

Constitutional Guarantees: The Unequal Sex

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Long before Independence, the theme on which Gandhiji wrote repeatedly, was the need to improve the status of Indian women. He drew attention to the fact that the woman was 'not only.... condemned to domestic slavery but when she goes out as a labourer to earn wages though she works harder than man she is paid less'.¹ He emphasised the fact that women should not suffer from any disability or discrimination² and drew attention to the fact that "what we are doing to our women and what we are doing to our untouchables recoils upon our heads with force thousand times multiplied".³ These strongly worded views inevitably had their effect on the members of the Congress. Pandit Nehru, who like Gandhiji believed in improving the status of women and integrating them in the development of the country, found it easy to have a special sub-committee in the National Planning Committee of which he was the Chairman, to report on the role of women in the Planned Economy. He wanted the Sub-committee to examine the question of a woman's role from every aspect - social, political, legal and economic.

The draft Report of the Sub-committee however went beyond the expectations of the Congress members and even of Pandit Nehru. Among their many recommendations, were those which wanted equal rights for women in the family, equal pay for women workers and protection for maternity, recognition of their economic role as housewives and also same standards of morality for both men and women. Pandit Nehru fearing that most Congressmen in their heart of hearts did not really subscribe to the view that there should be equality between men and women and the latter should be given the same opportunity in the labour market, urged the Chairwoman of the Sub-committee to go slow.⁴ He urged caution because he felt the Report may not be accepted and explained that men had to be enlisted in the fight against male domination and not become hostile by too radical suggestions.⁵ One of the recommendations made in the Report had been that maternity benefit for women workers should in no way depend on their marital status and that must have been one of the recommendations which would not have been easily acceptable to the men. That there should be an equal moral standard for men and women is a far cry and comes out clearly because even years after our country had become independent, a Government Department refused maternity benefit to a woman employee because she was not married. Strong and immediate protest from the women's groups made the Labour Ministry clarify that maternity benefit would be for all employees and would not depend on the marital status - a demand made as far back as 1939 by the Sub-committee of the National Planning Committee.

Owing to Gandhiji's repeated exhortations and Nehru's commitment equality of sexes had already been included as a Fundamental Right in the Karachi Congress in 1931.⁶ There was no going back and therefore the first major document after Independence - the Constitution - affirmed that there would not only be Justice, social, Political and Economic for all citizens but there would be Equality of Status and Opportunity also. This was "solemnly resolved by the People of India to secure for all its citizens (Preamble)". The Preamble, followed by Part 3 of the Constitution

dealing with Fundamental rights spelt out more clearly that not only equality of the sexes but there would be no discrimination *inter alia* on grounds of sex. Participating in the debate on prohibition of discrimination on grounds *inter alia*, of sex, Renuka Ray thought that this “fundamental right ... makes a tremendous difference and really does bring in equality... This right is a justifiable fundamental right today enforceable through courts of law and if there are any laws ... which remains as a contradiction... will have to be overridden”.⁷

Unfortunately her optimism was without any basis because being committed to ensuring constitutional equality was one thing and making it effective is totally different as it evident now. Renuka Ray did not realise that the male bastion practising patriarchal values does not surrender so easily.

Another factor which occurred during the debate and should have made those who are really committed to gender equality more vigilant was that there was no discussion when it came to the clauses dealing with sex equality and prohibition on grounds of sex except some light-hearted remarks. Purnima Banerjee did point out that as women of India” did not fail this land... in the freedom of the country so in the preservation of this freedom she shall not fail”.⁸ She however showed her displeasure at the frivolous remarks of some of her colleagues and chided them by saying that “I would beg of my colleagues in this House ... not to deal with the subject with any levity or any lightness of spirit because we have to realise that women ... are standing upon a threshold of life”.⁹

Renuka Ray’s optimism was belied when the clause regarding equal pay for equal work for both men and women was placed as a directive principle. This meant that it was not justifiable and allowed the states as well as private employers to discriminate between men and women workers. Equal pay for equal work is a concept of democratic societies which we in India claim to be, so there was no justification for the distinction regarding the work condition of men and women. How the principle of equality and no discrimination was violated even by the states was documented by the Committee on the Status of Women in their Report *Towards Equality*.¹⁰ One example was the fixation of lower minimum wages for women workers irrespective of the work they did by the Andhra Pradesh Government in 1969 where they were working for Tobacco, Zarda and Cigarettes.¹¹

This obvious gender inequality continued till the International Women’s Year in 1975 when by an ordinance, equal remuneration was promulgated and became a law in the following year. A hastily drawn legislation, it was inevitable that employers would not so easily give up their past practice of paying the women less. As has been pointed out, they continued their discriminatory practices either by making distinctions between permanent and casual employees or making categorisation of jobs placing women in the lower category. The critics of the equal pay doctrine even went to the extent of contending that equal pay for equal work is an abstract doctrine which cannot be enforced. The Supreme Court strongly refuted this fallacious argument by categorically emphasising that the “principle of equal pay for equal work is not an abstract doctrine”.¹² Also “the Preamble to the Constitution constitute India into a Sovereign Socialist Democratic Republic. Again the word ‘Socialist’ must mean something... it must at least mean ‘equal pay for equal work’”.¹³ But for more than two decades after the constitutional guarantee, payment to women workers

continued being lower. The provisions of the Act were such that they did little to remedy the situation with even the trade unions passively accepting the position.

The ineffectiveness of the law - Equal Remuneration Act - passed with a fanfare as an Ordinance in 1975 - was brought out by Chief Justice Poti of the Kerala High Court when he said in a case that though there is not much case law in India on the question of discrimination against women it is not "because there is no discrimination... but perhaps because women are reluctant to come to the courts to vindicate their rights". He added after this comment that he regretted the fact that "decisions of material consequences said to be in the so-called interests of women purporting to protect the position of women are generally taken not after consultation with representative bodies of women but unilaterally by the administrators most of whom carry with them the hang-over of the past - the past of male domination".¹⁴ Even the Government in amending the Act stated regretfully that the practice of paying women lower wages was continuing and therefore the Act was being amended to not only make punishments more stringent but give voluntary organisations apart from the inspecting staff the *locus standi* to file complaints regarding the violations of the Act.¹⁵

Apart from being paid unequal wages for the same work done by women workers, another factor contributing to their subordinate position and the attitude of the employers to deal with it, is the harassment women suffer in their place of work. In the early eighties, a commercial artist at the Directorate General of Employment and Training was continuously being harassed by one of her senior colleagues. In spite of her complaints the Ministry did nothing about it. She finally went to the Central Administrative Tribunal (CAT) to complain. The tribunal was extremely critical of the manner in which the Labour Ministry had looked into the complaint and ordered a fresh inquiry within four months. The Tribunal further added that the "redressal can be retributive and preventive so that violation of female modesty in office premises in the cause of duty is visited with punishment and future violations deterred. "For a good measure in pin-pointing the callous attitude of the Ministry they added "by not taking action, the Ministry had really become an accomplice".¹⁶

Under Pandit Nehru's leadership, the Constituent Assembly members had been made to realise that mere declaration of equality of sexes may not bring about the desired result. It would often be necessary to make special provisions for them and therefore the Constitution. Article 15 which prohibits discrimination, *inter alia* on grounds of sex, has a provision which permits the state to make special provision for women and children, which would not be violative of the Constitution. It is interesting to study how at times this provision has been used by the states. The Railway Department wishing to increase the employment opportunities of women workers, decided to reserve all posts as railway enquiry and reservation clerks for women employees. One of the justifications for this step was that "this would reduce mal-practices for in the social conditions obtaining at present in the country women were less susceptible to improper influences". The rule was challenged in the Delhi High Court as being discriminatory to man employees. The paternalistic attitude of the Court comes out clearly when it upheld the reservation as a "form of compensation to women who were backward and are greatly unrepresented in the railways".¹⁷ To justify their stand they relied on statistics to prove that women employees occupied only 5% of the jobs and were totally excluded in 19 out of 30

posts. They therefore felt that it was the duty of Court "to redress the imbalance between men and women". In view of this paternalistic concern for women employees it appears churlish to criticise the Court but facts and figures produced before the Calcutta redressing the imbalance between men and women employees. Before the Calcutta High Court where the reservation was also challenged, the figures given show that little benefit will come to the women. "It is unthinkable that such a step was taken to cause benefit to the women when only about 620 posts are involved... and there are several lakhs of other posts ... have been left untouched".¹⁸

After the Constitution had been adopted by the Constituent Assembly, the Parliament, like most colonial countries relied heavily on legislation to bring about the principle of Justice, Social, Political and Economic proclaimed in the Preamble of the Constitution. One area in which there was heavy reliance was in the area of family law. Free India had inherited a system from the British, who had perpetuated the difference among the various communities by recognising different family laws to govern them. The common element in all the family laws - Muslims, Hindus, Christian, Parsis - was that the women had a subordinate position in comparison to the man. Equality of the sexes and there being no prohibition permissible on the ground of sex would have required these laws to be changed immediately. But the policy makers in their wisdom continued these different family laws and deferred bringing about a uniform law which according to the solemn resolve of the people of India¹⁹ should have been based on Justice, Social, Political and Economic, Laws dealing with marriage, divorce, guardianship and inheritance therefore continued not only to be different among the communities but the subordinate position of the woman continued.

The ostensible reason was that most communities claimed that their personal law was of divine origin and therefore changing them would hurt their sentiments unless they asked for it. This reasoning however did not prevent the legislators from taking up Hindu law which too claimed to be of divine origin - for making not only necessary changes but also bringing about a uniform law to govern all Hindus. Till the new Hindu code there were two major schools - Dayabhaga and Mitakshara and innumerable sub schools.

The Dayabhaga school was predominantly in the East and Mitakshara in most other places. Radical changes were brought in the marriage law making marriages monogamous for all and giving both men and women the right of divorce. Similarly in adoption the restriction that girls could not be adopted nor could women adopt was changed giving women the right to adopt in their own right. In the case of married couple in pre-Independent India it was the right of the husband only to adopt and the need to get the consent of the wife was not required. This too was removed and the husband can no longer adopt without the consent of the wife.

Interestingly enough when it came to inheritance and giving women equal rights, the government faced the severest opposition. Platitudes of equality of sexes is one thing but translating them into reality is quite another thing. Gandhiji had written "Man has always desired power. Ownership of property gives this power". This came out clearly in the debates and finally in the law. The positive gains in the Hindu Succession Act are that a wife, mother and daughter have been recognised

as class I heirs with the son and will get an equal share in the man's property if he has not left a will. The second welcome change is that a woman will be an absolute owner of whatever she inherits. In pre-Independent India, under the Hindu law, a woman had only a life interest and therefore was never able to alienate the property like sell it or gift it unless there was really a legal necessity. Since the Hindu Succession Act she holds the property as an absolute owner. But Gandhiji's views about man's power through property comes out clearly where joint, family property is concerned. a son, grandson, or a great grandson gets a share in the joint family property from birth and the share is the same as that of the head of the family. They are known as coparceners. The orthodox Hindu view prevailed and women were not being coparceners and therefore, had no rights over the joint family property. The only gesture that was made, after prolonged discussion and debate, was that in the event of the father's death his share in the property would be divided equally among his class I heirs. this therefore means that a son gets a share in two distinct capacities - one as his father's son and the other in his own right. Recently two states - Andhra Pradesh and Tamil Nadu have amended their inheritance laws to abolish the orthodox coparcenary and given daughters the same right as sons in the joint family property. This will mean that atleast in these two states, there will be no discrimination between the rights of sons and of daughters governed by Hindu law.

The other concession made to the traditionalists which is really to be deplored is that daughters have only the right of residence in the dwelling house of the family and that too if the daughter is unmarried, widowed or separated. A married daughter has no right and a daughter seeking to leave her in-laws and her husband because of their harassment will not as of right be able to come and stay in her father's house as she is not separated. Refuge is denied to her altogether. In addition to this the daughters cannot ask for a partition to get a share. Only if the male members decide to sell or partition dwelling house can the daughters claim their share.

In addition to the legal provisions perpetuating the unequal position of sons and daughters, ignorance of her legal rights coupled with the social factor of instilling in her that claims should not be made against her brothers has resulted in the benefits of the Hindu Succession Act remaining mainly on paper . Only the middle class educated woman is aware of her rights and occasionally claims them. The argument is often advanced that only a microscopic minority has property to leave for the heirs. While there is such force in this argument, the provision preventing a married daughter from seeking shelter in her natal home, surely needs to be remedied. Whatever the income level of the family may be, harassment and cruelty to women is not confined to any income group but is almost all pervasive, therefore this discrimination continuing needs to be remedied immediately - if we are not to make a mockery of **Justice-Social, Political and Economic** promised to women of India.

Another branch of law ironically applicable to women of all communities, is the one giving the mother a subordinate position to the father in the right of guardianship. Even today the father continues to be the natural guardian and the mother's claim comes only after him. Fortunately the role of the judiciary has been very helpful in many cases and the mother has been given custody and guardianship on the principle that the welfare of the minor should predominate and not the principle of natural guardianship. The welfare of the child must be the guiding principle and the

fact that the father is the earning member should not determine this very important question of guardianship as used to be the case at one time. But the statutory law continues to emphasize the father's right. If these glaring discrepancies continue in post-Independent legislation (Hindu Law of Guardianship) framed by the same legislators who proclaimed equality of sexes and regarded this to be guiding principle of the Constitution, then one can only hazard a guess about the legal rights of other communities which the legislators have not cared so far to touch. The second report of the Legal Aid Committee mentioned clearly that "family law in the various regional and religious communities in the country shows glaring discrimination between the sexes. there is no good reason for the perpetual survival of this apparent injustice". More recently in such Bano's²⁰ case the highest court of the land - the Supreme Court - has regretted that "there is no evidence of any official activity for framing a common civil code even though a common code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies". They reminded the Government that Art. 44 which lays down that "the State shall endeavour to secure for the citizen a uniform civil code throughout the territory of India was the responsibility of the state which is really charged with the duty of securing a uniform civil code."

Another very important area affecting the status of women, is removing the discrimination which stands in the way of her full participation in the economic process. The constitution states that there shall be no discrimination between men and women in opportunities for employment. But what is the position after all these years? The draft Six Year Plan recorded that the "labour market as it is operating is not neutral as between men and women" and there are sectoral imbalances in the opportunities available for women for regular employment training and promotion". In addition to these imbalances and unequal opportunities, discrimination continues even in the Government departments and public sector enterprises.

Our senior most woman ambassador had to go to court to protest not only against her being denied promotion but also against the discriminatory rules governing women officers. One of the rules was that no married woman shall be entitled as of right to be appointed to the service. When challenged in Court, Justice Krishna Iyer said "the first blush this rule is in defiance of Art. 16 ... The misogynous posture is a hang-over of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against women's thralldom". The other rule which fall into the same category was "at any time after the marriage, a woman member of the service may be required to resign from the service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties...." The learned Judge stated clearly that "discrimination against women, in traumatic transparency is found in this rule ... If the family and domestic commitments of woman members of the service are likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member...." Fortunately the challenge of the rules in the Supreme Court compelled the Government to withdraw the two offending rules²¹ and also promote the petitioner, C.B. Muthamma, holding that "she was meritorious enough for promotion".

Two Government corporations - Indian Airlines and Air India - had continued discriminatory rules governing the service conditions of air hostesses compared to

those of flight stewards, who were doing more or less the same work during a flight. The discontent of the air-hostesses had led the corporation to refer their cases to two Tribunals earlier but their pay, promotional avenues and the age of retirement continued to be different though a slight improvement was made in their age of retirement. In addition to the awards of the two tribunals, the Government to remove all doubts about violating the Equal Remuneration Act 1976 by having two different scales of pay issued a notification in 1979 where they clearly laid down that they are “satisfied that the difference in regard to pay etc. of these two categories of employees are based on different conditions of service and not on difference of sex”. But the retirement age was increased from 30 years to 35 years.

Dissatisfied with their differentiated status, a number of hostesses filed a writ petition in the Supreme Court ²² alleging that fundamental rights of equality and equality of opportunity were being violated. According to the regulation governing the age of retirement flight stewards retired at 58 years while an air hostess retired “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”. The counsel for the air hostesses argued that even though they were doing identical duties, the air-hostesses had been ‘particularly selected for hostile discrimination by the Corporation mainly on the ground of sex... (this) was a clear infraction of the provisions of Art. 15 (1) and Art. 16 which prohibit discrimination *inter alia* on grounds of sex and equality of opportunity in matters of public employment”. In addition to this violation he argued that “the rule requiring on air hostess to retire on the ground of pregnancy or marriage within four years is manifestly unreasonable... and violative of Art. 14” which guarantees equality before law.

The Supreme Court had no difficulty in declaring that flight stewards and air hostesses did not belong to the same class as “the basic requirements for entry into the service are absolutely different “ and there was material difference both in respect of qualification and starting salaries, thus disposing of the point that there was discrimination between the two categories of employees though it recognised that “both the classes may during the flight work as a cabin crew”.

The judgement then examined the other condition regarding the rule about retirement to decide whether they were “entirely unreasonable and arbitrary”. In dealing with the condition of marriage within four years necessitating retirement, the Court opined that it was a desirable rule as it was “by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme”. In the Court’s view when a woman marries around 20 or 23 “she becomes mature and there is every change of such a marriage proving a success ... The third reason accepted by the Court was that “the Corporation will have to incur huge expenditure in recruiting additional air hostesses either on a temporary or on ad hoc basis to replace the working air hostesses if they conceive....”

Regarding condition of termination of the services of an air hostess on her becoming pregnant, the Court took the view that it was extremely unreasonable and “this provision shocks the conscience of the Court”. They further added that they were “constrained to observe that such course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it

smacks of a deep rooted sense of utter selfishness at the cost of all human values". Fortunately the conscience of the Court found it difficult to accept this condition and unhesitatingly held it to be violative of Art. 14 of the Constitution. Fortunately taking this view they did not allow the Government policy of family planning to be the guiding principle but followed the Constitutional mandate.

Another regulation struck down by the Court, in its existing form was one which laid down that while normally an air hostess retired at 35 years, her services could at the option of the Managing Director be extended to 45. This option given to the Managing Director in the view of the Court "may result in discrimination" as he might exercise it in favour of some women and not in favour of others. Therefore the Court ruled that "unless the provision is suitably amended to bring it in conformity with the provisions of Article 14 (air hostesses) would continue to retire at the age of 45 years".

Another case when the state government seemed oblivious of the Constitutional guarantee of equal opportunity for women and no discrimination on the basis of sex was remedied by the judiciary. In this case the Kerala Government had refused to appoint two women, who had not only been called for interview but who had been selected by the State Public Service Commission. The ostensible reason given by the Government department in refusing to appoint them in spite of their selection was that they could not ride a cycle. The High Court not only directed that the next two vacancies should be given to these two women but also pointed out that in the selections that had been made there were a number of other candidates (all male) who also could not cycle. They ended their judgement by holding the action of the Government department to be "irrational, unjust and unfair. It militated against the principle of equality".

The rules and regulations often laid down by state governments bring out clearly the patriarchal values still being pursued and militating against the principle of equality of sexes. In an interesting case where a training course was being run by the Government, the Civil Surgeon had advertised for the training course for midwifery but added that in the case of married women applying, the consent of the husband had to be sent along with the application. The candidate, who had been extremely anxious to apply got her husband's consent. But the husband had second thoughts and withdrew the consent letter. The reason he gave was that her absence "would disturb the family life and hence she should not be permitted to join". Dutifully the Department withheld her candidature asking her to get a "no objection" letter from her husband as the first stood cancelled by his letter sent subsequently. She went to court and got an interim order to stop cancellation of her training for which she had already been selected. She challenged the stand of the Department and their rule as being "wholly unreasonable and discriminatory, being violative of the right of equality enshrined in the Constitution". The Department argued that if she joined without the consent of the husband it might affect the wife and not only her family but also the training. The court rejected the argument holding that it was a purely personal matter between husband and wife and because "of these possibilities a valuable right to get employment can not be denied".

The cases show that the Judiciary has not been consistent in upholding the fundamental right of equality of the sexes or the right to equal opportunity but on the

whole in most cases when approached it has tried to uphold the right of the woman in this field. But how many women faced with similar situations are bale to seek redress from the Court? Constant vigilance is therefore required and the right of the aggrieved person to approach concerned organisations should be recognised and the organisations given *locus standi* to bring the complaint. Otherwise the Constitutional right given to the women and which had been hailed by many will remain only on paper .

NOTES

- 1 . **Young India** Feb. 1918
- 2 . “I am uncompromising in the matter of women’s rights. In my opinion she should labour under no legal liability not suffered by man. I should treat the daughters and sons on a footing of perfect equality”, Gandhi Series to the Woman, Ed. Hingorani p. 12.
- 3 . *Harijan*, 1934.
- 4 . “Many of the subjects dealt with ... relate to intimate details of personal life and to all manner of prejudices and customs. It is right that these prejudices and injurious customs should go One has to approach the subject in a manner which is the least offensive to larger sections of people and which does not irritate them”, **Selected Workers of Jawaharlal Nehru** - General Editor S. Gopal, Vol. II, p. 284.
- 5 . “Many of them silently voted for the Karachi resolution might not have meant what the resolution laid down. They might have had mental reservations ... There are still many in this country who are opposed to freedom being given to women”, May 1936, Nehru addressing a women’s meeting.
- 6 . All citizens are equal before the law, irrespective of religion, caste, creed or sex. No disability attaches to any citizen by reason of his or her religion, caste, creed or sex - Karachi Resolution on Fundamental Rights, 1931.
- 7 . 19th November 1948.
- 8 . 24th November 1949.
- 9 . Ibid. This was in response to the comment made by Rohini Kumar Chaudhuri. “We really need protection against women because in every spheres of life they are now trying to elbow us out in the offices, in the legislatures, in the embassies, in everything they try to elbow us out ... Now even after seats for women have been abolished, if the feelings of men are such that they should push them forward, I would very much regret it”. 22nd November 1949.
- 10 . *Towards Equality*, Government of India 1974, Table XIII on p. 165 gives details of differential in wages in Bihar, Haryana, Madhya Pradesh, Punjab, Tamil Nadu and Uttar Pradesh.
- 11 . Ibid. para 5.96, p. 174.
- 12 . V. Karkendeya v. State of A.P. 1989 S.C. 1308.
- 13 . Randhir Singh, Union of India, 1982, S.C. 879
- 14 . A.N. Rajamma v. State of Kerala 1983 Lab & I.C. 1388

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- ¹⁵ . “Inspite of the ERA having been passed more than ten years ago, there are several employers who continue to pay lower wages to women... Inspite of the known prevalence of disparity in wages between men and women, there have not been many reports of violations of the Act”, Object and Reasons of An Act to amend Equal Remuneration Act 1976.
- ¹⁶ . Reported in **The Telegraph**, 24.4.89.
- ¹⁷ . 1979, Lab. Ind. cases 889.
- ¹⁸ . Naba K. Ray v. Union of India 1979 Lab. Ind. Cases 1226.
- ¹⁹ . Preamble of the Constitution which reads we the People of India, having solemnly resolved ...
- ²⁰ . Mohd. Ahmed Khan v. Shah Bano Begum 1985 (2) SCC 556
- ²¹ . C.B. Muthamma v. Union of India (1979) USCC. 260.
- ²² . Air India v. Nergesh Meerzo 1981 (4) SCC 335.