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PROTECTIVE DISCRIMINATION IN FAVOUR OF WOMEN UNDER THE CONSTITUTION OF INDIA: AN OVERVIEW

Amrender singh

Abstract

Gender discrimination is way of life almost all over the world, particularly so in India. Offending feelings of women subsisting since immemorial time. Women constitute about one half of the global population, but they are placed at various disadvantageous positions due to gender differences and bias. After independence of India, the new constitution of India was framed keeping in view the unequal treatment meted out to the woman from time immemorial. In India the history of suppression of women is very old and long which is responsible for including general and special provision for upliftment and development of the status of woman. Certain provisions and legislations are specifically enacted for the benefit of women.

INTRODUCTION:

The prosperity and growth of a nation depends on the status and development of its women as they not only constitute nearly half of its populations, but also influence growth of the remaining half. In India too half of the population are women, still they have always been discriminated against and suffered and are suffering discrimination in silence. In India feminine glory was at its zenith in the Vedic period, after which it suffered a decline. After Independence, despite of the fact that during last century a social reform movement was started and constitutional provisions for women also aimed at securing equal status. They have been subjected to all indignities, inequality, inequity and discrimination, but still self-sacrifice and self-denial are their nobility and fortitude.¹

HISTORICAL BACKGROUND:

In India, the history speaks that women are considered as a divine force but the multi-cultured India society placed the women at different disadvantaged position.² The positions of women in India from pre-historic time to the present day indicate the general lines on which they have confronted with various types of humiliation, tortures and exploitation.³ Indian society has been a tradition bound society in which the traditionalists had presented an idealized picture of women substantiating their claims on the basis of certain references from the Vedic and classical literature. ⁴The highest place has been accorded to women in Indian religious and philosophical thoughts. The Indian philosophy poses the women with dual character. On the one hand, she is considered fertile, patient and benevolent but on the other hand she is considered aggressor and represents 'Shakti'.⁵ The position, power, status and disabilities of the daughter, the wife and the widow went on changing in course of time. Women once enjoyed considerable freedom and privileged in the spheres of family, religion and public life, but as centuries rolled on, the situation went on changing adversely and they were subjected to various types of discrimination. ⁶ The position which women occupied in Hindu society at the dawn of civilization during the Vedic age is much better than what we ordinarily expect it to have been. ⁷

Status of Women in India:

¹ Devi Kovuru, Women's Equality in India: A Myth or Realty 2000 p. 3.

² Taipathi S.C. Law relating to women and children 2010 at 1.

³ Misra, Rekka, Women in mugal India 1967 at 1.

⁴ Sood, Sushma, Violence Against Women 1990 at xi Historical Background of the Women in the different period of the History will give clear picture of women development unlike.

⁵ Supra Note 2 at 1.

⁶ ALIEKAR, A.S. (Dr) The Position of Women in Hindu Civilization 1956 at 355.

⁷ Id., at 337.



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There is no uniform status of the women in the Indian society. However, civilization showed the overall upliftment of women's position. In Indian society there have been infinite variations in the status of women according to cultural malice, family structure, class, caste, property rights and morals.⁸ Women along with man, from time immemorial, have formed an integral part of social structure. The role played by women in various walks of life has contributed to the evolution of values, which have counted for what may be described as all around progress. The women's status is the measuring yard for assessing the standard of culture and society of any age.⁹ Women constitute a unique resource of the nation. It needs recognition that women are the builders and molders of a nation's destiny. The status of women in independent India occupies an important role and all efforts were made to establish the significant role that she can play in for the upliftment of her own self and society at large. ¹⁰ Therefore the Indian polity more or less has always tried to cope with the contemporary need-based enactments and development of laws for the upliftment of the status of women and establishment of a just and equitable social order, where nobody can be treated or exploited by another as unequal. ¹¹ The low status of women in India up to 1940 had mainly stemmed from the traditional patriarchal norms, customs, caste restrictions, illiteracy, economic dependence, religious prohibition and lack of female leadership. With these challenges to meet, framers of the Indian Constitution have added numbers of provisions for the benefit and protection of the women. Keeping in view the constitutional objectives of the concept of equality and non-discrimination against women, government of India have enacted certain laws to improve the condition of women in independent India and has continued the process of enacting legislative measure to raise the legal status of women. ¹² After independence, various legislations have been brought out in order to give equal rights and privileges with men, eliminate discrimination against women, abolish inequality between the sexes, and remove external barriers coming in the way of their self-realization and development. ¹³ Thus rights and privileges have been made available constitutionally and enabling legislation has been drafted to give the women her due. ¹⁴ In the initial year following independence, the state has attempted to codify existing laws of the majority of Hindu population against traditional and conservative opinions against women. These laws¹⁵ generally determine the issue of marriage, divorce, guardianship, adoption and property and tend to non-discriminate against women. ¹⁶ However, the presence of personal laws tends to compromise the women's quest for equality and freedom as the basically conservative nature of these laws harbours many inequalities and is discriminatory to women. They entrench the women's subordinate position within community and society by sanctioning personal laws, ¹⁷ the state of treating women as equal citizens. ¹⁸ Thus a situation of anomaly exists in the constitution which prohibits discrimination based on sex, and yet discriminatory personal laws are permitted. The state has from time to time addressed itself to the examination and review of conditions of women prevailing in the country and has appointed committees and commission for the purpose. The state has also encouraged civil society initiatives in the form of voluntary associations, Non-governmental organization and advocacy groups to intervene in different ways to build women's awareness, consciousness and education, provide various kinds of support to women against oppression and violence and create a social environment intolerant of exploitation and injustice against women. ¹⁹

⁸ Supra Note 3 at 1.

⁹ Ibid

¹⁰ Kumar, Hajira. Varghese, Jaiman. Women and Law in India 2006 at ix.

¹¹ Das, P.K. Protection of Women From Domestic Violence 2011, pp. 3-6.

¹² Sanley, Selwyn . Social Problems In India 2004 p1

¹³ Kant Anjani- Women and the Law 2003 p. 16.

¹⁴ Juyal Pooja Women's Studies in India: Some Contemporary Contours, 2005 p. 62.

¹⁵ In the space of two year between 1954-1956 the state has passed Hindu Marriage Act 1955, The Hindu succession Act, 1956, The Hindu Minority & Guardianship Act, 1956, The Hindu Adoption & Maintenance Act, 1956. These acts apply only to Hindu.

¹⁶ Supra note 14, at p. 58.

¹⁷ The opposition to reform of personal law is based on the constitutional right to freedom of religion, guaranteed as fundamental right under Articles 25-28, which is claimed to encompass the right to be governed by religious personal laws. The consequence of this for women of minority communities is that they continued to be governed by the religion based personal laws, which may in some respect be at variance with equality as promised by the constitution to women as citizens. As Quoted Supra note 14at p. 65.

¹⁸ Id at p. 64.

¹⁹ Id at pp. 58-60.



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Constitution of India and Protective Discrimination in favour of women

Constitution of India is the basic and primary document having special legal sanctity, which is taking people and communities towards the non-discrimination against women. In India the constitution makers while drafting constitution were sensitive to the problems and indignities faced by women from time immemorial and made specific provisions relating to them. Although attitudes may be slow to change, but the potential impact of the provisions contained in this document should not be minimized. It is not therefore, sufficient merely to strike at laws which are obviously discriminatory. 20

Directed and guided by the constitution, various revolutionary laws giving equal status to women with men have been enacted in order to remove all disparities, dissimilarities and discrimination against women. For instance, Dowry Prohibition Act 1961, the Family Court Act 1984, Equal Remuneration Act, The Commission of Sati Act 1987, the Indecent Representation of Women Act, The National Commission for women Act 1990, Domestic Violence Act 2005 etc., all these enactments are intended exclusively for women to uplift the dignity and status in society and in the family. 21

To know the role of constitutional provisions in women empowerment, it is necessary here to examine one of the most important provision contained in the Constitution of India, specifically and generally for their benefit and to ameliorate certain unhappy condition in which they found themselves and to provide them equal status and opportunities in all spheres of life at par with men i.e. Article 15.22

Article 15 of the Constitution provides for a particular application of the general principle embodied in Article 14 i.e. Right to equality. The first clause of Article 15 direct the state not to discriminate against a citizen on rounds only of religion, race, caste, sex, or place of birth or any of them. The second clause prohibits citizens as well as the state from making such discrimination with regards to access to shops, hotels, etc. and all places of public entertainment, of public resort, wells tanks, roads etc. The third clause of Article 15 is of special importance for women and children because its empowers the state to make special provisions for the protection of women and children. According to this Article 15(3) of the Constitution discrimination on grounds of religion, race, sex or place of birth shall not prevent the state from making any special provision for women and children. This clause is an exception to the rule against discrimination embodied in clause (1) as well as clause (2) of Article 15 because both these clauses prohibit discrimination on the ground of sex, but clause (3) enables the state to confer special right upon women. From the reading of clause (1) to clause (3) of Article 15, together it is clear that while discrimination on the ground of sex is impermissible, but special provision for women are permissible. 23 Thus it is no violation of Article 15 if state positively discriminates in favour of women to make special provisions to ameliorate their social, economic, and political condition and accord them parity. 24

While explaining the object for inserting clause (3) to Article 15, the Supreme Court observed “that the insertion of this clause in relation to women is a recognition of the fact that for centuries, woman of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-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 clause (3) is placed in Article 15. Its object is to strengthen and improve the status of women. 25

Clause (3) of Article 15 which permits special provision for women, has been widely resorted to by the state and the courts have always upheld the validity of the special measures in legislation or executive orders favouring women. In particular provisions could be seen in the sphere of Criminal law, Labour Industrial laws, Service law and Civil Procedure Code etc., where discrimination in favour of women have been upheld. 26

20 Supra note 10 p.265

21 Chawla, Monick, Gender Justice: women and Laws In India 2006 p. 3.

22 Majumdar Maya- Encyclopedia of Gender Equality through Women Empowerment. Vol. 2, 2005 p. 95.

23 SHUKLA V.N. Constitution of India 2012 p. 56.

24 Supra note 2 pp. 5-6

25 Government of A.P. v. P.B. Vijaya Kumar AIR 1995 SC 1648 Quoted in Supra note 20 pp. 154-155.

26 Bakshi, P.M. Constitution of India 2010 p. 28.



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Clause (3) of Article 15 of the Constitution, allows legislation providing for discrimination in favour of women. On the strength of this Article 15(3), several statutory provision in favour of women have been upheld. 27 These include provisions exempting from punishment for adultery under Section 497 of Indian Penal Code, 1860, 28 provisions giving special rights to women in respect of bail under Section 437 of Criminal Procedure Code 1974, 29 provision under Section 195 of Criminal Procedure Code 1974, which requires the husband to maintain his wife and not vice versa, 30 however, in the changed circumstances, where women are ahead of many sphere, if she is earning and husband is not earning and they want to separate the wife should be liable to pay the maintenance to the husband if he is not earning. Provisions under order 5, Rule 15 of Civil Procedure code, 1908, 31 which makes service of summon on the male members of the family only and provisions for reservation of seats for women in local bodies or in educational institutions. 32 Similarly Section 14 of the Hindu succession Act, 1956, absolutely vesting the inherited property in woman which was earlier held by them as limited estate, has been upheld by the Supreme Court relying upon article 15(3) of the Constitution. 33 The 'special provision' which the state may make under Article 15(3) can be in the form of either affirmative action or reservation. Therefore, making special provision for women in respect of employment or posts under the state is an integral part of Article 15(3) and the power conferred under this clause is not whittled down in any manner by Article 16. 34

Judicial Response Favouring Protective Discrimination In Favour Of Women. :

The following few cases may be helpful in understanding the protective discrimination in favour of women.

In Yusuf Abdul Aziz v. state of Bombay, 35 the constitutional validity of Section 497 Indian Penal Code, 1860, which punishes only the male counterpart and exempts the women from punishment, was challenged on the ground that it is violative of Articles 14 and 15(1) of the Constitution. In this case petitioner contended that even though the women may be equally guilty as an abettor, but only the man was punished, which violates the right to equality on the ground of sex. The Supreme Court upheld the validity of the provision on the ground that classification was not based on the ground of sex alone. The Court relied upon the mandate of Article 15(3) of the Constitution and laid down that it was covered by the exception clause 3 of Article 15 to uphold the validity of this provision. The discrimination was therefore deliberate in view of the social position of women in this country. 36

In Miss C.B. Muthamma v. Union of India³⁷ rules regarding seniority and promotion affecting women members of India Foreign Service were challenged. The petitioner contended that she had been denied promotion to Grade I on the ground of sex, under Rule 8(2) of the Indian Foreign Service Rules 1961, which requires that an IFS women member should take written permission of the Government before she marriage; after marriage she may be asked any time to resign if it is felt that her family life affects her efficient discharge of duties; and no married woman shall be entitled as of right to be appointed to the service i.e. IFS. The provisions have now been deleted. Since the Supreme Court has held that the Rules relating to seniority and promotion in Indian Foreign Service which make discrimination only on ground of sex is not only unconstitutional but also a hangover of the masculine culture of having cuffing the weaker sex. Similarly in its landmark judgment in AIR India v. Nargesh Meerza, 38 the Apex Court has struck down the AIR India Regulations 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. The impugned Regulation 45 provided that an air

²⁷ Majumdar Maya. Protecting our Women. Vol. II 2001 p. 53..

²⁸ Yusuf Abdul Aziz v. State of Bombay AIR 1954 SC 321.

²⁹ Mr. Choki v. The State AIR 1957 raj 10.11 para 4. As quoted in Supra note 58 at p. 98.

³⁰ Shahdad v. Mohd. Abdulla. AIR 1967 J&K 120. As quoted in Supra note 20 at p. 154.

³¹ Ibid.

³² P. Sagar and Others v. State of Andhra Pradesh, AIR 1968. As quoted in Supra note 58 at p. 98, AP, pp. 165, 174.

³³ Thota Sesharathamma v. Thota Mani Kyamma (1991) 11 SCC 312. C. Masilmani Mudaliar v. Idol of Sri Swaminatha Swami Thiru Koil (1996) 8 SCC 525: AIR 1996 Sc 1697. As quoted in Supra note 54 at p. 86.

³⁴ Kumar Narender Constitutional Law of India 2006 p. 155.

³⁵ AIR 1954 SC 321.

³⁶ Supra note²⁷ Vol. 2, 2001 p.53

³⁷ AIR 1979 SC 1868.

³⁸ AIR 1981 SC 1829.



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hostess would retire from the service of corporation upon attaining the age of 35 years or on marriage, if it took place within 4 years of service or on first pregnancy whichever occurred earlier. Under Rule 47, the Managing Director was vested with absolute discretion to extend the age of retirement up to 45 years or by ten years. Both these provisions were struck down as violative of article 14 of the Constitution of India, which prohibits unreasonableness and arbitrariness.

Thus the above decisions of the Apex Court have greatly elevated the status of working women. 39

Women's Reservation in Panchayats and Municipalities:

Since inferior social status of women in the male dominated society makes it difficult for them to contest and get elected in the representative democracy. 40 So in 1992, 73rd and 74th amendment to the Constitution of India added Article 243 D and 243 T, making provisions for reservation of not less than one third of the total seats for women in the Constitution of the three tiers of Panchayats and Municipalities respectively. 41 The reservation of seats may be allotted by rotation to the different constituencies in a Panchayat and in Municipalities. Provided further that not less than one third of the total number of the offices of Chairpersons in the Panchayats at each level and Municipal shall be reserved for women. 42

Thus, the Government on the strength of the constitutional power made a successful reservation of 33 percent seats for woman in the local bodies which is considered as a pioneer legislative endeavor for the political empowerment of the women in India. 43

To improve and strengthen the women's access to major decision making structures, the Parliament introduced the 81st Constitutional Amendment Bill seeking to reserve one third of seats in Lok Sabha and State Assemblies for women in 1996, though the Bill has been referred to a joint committee of Parliament and is yet to be passed. 44 All these provisions would be protected under Article 15 (3). The object of these provisions is to raise the political status of the womenfolk and the removal of imbalances in the participation of men and women in political life. 45

Conclusion

Thus in view of these constitutional provisions, it can be said that India has moved a big step forward in empowering the women by providing positive discrimination in their favour with the help of Article 15 of the constitution of India. It is high time for society to consider that womenfolk in our society whether inside the home or outside the home get a respectable and dignified position. Their equal position and equal rights should be respected and effectively implemented. Awareness among the women as well as in the whole society has to be created about these constitutional provisions and various pro women legislations. The laws which have been made or which may be made for the protection of women from all types of discrimination and to provide them equal status at par with men, should not only be remain on the statute books but should also be implemented in true spirit and intent.

³⁹ Supra note 2 p. 7.

⁴⁰ Kafaltiya Anand Ballabh. Democracy and Election Laws 2003 at p. 372.

⁴¹ Kumar, Narender Constitutional Law In India 2006 p. 154

⁴² Article 243 D and 243 T of Constitution of India.

⁴³ Supra note 2, at p. 11.

⁴⁴ Ibid.

⁴⁵ Supra note 29, at p. 154.