

Making Legal Aid and Justice for Women from Investigation to Decision a Reality, through a Sensitized Judiciary.

--Justice D.K. Upadhyaya, Allahabad High Court, Lucknow.


Gender based Discrimination reveals ugly face of the Society.

This issue is very old and is global with varying degree. It is travesty of all canons of social justice and equity for women who constitute half of the world's population and work for 2/3rd of the working hours but earn just 1/10th of world's property and are victim of inequality and injustice. This anomaly is now being openly questioned and the underline discrimination is seriously challenged. As human development occupies central stage in the global development debate, gender security and gender equity are emerging major challenges.

Though, the terms 'sex' and 'gender' are used interchangeably in common parlance but sociologically they connote different meaning. The term 'sex' is used to depict difference between men and women based on male or female attributes. Whereas, the term 'gender' signifies cultural aspects of male and female, in other words, personality, behavior and other social attributes expected of male or female become the basis of masculine and feminine roles.

The ground realities: Mirage of gender justice

Although legal rights are guaranteed equally to men and women, there are several ways in which the structure of the family and the existence of several inequitable social customs and practices serve to deprive women of their rights. In particular, discrimination occurs within the family where norms regarding women's secondary status are reinforced in children from birth. Preferential status to son is one of the key aspects underlining social values that view girls as burden. Women are viewed as dependents within the family and face severe restrictions on their mobility, which further impede their ability to gain access to education, economic opportunities, to move freely and settle



anywhere, to form unions or groups and so on, which are all fundamental freedoms under the Indian Constitution. Freedom of speech and expression is often denied to women within the family, and women are kept out of decision making processes even within the community and state institutions. Cultural norms regarding appropriate behavior for women often reinforce images of docility, passivity and subservience, severely curtailing for the women the exposure and confidence they require for participating on an equal footing with men in public life. Practices like female foeticide, infanticide and the increasing incidence of violence on women also constitute assaults on women's right to life and personal liberty.

One of the fundamental obstacles in promoting gender equality in development remains at the community level where attitudinal biases often prevent women from realizing their rights. The Government has done little to take on board these obstacles, apart from occasional and irregular campaigns around single issues like dowry, girl child education and so on. Police education campaigns are restricted to occasional posters and TV spots, but are not consistent or backed up by strong and clear action by the State. Their impact remains less than effective, particularly, since there is little action taken against advertising or campaigns that are gender discriminatory.

Gender justice: Are the courts biased?

Bias has been defined as a particular influential power which sways the judgment: the inclination or propensity of the mind towards a particular object. In judicial parlance, justice requires that the judge should have no bias for or against any individual in making his judicial decision and that his mind should be perfectly free to act as the law requires.

Bias may take various forms but when it comes to the judiciary, bias, even on account of a particular gender, should have no place in it. Bias in any form is anathema to a judge. It is, therefore, recognized that where bias is perceived, the general

public considers the judicial system as having failed to adhere to the highest standards of impartiality and fairness. The rule of law obtain validity or ratification by society because of its commitment to equality for all citizens irrespective of race, colour, creed, sex, etc.

Earlier, the terms such as "judicial gender bias" or "gender bias and the courts" were unheard of. Today, the systematic discussion of gender bias is not only part of the most national judicial education systems, but it has also received national and international recognition. Pervasive gender bias in the courts has become apparent and is plainly visible on record and one cannot miss it even with a casual glance. Research conducted into this matter, by social scientists and researchers in the legal field have documented a judicial gender bias and its profound effect on judicial fact-finding and decision-making. In numerous areas of the law, a disquieting picture emerged which shows that gender bias existed in all areas, operating sometimes to the advantage of men and more often and more seriously to the disadvantage of women.

If gender bias is identified in all its nuances, it would be a large step in dealing with this dilemma. It is not special treatment for women or for men that is called for, because such special treatment is not needed. Instead, what is needed is sensitivity to the ways in which unexamined attitudes about men and women lead to the unintended result of biased decision making. Once this sensitivity is achieved, and it is reinforced by inquisitiveness, analysis and openness, then and only then will the litigants be able to explain their circumstances to a court that is both willing to learn and to judge to achieve a gender neutrality in its judicial system, which is both vital and important for the ultimate achievement of justice in its purest and highest form.

Violence and its perpetuation are often related to conflicts of caste, class, ethnicity, communalism, fundamentalism and terrorism; and all these factors cumulatively have a negative impact on women. Other forms of violence are trafficking in

women and girls and custodial violence perpetrated by law-enforcement agencies. Violence is reprehensible in all contexts.

Amendment in the Indian Penal Code and introduction of Section 304-B or ⁴⁹⁸408-A or even in case of important amendments in IPC on custodial deaths and even in the Evidence Act and such others are not sufficient enough to check increasing domestic cruelty and violence. Therefore, legal literacy and awareness programmes must be evolved for better development and empowerment of women. No doubt, we are deeply committed to the object of elimination of all forms of discrimination against women and India is one of the signatories of the Convention on the said subject.

Issues of Concern

- (a) Rape and sexual Assault
- (b) Domestic violence
- (c) Sexual harassment in the workplace and in educational institutions
- (d) Matrimonial disputes, custody, divorce
- (e) Women's property and inheritance rights
- (f) Reproductive and sexual health of women/ adolescent girls
- (g) Pre-birth sex-selection and elimination of female fetuses
- (h) Child marriage
- (i) Child sexual abuse
- (j) Acid Attacks
- (k) Honour killings

The root cause of all the evils faced by women are

(1) Illiteracy, (2) economic dependence, (3) caste restrictions, (4) religious prohibition, (5) lack of leadership qualities and (6) apathetic and callous attitude of males in the society.

In our society girls are socialized from their tender age to be dependent on males. Her existence is always subject to men. In her childhood she is under the protection of her father, after marriage under the protection of her husband and in old age at

the mercy of her sons. The patriarchal system in India made women to live at the mercy of men, who exercise unlimited power over them.

Laws in India

There are various legislations that have been passed in India with a view to curb the imbalance in gender hierarchy and aid in women's empowerment. The Constitution of India guarantees various rights for women in this regard. This can be evidenced by Part III of the Constitution which deals with fundamental rights and Part IV which deals with Directives Principles of State Policy. Article 14 states that there shall be equal protection of the law and equality before the law which means that the Courts or any Law enforcement agency should not discriminate between a man and a woman. The right to equality is the foundation on which other laws are formulated and can be implemented. Without the right to equality, the purpose of gender justice cannot be achieved.

Article 15 guarantees the right against discrimination. The prejudice and bias against women is rampant. It is an issue to be countered by the right to equality, hence the right against discrimination. Article 15(3) talks about the special protection for women. Article 16 provides the right to equal opportunity in terms of public employment irrespective of the sex of the person.

This provision aids women to start participating in elections and the decision making process. In this regard it is important to mention the 74th amendment, made for the reservation for women in Panchayat. Article 19 guarantees freedom of speech and expression; to assemble without arms; to form associations and unions; to move freely throughout the territory of India; to reside and settle in any part of the territory of India; to practice any profession, or to carry on any occupation, trade or business. This fosters the right to equality, by providing the necessary freedoms needed to live in society. Article 21 guarantees the right to life, the interpretation which has been broadened to include the right to live with dignity. Article 23 guarantees the right against exploitation. It prohibits traffic in human beings. The

Directive Principles of State Policy form Part IV of the Constitution. Article 38 empowers the state to secure a social order for the promotion of welfare of the people. It also states that the state shall strive to eliminate the inequalities to secure justice-social, economic and political. Article 39 talks about certain principles of policy that need to be followed by the state to secure adequate means of livelihood equally for men and women, equal pay for equal work among men and women, and the health and strength of workers, men and women. Article 42 requires the state to make provision for securing humane conditions of work and maternity relief. Part IV A was inserted into the Constitution by an amendment of 1976. This deals with Fundamental Duties and Article 51A (e) specifically deals with renouncing practices derogatory to the dignity of women.

Apart from the provisions in the constitution, there are certain other legislations that have been passed specific to certain issues. The Dowry Prohibition Act was passed in 1961 which deals with the practice of receiving and giving dowry. Dowry has been one of the age old customs in India and it is one of the major problems faced by women in rural and urban areas. Dowry deaths are also quite common. Section 304 B of Indian Penal Code deals with the offence of Dowry death; punishment for which is imprisonment for a term of not less than seven years or life imprisonment. Despite the legislation, in practice dowry as a custom continues to thrive. The problem of domestic violence has been a long standing issue for women. Section 498-A deals with the crime of cruelty by the husband or the relatives of the husband. The punishment for which is imprisonment up to three years and fine. This section defines cruelty which includes both mental and physical cruelty. This section was included by an amendment in 1983, by the same amendment, Section 113 A has been added to the Indian Evidence Act to raise a presumption regarding abetment of suicide by a married woman.

In 2005, The Protection of Women from Domestic Violence Act was passed. The term domestic violence is wide enough to encompass all sorts of physical, sexual, mental, verbal and economic abuse, and it also gives power to anyone else other than the aggrieved party to lodge the complaint. The issue of

sexual objectification and harassment of women, trafficking in women have been dealt with by specific acts such as the Indecent Representation of Women (Prohibition) Act, 1986, Immoral Traffic (Prevention) Act, 1986 and Section 294 of the IPC which relates to obscenity. For the issue of sati, the Commission of sati (prevention) Act was passed in 1987, even though sati was abolished in 1829. The Pre-natal Diagnostic Techniques (Regulation and Prevention) Act was passed in 1994 to curb the rise in female foeticide. Needless to say that despite this enactment, female foeticide is rampant. To secure gender justice for working women, the related enactments are; Maternity Benefit Act, 1961, Equal Remuneration Act, 1976, Factories Act, 1948. For enhancing social justice for women, enactments such as the Hindu Marriage Act, 1955 was passed, which made the marriageable age of women 18, now its been amended to 21; The Hindu Succession Act, 1956 ensures women's right to inherit parental property; The Hindu Widow Remarriage act, 1956 legalized widow remarriage. All the provisions that have been included in the Constitution and other enactments are reflective of the aim of gender justice but the implementation of all these provisions has been challenging. Thus despite the measures formulated for curbing the gender imbalance, in practice though, women still continue to face the same complexities.

Judicial sensitization towards women's justice and Legal aid

In order to effectively address violence against women, laws and national action plans should require the engagement and coordination between multiple sectors and groups, both public and private.

The court plays an integral role in implementing legislation prohibiting violence against women, as it bears the ultimate responsibility for case outcomes. The court can address the needs of many victims of violence against women by monitoring the behavior of perpetrators and mandating them to appropriate interventions, and by protecting women from their abusers. A court that is strong and committed to implementing legislation prohibiting violence against women must also use its authority to

demonstrate publicly the civil and criminal justice systems' commitment to effectively address crimes of violence against women.

Many laws also outline special roles for courts and prosecutors related to effective implementation. In general these laws focus on:

- Mandating or encouraging special protections for victims in court;
- Requiring the development of specialized courts or tribunals;
- Requiring the establishment of specialized prosecutors units;
- Requiring training for judges and prosecutors; and
- Requiring the development of special policies, procedures and protocols for handling cases of violence against women.
- Requiring that legal proceedings occur on a timely basis.

Complete gender justice is complex to achieve in a country like India. The diversity of cultures, subcultures, is vast and there is a lot of rigidity in traditions and beliefs. Lack of education, lack of development, poverty, improper enforcement of the laws, lack of awareness among women, deep rooted patriarchy, economic dependence of women, all lead to the subversive condition of women in our society.

Recent Judicial Initiatives Towards Empowerment of Women:

Though plethora of legislations exists, due to ineffective enforcement, women are exploited by the male dominated society. Male dominated society has found ways to circumvent the law as a blockade against women empowerment. Due to failure of the legislations to protect women, judiciary has come forward to protect women. In protecting the women, the Indian Judiciary has removed all the procedural shackles and has completely revolutionized constitutional litigations. The judiciary has

encouraged widest possible coverage of the legislations by liberally interpreting the terms. The judiciary has shifted from doctrine approach to the pragmatic approach, which is conducive to all interests in the society. The Courts have shown greater enthusiasm in granting the constitutional provisions for all women. The judiciary by its landmark judgments has filled up the gap created by the Legislative machinery. The judiciary has extended helping hands to women, when the legislature had denied it. The higher judiciary has shown concern for women's right in recent times; it also has been greatly influenced by the international declarations and covenants on women's rights. The vibrant judiciary has recently exalted the dignity of women by its golden judgments. In *Municipal Corporation of Delhi v. Female Workers (Muster Roll)* (AIR 2000 SC 1274), the Supreme Court extended the benefits of the Maternity Benefit Act, 1961 to the Muster Roll (Daily Wagers) female employees of Delhi Municipal Corporation.

In *Chairman, Railway Board v. Chandrima Doss* (AIR 2000 SC 988), the Supreme Court awarded compensation of Rs.10 lakhs to a woman under Article 21 of Constitution, who has been a victim of rape. In *Githa Hariharan v. Reserve Bank of India* (AIR 1999 SC 1149), the Supreme Court interpreted Section 6(a) of Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 in such a way that father and mother get equal status as guardians of a minor. In *Mohammed Ahmed Khan v. Shah Bano* (AIR 1985SC 945), the Supreme Court granted equal right of maintenance under Section 125 of Cr.P.C. 1973 to a divorced married woman notwithstanding the personal law. The Supreme Court also held that "large segments of society which have been traditionally subjected to unjust treatment, women are one such segment." In *Charan Singh v. Union of India* (1979 Lab IC 633), the Delhi High Court expressed that women are a backward class as compared to men. In *Government of Andhra Pradesh v. P.B. Vijay Kumar* (AIR 1995 SC 1648), the Supreme Court has held that the issue of reservation for women in State Services was upheld under Article 15(3) of the Indian Constitution. In *Municipal Corporation of Delhi v. Female Workers* (AIR 2000 SC 1274, 1281), the Supreme Court held that a just social order could be achieved

only when inequalities are obliterated and women, which constitute almost half of the segment of our society, are honoured and treated with dignity.

In *Uttarakhand Mahila Kalyan Parishad v. State of Uttar Pradesh* (AIR 1992 SC 1695), the Supreme Court struck down the discriminatory rules of Education Department of Government of Uttar Pradesh. In *Air Indian v. Nargis Mirza* (AIR 1981 SC 1829), the Supreme Court struck down the discriminatory rules of Indian Airlines. In *Bodhisattwa v. Ms. Subhra Chakraborty* (AIR 1996 SC 922), the Supreme Court held that rape is a crime against basic human rights. In *Vishakha v. State of Rajasthan* (AIR 1997 SC 301), the Supreme Court took a serious note of the increasing menace of sexual harassment at workplace and elsewhere. Considering the inadequacy of legislation on the point, the Court even assumed the role of legislature and defined sexual harassment and laid down instructions for the employers. In *Apparel Export Promotion Council v. A.K. Chopra* (AIR 1999 SC 625), the Supreme Court found all facets of gender equality including prevention of sexual harassment in the fundamental rights guaranteed by the Constitution. In *C.B. Muthamma v. Union of India* (AIR 1979 SC 1868), a service rule whereby marriage was a disability for appointment to foreign service was declared unconstitutional by the Supreme Court. In *Shobha Rani v. Madhukar* (AIR 1988 SC 121), the Supreme Court held that dowry demand was held enough to amount to cruelty. In *Prathibha Rani v. Suraj Kumar* (AIR 1985 SC 628), the Supreme Court upheld women's right to the Stridhana. In *State of Punjab v. Gurmit Singh* (AIR 1996 SC 1393), rape was held to be violative of the right of privacy. In *Bodhisattwa Gowtham v. Subhra Chakraborty* (AIR 1996 SC 622), the Supreme Court observed that rape was not only an offence under the criminal law, but it was a violation of the fundamental right to life and liberty guaranteed by Article 21 of Indian Constitution.

In *Delhi Domestic Working Women's Forum v. Union of India* (1995) 1 SCC 14, the Supreme Court suggested the formulation of a segment for awarding compensation to rape victims at the time of convicting the person found guilty of rape. The Court suggested that the Criminal Injuries Compensation Board or the Court should award compensation to the victims by

taking into account, the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if it occurs as a result of rape. In *Gourav Jain v. Union of India* (AIR 1997 SC 3012), the Supreme Court laid down guidelines including the necessity of counseling, cajoling and coercing the women to retrieve from prostitution and rehabilitate them.

Suggested Judicial Measures

1. In protecting the rights of the women in the criminal justice process from arrest to release, the judiciary has special responsibility to ensure that judicial officer shall always respond to the distressed call of women in custody irrespective of their jurisdiction or status in the judicial hierarchy.
2. When produced before the magistrate, he or she should invariably ask the woman of the treatment given to her by the police and of any other special problems she encounters in her situation. Every effort should be made to resolve those special difficulties and in cases where an immediate solution is not possible within the law, the Magistrate may explain the position to her, and initiate appropriate action for redress.
3. Except in extreme situations when detention is desired, the Magistrate should release the woman on her own bond, the conditions of which should be explained to her by the Magistrate.
4. No judicial remand of women should be allowed except into those institutions which are completely under the control of women officials.
5. If considerations of arrestee's own safety by anti social elements, demand detention in public institutions, bail should be refused to the woman in her own interest, unless she specifically states her willingness to be released even after being alerted to the above considerations.
6. In the disposition of women to custody or otherwise the Magistrate must enquire and direct that suitable arrangements for the welfare of her children be made in a manner that protects the rights of children.
7. Speedy trial of all cases involving women is a legal and moral requirement. All magistrates should proceed with such trials with utmost expedition, with due regard to the principle of

- limitation where applicable. Special tribunals and procedures to carry out this directive should be organized by Government in consultation with the High Court.
8. To the extent possible, the State should set up Women's Courts to try women offenders. Where joint trial with man is involved, the Courts may use their discretionary power whether to hold joint or separate hearings.
 9. Rights to legal aid in criminal proceedings is a fundamental right. In the case of women, free legal aid should be given from the time of arrest and Magistrate must ensure that adequate legal services are provided.
 10. Magistrate should inform women, when first produced, of their right to legal aid at State expense and direct the provision of necessary services. They should explain the nature and scope of the proceedings against her and her rights in it.
 11. When women are examined in court as accused or as witnesses, due courtesy and decency must be shown. If circumstances so demand in the interest of modesty and privacy of women, the trial may be held in camera or the woman may be examined on commission through women advocates.
 12. Long cross-examinations and repeated examinations may be avoided in the case of women and if necessary, information may be sought by affidavit and/ or interrogatories.
 13. Representation of women at all levels in the judiciary is essential to promote gender justice and women may be appointed in adequate numbers, among others, for processing cases involving women.
 14. In courts processing cases involving women, the court staff should consist of sufficient number of women employees in order to avoid personal difficulties which women accused or women witnesses may face with the male dominated institutions and cadres.
 15. Sentences and sentencing in respect of women offenders may have to take note of the solidarity of the family and the woman's unique role and needs. Except when unavoidable, custody should not be restored to. Community based treatment of women being ideal for them, their children and society; it is desirable to prefer such disposition.

16. While sentencing women to imprisonment or any form of custody, suitable arrangements should be made for the custody and welfare of their children.
17. Courts will take continuing interest in the welfare of women in custody and ensure that they receive proper treatment, including psychiatric and habilitative services.
18. Magistrates should make frequent visits to jails and custodial institutions within their jurisdiction and file periodic report to the superior judicial officers on the status and condition of women in such institutions.
19. In case of women in custody for long periods, premature release by reducing the sentence by courts may be considered. Parole and other forms of supervised release may be widely resorted to.
20. Short term sentences of less than 6 months may be totally avoided in case of women. Similarly simple imprisonment which is demoralizing and wasteful may be avoided.
21. In the disposition of women offenders, courts should mandatory call for and give due regard to the probation officer's report and to the report of medical/ psychiatric examination. Where probation officers are not available, probation investigation should be entrusted to recognized and accredited institutions and individuals.
22. Women, unless economically independent, should not be sentenced to fine and alternatives such as admonition, conditional discharge, probation under supervision etc. should be resorted to.
23. The courts should not sentence any mentally sick woman or retardates to prison and should ensure the immediate transfer of any existing cases of non-criminal and criminal lunatics to mental homes for therapeutic and habilitative care.
24. Insufficient escorting staff or facilities should not be used as grounds for postponing the hearing of women. The State Government through the Social Welfare Department should develop an escort corps to serve the escorting requirements of female inmates in various custodial situations.