

WOMEN EMPOWERMENT AND GENDER JUSTICE

by

**Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India
on 15.06.2013 at Tamil Nadu State Judicial Academy during the
Special Training Programme for all District Judges and Chief Judicial Magistrates**

The issue of gender justice and women empowerment has been a concern in many nations and in many an arena for some centuries. Though there has been formal removal of institutionalized discrimination, yet the mindset and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of indignity and prejudice. The malady sometimes pounces with ungenerous monstrosity giving a free play to the inferior endowments of nature in a man thereby making the whole concept a ridicule, destabilising the entire edifice. The recent incident in the Capital of the Nation not only exhibits how such treatment is basically an anathema to the concept of gender justice but also exposes the barbaric mindset annihilating the values of basic civilization. The days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should be a matter of history. Gender equality and women empowerment are the call of the day and attempts are to be made to achieve satisfactory results. Everybody should be prepared to fight for the idea and actualize the conceptual vision in practicality.

Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the rights of women and claiming equal treatment. Initially, in the West, it was a fight to get the right to vote and the debate was absolutely ineffective and, in a way, sterile. In 1792, in England, Mary Wollstonecraft in "A Vindication of the Rights of Women" advanced a spirited plea for claiming equality for, "the Oppressed half the Species". In 1869, "In Subjection of Women" John Stuart Mill stated, "the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other". On March 18, 1869 Susan B. Anthony proclaimed "Join the union girls, and together say, "Equal pay, for Equal work". The same personality again spoke in July 1871 : "Women must not depend upon the protection of man but must be taught to protect themselves".

Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American Man of Letters, stated "A sufficient measure of civilization is the influence of the good women". Speaking about the democracy in America, Alexa De Tocqueville wrote thus: "If I were asked to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women". One of the greatest Germans has said : The Eternal Feminine draws us upwards".

Lord Denning in his book *Due Process of Law* has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom - develop her personality to the full – as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

At one point, the U.N. Secretary General, Kofi Annan, has stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."

International Conventions and Treaties on Gender Equality

The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights.

The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this Convention and other Declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus: -

"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community... The World Conference on Human Rights urges governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection of human rights of women and the girl child."

The Declaration on the Elimination of Violence Against Women (1993) is a comprehensive statement of international standards with regard to the protection of women from violence. The Declaration sets out the international norms which States have recognized as being fundamental in the struggle to eliminate all forms of violence against women.

The other relevant International Instruments on Women are : (i) Universal Declaration of Human Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

Gender Justice on the Constitutional bedrock

The Preamble of our Constitution is "a key to open the mind of the makers of the Constitution which may show the general purpose for which they make the Constitution. It declares the rights and freedoms which the people of India intended to secure to all citizens. The Preamble begins with the words "WE, THE PEOPLE OF INDIA....." which includes men and women of all castes, religions, etc. It wishes to render "EQUALITY of status and or opportunity" to every man and woman. The Preamble again assures "dignity of individuals" which includes the dignity of women. On the basis of the Preamble, several important enactments have been brought into operation, pertaining to every walk of life – family, succession, guardianship and employment – which aim at providing the protecting the status, rights and dignity of women. Our compassionate Constitution, the Fountain Head of all laws, is gender sensitive.

The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. It is apt to refer to certain constitutional provisions which are significant in this regard:

- (i) Equality before law (**Article 14**)
- (ii) The State not to discriminate against any citizen on grounds only of religion, race caste, sex, place of birth or any of them (**Article 15(i)**)
- (iii) The State to make any special provision in favour of women and children (**Article 15(3)**)
- (iv) The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (**Article 39(a)**); and equal pay for equal work for both men and women (**Article 39(d)**)
- (v) The State to make provision for securing just and humane conditions of work and for maternity relief (**Article 42**)
- (vi) The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation (**Article 46**)
- (vii) To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (**Article 51(A)(e)**)
- (viii) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (**Article 243 D(3)**)
- (ix) Not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (**Article 243 D(4)**)
- (x) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (**Article 243 T(3)**)
- (xi) Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (**Article 243 T(4)**).

Reservation under Articles 243 D (3), D (4), T (3) and T (4) are meant to empower the woman politically.

Some Articles play a major role in the field of women empowerment. Article 15(3) empowers the State to make special provisions for them. The well-being of a woman is an object of public interest and it is to be achieved to preserve the strength and vigour of the race. This provision has enabled the State to make special statutory provisions exclusively for the welfare of women.

Article 39(a), requires the State to direct its policy towards securing that the citizens, men and women equally have the right to an adequate means of livelihood. Under Article 39(d), the State shall direct its policy towards securing equal pay for equal work for both men and women. This Article draws its support from Article 14 and 16 and its main objective is the building of a welfare society and an equalitarian social order in the Indian Union. To give effect to this Article, the Parliament has enacted the Equal Remuneration Act, 1976 which provides for payment of equal remuneration to men and women workers and prevents discrimination on the ground of sex. Further, Article 39(e) is aimed at protecting the health and strength of workers, both men and women.

A very important and useful provision for women's welfare and well-being is incorporated under Article 42 of the Constitution. It imposes an obligation upon the State to make provisions for securing just and humane conditions of work and for maternity relief. Some of the legislations which promoted the objectives of this Article are the Workmen's Compensation Act, 1923, the Employees State Insurance Act, 1948, the Minimum Wages Act, 1948, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965, and the like.

Presently to summarize the precedents and observations which have come from the constitutional philosophy.

In *Valsamma Paul*¹, it has been ruled that human rights for women comprehends gender equality and it is also traceable to the Convention for Elimination of All Forms of Discrimination Against Women. Human rights for women, including girl child are inalienable, integral and an indivisible part of universal human rights. The full development of personality, fundamental freedoms and equal participation by women in political, social, economic and cultural life are held to be concomitants for national development, social and family stability and growth—cultural, social and economical. All forms of discrimination on grounds of gender are violative of fundamental freedoms and human rights.

Conferment of equal status on women apart from being a constitutional right has been recognized as a human right. In *Bodhisattwa Gautam*², the Court observed that women have the right to be respected and treated as equal citizens. Accentuating on the concept, it proceeded to state thus: -

“9. ...Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.”

In *Kharak Singh*³, the Court has recognized that a person has complete rights of control over his body organs and his 'person' under Article 21. It can also said to be including the complete right of a woman over her reproductive organs.

In *Chandrima Das*⁴, - it was case of gang-rape of a Bangladeshi national by the employees of the Indian Railway in a room at Yatriniwas at Howrah Station. These employees managed the Yatriniwas, the Government contended that it could not be held liable under the law of torts as the offence was not

¹ (1996) 3 SCC 545 : 1996 SCC (L&S) 772.

² (1996) 1 SCC 490

³ AIR 1963 SC 1295

⁴ (2000) 2 SCC 465

committed during the course of official duty. However, the Court did not accept this argument and stated that the employees of Union of India, who are deputed to run the railways and to manage the establishment, including the Railway Stations and Yatrivas are essential components of the government machinery which carries on the commercial activity. If any such employee commits an act of tort, the Union Government of which they are the employees can, subject to other legal requirement being satisfied be held vicariously liable in damages to the person wronged by those employees. The victim was awarded by the Court with a compensation of Rs.10 lakhs for being gang raped in Yatrivas of Railways. Since the right is available to non-citizens also, the reach of the right is very wide.

In *Vishakha*⁵, the Court took a serious note of the increasing menace of sexual harassment at workplace and elsewhere. Considering the inadequacy of legislation on the point, the Court defined sexual harassment and laid down instruction for the employers and thereafter the Court observed as under :

“Each incident of sexual harassment of woman at workplace results in violation of fundamental rights of “Gender Equality” and the “Right to Life and Liberty”.

Fundamental Duties towards women enshrined in the Constitution

Article 51-A under Part IV-A of the Constitution of India lays down certain Fundamental Duties upon every citizen of India which were added by the Forty Second Amendment of the Constitution in 1976. The later part of Clause (e) of Article 51-A, which relates to men, given a mandate and imposes a duty on Indian citizens “to renounce practices derogatory to the dignity of women”. The duties under Article 51-A are obligatory on citizens, but it should be invoked by the courts while deciding cases and also should be observed by the State while making statutes and executing laws.

Protection of Property Rights and Equal Treatment in Employment

Economic empowerment is a necessary fulcrum of empowerment. The Constitutional Courts in many an authority have laid emphasis on said conception and interpreted the provisions to elevate the status of women and to empower them.

In *Thota Manikayamma*⁶ the Court, while interpreting Section 14 of the Hindu Succession Act, 1956 converting the women’s limited ownership of property into full ownership, has observed as follows:

“21..... Article 15(3) relieves from the rigour of Article 15(1) and charges the State to make special provision to accord to women socio-economic equality It would mean that the court would endeavour to give full effect to legislative and constitutional vision of socio-economic equality to female citizen by granting full ownership or property to a Hindu female. As a fact Article 15(3) as a forerunner to common code does animate to make law to accord socio-economic equality to every female citizen of India irrespective of religion, race, caste or religion.”

When the matter relating to mother as natural guardian was questioned, the Court held that relegation of mother to inferior position to act as a natural guardian is violation of Articles 14 and 15 and hence, the father cannot claim that he is the only natural guardian. The guardianship right of women has undergone a sea change by this interpretation given by the Court in *Gita Hariharan*.⁷

⁵ AIR 1997 SC 301

⁶ (1991) 4 SCC 312

⁷ AIR 1999 SC 1149

In *Gayatri Devi Pansari*⁸ The Court has also upheld an Orissa Government Order reserving 30% quota for women in the allotment of 24 hours medical stores as part of self-employment scheme. Thus, the language of Article 15 (3) is in absolute terms and does not appear to restrict in any way the nature or ambit of special provisions which the State may make in favour of women or children.

In this context it is useful to refer to the decision rendered in the case of *Sellamma*⁹, wherein the Court held that the Hindu Marriage Act will override the U.P. Jamindari Abolition and Land Reforms Act and also held that exclusive right to male succession may be suspended till female dependent adopt another mode of livelihood.

Many a time question arises with regard to rights of women qua property. Various High Courts have interpreted Section 27 of the Hindu Marriage Act in a different manner. As far as the High Court of Madhya Pradesh is concerned the Court in the case of *Ashok Kumar Chopra*¹⁰, held that 'Stridhan' is the property of the wife in her individual capacity and the husband is merely trustee of that property and the husband is liable to return that property and value thereof under the substantive law and in equity. The power has been conferred by the M.P. High Court on the matrimonial courts in respect of certain properties.

In this regard it is necessary to refer that Hindu women who were not entitled to right to property have been given equal share along with male heir and they have presently been given equal rights.

The concept of equality is the bedrock of gender justice. In the case of *Neera Mathur*¹¹, a female candidate was required to furnish information about her menstrual period, last date of menstruation, pregnancy and miscarriage. When the matter came before the Court, their Lordships held that such declarations were improper. The Court directed that the Corporation would do well to delete such column in the declaration.

In the case of *Gayatri Devi Pansari*¹², the Court, while setting aside the decision of the High Court, ruled thus:

"Otherwise, by the mere fact of any lapse or omission on the part of the ministerial officers to identify a shop, the legitimate claims of a lady applicant could not be allowed to suffer defeating the very purpose and object of reservation itself. The view taken by the High Court has the consequence of overriding and defeating the laudable object and aim of the State Government in formulating and providing welfare measures for the rehabilitation of women by making them self-reliant by extending to them employment opportunities. Consequently, we are of the view that the High Court below ought not to have interfered with the selection of appellant for running the 24 hours' medical store in question."

In *Miss C.B. Muthamma, IFS*¹³ the constitutional validity of Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 and Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961 was challenged before the Court. The impugned provision Rule 8(2) requires a woman member of the service to obtain permission of the Government in writing before her marriage is solemnized and 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 as a member

⁸ AIR 2000 SC 1531 : (2000) 4 SCC 221

⁹ AIR 1977 SC 1265

¹⁰ AIR 1996 MP 226

¹¹ AIR 1992 SC 392

¹² (2000) 4 SCC 221

¹³ AIR 1979 SC 1858 : (1979) 4 SCC 260

of the service. Further, Rule 18(4) also runs in the same prejudicial strain, which provides that no married woman shall be entitled as a right to be appointed to the service. The petitioner complained that under the guise of these rules, she had been harassed and was shown hostile discrimination by the Chairman, UPSC from the joining stage to the stage of promotion. The Court held that these Rules are in defiance of Articles 14, 16 and 21.

In *Maya Devi*¹⁴, the requirement that a married woman should obtain her husband's consent before applying for public employment was held invalid and unconstitutional. The Court observed that such a requirement is an anachronistic obstacle to women's equality.

At this juncture, it is noteworthy that in *Associate Banks Officers Association*¹⁵, wherein the Court held that women workers are in no way inferior to their male counterparts, and hence, there should be no discrimination on the ground of sex against women.

In *Yeshaswinee Merchant*¹⁶, the Court has held that the twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. The Constitution does not prohibit the employer to consider sex while making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan.

The Court in *Vijay Lakshmi*¹⁷, has observed that Rules 5 and 8 of the Punjab University Calender, Vol. III providing for appointment of a lady principal in a women's or a lady teacher therein cannot be held to be violative of either Article 14 or Article 16 of the Constitution, because the classification is reasonable and it has a nexus with the object sought to be achieved. In addition, the State Government is empowered to make such special provisions under Article 15(3) of the Constitution. This power is not restricted in any manner by Article 16.

In *Municipal Corporation of Delhi*¹⁸, the Court held that the benefits under the Maternity Benefits Act, 1961, extend to employees of the Municipal Corporation who are casual workers or workers employed on daily wage basis. Upholding the claim of non-regularised female workers for maternity relief, the Court has stated:

“Since Article 42 specifically speaks of ‘just and human conditions of work’ and ‘maternity’ relief, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.”

In *Nargesh Meerza*¹⁹ the Air India and Indian Airlines Regulations were challenged as violative of Article 14. Regulation 46 provided that an air hostess was to retire from service upon attaining the age of 35 years or on marriage if it took place within four years of her joining service or on first pregnancy, whichever occurred earlier. Regulation 47 empowered the Managing Director, at a time beyond the age of retirement, upto the age of 45 years, if an air hostess was found medically fit. The Court struck down the Regulation providing for retirement of the air hostess on her first pregnancy, as unconstitutional, void and violative of Article 14. The Court explained that the Regulation did not prohibit marriage after four years of joining service and if an air hostess after having fulfilled the first condition became pregnant, there was no reason why pregnancy should stand in the way of her continuing in service. After utilizing

¹⁴ (1986) 1 SCR 743

¹⁵ AIR 1998 SC 32

¹⁶ (2003) 6 SCC 277

¹⁷ AIR 2003 SC 3331

¹⁸ AIR 2000 SC 1274

¹⁹ AIR 1981 SC 1829

her service for four years, to terminate her service if she became pregnant, court said, amounted to compelling the poor air hostess, not to have any children. If thus amounted to interfere with and divert the ordinary course of human nature. It was held not only a callous and cruel act but an open insult to Indian womanhood. Court also said that it was not only manifestly unreasonable and arbitrary but contained the equality of unfairness and exhibited naked despotism and was, therefore, clearly violative of Article 14.

*M/s Mackunnon Mechenize and co.*²⁰, - the question involved in the said case was getting of equal pay for equal work. In the said context the Court ruled that when lady stenographers and male stenographers were not getting equal remuneration that was discriminatory and any settlement in that regard did not save the situation. The Court also expressed the view that discrimination between male stenographers and lady stenographers was only on the ground of sex and that being not permissible the employer was bound to pay the same remuneration to both of them when they were doing practically the same kind of work.

Reservation of seats for women in election to local bodies and the concept of empowerment:

The Parliament has succeeded in its efforts to provide for reservation of seats for women in elections to the Panchayat and the Municipalities. Reservation of seats for women in Panchayats and Municipalities have been provided in Article 243D and 243T of the Constitution of India. Parts IX and IXA have been added to the Constitution by the 73rd and 74th Amendment Acts with Articles 243, 243A to 243D and Articles 243P to 243ZG. According to Article 243D(3), "not less than one-third, (including the number of seats reserved for women belonging to the Scheduled Castes and Scheduled Tribes) of the total number of seats to be filled up by direct election in every Panchayat, shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat. Article 243T(3) of the Constitution provides similar provisions for reservation of seats for women in direct election in the government. There are also provisions in the State enactment, by virtue of the constitutional mandate, to reserve the office of Chairperson and the Presidents in certain Municipal Corporations and Municipalities, Zila Panchayats and Janpad Panchayats for women. It is noteworthy to state here that under the Consumer Protection Act, there is a provision that one of the members shall be a woman and under the Family Court Act, preference is given to women for appointment. Sometimes question arises as to what extent equality is to be extended. The people who put this elementary question forget or deliberately do so that all men are born equal; and the division of bifurcation by the society between man and woman is the craftsmanship of male chauvinism. It has to be borne in mind that in the absence of equality of gender, human rights remain in an inaccessible realm. In most of the nations women are ascribed a secondary role. The secondary role has to be metamorphosed to the primary one to bring woman at the equal stratum. To achieve so, a different outlook in law has to be perceived. The perceptual shift is absolutely essential, in a way mandatory. For this reason, various provisions have been engrafted in the Constitution to confer some special and equal rights on women.

Presently, it is essential to sit in a time machine and penetrate to the past.

*In T. Sudhakar Reddy*²¹, the petitioner challenged the validity of Section 31(1)(a) of the Andhra Pradesh Cooperative Societies Rules, 1964. These provisions provide for nomination of two women members by the Registrar to the Managing Committee of the Cooperative Societies, with a right to vote and to take part in the meetings of the committee. These provisions were upheld in the interest of women's participation in cooperative societies and opined that it will be in the interest of the economic development of the country.

²⁰ AIR 1987 SC 1281

²¹ 1993 Supp. (4) SCC 439

In *P.B. Vijaya Kumar*²², the legislation made by the State of Andhra Pradesh providing 30% reservation of seats for women in local bodies and in educational institutions was held valid by the Court and the power conferred upon the State under Article 15(3) is so wide which would cover the powers to make the special legal provisions for women in respect of employment or education. This exclusive power is an integral part of Article 15(3) and thereby, does not override Article 16 of the Constitution.

In *Rakesh Kumar Gupta*²³, the Court while concurring with the view taken by the High Court of Allahabad in respect of reservation of 50% passed in favour of female candidate has opined thus: -

“14. The Division Bench took the view that Article 15(3) of the Constitutional enables the State Government to make special provision for women and children notwithstanding the prohibition contained in Article 15(1). Particularly viewed in the background of the fact that a large number of young girls below the age of 10 years were taught in the primary school and recognizing that it would be preferable that such young girls are taught by women, the reservation of 50% of the posts in favour of the female candidates was held to be justified. The classification made was justified and cannot be styled as arbitrary or liable to be hit by the Article 14.”

In the State of Madhya Pradesh an amendment was brought into force in the M.P. Municipal Corporation Act, 1956 and the M.P. Municipalities Act, 1962 by enhancing the reservation in favour of women from 30% to 50% in municipal corporation and municipalities. The constitutional validity of the amended provisions was challenged on the backdrop of Articles 14 and 15 of the Constitution of India. In *Ashok Kumar Malpani*²⁴ the High Court, after adverting to the concept of reservation and the decisions relating to reservation in various fields, upheld the constitutional validity. In that context, the Bench observed:-

“The legislation, in our considered opinion, is a real deep inroad into encouraging the participation of women in the decision making process at the ground level of democracy. Women in India are required to participate more in a democratic set-up especially in the ground democratic polity. Not for nothing, it has been said "educate a man and you educate an individual; educate a woman and you educate a family".

The colossal complaint made by the learned counsel for the petitioners that if women come into the arena of the decision making process, it will be anathema to the administrative set-up as the bureaucrats shall take over the administration in view of the inadequacies of women, in our considered opinion, is a premature thinking based on a priori notions and beyond the scope of constitutional tolerance. Democracy is a basic feature of our Constitution and it has to develop from the ground reality level. The participation of socially and educationally backward classes and women could really nurture and foster democracy in the country. Be it noted, though the issue of gender justice has been gaining ground in many nations and in many an area for some centuries and the traditional view of gender injustice has been given quite a quietus and treated as an event of bygone days, yet the malady still remains and deserved to be remedied.

It would not be inappropriate to state here that if the dynamics of women reservation are understood in proper perspective, it would be quite clear that the number of women representatives at various layers of democratic setup is really quite low.

²² AIR 1995 SC 1648

²³ AIR 2005 SC 2540

²⁴ 2009 (IV) MPJR 179 = AIR 2010 MP 64

It would not be inapposite to state that women have entered into the Indian Panchayat Raj Institutions by virtue of the Constitutional Amendment but their active participation in the decision making process in actuality remains at abysmal level. It is because their interest in the democratic setup of election has still not been accentuated for the simple reason that they have to negotiate and wrestle with the powerful members of the society. The submission of the learned counsel for the petitioners is that women are contesting in the election is of utmost significance and that would irrefragably exhibit that they are conscious and there is no justification to marginalise the equality clause. We are of the view that participation in the election and losing the same can never be equated with the decision making process. One can only be a party to the decision making process when one is on the floor of the House as a representative and that is how the recognition of decision making process can be conferred on women. As the affidavit filed by the State would show their success in the election process is extremely low, we are disposed to think, the reservation, an act of special affirmation and a protective discrimination, is a warrant which has been done by the State Legislature in its wisdom. Therefore, the submission that such reservation is not necessary and, in fact, does tantamount to reverse reservation do not deserve acceptance.

It cannot be totally ostracised from the compartment of equality that unless law assists women in an accentuated manner, the basic tenet of the concept of equality would not be achieved and women will be put in the category of non-achievers.

In a democracy where Rule of Law governs, the democratic polity it can only be advanced in a cultivated society. It is absolutely imperative to have the help of women where they are given certain rights. The truth is self-evident and that is how the fathers of the Constitution had perceived it.

The High Court eventually ruled that Article 243T does not put a ceiling by using the terms 'not less than 1/3rd'. In fact, it prescribes for the minimum reservation but does not create any kind of impediment on the part of the State Legislature to enhance the percentage of reservation for women and that the stand of the petitioners to the effect that if the reservation of seats for women upto 50% is sustained, it will usher in bad governance as the bureaucratic setup would take up the entire policy making decision is totally baseless and, in fact, is absolutely premature.

Offences against women and issue of gender justice

*Madhukar Narayan Mardikar*²⁵ - The High Court observed that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a Government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any person to violate her as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.

In *Ramdev Singh*²⁶, while emphasising that the Court should deal with cases of sexual offences sternly and severely, it has been observed that sexual violence apart from being a dehumanising act is

²⁵ (1996) 1 SCC 57

²⁶ (2004) 1 SCC 421 : 2004 SCC (Cri) 307.

an unlawful intrusion on the right of privacy and sanctity of a female. It has been further held that rape is a crime against basic human rights.

In *Kundula Bala Subrahmaniam*²⁷, the Court gave some indications in dealing with the case of dowry related violence. The Court observed that such cases ought to be dealt with in a more realistic manner and criminals should not be allowed to escape on account of procedural technicalities or insignificant lacunae in the evidence and the courts are expected to be sensitive in cases involving crime against women.

In *Stree Atyachar Virodhi Parishad*²⁸, The Court observed,

“We are referring to these provisions only to emphasize that it is not enough if the legal order with the sanction above moves forward for protection of women and preservation of societal values. The criminal justice system must equally respond to the needs and notions of the society. The investigating agency must display a live concern. The Court must also display greater sensitivity to criminality and avoid on all courts 'soft justice'.”

In *Rupen Deo Bajaj*²⁹, the Court said that the offence under Section 354 IPC should not be treated lightly as it is quite a grave offence. In certain western countries privacy to person and even privacy to procreation are regarded as very sacrosanct rights and if this offence is studied in that prospect the offence would clearly show that it affects the dignity of women and, therefore, the accused of this offence, when proved, should be appropriately dealt with.

A judge should refrain himself from giving stigmatic observations on the character of the prosecutrix. It should be kept in mind that a finding recorded in this sphere is to be treated as irresponsible. A woman who is even acquainted to sexual intercourse has every right to refuse to submit herself to sexual intercourse as a woman is not a vulnerable object or prey for being sexually assaulted by any one. This is the view expressed by their Lordships of the Court in the case of *Ganula Satya Murthy*³⁰. It is appropriate to mention here that in the said case, the Court also observed that it is an irony that while we are celebrating women's rights in all spheres we show little or no concern for their honour. Their Lordships further observed that the Courts must deal with rape cases with utmost sensitivity and appreciate the evidence of the totality on the background of the entire case and not in isolation.

*A.K. Chopra*³¹ – The accused-respondent tried to molest a woman employee (Secretary to Chairman of a Delhi based Apparel Export Promotion Council) Miss X, a clerk-cum-typist on 12th August, 1988 at Taj Hotel, Delhi. The respondent persuaded Miss X to accompany him while taking dictation from the Chairman, so that her typing was not found fault with. While Miss X was waiting in the room, the respondent taking advantage of the isolated place tried to sit too close to her and touched her despite her objections; and tried to molest her physically in the lift while coming to the basement, but she saved herself by pressing emergency button, which made the door lift open. In appeal of the case Court held that in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of case and not swayed away by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression 'molestation' or 'physical assault'.... The sexual harassment of a female employee at the place of work is incompatible with the

²⁷ (1993) 2 SCC 684

²⁸ (1989) 1 SCC 715

²⁹ (1995) 6 SCC 194

³⁰ AIR 1997 SC 1588

³¹ AIR 1999 SC 625

dignity and honour of a female and need to be eliminated and that there can be no compromise with such violation.

Recently, in *Jugendra Singh*³² the Court, while commenting on rape and its consequences, observed thus:

49. Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu. The cry of the collective has to be answered and respected and that is what exactly the High Court has done by converting the decision of acquittal to that of conviction and imposed the sentence as per law.³³

In *Gurnaib Singh*, decided on 10.5.2013, Court has opined that respect of a bride in her matrimonial home glorifies the solemnity and sanctity of marriage, reflects the sensitivity of a civilized society and, eventually, epitomizes her aspirations dreamt of in nuptial bliss. But, the manner in which sometimes the brides are treated in many a home by the husband, in-laws and the relatives creates a feeling of emotional numbness in the society. It is a matter of great shame and grave concern that brides are burnt or otherwise their life-sparks are extinguished by torture, both physical and mental, because of demand of dowry and insatiable greed and sometimes, sans demand of dowry, because of the cruelty and harassment meted out to the nascent brides treating them with total insensitivity destroying their desire to live and forcing them to commit suicide a brutal self-humiliation of "Life".

Offence of rape is regarded as one of the most heinous crimes. Every person's physical body is a temple in itself. No one has the right to encroach and create turmoil. When there is any kind of invasion or trespass, it offends one's right. The right of a woman to live in her physical frame with dignity is an epitomization of sacrosanctity. An impingement or incursion creates a sense of trauma in the mind of the person. Not only does the body suffer but the mind also goes through such agony and tormentation that one may not be in a position to forget throughout her life. She becomes a different person in the eyes of the society for no fault of her. That apart the offence of rape is an offence which creates a dent in the social marrow of the collective and a concavity in the morality of the society. A sense of fear looms large and the menace is extremely arduous to cross over. The perversity ushers in a sense of despondency and mass melancholia. While dealing with offences of this nature a judge has to be exceedingly sensitive. A desensitized approach is not appreciated. It is the bounden duty of the judge to show greater sensitivity. The Judge should show careful attention and greater sensitivity as has been highlighted by the Court in the case of *Mange Ram*³⁴.

An aspect which needs to be stated here is that a woman who has been raped is not an accomplice. She is the victim of a carnal desire. In a case of rape, corroboration need not be searched for by the judge if in the particular circumstances of the case before him he is satisfied that it is safe to rely on the evidence of the prosecutrix. The evidence of the prosecutrix should be appreciated on the basis of the probability and conviction can be based solely on such testimony if her evidence is credible,

³² *Jugendra Singh v. State of U.P.*, (2012) 6 SCC 297 : (2012) 3 SCC (Cri) 129.

³³ *Ibid.*, 311, para 49.

³⁴ AIR 2000 SC 2798

unimpeachable and inspires confidence. There is no rule of law that her testimony can not be acted upon without corroboration in material particulars. If the prosecutrix is able to give a vivid account of how she was subjected to sexual harassment and the intercourse the same can be placed reliance upon and the conviction can be recorded. This is the view of the Court in the decisions rendered in the cases of *Gurmeet Singh*³⁵, *N.K.*³⁶ and *Padam Lal Pradhan*³⁷.

In the case of *Gurmeet Singh*³⁸, the Court observed as under :

“21. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecuterix as to the details of the rape The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the Court while every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility her version through cross-examination, the court must also ensure that cross-examination, is not made a means of harassment or causing humiliation of the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings, what shad been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as ‘discrepancies and contradiction’ in her evidence.”

While dealing with this offence certain more decisions are also to be kept in mind so that they can be applied in the facts of the case. In the case of *M.M. Mardikar*³⁹, it has been emphatically laid down that there is no rule of law of prudence requiring corroboration of the victims in a case of rape. Lack of corroboration by medical evidence, non-raising of alarm, no-evidence of showing resistance and such other ancillary factors. From these angles the prosecution is disbelieved or the Court arrives at the conclusion that there is consent. The Court in the case of *Mange Ram*⁴⁰, has clearly laid down that if the prosecutrix submits her body under fear or terror the same would never amount to consent. In the said case their Lordships also held that in the absence of any violence to the body of the victim in all circumstances would not give rise to inference of consent. In this context, it is profitable to refer to the observation made in the case of *N.K.*⁴¹, wherein the Court held that the absence of injuries on the person of the prosecutrix is no necessary to falsify the allegation or be regarded as an evidence of consent on the part of the prosecutrix. Their Lordships have further held that it would depend upon the facts and circumstances of each case. In the aforesaid case the statement of the father of the prosecutrix was treated to be admissible under Section 157 of the Evidence Act as her father’s statement corroborating her testimony under section 8 of the said Act as evidence of her conduct. The Court laid stress on the testimony of the father keeping in view the tradition of the society where a father would not come to depose to jeopardise the prospects of marriage of his daughter.

³⁵ (1996) 2 SCC 384

³⁶ AIR 2000 SC 1812

³⁷ (2000) 10 SCC 112

³⁸ (1996) 2 SCC 384

³⁹ AIR 1991 SC 207

⁴⁰ AIR 2000 SC 2798

⁴¹ AIR 2000 SC 1812

At this stage, it is apposite to refer to a passage from the decision rendered in the case of *Bharwada Bhoginibhai Hirjibhai*⁴², wherein the Court observed thus:-

“Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.”

The Court further proceeded to hold as under: -

“A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had even occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbors. She would face the risk of losing the love and respect of her own husband and near relatives and of her matrimonial home and happiness being shattered. If she is unmarried she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built in assurance, that the charge is genuine rather than fabricated.”

A victim of rape suffers from deathless shame. To acquit an accused because of loopholes in the prosecution would be adding insult to injury. In the case of defective investigation the court has to be circumspect in evaluating the evidence but it would not be correct in acquitting the accused for the said defect. If the courts pave that path it would tantamount to playing into the hands of the investigating officer, if the investigation has been designedly made defective. Another aspect which I intend to highlight is that as per law laid down by the court and also the provisions in the statute book the trial of a rape case is to be held in camera and it should be the duty of the Court to see that she is not harassed.

In *Gyan Chand*⁴³, the Court reiterated the principle that minor inconsistencies should not be given weightage. In the said case the Court also emphasised that the Court should shoulder a great responsibility while considering a rape case and such cases must be considered with utmost sensitivity. The Court should examine the broader probabilities of the case and not get swayed away by minor contradictions.

Another fact is delay in filing of FIR. In a case of rape it is dependent upon the facts of each case. The prosecuterix does not immediately rush to the Police Station to lodge and FIR. She has to overcome the trauma. There is consultation with the family members and a decision is taken. All these circumstances are to be kept in mind.

It is noticed that some judges unnecessarily give emphasis on the presence of spermatozoa in the victim's private parts. It is to be borne in mind that the definition of rape has a different connotation. A mild penetration would meet the ingredients of the crime. There may be several circumstances, which affect the presence of the spermatozoa, and hence, emphasis on the same is unwarranted.

⁴² AIR 1983 SC 753

⁴³ AIR 2001 SC 2075

Every trial Judge should be vigilant and alert. He should see to it that the trial is properly conducted and the prosecutrix is not unnecessarily harassed. In this context, one may profitably quote a line by Edmund Burke:

“A Judge is not placed in the high situation merely as a passive instrument of the parties. He has duty of his own, independent of them and that duty is to be investigate truth.”

In this regard reference to the observation of Lumpkin, J, in the case of *Epps V. State* is seemly :

“Counsel seek only for their client’s success, but the Judge must watch that justice triumphs.”

When one talks about gender equality one cannot be unobservant with regard to the dowry problem which has become an incurable menace to the society. One would not be very much incorrect to say that it has corroded the core and kernel of the society. Enactments have been made to check the evils of dowry. Definition has been given defining dowry death. Section 113(b) has been inserted in the Evidence Act raising presumption as to dowry death in certain circumstances. All force and energy should be exerted to repress and check the move of this despot. Sometimes it is felt that despite denunciation from all quarters the malignancy of dowry permeates. It appears to be wholly ubiquitous. While dealing with the offence relating to this sphere the Court has to adopt a realistic yardstick.

In this context, I may refer with profit to the reflection of a woman author who has spoken with quite a speck of sensibility :

“Dowry is an intractable disease for women,
a bed of arrow for annihilating self-respect,
but without the boon of wishful death.”

In these lines the agony of the woman is writ large.

Court’s concern in eve-teasing cases

In *S. Samuthiram*⁴⁴ the Court observed that every citizen in this country has right to live with dignity and honour which is a fundamental right guaranteed under Article 21 of the Constitution of India. Sexual harassment like eve-teasing of women amounts to violation of rights guaranteed under Articles 14 and 15 as well. Eve-teasing today has become pernicious, horried and disgusting practice. Consequences of not curbing such a menace are at times disastrous. There are many instances where girls of young age are being harassed, which sometimes may lead to serious psychological problems and even committing suicide. The necessity of a proper legislation to curb eve-teasing is of extreme importance. Thereafter, taking note of the absence of effective uniform law, certain directions were issued to curtail the menace. The said directions include to depute plain-clothed female police officers in the precincts of bus-stands and stops, railway stations, metro stations, cinema theatres, shopping malls, parks, beaches, public service vehicles, places of worship, etc. so as to monitor and supervise incidents of eve-teasing. The persons in charge of educational institutions, places of worship, cinema theatres, railway stations, bus-stands have to take steps as they deem fit to prevent eve-teasing, to establish women helpline in various cities and towns and also to control eve-teasing in public service vehicles either by the passengers or the persons in charge of the vehicle.

Future Protection: Female foeticide

⁴⁴(2013) 1 SCC 598.

While dealing with violation of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994, apart from giving series of directions, emphasis was also made on practice of female foeticide in *Voluntary Health Association of Punjab*⁴⁵. In the said case it has been said that Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, ego-centric traditions, pervert perception of societal norms, and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.

Further discussing about the repercussion of female foeticide it has been opined that every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it.

Reference was made to the scriptural comments and postulates. The Court referred to three Shlokas that have been referred in *Nikku Ram and others*⁴⁶, wherein the judgment commenced with the line

“यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः”

[“*Yatra naryastu pujiyante ramante tatra dewatah*”] (where woman is worshipped, there is abode of God).

The second line being significant was reproduced. It is as follows: -

“यत्र तास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः”

[*Yatra tāstu na pūjiyante sarvāstatrāphalāḥ kriyāḥ*]

A free translation of the aforesaid is reproduced below:-

“All the actions become unproductive in a place, where they are not treated with proper respect and dignity.”

Two other references that were given are stated below: -

“भृतृभ्रातृपितृजातिश्वश्रूश्वशुरदेवरैः ।

बन्धुबिश्च स्त्रियः पूज्याः भूषणाच्छादनाशनैः ॥”

[*Bhārtr bhratr pitrijnāti śwaśrūswaśuradevaraih*
Bandhubhiśca striyah pūjyāḥ bhusnachhādanāśnaih]].

A free translation of the aforesaid is as follows:-

“The women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour.”

⁴⁵ 2013 (3) SCALE 195

⁴⁶ (1995) 6 SCC 219

Yet again, the sagacity got reflected in following lines: -

“अतुलं यत्र तत्तेजः सर्वदेवशरीरजम् ।
एकस्थं तदभून्नारी व्यासलोकत्रयं त्विषा ॥”
[Atulam yatra tattejah śarvadevasarirajam| Ekastham
tadabhūnnārī vyāptalokatrayam tvisā||]

A free translation of the aforesaid is reproduced below:-

“The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman.”

In *Vishal Jeet v. Union of India*⁴⁷ the Court in Public Interest Litigation, after issuing certain directions, observed thus: -

“We hope and trust that the directions given by us will go a long way towards eradicating the malady of child prostitution, devadasi system and jogin tradition and will also at the same time protect and safeguard the interests of the children by preventing the sexual abuse and exploitation.”

Conclusion

It is common knowledge that despite constitutional safeguards, statutory provisions and plethora of pronouncements to support the cause of equality of women, changes in social attitudes and institutions have not significantly occurred. But, there has to be total optimism to achieve the requisite goal. It is necessary to accelerate this process of change by deliberate and planned efforts so that the pernicious social evil of gender inequality is buried deep in its grave. Laws written in black and white are not enough to combat the evil. A socially sensitive judge is indeed a better statutory armour in cases of crimes against women than penal statutes.

Awakening of the collective consciousness is the need of the day. A problem as multifaceted as women's self-actualization is too important to be left to a single section of the society. This responsibility has to be shared by the State, community organizations, legislators who frame the laws and the judiciary which interprets the Constitution and other laws in order to give a stimulus to the legal reform in the field of gender justice and to usher in the new dawn of freedom, dignity and opportunity for both the sexes equally.

⁴⁷ AIR1990 SC 1412