



## Gender Justice: The Constitutional Perspectives

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### Abstract

*Gender justice means that no one denied justice or discriminated only because of one's gender (sex). The Constitution being a living document reflects the aims and aspirations of the people who gave to themselves the Constitution. Thus, Indian Constitution puts women completely at par with men and fulfills the cherished goal of equality in matters of civil, political and economic rights. Being a superior authority of the country the Indian Constitution ensures gender justice as it is enshrined in its Preamble, Fundamental Rights, Directive Principle of State Policy and Fundamental Duties. It recognizes women as a class by itself and permits enactment of laws and reservations favoring them. Several Articles in our Constitution make express provision for affirmative action in favour of women. It prohibits all types of discrimination against women and lays a carpet for securing equal opportunity to women in all occupations. The gender sensitive approach of the judiciary is reflected in case of C.B.Muthamma vs. Union of India AIR 1979 SC 1868, whereas Vishaka vs. State of*

*Rajasthan AIR 1997 SC 3011 is a landmark decision on the sexual harassment at work place. We have miles to go before gender justice is integrated into the system. Yet, despite of all the ground realities, the India womanhood has to make a long march to reach a level of justice, equity and good conscience.*

**Key words:** *Constitution, Fundamental Rights, Gender, Justice, Vishaka Guidelines*

### Introduction

The Constitution of any nation is *suprema lex*. The Constitution being a living document reflects the aims and aspirations of the people who gave to themselves the Constitution. Every Constitution has a philosophy of its own. In the same way the Constitution of India embodies certain goals and list of rights and offers to all people/citizens individually and collectively those basic right, freedoms and conditions of life which can make life significant and fruitful. Such rights are considered essential for the proper, moral and material upliftment



of people. These rights are an integral part of the Constitution. The Constitution of India is the bedrock of all social justice legislations.

Indian Constitution is a prominently social document that puts women completely at par with men and fulfills the cherished goal of equality in matters of civil, political and economic rights. It incorporates certain sacrosanct ideals in the form of comprehensive rights for women to metamorphose the abstract ideals into a concrete form, which would enable the upliftment of the status of women in the male-dominated chauvinistic society.

The Constitution of India, the fountain-head of all laws and the organic law of the land, recognizes equality of the sexes and prohibits discrimination on the basis of sex.

### **Gender**

Gender theory "is about challenging and changing relations of power that objectify and subjugate people. The term 'gender' used interchangeably with the word 'sex' to denote whether a person is a male or female. Gender is a part of the broader socio-cultural context. It applied to social analysis, reveals how women's subordination (or men's domination) is socially constructed.

### **Justice**

Justice is the keyword of the legal theory, which means being 'just and fair' to all the individuals in the society. Cicero has pointed out foundation of justice is good faith and that no one shall suffer wrong. The justice has a rainbow of colours, with a profound concept, which enwombs the great values of liberty, equality and human dignity. There can be no justice without equality.

**Gender Justice** - Gender justice means that no one denied justice or discriminated only because of one's gender (sex). The term gender justice often understood to mean justice for women. In legal parlance, it means justice without discrimination on the ground of sex and enjoyment of all rights granted to them by the Constitution and the other laws. Generally, gender justice refers to the equal and equitable treatment of women in social, political and economic domains. Gender justice challenges traditional rationality of law. Gender justice seeks to displace this secondary role itself by affirmative pro women action that puts them on equal footing of men.

In the opinion of Justice Krishna Iyer, "Gender injustice to the weaker sex is the disturbing concern of all Indians, men and women, politicians, professionals and people



with a social conscience, and we must battle for the cause of freedom and development of the feminine sector as an integral and strategic part of the struggle for women justice. No society can be free, fair or just until its women enjoy freedom and justice and opportunity for enfoldment of their full potential."

### **Status of Women**

Human history has been a history of male domination over women. Throughout history and indeed today women have often been subjugated, abused by and forced to be subservient to men. Though women's issue have moved to centre stage in our thinking gender justice and gender equality are still distant dreams. Injustice is writ large on many layers of Indian life-senses of sorrow and repression, backlogs of barbarity and indignity.

Women play a key role in development, in the context of the family and social stability. They have special sensitivity and empathy to social issues concerning the weaker sections of the society. Women are therefore in a strategic position in the delivery of justice especially the gender justice and social justice. Access to justice in this context becomes the focal issue in the justice delivery system. Enhancing the role of

women in the profession is vital for improving the delivery of justice and for just transformation of future society.

According to Mahatma Gandhi freedom means equality and equality means every person is equal before the law. Discrimination on any ground violates the natural rights of human being.

### **Constitutional Provisions**

Being a superior authority of the country the Indian Constitution ensures gender justice as it is enshrined in its Preamble, Fundamental Rights, Directive Principle of State Policy and Fundamental Duties. It recognizes women as a class by itself and permits enactment of laws and reservations favoring them. Several Articles in our Constitution make express provision for affirmative action in favour of women. It prohibits all types of discrimination against women and lays a carpet for securing equal opportunity to women in all walk of life including employment and participation.

In the Constitution gender specific provisions has been engrafted in –

#### **[A] Preamble**

The Preamble is an introductory statement of the Constitution of India, which is regarded as “a key to open the mind of the makers of the Constitution which may show



the general purposes for which they made the Constitution”. It declares the rights and freedoms which the people of India intended to secure to all citizens. The Preamble opens with the words ‘We the People’ are of wide significance, which echo and emphasis the ultimate sovereignty of the people irrespective of their sex, caste, creed etc. Further the Preamble proceeds with the objectives of providing justice, liberty, equality and fraternity to every individual. The core concept of the dignity of the individual has been embedded in the Preamble.

### **[B] Fundamental Rights**

Part III of the Constitution that is related to fundamental rights, are considered as the ‘heart’ of the Constitution. The Fundamental Rights are equally available to men and women who happen to be the citizens of India.

The framers of the Constitution realized that sex-equality was a paramount necessary for national development. Therefore, in order to eradicate inequality, discrimination and exploitation and to provide enough opportunities, it was necessary to promote the socio-economic interest of women to protect them from neglect and injustice. In order to achieve these objectives the

following principles has been laid down by the Constitution.

**Right to Equality-** Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws. The first expression ‘equality before law’ is a negative concept, is of English origin. It means everyone is equal before law. The second expression ‘equal protection of laws’ a positive one and is from American Constitution, which is the essence and core of the right of equality under which, the State is under an obligation to take necessary steps, so that every individual, man and women alike, is given equal respect which he or she is entitled to as a human being.

### **Prohibition of Discrimination on Ground of Sex**

Article 15(1) declares that, “The State shall not discriminate against any citizen on grounds only of ... sex... or any of there”. Article 15(3) further provides that the State can make any special provision for women. The expression “discrimination” and “sex” used in the language of the Article is nowhere explained in the Constitution. The word Discrimination means difference in treatment. Though the word ‘discriminate’ is



not used in Article 14, it is usual to avert the violation of Article 14 by pleading that the impugned law or executive act ‘discriminates against’ the party pleading. Article 14 does not forbid classification, and that equality is not denied by a permissible classification. However the Constitution goes further and prohibits certain types of classification which may be upheld under Article 14. For instance, religion, race or sex may furnish a legitimate basis for classification, but as far as citizens are concerned, Article 15 forbids a classification on the ground only of religion, race or sex or any of them subject to specific exceptions and Article 16 makes a like provision in connection with public employment as forbidden grounds for classification. Whereas “sex is an immutable characteristic determined solely by the accident of birth. The imposition of any disability or denial of any rights on this basis is against the system of nature as also against the system of any civilized society”. A discrimination against a man or a woman, only on the ground of sex would be violation of Article 15(1).

Supreme Court in *Government of A. P. v. P.B. Vijay Kumar* AIR 1995 SC 1648 explaining the object for inserting clause 3 to Article 15 and observed: “The insertion of

clause (3) of the Article 15 in relation to woman is recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the social-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Art. 15. Its objects are to strengthen and improve the status of women”.

Based on Article 15(3), quota based reservations for women in government jobs and setting up exclusive women’s college have all been part of the constitutional scheme and upheld as affirmative action that benefits women.

### **Equality of Opportunity in Matters of Public Employment under Article 16**

The banner of equality, the hallmark of our Constitution is foisted in the realm of public employment too, which is conferred by Article 16. Article 16 is an instance of the application of general rule of equality before the law laid down in Article 14 and the

prohibition of discrimination in Article 15(1) with respect to the opportunity for employment or appointment to any office under the State.

Articles 16(1) and (2) embody the general rule that State shall provide equal opportunities for all citizens in matters relating to employment or appointment to any office under the State. These provisions are an extension of the principle of equality before law and the goal of 'equality of status and opportunity' as set in the Preamble. The importance of these provisions is that a woman has the same rights in matters of employment under the State as a man and the State shall not discriminations against women on this count. It operates equally against any such discriminative legislation or discriminative executive action. If any law is passed or any executive action is taken to prevent the women from taking up employment under the State, such law or executive action could be challenged under Articles 16(1) and (2).

The Constitution provides the *Doctrine of Protective Discrimination* in favour of women. Protective discrimination connotes mitigating absolute equality to achieve the equality in favour

### **Right to Life and Personal Liberty**

The greatest heritage to the humankind is the right to life, personal liberty and dignity. Right to life enshrined in Article 21, which means the guarantee of life with dignity, included all the aspects of life, which go to make a person's life meaningful, complete, and worth living. In other words to live a life means life with dignity. The right to personal liberty is the foundation stone of fundamental rights, without its significance all other rights pale into insignificance. As the Supreme Court has on many occasions reaffirmed that, the "right to life" means something more than animal instinct. The wide interpretation of Article 21 brought in to it the right against sexual harassment of women at workplace. *Vishaka v. State of Rajasthan AIR 1997 SC 3011* is a landmark decision in this field and in *Neera Mathur v. L.I.C. of India 1992 SC 392*., the Apex Court held that requiring a woman to declare her personal problems was not only embracing and improper, but was against the dignity of the womanhood. Because of objective approach and wide meaning this fundamental right has undergone a total transformation thus, cover various aspects of life and liberty by which a person can lead a life with dignity.

## Right against Exploitation

For centuries, women have been humiliated, exploited, tortured and harassed in all walks of life physically, mentally and sexually. To safeguard and protect women against exploitation, the Article 23 (1) incorporates prohibition against ... begar and other similar forms of forced labour. Exploitation, which means the utilization of persons for one's own ends, is opposed to the basic concepts of the Constitution. It is opposed to the dignity of the individual, to which the Preamble refers.

The Constitution makers had in mind the widespread evil custom of forced labour without remuneration or just a nominal remuneration verging on pittance prevalent in the country since ages. The word 'begar' has not been defined in the Constitution, Thus 'begar' means involuntary work without payment. The expression 'other forms of forced labour' means to compel a person to work against his will.

In *People's Union for Democratic Rights v. Union of India AIR 1982SC1473*, the Supreme Court has held that the scope of Article 23 is wide and unlimited and strikes at 'begar' and 'other forms of forced labour,' where ever they are found, because

it is violative of human dignity and contrary to basic human values.

All these fundamental rights are intended to give a stimulus for women and women's emancipation.

### *[C] The Directive Principles of State Policy*

The Constitution makers poured their mind by setting forth the humanitarian socialist principles, which epitomized the hopes and aspirations of the people and declared them as fundamental in the governance of the country. Thus, the Directive Principles of State policy is enshrined in Part IV. They are affirmative instructions from the ultimate sovereign to the State authorities, to secure to all citizens justice, social and economic and equality of status and opportunity and to promote among them all fraternity assuring the dignity of the individual.

The Directive Principle from Articles 36 to 51 enjoins upon the State, certain principles with the aim of ensuring a just and equitable socio-economic order. These are the minimum requirements of civilized existence and it is the foremost duty of every State, whatever is its label, to ensure that all these necessities of life are available to all individuals. In fact, the Directive Principles are the guidelines for the framing of laws by



the Government. However, they are pious declaration, as they have no binding force.

The concept of social justice is emphasized by Article 38(1) which that the State shall promote the welfare of the people by securing and Article 38(2) enjoins that the State shall minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities.

Directive Principles contained special provisions for the welfare of women. One such provision is mentioned in Article 39(a), which provides that the State shall direct its policy towards securing the citizens men and women equally, have the right to an adequate means of livelihood. Under Article 39(d), the State shall direct its policy towards securing equal pay for equal work for both men and women. Further Article 39(e) is aimed protecting the health and strength of workers, men and women.

A very important and useful provision for women's welfare and well-being is incorporated in Article 42, which imposes the obligation upon the State to make provision for securing just and humane conditions of work and for maternity relief. In *Municipal Corporation of Delhi vs. Female Worker (Muster Roll) (2000) 3 SCC*

224 it was held that daily rated women employees were also entitled to the benefits of maternity relief.

Article 44 directs the State to provide a Uniform Civil Code throughout the territory of India. The judiciary has taken note of the injustice done to women in personal matters and therefore delivered judgment indicating the urging to have uniformity in personal laws. Such cases are *Mohd. Ahmed Khan vs. Shahbano AIR 1985 SC 945*; *Sarla Mudgal vs. Union of India (1995)3SCC 635*; *Danial Latifi vs UOI (20001) 7SCC 740*. Recently in *Shayara Bano vs. UOI LNIND 2017 SC 415*, the Supreme Court took into consideration the fact that in future Legislatures may attempt to adopt Uniform Civil Code for all sections of people.

### **Reservation of Seats for Women's in Election to Local Bodies**

The Parliament has succeeded in its efforts to provide for reservation of seats for women in election to the Panchayat and Municipalities, vide Constitutional Amendment Act 73<sup>rd</sup> and 74<sup>th</sup> respectively. Thus, not less than one –third seats are reserved for women belonging to the Schedule Castes and Schedule Tribes in the Panchayat as per Article 243(D) and in the Municipalities as per Article 243(T). Apart



from these provisions, a Constitutional Amendment Bill was introduced in the Parliament for the reservation of one-third of seats for women in the Lok Sabha and the State Assemblies however; this bill is still pending due to political differences.

#### **[D] Fundamental Duties**

A Constitution can never become functional merely through the State. It has to have a civil society, which share the values cherished by the Constitution. The Constitution conferred rights on the people and corresponding duties on the State. However, the people also owed duties towards other members of society. These duties were for the first time included in the Constitution by the 42<sup>nd</sup> Amendment Act, 1976. The preferential status as a strategy to achieve equal justice to women is evident from Article 51-A (e) in which a fundamental duty is cast on everyone “to renounce practices derogatory to the dignity of women”.

#### **[E] Judiciary**

The importance of Judiciary in a democratic set up for protection of rights can hardly be overestimated. The principal function of

Judiciary is to provide legal remedies against infringement of personal and property rights of persons. The gender sensitive approach of the judiciary is reflected in a number of decisions like *C.B.Muthuamma vs. Union of India* AIR 1979 SC 1868; *M/s.Mackinnon Mackenzie vs. Audrey D’ Costa* AIR 1987 SC1281; *Air India vs. Nergesh Merza* (1981) 4 SCC 335; *T.S.Reddy vs. Govt. of A.P.* AIR 1994 SC 544; *Govt. of A.P. vs. P.B.Vijay Kumar* AIR 1995 SC 1648; *Uttrakhand Mahila Kalyan Parishad vs. State of UP* AIR 1992 SC 1695; *AEPC vs. A.K. Chopra* AIR1999 SC. In *Sakshi vs. Union of India*, AIR 2004 SC 3566, the Supreme Court passed directions that must be adhered to while conducting trial of child sexual abuse or rape. *R.D. Upadhyay v. State of Andhra Pradesh*, AIR 2006 SC 1946, the Supreme Court considered the issue of development of children who are in jail with their mothers; where as in *CEHAT v. Union of India*, 2003 (8) SCC 398 the Supreme Court has issued Guidelines to prevent female foeticide. The unwed mothers need not name the child’s father as held by the Apex Court in *ABC v. The State (NCT of Delhi) SLP (Civil) No. 28367 of 2011*. To stop Acid attacks, regulate and restrict the sale of acid the Hon’ble

Court issued direction in *Laxmi v. Union of India* (2014) 4 SCC 427.

## Conclusion

Biological inferiority of the female demands additional privileges for maintaining proper socio-legal status of women. The Constitution, which lays down the basic structure of a nation's policy, is built and rest on certain fundamental values that are reflected in the Preamble, Fundamental Rights and the Directive Principles, thus described as the soul of the Constitution. In fact, the Constitution is title deed of social justice. Social and economic justice is a right enshrined for the protection of society.

As women is also an integral part of the society. Indian womanhood demand social and economic justice in practical terms with dignity. It is clear that dignity of womanhood, as a special factor of personhood, has been the salutary cynosure of constitutional concern. Special measures for uplift of women are mandated. Equal pay for equal work regardless of sex is State policy now expressed in legislation.

Exploitation and moral and material abandonment of youth are frowned upon by the Constitution. If Law's promises were facts, India would be women's paradise.

We have miles to go before gender justice is integrated into the system. Yet, despite of all the ground realities, the India womanhood has to make a long march to reach a level of justice, equity and good conscience. As aptly remarked by J. V. R. Krihna Iyer social pressure to broaden female equality alone can bring up new vistas of gender justice. Awakening of the collective consciousness is the need of the day. This responsibility has to be share by the State, community, NGOs, legislators who frame the laws and the judiciary in order to give a fillip to the legal reforms in the field of gender justice.

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