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# Judicial Approach towards Gender Discrimination in India

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## ABSTRACT

*Gender discrimination is a problem faced by women all over the world. Indian society is no exception to this and in recent years many steps regarding it have been taken by the legislation and the judiciary of India. This paper deals with the role that Indian judiciary played in the advancement of women in the society through its various judgments and progressive remarks. It plays an important part in providing the benefit of legal provisions to the people. Judiciary uses its discretion as well as judicial activism to support women empowerment.*

**Keywords-** Courts, discrimination, offences, patriarchy, women.

## I. INTRODUCTION

Women have been subjected to discrimination based on gender from time unknown. They have always been treated as a weaker gender regardless of their capabilities and achievements. Equality and freedom, evaded women in the history of mankind, it is found that different cultures, however distant they may be, have one thing in common which is contempt for women. The unequal and subordinate status of women, being offensive to the human dignity and human rights emerged as fundamental crisis in human development all over the world. The development of fundamental freedom and equal participation by women in political, social, economic, and cultural scenario are collateral of national development which depends on the social stability.

Unfortunately, India is one the countries where discrimination against women have existed from time immemorial. In the recent times, the legislative provisions exist their implementation and outreach were a problem because as a society woman are still considered subordinate to men in various aspects of life. The judicial decisions play a major role in defining the character of nation and in giving the meaning to rule of law as it impacts the most intimate details of everyday life and shape the identity of the judiciary. The decisions given by the judiciary becomes a norm for all people in the society and the influence of the court goes beyond those

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who come in direct contact with them. The status of women in our country has risen, which is still not up to the mark but is satisfactory, because of the active role of judiciary and the people who successfully helped to change the situation of women in the country by bringing such issues to the court. However, it is not necessary for people to get influenced as many of them are still governed by their customary laws and deep-rooted patriarchal thinking. Women are facing discrimination and atrocities which is why we need judicial activism to put an end to such acts. Justice K Rama Swamy in *Madhu Kishwar v. State of Bihar*<sup>2</sup> remarked that. '*Half of the Indian population too are women. Women have always been discriminated against and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all indignities, inequalities and discrimination.*'

## II. CAUSES OF GENDER DISCRIMINATION

### (A) Poverty

In India, the total thirty percent people are below poverty line, seventy percent of them are women. Women's poverty in India is majorly due to absence of economic opportunities and autonomy, lack of access to economic resources including credit, land ownership and inheritance, lack of access to education and support services and their minimal participation in the decision-making process. The situation of women on economic front is no better, especially in rural areas, and men still enjoy a larger share of such opportunities. Thus, poverty is root of gender discrimination in our patriarchal society and the economic dependence on the male counterpart is a cause of gender disparity.

### (B) Illiteracy

Despite many efforts by the countries around the globe that have rooted for the basic education, there are approximately 960 million illiterate adults of whom two third are women. Educational backwardness of the girls has been one of the causes of gender discrimination. The disparities became more significant between male and female literacy rate, during 2001. The literacy rate for males increased from 56 per cent in 1981 to nearly 76 per cent in 2001. The corresponding change in female literacy rate from 30 to 54 per cent. Overall, the decline on gender gap peaked in 1981 at 26.6 per cent and was 21.7 per cent in 2001 is less impressive. The interstate variation in literacy rate for males was much lower in comparison to females. At the state level female literacy rate varies from 35per cent in Bihar to 88 per cent in Kerala in states like Arunachal

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<sup>2</sup> (1996) 5 SCC 148.

Pradesh, Assam, Bihar, Rajasthan, and the Union Territory of Jammu & Kashmir, the female literacy rates are still below 50 per cent.

The progress towards education by girls is terribly slow and gender disparities exist at primary, upper primary and secondary stage of education. Girl's account for only 43.7 per cent of enrolment at primary level, 40.9 per cent at upper primary level, 38.6 per cent at secondary level and 36.9 per cent at degree level and above. Moreover, the participation of girls in education is still below 50 per cent. Gender differences in enrolment are prevalent in all the state at all levels in the country. They still are not able to realize identity and power in all spheres of life only due to illiteracy.

### **(C) Lack of employment opportunities**

Women have not been able to resolve the conflict between new economic and old domestic roles. In rural as well as urban India, women spend a large proportion of time on unpaid household chores. Women, in many cases, are not able to respond to new opportunities and shift to new occupations because their mobility tends to be low due to allocation of household responsibilities.

Rights and obligations within a house are not distributed evenly. Generally, male ownership of assets and conventional division of labour reduce incentives for women to undertake new activities. In addition, childbearing has clear insinuation for labour force participation by women. Time spent in bearing and rearing of children often results in de-skilling, termination of long-term labour contacts as in many cases women are not even aware of their rights of employment. Due to this, women are not able to become economically self-sufficient and face unemployment and their economic dependence on the male counterpart is itself a cause of gender disparity.

### **(D) Social customs, beliefs, and practices**

Women even in modern times are not free from social customs, beliefs, and practices. The traditional patrilineal joint family system confines women's roles mostly to the domestic sphere, allocating them to a subordinate status, authority and power compared to men. Men are perceived as the major providers and protectors of a family, while women are perceived as playing only a supportive role, attending to the chores given to them. Boys and girls are accordingly trained for different adult roles, status, and authority. In Indian culture since exceedingly early periods, men have been dominant towards women as a group and their status has been low in the family and society.

The preference for sons and disfavour towards daughter is complex phenomenon that exists in many places. Sons especially in the business communities are considered to be economic, political, and ritual assets whereas daughters are liabilities. Thus, anti-female social bias is a major concern in regard to gender disparity in our society.

The boy receives a ceremonial welcome on his birth, whereas everyone is sad at the birth of a girl child. The preference for male child is due to lower female labour participation, prevalence of social evils like dowry and many others causes. The typical orthodox mentality is present even in this modern era leading to sex determination tests, female infanticide, and foeticide.

Parents often think that teaching a girl child to manage the kitchen is more important than spending money on her education. Many feel that it is an unnecessary financial burden to send a girl child to school as one day she will be married off and shifted to some other family. This orthodox belief of parents is responsible for gender disparity.

#### **(E) Social attitude**

Though many social activists and reformers carried their crusade against all social odds to restore honour and dignity to women, attitudinal disparities still hunt our rural masses. Despite pronounced social development and technological advancement, women in our society continue to be victims of exploitation, superstition, illiteracy, and social atrocities.

The social stigma that women are housekeepers and should be confined to the four walls of the house is perhaps a viable cause of gender disparity. They should not raise their voice regarding their fortune for the sake of the prestige of the family. In patriarchal society a lot of weightages is given to men. In the health and nutritional field, male members of family are supposed to take fresh and nutritious food in comparison to women because either they are earning members or head of the family, or they are supposed to be more important than female members. This type of social attitude is conducive to create the problem of gender discrimination.

#### **(F) Lack of awareness**

Most of the women, especially in rural areas, are unaware of their basic rights and capabilities. They even do not have the understanding as to how the socio-economic and political forces affect them. They accept all types of discriminatory practices that persist in their families and society largely due to their ignorance and unawareness.

Article 15 of the Constitution of India states that, the state shall not discriminate any citizen on the grounds of only sex. The irony is that there still is widespread discrimination which is a

injustice to women. Hence, at the onset of the new millennium let this generation be a historic example by putting an end to the discriminations based on gender by unfurling the flag of gender justice in all our action and dealings.

As Desai has stated, *'if women get equal opportunities like men, they can work in every field like men. Today if she lags a little, it is not her fault but the fault of traditions which have suppressed them for centuries, owing to this, her own thoughts like also hang around only familial life and her nearest environment also does not provide favourable conditions for her devotion in the outside work. To change the situation along with economic growth social progress is also greatly required.'* Hence, the need of the hour is to effectively work against gender disparity to promote gender equality by empowering the women.

### **(G) Son preference**

In our patriarchal society there is strong son preference. The desire is in line with aspirations emerging from an increasingly consumerist culture leading to practice of female foeticide. Son is preferred to maintain family's surname and inherit ancestral property. Thus, son preference leads to discrimination at an incredibly early age.

## **III. JUDICIAL DECISIONS ENSURING GENDER JUSTICE**

Judges are applying their discretionary power to provide justice to women in the context of socio-economic conditions. The judiciary has played an important role in enforcing and strengthening the constitutional goals towards the protection of rights of women of the country. Some of the important case laws are as follows: -

### **(A) Equal treatment in public employment**

In *C.B. Muthamma v. Union of India*<sup>3</sup> the apex court in 1979 abrogated the discriminatory rules of the Indian Civil Services against women on the ground that it violated the fundamental rights of women employees to equal treatment in matters of public employment. Justice Krishna Iyer stated that, *'Freedom is indivisible so is justice. Our founding faith enshrined in article 14 and 16 should have been tragically ignored vis-à-vis half of India's humanity, viz., our women is a sad reflection on the distance between the Constitution in the book and the law in action.'*

### **(B) Mother as a natural guardian**

In *Ms. Githa Hariharan v. Union of India*<sup>4</sup> the supreme court relying upon the gender equality

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<sup>3</sup> 1979 AIR 1868.

<sup>4</sup> Writ Petition (C) No. 489 of 1995.

principles incorporated in the Indian Constitution, Convention on Elimination of all forms of Discrimination Against Women (CEDAW), and Universal Declaration of Human Rights (UDHR), interpreted the word 'after' given in section 6(a) of the Hindu Minority and Guardianship Act, 1956, and held that both father and mother are the natural guardians of the minor Hindu child. The mother cannot be said to be natural guardian only after the death of the father as that would not only be discriminatory but also against the welfare of the minor child, which is legislative intent of the Act.

### **(C) Women's right to privacy**

In *Neera Mathur v. Life Insurance Corporation of India*<sup>5</sup> the court was shocked to note that the declaration form required women candidates to provide information regarding their menstrual cycles and past pregnancies. The court held this to be an invasion in privacy of women and violative of Article 21 of the Indian Constitution, which guarantees the right to life and privacy, it also directed the LIC to delete those columns from its future questionnaire.

The judgment in *K.S. Puttuswamy v. Union of India*<sup>6</sup> has provided us new insights in of privacy and how it affects women, it protects a person's autonomy by preserving his/her bodily integrity and autonomous decision-making capacity.

### **(D) Inheritance right of women**

In *Mary Roy v. The State of Kerala*<sup>7</sup> the hon'ble Supreme court decided for the first time upon the inheritance of property by the Christian women against the law laid down in Travancore Succession Act, 1916. It was held that the provision under Travancore Succession Act, 1916 violates the right to equality guaranteed under Article 14 of the Constitution and creates discriminatory rights under Article 15 shall be held as void and cannot be made applicable.

In *Vineeta Sharma v. Rakesh Sharma*<sup>8</sup> a three-judge constitutional bench was set up to resolve the issue regarding section 6 of the amended Hindu Succession Act, 2005 and give the correct interpretation regarding the legislative intent. The court observed that joint Hindu family property is unobstructed heritage, in this the right of partition is absolute and is given to a person based on his/her birth. So, it is immaterial that the father of the coparcener was alive or not when the amendment in the Act was effectuated, hence, the coparcenary rights pass from a father to a daughter and not 'a living father to a living

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<sup>5</sup> 1992 AIR 392.

<sup>6</sup> 26<sup>th</sup>September, 2017.

<sup>7</sup> 1986 AIR 1011.

<sup>8</sup> 11<sup>th</sup>August, 2020.

daughter.’

### **(E) Bigamy**

The issue of bigamy in India was inspected closely in the case of *Sarla Mudgal v Union of India*<sup>9</sup> it settled the obscurity surrounding the rights, duties and obligations of the people who change their religion to defeat the purposes of law. The court in its judgment provided that a person changes his religion and commit bigamy to defeat the purpose of the law. After this in the *Lily Thomas v Union of India*<sup>10</sup> case, the judgment of Sarla Mudgal case was reviewed on the ground that the case violates the fundamental right to life and liberty and the right to practice religion provided under Article 20, 21, 25 and 26 of the Indian Constitution.

The apex court held that the argument of the petitioner that the judgment of the impugned case violates freedom of conscience and free profession, propagation and practice of religion as guaranteed under Article 25 and 26 of the Constitution, is implausible and is alleged to help those who defeat the purpose of law by hiding under the cloak of religion. The court further provided that the freedom guaranteed under Article 25 of the Constitution is a freedom, which does not intrude in the similar freedom of the other person. The court observed that the petitioners are being ignorant and rightly said that even under Islamic law, purity of marriage is upheld by Prophet Mohammad. In modern sense, the interpretation of Islamic law would never allow such acts in its religion, as it is a progressive, pious, and respected religion that cannot be given a narrow concept as has been allegedly done by the petitioners.

## **IV. PRESENT SCENARIO**

We cannot deny the fact that women have in India have made a considerable progress in the modern times, yet they had to face many handicaps and social evils. The Supreme court recently in *The Secretary, Ministry of Defence v Babita Puniya & Ors.*<sup>11</sup>, ordered the government to grant permanent commission to women officers in the Army’s non-combat support units on par with their male counterparts if they wish to continue with it after they complete their short commission, which has paved way for the future women officers in the defence services. A division bench of Rajasthan High Court upheld the notion that reproductive choice of a woman is a fundamental right provided under the umbrella of Article 21 of the Constitution, which was given after a petition seeking the permission for termination of pregnancy by a minor girl who was subjected to sexual assault conceived, was filed. Giving

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<sup>9</sup> (1995) SCC 635.

<sup>10</sup> AIR 2000 SC 1650.

<sup>11</sup> 17<sup>th</sup>February, 2020.

another progressive judgment the Karnataka High Court observed that the marriage does not determine the continuance of relationship between parent and child, excluding a married daughter from consideration for appointment on compassionate grounds is unconstitutional. It also stated that *'Son continues to be a son both before and after marriage and a daughter also should continue to be a daughter both before and after marriage. This relationship does not get affected by the fact of marriage, as marriage does not sever the relationship of the daughter with the parent.'* In one of the cases, the Bombay High Court held that 'prostitution' is not an offence under Immoral Traffic (Prevention) Act, 1956, woman have the fundamental right to choose her profession and cannot be forced to live in a correction home. Such judgments of the apex court and the High courts of the country give us hope that the future of women is in safe hands and regressive ideologies will no longer be entertained.

## V. CONCLUDING REMARKS

It is true that women have been given several rights in the recent years, however, it is one thing passing a law and its absorption in the thinking of society is a different matter. To prove themselves, the women of Indian society still must break the shackles of superstitions and patriarchal thinking. Crimes such as domestic violence, dowry death, sexual offences, female infanticide, honour killing, are still the evils in society which women face and until these are eradicated, we cannot in true sense say that women have been empowered. Therefore, the continuous support of the judicial institution of the country is needed for the empowerment and progress of women in Indian society.

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**VI. REFERENCES**

## 1. Books-

- Law relating to Women and Children, Mamta Rao, Fourth Edition.
- Modern Hindu Law, Dr. Paras Diwan.
- Indian Constitutional Law, M.P. Jain, Eighth Edition.

## 2. Acts-

- Hindu Minority and Guardianship Act, 1956.
- The Constitution of India.
- Immoral Traffic (Prevention) Act, 1956.

## 3. Websites-

- <https://www.lawaudience.com/ensuring-gender-justice-through-judicial-activism/>
- <https://www.bu.edu/wcp/Papers/Huma/HumaSing.htm>.

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