

Women and Law: Conflict between Protection and Empowerment

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Introduction:

In today's globalised world, women, who occupy half of the population, need to be performing an empowered role rather than to be remaining protected under the veil of traditions and systems. However, do our law support this aspiration? Role of law in empowerment of women is conflicting in nature. Gender based laws have viewed women as gendered subjects- as subordinate and in need of protection. At the same time few laws are also challenging women's prejudiced secondary position in the society. Thus, a constant conflict is seen between protection and empowerment of women under the legal regime in comparison to the empowered approach. In other words women are being protected under law for the sake of empowerment. Thus, women are positioned in the society as "in need of protection" and thus in society they remain as subordinate.

Position of women under international law:

Theoretically, the rights of women have been incorporated in various conventions and declarations. In fact, women's rights were and are one of the necessary part of human rights movement which is going on globally. UN 1945 Charter recognises the equal rights of men and women and this principle was incorporated in various United Nations important international instruments: Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, International Covenant on Economic, Social and Cultural Rights, 1966, The Convention on the Political Rights of Women (1952),

The Convention on the Nationality of Married Women (1957), The Convention, and the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956), The Convention for the Suppression of the Traffic in person and of the Exploitation of Prostitutes and others (1949). The rights of women has also been addressed in various other international organisations as well. To name a few The Underground Work (Women) Convention: 1935 (No 45), The Night Work (Women) Convention (Revised): 1949 (No. 89), the Equal Remuneration Convention for Men and Women Workers for Work of Equal Value: 1951 (No 100), the Discrimination (Employment and Occupation) Conventions: 1958 (No 111) and The Workers and Family Responsibilities Conventions: 1981 (No.156). Similarly, the Convention Against Discrimination in Education adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation in 1960, the Declaration on the Protection of Women and Children in Emergency and Armed Conflicts of their Families, 1990. In 1979, the principle of non-discrimination between women and men became the object of a specific treaty, i.e., The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The aim of this is to implement equality between men and women and to prevent discrimination against women, in particular such specific forms of discrimination as forced marriages, domestic violence and less access to education, health care and public life as well as discrimination at work. Article 1 of the Convention defines discrimination against women as "any

distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” State Parties to the Convention are bound to take all the necessary legislative judicial, administration or other appropriate measures to guarantee women the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality of men. Article 2 of the CEDAW imposes a clear obligation on all states Parties to undertake a policy of eliminating discrimination “by all appropriate measures, including legislation” to eliminate discrimination in the “political, economic, social or cultural, civil or any other field.” Article 4 further clarifies that “temporary special measures aimed at accelerating defacto equality” will not constitute discrimination but are to be welcomed as necessary interim steps towards eliminating discrimination. Recognising the existence of inequality in women’s day to day life in society and/or in family, Article 5 requires states to modify “social and cultural patterns of conduct... with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotypes roles for men and women.” Article 24 further imposes an obligation to take “all necessary domestic measures at the national level aimed at achieving the full realisation of the rights recognised”. Thus, a state will violate its obligations under Article 2,3 and 24, if it passes or fails to repeal legislation that incorporate standards of inequality, or if it’s judicial organs enunciate decisions that discriminate against women as a result of existing legislation or customary practices by virtue of Article 2(e) and Article 5.

Position of women under national law

Though, women population is approximately half of the world population, but in India scenario is not ideal in nature. Women constitute only 26% of the

workforce. Let’s see what the empowerment is and how women have been empowered and protected under national legal regime.

The Preamble of the Indian Constitution grants freedom, liberty and equality to women. Article 14 states that, “the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India.” Further, based on religion, race, sex, caste or place of birth discrimination was explicitly prohibited under Article 15. In addition Article 15(3) provides:

“Nothing in Article 15 Clause (1) shall prevent the state from making any special provision for women and children.”

This clause empowers the state to make laws in favour of women to provide socio-economic justice to them. The state is also under an obligation to promote the welfare of the people including women by securing and protecting as effective as it may a social order in which justice, social, economic and political shall pervade all the institutions of national life. In this respect, Article 39 is one of the important provision regarding women position. Its Clause (a) provides that the state shall in particular, direct its policy towards securing adequate means of livelihood to men and women equally. Clause (b) enunciates that these shall be equal pay for equal work for both men and women. Clause (c) directs that the health and strength of workers, men and women, and the tender aged children are not abused and that citizens are not forced by economic necessity to enter avocation unsuited to their age or strength. It has been obligated upon the state to make endeavours to secure just and human conditions of work and maternity relief by Article 42. At the same time the Constitution of India imposes fundamental duty upon every citizen of India to renounce practices, derogatory to the dignity of women under Article 51 A (e).

Approximately 51 legislations have gender specific provisions, out of which eight legislations are absolutely gender specific. They are: For example,

Maternity Benefit Act, 1961, Domestic Violence Act, 2005, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, The Immoral Traffic (Prevention) Act 1956, The Dowry Prohibition Act, 1961, The Indecent Representation of Women (Prohibition) Act, 1986, The Criminal Law (Amendment) Act, 2013. How far will these legislations assure empowerment of women along with the protection Let's do a critical analysis for the same.

A critical analysis of legislations and judicial response in India with special reference to conflict between protection and empowerment

Legislations has been adopted in various sectors where women have been discriminated against. Legislations were adopted to deal with the problems considering the obligations of Article 14, 15 (3), 39 and other constitutional provisions and considering the discrimination against women in social, economic, political and other areas.

As the theme is in relation to empowerment vis- a-vis protection, so let's begin with position of women in economics, followed by approach of gender centric laws.

Women, economics and law

Economical settlement and the waysto ensurethis settlement is one of the most crucial aspect to empower a person. Same is applicable for women as well. Labour laws are for protection and empowerment of labour. Various labour laws are in force for women. However, most of the labour laws are for the protection of women rather than empowerment. Equal Remuneration Act, 1976 provides for equal pay for equal work. "Same work or work of a similar nature" is defined in the Act as: '...work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man and a woman.' The definition further provides that work will be considered to be the same or of a similar nature if any differences in skill, effort and responsibility between women and men 'are

not of practical importance in relation to the terms and conditions of employment.' The Act also prohibits discrimination in the recruitment of workers, and since its amendment in 1987, further prohibits discrimination in promotion, transfers and training.

However, in this background, if one analyses the market conditions, it would be observed that market has segregated work undertaken by men and women. However, the Act insists upon only equal remuneration but does not insist upon equal opportunities and equal work to be given to men and women. Women workers suffer lack of opportunities in labour market. It means men and women will not get equal work. Therefore, how will Equal Remuneration Act would be able to ensure equal remuneration. This Act speaks about equal remuneration only for same work or works of a similar nature, however do not speak about giving equal opportunities and nature of work.

In fact the ideal position would be that women should get an opportunity to decide if they can go for specific kinds of labour or not. That liberty to think for themselves has not given to women, it means labour laws are protecting women and not empowering women. Recently two developments have occurred in this regard. It's about night duty and employment in military as also maternity benefit to women. The Maternity Benefit (Amendment) Act, 2008 provides for more time to mothers for the care and protection of infants by regulating maternity benefits available to women in factories, mines, circuses, plantations and shops or establishments employing 10 or more persons. This Act provides for maternity leave and payment of monetary benefits to working mothers. Recently Bill on the same was passed by Rajya Sabha saying that public and private sectors have to give 26 weeks maternity leave. However, apprehensions have been coming up that due to this long leave that may be employers will be discouraged to appoint pregnant women. It may be noted that maternity benefit legislation gives maternity leave but do not put any obligation on employers to recruit women who is on the family way.The Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) enacted in

September 2005, provides for participation of women in employment and mandates employment of at least 33% of women who have requested employment. It provides for nurse and childcare at work site and convergence with schemes such as ICDS. The Act now covers all the districts of the country.

Unorganised Workers Social Security Act, 2008 provides social security to unorganised workers. It provides for constitution of National Social Security Board for formulation of Social Security schemes, namely (i) health and maternity benefits, (ii) death and disability, (iii) old age protection. The Board was constituted on 18th August 2009 and Government has also set up National Social Security Fund for unorganised sector workers.

The Plantations Labour Act, 1951 has been amended to make it gender sensitive and the provisions of the Plantations Labour (Amendment) Act, 2010 have come into force with effect from 7th June 2010.

Judiciary has intervened in this position at times positively but at times it goes in other way as well. Though in *Asha Goel v Union of India* dismissed a writ petition filed by woman lawyer who was prevented from employment in the Judge Advocate General's office for a five years short service commission in the law branch in which the reasons given by the Government for barring women from applying were that, "they are required to travel by rail, road and river, sometimes for a long period at a stretch, they will have to be present in the court martial where Judge accused and witnesses will all be males and the lady advocates are required to study the life of soldiers (all males) in Army units for several months, however, this position is changed and now even women can work in Judge Advocate General's Department. Induction of women in the Armed Forces was into certain restricted areas and on a Short Service Commission (SSC) basis. A policy decision was taken

in September 2008 where under the policy offering Permanent Commission prospectively to Short Service Commission (Women) officers in the JAG (Judge Advocate General) Department and the Army Education Corps (AEC) of the Army and their corresponding Branch/Cadre in the Navy and the Air Force has been sanctioned.

In number of decisions judiciary has played an active role to have equal position between men and women. One of the most glaring example is, "The Protection of Women at Workplace Act". This Act is adopted due to the guidelines adopted by the Supreme Court in *Vishaka v. State of Rajasthan*, which was a case regarding a woman who was raped at workplace. However, with this the objective of protection has been taken care of not empowerment. In fact, the researcher would like to argue that the name of the Act should have been "The Empowerment of Women at Workplace." In this sequence, recent amendment in Company Law 2013 is noteworthy. In which, having at least one women director has made mandatory. This provision is indeed can be read as a women empowerment provision.

Role of Judiciary

Therefore, to implement equality between men and women, mainly three approaches have been used by the judiciary. They are: protectionist approach, equal treatment approach and corrective approach. However, empowerment of women has hardly seen to be achieved even with these approaches.

The judiciary has used all three above mentioned approaches for the protection and at times for the empowerment of women. To support this, one may see the judgement given in *Bombay Labour Union v. International Franchise* (1966 AIR 942), *Maya Devi v. State of Maharashtra* (1986) 1 SCR 743 as also *Vishakha v. State of Rajasthan* (AIR 1997 SC). However, these decisions has made impact only for the case or the similar kind of situation.

Some of the recent cases are: *K. Krishnamurthy (Dr.) vs. Union of India*, (2010) wherein Supreme Court upheld the constitutional validity of Articles 243-D and 243-T of the Constitution, that provide for reservation of posts for women in panchayats /local self-governance institutions promoting substantive equality rather than formal equality pertaining to political participation at grassroots level; *Union of India vs. Rakesh Kumar*, (2010) wherein Supreme Court upheld the validity of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and the Jharkhand Panchayat Raj Act, 2001 reserving half of the seats in panchayats located in Scheduled Areas in favour of Schedule Tribes. The court held that the legislature has adopted a standard of compensatory discrimination which goes beyond the ordinary standards of “adequate representation” and “proportionate representation”.

The courts have always closely observed and corrected the provisions of various legislations. For example in case of *Anuj Garg vs. Hotel Association of India* (2008), the Supreme Court confirmed the Delhi High Court judgment and held that Section 30 of the Punjab Excise Act, 1914 that prohibits employment of “any woman” in any part of such premises in which liquor or intoxicating drug was served was discriminatory. It further observed that instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the State’s duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. In case of *Arun Kumar Agrawal vs. National Insurance Company Limited*, while determining the criteria for payment of compensation to the dependents of a woman who dies in a road accident but does not have a regular income, CEDAW and the Committee’s general recommendation 17 were relied upon. Section 66 of the Factories Act banned women from working in a factory in the night shift between 7 pm to 6 am. This provision was challenged before various High Courts

and the courts have struck down this provision holding it as discriminatory.

The way forward

With the help of various legislations and judicial decisions the women are becoming protected. Now the time has come when approach of protection should move towards empowerment. At times, it is seen that protectionist approach is shifting towards over protectionism. With this over protectionist approach, women may be would not be able to empower themselves. After Nirbhya’s unfortunate incidence, once again it was seen that thinking approach of people is still protectionist. Many influential and well known people suggested that girls should not go outside home at night. After this incidence majority of the taxis are claiming that they “respect women”, and they communicate this by writing it on the taxi. Here, the question is why taxi and other people have identified women as a separate group. Let’s write it as we “respect all human beings”. Woman is also a human being, so why taxi has to mention separately as we “respects women”. Recently, few schemes have been launched by the Indian Government which is showing that protectionist approach is shifting towards empowering women. Thus, various bills have been passed to empower women. Now its social group’s turn to let women empower then only a real equality will exist in society.

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