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Indian Legal Framework and Women's Freedom to Work

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ABSTRACT

Often one comes across certain laws which exist exclusively for women. In this paper I have tried to find the status of such laws under the constitution trying to answer whether these laws are discriminatory or not. Further, I have tried to find out the intention of the law makers for making such laws and comparing it with the unintended consequences of existence of such laws. Finally, recognizing disparity between the intentions and he unintended consequences of such laws, I have proposed a solution.

"Women today are at the cross roads and feel that they are in a state of minority even today, despite being one half the human kind in an independent nation, where many social legislations are in favour of them along with a constitutional guarantee assuring their equality unlike in many other countries."

These opening lines of one of the Chapters in a book which is a publication[1] of the Working Women's Forum in India makes one think that if all the things including the constitutional guarantee assure equality then why do women feel that they are in a state of minority even today.

[1] Arunachalam, Jaya. Women's Equality – A Struggle for Survival, 2005: Gyan Publishing House, New Delhi, pg 113.

INTRODUCTION

Constitutional guarantee is a major component of the legal framework of any country. Similarly, when we talk of Indian legal framework, we necessarily have to look into the Constitution of India which is the basic norm for all the laws within the territory of India. Going by Kelson's Pure Law theory (Kelsen, 1949) 'basic norm' which is referred in the theory as 'grundnorm' is the base law upon which rest of the laws are built. That means if a law goes against the grundnorm, which in this case is the Constitution of India, then that law is *void*.

Who decides which law is going against our constitution? The judiciary does. The Indian judiciary has been enshrined with the power of interpreting laws which includes interpretation of the Constitution of India. This power termed as judicial review has been given by the Indian judiciary to itself following a famous ruling[2] of the US Supreme Court. So, in a nutshell any law in India should necessarily abide by the Indian Constitution in the eyes of Indian Judiciary. It has to be kept in view that judiciary entertains the question of constitutionality or unconstitutionality only when it comes up before them after being practiced. Not every law is subjected to judicial review before practice. Let us now see what the Indian Constitution says.

The Indian Constitution guarantees right to practise any profession, or carry on any occupation, trade or business[3] and this right by virtue of right to equality[4] applies to every person equally. That means this right to freedom of profession, occupation, trade or business applies equally to men and women. Moreover, the State is obliged to direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood[5] and that there is equal pay for equal work for both men and women.[6]

Such a Constitution seems to give a promising view of a country where its people, both men and women, enjoy the right to choose the way they want to earn their living. However, despite being barred from discriminating against any citizen on grounds only of sex[7] the State is allowed to make

[2] Marbury v. Madison, 5 U.S. 137 (1803)
[3] Article 19(1)(g), Constitution of India.
[4] Article 14, Constitution of India.
[5] Article 39(a), Constitution of India.
[6] Article 39(d), Constitution of India.
[7] Article 15(1), Constitution of India.

special provisions for women.[8] This seems contradictory. This discrimination 'for' women has been termed 'positive discrimination'.

What is positive discrimination? It is said to be an attempt to achieve equality. It means to up lift and bring the disadvantaged to the level of others by providing certain specific benefits for the same. For example; a separate compartment for ladies in the Delhi Metro is 'positive discrimination' in that the women can avail the Metro services without being harassed. It is often said that these separate laws are for the upliftment women. It is pertinent to mention here that women are being positively discriminated against because they are the disadvantaged and underprivileged. One would not positively discriminate between equals. Thus, it is necessary to assume first that women are not equal to men and thus need to be positively discriminated against.

Let us now have a look at another interesting provision in the non-discriminatory Constitution of India. This provision is a proviso to the right to freedom to practice any profession, or carry on any occupation, trade or business. By virtue of this provision, the said right can be curtailed by 'reasonable restrictions' in the interest of general public.[9] It is simple. Here, the law is trying to protect social good by compromising on individual good. But, how do we judge the reasonability of a restriction? Well, as discussed above, this has been left to interpretation of the courts. The court has been given the power to decide what is reasonable and what is not.

Constitutionally speaking, the grundnorm itself has two aspects which directly affect a woman's freedom to work in India. The first is positive discrimination and the second provides reasonable restrictions. While positive discrimination enables the state to make special pro-women laws and policies in accordance with its socialistic welfare motives, the reasonable restrictions apply to men and women equally, however, such reasonability is left to judicial interpretation. The two concepts are distinct in existence but can be overlapping at instances. None is, however, completely inclusive of the other.

[8] Article 15(3), Constitution of India.
[9] Article 19(6), Constitution of India.

INDIAN LAWS RESTRICTING WOMEN'S FREEDOM AND JUDICIAL TRENDS

Assuming the disadvantaged position of women, India is very adamant in granting women a status, equal to men. In pursuance of its socialistic welfare motives, the country has enacted many laws especially for women. The laws seek to 'positively discriminate' in favour of women so that they can avail opportunities equal to men. Let us have a look at some laws enacted so far.

Punjab Excise Act, 1914 is a law relating to import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs. This pre-independence law was made in order to consolidate the existing rules and regulation in relation to the abovementioned. Although the name suggests that the law applies to the region of Punjab; it also applies to neighbouring regions of Punjab. Before the enactment of Delhi Excise Act, 2009, the Punjab Excise Act was also operative in Delhi.

The Punjab Excise Act expressly prohibits the employment of men under the age of twenty five years and of women (all ages) in any part of premises where liquor or intoxicating drug is consumed by the public.[10] This surely is positive discrimination. However, whether this law is constitutional or not is for the courts to decide.

The Supreme Court of India did the needful in a judgment of 2006 when in the case of Hotel Association of India and Others vs. Union of India; Constitutional validity of the said law was questioned. Few graduates of hotel management, two of whom were women employees in hospitality industry along with Hotel Association of India filed a writ petition in Delhi High Court challenging constitutional validity of Section 30 of Punjab Excise Act, 1914. Their contention was that restriction imposed was against the right to equality.[11]

The Supreme Court, keeping in view the spirit of the Constitution declared the said section unconstitutional and inoperative as it violated right to freedom to practice any business, trade or profession and right to equality, and right to life and personal liberty.[12]

[10] Section 30, Punjab Excise Act, 1914.
[11] Article 14 and Article 15, Constitution of India.
[12] Article 21, Constitution of India.

The court referred to John Stuart Mill and also built its argument in reference to other laws, case laws etc. in its judgment. The court picked up the following lines to justify its decision:

"Human beings owe to each other help to distinguish the better from worse, and encouragement to choose the former and avoid the latter.... But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect...."

The court saw the law under Punjab Excise Act, 1914 as a protectionist measure and observed, *"This measure to protect the working women from exposure to the travails of alcoholic consumption, is today outdated and far from serving the cause of protecting women, has in fact the effect of inhibiting and curbing the employment opportunities of modern Indian women. The Indian women today are marching step by step with men in all spheres of life. The modern Indian women are intelligent, informed, educated, confident and fully aware of their rights. The seemingly protectionist measure which might have had the effect suggested in 1914 can no longer stand the test of constitutional validity in 2005."*

Thus, Section 30 of Punjab Excise Act, 1914 was declared to violate right to equality and freedom to practise a profession and was held to be unconstitutional.

When the judiciary declares a law to be unconstitutional it is deemed to be ineffective from the time specified in the pronouncement. However, the laws in this country are framed by the Parliament. The members of the legislature might not be in favour of a repeal amendment. Thus, sometimes even when a law has been declared unconstitutional it still exists in the Act. So does this provision in the Punjab Excise Act, 1914.

The next example of a women specific law is an example in support of this.

In 2005, the Bombay Police Act was to prohibit any kind of dance performance in an eating house, permit room or beer bar.[13] Prior to this provision restricting dance performances, such activity was allowed under a licence. But under the new law, any kind of license granted previously in this regard stood cancelled on the day this amendment was passed.[14] Interestingly, places with restricted entry

[13] Section 33A(1)(a), Bombay Police (Amendment) Act, 2005
[14] Section 33(1)(b), Bombay Police (Amendment) Act, 2005

and three starred or above hotels were exempted from this prohibition.[15] I wonder how the legislature even imagined it to be justified under the non-discriminatory constitutional scheme. This law was followed with number of raids and arrests especially in the metropolitan city of Mumbai. A number of employers as well as dancers were arrested. This led many NGOs and Unions including Indian Hotel and Restaurant Association, Bhartiya Bargirls Union, Forum against Oppression of Women, Aawaz-e-Niswan, Women's Research and Action Group, Centre for Human Rights and Law to file a writ petition in the High Court of Bombay with a view to get justice. Having received so many petitions, the court combined them all and the final case was named as Indian Hotel and Restaurants Association and others v. State of Maharashtra.[16] The main question before the court was whether Sections 33A and 33B of the Bombay Police Act, as amended by the Bombay Police (Amendment) Act, 2005 were constitutionally valid.

The Bombay High Court held:

"..considering that the object of the Legislation is to prevent dances which are obscene, vulgar or immoral and hence derogatory to the dignity of women and to prevent exploitation of women, we find that there is no nexus between the classification and the object of the Act. The Act bans all dancing including the dances which are permitted in the exempted establishments and which are governed by the same rules and conditions of licence. If women other than dancers can work in the prohibited establishments and that does not amount to exploitation, we do not see why when women dance to earn their livelihood, it becomes exploitation. Section 33A and consequently Section 33B are void…"

Although throughout the judgment the court has accepted the submission that women have not adopted this profession out of choice, but have been forced or misled into the same by middlemen or other exploitative factors and that the element of a free and informed choice of adoption of a profession is absent, it was able to conclude that the bar dancers as well as the bar owners are entitled to carry on their trade and profession, it can only be subject to their contracting within the parameters of law.

This means that the activity of dancing should not be restricted by law and can only be subject to individual contracts. If such a step is applied in practice, it seems to have a regulating effect not only for women working as dancers but also employed in other professions. Just like this law was made

[15] Section 33B, Bombay Police (Amendment) Act, 2005
[16] 2006 (3) BomCR 705.

with a view to protect women but resulted in restricting women's freedom to work, similarly there are other protectionist laws which obliquely impose similar restrictions.

One such very dominant law prevalent in many acts across country is the law regulating working hours for women. The two best examples for this would be Shops and Establishments Acts and the Factories Act, 1948. Let us first understand the difference between the two acts and their applicability.

The Shops and Establishment Acts are region specific and exist almost throughout the country and regulate the shops and commercial establishments of a particular region. For example Delhi has its own act while the act of Bombay regulates Maharashtra, Daman & Diu and Gujarat etc. The Factories Act, 1948 is uniformly applicable throughout the country of India. Also, while Shops and Establishments Act regulates only shops and commercial establishments, the Factories Act is to regulate factories throughout the country. No establishment can fall under both the acts at the same time.

Below you can find a table with examples of Shops and Establishments Acts in India and the respective regulation on the working hours of women:

S.no.	**Name of the Act**	**Concerned clause**	**Time while women are prohibited from working**
1.	The Assam Shops and Establishments Act, 1971	Section 20	7:00 pm – 6:00 am
2.	Delhi Shops and Establishment Act, 1958	Section 14	9:00 pm – 7:00 am (summer) and 8:00 pm - 8:00 am (winter)

3.	Bombay Shops and Establishment Act, 1948	Section 33(3)	After 9:30 pm
4.	Punjab Shops and Commercial Establishments Act, 1958	Section 30(1)	During night
5.	The Karnataka Shops and Commercial Establishments Act 1961	Section 25	During night
6.	The U.P. Dookan Aur Vinijya Adhishtan Adhiniyam Act, 1962	Section 22	During night

We can see that while some acts specifically mention the time during which women are prohibited from working, others are as vague as mentioning 'during night'. Neither is there certainty, nor is it open for women to decide when she wants to work.

Looking at the above data, the first question that arises is: how do BPOs, hotels etc. operate as women can openly be seen working there during the time prohibited under the above law? Well, with livelihood opportunities available, at some places conditional exemption has been provided while at others it is simply not followed. For example, under Delhi Shops and Establishments Act, if the employer wishes to employ women in his establishment during the prohibited hours he can file an application for exemption. The grounds of exemption include the establishment being of 'public utility'. However, these grounds still remain vague. This is because of the lack of definition of a 'public utility' is. However, general rule still remains that women are prohibited from working during the specified hours.

Similar restriction on working hours exists in factories under the Factories Act, 1948. It prohibits employment of women in factories between 7:00 pm and 6:00 am.[17] This protectionist law seems to be discriminatory. The unintended consequence here is that only men can work during the prohibited hours. This would lead in lesser opportunity to work for women and bring them at a disadvantaged position. This was obviously not to be tolerated by the women of democratic India. Soon, constitutional validity of the said law within the Factories Act was challenged in Triveni K.S. and others vs. Union of India and Others.[18] Constitutionality of Section 66(1), clause (b) of the Factories Act was challenged being discriminatory on the basis of sex.

In this case textile industry was overburdened with work and needed the women to work for extra hours to complete the promised supply. However, as per the Factories Act, the employer could not employ these ladies just because they belonged to a particular sex.

When the High Court was approached challenging the constitutionality of the matter, it held that, that the women should not be employed during night for their own safety and welfare was a philosophy of a bygone age and was out of tune with modern claims of equality, especially between sexes. Under Section 66(2) of the factories Act, 1948, the State had been authorized to prescribe working hours for women without any restrictions in fish-curing and fish-canning industries. This exception was not for protecting the women but for protecting the fish which would deteriorate.

The High Court further observed that it looked an absurd argument that women would be safe in fish-curing and fish-canning industry but not safe in textile industry. It is pertinent to mention here that the fish curing and fish canning industry are expressly exempted from this restriction. Rather, these industries were obliged to provide certain safeguards to women during night time. Consequently, Section 66(1) of Factories Act was struck down as unconstitutional by the High Court and declared that the same safeguards as provided to women in fish industry should be given to women workers in other industries during night time.

Here, the High Court has replaced one protectionist law with another. Earlier, since the state could not guarantee security of women during night it prohibited the women from working during the specified hours. Now, the responsibility has been shifted from the state to the employer. The

[17] Section 66(b), Factories Act, 1948
[18] (2002) III L.L.J. 320 (A.P.)

employer needs to provide adequate safeguards to women. The right of a woman to choose for herself has clearly been ignored here.

Under the Factories Act, 1948, prohibition on the basis of time is not the only restricting law. There still exist other protectionist laws in this act which are exclusively made 'for' women. One such provision prohibits them from undertaking a particular activity as it would expose them to 'risk of injury'[19] while another prohibits their employment near cotton openers for probably similar reasons.[20] Above all, State Governments are empowered to make orders or rules regarding prohibition or restriction of employment of women in manufacturing processes or operations which are dangerous.[21]

Apart from the protectionist measures mentioned above, certain welfare measures also exist for women. One such welfare provision mandates establishment of a crèche in every factory where more than thirty women workers are employed.[22] This provision seems to ensure care for children of women employees. Before we begin to happily cherish this provision, let us take a look at the other side. Would the employer want to invest in a crèche? How can he escape such a provision? Can this provision have some unintended consequences? It is possible that this might also make certain employers reduce the number of workers to compensate the money spent. Such provisions not only attack the employer's right to choose but also reaffirm the established picture of women as a care takers of the child.

CONSEQUENCES – INTENDED AND UNINTENDED

With above examples we can find two kinds of laws exclusively made for women – protectionist laws and welfare laws. It is by protecting the women and by enabling welfare for the women that the state seeks to 'positively discriminate' for (or perhaps against) them. However, the identified laws, when formed, were formed with one of the two intentions but the unintended consequence was restriction on women's freedom to work. The rationale behind almost every provision mentioned above was either relating to ensuring safety or welfare of women.

[19] Section 22(2), Factories Act, 1948
[20] Section 27, Factories Act, 1948
[21] Section 87, Factories Act, 1948
[22] Section 48, Factories Act, 1948

Restricting women from being employed in a particular place or at a particular time has affected women's freedom to work and right to choose. It only shows how incapable State is in ensuring safety of free women in their territory. Should a woman not be able to walk alone and freely on the roads of this country even at 3:00 am? When the state is not able to secure, it sheds away its responsibility of securing a right by restricting another right.

Other laws, which seek to ensure 'welfare' for women, are the ones which seek positive discrimination of women as compared to men. However, in the process of positively discriminating them and bringing them at par with men, it has in an unintended manner pushed the status of women far below the level of equality. Why does this happen? It is because, as discussed in the beginning, the whole concept of positive discrimination is based on an assumption. The assumption is that women are a weaker sex. The moment a girl is born it is assumed that she is disadvantaged and will need extra protection. In schools, colleges and almost every second education institution we are taught about 'special provisions' for women under 'vulnerable sections', 'disadvantaged sections' and the like.

When a mentally or physically disabled person or a minor is being positively discriminated, it is because he or she less enabled in some way and thus require protection and safety. Women are in no way disadvantaged and thus need no positive discrimination. The patriarchal society and dominance of men over years have created a stereotypical image of women in the society which is now being fuelled by such laws which intend to 'positively discriminate' them. Thus, this very concept of positive discrimination, if removed would, if not improve, at least not fuel the 'disadvantaged' status of women in India.

The most common and peculiar argument given in this regard is 'women are physically weaker' as compared to their male counterparts. Well, similarly it is often stated that 'women are mentally stronger' as compared to their male counterparts. So does that mean that State will now make some special provisions for men? My argument in this regard is that no two individuals on this planet are exactly similar. So a blanket legislation of this sort would always have negative consequences.

Another argument given in favour of women being a 'disadvantaged' sex is the Patriarchal nature of society. It is due to patriarchy that women are objectified and are seen as humans distinct from their male counterparts. Well, our laws are just fuelling this already existing discrimination.

'Equality among equals' is what we seek, forgetting that no two individuals are equal. Misuse of Domestic Violence laws and Dowry Laws has already raised concerns in the society. We cannot judge the requirement of a person only on the basis of sex. Each individual has different strengths and weaknesses. The individuality of every person must be honoured.

CONCLUSION

The problem has been highlighted. We now need to find a solution.
It is necessary to note that so far it has never been denied that security of a woman is an issue in the present state of affairs. The argument here has focussed on protectionist laws. So how else can we secure the women of our country and do women even need such security?

Women are capable of securing themselves. An individual can best decide for herself what she values more. The employer-employee relation is contract based. If a woman has to make a choice between two employers, one who is providing security and another who is not and both offering same salary, it is obvious for the woman to work for the one who is ensuring her security.
If no employer is assuring security, let the woman decide for herself till what time is she comfortable working. Some travelling in local transport might prefer to leave at 6:00 pm while others might want to work till 8:00 pm. Respect for the diversity and individuality is required.

Another question which might rise is who assumes responsibility in case something happens. It is pertinent to mention here that in case of any criminal conduct, by the very structure, state assumes the role of a protectionist. That means, whenever a criminal case if filed in the court of law 'Union of India' or the respective state would represent the victim's side. This whole concept is based on the assumption that whenever a crime is committed it is committed not against an individual but against the state.

Although all the women specific laws discussed above were framed with the intent of protection and welfare of women, unfortunately the unintended consequences have led to different results. So how do we ensure protection and welfare of women? We might find answers to the question through a consideration of through free market and competition.

In a free market, the companies have to compete to provide best products and services to its consumers. For that, they will have to attract the best of employees. Employees in turn, whether men or women, would work for companies which suit their requirements. For example, if

establishments A and B are paying equal salaries to women for the same work, the only difference being A providing cab service for pick up and drop, then a woman is more likely to join that establishment. Competition for goodwill looks to be a good idea. Simple market dynamics look to be a promising spontaneous solution to the problem which not only ensures welfare and protection but also protects a woman's right to choose.

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