



A study of CEDAW vis a vis Indian constitution: Elimination of violence against women.

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Abstract

Violence against women is not something new to the Indian society but can be traced back from ancient period till modern times. History has witnessed discrimination towards women in every sphere of life. Different cultures of the world have treated women differently for some she is an object of desire and for others simply chattel, property of the husband who could sell her, discipline her, beat her, suppress her, or even silence her voice without any fear of law. Indian society is also not different as far as status of women is concerned. Some scriptures have depicted her as Shakti but some have portrayed her as powerless, inferior section of the society.

India become independent in 1947. The plight of Indian women in the society was pathetic. Empowerment of the women was the aim and objective of the constitution makers who made many laws to protect and improve the status of women in post-independence India by following international conventions of the United Nations.

The prime duty of the constitution makers was to prepare a constitution to give equal rights to men and women of this country to build a progressive nation.

Declaration on the elimination of violence against women:

United Nations came into existence before independence of India so played a significant role in shaping the constitution of India by incorporating fundamental rights, part third of the constitution.

No country in the world can prosper if women of that country are illiterate and treated unfairly. Fundamental rights were the basic need for the modern egalitarian Indian society. Social evils like satipratha, worst form of Violence against women was prevalent in the society. The main reason behind violence being the financial insecurity and patriarchal Indian society.

The declaration on the elimination of violence against women was adopted by the general assembly by its resolution in the year 1993. The article 1 of the declaration says that the violence against women means any act of gender-based violence that results in physical, sexual or psychological harm, or suffering to women and also includes the threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. According to the Article 2 every kind of violence whether occurring in the family like battering dowry related violence, marital rape etc. or violence occurring within the general community or educational institutions which includes rape, sexual abuse, sexual harassment has to be acknowledged by the states and take can necessarily action for the same. Article 3 of the declaration gives women right to equal enjoyment of all human rights which would include the right to life, equality and the right to liberty and security of persons. The international covenants and declarations as adopted by the united nations have to be respected by all signatory states and the meaning given to the above words in those declarations and covenants have to be such as would help in effective implication of those rights.¹

¹ Chairman, Railway Board v Chandrimadas, (2000)2sc 465 p.481

1. Convention on the elimination of discrimination against women (CEDAW):

Despite regard for the principle of non-discrimination in the enjoyment of rights contained in the UDHR, ICCPR, ICESCR, and other human rights instruments, women were not treated equally at the global level. The convention on the elimination of all forms of discrimination against women, 1976 (CEDAW) was formulated with a view to arrive at an international consensus on the need to redress inequalities and to impose obligations on states to specifically provide protection and implementation mechanisms for the realization of this right.

The principle of equality is central to the CEDAW Convention. Eradication of Inequalities in relation to employment opportunities, wages, access to and enjoyment of health, rights within the family, citizenship etc. is the aim of this convention and to fulfil this purpose it is important that women have equal rights to that of men which is the only way to make men and women equal.

2. The CEDAW Convention is a comprehensive bill of rights for women:

It is based on a principle of equality between men and women. Hence it extends the coverage of human rights to women. It recognizes that the inequality of women is socially constructed and hence establishes that there is discrimination against women. It provides a broad definition of discrimination (article 1), which includes overt and indirect discrimination or any act which has the effect of discriminating against women.

It demands that rights for women must be granted and guaranteed through the legislative process and the legislative measures shall incorporate the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women also establishing tribunals and other public institutions to ensure the effective protection of women against discrimination; and ensuring the elimination of all acts of discrimination against women by persons, organizations or enterprises.

CEDAW has recognized that despite legal rights being granted to women in many countries, discrimination persists, and women's access to legal rights are curtailed by denial of women's rights to economic and social development. Hence it bridges the traditional divisions between civil and political and socio-economic rights and it mandates both legal and development policy measures to guarantee the rights of women. It addresses the need to tackle power relations between women and men at all levels, from family, to community, market and State.²

It also recognises the negative impact of social, customary and cultural practices which are based on the idea of the "inferiority or the superiority" of either sex or on stereotyped roles for women and men (article 5). Articles 1 and 5 give the CEDAW Convention the widest applicability, as together they can be interpreted to refer to almost any situation that adversely affects women.

The God has created man and women with no different minds, having similar power of thinking and doing things but it is still the women who is always treated something inferior to the man and no one can deny the fact that women have been struggling for their human rights over the years in this male dominated society. The international and national human rights and laws apply to all human beings and all citizens. As a result of women's struggle for their rights, the provision and granting of women's human rights has improved in many ways globally. One of the significant achievements in the fight for women's human rights was the adoption by the united nations general assembly of the convention on the elimination of all forms of discrimination against women (CEDAW).

² http://www.iwraw-ap.org/using_cedaw.htm

This is the most important human rights instrument for the protection and promotion of women's rights, and is also one of the most ratified treaties. CEDAW contains civil, political, economic, social and cultural rights, which before its adoption had only been addressed in an ad hoc manner. Furthermore, the Optional Protocol to CEDAW provides for the possibility to address individual complaints to the Commission under CEDAW.

There are 30 articles of this convention. According to article 1 of the convention the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

According to article 3 of this convention, States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 5 of the convention says that the States Parties shall take every possible steps so as to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women and also such measures so as to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primal consideration in all cases.

As per article 8 of the convention the States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

According to article 9 the States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband and shall also grant women equal rights with men with respect to the nationality of their children.

The article 15 and 16 of the convention form the part iv of this convention dealing with the provisions of equality. The article 15 the States Parties shall treat women equal with men before the law, shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. Also States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

According to article 16 of the convention the state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- a) The same right to enter into marriage;
- b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- c) The same rights and responsibilities during marriage and at its dissolution;
- d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

- e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory

Theoretically, implementation of this treaty is binding on all States parties. Therefore, any States party must not commit any act of discrimination against women. The convention has been ratified by India and has been utilized by the Indian Judiciary in order to direct the state to take action to realize the principles contained therein and observe its obligations. In *Vishka v. State of Rajasthan*, in the absence of any laws preventing sexual harassment at the work place, the supreme court laid down guidelines that would have to be followed by all employers. The formulation of the guidelines was prompted by India's constitutional obligation of equality and its international obligations under CEDAW.

Under the new Optional Protocol to CEDAW, adopted by the UN General Assembly in October 1999, ratifying States recognize the authority of the Committee to receive and consider complaints from individuals or groups within that State's jurisdiction. On the basis of such complaints, the Committee can then conduct confidential investigations and issue urgent requests for a government to take action to protect victims from harm, bringing the Convention into line with other human rights instruments such as the Convention against Torture. This growing momentum has compelled better understanding of the causes and consequences of violence against women, and positive steps have been taken in some countries, including reforming and changing laws that deal with this issue. Some regions have developed their own conventions on violence against women, examples of which are the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and the African Convention on Human and People's Rights, including its Additional Protocol on Women's Rights.

3. Are there any laws dealing with women's human rights in Indian constitution:-

The constitution of India was adopted on Nov 26, 1949 but didn't come into force immediately on that day. According to art 394 of the constitution, the whole of the constitution except articles 5,6,7,8,9,60,324,366,367,380,388,392,and 393(which came into force at once), came into force on January 26,1950 which is the commencement day of the constitution. It is really astounding that although before the adoption of Indian constitution. U.N Charter had been adopted at San Francisco on June 25, 1945 and came into force on October 24,1945, India being a country who signed and ratified the charter. The universal declaration of human rights was adopted by the general assembly of the U.N on 10th December, 1948; the U.N commission on human rights had been established by the economic and social council in February 1946 as the "nearest approach to permanent on achieving for the supervision of the problem of protection of the human rights" of human right and the commission had been directed to prepare, *inter alia*, recommendation and reports on an international bill of human rights yet in the whole constitution of India the term "human rights does not find mention even once."³

"Human rights" has been defined in section 2(d) of the Protection of Human Rights Act,1993. According to this section human rights means the rights relating to life, liberty, equality and dignity of the individual

³ INTERNATIONAL LAW AND HUMAN RIGHTS BY Dr S.K KAPOOR P.NO 243

guaranteed by the constitution or embodied in the international covenants and enforceable by courts in India.

At the same time it can be said that the recognition of the term human rights does not matter but what really matters is whether Indian constitution has recognized and given effect, to human rights? The answer is not only fair enough but at the same time cannot be denied that Indian constitution is credited with not only giving effect to human rights but also has made them enforceable long before the adoption of international covenants on human rights in 1966 and even before the European convention for the protection of human rights and fundamental freedoms (1950) which came into force on September 3, 1953.

Constitution of India guarantees a number of human rights available to individuals under part III of the constitution which are known as “fundamental rights”. In addition to them part IV of the constitution lays down the ‘directive principles of state policy’. The fundamental rights are available to all “citizens” of the country but a few of them are also available to “persons “like aliens, foreigners etc.

Being conscious of the need of the time, the framers of our constitution incorporated certain ideals in the form of comprehensive rights for women so as to transform the abstract ideals into a concrete form, which would facilitate the upliftment of the status of women in the male dominated society. Our constitution, the source of all laws and the organic law of the land, recognizes equality of the sexes and prohibits discrimination on the basis of sex.

It also provides legislation to be made to confer more rights on women by making special provisions. it has to be borne in mind that in the absence of equality of gender , human rights remain in the inaccessible realm. In most of the nations, women are ascribed a secondary role. To grant women same status as that of the males in the country like India various provisions have been engrafted in our constitution. The preamble of our constitution begins with the words “we, the people of India...” which includes men and women of all castes, religions etc. it desires to give “equality of status and opportunity” to every man and woman. the preamble again assures ‘ dignity of individuals “ which includes the dignity of women. Part III of the constitution, consisting of articles 12 to 35, relating to fundamental rights, is considered the ‘heart’ of the constitution. Fundamental rights are regarded as the basic rights of the individuals because they are most essential for the attainment by the individual of his full intellectual, moral and spiritual status.

According to Justice P.N Bhagwati: “ These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent”⁴. Another important aspect of the fundamental rights is that they differ from ordinary rights in the sense that the former are inviolable. No law, ordinance, custom, usage or administrative order can abridge or take them away. Any law which is violative to any of the fundamental rights is void.⁵ The supreme court of India has recognized these fundamental rights as ‘ natural rights’ or ‘human rights’.⁶

According to chief justice, Patanjali Shastri fundamental rights are those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country.⁷ Also chief justice, subba Rao, has rightly pointed out that “fundamental rights are the modern name for what have been traditionally known as natural rights”⁸

⁴ The protection of women from domestic violence Act, 2005 by Anil sachdeva Ed 2007

⁵ Article 13 of the constitution of India.

⁶ Motilal v state of U.P.,I.L.R (1951) Alld., p.369 at pp. 387-388

⁷ State of west Bengal v subodh gopal bose, AIR 1954 SC 92 AT PP.95-96

⁸ I.C.GOLAK NATH V STATE OF PUNJAB AIR 1967 S.C. 1643 AT P.1656

4. Article 14 of the constitution of India guarantees right to equality

Article 14 says the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 14 uses two expressions “equality before the law” and “equal protection of the law”. The phrase “equality before the law” finds a place in almost all written constitutions that guarantee fundamental rights like the constitutions of U.S.A, Burma, Chile.⁹ Both these expressions have, however, been used in the universal declaration of human rights.¹⁰ Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws within the territory of India. The first expression ‘equality before law’ taken from the English common Law, means absence of any special privilege in favour of any individual by reason of birth, creed or the like. The second expression, the equal protection of the laws is the essence and core of the right to equality under which the state is under an obligation to take necessary steps so that every individual, man and woman alike, is given equal respect which he or she is entitled to as a human being.

Article 14 permits reasonable classification but prohibits class legislation. The apex court while dealing with the fixation of different ages of retirement for male and female employees and the provision preventing the female employees from having child, took the view that the retirement of hostesses in the event of marriage taking place within four years of service does not suffer from any irregularity or arbitrariness but retirement of air hostesses on first pregnancy is unconstitutional being violative of articles 14 and 16 of the constitution. It was considered that such a provision was callous, cruel and an insult to Indian womanhood. Therefore, such disability violates the equal protection of law and opportunity which is the cornerstone of our constitution and legal system.¹¹

5. Article 15 : this article prohibits discrimination on the grounds of religion, Race, Caste, sex or place of birth.

Article 15 of the constitution says that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.¹² The article guarantees social justice in the form of the clause 3 which says that state can make special provisions for the welfare of women and children.

The concept of equality between male and female was almost unknown to us before the enactment of the constitution of India. While incorporating these provisions in the constitution of India shows that the framers of the constitution were well aware of the unequal treatment given to the women in India. The history of the suppression of women in India is very pathetic which is responsible for the inclusion of some specific provisions for the upliftment of the status of women in India.

Thus it would be no violation of article 15 if institutions are set up by the state exclusively for women or places are reserved for women at public entertainments or in public conveyances. The main objective of art 15(3) IS BASED ON PROTECTIVE DISCRIMINATION keeping in view the weak physical position of women.

In **yusuf abdul Aziz vs. state of Bombay**, the validity of section 497 of the Indian penal code was challenged under articles 14 and 15(1) of the constitution. Section 497 of the IPC punishes man for adultery and exempts the woman from punishment though she may be equally guilty as an abettor. This SECTION WAS HELD BY THE apex court valid since the classification was not based on the ground of sex alone. The court upheld the section 497 of the IPC as valid by relying upon the mandate of article 15(3) of the constitution. Section 354 of the IPC protecting the modesty of the women is also not invalid and section 125 crpc is valid although it obliges the husband to maintain his wife but not *vice versa*. Section 14 of the Hindu succession Act, 1956 converting the women’s limited ownership of property into full ownership has been found in pursuance of article 15(3).

⁹ Constitutional law of India by Dr J.N Pandey 32nd Ed 1997 p.70-71

¹⁰ Article 7 of the universal declaration of human rights says: all are equal before the law and are entitled without any discrimination to equal protection of the law.s

¹¹ AiR India vs. Nergesh Meerza AIR 1981 SC 1829

¹² Art15(1)

Article 15(3) of the Indian constitution is wide enough to include any special provision for women which may include also the reservation in jobs. Article 16 cannot become impediment to such reservations.

Article 16(2) of the constitution says that the state shall not discriminate on the grounds of religion, race, caste, sex, descent, place of birth or residence in the matters of public employment. It means that every woman has an equal right to employment under the state as a man and the state cannot discriminate against woman on this ground. Supreme court has 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.¹³

In vijay lakshmi VS Punjab university, it has been observed that rules 5 and 8 of the Punjab university calendar, vol.III PROVIDING for appointment of a lady principal or a lady teacher cannot be held to be violative of either article 14 or art 16 of the constitution, because the classification is reasonable and it has a nexus with the object sought to be achieved.

Article 19(1)(g) of the constitution guarantees that all citizens have right to practice any profession or to carry on any occupation or trade or business which also means that the right must be exercised with human dignity. Therefore sexual harassment in the exercise of this right at the work place amounts to its violation. The supreme court has pointed out that in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all places of work . the contents of the international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality of right to work with human dignity in articles 14, 15, 19(1)(g) and 21 of the constitution and the safeguards against sexual harassment implicit therein.¹⁴

J.S. verma, C.J.I., observed in vishaka v. state of Rajasthan: “The meaning and content of the fundamental rights guaranteed in the constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.”

In the opinion of Dr. Anand, C.J.I “ IN Cases involving violation of the human rights the courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between international norms and the domestic law occupying to field. In the instant case, the high court appears to have totally ignored the intent and content of the international conventions and norms while dealing with the case.¹⁵

NCW in its report, “A decade of endeavour”, vol. II, 1990 – 2001, rightly states, “sexual harassment of women at the workplaces, as an antithesis to the basic human and fundamental rights, not only violates the sense of dignity of a woman, but also vitiates the whole work environment and inter- personal relationships, resulting in low level of efficiency and productivity.”

Article 21 of the constitution of India contains provisions for the protection of life and personal liberty of every person. It states that no person shall be deprived of his life or personal liberty except according to procedure established by law. the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. This article has also been invoked for the

¹³ Associate Banks officers Association vs. State Bank of India,

¹⁴ Vishaka v state of Rajasthan AIR1997 sc 3011.

¹⁵ AIR 1999 SC 625 at p. 634.s

upliftment of and dignified life for the prostitutes. The supreme court has placed emphasis on the need to provide to prostitute opportunities for education and training so as to facilitate their rehabilitation.¹⁶

Indian constitution contains certain directive principles which are to be followed by all the states in India. Article 39 of the constitution of India directs the states to secure that men and women have equal right to an adequate means of livelihood, and there is equal pay for equal work for both the men and women etc. according to article 42 of the constitution it is the duty of the state to make provisions for securing just and humane conditions of work and for the maternity relief.

Human beings are born equal and endowed with equal abilities, still, the cry for equality of women with men continues throughout the world. Social system considers women to be weak, lack cognitive and decision making abilities and is eventually kept in the ventures. They are not merely treated subordinate but at times aside they are not even counted as human beings. They are killed at birth, burnt to death for dowry and sold into slavery and prostitution. The society is accustomed to inequality of power and status resulting in denial to women of basic plus freedoms for survival with human dignity. Equality is the cry of the modern woman as she is searching for her place in the human society.

Despite the recognition of women's equal status and need of women's contribution for the development and peace and acceptance of basic human rights of women as inalienable and protected right both within and outside the country, inequality persists.¹⁷ –

Violence against women is perhaps the most shameful human rights violation. And it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace¹⁸. Violence against women and girls is often considered as an individual problem and as isolated incidents. According to the empirical evidence of the World Bank the violence against women is as serious as a cause of death and incapacity among women of reproductive age as cancer and is a greater cause of ill health than traffic accidents and malaria put together (World Bank 1993). From this observation, it becomes clear that – besides being a fundamental violation of human rights, violence against women represents one of the most critical public health challenges and is a major factor contributing to poverty.¹⁹

The Indian constitution enshrines the principles of human values in the form of guaranteed rights and aims and directive for the government in all its endeavors. Women are guaranteed with equality, freedom and justice and the legal system aims at providing basic minimum to women to live with human dignity. Social evils such as sati, infanticide, bigamy, illegal trafficking and prostitution and dowry are condemned and declared illegal. However, such laws are not effectively enforced to keep such social evils that are an affront to the dignity of women under check. The problem of domestic violence against young wives and mothers remains a hidden crime. Despite the constitutional guarantee for equality and special protection, in every walk of life and at every stage of life, women are destined to suffer discrimination, exploitation or violence.

“It is important to walk a mile in another person's shoes. As it is possible to grow up in the same family, neighborhood, school, etc. and yet have totally different experiences depending on whether you are a man or a woman. The way to resolve differences therefore is not to suppress those who are different but to notice them and not try to see our reflection in them”—*justice L'HEUREUX DUBE*, supreme court of Canada.

¹⁶ STATE OF MAHARASHTRA V MADHUKAR NARAYAN MANDIKAR.

¹⁷ Advancement of women by Dr chandrasekaran lecturer Dr. Ambedkar Govt. Law College Pondicherry.

¹⁸ KOFI ANAN secretary general of the united nations, march 8th, 1999.

¹⁹ ENDING VIOLENCE AGAINST WOMEN AND GIRLS- PROTECTING HUMAN RIGHTS <http://www.gtz.de>

6. Conclusion:

CEDAW is an important international convention on women rights which raises voice against violence in all forms. this convention rejects discrimination against women, and promotes equality among genders. Indian constitution through different articles give protection to women irrespective of caste, colour, race, religion etc. Articles 14,15,19, 21 are basic human rights without which a dignified life is not possible.

CEDAW is an initiative signed by majority of 189 countries to upgrade the status of women in the society. No country can progress until the women of that society are educationally, financially, socially forward.

The growth of the nation is dependent on the growth of the society and a welfare society is one where people live in harmony and both genders respect each other's rights and value their existence.

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