

**"HUMAN RIGHTS IN INDIA ON CERTAIN SPECIFIC GENDER ISSUES" —  
A SOCIAL-LEGAL PERSPECTIVE**

*By*

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***Introduction :***

"The human rights of women and of the girl-child are the inalienable, integral and indivisible part of human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community," concluded the World Conference on Human Rights, 1993. In view of the indispensably pivotal role played by women in the spheres of family and society, the human rights affecting women in particular call for urgent and foremost attention in the interest of justice, equality and human dignity. In modern times the affirmation, protection and implementation of human rights has virtually become a *sine qua non* of just and fair society, and these issues are neither confined to the area of international law nor are mere platitudes for the purpose of academic debates any more.

***Human Rights : Concept :***

Since the advent of human civilization, the quest for peace, prosperity and development has been common to all mankind. Laws regulating societies do vary from country to country; however, philosophers and jurists worldwide have always asserted the brooding omnipresence of higher law. It was termed as 'Jus Naturale' for the Romans, 'Lex Naturalis' for medieval Christian thinkers, 'Rita' and 'Dharma' for ancient Hindus, and is christened as 'Natural Law' by modern jurists.

The recognizing of such superior law led to the evolution of the concept of 'Natural Rights' which were claimed to be inherent, inalienable, immutable and essential in nature. Such rights of groups or individuals, whether justifiable or non-justifiable, positive or negative, against the State or any other authority *et al* are in the modern context termed as Human Rights. The 'charter of the United Nations Organization' adopted in June 1945 declared one of its purpose of 'promoting and encouraging respect for human rights'. The immortal Magna Carta (1215), Petition of Rights (1628), Bill of Rights (1689) and Act of Settlement (1700) in great Britain; the Declaration of Independence (1776) and Bill of Rights (1789) in USA and Declaration of the Rights of Man (1791) in France also contained these rights in substance, though not under the rubric of human rights. The entire Indian struggle for independence was veritably a movement against suppression of human rights of Indians by the British empire. In modern context, the UN Charter, sundry international and regional declarations, conventions, charters and conferences and national constitutions compose the rich sources of human rights. However, there is and can be no exhaustive list of all human rights, for new rights also do evolve with changing times.

***Human Rights and Women : An International Overview :***

The Character of the United Nations Organization affirms faith in the equal rights of men and women. The 'Universal Declaration of Human Rights, 1948', professes

the principle of non-discrimination and proclaims that all human beings are born free and equal in dignity and rights, without any distinctions including that of sex. The 'International covenant of Economic, Social and Cultural Rights, 1966; a number of regional rights charters, viz., "European convention for the Protection of Human Rights and Freedoms, 1950; African Charter on Human and People's Rights, 1981' and provisions for progressive protection and guarantees for women. Attention has also been focused exhaustively on gender issued by the UN and other organizations from time to time. Thus, the UN Eliminations of Discrimination Against Women" in November grant women equal rights with men in matters of civil law including absolute interest in property and free choice and consent in marriage. The 'Social World Conference on Human Rights held at Vienna in June 1993 called for full and equal participation of women in all aspects of public life. Recognizing the nature of gender-discrimination as systematic and purposive, the 'convention on the Elimination of All Forms of Discriminations Against Women (CEDAW), 1981' prohibited all distinctions, restrictions and exclusions impairing or nullifying the enjoyment and exercise by women of human rights and fundamental freedoms. The issue of women's right to health and to control their reproductive capacities were recognized in Cairo's 'International Conference on Population and Development, 1994'. Gender equality was reaffirmed as fundamental prerequisite for social justice in the 'Fourth World Conference on Women' held in 1995 at Beijing.

Undoubtedly, discrimination against women is incompatible with human dignity. It is an obstacle to the full development of the potentialities of women in the service of their countries and of humanity. Women have a significant role in the social, political economic and cultural life and an indispensable part to play in the family, particularly in the

rearing of children. Nevertheless, the die-hard patriarchal social systems the world over have sustained bias, prejudices and discriminations against women such as rape, molestation, child sexual abuse, custodial torture, domestic violence, sexual harassment at workplace *et al* continue as global problems today. Women represent a mere 10 per cent of all elected legislatures worldwide. They however form a substantial proportion of migrant workers and contract labourers. For most women, primary health-care still remains a distant dream, as out of around 150-200 million pregnancies worldwide each year, about 23 million lead to serious complications resulting in half-a-million of these to end in the mother's death<sup>1</sup>. Women form one of the most vulnerable groups for HIV-transmission and AIDS. Their control over their own bodies remain a debatable issue till today as is evident from the controversial right to abortion debate. In most communities women are denied equal property rights too.

### ***Human Rights of Women : Indian Scenario :***

The Constitution of India confers a catena of rights upon women. Our revered Constitution- makers were well aware of the subordinate and backward position of women in our society. They therefore, made conscious efforts for improving the entire situation in favour of women. There is thus not only a fundamental right to equality conferred upon all, but also an unequivocal prohibition against discriminating only on the ground of sex<sup>2</sup>. The State is also empowered to make special provisions in favour of women<sup>3</sup>. There are other fundamental rights viz., right to life, liberty and to constitutional remedies<sup>4</sup>. Resorting to judicial activism, the

1. Jaising, Indira 'Making Human Rights Norms Measure u to Women's Needs' The Lawyers collective, Vol.12 No.2 at 9.

2. See Articles 14 and 15(1) Constitution of India

3. Article 15(3), Constitution of

4. See, Articles 21, 19 and 32 Constitution of India.

Supreme Court has expanded the scope of 'right to life' to new horizons by reading many more rights into it as integral and essential part thereof. Thus, women also have fundamental right to human (read feminine) dignity<sup>5</sup> to privacy, to health, to primary education,<sup>6</sup> to free legal aid, to speedy-trial *et al* as adjuncts to right to life. The State is directed to provide for maternity relief to female workers under Article 42 of the Constitution, whereas Article 51-A declares it a fundamental duty of every Indian citizen renounce practices derogatory to the dignity of women. Thus, the spirit of gender equality, dignity and justice pervades the entire framework of our Constitution.

The Indian Parliament has enacted the Protection of Human Rights Act, 1993; Section 2(d) defines "human rights" to mean 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International covenants and enforceable by Courts in India.'

In view of the generous constitutional scheme, innumerable laws have either been enacted or amended in the interest of women in India. Similarly, the Indian Courts have also shown a rising trend towards feminine protection/rights. Insofar as the treaties or conventions to which India is a party are concerned, though they do not automatically become part of municipal law, the Courts in India try so to interpret law as to be in consonance with such treaties and conventions.

At this juncture it seems pertinent to make a brief socio-legal review of human rights in India on certain specific gender issues.

(a) *Right to Education and Women :*

The 'Universal Declaration of Human

Rights, 1948' boldly declares that everyone has right to education. The 'World Declaration on Education for All, 1990' resolves for educational opportunity to be provided to all enabling them to develop to their full capacities, participate in development, improve quality of their lives, make informed decisions and to continue learning. The right to education finds its place in Chapter IV of Indian Constitution as a non-justifiable right, but has now been elevated by judicial interpretation to the status of a fundamental right by the Supreme Court in its decision in *Unnikrishnan, J.P.v .State of Andhra Pradesh*, AIR 1993 SC 2178, which laid down that every citizen of India has a guaranteed right to free education upto 14 years of age and his right thereafter is subject to economic capacity and development of the State. It flows directly from the fundamental right to life.

The ground realities however present an altogether different picture notwithstanding the aforesaid legal position. While many of our neighboring Asian countries have crossed 70% mark in overall literacy (China 73%, Thailand 93%, South Korea 96%, Sri Lanka 88%, Myanmar 81%, Malaysia 78% India still has a literacy rate of 36% only<sup>7</sup>. According to the annual report of one ministry of Human Resource Development for 1998-99, 38.23 percent of boys and 41.34 percent of girls drop out of schools before they reach class V and of the survivors less than a third are able to clear secondary school level. Studies have revealed strong links between women's education and their awareness for family planning. It was observed that on an average 5% children were born to women who have completed middle school and only 3.36% to those who studies up to metric, while graduates gave birth to only 2.31% children. Each additional year of schooling for girls was found to result in a decline in child mortality by 5% to

5. *Francis Coralie v. Union Territory of Delhi*, (AIR) 1981 SC 746

6. *J.P. Unnikrishnan v. State of Andhra Pradesh*, (AIR) 1993 SC 2178)

7. Bindey, Shruti, The Politics of Population policy; The Lawyers Jan. 1994 at p.6

10% and an overall decrease in infant and maternal mortality.

(b) *Women's Right to Health and Nutrition :*

"The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties, "directs Article 47 of the Indian Constitution under Chapter IV, Directive Principle of State Policy. In a trend-setting judgment, the Supreme Court declared the right of a worker to good health, medical care and safe hygienic work place as embodied in a person's fundamental right to life<sup>8</sup>. Similarly, right to a healthy environment<sup>9</sup> and to emergency medical aid have also been declared a fundamental right for being essential facets of right to life.

But in a country where around 40% of its population is living below the poverty line, it is not surprising that a considerable proportion of its female population suffers from acute problems of health and nutrition. Mothers in Indian continue to be the most vulnerable section of the population craving for primary health care. Maternal mortality rate in the country is 50 times more than in the developed countries. To quote a report by the Commission on the State of Women, "because women need more iron than men and because they tend to receive a lower share in the distribution of food, globally 43% of women and 5% of pregnant women suffer from anaemia. In developing countries 56% of women are anaemic. Because their mothers lack iodine, 30,000 bodies are still-born every year and over 1,20,000 are born cretins.

Women form one of the most vulnerable groups for HIV-transmission and AIDs. According to WHO, and estimated 19.5

million men and children have been infected world over with the virus since it was firstly diagnosed.

(c) *Right to women against Exploitation and Abuse :*

(i) *Women as Labour and Industrial Workers :* India is a signatory to ILO conventions and has enacted a plethora of labour and industrial laws aimed at *inter alia* securing healthy and favourable conditions of work. However, all the laws providing for equal remuneration, maternity relief and leave, healthy and safe working conditions, minimum wages and overtime wages, fixed working hours, prohibition in hazardous employments *etc.*, are flagrantly violated with impunity with tacit connivance of enforcement agencies<sup>10</sup>. A study covered by Participatory Research in Asia (PRIA) shows that agricultural workers in Gujarat and Tamil Nadu, cottonpluckers in Punjab, women in Gujarat's tobacco processing, in brass-work in Tamil Nadu and those working in Gujarat's stone quarries mostly suffer from occupational diseases like anaemia, dizziness and respiratory and gynecological disorders. Nothing that about 80 per cent workers in agricultural and informal sector were women, the study painted a dismal picture of worker's conditions. Women workers in Punjab were found suffering from repeated miscarriage due to heavy work up to advanced stages of pregnancy. The rate of miscarriages, stillbirths and infant mortality was found to be very high. Results of such a study is one illustrative of women worker's pathetic conditions in our country.

(ii) *The Girl child :* abuse of the girl child is yet another facet of female exploitation. Surveys conducted by some NGOs reveal that children are raped, sodomized and

8. *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42.

9. *Dr. B.L. Wadhera v. Union of India*, (1996) 2 SCC 594.

10. The apex Court has also taken note of these harsh realities in its judgments. See for instance, *peoples Union of Democratic Rights v. Union of India*, AIR 1982 SC 1473.

sexually exploited in many other ways. The law fails to provide relief to a victimized girl child owing to an insensitive legal procedure and subsequent ostracizing by the society. The National Commission for Women Laments to serious contradictions in the existing laws which tend to inhibit women as well as children from reporting crimes of sexual abuse against them. Child abusers come from all strata of society, including the victim's family itself. However, such abuse sometimes have even commercial undertones. The current trend of high consumerism worsens the situation for vulnerable girl-children who there under become an alternative source of sexual gratification.

(iii) *Custodial Abuse* : A person, being a public servant, a superintendent or manager of a jail or remand home, or a member of management or staff a hospital may depravely take advantage of his official position and induce or seduce any woman under his custody to have sexual intercourse with him. This may not amount to rape but is obviously and abuse of the women's subservient position, and is also her physical exploitation. The Indian Penal Code declares the above as offences and lays down punishment of 5 years' imprisonment in each case. However, fear of moral stigma and social or Court-room harassment and an insensitive approach of the policy generally prevent victims from reporting their exploitation by such authorities. As a result, the law is rendered a mere dead-letter.

(d) *Violence against Women* :

In 'Convention on the Elimination of All Forms of Discrimination Against Women' (CEDAW), 1981 declaration adopted by the United Nations General Assembly, "violence against women" is defined as—

Any act of gender-based violence that results in our country is likely to result in physical, sexual or psychological harm to women including threats of such acts, coercion

or arbitrary deprivations of liberty whether occurring in public or in private life.

Gender-based violence is a form of discrimination which seriously inhibit women's ability to enjoy right and freedoms on the basis of equality with men.

- (1) Violence occurring in the family<sup>11</sup>; *viṣ*, battering, sexually abuse of female children in the household, dowry related violence, marital rape<sup>12</sup>, non-spousal violence and the like.
- (2) Violence occurring within the general community; *viṣ*, rape, sexual abuse, sexual harassment and intimidations at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.
- (3) Violence perpetrated or condoned by the State; custodial torture and rape or similar excesses by police or armed forces to suppress any political or social movement in disturbed areas or anywhere else *etc.*

### Conclusion :

Once we realize that most of our laws are 'masculine' in terms of intended beneficiary and in authorship, that it has been man's understanding of women, her nature, her capacities and her experiences rather than

11. Dr. A.S. Anand, Chief Justice of India while inaugurating a colloquium on 'Justice for Women; Empowerment through Law' at New Delhi opined that: "Domestic Violence does not only mean harassment or cruelty at the hands of the husband or the in-laws, it included offences like incest, mutilation of private organs, rape abortion of female foetus, molestation, unnatural *se*, assault or battery and the like". Delhi Ed. 9th May, 1999.

12. Rape uniformly permit, although impliedly, a husband to invade his wife even without her consent and it does not amount to rape. In India the only exception is Section 376-A of the IPC., which regards forced sexual intercourse by a husband against his wife during judicial separation, as an offence punishable with a mild two years' imprisonment with fine.



women's own definitions that has informed law, it becomes almost imperative to rearrange our social, political and legal systems so that the feminine needs, aspirations and interests originating in women's distinctive existential and material state of being, find a genuine reflections therein.

An effective and appropriate representation of women from different strata of society at Parliament and all State legislatures would certainly prove conducive to bring all our laws in consonance with gender equality and social justice. Even reservation of seats for women may be resorted to temporarily for ensuring such representation, at the initial stages.

Votaries of egalitarianism have always raised their eye-brows against certain provisions in the 'personal laws' and the 'customs of the tribal communities' in India which allegedly perpetuate gender discrimination.

The concept of coparcenary, the father's overwhelming right as natural guardian of a child *vis-a-vis* that mother, the position only of a Hindu male as karta of joint family *etc.*, are still the legalized rules of Hindu law. The Muslim law still validates polygamy, unilateral talaq and women's unequal share in inheritance. The Christian law still contains very strict divorce provisions for women. Diverse customs of various tribal communities still continue to treat women unequally, for example by their strict adherence to patrilineal succession. Yet these are accorded constitutional protection in that they cannot be challenged as violating any of the fundamental rights. In effect, rights constitutionally guaranteed as being 'fundamental', are rendered unavailable to women in the realm of family law. Such a legislative policy prevailing hitherto in the name of 'protecting personal laws' and 'preserving tribal culture' calls of an immediate reconsideration.

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**K. RUDRAPPA V. SHIVAPPA, AIR 2004 SUPREME COURT 4346 :  
2004 SAR (CIVIL) 781 — A DISCONCERTING DECISION**

*Laying down the failure to pray for setting aside the abatement and the failure to pray for condonation of delay in terms of the statutory provisions as provided under 22(9) (2 and 3) C.P.C., are only technical objections and shall not come in the way of doing justice, giving a wide meaning of a Judicial Review a direction of a legislative nature, is a legitimate judicial function?*

*In other words*

*Does this decision amount to impermissible legislature, and per "incurium"?*

*By*

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The study of the article is spread over into two phases. Per incurium and impermissible legislation.

***Phase –I- Per incurium***

The judgment of the Supreme Court, a Bench decision, consisting of two learned

Judges in *K. Rudrappa v. Shivappa*, AIR 2004 SC 4346 – 2004 SAR (Civil) 761, without considering the impact of order 22(9) (2 and 3) CPC., laying down *inter alia*, the failure to pray for setting aside the abatement of appeal, and failure to pray for condonation of the delay, are only technical objections and