



# Judicial Partaking in Respect of Gender Justice

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**Abstract:** Women in India are bearing the brunt of the country's increasing poverty, colossal human deprivation, poor governance, discriminatory law, and victims of physical and sexual violence. Among the number of poor, illiterate and unemployed people in the world, women form the majority. Women have hardly a voice in the decision-making for a in the country. They work more hard from dawn to dusk, but their work is not counted. Despite national and international commitments, women still continue to be treated as a single largest group of backward citizens of India. The constitution of India provides many safeguards to women and their rights. The preamble of the constitution provides to all citizens equality of status and of opportunity as well as justice- social, economic and political. Article 14 of the Constitution ensures equality before law to all persons within the territory of India. Article 15 prohibits discrimination on the ground of religion, race, caste, sex, place of birth or any of them. Article 15(3) empowers the state to make special provision for women and children. Article 16 speaks of equal opportunity in the matter of public employment.

**Key words:** Gender, Equality, Fundamental, Discrimination and Constitution.

## 1. Introduction:

Historically, women had the unfortunate fate of bearing the brunt of discrimination in all walks of life. Access to good opportunities in life like education, employment, property and opportunity to participate in social and political life on a footing equal to that of men was denied to them.. There is also the fear today regarding the abuse of 'cloning technology'. With the increase in sexual offences and harassments against women, the need for their security through law is very much felt<sup>1</sup>. The Preamble to the Constitution of India assures the people to secure, for all citizens, Social, Economic and Political Justice and Equality of Opportunity and Status<sup>2</sup>. The Preamble of the Constitution has been framed with great care and deliberation so that it reflects the high purpose and noble objectives of the Constitution makers. The words "Justice, Liberty, Equality and Fraternity are words of passion and power, also the watch words of the French Revolution. While winding up the discussion on the Draft Constitution of India, Dr. B.R. Ambedkar observed that "without Fraternity Equality and Liberty, will be no deeper than a coat of paint"<sup>3</sup>. The object of inclusion of these words in the Preamble is to develop human personality and guarantee the dignity of the individuals both men and women. Thus, 'gender justice' has been embodied in the Constitution right from its incorporation.

## 2. Gender Equality and the Constitution :

A Constitution is the basic document of a country, having a special legal sanctity, which sets the framework and the principal functions of the organs of the government of a State and declares the principles governing the operation of these organs. The Constitution of India aim at creating legal norms, social philosophy and economic values, which are to be effected by striking synthesis, harmony and fundamental adjustment between individual right

<sup>1</sup> Prof P. Ishwara Bhat, 'Constitutional Policy and Developments Towards Gender Justice' in Prof(Dr) C.A. Gurudath,(Ed.) 'Women Child Law and Society', Vidyavardaka Law College, (2006) at p 13-14

<sup>2</sup> B. Shivararamayya, "Equality and Inequality: The Legal Framework" in Andre Beteille(Ed.) Equality and inequality, Oxford University Press, Delhi (1983) at p 32

<sup>3</sup> Constitution Assembly Debates, vol. 12 at p. 980



and social interest to achieve the desired community goals.<sup>4</sup> As humanity marched toward development, and the concept of gender equality globally debated, it found a legitimate place in all important international documents. The principles of gender equality and gender equity have been basic to Indian thinking. The 19<sup>th</sup> and 20<sup>th</sup> centuries saw succession of women's movements first around social issues and later around the freedom struggle itself.<sup>5</sup> The Supreme Court speaking through Chief Justice J S Verma laid down several propositions of law of far-reaching consequences and this case can be considered as a great watershed in so far as the subject of gender equality is concerned. One of the logical consequences of such an incident is also the violation of the victim's fundamental rights under article 19(1)(g) the meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facts of gender equality including prevention of sexual harassment or abuse.<sup>6</sup> The Supreme Court further held that gender equality includes protection from sexual harassment and right to work with dignity which is a usually recognized basic human right. The common minimum requirement of this right has received global acceptance.

While dealing with employment under the State, both articles 15 and 16 have borne in mind- the former being a more general provision and the latter, a more specific provision. Since Article 16 does not touch upon any provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State. The term "any special provision for women" in Article 15(3) means those that the State may make to improve women's participation in all activities under the supervision and control of the State, they can be in the form of either affirmative action or reservation.<sup>7</sup>

### 3. Right to Equality: A Mechanism to ensure gender Justice :

The Constitution of India guarantees the Right to Equality under Articles 14 to 18. 'Equality is one of the 'magnificent' corner-stones of Indian democracy.' The doctrine of equality before law is a necessary corollary of the 'Rule of Law' which pervades the Indian Constitution. The Constitution is wedded to the concept of equality, and the right to equality is declared by the Supreme Court to be the basic feature of the Constitution. Consequently, either the Parliament or any State legislature can transgress the principles of Equality<sup>8</sup>. This principle has been reiterated by the Supreme Court that;<sup>9</sup> "Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequal as equals will be violation of basic structure of Constitution of India. The Constitutional bench of the Supreme Court has declared in unequivocal terms that content of Article 14 got expanded conceptually; and comprises the doctrine of promissory estoppels, non arbitrariness, compliance with natural justice, eschewing irrationality etc<sup>10</sup>. Article 15(3) is one of the exceptions to the general rules as laid down in Article 15(1) and 15(2). Article 15(3) reads: "Nothing in this article shall prevent the State from making any special provision for women and children".

Hence, Art.15(3) specifically provides that, the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth as contained in Art.15(1) and (2) shall not prevent the State from making any special provision for women and children. Thus it would be no violation of Art.15 if institutions are set up by the State exclusively for women or places are reserved for women at public entertainments or in public conveyances. The main object of article 15(3) is based on 'protective discrimination' keeping in view the weak physical position of women.

The impugned law was justified on the ground that the discrimination was not based on the ground of sex alone<sup>11</sup>. The exemption in favour of the wife was made for other reasons also, that women in this country were married at a very young age and that their husbands could have a plurality of wives<sup>12</sup>. When the matter relating to a mother as natural guardian was questioned, the Supreme Court held that relegation of a mother to an inferior position to act as a natural guardian is a violation of article 14 and 15 and hence, the father cannot claim that he is the only natural guardian<sup>13</sup>.

Equality before the law, in its narrow sense, means that no person is above the law and that all have equal access

<sup>4</sup> Mamta Rao, "Law Relating to Women and Children" 64, Eastern book Co. 2012

<sup>5</sup> J.N. Bhat, 'Gender Equality: Turmoil or Trium', Indian Bar Review, vol 25(2), 1998 p1

<sup>6</sup> Vishaka v. State of Rajasthan, 1997,(6)S CC 618

<sup>7</sup> Krishna Pal Malik, "Women and Law" 49, Allahabad Law Agency 2009.

<sup>8</sup> Kesavanand Bharathi v. State of Kerala AIR 1973 SC1461

<sup>9</sup> Badappanavar v. State of Karnataka AIR 2001 SC 260.

<sup>10</sup> M. Nagaraj v. Union of India AIR 2007 SC 71.

<sup>11</sup> Yusuf Abdul Aziz V. State of Bombay AIR 1954 SC 321

<sup>12</sup> V. N. Shukla's 'Constitution of India', Mahendra P.Singh(Ed.) Eastern Book Company, Lucknow, 1998 at p 74

<sup>13</sup> Gita Hariharan V. Reserve Bank of India AIR 1999 SC 1149



to the courts. This is termed as procedural equality. The courts in addition exercise their power to scrutinize the laws themselves so that they do not violate the right to equality, and is referred to as 'substantive equality'. If the law enacted by the State violates the equality of a citizen, it may be declared void.

However, as a balance has to be struck between the theories of political equality with the factual existence of natural inequalities, the Indian Courts evolved the doctrine of reasonable classification, even though article 14 is absolute in its language, following the view of the U.S. Supreme Court, Justice, Subba Rao pointed out that: "In Indian society of unequal basic structure, it is well high impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary, if society should progress"<sup>14</sup>.

Social justice, envisaged in the Constitution of India implies a reduction of inequalities, if not their eradication. Thus, Social justice involves distributive justice or redistributive, justice, i.e., distribution of resources, benefit and burden in society according to needs, worth, merit and work. Transgender person- a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as kinner, hijra, arvani and jogta<sup>15</sup>. An integral part of any society, and now being recognized as the third gender in the Supreme Court's decision the law has granted them legal and constitutional protection. The court held that Articles 14,15,16,19 and 21 of the constitution of India, all of which use gender neutral terms such as person, citizen and sex, include transgender within their ambit but that Indian statutes recognize gender as binary- that is, male and female<sup>16</sup>. While discrimination of sexual intercourse between consenting transgender protects them from exploitation and harassment in part, they are still discriminated against in civil rights such as marriage, adoption, succession etc.

Through the 73<sup>rd</sup> and 74<sup>th</sup> Constitutional Amendment Acts, 1993 the Constitution of India provided some more privileges for special attention towards women rights. It is well known fact that through these amendments the Constitution introduced here tier system of the local government. <sup>17</sup>These amendments to the Constitution have served as a major breakthrough towards enhancing women's political participation in democratic process. It has given a great opportunity to women as a mandatory principle to take part in the law making sector. If one has a close look at these amendments it has not given any other option to the male dominated society except accepting and inviting women's participation in politics. By this, women have got the chance to enter in the world from within four walls of their home. These amendments have created a milestone in the journey of women's development. These amendments have thus provided political participation to women at the local and State levels but not at the National level. Though it seems unfair, one should remember that these amendments are great achievements.

The sex discrimination case law remains overly determined by a formal model of equality. While some inroads to a substantive model of equality are evident, the judicial approaches remain limited by their formal equality discourse. But the case law dealing with sex discrimination raises some issues of its own. The prevailing conception of equality, as sameness has led to a focus on the relevance of gender difference. The first and most common approach is a protectionist approach in which women are construed as weak and subordinate, and are thus in need of protection. In this approach, the courts understanding of women's differences is asserted as justification for differential treatment is preferential treatment, more often than the differences are seen a sufficient justification in and themselves for differential treatment.

The second approach is an equal treatment or sameness approach, in which women are construed as the men, and thus ought to be treated exactly the same as men in law. This sameness approach is invoked in a number of different contexts. It has been used to strike down provisions that treat women and men differently. It has however, also been used to preclude any analysis of the potentially disparate impact of gender neutral legislation. According to the sameness approach, it is sufficient that women and men be treated formally equally.

Some feminist approaches endorse this conception of equality according to which gender difference ought to be irrelevant, and women ought to be exactly the same as men<sup>18</sup>.

In this approach, any recognition of gender difference in the past has simply been a justification for discriminating against women. Advocates of this approach for example, argue that special treatment has historically

<sup>14</sup> *State of U.P.V.Deoman, AIR.1960 SC 1125*

<sup>15</sup> Transgender Persons (Protection of Rights) Bill, 2018, section 2(k).

<sup>16</sup> *National Legal Service Authority Vs. Union of India 2014 (5) SCC p 438*

<sup>17</sup> Previously the Constitution provided two tier at Center and at State level but by 73<sup>rd</sup> and 74<sup>th</sup> amendments introduced 'Local Self Governments', So, it introduced third tier to the system.

<sup>18</sup> This approach is associated with the work of Wendy Williams, "The Crisis in Equality and Maternity, Sexuality and Women". 7 Women's Rights Law Report 179(1982)



been a double-edged sword for women, that is, under the guise of protection, it has been used to discriminate against women. Any admission of difference between women and men, and any attempt to accommodate those differences is seen to provide a justification for continued unequal and discriminatory treatment. For example, the use of gender difference in the past in prohibiting women to vote, to be elected to government, to be admitted to the legal profession, and other such participation in the economic, political and cultural dimensions of society<sup>19</sup>. The third and most promising approach is a corrective approach, in which women are seen to require special treatment as a result of past discrimination. Within this approach, gender difference is often seen as relevant and as requiring recognition in law<sup>20</sup>. Gender differences are not essential, but rather, their relevance is seen in the context of past disadvantage. In other words, gender differences need to be recognized because of the extent to which it has historically been the basis of disadvantage and discrimination.

Many of the rules, regulations and practices that impose restrictions on women's employment have been found to violate the equality guarantees. However, the decisions in this area are not problematic. Firstly, some of the rules and practices which restrict women's employment have been upheld. Secondly, the approach to equality and gender difference informing these decisions are often problematic. The Courts have overwhelmingly adopted a formal approach to equality. The approach to gender difference, however, is divided. Many judges have adopted a protectionist approach, while others have adopted a sameness approach.

The court adopts a formal approach to equality, within which the perceived differences between women and men justify the differential treatment, and in effect, precluded women's entitlement to equality. Moreover, the Courts adopt a protectionist approach to gender difference<sup>21</sup>. Many constitutional challenges have been directed to employment rules that specifically restrict the employment of married women. For example, the Supreme Court struck down the Air India Regulation relating to retirement and pregnancy bar on the services of Air hostesses as unconstitutional on the ground that the conditions laid down therein were entirely unreasonable and arbitrary<sup>22</sup>. Not only through the Constitution but even through different enactments of law protection and promotion of women rights in all walk of their life right from fetus stage to until their lost breath is guaranteed. But it is also an important point to be noted that mere guaranteeing rights in law and on paper is not sufficient; it should be implemented in reality only there the 'framers' aspirations will be fulfilled. So, this task of implementation by interpreting law is being performing by the Indian judiciary in a sensible and admirable manner. In fact the Indian judiciary has been sympathetic regarding women and women's issues right from beginning still today. There are several judicial pronouncements were uphold the Constitutional aspirations, in the protection and promotion of women rights. The Apex Court held that denial of seniority promotion on ground of sex and putting restrictions on marriage only to women arbitrarily is a serious gender justice<sup>23</sup>.

The Supreme Court of India set aside the practice of talaq-e-bidat, which allowed certain Muslim men to divorce their wives instantaneously and irrevocably, on the basis that it violated the constitution of India. The case itself does not primarily focus on gender justice but has strong positive implications on advancing women's rights and gender equality in India<sup>24</sup>. In 2018 the apex court held that denial of women(certain age group) in Sabarimala Ayyappa temple is violative of Article 14,15and 25. The court ruled that all Hindu pilgrims regardless of gender can enter the Shabarimala temple<sup>25</sup>.

Article 14 of the Constitution guarantees equality before law and equal protection under the law and it prohibit unreasonable classification. The Supreme Court has said that the principles underlying the guarantee of article 14 is not that the same rules of law should be application to all persons within Indian Territory or that the remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike, both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another, if a regards the subject matter of the legislation, their position is substantially the same.<sup>26</sup>

<sup>19</sup> In *Bradwell V. Illinois*, 16 wall.130(1872)490, the refusal to admit a woman to the legal profession was upheld by the United States Supreme Court, on the basis of Women's differences.

<sup>20</sup> Krieger and Cooney, "the Miller- Wohl Controversy: Equal Treatment, Positive Action and the meaning of Women's Equality," 13 Golden Gate U.L.REV.513(1983)

<sup>21</sup> *Raghavan Saudagar Singh V.State of Punjab AIR 1972 P&H.117*

<sup>22</sup> *Air India V. Nargesh Mirza AIR 1981 SC 853*

<sup>23</sup> *C.B.Muttam Vs. Union of India AIR 1979 SC 1868.*

<sup>24</sup> *Sayira Banu Vs. Union of India* <http://lawtimesjournal.in/triple-talaq>

<sup>25</sup> *Young Indian Lawyer Association Vs. State of Kerala* <http://www.sconline.com>>tag>s...

<sup>26</sup> *Western U.P.Electric Power and Supply Company Ltd v. State of U.P. 1969 SCR(3) 865*





#### **4. Conclusion:**

The fundamental rights guarantee gender equality under the law. Article 14 and 15 pronounces the right of men and women to equality before law and prohibit discrimination on the basis of sex by the state. The principles of gender equality pervades throughout the frame work of the constitution of India. In interpreting Article 14, the courts have approached formal equality, which means similarly situated be treated similarly, where substantive equality recognizes that equality requires individuals to be treated differently in order to eliminate inequality of disadvantaged groups.