-bias-sc-promises-more-women-judges-in-apex-court-high-courts/?infinite-scroll=1>> accessed 4 May 2021

³³ [2014] 8 SCC 273

³⁴ Ms. Sumana Bhasin Vs Sh. Neeraj Bhasin and Ors, CC No:316/3/2007, Metropolitan Magistrate Court-01 (Mahila Court), Saket District Courts, New Delhi, Date of Judgment: 27.05.2015.

³⁵ Latest Laws.Com, Wife Imposed Rs. 1 Lakh cost for misusing Domestic Violence Laws

³⁶ W.P (MD) No: 8646 of 2015, Date of Order: 08.06.2015.

³⁷ The provisions relating to sexual violation and The Protection of Children from Sexual Offences Act are also not an exemption from attack.

that women will find it hard to resist the temptation to teach a lesson to their male relatives and will file frivolous and false cases’.

The Supreme Court of India, in *Sushil Kumar Sharma Vs Union of India and Ors*³⁸, held that ‘The object of the provision is prevention of the dowry menace. But, many instances have come to light where the complaints are not *bonafide* and have filed with oblique motive.... Merely because the provision is constitutional and *intra vires*, does not give a licence to unscrupulous persons to wreck personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with’. In this case, the Apex Court of India termed this misusing of the legal provisions as ‘*Legal Terrorism*’.

Yet, another example is that, in *Indian Professional Nurses Association Vs Union of India & Anr*, the Delhi High Court termed that ‘the Practice of Indian Army having only women in its nursing service is gender discrimination’. In this case, the petitioner’s association challenged the validity of Military Nursing Service Ordinance 1943 and the Military Nursing Service (India) Rule, 1944, to the extent they provide only for appointment of women³⁹.

The Military Nursing Service Ordinance 1943, Section 6 states as follows:

Eligibility for Appointment: ‘Any citizen of India **if a woman** and above the age of twenty-one, shall be eligible for appointment as an officer in the Indian Military Nursing Services and, if she satisfies the prescribed conditions, may be appointed thereto in the manner laid down in section 5’.

6. CONCLUSION AND SUGGESTION

From the above analysis, discussions and authorities cited, it is crystal clear that there has been a gross violation of women rights in Indian society from the past to present. Further, it is also indisputable that due to various actions of the government and the judiciary, there has been a considerable transition in the position and status of the women in the modern society. Yet, in one way or other, the tendency is increasing that some of the women are misusing the provisions of law which are being enacted for the interest and welfare of the women in India. Therefore, to bring an equilibrium approach it is the duty of the legislature to find out ways and means as to how to eradicate the menaces of misusing the provisions of law. Further, it our duty to identify certain fields in the society so as to bring the full participation of women on par with their male counterparts and that field has to be intensified. Wherefore, the author, since the equilibrium approach irrespective any gender is the need of the hour, would like to suggest the following measures to ensure that gender disparity is completely removed from our society.

- Special reservation should be provided in the Parliament and State Legislature to encourage women in political participation. Separate Constituencies have to be created for women candidates to contest in the elections.
- Due representation must be given to women in appointment of Judges in the Constitutional Courts in India considering the poor representation exist in the higher Courts.
- The government should establish a separate Committee to verify and ensure the accessibility of education to all girl child in India and it has to be provided at free of cost.
- The Labour Laws in India has to be amended to add a special privilege for women providing a menstrual leave of three days a month in addition to casual leave and earned leave as a part of their employment.
- A special legislation called ‘*The Protection of Citizens from Misusing the Provisions of the Act, 2021*’, shall be enacted to deal with the men or women who are misusing the provisions of law and stringent punishment should be brought into force for the legal terrorism, since mere possibilities of misusing the provisions of law cannot be a ground for assailing the provisions procedurally or substantially unreasonable as categorically mentioned in catena of decisions⁴⁰.
- Fields or departments must be identified to completely remove the disparity based on gender identity and to ensure the true spirit of the provisions of the Constitution of India as discussed herein above.

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³⁸ WP(C) No: 141 of 2015, decided on 19.07.2015.

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