

GENDER JUSTICE SENSITIVITY OF JUDICIARY*

The leaders of Indian judiciary and those who feel convinced of the

need for women empowerment – by law and by legal means – have assembled here, today, to have a free, frank and heart to heart discussion on women empowerment vis-à-vis legislation and judicial decisions. It is a welcome move. I would not, even for a moment, subscribe to the view that Indian judiciary is not sensitive to needs of justice. It is one of the judiciaries in the world which enjoys a high reputation of being justice-sensitive. However, the National Commission for Women feels that it should be more gender-justice-sensitive.

During last three decades, there has been a sea change in the concept of women empowerment. I am reminded of a dialogue from *Doll's Home* written by Henrik Ibsen. Helmer tells to Nora – “First and foremost, you are a wife and mother.” Nora replied – “That I don't believe any more. I believe that first and foremost, I am an individual, just as much as you are.”¹ This dialogue carries a forceful message. A woman today expects herself – and rightly so – to be treated as an individual, a living human being, entitled to the same dignity and status, as her male counterparts.

International Treaties and Conventions

Twentieth century has witnessed the upsurge of women empowerment movement, universally. The Universal Declaration of Human Rights (1948), reaffirming faith in the fundamental human rights, in the dignity and worth of the human persons, and in the equal rights of men and women, contemplated the entitlement of all cherished freedoms to all human beings without any distinction of any kind, including discrimination based on sex. The World Conference on Human Rights, at Vienna in 1993, had declared the human rights of women and the girl child to be “inalienable, integral and indivisible part of universal human rights” and eradication of any form of discrimination on the basis of sex, is the prime objective of the international community. The Convocation on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 is the United Nations' landmark treaty, marking the struggle for women's rights. Described as the Bill of Rights for women, it spells out what constitutes discrimination against women and propagates strategies based on 'non-discriminatory' model, so that women's rights are seen to be violated, if women are denied the same rights as men. The General Recommendation 19 to CEDAW, formulated in 1992, deals entirely with the violence against women and explicitly states that gender based violence is a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men and asks state parties to have regard to this, while reviewing their laws and policies. The Declaration on the Elimination of Violence Against Women (1993) is a comprehensive statement of international standards with regard to the protection of women from violence. The Declaration sets out the international norms which States have recognized as being fundamental in the struggle to eliminate all forms of violence against women. Any “grave or systematic violations” are liable to be inquired into and penalised, ever since Optional Protocol of December 2000.

For centuries women in this country have been socially and economically handicapped. They have been deprived of equal participation in the socio-economic activities of the nation. The Constitution of India has taken a long leap in the direction of eradicating the lingering effects of such adverse forces, so far as women are concerned. It recognizes women as a class by itself and permits enactment of laws and reservations favouring them. Several Articles in our Constitution make express provision for affirmative action in favour of women. It prohibits all types of discrimination against women and lays carpet for securing equal opportunity to women in all walks of life, including education, employment and participation. Article 51 of the Constitution obligates the State to honour international law and treaty obligations. Our natural obligation to renounce practices, derogatory to the dignity of women, has been elevated to the status of Fundamental Duty by Article 51A.

In spite of all these developments, the truth remains that widespread violations of women's rights continue to persist. The forces of globalisation and extremism and the unwillingness of other segments of humanity continue to pose a threat to women's human rights. Structural inequalities and power imbalances facilitate such violations. Urge for easy money, at times greed, facilitating a life full of comforts, possibly luxury, has in recent years, made women more susceptible to exploitation and violence.

Law vs Justice

Laws have taken silent and slow steps in the direction of political participation of women, preventing gender biases and removing lacunas in procedural laws and laws relating to evidence. The law cannot change a society overnight, but it can certainly ensure that the disadvantaged are not given a raw deal. The courts can certainly go beyond mere legality in insulating women against injustice, suffered by biological and sociological factors. But all law is not justice; nor is all justice law alone. At times there could be more justice without law and likewise there could be times when strict adherence to, or mindless application of laws, could lead to injustice. Justice is a combination of various factors: enactment of laws responsive to the changing needs of time, their effective enforcement, progressive and pro-active interpretation and application so as to fill up any void that is left and not taken care of by statutory enactments. It is the law in action and not just the law, which is important. If one were to ask to name a significant single factor which could make the delivery of justice just and meaningful, the answer would be – a sensitised judiciary – a judiciary which views the circumstances and situations in a holistic manner. Judges too have their own philosophy and their own convictions, depending on the background wherefrom they come, but then, there is a collective qualitative philosophy of justice dispensation in which personal beliefs, at times amounting to inhibitions and predilections, have no place.

Role of Indian Judiciary

We have, this morning, assembled together, on the invitation of the National Commission for Women, to discuss, deliberate and dwell upon issues relating to women empowerment vis-à-vis legislation and Judicial decisions. In such a meet, the judges have a two-pronged role to play. Firstly, it is the judiciary which interprets and implements the laws. A judge is an eye-witness to a real life drama – how the script written by the legislature is played by real life characters. The parties, while critically evaluating the laws, may tend to have a partisan look; a judge can make a correct and realistic evaluation of the laws and find out, authoritatively, the difficulties in implementation of, or lacunas in, the legislation. Today, we propose to identify and catalogue such difficulties and lacunas. Secondly, and

which is more important, a judge while administering the laws, if deprived of requisite sensitivity, may frustrate the objectives sought to be achieved by the best of the laws.

We should have a clear understanding of the role of judiciary in vindicating gender justice. According to Justice V.R. Krishna Iyer, "case-law, creative, imaginative and gender friendly, has its logic and limitation. Judges cannot make law but only interpret it and decide specific cases and controversies within defined bounds, although in that process, they do make law, interstitially. But legislation is essentially a wider function covering vaster spaces and free to weave fabrics of fundamental mutation. So it is substantive codification, radical in transformation of the social order, that we need, an avant-garde operation which the Parliament must perform. Magnificently as the judiciary has acted, they have not and could not usurp legislative functions."² Landmark decisions delivered by the Indian judiciary, in particular during last two decades, bear testimony to the fact that judges cannot be accused of gender injustice. They have shown the requisite sensitivity, expected of them. However, all that can be said is that such sensitivity is individual and needs to be institutionalized. The purpose of this meeting is to share the experiences, have an exchange of views and to learn and devise, by our experiences, a model of gender justice sensitization.

About the Book (to be released today)

Let me say a few words about 'Search for a Vision Statement on Women Empowerment vis-à-vis Legislation and Judicial Decisions', the Book which has been prepared by the Indian Trust for Innovation & Social Change and published by the National Commission for Women and which I will have the privilege of releasing today. It goes without saying that the National Commission for Women, under the leadership of Dr. Poornima Advani as Chairperson, has done an excellent job. The Commission has carved out its place in the working of Indian constitutional governance. It has succeeded in wiping out tears from the eyes of several aggrieved women and it has certainly succeeded, to a large extent, in empowering the women by developing their confidence, through education, literacy campaigns, philosophy propagation and field work. By the courtesy of Dr. Poornima Advani, I have received several publications, brought out by the Commission and, turning over the pages, I have benefited much, by adding to my knowledge, and widened my vision.

I have looked into the Book – 'Search for a Vision Statement on Women Empowerment', which will be in your hands, a few minutes hereafter. I can say without hesitation that it is the obligation of every judge and everyone else concerned with gender justice and women empowerment, to read this Book from cover to cover. It makes available a lot of vital statistics. It is also a digest of, almost, all judicial pronouncements, relevant to the subject, in the field of substantive and procedural law and practices. However, I have a caveat to enter on three points. Firstly, the Book projects too high expectations from the judiciary and, while doing so, the concept of separation of powers between legislature, judiciary and executive seems to have been obliterated at some places in the Book. It is too much for the Commission to expect from the judiciary to legislate and to vindicate women empowerment, by crossing its constitutional and jurisdictional limits. Secondly, in spite of the concept of affirmative action and protective discrimination being acceptable to us, as ordained by the Constitution, we cannot afford to overlook certain basics of criminal jurisprudence. We cannot convict an accused even if there is no evidence and even where the standards of proof well settled in criminal jurisprudence are not satisfied. Thirdly, at places the edge of the pen, used by the writers, seems to have gained more sharpness than needed. Expression like – "unconcerned

and unmindful judges bogged by technicalities in the courts" (page 41); "The effort of the judge was diverted to proving the accused innocent and that was truly a case of miscarriage of justice" (page 67); "There is no quest for social justice but more emphasis is given on technicalities and procedural requirements. In the sample cases cited above, these are only illustrative to show how the attitude of the Judges of the various High Courts are almost the same and similar" (page 70); and "Insensitive Court" (page 132) and a few such like observations could have been avoided, without compromising with the theme and message of the Book; though I do acknowledge that generally encomiums have been showered on judiciary and the books is full of appreciation, recorded with generosity on the gender-sensitive performance of Indian Judiciary.

I am not critical of the criticism of judiciary, levelled in the Book. It may be zeal or may be over zealousness of the authors. Nevertheless, whatever has been said therein, is with objectivity and all good intentions. I will appeal to the judges and readers to eschew a few observations (may be overgeneralised) and concentrate on receiving the message which is intended to be given by the Book.

What do we do

I would suggest the following principles to be kept in mind by the judges to achieve the goal of gender justice:

- (1) Be informed of the historical and cultural background in which the women have lived over the ages and understand their feelings and have regard to their needs as a class;
- (2) Because the women are weaker sections of the society, strike a balance in your approach in dealing with any issue related to gender, or where a woman is victim, in such a way, that the weaker are not only treated as equals but also feel confident that they are equals.
- (3) Treat women with dignity and honour and inculcate confidence in them by your conduct, behaviour and ideology, whenever they come to you as victims or seekers of justice;
- (4) Do not allow them to be harassed and certainly do not do anything yourselves which may amount to harassment of a woman in court room; and
- (5) Make efforts to render a woman victim quick, speedy, cheaper and effective justice – true to its meaning.

These are the broad principles. I take this opportunity to share with you a few court-room-tips, which I have myself followed as a trial court judge and also as a member of higher judiciary. These are:—

1. Women are to be treated with courtesy and dignity while appearing in the Court. Any comment, gesture or other action on the part of any one, in or around the court-room, which would be detrimental to the confidence of the women, is to be curbed with a heavy hand.
2. Any gender bias is carefully guarded against in the court-room and this protection should be extended to any female present or appearing in the court, either as a member of the staff or as party or witness or member of legal profession. A

message should clearly go that any behaviour, unbecoming of the dignity of woman, shall not be tolerated by the Court.

3. Court proceedings involving women must begin on time and proceed with in an orderly manner and with dispatch so that they are concluded as expeditiously as possible, avoiding the need for repeated appearance of women in the Court.
4. The examination and cross-examination of women witnesses, in particular in cases relating to violence against woman shall be conducted under the supervision of presiding judge with such care and caution as to avoid prolixity and any harassment to witness.
5. The female members of the Bar need to be encouraged in the profession, maybe by giving assignments as Court Commissioners for inspections and recording statements of witnesses.
6. Preference be given to female lawyers, in the matter of assigning legal aid work or amicus curiae briefs, so that they have more effective appearances in Courts.
7. Crime against women ought to be dealt with on priority basis so as to be decided finally, at an early date lest the delay should defeat the justice.

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

Justice Michael Kirby of Australia says – “In a pluralist society judges are the essential equalizers. They serve no majority; not any minority either. Their duty is to the law and to justice. They do not bend the knee to governments, to particular religions, to the military, to money, to tabloid media or the screaming mob. In upholding law and justice, judges have a vital function, in a pluralist society, to make sure that diversity is respected and the rights of all protected.”

I would also like to quote Justice Leila Seth – an eminent lady judge, who also held the office of the Chief Justice of High Court – “So, can a woman get impartial justice from a man? Or conversely, can a man get impartial justice from a woman? The answer is”Yes”... in both cases. But judges have to learn the language of equality and be impartial and try and place themselves alternately, in the shoes of the two disputants and appreciate the problem and give an objective decision. This process of learning the language of equality is slow – but has to be encouraged. Otherwise there will be no equality and no justice. As one learns a new language when one goes to a new country, so must we learn the language of equality as we enter a new century, with hope and with desire to remove injustice.”³

* Speech delivered on “*Gender Sensitization*” on the occasion of All India Meeting of Chief Justices of High Courts on Women Empowerment *vis-a-vis* Legislation and Judicial Decisions on 11th December, 2004 at Parliament Annexe, New Delhi.

1. Arthur T. Morgan, *Quotations*, p. 412.
2. JUSTICE V.R. KRISHNA IYER: Search for a Vision Statement on Women Empowerment vis-a-vis Legislation & Judicial Decisions - ‘A Vibrant Vision and Militant Mission’, p. (xvii).
3. Justice Leila Seth: ‘Gender Sensitization of the Judiciary’, *The World of Gender Justice* edited by Murlidhar C. Bhandare, p. 103.