

Equality and Social Justice: A Constitutional Diathesis of Protective Discrimination in Favor of Women in India

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Abstract

The world has a long and unfortunate history of sex discrimination. In almost all societies women have been treated with inferior positions. In India also, women have a long history of suffering and even of exploitation. The women suffered from a variety of economic and social inequality which prohibited them from exercising their human rights and freedom in society.

But with the development of society and the emergence and expend of new ideas of equality, liberty and fraternity there came a new social awareness, all over the world to adopt a new social awareness and to bring about the emancipation and freedom of women. Today no country in the world can afford to ignore the position of women in national life. Rather mentally awake efforts are constantly being made in every country, for the uplift and liberation of women and thus to bring them at par with men in every possible respect. In India the post-independence era has witnessed remarkable developments in this respect. A number of new laws have been passed to improve the status of women.⁽¹⁾

The farmers of the Indian constitution prohibited any kind of discrimination on the grounds of sex.⁽²⁾ prohibited traffic in human beings⁽³⁾ including traffic in women for immoral purposes.⁽⁴⁾ not only this, the constitution requires positive acts of equalization between the sexes by giving preferential treatment in favor of women.⁽⁵⁾

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Preferential treatment in favor of women is a worldwide phenomenon. Article 103 of the Declaration of Elimination of Discrimination against Women, 1967 says that ".....measures taken to protect women in certain types of works for reasons inherent in their physical nature shall not be regarded as discriminatory. Although the 27th Amendment of the American Constitution rules out any discrimination on the grounds of sex.⁽⁶⁾ but judiciary has been conscious from the very beginning to protect the interest of women by preferential treatment. In Muller v/s Oregon justifying the regulation of the working hours for women employees even though such regulation was not necessary for men, the Supreme Court of America said:- "Women's physical structure and the performance of maternal function place her at a disadvantage in the struggle for assistance and her physical wellbeing become an objective of public interest and vigor of the race."

Few people argue that women no longer suffer from any peculiar disability or backwardness in the political sphere and that no discrimination should be permitted between sexes in this field.⁽⁷⁾ In Dattaray V/S state of Bombay⁽⁸⁾ the Bombay High Court upheld the separate representation in favor of women in local bodies.

However, it may be pointed out that Dr. Basu's reliance on Nainsukhs case is misplaced. In Nainsukhs case discrimination was practiced on communal and religious grounds which is not protected by any of the excepting clauses of article 15.⁽⁹⁾

A similar question came up for consideration before the Patna High Court in Rama Chandra V/S State of Bihar.⁽¹⁰⁾ Section 15(1)(v)(b) of the Bihar Panchayat Samities and Zila Parishad Act 1961 conferred a right to co-opt two women as members in the panchayat samiti because such an act would not be in consonance with Article 15(1). In support of this argument a reference was made to the opinion held by Dr. Basu as regards the true scope of clause 3 of article 15. Rejecting this argument, it was held by the Patna High Court the view of the learned author did not stand on sound footing.⁽¹¹⁾

The framers of the constitution of India wished to help the women with adventitious aids keeping in view the social disabilities from which they have suffered for a long. The election return in favor of the women candidates in the last four decades is indicative of the fact that in the political sphere women as a class are under no disabilities or backwardness.⁽¹²⁾ In fact India was governed for more than a decade by women,⁽¹³⁾ and this was true of some of the provinces too.⁽¹⁴⁾

A notable area where women require preferential treatment because of the social circumstances prevailing in India is that of education. Women and girls could

have had very limited access to education in the past because in Indian society the education of women and girls was given the least priority. It was rather feared that a girls prolonged education might diminish her marital prospects. And these social prejudices against them still continue to exist, particularly in rural areas.⁽¹⁵⁾

Under clause (3) of article 15, special provision for the benefit of women and children may be made by the state and such special provision will not be open to attack as contravening article 14 or 15(1). The question may arise whether the reservation of seats for women in the academic institutions may be made even without having a report of Article 15 (3).⁽¹⁶⁾

Under Article 29(2), it is provided that no citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state on grounds only religion, or race, Cast, language or any of them. Sex is not mentioned as a forbidden ground of discrimination under this provision. Article 29(2) being a special provision applying to admission, article 29(2) and not article 15(1) would, on the principle of generalia specializans non derogant, appear to be a governing provision for determining whether special treatment to a particular sex and can be given in matters of admission educational institutions this was the very of the Madras High court in the University of Madras V/S Shanta Bai.⁽¹⁷⁾

Conclusion

The protective discrimination and the preferential treatment in favor of women is not based on sex discrimination but on social facts attached to women as a class.⁽¹⁸⁾ While interpreting the Constitutional provisions, the court of India has demonstrated an inclination to uphold sex discrimination where the classification was not unreasonable and where it was motivated by a legislative and the executive solicitude for the moral and physical well-being of women.⁽¹⁹⁾

Thus sex as a basis of classification is suspected but it is not absolutely prohibited. If gender-based classification is completely eliminated it may lead to absurd results because then it would not be possible to maintain separate hostel and toilet facilities for women. One must realize that such arrangements do not treat women differently but separately. Separation of sexes in these situations carries no implication of inferiority for either sex.⁽²⁰⁾

Special laws can be made for women in all kinds of cases and these laws may be both favorable and unfavorable to women. However to be valid all such laws must sound to be reasonable to the court and the courts standards of reasonableness are bound to be influenced by current ideas about the position of women in society. This is substance the position in the United States also. To

withstand constitutional challenge classifications by gender must according to the American Supreme Court ,serve important governmental objectives and the means employed must be substantially related to the achievement of those objectives.⁽²¹⁾

It is significant to note that the Indian Judiciary has well played its role by giving real life to the dead words of the statute through the process of applying them to concrete cases. It has shown a fairly liberal attitude in favor of women by upholding every such legislative enactment rule regulation and a general order with aims at promoting the welfare of the women as a class provided there are in court opinion special circumstances justifying such treatment.⁽²²⁾

But we do not overlook the fact that the law as an instrument of social change has got its limits. Its efficiency depends to a large extent upon its acceptability by the people. So, unless there comes about a new social awareness and change in our outlook towards the role and of the status of women in the family and society we can't hope to achieve much in this regard.⁽²³⁾

References

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3. Article 23 Constitution of India.
4. Raj Bhadur v/s Legal Rememberancer. Government of west Bangal A.I.R.1953 Supreme Court.
5. Article 15(3).
6. Article 27 of the constitution of India.
7. SeeBasu, D.D. Commentary on the Constitution of India. Vol.B. Pg. **302**.
8. (1953). Dattaraya v. State of Bombay A.I.R. Bob. 311.
9. Supra note 15. Pg. **314**.
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11. Lbid at Pg. **216**.
12. Supra note. 28 Pg. **302**.
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14. Smt. Sucheta krplani was Chief Minister of U.P.
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