



**JUDICIARY
AND
GENDER JUSTICE**

**NJA Occasional
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JUSTICE R.C. LAHOTI

**National
Judicial Academy
Bhopal, India**

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At the instance of the NATIONAL COMMISSION FOR WOMEN, NJA organized a National Consultation among the various High Courts and State Judicial Academies between 29th February and 1st March, 2004 at NJA, Bhopal. The object was to evolve appropriate modules for training of Judges in respect of gender justice and delivery of equal justice to women. While inaugurating the Consultation Meeting, Hon'ble Mr. Justice R.C. Lahoti of the Supreme Court briefly recalled the contribution of the judiciary towards achieving the constitutional goal of gender equality and recommended certain measures to be adopted by judges while dealing with cases involving women. An edited version of the Inaugural Address is published under the NJA Occasional Paper Series for wider dissemination in the cause of equal justice under Law.

Publication of Journals, Monographs and Reports relevant to Judicial Education and training is now being regularly undertaken by NJA. The Governing Council decided to make it available to judges all over the country at a token price just to cover the production cost. Those wanting to receive copies of Occasional Papers may visit our website:<http://nja.gov.in>

MARCH, 2004

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THE PROBLEM :

It seems that the Society, taking advantage of the difference in biological creation of male and female, has landed itself into a state where the dice is heavily loaded in favour of the masculine gender and a situation has emerged wherein the women have come to be treated as socially suppressed and disadvantaged section of the society needing protection. There is a demand for development of a jurisprudence-procedural and substantive-justifying affirmative discrimination in favour of women so as to earn for them the equality of status and parity in treatment.

Definition of gender is not just sex as biologically determined; gender needs to be construed in social, cultural and psychological background. The term 'Gender' is constructed by human social relationships between the sexes and by play of power. Thus, the reason for gender injustice can be attributed to unequal power equation in gender relations. Patriachal society, considering women's household work as economically insignificant, male child preference in society, lack of legal awareness in women and so on aggravated the differential status to the disadvantage of women.

Neither the term 'Gender Justice' nor struggle for it is new. What has intensified in recent days is the awareness on gender justice. It is being increasingly realised that crimes against women are to be handled with greater sensitivity and women - as seekers of justice, to be treated with extra care.

Gender justice therefore is a human rights issue and an attitudinal problem. Speaking for myself, I feel little uncomfortable

with the recurrent use of the term 'gender justice'. It has a negative connotation. It has a critical tinge too. It suggests that there is injustice based on gender prevailing not only in the society but also in judiciary; for the common man invariably associates the terms 'injustice' and 'justice' with judiciary. A better and pro-active term can be coined. Homemaker is a better and pro-active expression for a housewife. So also, 'gender justice' can be thought of being replaced by some expression more positionally suggestive of gender harmony. This minor change can remove a misgiving that a demand for gender justice is suggestive of a clash between male and female in a society.

Gender justice can be analyzed from several angles in an effort at finding out the causes :-

1. Contribution of civil society as a whole which will include the constitutional and legal perspective such as the enactment of laws which is the collective action of the society.
2. The contribution of male society towards gender justice or injustice.
3. The contribution of woman herself in gender justice or injustice.
4. The role of judiciary

The Constitution and the Laws

So far as the various provisions of the Constitution are concerned nobody can raise an accusing finger. The Founding Fathers of the Constitution displayed deep insight and extraordinary farsightedness in incorporating various provisions in the Constitution so as to remove the sense of injustice, if any, from the minds of female society. Any discrimination on the ground of sex is prohibited. On the other hand, the Constitution provides for a special protection being extended in favour of women by providing that nothing

prevents the State from making any special provision for women and children.¹ Thus, the constitutional philosophy is to prohibit discrimination against women and at the same time encourage and protect any affirmative action against discrimination in favour of women.

The constitutional philosophy has inspired enactment of special legislations which are intended to eradicate the evil prevailing in the society, detrimental to the interests of women, and at the same time extending protective legislative umbrella over women. Sati, dowry, child-marriages and such other evils as are detrimental to interests of women have been prohibited. Discrimination against women, violence, atrocities on women have been all made punishable offences. Punishments for offences against women have been made gradually more deterrent. Rules of evidence and procedure have been moulded from time to time so as to lean in favour of women. In matters relating to property ownership, matrimonial issues and employment, more liberal and beneficial provisions have been carved out for women. To mention a few of such legislations, there are the Equal Remuneration Act, 1976, the Hindu Marriage Act, 1955-as amended in 1986, the Dowry Prohibition Act, 1961, the introduction in Penal Code of Section 304B- 'Dowry death', 366A- Procuration of Minor Girl, 366B - Importation of girl from Foreign Country, 376A, 376B, 376C and 376D providing for aggravated forms of offence of rape, 498A-dealing with women being subjected to cruelty by husband or relative of husband. These are illustrative of legislative activism in the field of substantive Penal Law. Enactment of Section 113A on "presumption as to abetment of suicide by a married woman", 113B on "presumption as to dowry death", 114A on "presumption as to absence of consent in certain prosecutions for rape have introduced path-breaking changes in rules of evidence relating to offences against women.

¹Article 15 (3)

Role of Judiciary

The role of judiciary can be discussed by dividing it into two aspects : one, justice as an end-result and two, the procedural aspect of justice dispensation.

So far as the first aspect is concerned, the move in the right direction has already commenced. The constitutional courts of this country including the Supreme Court have rendered some landmark judgments. The law enunciated by the constitutional courts is like fresh air providing soothing relief to the women and in doing so, the constitutional courts have not hesitated in crossing the strict juridical limits and laying down such law as may amount to legislation in the opinion of certain critics and observers. Unlike other countries, the Indian courts have been more positive and constructive.

The Supreme Court of India has been, for the last two decades, making many bold innovations in administering what may be called "substantive justice" to women. Three of its recent judgments in the realm of "gender justice" were (1) *Vishaka v State of Rajasthan* (1997) 6 SCC 241; (2) *Apparel Export Promotion Council v A.K. Chopra* (1999) 1 SCC 759 and (3) *Gita Hariharan v Reserve Bank of India* (1999) 2 SCC 228.

In all these cases, the Supreme Court invoked and strongly relied on the provisions of international instruments, ostensibly to fill the void in the domestic law. This represented a significant departure from the Court's earlier stand in keeping with the traditional rule as to the applicability of international instruments which unlike customary International Law, ordinarily, must go through "the process of transformation into municipal laws", before becoming enforceable by the domestic courts.

Vishaka was a public interest class action that came up before the Supreme Court at the instance of certain social activists

and NGOs. The issue raised was prevention of sexual harassment of working women in places of work. It was brought to the notice of the court that working women were vulnerable to harassment and neither the Legislature nor the executive government was taking any effective preventive measure on this behalf.

In its Judgement, the Supreme Court pointed out that it is the responsibility of the legislature and of the executive government to ensure that working women could live with dignity and carry on their respective vocations in a safe environment. Suitable legislation and a mechanism for the enforcement of the rights are required. If the legislature and the executive failed to perform their duties, the Court said that it had to assume an active role to administer gender justice whenever required. In doing so, Supreme Court referred to the Beijing Statement of Principles of the Independence of the Judiciary. According to the Supreme Court, the Objectives of the Judiciary as mentioned in that Statement include : (a) ensuring that all persons are able to live securely under the Rule of Law (b) promoting within the proper limits of judicial function, the observance and attainment of human rights and (c) administering law impartially among persons and between persons and the State.

The Supreme Court also noted that the provisions of 'Convention on Elimination of All forms of Discrimination against Women' (CEDAW) required the States Parties to take all appropriate measures to eliminate discrimination against women in the field of employment, as the right to work is an inalienable right of all human beings. Under the Convention, equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace. CEDAW defines sexual harassment in comprehensive terms; it includes unwelcome sexually-determined behaviour, sexually-coloured remarks etc. Such conduct can cause humiliation and problems

related to safety and health of working women. The Government of India ratified the CEDAW Resolution on 25th June 1993 and had also made an official commitment at the Fourth World Conference on Women in Beijing undertaking to formulate and put into operation a national policy on women and to take other measures as required under the said instrument. At the time of **Vishaka**, however, the Legislature had not made any law to give effect to CEDAW Resolution in this regard and as such there was a void in domestic law.

The Supreme Court said in **Vishaka**, "It is now an accepted rule of judicial construction that regard must be had to the international conventions and norms when construing domestic laws when there is no inconsistency between them and there is a void in the domestic law. Therefore, in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment at workplaces, the Court should lay down the guidelines and norms to be duly observed at all workplaces or other institutions, until legislation is enacted for the purpose."

The Supreme Court even went to the extent of legislating (as some critics say) by laying down elaborate Guidelines and Norms for the prevention of sexual harassment at the place of work and the duty of the employers in this behalf. Comprehensive measures for the safety and protection of working women, against overt or covert acts or conduct amounting to sexual harassment were declared. Provisions were made for punitive and disciplinary actions in appropriate situations, including the development of a complaint mechanism, the formation of Complaint Committee and the adoption of measures for adequate awareness campaign and holding of workers' meeting for discussion and dissemination of information, etc. The Court made it clear that this should be treated as the law of the land declared by the Court under Article 141 of the Constitution.

While **Vishaka** was a class action, the more recent case of **Apparel Export Promotion Council Vs. A.K. Chopra** was an adversarial litigation. The employer AEPC had taken disciplinary action, leading to termination of service, against A.K. Chopra. He was a company officer who had been found guilty of causing sexual harassment to Ms. X, a stenographer by making sexually coloured remarks and soliciting sexual intimacy, taking advantage of his superior position. By implication, he had caused Ms. X to believe that her objection would be disadvantageous to her in her employment and adverse consequences might result if she did not consent to such advances or sought to resist the same. However, Chopra was directed to be reinstated in service by the High Court, being the first court of judicial review, on the ground that at the most he had only attempted to commit the offence but had not actually done it. When the matter was brought in appeal to the Supreme Court, the Court reacted sharply.

In its judgment, the Supreme Court referred to international Instruments and observed that they cast an obligation on India as Party State to gender-sensitize its Laws and the Courts are under an obligation to see that the messages of International Organizations are not drowned by inaction and neglect. The Court held that according to CEDAW Declaration, sexual harassment includes unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, (whether directly or by implication), particularly when submission to or rejection of such conduct by the female employee was capable of being used for prejudicially affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating and hostile working atmosphere for her. As such Chopra was rightly dismissed.

In **Gita Hariharan Vs. Reserve Bank of India** (1999) 2 SCC 228, the gender justice question again arose. The issue was whether

the mother of a minor child could be regarded under the Guardianship Statute, as the 'natural guardian' of the child when the father was alive. The Statute Law on the subject was to the effect that the natural guardian of a minor is 'the father and after him the mother'. This was always taken to mean that if the father was alive, he would be the natural guardian, and only after his death the mother can be the natural guardian. The Supreme Court felt that such an interpretation would lead to unfair discrimination against the mother and would amount to a breach of gender equality as guaranteed by the Constitution and International Instruments. Therefore, the Court read down the provision of the Statute, and construed the words "after him" following the word "father" to mean, that the mother would be the natural guardian even during the life time of the father, if the father was absent from the scene of the minor either due to his own indifference or by choice or when he was physically absent or when he was unable to perform the duties of guardianship for any disability or did not want to do, or when he had no objection to the mother being the guardian.

All the three decisions have been widely hailed by activists and organizations concerned with gender justice, as well as by the media in general.

In **C.B. Muthumma Vs. Union of India** AIR 1979 SC 1868 service conditions of Foreign Service personnel requiring female employees to obtain government permission before marriage and denying married women a right to be employed, were struck down as discriminatory.

The question of Maintenance has also found the judiciary playing a very progressive role. Even prior to the Shah Bano case (AIR 1985 SC 945), the Supreme Court had, in two earlier decisions interpreted Section 125 as giving to a divorced Muslim woman a right to maintenance if the Mahr which she had obtained at the

time of divorce was not sufficient to maintain her and, therefore, could not be considered as in lieu of maintenance. Yet when the Shah Bano case was decided by the Supreme Court on the same grounds awarding maintenance to a divorced Muslim woman, the Legislature thought it fit to enact the Muslim Women (Protection on Divorce) Act, 1986.

In **Mangat Mul Vs. Punni Devi** 1995 (5) SCALE 199 the Supreme Court said, "Maintenance as we see it necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner more or less to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head. Provision for residence may be made either by giving a lump sum in money or property in lieu thereof. The judgement will provide much needed succor to many destitute women.

In **Danial Latifi & Anr. Vs. Union of India**, (2001 7 SCC 740) the Constitution Bench liberally interpreted in favour of Muslim wives the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986. The Court held that the **Shah Bano case** was a new era dawning in favour of the rights of the Muslim women and the same was not open to reconsideration. The provisions of the Muslim Women (Protection of Rights on Divorce) Act should be interpreted beneficially in favour of Muslim women keeping in view the exposition of law as made by the Constitution Bench in **Shah Bano case**. During the course of its judgment the Constitution Bench observed:

"In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or

the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognized by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice

should be invariably left to be decided on consideration other than religion or religious faith or beliefs or sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question".

Shamin Ara Vs. State of U.P. & Anr., (2002) 7 SCC 7 SCC 518 is a long leap in the direction of protecting marital status of Muslim women. In a petition for maintenance filed under Section 125 Cr. P.C. the husband raised a plea in defence that he had already divorced his wife on a particular day by orally pronouncing triple talaq. The husband failed to adduce any evidence in support of the plea and, therefore, failed in proving the triple talaq as pleaded by him. However, the trial Court was persuaded to hold that in spite of the plea having not been proved, the statement by the husband in his pleading filed in the Court that he had divorced his wife resulted in dissolution of marriage. The finding had devastating effect on the right of the Muslim wife to claim maintenance.

The Supreme Court upset the judgment of the High Court and held on a near-exhaustive review of the available decisions on the point that a mere delivery of a copy of the written statement containing the plea of talaq on the wife did not have the effect of dissolving the Muslim marriage by talaq.

In **State of Rajasthan Vs. Hat Singh & Ors.**, (2003) 2SCC 152, the Supreme Court dealt with a petition laying challenge to prosecution under Rajasthan Sati (Prevention) Ordinance/Act, 1987. Some of the provisions were declared by the High Court to be ultra vires of the Constitution. The Supreme Court set aside the judgment of the High Court and held that glorification of sati was punishable at both the stages, i.e. at the attempt at glorification and also on the accomplishment of the act of glorification. Such

provisions of the Act were not violative of the Rule against Double Jeopardy enshrined in Article 20 of the Constitution.

The Courts have not hesitated in departing from the well-established Rules of Evidence and Principles of Appreciation of Evidence when needed and bending them in favour of women to see that any one guilty of offence against women does not go unpunished. The need for corroboration of the testimony of prosecutrix sexual offence has been almost dispensed with. Minor variations in the testimony of female victims are no longer held enough for impeaching her testimony.

The Supreme Court has ruled that in the judgments dealing with sexual exploitation of women, she should not be named in the judgment so that she remains protected from any social stigma without regard to the fact that the accused is convicted or acquitted.

The matrimonial laws provide for a matrimonial dispute being filed at a place where the marriage was performed or where the spouses have last resided together. The provision was made in the background that in Indian society the marriages were invariably performed at the place where the girl resided with her parents. In the last two decades a changed pattern is noticeable when the parents of the boy insist on the family of would-be bride coming to the place of the residence of the boy and his parents for performing the marriage. This new trend has defeated the object of legislation providing for jurisdiction. Earlier, it was open for the wife to initiate legal proceeding at the place of marriage which used to be the place of residence of her parents. The Supreme Court is very liberally allowing petitions by wives for transfer of matrimonial cases, filed at the place of the residence of the husband founded on the plea of 'last-resided together', to the place where the wife is residing with her parents on account of the marriage having broken down. This is protection liberally and pro-actively extended by the Courts for the women.

Judicial Process and Gender Neutral Values:

A judge is supposed to be impartial and objective in his approach not only while deciding a case but also while conducting the proceedings. Theoretically and strictly speaking, a judge is not supposed to show any favour or soft approach for a woman who should be treated like any other party or witness before the Court. In practice, the judges keep in mind that any woman appearing either as a party or as witness, or as victim of any crime or harassment, is to be treated with understanding and consideration so as to inculcate confidence in her during the Court proceedings. A few practices have come to be recognized well and do not offend the sense of justice. These are :-

1. Women to be treated with courtesy and dignity while appearing in the Court. Any comment, gesture or other action on the part of any one in or around the court-room which would be detrimental to the confidence of the woman is to be curbed with a heavy hand.
2. Any gender bias is carefully guarded against in the courtroom and this protection should be extended to any female present or appearing in the court either as a member of the staff or as party or witness or member of legal profession. A message should clearly go that any behaviour unbecoming of the dignity of women shall not be tolerated by the Court.
3. Court proceedings involving women must begin on time and proceed in an orderly manner and with dispatch so that they are concluded as expeditiously as possible avoiding the need for repeated appearance of women in the Court.
4. The examination and cross-examination of women witnesses must be conducted by the Court itself or under the direct supervision of the presiding judge.

5. The female members of the Bar may be encouraged in the profession, may be by giving assignments as Court Commissioners for inspections and recording statements of witnesses.
6. Preference may be given to female lawyers in the matter of assigning legal aid work or amicus curiae briefs so that they have more and more effective appearances in Courts.
7. Crime against women ought to be dealt with on priority basis so as to decided finally at an early date lest the delay should defeat the justice.

The position and office of judge makes him duty bound to apply judicial mind and while doing so, the only criterion before him is to act in the interest of justice. To allow judges to act in interest of justice it is important that faith is placed in them. It should not be expected from a judge to act under pressure of public opinion. The growing role of press and mass media has increased the importance of public opinion. This is good for democracy and this is also good for a democratic state. A democratic state is conceptualised to implement public opinion over individual opinion. But the task of judiciary is to do a balancing act between social and individual interest. The scales of justice must be held even.

Just to illustrate, situations arise before a judge when a hardened terrorist charged with merciless killing pleads human rights. Striking a balance is a difficult task and perfection is impossible. The current trend of criticising judgements merely on ground that a judgment was not in tune with public opinion is wrong. Judgements should be evaluated in their proper context and in the light of facts and circumstances as they arise in the case and then constructive criticism may be offered. Instead of hasty remarks only well informed and constructive criticism should be made.

Finally, two precautionary observations. Let the issue of gender injustice not be perceived as a war between two sexes. Long before, when consciousness in society towards gender injustice was not present then resentment on part of women was justified; but now the approach should be of complementing each other rather than competing on false perceptions. Societal bonds are based upon integration, mutual dependence and respect. They are not just contractual but based on deep organic unity. It is true that the male sex is most of the time blamed as inflictor of gender injustice: but it cannot be ignored that male sex also suffers from and feels pained at gender injustice, as the woman subjected to injustice is sometimes his mother or his daughter or sister or wife. Therefore, perceptual change is needed for greater social awareness and sensitization which breeds equality of sexes and not rivalry of sexes.

Social Reform to Precede Legal Reform

There is no denying that Law must as far as possible and as and when required make its contribution in social reform process, but, the effort of Law shall stand meaningless if it remains unaccompanied by social change. Law may provide daughters an equal right along with sons in joint family property but if daughters are treated with 'hostile' or a 'rival claimant attitude' in their paternal home, injustice shall still remain. Therefore, good laws alone cannot help much in problems such as gender injustice unless there is social acceptance and promotion of the true spirit behind the Law.

Advocates of gender injustice are welcome. Demand for gender justice is welcome. History bears testimony to the fact that no social change has ever been brought in, except by a revolution or by having been taken as a movement led by well-intentioned activists. However, a charge of injustice made in an individual case

should not be highlighted or pressed beyond a limit without verifying and contextualising full facts. Otherwise, it does more harm than good to the movement.

We all must ask ourselves that in/spite of so many efforts, still, why a lot remains to be done for gender equality. To achieve sensitization in the society more proactive efforts are required. As Gandhi said, "Every home is a university and the parents are its teachers".

Home is the best place to start. Mother is the best person to begin. Deviant behaviour of a child if corrected at the right moment in childhood will reduce instances of gender injustice in future. For this mothers must continuously counsel their children. Mothers can play a lead role in:

1. teaching boys to respect their sister and not try to dominate over her,
2. maintaining equal treatment between boy and girl child,
3. making girls participate in family matters and decisions.
4. encouraging girls to take a promise from their brothers that they will not harass any other girl,
5. educating girls to desist from any behaviour that may make her vulnerable to harassment,
6. requiring boys to maintain a distance from morally and ethically unacceptable behaviour,
7. giving due respect to daughters-in-law, grannies and mothers-in-law.

India has yet to see a social revolution in which 'women image' is perceived beyond the traditional mother Vs. wife role or

just an object of desire. Media can play a very powerful role by projecting an empowered image of women, initiating a drive against discrimination and injustice, and resisting offensive representation of women. Youths and women organizations can also do noteworthy work in this direction.

In the end, I would like to quote from the final report of the Citizen's Commission to Improve Michigan Courts

"Nothing is more basic than courtesy. The court system exists to serve those who come to it voluntarily, as well as those who are involuntarily summoned. There must be a welcoming attitude on the part of all Court personnel, including Judges. The Chief Judge must take personal responsibility for setting a tone and attitude of courtesy and helpfulness toward all who come to the Court".

Justice Michael Kirby of Australia says - "In a pluralist society judges are the essential equalisers. They serve no majority; nor any minority either. Their duty is to the law and to justice. They do not bend the knee to governments, to particular religions, to the military, to money, to tabloid media or the screaming mob. In upholding law and justice, judges have a vital function in a pluralist society to make sure that diversity is respected and the rights of all protected".



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