

WOMEN AND THE LAW

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Indian women have not suffered due to neglect by the law - they have suffered inspite of the law. Her inferior status as a secondary caste was not legally mandated. Inferiority and inequality are closely linked to the stratification of society into a sexual caste system. The existence of a predominantly male-dominated culture is only a reflection of a predominantly patriarchal society. The ideology of this sexual caste system being similar to the larger caste system which, as anthropologist June Star has pointed out "celebrates special hierarchy and inequality and represents, in ideal form, a society divided into permanently separated groups arranged in a hierarchical order, in a social system in which there is subordination, separation into castes, and inter-dependence among the caste groups."¹

Women's status is determined only in part by "Law". Social conditions, the values of a masculine culture, religion, economic imbalances are very important extra legal factors which shape attitudes that determine status. What is needed to improve the status of women in India is not a constitutional battle as is now being witnessed in America over the Equal Rights Amendment. Rather there is an urgent need for a powerful social movement; the recognition that law and more law is not a panacea for all evils, but the need to strengthen and communicate and apply existing laws is, so also the introduction of legislation only in those areas where it is necessary to eradicate specific social evils like dowry. Anthropologist Andrea Singh² suggests making

women's participation mandatory in local panchayats to ensure their interests especially given the "informal social networks of males in power relationships from which women are excluded due to sex segregation." Also recommended are the development of rural women's organizations like Mahila Mandals, trade unions and co-operatives; women dowry cells; anti-rape squads; a human rights commission to assess the violation of human rights against women; an economic employment cell to assess the progress of work projects in rural and other areas; a cell to investigate the economic exploitation of women in the organised and unorganised sectors. (The latter is especially necessary since economic inequality is closely related to social inferiority.). All these welfare services will imply participation of women social workers if the existing laws are to be made more meaningful.

Constitutional declaration - Political and Legal Rights

The Indian Constitution's explicit stated goal was one of egalitarianism and social justice. In fact, the Constitution itself provides for affirmative action³ in Article 15(3), Articles 14, 16, the Preamble, as well as the Directive Principles of State Policy, extend these egalitarian goals. Political, social and economic disabilities were thus abolished in 1950 by the Constitution. Social conditions, however, perpetuated discrimination which resulted in excluding one-half of the population from the tangible benefits of political and economic power. To quote June Starr again⁴ -

"Constitutional statements concerning secular equality and social justice make India's system of enacted civil and political rights sound as modern and just as any democratic country in the world. But as we shall see these are mostly a series of 'paper laws' and 'political rhetoric' with too little, too late attempts at implementation."

This view is in fact supported by the decline in participation of women in elections and in the representation in the Lok Sabha and State Legislatures. In 1962, there were 1,985 women who contested elections to the Lok Sabha, 7.09% were elected. In 1977, by contrast 2,439 women contested elections; only 3.51% were returned.

The battle over the Equal Rights Amendment in the U.S.A. was partly responsible for the dramatic shift in judicial treatment of sex discrimination cases. The need for a powerful women's movement in India is even more compelling to expose the inequities and injustices of movements which promise social justice but fall actually far short of doing so. In two recent decisions of the courts in India undoubtedly influenced by the egalitarian winds of the International Women's Year, the Court invoked the provisions of the Indian Constitution to safeguard the rights of women in Muthamma vs. Union of India⁶ and Garg vs. Garg⁷. In the former, Justice Krishna Iyer ruefully remarked about the dichotomy between the law in the book and the law in action:

"That our founding faith enshrined in Article 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity viz., our women is a sad reflection on the distance between Constitution in the book and law in action. And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part IV, especially when high political office, even diplomatic assignment, has been filled by women, the inference of die-hard allergy to gender parity is inevitable."

The facts of the case were as follows :

The petitioner was a senior member of the Indian Foreign Service and complained that she had been denied promotion to Grade-I of the Indian Foreign Services on the grounds that (i) there is a long standing practice of hostile discrimination against women, (ii) had to give an undertaking at the time of joining the foreign

service that if she were to get married, she would resign from the service, (iii) had to face the consequences of being a woman and thus suffered discrimination, and (iv) the members of the appointments Committee of the Union Cabinet and Respondent No. 2 are basically prejudiced against women as a group. The petitioner further challenged two rules namely rule 8(2) of the Indian Foreign Service (Recruitment Cadre, Seniority and Promotion) Rules, 1961, which in short states that a woman member of the service shall obtain permission in writing of the Government before marriage and the woman member may be required to resign any time after marriage if the Government is satisfied that her family and domestic commitments will hamper her duties as a member of the service and under the second rule no married woman shall be entitled as of right to be appointed to the service. The petitioner's remaining grievance was that during the interval of some months between her first evaluation and the second, some officers junior to her, had gone above her and her career was affected.

In the second case, Justice Deshpande observed:

"In the light of the above observations, it would appear that there is no warrant in Hindu law to regard the Hindu wife as having no say in choosing the place of matrimonial home. Article 14 of the Constitution guarantees equality before law and equal protection of the law to the husband and the wife. Any law which would give the exclusive right to the husband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife would be contrary to Article 14 and unconstitutional for that reason."

While the Courts upheld to challenge to Article 14 of the Constitution, the "protective discrimination" in favour of women sanctioned by the Constitution which prohibited women from being prosecuted for the offence of adultery in section 497 IPC was sought to be challenged by a women petitioner⁸ who alleged that the discrimination

in favour of women had, in fact, resulted in denying her equal protection of laws under Article 14 of the Constitution. A wife under section 497 IPC is not punishable as an abettor in the crime of adultery⁹. Consequently, her husband not having joined her as a co-accused in a complaint filed by him against his wife's paramour, it was contended would in fact result in the wife petitioner not being given an opportunity to be heard in defence of the allegations made by her husband. The direct and inevitable result of such an adverse order, it was alleged, would gravely prejudice the petitioner and hence it was urged that in view of the resultant miscarriage of justice and violation of equality, section 497 of the IPC ought to be struck down. Thus, what was considered a beneficial provision at the time of the enactment of the Indian Penal Code in 1860, because of the social position of women had in fact caused hardship to the wife petitioner. The decision is yet to be pronounced and the matter is pending in the Supreme Court and is subjudice.

Economic Rights and Employment

While the Courts were quick to extend the beneficial effects of Article 14 to women, the Legislature was equally anxious to prove its non-sexist credentials, particularly in the International Year of Women.

The enactment in 1976 of the Equal Remuneration Act marks an advance in the fight towards equal rights. This Act is an extremely important piece of legislation. Good laws, however, go unnoticed in bad days. While the government was busy destroying human rights in the period of the Emergency, ironically, it passed the Equal Remuneration Act which was meant to confer, equal benefits on women. If the law is to be effective, it is important that policy makers should publicise such laws for the sake of the people whom it is intended to benefit. The objects and reasons of the Act are laudable.

"Article 39 of the Constitution envisages that the State shall direct its policy, among other things, towards securing that there is equal pay for equal work for both men and women. To give effect to this constitutional provision, the President promulgated on the 26th of September, 1975, the provisions of Article 39 of the Constitution may be implemented in the year which is being celebrated as the International Women's Year. The Ordinance provides for payment of equal remuneration to men and women workers for the same work or work of a similar nature and for the prevention of discrimination on grounds of sex". The Act is applicable to discrimination in both Government and the private employment in respect of establishments factories and industries which have been enumerated in the Schedule to the Act.

"Section 4: Duty of employer to pay equal remuneration to men and women workers for same work or work of similar nature -

(1) No employer shall pay to any worker, employed by him in an establishment or employment, remuneration whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work of a similar nature.

(2) No employer shall, for the purpose of complying with the provisions of sub-section (1) reduce the rate of remuneration of any worker.

(3) Where, in an establishment or employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the same work or work of a similar nature are different only on the ground of sex, then the higher (in cases where there are only rates), or as the case may be, the highest (in cases where there are more than two rates), of such rates shall be the rate at which remuneration shall be payable on and from such commencement, to such men and women workers.

Provided that nothing in this sub-section shall be deemed to entitle a worker to the revision of the rate of remuneration payable to him or her with reference to the service rendered by him or her before the commencement of this Act.

Section 5: No discrimination to be made while recruiting men and women workers:

On and from the commencement of this Act, no employer shall, while making recruitment for the same work or work of a similar nature, make any discrimination against women except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force.

Provided that the provisions of this section shall not affect any priority or reservation for scheduled castes or scheduled tribes, ex-servicemen, retrenched employees or any other class or category of persons in the matter of recruitment to the posts in the establishment or employment".

The Act provides for Advisory Committees for increasing the employment opportunities of women; it enjoins the Government to appoint authorities to decide claims and complaints. It casts duties on employers to maintain registers with regard to workers employed, it imposes penalties for non-compliance with the provisions of the Act Clauses 15 and 16, however, restrict application of the Act in some cases.

Apart from the Equal Remuneration Act, used effectively in the ASIAD Judgment¹⁰, there are also a series of Legislative Acts, Laws and Judicial decisions which comprise the existing body of labour law. The ideals of "the welfare state" are enshrined in the directive principles of state policy enunciated by the Constitution of the Republic of India. These directives suggest the responsibility of the state "to secure just and humane conditions of work and maternity relief". In

addition, the state is to provide "public assistance in cases of unemployment, old age, sickness and disablement and in the cases of undeserved want; protection of the health and strength of workers, and to protect citizens from being forced to enter avocations unsuited to their age or strength. The state is further required to strive to secure work, a living wage, a decent standard of living, leisure, social and cultural opportunities for people which are to be available to all sections of the population, including the working class. The right of labour to form associations is enshrined as a fundamental right.

Under the Factories Act of 1948 no women can be employed in any factory between 6.00 p.m. and 7.00 am and there should be no change of shifts without a weekly holiday or any other holiday.

The Employer's Liability Act of 1938; the Employees' State Insurance Act of 1948; the Maternity Benefit Act of 1961 are other statutory enactments in the area of labour law. The Act covers women employees in factories, mines, plantations and other places where women are employed for equestrian, aerobic or other kinds of performances. State governments with the approval of the Central Government may extend maternity benefits to "agricultural" workers.

On paper here too, the discrimination quotient in wage payment is not apparent. While there is no wage discrimination between men and women occupying the same job in the organised sector in India, this is not easily monitored and enforced outside the public sector. Besides little data is available on income for the vast majority of women workers, i.e. those in the unorganised sector and agriculture who are not affected by minimum wage legislation. A few states in India have fixed minimum wages for occupations in the non-organised sector including agricultural unskilled labour. The implementation and enforcement, however, has

proved to be a problem and, as anthropologist Andrea Singh has pointed out, the women's bureau is looking into legally sanctioned discriminations of this kind with a view to taking corrective measures. Further, she points out that sex stereo-typing of agricultural tasks is one of the most important factors that have to be taken into consideration since women have been relegated to back-breaking labour-intensive jobs which are rather poorly paid. Besides, protective legislation which was meant to bring special benefits to women has had, as Andrea Singh points out the unintended consequence of reducing their employment in factories in the organised sector because of the increased cost of record keeping and benefits. Perhaps, the suggestions that there is a need for law making it incumbent on the employers to allocate specific funds whether they employ women or not for the purposes of providing child care services in the industries is a point worth considering. So also social security claims and social security legislations to deal with the problem of 'heads of households' where large number of women have to shoulder the responsibility of providing for household income due to the migration of man to urban areas or their failure to contribute to household income. The Department of Social Welfare has estimated that about a hundred thousand widows become destitutes each year in India. This has created a new problem which requires the enactment of new laws. The need for implementing advisory centres, legal aid services and vigilance centres of social workers could help to protect and mitigate the injustices caused to women due to the problems highlighted in the above mentioned paragraphs. In this context the ASIAD judgment already referred to could pave the way to help correct prejudices by employers who either refuses to employ women or employ women in stereotyped jobs.

Replies from 10 states to questionnaires showed that there was only one case of prosecution. The official document states that the incidence and practice of dowry leading to torture and death is reported to be higher amongst the middle class.

If the system of dowry were associated with giving a daughter the share of her father's property, it would be easier to deal with it.

In reality, dowry has come to be associated with barter and offsetting the economic liability for parents of the bridegroom. The failure of the existing level measures are to be found both within the legal system and outside the legal system. There are loopholes and lacunae in the law, particularly in the definition of dowry in the law, particularly in the definition of dowry in the Dowry Prohibition Act of 1961. In a recent judgment of Delhi Court, the demand for dowry made after the marriage had been performed was not held to be dowry by the learned judge. Such lacunae and loopholes and technical interpretations of law defeat the purpose for which the Act was enacted. The other legal factors are that the dowry law itself has not been widely communicated to people in the country.

The extra legal causes are (a) the lack of supporting social opinion; (b) the lack of community concern for individual suffering; and (c) the lack of will to end this evil. Prof. Rathod and Prof. Pandey of the Delhi University Faculty of Law have suggested various amendments which need serious consideration. They are -

- (a) making the offences under the Act non-cognizable and compoundable;

The role of voluntary women's organizations in organising protests, demonstrations and socially ostracising those who indulge in the giving and taking of dowry, has helped immensely in creating social awareness which, it is hoped, will have its effects on the law since social movements inevitably have powerful repercussions on legal movements.

The pervasive poverty in India has aggravated the problem of dowry. Official statistics have placed people living below the poverty line in rural areas at 40% and in urban areas at 41%. In 1976, of an estimated 310 million families in South Central Asia, 127 million lived in poverty. Besides, patrilineal systems prevalent in India have served to reinforce dependency of women on men and to dramatically reduce the amount of control they can exercise on their own lives. There is greater social equality amongst the lowest classes like the Mahars, an untouchable caste in Maharashtra and the Dalits and Advāsis among whom there is a total absence of this prevailing social evil. This is particularly true in rural areas where women contribute to agricultural production. The solution then lies not in strengthening laws alone, but in providing greater work participation and employment for women by means of affirmative action programmes, and the increasing involvement of activist women social workers - rural and urban. It would also be worthwhile to consider the participation of social workers in investigations under Sec. 174 of the Criminal Procedure Code, and the creation of dowry crisis intervention centres. The workshop will focus attention on the points outlined below :-

- b) BONDED LABOUR, EXPLOITATION & SEC. 23 OF THE CONSTITUTION.
- c) RAPE, MOLESTATION AND EVE TEASING
DISCUSSION OF CRIMINAL PROCEDURE CODE AMENDMENT
BILL 1980.

REPRODUCTIVE RIGHTS - ABORTION AND MEDICAL
TERMINATION OF PREGNANCY ACT.

Need for counselling centres and safe pregnancy
advisory services.

RIGHTS OF ARRESTED, ACCUSED AND JAILED WOMEN

- a) Need for legal services and vigilance committees
and social workers.
 - b) Sheila Barse Vs. State of Maharashtra.
(case subjudice)
 - c) Use of Habeas Corpus and
Frances Mullens' case.
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Scope for participation by social workers during medical examinations both of the victim and the accused at Police Station during investigations.

Creation of rape squads and crises centres for rape victims particularly of custodian rape.

- d) PROSTITUTION - NEED FOR SOCIAL VIGILANCE IN "PROTECTION HOMES AND "DEVADASI" PROBLEM.
- e) DOMESTIC VIGILANCE - PROBLEM OF BATTERED WIVES - RURAL AND URBAN PHENOMEN.
SECTION 324 AND 352 OF THE I.P.C.
ROLE OF SOCIAL WORKERS - POLICE RESPONSE.
WHETHER DESIRABILITY OF LEGISLATION as in ENGLAND - DOMESTIC VIOLENCE ACT OF 1976.
Necessity of Crisis Centres.
- f) SUICIDE and Sec. 306 I.P.C.
- g) NON-PHYSICAL VIOLENCE - SEC. 499/500 I.P.C.
DEFAMATION - CHARACTER ASSASSINATION
How to use the law to protect women against sexual harrassment at work. Illustration-Chandrika vs. Management Maurya Sheraton Hotel (Case subjudice)

MARRIED WOMEN

- a) Problems of enforcing maintenance orders; how to use Sec. 127 of the Cr.P.C.
- b) Offences against married women - Section 493-497 of the I.P.C.
- c) Problems of jurisdiction -- Provisions in Matrimonial Laws which are unfair to deserted and abandoned wives- how to use Section 25 and 20 of the Civil Procedure Code effectively.
- d) Use of injunctions to ensure safety and prevent destitution.
- e) Right to custody, guardianship and adoption.

Professor Nigam and Prof. Madhav Menon, also of the Delhi University, have submitted that the economics and politics involved in the dowry cult have perpetuated this abnoxious practice. Preventive strategies have been formulated by them, viz., :-

- (a) Ensuring that violations will not go unpunished;
- (b) to provide legal literacy programmes and legal aid;
- (c) to organise a mass movement for social engineering through law;
- (d) public interest litigation at the instance of any one without considerations of standing.

The Professors of Delhi University, Faculty of Law were right in anticipating public interest litigation in this area. On 4.10.1980¹¹, a private complainant, a mother of a victim of dowry death by burning, supported by a solidarity front composed of women's organization, filed a complaint under section 200 of the Criminal Procedure Code, 1973, for registration and trial of a case for offences under section 302 read with section 34 of the IPC. Later a Special Leave Petition against the order of the Chief Judicial Magistrate, who had given an unduly long date in the evidence of the complainant, was filed in the Supreme Court. The Special Leave Petition sought to bring to the notice of the highest court of the country the scandalous state of affairs in the administration of justice and urged the Supreme Court that arrangement should be made by all the States to have an adequate number of Magistrates who could pass appropriate judicial orders on complaints presented to them as expeditiously as possible. The Supreme Court was swift to respond to this plea and issued notice to the State to produce the records of the case so that it could investigate the reasons for unconscionable delay. Yet again, the Supreme Court in the exercise of its epistolary jurisdiction ordered a C.B.I. enquiry into a purported dowry murder case.¹²