

## Gender Discrimination and the Indian Constitution

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**Abstract:** *The recent trends in the field of women empowerment, gender justice and constitutional interpretations have witnessed a great upheaval. The earlier prevalent discriminatory policies against women have been vehemently criticised and as a result they have been a major cause of social transformation in India. The Constitution of India mandates that all the citizens are equal and they should not be discriminated, gender being one of the grounds. Hence, though the discriminatory policies despite the equality code of the constitution existed, they have been declared null and void by the judiciary time and again bringing the concept of gender justice and gender equality to reality.*

**Key Words :** *Gender justice, social transformation, gender discrimination, gender equality.*

### 1. INTRODUCTION:

It was the year of 1980, when India signed and became a party to the Convention on all forms of discrimination against women, popularly known as CEDAW. Giving consent to the convention itself was evidence to the fact that discrimination has been in existence in the Indian society in some form or the other. Now, before we proceed further we should know the clear meaning of discrimination. According to the said convention, discrimination means “unfair treatment of a person or group for any reason such as being a girl or a boy belonging to a particular race or religion or having different abilities and so on.” Discrimination against girls and women means indirectly or directly treating them differently from boys or men in a way which prevents them from enjoying their rights. The discriminatory policies against women particularly existed at their workplaces and treated them differently. In various cases it was observed that despite the nature of duty remaining the same, men were given preferential treatment and women were discriminated against. As a result often recourse was taken to the courts for the interpretation of such discriminatory rules and declaring them null and void, particularly in the light of the Indian Constitution.

In Indian society, women have been treated much differently. Indian society has been a patriarchal society, where the women have been suppressed and have always held a subservient position in the Indian society. This trend has been observed both, inside and outside their homes. Age old customs, traditions and male dominant society has often led to the abuse of women within their homes often on pretext of domestic unrest and dowry. However apart from domestic violence and abuse women have been discriminated and exploited at their workplace. The cases of C.B. Muthamma, *Naegesh Meerza*, *Neera Mathur* are glaring examples of discrimination of women at their workplaces.

In *C.B. Muthamma*<sup>1</sup>, the Supreme struck down the discriminatory policies in the Indian Foreign Service. Rule 8(2) Foreign Service (conduct and Discipline) Rules 1961, required a woman member to marry only after obtaining the prior permission of the Government and rule 4 of the same act enunciated that no married women shall be entitled as of right to be the service. Condemning this rule Justice Krishna Iyer has very well remarked in this case that ‘at the first blush this rule is defiance of Article 16. If a married man has a right, a married woman, and other thing being equal stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman’s thralldom. Freedom is indivisible, so is justice’

In *Neera Mathur v. Life Insurance Corporation of India*<sup>2</sup>, required a lady candidate to furnish information in form of a declaration about the nature of her menstrual periods, date of her last delivery and if any lady applicant was pregnant her appointment shall be considered after the delivery. This was held to be highly embarrassing and was totally condemned.

In *Uttrakhand Mahila Kalyan Parishad*,<sup>3</sup> where lady teachers and lady employees engaged in administrative work in the education department of the state of Uttar Pradesh were given less salary as compared to the males of the same department.

<sup>1</sup> C.B. Muthamma v. Union of India, AIR 1979 SC 1868

<sup>2</sup> Neera Mathur v. Life Corporation of India, AIR 1992 SC 392

<sup>3</sup> Uttrakhand Mahila Kalyan Parishad v. State of U.P, AIR 1992 SC 1695

In *Nargesh Meerza*,<sup>4</sup> a rule of Air India Employees Regulations was challenged and condemned. This particular rule stated that air hostess shall retire from service of the Air India Corporation upon attaining the age of 35 years or upon marriage or on first pregnancy whichever happens earlier.

However over the years this suppression and discrimination has taken the form of abuse and exploitation. Now apart from discrimination at workplace the women witnessed sexual exploitation. It seems the Indian society was adamant that it will not let the women move ahead.

Apart from the homes, where the women of the modern India needed protection was the places where they were employed. Exploitation of women at their workplaces started as early as in 1988, where an I.A.S officer, *Rupan Deo Bajaj*,<sup>5</sup> reported against a senior cop

K.P.S. Gill for assault and criminal force to women with the intent to outrage her modesty and under section 509 of the Indian Penal Code for word, gesture or act intended to insult the modesty of a woman and thereafter the Vishakha case<sup>6</sup>.

Judicial activism and gender justice reached its pinnacle in this case when much uproar was created in the year 1997, when a 'sathin' named Bhawari Devi was gang raped when she tried to prevent a child marriage. This case of Rajasthan created great unrest among the people and they demanded amendments and enactments ensuring the security of women at her workplace. Intensive guidelines were issued by the Supreme Court while delivering the judgement of this case, popularly known as the Vishakha case. After the judgement of this case efforts were made to bring about new law to protect the women at their workplace and eventually a whole new law was formulated in the name of the sexual harassment of women at workplace (prevention, prohibition and redressal) act, 2013. This act laid down exhaustive guidelines for security of women at their workplace. The court has clearly stated that a safe working atmosphere is the fundamental right of every woman and in no way should a woman be discriminated at workplace.

This case gave a new impetus to women empowerment however its awareness and implementation are the two major points that still need our attention as merely enacting the laws doesn't serve the purpose, the object is its effectiveness.

Yet again, over the period social transformation has taken place and once again the new dawn of independence in India, brought a new wave of social enlightenment of the masses. Thus, the independence of India, the enactment of the Constitution and the new agenda of human rights brought about a new change and new trends. Hence, where in ancient times the women did not enjoy any rights the post-independence era saw a totally different scenario. This has brought about a new change in the outlook of the people and thus began the social transformation of the Indian society. Now women apart from just managing the household work started moving out of their houses and started indulging in activities like education, politics, art's to name some. Though the percentage of such women was very small initially, yet the seeds of a modern society had been sowed. Though the position of the women witnessed a transformation but with it also increased the crimes, abuses and exploitation of women. India in its race of modernisation failed to create a society free from the exploitation and crimes against women. Thus where on one hand the position of the women in the society moved towards betterment the crimes against them also increased. Defying the traditional concepts and beliefs the women of India however failed to let these hindrance's conquer their firm belief in them and the confidence that they had attained after all the struggle. The state on its part contributed and supported the women in the forms of legislations to provide them security. The only problem that now demanded attention was the fact that once these women have been subject to the cruelty of their families and now when they had mustered the courage to step out of their homes and enjoy their rights the society denied them the rights. Initially, various laws have been enacted time and again to grant protection to the women in their homes and now for their protection legislations were enacted to protect them at their workplaces.

Gender jurisprudence is the new ordering to emancipate and liberate women from the shackles of ancient law, traditions and customs whereby the new claims, interests and needs of the women are promoted and readjusted through law with men and folk on a footing of equality, dignity and non-exploitation.<sup>7</sup>

The fulfilment of a long struggle of Indian women found its expression in the U.N. Covenant on Human Rights and the mandate of the Indian Constitution. The new gender legal theory attempts to bring women at par with men in socio-politico-economic and cultural life and resurrect the male dominated Indian society into a society of co-equals with equality of status and opportunities free from discrimination and exploitation. Only when we truly achieve this we can say that yes, truly India is moving ahead.

## 2. STATUS OF WOMEN UNDER THE INDIAN CONSTITUTION:

<sup>4</sup> Air India v. Nargesh Meerza, AIR 1981 SC 1829.

<sup>5</sup>Rupan Deol Bajaj v. Kanwal Pal Singh Gill, AIR 1996 SCC 309

<sup>6</sup> Vishakha & Others v. State of Rajasthan & Others, AIR 1997 SC 3011

<sup>7</sup> Dr. S.N. Dhyani, Fundamentals of Jurisprudence, Universal Law Publication, 2011 pg. 410

The Constitution of India is considered to be the supreme law of the land. It envisages various objectives to achieve equality and social harmony. However, the vision, aims and objectives of the Constitution are contained in the Preamble itself. After many deliberations, debates and references to the various constitutions of other countries, the Constitution of India was enacted and finally the preamble withholds the true spirit. Apart from giving an insight to the Constitution of India, it also serves some certain important purposes. Amongst the most important purposes are:

It declares or indicates the very source from where the Constitution comes; we the people.

It affirms the rights and freedoms which the Constitution intended to guarantee to all its citizens. The Preamble of the Constitution reads as following:

WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC]<sup>8</sup> and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the <sup>9</sup>[unity and integrity of the Nation];

IN OUR CONSTITUTESNT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Before we proceed further, it is very important for us to understand that objectives of attaining justice, liberty, equality and fraternity are most for establishing an egalitarian society. The Constitution of India guarantees certain basic fundamental rights to the citizen's. For the development of its citizens and their progress, these fundamental rights are protected by the Constitution. They are broadly divided into the following categories:

- Right to Equality
- Right to Freedom
- Right against Exploitation
- Right to freedom of Religion
- Cultural and Educational Rights
- Right to Constitutional Remedies

Amongst these, the Right to equality is the basic right and also the aim which India had thought to achieve sine ages. Indian society was divided into various segments on the basis of caste and gender which was so deep rooted in the society that it was impossible to uproot them. These differences in the society were further aggravated during the British reign for their selfish motives. Hence, to achieve equality for all has been a dream of new India in the new era. Article 14, is also called the 'equality code' of the Indian Constitution. Article 14 very clearly states that 'the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Referring to this article Pandit Jawaharlal Nehru while passing the resolution on the same said that the resolution seeks to 'tell the world of what we have dreamt of so long, and we now hope to achieve in the near future'<sup>10</sup>.

Articles 14, 15 (1), (3) and 16 are considered to be the 'equality code' of the Indian Constitution. Article 14 talks about equality before law.

Article 14 states that 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 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. it states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(3) further states that nothing in this article shall prevent the State from making any special provision for women and children.

Article 16 talks about equality of opportunity in matters of public employment. It states that, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(2) further states that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

Guaranteeing equality of opportunity in matters of public employment was essential in an emerging economy as India was witnessing a change in the social trend, where more and more women have started participating in the workforce. Hence it was very essential for the country to protect its women not only in their homes but also provide them an equal opportunity in participating in public employment. The new Constitution intended to enact provisions

<sup>8</sup> Substituted by the Constitution (Forty-second Amendment) Act, 1976

<sup>9</sup> Substituted by the Constitution (Forty-second Amendment) Act 1976

<sup>10</sup> Constitutional Assembly Debate Vol. I p. 57

that would grant equality to all its citizens irrespective of the evils of gender and caste so that the nation and its citizens prosper as a whole. The major objective was to eliminate equality.

Equality is directed at eliminating individual, institutional and systematic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society. It is intended to promote a society in which the hitherto powerless, excluded and disadvantaged enjoy the valued social interests such as dignity, respect, access to resources, physical security, membership in community and power, available to the powerful and advantaged. Within this approach, discrimination consists of treatment that disadvantages or further oppresses a group that as historically experienced institutional and systematic oppression<sup>11</sup>.

Article 15 (1) is yet another face of equality which sternly prohibits discrimination on the basis of many factors and gender which is one of them. In the case of *Kathi Raning Rawat v. State of Saurashtra*<sup>12</sup> it was held that the crucial word in Article 15 is discrimination which means making an adverse distinction with regard to or distinguishing unfavourably from others. Another important word in 'only' which means that if discrimination is based on some grounds not connected with religion, race, caste, sex, or place of birth but with some other rational factor, the discrimination would be valid. The benefit of this lacuna was soon to be used for justifying the continuous discrimination which was still prevalent in the society. How blatantly the basic fundamental rights were being violated and how reluctant the society was to grants its women equality was witnessed in the famous case of *Nargesh Meerza*<sup>13</sup>. In this case there were different conditions and regulations for hiring and remuneration related issues for the air hostess and Assistant Flight Pursers. This different or rather discriminatory treatment meted out to the Air Hostesses was challenged on the grounds of Articles and 15 (1). The discriminatory regulations against Air Hostesses included:

Termination of services on first pregnancy

Restriction on marriage within 4 years

Early retirement at the age of thirty-five years; extendable to forty-five years at the desire of the managing director.

The court ruled that what Article 15(1) prohibits is the fact that sex 'alone' should not be the factor for treating women differently or discriminating them. However, it does not prohibit the states from making discrimination on the ground of sex coupled with other considerations. As a result, the court validated the discriminative attitude and regulations made against women stating that such discriminative policies were formulated as a result of recruitment and gender considerations, both and not gender alone. Thus, the provisions of Article 15 (1) itself defeated the purpose and intention for which it was enacted.

However, eventually, observing the changing social trends and scenario, in the year 2005 Air India Issued an administrative order which stated that 'Executive Female Cabin Crew will be eligible for the position of In-Flight Supervisor', the post for which earlier only male employees were considered. Though the bold act of Air India was praise worthy, for making an effort to bring equality and treat its women employee similar to the males and thus bringing them at par with them, it was hard for the male employees to accept and welcome the new order which granted equality to the female employees working with them. The patriarchal thought has been so deep rooted within the mind and souls of the Indian males that they went ahead and challenged this order. The Delhi High Court however welcomed the change that Air India attempted to bring and incorporate in its rules and regulations and held that "Air India's action removes the 'men only' tag to the position of the In Flight Supervisor. It has perhaps enabled its female cabin crew while on flight duties to break the 'glass ceiling', a concept that describes the artificial and invisible barriers that impede women from advancing to senior leadership positions in organizations. Such a measure is in our view consisted well with the mandate of articles 14 and 15 of the Constitution as well as the mandate of CEDAW.<sup>14</sup>

Article 15 (3), in the substantive equality approach is, in essence, an articulation of the principle of non-discrimination guaranteed by Article 15(1). Under Article 15 (3), the State is empowered to provide special treatment for women and children by who are repeatedly discriminated and thus eliminate the historical disadvantages which prevent them from enjoying equal opportunity. Thus unambiguous, positive discrimination extended to women is an important aspect of the equality guaranteed in the Constitution. The State may take progressive measures to protect women from violence and sex discrimination including sexual harassment.<sup>15</sup>

In the case of *Government of Andhra Pradesh v. P.B. Vijaykumar*<sup>16</sup> the court has once again acknowledged and reiterated the concept embodied under Article 15(3). The court has once again accepted that for centuries women have been discriminated, socially, politically and economically, 15(3) thus attempts to remove the socio-economic barrier casted upon women. In the case of *Dattatraya*<sup>17</sup>, in which reservation of seats in elections for women was challenged on

<sup>11</sup>Kapur, Ratna and Brenda Cossman, "Subversive Sites: Feminist engagements with law in India, Sage Publications, 1996 p 176.

<sup>12</sup> AIR 1952 SC 123

<sup>13</sup> Air India v. Nargesh Meerza 1981 4 SCC 335

<sup>14</sup>Rajendra Grover v. Air India Ltd. 2008 ILR 1 Del 508

<sup>15</sup> Indira Jaisingh, Sexual Harassment at workplace, Universal Law Publication 2015 p. 57

<sup>16</sup> 1995 4 SCC 520

<sup>17</sup>Dattatraya Motiram More v. State of Bombay AIR 1953 BOM 311

the grounds of Article 14, 15 and 16 of the Constitution, the court stated that ‘as a result of the joint operation of Articles 15 (1) and 15(3), the State may discriminate in favour of women against men but it may not discriminate in favour of men against women.’ in Again in the case of U.S. Verma, Principal, Delhi Public School Society v. National Commission for women the court has acknowledged that Article 15 (3) was also necessary to prevent Sexual Harassment at workplace.

Though the Constitution has time and again made complete efforts to grant equality to its women and strictly prohibit any forms of discrimination, sexual harassment at workplace emerged as new evil which was waiting to attack the women as if challenging the women who have moved out to earn a living for till now they were chained and bounded by the boundaries of the norms of the society, the for walls of the house and above all bound and buried under the patriarchy. The enactment of these various provisions and legislations, indirectly seem to admit that women have been discriminated, indirectly seems to admit that women have been discriminated and harassed and hence they need legal sanctions and legislations to protect and empower them. it is to be noted that, in the entire Constitution, the equality of women to that of men has been emphasised, which has also been recognized on various occasions by the courts, but nowhere do we talk about treating the men with equality, or enacting special legislation for them, which itself proves, that it is our women who have been injured by the narrow thought process of the society, the age old believes and hence they now need the legislations that act as crutches and thus enable them to walk.

Article 16(2) prohibits discrimination on the ground of sex in matters of public employment. It states as under:

No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

Article 16 when interpreted along with Articles 14 and 15 is referred as ‘equality code’. The Supreme Court in the case of *Gita Hariharan v. Reserve Bank of India*<sup>18</sup> has emphasised that gender equality enshrined in Article 14 in one of the basic principles of the Constitution. On various occasions the courts have ruled out policies, regulations and legislations which are discriminatory in nature in cases of public employment. In *C.B. Muthamma v. Union of India*<sup>19</sup> the court condemned the service rule which required a female employee to obtain written permission of the government before getting married and if a female was married she was denied to be appointed at all. This rule was a glaring example of the violations of the right to equality.

Article 19 (1) (g) guarantees to all its citizens

The right to freedom of profession and to carry on any occupation trade or business.

In a democratic society where all are treated equally and where the Constitution of the land prohibits any discrimination between the two genders the fundamental right to freedom of trade and profession is an essential element. Thus, any act of sexual harassment at workplace violates the provisions of this fundamental freedom guaranteed by the Constitution. Sexual harassment at workplace not only violates the freedom to profession but it also violates the concept of equality. When women move out to work, such acts damage the society, the economy and the prosperity of the nation. Hence, it is necessary that we not only guarantee the freedom to work to our women but also ensure a safe working environment for them. this Article recognized various aspects and manners which were treated discriminatory in nature, for instance in the case of *Mackinnon Mackenzie and Co. Ltd v. Audrey D’Costa*<sup>20</sup> the court recognized that differences in the remuneration among men and women on the basis of gender was a discriminatory behaviour and violative of Article 19 (1) (g). It was again in the case of *Vishaka*, that apart from the above mentioned factors, which were held to be violative of Article 19 (1) (g), sexual harassment of women at workplace was also recognized as a major factor, violative of freedom of trade and profession. The decision of this case, later led to the development of an entire legislation on sexual harassment at workplace.

Article 21 states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Right to life under Article 21, incorporates to live with human dignity and not as a mere animal existence. Hence, it also recognizes gender as one of the aspects that has often denied the women to live a life of dignity. Since the constitution aims to establish an egalitarian society where all are treated equally, hence it was felt necessary to guarantee the right to life and personal liberty to all.

In the case of *Bodhisatwa Gautam v. Subhra Chakroborty*<sup>21</sup> the court has recognized that women too have the right to life under Article 21. Again in the case of *Chairman, Railway Board v. Chandrima Das*<sup>22</sup>, the Supreme Court held that any physical violence and attempts to outrage the modesty of a woman is violative of Article 21 as she too is entitled to life of dignity. Eventually, with passage of time the courts have adopted an expanded view of Article 21 and have incorporated various rights that help a person to live a life of dignity. On the same grounds in *Vishaka*<sup>23</sup>, the courts have wilfully recognized sexual harassment of women at workplace is a clear violation of right to life or live a life of

<sup>18</sup> 1999 2 SCC 228

<sup>19</sup> 1979 4 SCC 260

<sup>20</sup> 1987 2 SCC 469

<sup>21</sup> 1996 1 SCC 490

<sup>22</sup> 2000 2 SCC 465

<sup>23</sup> 1997 6 SCC 241

dignity. Again in the case of *Apparel Export Promotion Council v. A.K. Chopra*<sup>24</sup>, the Supreme Court has reiterated this concept.

In a recent case of *Deputy Inspector General of Police v. S. Samuthiram*<sup>25</sup> the Supreme Court has observed that 'every citizen in this country has a right to live with dignity and honour and this is a fundamental right guaranteed under Article 21 of the Constitution of India. Sexual Harassment, eve-teasing of women amounts to violation of rights guaranteed under Article 14, 15 and 21.

Hence, acts like sexual harassment, not only violate the right to life and personal liberty but also violate the right to privacy of a women which is incorporated as an aspect of Article 21.

The Constitution of India has made spirited efforts to incorporate every aspect which would guarantee equality to all. By the various judgements, enactments of new laws and subsequent amendments, the constitution and the courts have eventually eliminated gender discrimination to some extent, though not completely. To ensure that gender justice actually prevails above gender discrimination, the constitution has incorporated certain attributes in the directive principles of state policy; which act like the guiding principle in establishing a social democratic state and also in the fundamental duties. Certain Articles which are relevant to the problem of sexual harassment are:

Article 38, which aims to promote social, economic and political justice, an aim also enshrined in the preamble of the constitution. It talks about promoting welfare of the people of the state. It states that,

- the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life;
- the State shall, in particular, strive to minimize inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39 aims at securing a good standard of livelihood for the citizens. It states that:

- The citizens, men and women equally, have the right to an adequate means of livelihood
- That there is equal pay for equal work for both men and women
- That the health and strength of workers, men and women, and tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 42 is most appropriate amongst these as it talks about just and humane conditions of work and maternity relief. It states that the state shall make provision for securing just and humane conditions of work and for maternity relief. Thus, the state is under an obligation to ensure that the working conditions are conducive and such that would ensure the safety of a woman.

Incidents of sexual harassment create a hostile environment and hence it is the duty of the State to ensure that the working conditions are appropriate.

- Apart from the directive principles of state policy, Article 51A holds a great importance in its own way. It talks about the fundamental duty of every citizen to abide by the Constitution and to respect its ideals and institutions. This includes the principle of gender equality, non-discrimination on the ground of gender and to renounce any such practices which are derogatory to the dignity of women. Incorporated by the 42<sup>nd</sup> Amendment Act, this article contains a list of duties which every citizen should fulfil and which are necessary for the establishment of a welfare state and will also help in fulfilling the aims and objectives enshrined in the Preamble of the Constitution. The Fundamental duties incorporated under this Article are:
  - To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem
  - To cherish and follow the noble ideals which inspired our national struggle for freedom
  - To uphold and protect the sovereignty, unity and integrity of India;
  - To defend the country and render national service when called upon to do so
  - To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, and regional or sectional diversities; to renounce practices derogatory to the dignity of women
  - To value and preserve the rich heritage of our composite culture
  - To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
  - To develop the scientific temper, humanism and the spirit of inquiry and reform;
  - To safeguard public property and to abjure violence;
  - To strive towards excellence in all spheres of individual and collective activity so that nation constantly rises to higher levels of endeavour and achievement;

<sup>24</sup> 1999 1 SCC 759

<sup>25</sup> 2013 1 SCC 598

- Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years

Thus we see that apart from guaranteeing the fundamental right to all the citizens the constitution has also imposed the fundamental duties upon the citizens of India for its development and progress. We can see that the constitution has included the fundamental duties from all the fields so that the nation develops in all the spheres and at the same time its objectives are also fulfilled.

Though the Constitution of India has recognized sexual harassment of women at workplace as a violation of their fundamental right embodied under article 21 and the right to equality, the major questions and problem remains that of their enforcement. Sexual harassment is a hazard that ruins the dignity of a woman not only physically but also mentally hence what is more important is the implementation of the laws and orders of the court. Thus to ensure that the fundamental rights are not violated and appropriate remedy is provided; the right to Constitutional remedies, the constitution has enacted the provision of writ jurisdiction to the courts, where one can directly approach the High court and the Supreme Court for the violation of the fundamental rights and demand that an appropriate writ be issued.

### 3. RIGHT TO CONSTITUTIONAL REMEDIES AND SEXUAL HARASSENT:

A victim of sexual harassment may file a writ petition under Article 32 in the Supreme Court and under Article 226 in the respective High Court.

Article 32 states that:

- The right to move to the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed
- The Supreme Court shall have the power to issue directions or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
- Without prejudice to the powers conferred on the Supreme Court by the clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)
- The right guaranteed by this article shall not be suspended except as otherwise provided for by the constitution.

Article 226 states that

Every High court shall have the power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs. The right to issue directions orders or writs to any government authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part arises for the exercise of such power, notwithstanding that the seat of such government or the authority or the residence of such person is not within those territories.<sup>26</sup>

The circumstances in which a person may file a writ petition are as following:

- Against the employer, if there was an unlawful termination of her services upon refusal to comply with sexual favours.
- Against the employer, for the conduct of an enquiry against the harasser, if sexual harassment was committed
- Against the employer, for failure or refusal to take action, if sexual harassment was committed
- When the committee established in accordance with the Vishaka guidelines has passed an order in violation of principles of natural justice, one can file a petition to set it aside
- For a transfer from a place where the offender works
- For the transfer of the offender
- For failure to conduct enquiry in terms of full compliance of the Vishaka guidelines and the act

Where the internal guidelines, policies formulated by the organization or institution have been violated by it

Apart from these writ petition may also be filed under **article 227**<sup>27</sup> in cases of

- Erroneous assumption or excess of jurisdiction;
- Refusal to exercise jurisdiction;
- Error of law apparent on the face of record;
- Violations of the principles of natural justice;
- Arbitrary exercise of authority or discretion;
- Arriving at a finding which is perverse or based on no material;

<sup>26</sup> Article 226 of the Constitution of India, Power of the High Courts to Issue Writs

<sup>27</sup> Article 227;

- A flagrant error of procedure;
- Order resulting in manifest injustice;
- Error on facts and in law<sup>28</sup>

The Constitution of a country is the fundamental law of the land. It is sometimes called the grundnorm or *suprema lex* or the Basic law of the land. If we consider the provisions of the Indian Constitution we see that the Constitution and the law makers have made many efforts to achieve gender equality and to remove the curse of gender inequality which had gripped India since ancient times. The 'Equality Code' consisting of Articles 14, 15 and 16 have made various efforts in various cases to eliminate the obstacles that might prevent the woman in achieving equality and to stand equal to men. The various provisions embodied under these articles have recognized time and again the concept of equality. However, in the effort to grant equality to women in every aspect the most important facet was Article 21, the Fundamental Right to life and personal liberty. While the equality code on one hand granted equality to women in every aspect like equality in opportunities in public employment and right to profession, Article 21 guaranteed the right to profession; the Article 21 guaranteed the right to exist with dignity which means the right to life and liberty. However, with the passage of time and the concept of human rights, the courts recognized various other rights as human rights and which are ancillary rights to life and liberty. These ancillary rights help a person to lead a life of dignity and at the same time they run corollary to the international covenants to which India has been a party that support human life and personal liberty.

Among the various facets which have been given the status of Fundamental Rights under article 21, the most important development for the purpose of women empowerment was the realisation of sexual harassment of women at workplace as a violation of article 21. Though it is to be noted that when the question regarding the sexual harassment was raised under article 21, India did not have a precise law on this subject matter. Considering the case of Vishaka, India had no separate law for prevention of sexual harassment at workplace. Hence, it relied much on International Conventions on such subject matters on which there was no proper Municipal law. This case created great uproar demanding justice for working women thus preventing them from any harassment at workplace and which would guarantee them their fundamental right given to them under the Constitution.

The trigger was actually led by the gang rape of a worker, Bhanwari Devi, a sathin, who was a grass root worker engaged by the Government of Rajasthan in their Women Development Project's. In the year 1992, to prevent Child Marriages, which was an evil practice prevalent much in that part of the country, the government employed such sathin's who were the grassroots workers and who would help the government in its project by generating awareness among the society and deterring such practices. Bhanwari Devi was a very active worker and when she tried her best to prevent the child marriage of a one year old girl she had to face dire consequences. She was boycotted by the villagers for her efforts to stop child marriages and as revenge she was gang-raped by five men in the presence of her husband.

What brought shame to humanity was the decision of the trial court of Rajasthan which acquitted the five rapists? Outraged by this decision, a group of five NGO's under the name of Vishaka, filed a Public Interest Litigation, in the Supreme Court seeking justice for Bhanwari Devi and demanding detailed guidelines to prevent sexual harassment at workplace. Since India, did not have a precise law on sexual harassment, it relied much on International Conventions like CEDAW and issued guidelines which eventually resulted in the proper enactment of laws. However, in this case, the court referred to international sources like Beijing Statement of Principles of the Independence of Judiciary where it asserted that its obligation enforce fundamental rights must be viewed in this context of the judiciary which emphasizes that judiciary's role to protect and observe human rights and promote rule of law. Further it relied on the decision of the High Court of Australia, in the case of *Minister for Immigration and Ethnic Affairs v. Tech*<sup>29</sup> which stated that a state may observe international law in case there is no contrary domestic legislation and also on its own earlier decision in the case of *Nilabati Behera v. State of Orissa*<sup>30</sup>

As a result the Supreme Court issued certain guidelines which were known as the Vishaka Guidelines and which eventually were culminated or took the form if a complete legislation. The judgement of this case stated that the incidences of sexual harassment at workplace can be described as an illustration of hazards to which working women may be exposed, the depravity to which sexual harassment can degenerate and the urgent need for safeguards by an alternative mechanism in the absence of legislative measures.

#### 4. CONCLUSION:

Thus, though the constitution guaranteed the equality as a basic fundamental right, it failed to ensure the same at grass root level. Ever since the enactment of the constitution, discriminatory policies have been existed and particularly at their workplaces. Apart from discriminatory policies, harassment of women at workplace also continued

<sup>28</sup> D.D. Basu, Constitution of India, Lexis Nexis Butterworths Wadhwa, 14<sup>th</sup> Edition, 2009 p. 1549

<sup>29</sup> 1995 128 ALR 353

<sup>30</sup> AIR 1993 SC 1960



to deter them taking up work as a result it affected their efficiency and right to freedom. We can therefore say that the right to equality also indirectly affects the other rights guaranteed in the constitution; hence it is essential that no deviation from the supreme law of the land should be allowed. This is also essential for the development of the society as a whole and then only a nation can be a progressive nation.

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