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Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

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BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ROLE OF INDIAN JUDICIARY IN CURBING GENDER DISPARITY

AUTHORED BY - AKANKSHA SRIVASTAVA
& VIJAY LAXMI

ABSTRACT

In this following Article the role played by Indian Judiciary in Curbing Gender disparity is discussed. Discrimination based on gender is a social evil that should be curbed at all times. The judiciary of a nation has to stepped up and interpreted the laws in many ways and has always upheld the principle of equality. Time and again how judiciary has upheld constitutional morality over societal norms is discussed in detail. The article discusses from general role of judiciary and moves to the provisions available in our constitutions for gender equality and then inspite of presence of these rights, how judiciary has played a significant role in curbing this social evil through its judgments.

Keywords: Indian Judiciary, Social Evil, Gender Disparity, Equality, Constitutional Morality

INTRODUCTION

"You can tell the condition of a nation by looking at the status of its women"^[1]

Jawaharlal Nehru

Hon'ble Justice Fatima Beevi , who passed away recently , was the first female judge of Supreme Court , Hon'ble Justice Leila Seth was the first woman Chief Justice of High court in India and Hon'ble Justice B. Nagaratana is slated to be the first female Chief Justice of India .^[2] It is either the first person who we remember for or the first female of any field. Why do we not say "First Male of any field and say First Female? Why do we specifically use the word "Woman?"

It is not hidden that women are considered a vulnerable section of our society from a very long time. And even though we have proper legislations and agencies working for women empowerment every single day, have we actually achieved gender equality even after 74 years of our Constitution being enforced?

But Before we see how judiciary has played a significant role in curbing gender disparity, we will first briefly discuss about the role of judges, in general. Indian democracy has three organs, namely Legislature, Executives and Judiciary. With legislature making the laws, Executives enforcing the laws, the Judiciary is invested with the responsibility of interpreting the laws. Judiciary is an independent body and is separate from the legislature and from the executives. This power is guaranteed under **Article 50**¹ of the Indian Constitution. The Judiciary is referred to as the watchdog of democracy and also as the guardian of the constitution. For the effective functioning of the judiciary, it is important to have an independent judiciary.

The important functions and roles of the Judiciary include:

1. **Guardian of the Constitution:** The Hon'ble Supreme Court is considered to be the guardian of constitution. Upholding Constitutional morality by protecting rule of law under any circumstances is the supreme role of judiciary.
2. **Law Making or Interpretation of Law -** There are different ways of interpretation of laws, such as literal interpretation, liberal rule of interpretation etc. However, when there is an ambiguity in interpreting the laws the Hon'ble court uses purposive rule of interpretation and such cases takes the face of law. Hon'ble Supreme Court has adopted this in multiple cases. For example: In **Laxmi v. Union of India**² the Hon'ble Supreme Court gave guidelines for acid attack victims because there were no specific law for such heinous crimes that were prevailing in society and then Sec 326A & Sec 326B were added in Indian Penal Code, 1860³ making such offences punishable. This is Judicial Creativity and is in conformity with upholding Rule of Law.
3. **Protector of Fundamental Rights:** Under Part III of the Constitution, there are fundamental rights guaranteed to the citizens against any arbitrary action. The Hon'ble Court protects these rights by issuing writs.
4. **Supervisory functions:** every court in India is under the supervision of Hon'ble supreme court and every judgment passed by the Hon'ble Court is precedent for all the courts in India.
5. **Advisory function:** They provide advise upon any question of law to any Constitutional Body or the lower courts.

¹Separations of Power, Indian Constitution

² (2014) 4 SCC 427

³ Ref Sec 124, The Bhartiya Nyaya Sanhita, 2023 No. 45 Act of Parliament 2023 (India)

HISTORICAL BACKGROUND

In early Vedic period, women were considered at par with the opposite gender. Old scriptures also indicate that women enjoyed equal amount of rights as that of men during the early Vedic period. There was no discrimination on the basis of sex. However, with passage of time the position of women in India started to decline. It had hit rock bottom during the medieval period, and when British people started to rule over it was the same, but because of our social reformers who strongly voiced against the discrimination against women, British had to introduce legislations in favour of women, for example: Sati Prohibition Act, Widow Remarriage Act, Prevention of Prostitution Act etc. They still did not touch the personal laws and neither has any government till date, brought in Uniform Civil Code, in spite of presence of **Article 44**⁴ under Indian Constitution, because, under personal laws women i.e. a daughters or wives or mother are not given equal status as that of males in the house. The Hon'ble Supreme Court has given landmark judgments which have paved way for women equality in personal laws too. Women are considered to be a vulnerable section of our society. They were depressed and ill treated so much in earlier times, that our constitution makers had to put in separate provisions for protection of rights of women, and as the society developed the legislature amended the constitution and inserted articles in constitution and also enacted specific legislations focusing on women rights. The most recent is 106th Constitutional Amendment, 2023 which reserves one-third of all seats for women in Lok Sabha, State Legislative Assemblies and Legislative Assemblies of National Capital Territory of Delhi including those reserved for SCs & STs.⁵

PROVISIONS FOR GENDER EQUALITY IN CONSTITUTION

Seeing such vulnerable conditions of women in our country, our Constitutional makers ensured that everyone i.e. including women got equal rights to live with dignity. There are also specific legislations passed by Parliament from time to time in order to curb this social issue, which are discussed below:

First and foremost is the Preamble of the Constitution. Although it is not an operative part of the constitution but it does sets out the aim and objectives of the Constitution. Preamble gives the outline of the Constitution or we can also say it gives us the Birds View of our Constitution. There is Social Justice, Economic Justice, Political Justice, also Equality of Opportunity and Status is guaranteed.

⁴ Uniform Civil Code, Indian Constitution.

⁵ The Constitutional (One Hundred and Sixth Amendment) Act, 2023.

i. Equality of opportunity and Equal protection of law⁶ -

Irrespective of gender, every person is entitled to equal opportunities and law protects every individual equally . Under Article 14 “... any person...” means that this fundamental right is available to every one living under Indian territory.

ii. Nothing in this article shall prevent the State from making any special provision for women and children⁷-

Meaning thereby the state if required can make specific laws in favour of women and children and it will not be considered a discrimination on the basis of gender. This article however, is only applicable upon Indian citizens. No foreigner can claim this right.

iii. Equality of opportunity in matters of public employment⁸ -

No citizen of India can be discriminated on the basis of their place of birth, sex, race etc. in any public employment. Same as Article 15, this Fundamental Right is available only to the citizens of India. Hence no person who is not an Indian citizen can claim his right in public employment.

Above mentioned are the Fundamental Rights, there are specific provisions in Part IV of the Constitution as well which particularly talks about the Directive Principles of State Policies (hereinafter referred as DPSP). Fundamental Rights are specifically enforceable i.e. if these rights are infringed, a person can claim this right in court of law, whereas for DPSP, they cannot be claimed in court. They are merely directives for each state to make laws in accordance with the given provisions, and time to time the states have made laws upon them. Provisions that talks about Gender Equality in DPSP are as follows:

iv. Equal pay for equal work for both men and women⁹

Legislation enacted under this is **Equal Remuneration Act , 1976** - the said Act guarantees and any gender who is doing work as equal amount to the opposite gender are entitled to equal remuneration . However even today the hard reality is that inspite of such Act, women are not paid equally and have to work so much more harder to establish their importance at work place.

⁶ Art. 14, Indian Constitution

⁷ Art.15(3), Constitution of India.

⁸ Art. 16, Constitution of India.

⁹ Art. 39(d) Constitution of India

v. **Provision for just and humane conditions of work and maternity relief**¹⁰ –

The legislation made in conformity with this article are, **The Factories Act, 1948** and **Maternity Benefits Act, 1961**. our Constitution came in 1950, Maternity Act was enacted in 1961 and it was enforced in March 1975, therefore for almost 25 years the working women of our country had no reliefs if they were pregnant. They either had leave their jobs or consider leave without pay, if the institution they worked for, allowed.

ROLE OF OUR JUDICIARY IN CURBING GENDER DISPARITY

The following judgements passed by our Hon'ble court have turned out to be the cornerstone of democracy and have paved way for equality between the gender. The Hon'ble Court have upheld Constitutional Morality over social norms.

* ***National legal Services Authority (NALSA) V. Union Of India***¹¹

Popularly called as the “*Third Gender Case*”. Our Constitution only recognized two genders Male and Female, but the Hon'ble Supreme Court recognized a third category of gender who are neither male nor female, the third gender, in the above case. Transgender were not treated with equal respect as that of other recognised genders, their treatment are worse than of a woman of our society. Due to lack of social acceptance they are forced to take low paying work or undignified work as their livelihood such as Badhai, begging and even work as sex workers. Parents tend to feel that they brought dishonour to the family and they will bring shame on the family. In the above case the Hon'ble Supreme Court recognised transgender people as the third gender and held that all transgender persons are entitled to Fundamental Rights under Article 14 (Equality), Article 15 (Non Discrimination), Article 16 (Equal Opportunity in Public Employment), Article 19(1)(a) (Right to Free Speech) and Article 21 (Right to Life) of the Indian Constitution. The Parliament made law after the Hon'ble court recognised third gender and enacted **The Transgender Persons (Protection of Rights) Act, 2019** and **the Transgender Persons (Protection of Rights) Rules, 2020**. In 2020, the parliament legally recognized ‘*transgender*’ as an official gender in India.

¹⁰ art. 42 Constitution of India

¹¹ 2014 SC 275

* *Anjali Guru Sanjana Jaan v. State of Maharashtra*¹²

The Bombay High Court observed that for the Village Panchayat elections, the petitioner identified herself as a female while she was a transgender and wanted to contest election on a women seat but her application was rejected. The Hon'ble Court held that the petitioner had the right to self-identify her gender and accepted her application.

[11]
[SEP]

* *Vishakha v. State of Rajasthan*

This case is also one of the major stepping stones taken by Indian Judiciary towards Gender Equality. The petitioner Vishakha was an NGO working for women which helped the victim and filed a case on her behalf. This writ petition was filed after an incident during 1990s wherein Bhanwri Devi, a social worker (State Government employee) was brutally gang raped when she tried to prevent a child marriage which was a part of her duty as a worker of Women Development Programme. The feudal patriarchs who were enraged by her fearless behaviour, decided to teach her a lesson and gang raped her repeatedly, to show their superiority over a woman of lower caste. The Rajasthan High Court acquitted the accused rapists who belonged to rich, affluent and powerful upper caste families. A PIL was filed in the Supreme Court by the above NGO in order to address the issue for protection of women at workplace. The Hon'ble Supreme Court gave guidelines for protection of women from sexual harassment at workplace based upon the Convention on Elimination of all Kinds of Discrimination against Women (CEDAW). The Government of India then enacted **Protection of Women (from Sexual Harrassment) at Workplace, 2013** also called as POSH Act.

* *Laxmi v. Union of India*¹³

Between 2008 to 2010 the acid attack cases were at their peak. Acid was so easily available in the market and there were no such laws present under our criminal laws for such acts. At most if a girl was injured by acid, the offender was booked under Grievous Hurt under IPC,1860¹⁴. This was yet another landmark judgment which recognised this prevailing crimes against women and had to be dealt with, on an immediate basis. The Hon'ble Court gave out guidelines for such crimes against women. Later on by Criminal Amendment Act 2013, the Government of India inserted specific sections and made acid attack a heinous crimes against women. With the enactment of Bhartiya Nayaya Sanhita, 2023(hereinafter called BNS), old IPC is now been

¹² 2021 Bom. H.C.

¹³ Supra note 2

¹⁴ Sec.325 Indian Penal Code,1860 Act 45 of 1860

repealed. Offence of Acid Attack is now covered under BNS,2023¹⁵

*** *Indian Young Lawyers Association vs The State Of Kerala*¹⁶**

Popularly called as “*Sabrimala case*”. The facts of the case centred around the Sabarimala shrine, which is a Hindu temple dedicated to God Ayyappan, in Kerala. As per tradition, women of menstruating age, i.e. between 10-50 years, were not allowed to enter the temple since God Ayyappan is considered to be the Bramhachari, and there was a belief that women of menstruating age would damage his “*Brahmacharita*”. The said rule of the temple was argued to be against Article 14, 15 and 17 of the Constitution. The court upheld the Constitutional Morality and held that this rule was in fact against the Fundamental rights guaranteed to women and allowed women of all ages to enter the temple premises and do Darshan of Lord Ayyappa . The judgment was passed by the five judges bench in 2017 with 4:1 ratio and Dissenting Judgment was given by Hon’ble Indu Malhotra, J. who held that the limited restriction on the entry of women between 10 years to 50 years was not be violative of Part III of the Constitution.

*** *Air India vs Nargesh Meerza & Ors*¹⁷**

In this case an Air Hostess had to step down from the position only because she got pregnant. The main issue in this case was that Air Lines rules were that an air hostess of Air India, upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier, was liable to be terminated from job. The Air Hostess employee challenged this rule of the airlines and contended that it was against Article 14 , 15 (1) and 16 of the constitution . Despite living in a society that is progressing, women are terminated describing that pregnancy is against societal morals and the Hon’ble court held that such rules were arbitrary and were unconstitutional and was ultimately struck down.

*** *C.B.Muthamma v. Union Of India*¹⁸**

The plaintiff was An IAS officer and had several issues which were mostly revolving around the fact that the Ministry of External Affairs, her workplace created a very hostile environment for women in the service sector. Her first complaint was on the basis that, there was a long-

¹⁵ Sec. 124, BNS,2023 Act 45 OF 2023

¹⁶ ((2017) 10 SCC 689)

¹⁷ 1981 AIR 1829

¹⁸ 1979 AIR 1868

standing practice of hostile discrimination against women in her workplace. Further, she complained that women had to give an undertaking at the inception of their work in the Foreign service that she would give her resignation if she were to get married. She added that she had to face the consequences of being a woman which was coupled by certain discrimination. She raised another pertinent issue saying that the Union Cabinet's members who appoint officers are prejudiced against women as a group. Lastly, the plaintiff brought to light that she was denied promotion on the bases of "merit". Upon which the ministry thought that if she was given promotion the supreme court will dismiss the matter as there will not be any issue left. Therefore the ministry promoted her, consequently court had to dismiss the case, but Hon'ble V.R.Krishna Murthy , J. In this judgement had some strong opinions against this practice of Government and of Union Public Service Commission. He remarked that the case can be dismissed but not the problem.

The authors feel the necessity to cite the above case in order to showcase that Women holding such high rank in the Government, working as a Civil Servant were facing discrimination of the basis of sex. Even though the case got dismissed, since the plaintiff received her deserved promotion, the problem was well noted by our Hon'ble V.R.Krishna Murthy, J.

**** Joseph Shine v. Union of India¹⁹***

This case is popularly called as Adultery case. A Writ Petition was filed under Article 32²⁰ by Joseph Shine challenging the constitutionality of Section 497 of IPC read with Section 198 of Cr. P.C., being violative of Article 14, 15 and 21 of the Indian Constitution. This was at first a PIL filed against adultery. The petitioner claimed the provision for adultery to be arbitrary and discriminatory on the basis of gender. The petitioner claimed that such a law demolishes the dignity of a woman. The Apex Court stated that Section 497 was old and constitutionally invalid as it robbed a woman of her autonomy, dignity and privacy. The Court was of the opinion that such a Section violated a woman's right to life and personal liberty by accepting the idea that marriage subverted true equality by applying penal sanctions to a gender-based approach to the relationship between a man and a woman. Therefore the Hon'ble Supreme Court struck down Section 497 in this landmark case and held it unconstitutional and violative of Articles 14, 15 and 21 of the Constitution of India. It also asserted that Section 198(2) of the

¹⁹ AIR 2018 SC 4898

²⁰ Constitution of India.

CrPC was unconstitutional to the extent as and when it is applied to Section 497 of the IPC.

*** *Mohd. Ahmed Khan v. Shah Bano Begum*²¹**

This case was one of the landmark judgment from Muslim women rights. The respondent i.e. Shah Bano Begum was petitioners wife. Under Muslim Personal Laws a wife is not eligible for maintenance after the Iddat period is over. The respondent filed a petition for maintenance under Section 125 Criminal Procedure Code, 1973, which is a secular law and a wife is eligible for maintenance if she is unable to maintain herself. The Hon'ble Court ruled in her favour and ordered for her Maintenance. This decision was however, criticised severely by the Muslim gurus and under pressure the then Government of India brought in new Act in order to nullify the order passed in the above case. The new Act was called **The Muslim Women (Protection of Rights on Divorce) Act, 1986.**

*** *Daniel Latifi v. Union Of India*²²**

After the enactment of **Muslim Women (Protection of Rights on Divorce) Act, 1986** there again ignited a conflict between CrPC and this Act . When Daniel Latifi surfaced before the Supreme Court since the Act was discriminatory on the grounds of Art 14, 15 and 21. Using its power of Judicial Creativity the Hon'ble court drew a harmonious construction between the Act and CrPC, and held that even after Iddat period is over the husband who was divorcing his wife and Iddat period is over the husband is bound to contemplate living sources for the wife and accordingly make preparatory arrangements. Since he married her and after he divorced her, she still is his responsibility if she is unable to maintain herself. On the contrary, under Muslim law and under the newly made Act after the Iddat period was over, it was her relatives responsibility to maintain her and not the husband's responsibility.

*** *Shayra Bano v. Union of India*²³**

The petitioner married Mr. Rizwan Ahmad in 2002, immediately after the wedding the groom and his relatives started to ask for dowry. Since their dowry demands were unmet, they started to drug her, abused her, and eventually abandoned her while she was sick. In 2005, the husband of petitioner gave her instant talaq also called *Talaq -E - Biddat* , where the husband has to pronounce the words talaq thrice in one sitting. The consent of women is not required. The

²¹ AIR 1985 SC 945

²² AIR 2001 SC 3958

²³ AIR 2017 SC 4609

petitioner filed a writ petition that such practice of triple talaq , polygamy and Nikah Halala under Muslim law were against Art 14 , 15, 21 , and 25 of Indian Constitution . In a 3:2 split, the majority held that the practice of talaq-e-biddat was ‘MANIFESTLY ARBITRARY’ and unconstitutional. Chief Justice Khehar and Justice Nazeer dissented, stating that *talaq-e-biddat* was protected by the Right to Religion and that it was the job of Parliament to frame a law to govern the practice. Two years later the Parliament made a law upon the Judgement. The Act is now called **Muslim Women (Protection of Rights on Marriage) Act, 2019** which made the practice of *talaq-e-biddat* a criminal act, punishable with up to three years imprisonment.

*** *Vineeta Sharma v. Rakesh Sharma*²⁴**

In 2005 the parliament made an amended Section 6 of Hindu Succession Act, 1956 where daughters were given coparcenary rights in ancestral property of their fathers, before this 2005 Amendment this right was only with the males. This Act came into force on 9th September 2005. This amendment however created so many more doubts in people's mind, one of the doubts was if the father had to be alive on 9th September 2005 for daughters to have coparcenary rights. There were two contradicting judgments of Divisional Bench, which confused people to follow which case. Then the above case came in 2020 and cleared all the doubts. The Hon'ble Court in the above case held that the father need be alive on 9th September 2005 for daughters to have coparcenary rights. This rights would have a retrospective effect and any daughter born before 1956 also will have a vested interest in the ancestral property of the father.

*** *Ms. Geetha Hariharan v. Reserve Bank of India*²⁵**

This case related to Hindu Minority and Guardianship Act (hereinafter called HMGA). The brief facts of the given case are, the petitioner, who was married with a son, applied to the respondent, the Reserve Bank of India ("RBI"), for bonds to be held in the name of their minor son and had signed off as his guardian. The respondent sent back the application to the petitioner, advising her to either produce the application signed by her son's father or produce a certificate of guardianship from a competent authority in her favour. The respondent was of the opinion that the petitioner's husband was the natural guardian on the basis of Section 6(a) of the HMGA. That provision stated that the father is the natural guardian of a Hindu minor

²⁴ AIR 2020 SC 3717

²⁵ AIR 1999 SC 1149

child and the mother is the guardian “after” the father. The petitioner challenged the constitutional validity of this provision in the Supreme Court on grounds that it violated the right to equality guaranteed under Articles 14 and 15 of the Indian Constitution. The Supreme Court, relying on gender equality principles enshrined in the Indian Constitution, CEDAW and UDHR, and widely interpreted the word “after” in the provision and upheld the constitutional validity of Section 6(a) HMGA, 1956. It was held that both the father and mother are natural guardians of a minor Hindu child, and 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 child, which is legislative intent of HMGA, 1956. This case is important because it established for the first time that a natural guardian referred to in the HMGA, 1956 can be a father or a mother: whoever is capable of and available for taking care of the child and is deeply interested in the welfare of the child, and that need not necessarily be the father.

Conclusion

Discrimination on the basis of gender is not present in one particular section of society but in every strata of society, from a Housewife to an IAS officer, women as well as transgender face discrimination. Our judiciary have no doubt have done a commendable job in curbing gender disparity against all evils yet there is still a long way to go. On paper there are laws that empower the women, but its reality is still far fetched. But Due to Separation of power in India, people have faith in our judicial system and they firmly believe that justice always prevail against all odds.

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