

GENDER JURISPRUDENCE IN INDIA

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INTRODUCTION

Law and its enforcement can never be separated from the social context in which it has originated. Therefore those laws are equally sensitive to the society. Indian laws are criticized for being gender biased. Our laws also reflect a lack of understanding of female psychology and support the patriarchal mindset. It is necessary to have an understanding of issues pertaining to gender in our laws so that we can figure out merits and demerits of our legal provisions. With several emerging issues in society like the advent of a strong feminist movement, awakening of transgender identities, etc., it is necessary to have an understanding of gender orientation of laws in India.

LAW, SOCIETY AND CONCERNS FOR GENDER IN INDIA:

The position of women has been unique in Indian society which has traditionally been patriarchal in its structure, although in some quarters of history, traces of matriarchy were said to exist. The consequences of a patriarchal society have been many and varied, advantageous and disadvantageous. While on the one hand, our patriarchs have tried to protect women chivalrously from other men, they have also taken the idea of protection many steps further by stating that women should be confined to the four walls of the house and their functions be limited to tending the family. Likewise, brothers and sisters were treated unequally with the former having an edge over the latter; child marriages were in vogue with very young girls being married off to men older to them by a decade or more; the system of Sati was encouraged

where women were incited to commit suicide after their husbands died; purdah system was in vogue which meant that women were always supposed to be behind veils; the institution of dowry was prominent because of the general belief that women were an economic burden for the family that took them in as daughters-in-law.

With the Indian National Movement, our country witnessed the rise of significant social reformers who fought tooth and nail to give Indian women their place in society. Reformers like Swami Dayandand Saraswati, Raja Rammohan Roy, Rabindranath Tagore and many others came forward to drill into the minds of Indian men that women deserved to be respected as equals. With the dawn of Independence, the Indian Constitution was drafted which recognized women as a section of society deserving special attention on account of the fact that it had been rendered weak after years of exploitation.

SPECIAL LEGISLATIONS IN INDIA FOR PROTECTING THE SOCIAL STATUS OF WOMEN:

To protect the status of women as human beings who needed minimum protection of their basic rights, certain stringent laws had to be passed in India. The objective of these laws was to ensure that women receive the minimum dignity and freedom that they are entitled to as part of a democratic republic. The most vital laws are being discussed in this article.

Bengal Sati Regulation, 1829 and Commission of Sati Prevention Act, 1987/ Hindu Widows' Remarriage Act, 1856:

Before the Indian Constitution was enacted and enforced, some laws were passed with the sole objective of protecting rights of women and thereby preventing their oppression. One such legislation was directed towards the abolition of Sati, a practice encouraged by Hindu fanatics. In 1829, the Bengal Sati Regulation or Regulation XVII, 1829 A.D. of the Bengal Code was passed by the then Governor General Lord William Cavendish Bentinck for the purpose of prohibiting the practice of Sati in the whole of British India. Under the legislation the practice of Sati was said to mean the immolation of a Hindu widow on the funeral pyre of her dead

husband or the burying of such woman when she was alive in pursuance of the death of her husband. The Regulation declared such practice as illegal and also stated that those practising Sati would be prosecuted. Aiding, abetting or encouraging Sati was also declared illegal.

Among the Hindus in Indian society, another major impediment for women was the fact that they were widows. In an age where women as young as 9 to 10 years old were married off to men as old as 40-50 years old, the death of the men would disentitle women of a healthy social life. Very young women were forced to live a life of deprivation and renunciation, sometimes even when the marriage had not been consummated. The then Hindu society did not permit re-marriage of the young widows. After a lot of struggle, social reformers succeeded in getting a legislation passed in 1856 that would make life easier for the widows by allowing them to re-marry. This legislation was titled Hindu Widows' Remarriage Act. The Act provided that marriage of widows would be valid and the children born out of such marriages would also be considered legitimate. Not only that, such widows, upon their marriage would be entitled to rights of property and maintenance just as they would have been entitled in case of a first marriage.

Female infanticide prevention act, 1870/ The Child Marriage Restraint Act, 1929:

Girls have been eliminated in India for centuries. During British rule over India in the 19th century, however, female infanticide was recognized as a social evil and was outlawed by the Female Infanticide Prevention Act of 1870. There have also been instances where sex of the fetus is determined before birth and the pregnant woman is beaten with blows to her stomach so that the female fetus doesn't survive. The Female Infanticide Prevention Act, 1870 also Act VIII of 1870 was a legislative act passed in British India, to prevent murder of female infants. The Section 7 of this Act declared that it was initially applicable only to the territories of Oudh, North-Western Provinces and Punjab, but the Act authorized the Governor General to extend the law to any other district or province of the British Raj at his discretion.

Child marriages were very common in India in the past, particularly among girls. This has also been the major concern of the commission over a number of years. To do away with the practice, the Child Marriage Restraint Act was passed in 1929. The Act states that women

cannot be married off until they acquire the age of 18 years. The commission has been interacting with the National Commission for women and the department of women and Child Development to evolve suitable measures to combat this problem. As the Draft Marriage Bill jointly prepared by the National Commission for women and department of Women and Child Development did not find favor with the government, the commission decided to work on an amendment to the Child Marriage Restraint Act, 1929. Even today, in many parts of India the practice continues, in spite of the fact that it has been struck down as illegal.

Matrimonial Laws:

Personal Laws in India for regulating incidents of marriage have had mixed consequences in relation to women. In some cases, the laws have worked more to the disadvantage of women than to their advantage. Marriage, in India is regarded as an institution which is capable of changing the entire course of a woman's life, either for the worse or for the better. With marriage, are associated the most significant social problems that women confront, like dowry, matrimonial cruelty/ domestic violence, divorce/termination of marriage, maintenance and custody of children. How far our laws are equipped to tackle these problems is an issue of major concern. With the objective of eradicating the problem of dowry, the Dowry Prohibition Act, 1961 was passed by the Parliament. The Act defines the term "dowry" and punishes the payment, request or acceptance of it. Apart from dowry, another problem that women face very often is the problem of Intimate Partner Violence. An intimate partner could be a spouse or a person with whom the woman may share a romantic relationship. The Domestic Violence Act was passed by the Parliament in 2005 to counter the menace of violence in matrimonial or live-in relationships. Sections 498 -A and 304-B of IPC have also played an important role in protecting the rights of women by prescribing punishment for the offences of matrimonial cruelty and dowry death.

Women and their right to Property in Indian Laws:

So far as the right to property is concerned, Hindu women have traditionally been excluded from the right to property in their parental home as only male members can constitute a

coparcenery. In order to bring about equality between sons and daughters, an amendment was made in 2005 to the Hindu Succession Act, 1956. After the amendment, women are entitled to shares in property in the same way as sons and are treated as Coparceners. A logical extension of Coparcenary rights is that a woman can now initiate partition and can also become the Karta of the household. Traditionally, the position of Karta was restricted to the senior-most male member of the family but with women becoming coparceners, it is logically possible for them to acquire the position of Karta if they are the senior-most members of the family. Further, the law also recognizes absolute ownership of a certain type of property by a woman in the matrimonial household. Such property is called Sridham, over which she has absolute rights of transfer, enjoyment and disposal. Likewise, in Islamic Law, women's rights in the domain of property saw a significant change after the passing of The Shariat Act, 1937.

Laws at Workplace and Labor Legislations in India:

Gender identity discrimination in the workplace occurs when an employer discriminates against an employee because of their gender identity. Discrimination can include terminating a transgender employee after the employer finds out about the employee's gender identity or planned transition; denying a transgender employee access to workplace restroom facilities available to other employees; requiring a transgender employee to use a restroom not consistent with the employee's gender identity or presentation; harassing a transgender employee; permitting and/or refusing to investigate claims of harassment by coworkers and supervisors; or any other negative employment action taken because of an employee's gender identity. The Parliament enacted the Equal Remuneration Act in 1976 to do away with discrimination between male and female employees.

Under the Act, no employer can discriminate against an employee on the basis of gender. Other than that, some special provisions have been made under the Maternity Benefit Act, 1961 for women. Under the legislation, certain benefits have been extended to women who are pregnant in a place of employment. Apart from that, sexual harassment at workplace has been taken up with urgency by the Supreme Court in the case of Vishakha v. State of Rajasthan.⁵ Guidelines have been laid down in the aforementioned judgment for protecting women from sexual harassment. Further, labor legislations also make special provisions for women at the

workplace. For instance, the Factories Act, 1948 provides for mandatory arrangements by every factory in India to maintain adequate number of sanitation facilities like urinals and toilets for women. Likewise, employment of women in hazardous occupations is also prohibited under the Act.

CRIMINAL LAW

The Indian Penal Code, 1860 has many provisions which have been thoroughly criticized as gender insensitive. For instance, the definition of Adultery under the Code stipulates that a case of adultery can be filed by the husband against the paramour of the woman with whom she had sexual intercourse. The woman is treated as an entity that can have no active role to play in the entire act. Further, a case of adultery cannot be filed by a wife against a woman with whom her husband might have had sexual intercourse. The law on this count is gender insensitive as it does not give an equitable right to a woman to prosecute for adultery and also treats her as an irrational entity which is always dictated by a man in acts of sexuality.

Similarly, section 377 of the IPC has also been controversial in the recent past for not taking into consideration the rights of lesbians, gays and trans-genders. Section 375 of the Code has also undergone a massive change after gathering much criticism about being loose. For instance, it did not recognise oral penetration as Rape. The massive amendment which happened in 2013 following the Nirbhaya episode has broadened the definition of Rape by extending the offence to any and every form of penetration. Not only that, certain new offences like voyeurism, etc. have been created to protect the rights of women. Another major area of concern is the non-recognition of feminine psychology while determining defenses. For example, while grave and sudden provocation has been recognized as a partial defense, the battered woman syndrome has not been taken into cognizance as a defense.

Considering the struggle women have undergone for several centuries, the Indian legal system has tried to extend benefits to them in various other sectors. Under the Income Tax Act, for instance, women enjoy greater tax benefits than men. Also, women have wide range of exemptions from court fees under Indian Law. Likewise, provisions for reservations also exist in certain sectors of employment.

CONCLUSION

It is evident from the above discussion that the Constitution of India contains various provisions relating to equality between men and women and there are certain cases where women have been given special importance. Along with that certain legal provisions for women have been enacted viz: the Factories Act, Maternity Benefit Act, Dowry Prohibition Act, Equal Remuneration Act, Child Marriage Restrain act, Medical Termination of Pregnancy Act, National Commission for Women Act, Protection of woman from domestic violence Act, Protection of women against sexual harassment at workplace etc. However, till date that are violated now and then. Sex violence and gender based violence are increasing at an alarming rate. The Verma Committee Report of Jan 23rd, 2013, gave a detailed over view of the crimes relating to women and suggested certain reforms. I personally believe that the increase in women-related violence is the direct result of the fact that differences between men and women are more highlighted lately and women are provided with certain temporary privileges.

The swings in non-discrimination jurisprudence where it concern women cease to be unexpected. B.R. Ambedkar anticipated this difficulty clearly when he said, "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it".⁹¹And "our people" includes women and men, leaders and citizens, litigants, lawyers and judges alike. The guidelines on the issue of sexual harassment in the Visahha case were framed from the standpoint of the situation of a working class Dalit woman's vulnerability vis-à-vis the dominant castes, the police and the state or government. The purpose of the writ petition was to seek "the enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon". The significance of this decision lies in the judicial recognition of the notion of "hostile environments" as something obstructing women's equal entry to employment—a notion that could be extended by courts to better understand the subjugation of women in patriarchal societies, which are divided along multiple, intersecting lines of caste, class, religion and gender, among others, not severally but together and in conjunction with each other.

The first step in breaking the cycle of interpretive disaggregation and dissociation is to attempt to redefine sex and its contexts in radically new terms. In the recent Naz Foundation judgment,

the Delhi High Court deliberated on the meaning of the word "sex" in Article 15 (1). Does the term "sex" refer to attribute (gender) or performance (sexual orientation)? Through a nuanced reading of "sex" in Article 15 (1), the court held that "sexual orientation is a ground analogous to sex and discrimination on the basis of sexual orientation is not permitted by Article 15". We could take this further. Article 15 (1) of the Constitution says, "The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." the state shall not discriminate solely on the listed grounds and on any of the listed grounds, in the singular or the plural and on grounds of any of the listed indices with factors that do not figure in this list— factors that allude to the larger context.

The specific conjunction of sex with any other factors or listed grounds that are alleged to result in discrimination based on sex must then be examined by the court. The emphasis will then be from a mechanical reading to a substantive reading of the constitutional guarantee of non-discrimination. In other words, the word "only" need not drive a wedge between and gender if it is read harmoniously with "or any of them", because would open the possibility for reading sex either alone whether these be religion, race, caste, language and place of birth Its significance lies in that it has the potential to lift thinking out of the cycle of reification and subjugation of women that the discourse on heterosexual conjugality is trapped in even today. In the final analysis, it is only radical constitutional interpretation rooted in constitutional morality, which is strengthened by equal representation within the judiciary at all levels along all axes, that will open up rich possibilities for an intersectional jurisprudence on non-discrimination in India as the norm.