The Role of Law in Empowering Women in India

THESIS

Submitted to
Lucknow University, Lucknow (U.P.)
For the Degree of
Doctor of Laws
(LL.D.)

Supervisor: Prof. (Dr.) S.K. Singh
Professor of Law
Lucknow University, Lucknow

Researcher: Anju Singh

2013
Preface

Women empowerment has been the most talked about topic in socio-economic and political environment for the decades. Numerically women are almost equal but in terms of power, position and influence they still are a minority group.

We cannot progress if half of the population remains socially, economically and politically backward. The aim and purpose of the present study is to explore the existing provisions of the Constitution and various women specific and women related legislations, their state of implementation and impact on women empowerment. The verdict given by higher judiciary in various appeals and PILs relating to women has also reviewed to evaluate the approach and attitude of judiciary towards women.

In nutshell the study attempts to investigate the laws as well as judgments delivered by various courts to protect, safeguard and empower women; so as to suggest reasonable measures to strengthen the process of empowerment of women.

Anju Singh
Researcher
Acknowledgement

“गुरू गोविन्द दोऊ खड़े काके लागौं अंग, बलिहारी गुरू आपने गोविन्द दियो बताय”

First and foremost my sincere regards to my guru and supervisor, Prof. (Dr.) S.K. Singh, whose encouragement, guidance and support from the initial to the final level enabled me to develop an understanding of the subject.

My hearties thanks to Mrs. Malti Singh whose initiation and encouragement pushed me to take up this endeavour. I would like to express my regards to my parent-in-laws for their blessings, co-operation and encouragement.

Last but not the least I would like to express my gratitude to my best friend and husband Rakesh Chandra for his constant support and encouragement and to my daughter Rikriti who born during this work and being so sensible to allow me to keep on working and complete this work.

Finally, I would like to dedicate this work to my father Late Raghubansh Singh who never differentiated between me and my brothers.

Anju Singh
# Contents

<table>
<thead>
<tr>
<th>Chapter No.</th>
<th>Title</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Historical Perspective of Women in India</td>
<td>1-18</td>
</tr>
<tr>
<td>2</td>
<td>Women Empowerment under International Conventions</td>
<td>19-41</td>
</tr>
<tr>
<td>3</td>
<td>Constitutional Commitment for Empowering Women</td>
<td>42-100</td>
</tr>
<tr>
<td>4</td>
<td>Women Empowerment under Personal Laws</td>
<td>101-170</td>
</tr>
<tr>
<td>5</td>
<td>Women Empowerment through Property Rights under Personal Laws</td>
<td>171-207</td>
</tr>
<tr>
<td>6</td>
<td>Domestic Violence Act, 2005 &amp; Women Empowerment</td>
<td>208-229</td>
</tr>
<tr>
<td>7</td>
<td>Women Empowerment under Other Legislations</td>
<td>227-301</td>
</tr>
<tr>
<td>8</td>
<td>Judiciary as Harbinger for Women Empowerment</td>
<td>302-404</td>
</tr>
<tr>
<td>9</td>
<td>Conclusion &amp; Suggestions</td>
<td>405-423</td>
</tr>
</tbody>
</table>
The Role of Law in Empowering Women in India

Chapter 1
Historical Perspective of Women in India
Historical Perspective of Women in India

The woman in our country has always been accorded the status not only equal but above men. Since ancient time anything nurturing human life was worshipped as a female identity, i.e., the nature as Prakriti Devi, the earth as Prithvi Devi, the forests as Van Devi and so on. The tides of time have affected the status of women from worshipped to the exploited.

During the Vedic period the Woman in India have always been issues of concern. Rig Veda is the only scripture among those of all religions in which the Divine Truths are revealed to women sages also. There are more than thirty women sages in Rig Veda with specific hymns associated with them. There are numerous hymns in the Rig Veda indicating the high status accorded to women in the Vedic society. One of the hymn (Rig Veda 10.27.12), explicitly states that the practice of a lady choosing her husband was in vogue. The Rig Veda’s marriage hymn (10.85), explicitly states that the daughter-in-law should be treated as a queen, samrajni and bride was exhorted to address the religious assembly.\(^1\)

---

\(^1\) Indian Feminism in Vedic perspective, by Shashi Prabha Kumar Reader, Journal of Indian Studies, Vol. 1 1998
This is noteworthy that various names and epithets are used to denote women in Vedic literature. Apart from Jaya, Jani and Patni woman is designated as Devi, as she is divine; Ida, as she is worshippable; Simhi, as she is courageous; Suyama, as she is self-disciplined; Vishruta, as she is learned.\(^2\)

The Vedic period was glorified by the tradition. Many rishis were women and several of them authored slokas in the Vedas. Some of these rishis are Ghoshala, Godha, Vishwara, Apala, Upanishad, Brahmjaya, Aditi, Indrani, Sarma, Romsha, Lopamudra, Shaswati and many others. Even married women were known to be acknowledged authorities on the Vedas.\(^3\)

Though we admire and preach them in the name of Durga, Saraswati, Parvati and Kali, we also abuse her in the form of Child-marriage, Female infanticide as well as foeticide, Sati, Sexual harassment, Dowry and so on. The status of women in India has been subject to many great alterations over the past few millennia. From a largely unknown status in ancient times through the low points of the medieval period, to the

---


\(^3\) Women and the Veda by Raghbendra Jha an Article @ http://www.ivarta.com/columns/OL_070503.htm
promotion of equal rights by many reformers, the history of women in India has been lively. The status of women has varied in different time periods.

It is believed as well as recorded by the historians, that women benefited equal status with men in all spheres of life in ancient India. In the early Vedic period women were educated and they used to participate in all the important rituals. It is truly in this period that women were treated as Durga and Parvati. There was a special thread ceremony in which girls were tied threads of honour based on merit. During Post-Vedic period this ceremony was replaced by ‘child-marriage’, which afterwards transformed into an evil act which is bothering the society even today. Child-Marriage by this time was started on a large scale because of many holy books. Girls were married when they were infants. They were sent to their husband’s house when they attained puberty. Girls were not permitted to gain education.

Some idea of the position of women under Hinduism could be gleaned from the classic Hindu Dharmashastra ‘Manu-smriti’, is the best known, this describes the duties of women as follows:
“by a girl, by a young woman, or even by an aged one, nothing must be done independently, even in her own house. In childhood a female must be subject to her father, in youth to her husband, when her lord is dead to her sons; a woman must never be independent. In fact the women were prevented from performing religious rites, and even the knowledge of the Vedas was to be kept away from them.

The condition of Women in Indian society was worsening during the medieval period. At this point of time child-marriage, sati, female infanticide was practiced largely. India got secluded by arrival of Muslims in India and they introduced the ‘purdah’ system i.e. to cover their heads fully with a ‘veil’ on Muslim women. The Rajput women of Rajasthan practiced an evil commonly known as ‘jauhar’. Jauhar was the practice of the voluntary immolation of all the wives and daughters of defeated warriors, in order to avoid capture and consequent molestation by the enemy. Even polygamy was also practiced by most Hindu Kshatriiyas. Polygamy is a practice where a husband married more than once. At the same time many women excelled in arts, literature, and music. Women were also rulers in

---

4 Laws of MANU, Chapter V, Page 147-8
5 Laws of MANU, Chapter IX, Page 18
the medieval period. Some of the great women rulers were Razia Sultan, the only women ruler to reign over the throne of Delhi. The Gond Queen Durgavati ruled for fifteen years, before she lost the battle to mughal emperor Akbar’s general Asaf Ali. Sati was also practised where women were forced to jump in the burning funeral of their dead husband. ‘Devdasi’ was prevalent in south India where girls were married to deity or trees. This practise had destroyed the lives of many girls as they were physically molested and sexually exploited by many pundits/pujaris. So we can say that the status of women in the Medieval India was hectic and the main discrimination was started from that period.

Hindu religion considered, sons as essential to the family, since sons alone could offer oblations to their departed ancestors and save them from suffering a spell in hell. The daughter could not perform these rites and was therefore considered as inferior to the son. The ancient Roman, Greek, and Egyptian civilizations were no exception wherein the status of woman was inferior to that of the man. England, which boasts of an ancient democratic tradition, gave its women a right to vote only in the year 1928. Like the Hindu religion, other religions such as
Islam and Christianity also placed women on a much lower pedestal than that of men.

The Traditional status of a man and woman was that of the husband as the provider and protector of the wife, family and its members. The wife’s first duty, therefore, was to submit herself to the authority of her husband and to remain under his roof and protection. This mindset or philosophy was prevalent worldwide. The earlier judicial pronouncements explain it very clearly as in 1909 the House of Lords expressly held that the women did not fall within the meaning of the term ‘person’\textsuperscript{6}. The similar view was taken for married women in 1872 by Justice Joseph Bradley of the U.S. Supreme Court in \textit{Bradwell vs. Illinios}\textsuperscript{7}. Just after two years of Bradwell vs. Illinois the U.S. Supreme Court admitted that women are persons and citizens but they have no right to vote\textsuperscript{8}. The Nineteenth Constitutional Amendment to Federal Constitution in August, 1920 provided female citizens of the United States the right to vote. The Supreme Court of Canada unanimously decided negatively for the appointment of women to the Senate of Canada as women were not included in the term ‘persons’ as

\textsuperscript{6} Nairn v University of St Andrews [1909] AC 147
\textsuperscript{7} [1873] 83 U.S. 130 (Wall.)
\textsuperscript{8} Minor v. Happersett [1875] 88 U.S. 162
per their verdict. In appeal, the Privy Council brought the argument to an end declaring that the word ‘person’ included both sexes.

In India the Calcutta, in Re Regina Guha and the Patna, in Re Sudhansu Bala Hazra High Courts rejected the applications of women for enrolment under the Legal Practitioners Act. The full benches of these courts held that the women were not included in the term ‘person’.

To some extent it is observed that our country witnessed improvements in the status of Women after the arrival of British. There were many women reformers who worked for the betterment and upliftment of their other female counterparts. The begum of Bhopal discarded the purdah and fought in the revolt of 1857. Many reformers like Ishwarchandra Vidyasagar, Jyotiba Phule with his wife Savitribai Phule undertook several measures to eradicate social evils from the society. Sir Sayyed Ahmad Khan established the Aligarh Muslim University for the spread of education among the Muslims. He also eliminated the purdah system among muslim women. Many Acts

---

11 AIR 1922 Cal 161
12 AIR 1922 Pat 269
were passed for the upliftment of women among which Widow Remarriage Act of 1856 was important.

The Universal Declaration of Fundamental Human Rights asserts that all sexes should enjoy equal rights. This is reinforced by the Indian Constitution and the various pro-women legislation passed in this country. However, both from the ground reality and the type and number of cases that reach the courts, one finds that women are not treated as equal partners in all areas of planning and developmental activities in the country.

Indian women have not to struggle for Constitutional and legal rights which stands given to them. Since the days of independence struggle, the achievements in the area of women’s rights are many. Education has become a Fundamental right of every child. Health infrastructure and gender budgeting and allocations for better family health have improved. There is no discrimination in competitive examinations, recruitment and employment. There is no taboo for women to contest and occupy the highest echelons of power. The Judicial decisions have improved women’s lot here and there. Changes in the laws to prosecute and punish with stringent punishments are
available. Many amongst the 100,000 odd women elected to Panchayats spread all over India are getting ready to participate duly in the Parliamentary and the Assembly elections. There is now a wide base developing where women are getting a hold in the Indian political arena.

Indian women now chip in all activities such as education, politics, media, art and culture, service sectors, science and technology, and so on. Indian women were also given liberties and rights such as freedom of expression and equality, as well as right to get education. But still at this moment in time, we are fighting for crisis such as dowry, female infanticide, sex selective abortions, health, domestic violence, etc. Another harmful practise is the Dowry system where gift of money or valuables are given by the bride’s family to the groom’s at the time of their marriage. This is the new harassment in the name of wedding gift. Women are killed if they bring fewer dowries after marriage. The term Bride Burning is criticized within India itself. Women today are educated but they still, are illiterate in terms of knowing their rights properly.

The trend of Women empowerment is backed by the Constitution of India. Over the decades,
various laws and the National Policy, the Plans, Programmes and allied strategies for implementation of national and international periodic reviews and assessments too have further strengthened this trend in that women’s welfare and development is an on-going active concern of this nation. But can we say that this mega-trend has benefitted all women? Do not, women at large, still remain unreached by the aforesaid bounty?¹³

There is no doubt in this fact that our socio-economic development has been uneven and has not touched millions of women. These women somehow survive in spite of not having awareness of their own rights. The question is that whether the existing legislations or enforcement or efforts are not adequate? The child mortality rate, foeticide, infanticide, child marriages, rampant in some of the Indian States. There are the gaps in between our laws and their implementation. These are stark realities that still persist. Why ensured legal rights fail us again and again is a perennial question.

Be it health or education, system after system, the story remains unchanged. Health is of course a big casualty, maybe because of short

¹³ Search for a vision statement on women’s empowerment; [2002] National Commission for Women, New Delhi
sighted plans or absence of required infrastructures. The women and children still continue to suffer even after 60 years of our political independence. The UN and other Donor agencies funding, also, often do not reach the people for whom it is meant. The basic infrastructure though minimum in number has not been effectively functioning. People of the villages are still not active partners in developmental programmes.

A woman in India, as in many other countries is born to fight for her rights at every step. She is silenced by emotional ties, family norms, values, proprieties etc. Mostly her inability as a non-economic entity stems as the main cause of several of her problems in life. Ninety-nine percent of Indian women have neither a social, an economic nor a legal Persona.

In the male-dominant society, women are denied property rights. The daughters are not equal to their brothers. The Medical Termination of Pregnancy Act has been made to give woman a choice to decide about abortion or exercise choice to limit the size of her family. But they still, are not able to make the choice on their own.
The Archaic concept of women being inferior to men continued even after independence. There is a vast gap in empowerment and freedom enjoyed even by a microscopic number of women and the large majority who are illiterate, ignorant and poor.

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupation of civil life. The Constitution of the family organization, which is founded in divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood.

The founding fathers of our Constitution understood the need for protective discrimination in favour of women and as such, while providing for equality of all persons under Article 14, for prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth, under Article 15 and equality of opportunity in matters of public employment under Article 16 of the Constitution, specifically provided for protection in favour of women under Article 15(3) of the Constitution, which enables the State to
make any special provision for women and children.

Article 21 of the Constitution of India reinforces right to life. Life in its expanded horizon includes all that which gives meaning to a person’s life including culture, heritage, tradition and dignity of person. For its meaningfulness and purpose, every woman is entitled to elimination of obstacles and discrimination based on gender. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on a footing of equality. Article 23 of the Constitution specifically prohibits Traffic in human beings. The Directive Principles of State Policy contained in Part IV of the Constitution incorporate many directives to the State to improve the status of women and for their protection. Article 39(a) requires the State to direct its policy towards securing for its citizens, men and women equally, the right to an adequate means of livelihood. Article 39(d) requires the State to secure equal pay for equal work for men and women. Article 39(e) directs the State not to abuse the health and strength of workers, men and women. Article 42 directs the State to make provisions for securing just and humane conditions of work and for maternity
relief. Article 44 directs the State to secure for its citizens a Uniform Civil Code throughout the territory of India. Equally in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51 A(h) and (j) of the Constitution of India, facilities and opportunities not only are to be provided for, but also all forms of gender based discrimination should be eliminated. The State should create conditions and facilities conducive for women to realize the right to economic development including social and cultural rights. The 73rd and 74th Amendments to the Indian Constitution provide for reservation of seats for women in elections to panchayats and Municipalities. Under Clause (3) of Article 243-D, not less than one-third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women. Similar reservation in Municipalities is prescribed by Clause (3) of Article 243-T of the Constitution.

The General Assembly of the United Nations adopted a Declaration on December 4, 1986 on The Development or the Right to Development, in which India played a crusading role for its adoption and ratified the same. Human rights for woman,
including the girl child are an integral and indivisible part of the universal human rights. The full development of personality, fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on ground of gender are violative of fundamental freedoms and human rights.

The Vienna declaration on the elimination of all forms of discrimination against women, in short CEDAW, was ratified by the U.N.O. on December 18, 1979. The Government of India which was an active participant to CEDAW, ratified it on June 19, 1993, and acceded to CEDAW on August 8, 1993 with certain reservations. The Preamble of CEDAW reiterates that discrimination against women violates the principles of equality of right and respect for human dignity. By operation of the relevant articles of CEDAW, the State should take all appropriate measures including legislation to modify or abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.
The intensity of change witnessed during recent years in the sphere of women and the law is not an accident or a sporadic occurrence. There is an increased awareness in society of the injustice done to women in the past. Worldwide movement for women’s rights has not left India untouched. The rights and position of women, in several of their facets, have received close attention at the hands of the Law Commission of India, whose contribution in this area has been of immense value. More than all, judicial intervention on various issues concerning women has been largely progressive and liberal.

Judicial activism through the process of affirmative action and protective discrimination in favour of women has been, to a large extent, instrumental in the growing empowerment of women and in providing the necessary framework within which the woman of today is able to move around with confidence, assert her rights and gradually progress towards a position wherefrom they can stand on an equal footing with men in all walks of life.

To make law keep its promise, it behoves on the judiciary to help actualization of statutory objectives, the Constitutional mandates and legislative initiatives.
Judicial interpretation of gender jurisprudence in diverse situations has explained and expanded the law, some of them containing positive directives to make empowerment a living reality. Even court rulings, however supreme and inviolable, are not self-operative. The executive using its police powers must act or other agencies invested with State power must be created to make law perform. In the words of the Judge, the watershed of human rights jurisprudence is marked by the epic event of the Indian Constitution coming into force on 26th January, 1950. But the struggle to give meaning to the jurisprudence of justice to women from foetus to ashes is still a continuing process resisted at every turn by masculine strategists giving specious reasons and scriptural citations.

All types of suffrage, humiliation, social negligence and deprivations have forced women to stand and demand their share of human rights. A number of oppositions and women-movements have forced the world to change attitudes and to make specific provisions for their rights on national and international levels.

14 Search for a vision statement on women’s empowerment; [2002] National Commission for Women, New Delhi
The Role of Law in Empowering Women in India

Chapter 2

Women Empowerment under International Conventions
Women Empowerment under International Conventions

"Empowerment is the process of enhancing the capacity of individuals or groups to make choices and to transform those choices into desired actions and outcomes. (...) Empowered people have freedom of choice and action. This in turn enables them to better influence the course of their lives and the decisions which affect them".¹


Empowerment is often suggested as part of the solution to a lot of societal problems, as well as being an end in itself. But, while discussing about empowerment the greatest challenge is to understand what exactly it means.

"Empowerment means individuals acquiring the power to think and act freely, exercise choice, and to fulfill their potential as full and equal members of society".²

²UK’s Department for International Development (DFID), [2000]
a context where this ability was previously denied to them”.³

Andrew Barlett has described it in a poetic way, “empowerment is like the taste of mango, or the scent of jasmine, or the sound of the waves on the shore; almost everybody can recognise those things for what they are, but almost nobody can describe them”.⁴

In brief, empowerment is about people taking greater control of their lives.

According to Kabeer, “Empowerment is a process by which those who have been denied power gain power, in particular the ability to make strategic life choices. For women, these could be the capacity to choose a marriage partner, a livelihood, or whether or not to have children. For this power to come about, three interrelated dimensions are needed: access to and control of resources; agency (the ability to use these resources to bring about new opportunities) and

achievements (the attainment of new social outcomes). Empowerment, therefore, is both a process and an end result”.

In the present scenario ‘empowerment’ is considered a process by which the one’s without power gain greater control over their lives. This means control over material assets, intellectual resources and ideology. It involves power to, power with and power within. Some define empowerment as a process of awareness and conscientization, of capacity building leading to greater participation, effective decision-making power and control leading to transformative action. This involves ability to get what one wants and to influence others on our concerns.

The couple of word “Women-Empowerment” may be defined as a multidimensional social process that helps women in gaining control over their own lives. It fosters capacity in them, for use in their own lives, their community, and in their society by acting on issues that they define as

---

important. It is multidimensional in the sense that it occurs within sociological, psychological, economic, political and other dimensions. It also occurs at various levels such as individual, group, and community. It is a social process in the sense that it occurs in relationships to others.

According to UNFPA Guidelines, “The empowerment of women comprises five components—women’s sense of self-worth; their rights to have and to determine choices; their right to have access to opportunities and resources; their right to have the power to control their own lives; both within and outside the home; and their ability to influence the direction of social change to create more just social and economic order on national and international levels.”

In the path of empowering women the primary step is to remove gender inequality. The gender equality and women’s empowerment are so mingled that they are considered one and the same thing. Many of the experts consider women empowerment and gender equality as two sides of the same coin: progress toward gender equality requires women’s

---

The need for women empowerment reflects in the words of Helen Clark, the Administrator UNDP, “Development cannot be achieved if fifty percent of the population is excluded from the opportunities it brings.”

Gender equality or women empowerment is central to economic and human development in a country. Removing inequalities gives societies a better chance to develop. When women and men have relative equality, economies grow faster, children’s health improves and there is less corruption. Gender equality is an important human right.

Almost all the international organisations have advocated in favour of women empowerment for very long, the United Nations has been the pioneer among them.

The Intergovernmental Women Suffrage Alliance 1904; the International Congress of Women 1888; Equal Rights International 1930s; Coalition of International Women’s Organizations 1935; the
United Nations’ Fourth World Conference on Women 1995 are some of the movements that have been started for the empowerment and rights of women across the world.

Various efforts by United Nations include:

1. Discrimination (Employment and Occupation) Convention (1958);
2. Convention against Discrimination in Education (1960);
3. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962);
5. UN Security Council Resolution 1325 on Women, Peace and Security (2000) recognized that war impacts women differently, and reaffirmed the need to increase women’s role in decision-making with regard to conflict prevention and resolution. The UN Security Council subsequently adopted four additional resolutions on women, peace and security: 1820 (2008), 1888 (2009), 1889 (2009) and
1960 (2010). Taken together, the five resolutions represent a critical framework for improving the situation of women in conflict-affected countries.

6. “Promote Gender Equality and Empower Women by 2015” has been one of the eight goals in the Millennium Development Goals by UN.

The Cairo Conference in 1994 organized by UN on Population and Development called attention to women’s empowerment as a central focus and UNDP developed the Gender Empowerment measure (GEM) which focuses on the three variables that reflect women’s participation in society – political power or decision-making, education and health. 1995 UNDP report was devoted to women’s empowerment and it declared that if human development is not engendered it is endangered a declaration which almost become a *lei motif* for further development measuring and policy planning. Equality, sustainability and empowerment were emphasized and the stress was, that women’s emancipation does not depend on national income but is an engaged political process.

Beijing Declaration and Platform for Action (PFA) was adopted by governments at the 1995 Fourth
World Conference on Women, this document sets forth governments’ commitments to enhance women’s rights.

Following are the remarks of Secretary-General Kofi Annan at the forty-ninth session of the Commission on the Status of Women marking Beijing +10 which clearly explains the need for women empowerment or gender equality:

“Sixty years have passed since the founders of the United Nations inscribed, on the first page of our Charter, the equal rights of men and women. Since then, study after study has taught us that there is no tool for development more effective than the empowerment of women. No other policy is as likely to raise economic productivity, or to reduce infant and maternal mortality. No other policy is as sure to improve nutrition and promote health – including the prevention of HIV/AIDS. No other policy is as powerful in increasing the chances of education for the next generation. And I would also venture that no policy is more important in preventing conflict, or in achieving reconciliation after a conflict has ended.

But whatever the very real benefits of investing in women, the most important fact
remains: women themselves have the right to live in dignity, in freedom from want and from fear.”

In July 2010, the United Nations General Assembly created “UN Women”, the United Nations Entity for Gender Equality and the Empowerment of Women. In doing so, UN Member States took an historic step in accelerating the Organization’s goals on gender equality and the empowerment of women. The creation of UN Women came about as part of the UN reform agenda, bringing together resources and mandates for greater impact.

Grounded in the vision of equality enshrined in the UN Charter, UN Women, among other issues, works for the:

- elimination of discrimination against women and girls;
- empowerment of women; and
- achievement of equality between women and men as partners and beneficiaries of development, human rights, humanitarian action and peace and security.

---

Considerable efforts have been made internationally but the efforts within our country are numerous and continuous since our struggle for freedom against the British Raj. It was during that period women emancipation was initiated by some of the male reformers to improve our societal structure, educational and health standards.

The inception of Mahatma Gandhi in the National freedom movement ushered a new concept of mass mobilization. Women constituted about 50% of the country’s total population, he, therefore, involved women in the nation’s liberation movement. The mass participation of women directly in the freedom struggle was the great divide in the history of (Feminist movement) empowerment of women. They shed age-old disabilities and shared the responsibility of liberation of their motherland with their counter parts. The freedom of India thus became synonymous with the empowerment of women. In this context the date of India’s political freedom (15th August, 1947) is a landmark in the history of women empowerment in India. It brought in its wake a great consciousness in our society for human dignity. It was realized that every citizen of independent India be accorded equal treatment under the law.
Women-only organizations like All India Women’s Conference (AIWC) and the National Federation of Indian Women (NFIW) emerged. Women were grappling with the issues relating to the scope of women’s political participation, women’s franchise, communal awards, and leadership roles in political parties.

The Indian National Army (INA), which was set up by Subhash Chandra Bose, was one of the most genuine and fearless movements undertaken by Indian men and women under the able and remarkable leadership of this great patriot. Netaji Subhash Chandra Bose recruited around 1000 women for the Rani of Jhansi Regiment from different South East Asian countries. Dr. Lakshmi Swaminathan, who was a medical practitioner by profession, led this regiment. The women in the regiment were given the same training as that was given to men. Even their uniform was similar to the men soldiers. The real impact of the INA may not have been in military terms, but it had a deep psychological impact on the women of India.

While there was significant number of women patriots who stood by Gandhiji and the Congress in the non-violent movement, women of Bengal and from
other parts of India also participated in a vital role in various armed revolutions. Women played a major role in the Lahore Students Union of Bhagat Singh and the Kakori case. The Mahila Rashtriya Sangha was established by Latika Ghosh in the year 1928. Veena Das who shot at the Governor of Bengal, and Kamla Das Gupta and Kalyani Das were all active within the respective revolutionary groups. Women courageously participated in violent and non-violent movements of Indian independence.

The women in freedom struggle of India excelled as speakers, marchers, campaigners and tireless volunteers. They actively participated in the processions and rallies conducted by the Indian political parties. They always fought for Hindu-Muslim unity. The contribution of women in freedom struggle of India is truly remarkable and is difficult to define in words.

Women’s participation in the freedom struggle developed their critical consciousness about their role and rights in independent India. This resulted in the introduction of the franchise and civic rights of women in the Indian constitution. There was provision for women’s upliftment through affirmative action, maternal health and child care
provision (crèches), equal pay for equal work etc. The state adopted a patronizing role towards women. Women in India did not have to struggle for basic rights as did women in the West. The utopia ended soon when the social and cultural ideologies and structures failed to honour the newly acquired concepts of fundamental rights and democracy.

It is really a matter of concern that in independent India the women are not given their due credit and their participation in all the walks of life is not as remarkable as during those days of struggle.

Although women in India did not have to struggle for basic rights but many problems still remain which inhibit these new rights and opportunities from being fully taken advantage of. For example, India’s constitution also states that women are a “weaker section” of the population, and therefore need assistance to function as said equals.

There are also many traditions and customs that have been a huge part of India and its people for hundreds of years. Religious laws and expectations, or “personal laws” enumerated by each specific religion, often conflict with the Indian
Constitution, eliminating rights and powers women legally should have. Despite these crossovers in legality, the Indian government does not interfere with religion and the personal laws they hold. Indian society is highly composed of hierarchical systems within families and communities. These hierarchies can be broken down into age, sex, ordinal position, kinship relationships (within families), and caste, lineage, wealth, occupations, and relationship to ruling power (within the community). When hierarchies emerge within the family based on social convention and economic need, girls in poorer families suffer twice the impact of vulnerability and stability. From birth, girls are automatically entitled to less; from playtime, to food, to education, girls can expect to always be entitled to less than their brothers. Girls also have less access to their family’s income and assets, which is exacerbated among poor, rural Indian families. From the start, it is understood that females will be burdened with strenuous work and exhausting responsibilities for the rest of their lives, always with little to no compensation or recognition.

These traditions and ways of Indian life have been in effect for so long, that this type of
lifestyle is what women expect and are accustomed to. Indian women do not take full advantage of their constitutional rights because they are not properly aware or informed of them. Women also have poor utilization of voting rights because they possess low levels of political awareness and sense of political efficacy. Women are not informed about issues, nor are they encouraged to become informed. Political parties do not invest much time in women candidates because they don’t see much potential or promise in them, and see them as a wasted investment.

There is a poor representation of women in the Indian workforce. Females have a ten percent higher dropout rate than males from middle and primary schools, as well as lower levels of literacy than men. Since unemployment is also high in India, it is easy for employers to manipulate the law, especially when it comes to women, because it is part of Indian culture for women not to argue with men. Additionally, labor unions are insensitive to women’s needs. Women also have to settle for jobs that comply with their obligations as wives, mothers, and homemakers.
While striving for women empowerment it must be kept in mind that empowering women doesn’t mean empowering them in technical area only. The notion that women is being highly educated and employed are empowered, is a myth. Dependent women are not empowered women.

When they manage to survive, they are made to live without dignity due to various types of crimes against them. It only proves the point that the societies’ mind-set is still against girl child. Even the educated and economically well off sections are not free from this ‘son preference attitude’. It is because Indian society’s cultural mooring is very strong. Thousands of married women suffer in silence, because domestic violence is rampant. The abuse takes physical, mental, emotional and economic forms. For the sake of the society, women sacrifice a lot and bear a lot of mental, physical and emotional stress. Even if a woman lives in an abusive domestic environment, she will hesitate to come out of marriage in spite of her economic independence. This situation is due to strong addiction to culture and tradition. Such patience is exercised not only for the sake of society and children, but also due to lack of confidence to live as a single woman and face the
challenges of life. Women have to awake from deep slumber and understand the true meaning of empowerment.

Despite tremendous progress made toward gender empowerment, significant challenges still face women throughout their lives.

One major contributing factor is the system of patriarchy in society that places male and females in different and unequal positions. The gender system is reinforced through different aspects of life, such as interpersonal behaviour, law, and politics. Nobel Lauret, Dr. Amartya Sen emphasises that the empowerment of women is one of the main issues in the process of development and more importantly, that “the factors involved include women’s education, their ownership pattern, their employment opportunities and the working of the labour market”\(^9\).

In the same book he quotes, “since there is considerable evidence that women’s empowerment within the family can reduce child mortality significantly”. This clearly shows empowering alone

---

\(^9\) Amartya Sen; Development as Freedom, Alfred A. Knof, New York, 1999, p 101
can take care of so many issues that society faces.\textsuperscript{10}

The all-round development of women has been one of the focal point of planning process in India. The First Five-Year Plan (1951-56) envisaged a number of welfare measures for women. Establishment of the Central Social Welfare Board, organization of Mahila Mandals and the Community Development Programmes were a few steps in this direction.

In the second Five-Year Plan (1956-61), the empowerment of women was closely linked with the overall approach of intensive agricultural development programmes.

The Third and Fourth Five-Year Plans (1961-66 and 1969-74) supported female education as a major welfare measure.

The Fifth Five-Year Plan (1974-79) emphasized training of women, who were in need of income and protection. This plan coincided with International Women’s Decade and the submission of Report of the Committee on the Status of Women in India. In 1976, Women’s welfare and Development Bureau was set up under the Ministry of Social Welfare.

\footnote{Amartya Sen; Development as Freedom, Alfred A. Knof, New York, 1999, p 109}
The Sixth Five-Year Plan (1980–85) saw a definite shift from welfare to development. It recognized women’s lack of access to resources as a critical factor impending their growth.

The Seventh Five-Year Plan (1985–90) emphasized the need for gender equality and empowerment. For the first time, emphasis was placed upon qualitative aspects such as inculcation of confidence, generation of awareness with regards to rights and training in skills for better employment.

The Eight Five-Year Plan (1992–97) focused on empowering women, especially at the grass roots level, through Panchayat Raj Institutions.

The Ninth Five-Year Plan (1997–2002) adopted a strategy of women’s component plan, under which not less than 30 percent of funds/benefits were earmarked for women-specific programmes.

In our country, a National Policy for Empowerment of Women was formulated and adopted by the government on 20th March, 2001 so as to bring about advancement and empowerment of women and to eliminate all forms of discrimination against women and to ensure their active participation in all the spheres of life and activities.

Today, the empowerment of women has been recognized as the central issue in determining the status of women. The government of India set up a National Commission for Women through an enactment by Indian Parliament in 1990 to safeguard the rights and legal entitlement of women. The 73rd and 74th Amendments of Panchayat and Municipalities for women, lays a strong foundation for their participation in decision making at the local levels. According to the National Policy for Empowerment of Women-2001, India has also ratified various International Conventions and Human Rights Instruments committing to secure equal rights of women. Key among them is ratification of the Convention on Elimination of All forms of Discrimination against Women (CEDAW) in 1993.

Some women have landed highly respectable careers and achieved international fame. However,
this is not the norm throughout the country; such modernizations and the women behind them face serious resistance from anti-liberalists. The country is still severely male-dominant and unwelcoming to such movements that go against sex and gender traditions in India.

The statistics also point out that women are still far behind the men in India. Gender discrimination still persists in India and lot more needs to be done in the field of women’s education in India. The gap in the male-female literacy rate is just a simple indicator. While the male literary rate is more than 75% according to the 2001 census, the female literacy rate is just 54.16%.

The women are underrepresented in Indian politics. The candidates fielded by the various political parties are still dominantly male: women account for only five to ten per cent of all candidates across parties and regions. This is the same broad pattern that has been observed in virtually the 12 previous general elections in the country. The political empowerment of women still has a long way to go.

"When women move forward the family moves, the village moves and the nation moves". It is
essential as their thought & their value systems lead the development of a good family, good society & ultimately a good nation”. Indian government has taken several steps towards empowering women. Empowerment of women also requires participation and co-operation of men as they benefit by having educated mothers, wives, daughters and sisters. The economic empowerment will allow raising women’s self-awareness, skill development, creative decision making and it may also lead to produce better citizens and a new and modern India.

Although significant improvements has been observed in last few decades in the status of women. A lot of efforts have been made by the central and state governments through their plans, policies and programs to up-lift the status of women and to bring them into main stream.
The Role of Law in Empowering Women in India

Chapter 3
Constitutional Commitment for Empowering Women
Constitutional Commitment for Empowering Women

Empowerment of any section of a society is a myth until they are conferred equality before law. The foundation of freedom, justice and fraternity is based on the recognition of the inherent dignity and of equal and inalienable rights to all the members of the society. The Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations on 10th December, 1948, envisaged in Article 2 that “everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind.” Further, it also recognized that “the family is the natural and fundamental group unit of the society and is entitled to protection by society and the State.”

We are fortunate enough that our Constitution was framed in such a period when the whole world was debating over empowerment of various sections of society and our Constitution framers were inspired by the mass participation by women directly in the freedom struggle at the call of Mahatma Gandhi. In fact the freedom movement of India became synonymous with the empowerment of women as they shed age-old disabilities and shared
the responsibility of liberation of their motherland with their counterparts. In this context the date of India’s political freedom (15th August, 1947) is a landmark in the history of women empowerment in India. It brought in its wake a great consciousness in our society for human dignity. It was realized that every citizen of independent India be accorded equal treatment under the law.

To realize the vision of the freedom movement special attention was given by Constitution framers. The framers of the Indian Constitution bestowed sufficient thought on the position of women in the Indian Social order. This is evident from the provisions of the Constitution, which have not only ensured equality between men and women but also provided specifically certain safeguards in favour of women.

While supporting the incorporation of Fundamental Rights in our Constitution one of the member of the Constituent Assembly, Mrs. Hansa Mehta ushered these words, “It will warm the heart of many a woman to know that free India will mean not only equality of status but equality of opportunity. It is true that a few women in the
past and even today enjoy high status and have received the highest honour that any man can receive, like our friend, Mrs. Sarojini Nadu. But these women are few and far between. One swallow does not make a summer. These women do not give us a real picture of the position of Indian women in this country.

The average woman in this country has suffered now for centuries from inequalities heaped upon her by laws, customs and practices of people who have fallen from the heights of that civilisation of which we are all so proud. There is thousands of women to-day who are denied the ordinary human rights. They are put behind the purdah, secluded within the four walls of their homes, unable to move freely. The Indian woman has been reduced to such a state of helplessness that she has become an easy prey of those who wish to exploit the situation. In degrading women, man has degraded himself. In raising her man will not only raise him but rise the whole nation. Mahatma Gandhi’s name has, been invoked on the floor of this House. It would be ingratitude on my part if I do not acknowledge the great debt of gratitude that Indian women owe to Mahatma Gandhi for all that he has done for them. In spite of all these, we have never
asked for privileges. The women’s organisation to which I have the honour to belong has never asked for reserved seats, for quotas, or for separate electorates. What we have asked for is social justice, economic justice, and political justice. We have asked for that equality which can alone be the basis of mutual respect and understanding and without which real co-operation is not possible between man and woman. Women form one half of the population of this country and, therefore, men cannot go very far without the co-operation of women. This ancient land cannot attain its rightful place, its honoured place in this world without the co-operation of women. I therefore welcome this Resolution for the great promise which it holds, and I hope that the objectives embodied in the Resolution will not remain on paper but will be translated into reality.”

The Constitution of India is a basic document which provides for women empowerment within the framework of the plenary provision of various and the Preamble. The courts always try to interpret the cases which are detriment to women within the area of social justice with these Articles. The

---

objective of the Constitution as spelt out in the Preamble is to ensure that justice, equality and liberty are achieved. The ways and means to achieve these objectives are provided under Part III enumerating Fundamental Rights and Part IV incorporating the Directive Principles of the State Policy.

The Preamble to our Constitution seeks to establish what Mahatma Gandhi described as The India of My Dreams, “... an India in which the poorest shall feel that it is their country in whose making they have an effective voice; ... an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of Intoxicating drinks and drugs. Woman will enjoy as the same rights as man.”

Condition of women in India has not been historically very good. As is evident from Manusmriti, women did not have many rights as compared to men. Further, the women are physically weaker than men and due to this fact also, they have been exploited. Due to such continuous unfavorable treatment, the social status of women has become really bad.
That, women are naturally a weaker sex was first acknowledged by *US Supreme Court* in the case of *Muller v. Oregon*\(^2\). In this case, the US Supreme Court observed that due physical structure and performance of maternal functions, women are at a disadvantage in the society and thus it is society’s responsibility to implement favorable laws to bring them on the same level as men.

The makers of Indian Constitution also understood this fact and have provided several provisions for elevating the status of women and giving them a level playing field. The following is a brief description of such provisions. The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them.

**Fundamental Rights Guaranteed to women under the Constitution:**

Part III of the Constitution, consisting of Articles 12 to 35, relating to Fundamental Rights,

\(^2\) 208 US 412 (1908)
is considered the ‘heart’ of the Constitution. The fundamental rights are regarded as fundamental because they are most essential for the attainment by the individual of his full intellectual, moral and spiritual status.

As per Justice P. N. Bhagwati:

“These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.”

Article 14 — Equality before Law:

The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them.

Our Constitution has a substantially elaborate framework to ensure equality amongst its citizens.

---

3 Maneka Gandhi v. Union of India, AIR 1978 SC 597
It not only guarantees equality to all persons, under Article 14 as a fundamental right, but also expands on this in the subsequent Articles, to make room for affirmative action and positive discrimination. Article 14 of the Constitution provides equality before law. It embodies general principle of equality and prohibits unreasonable discrimination between persons. It states that:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

In practice this guarantee has been read to infer ‘substantial’ equality as opposed to ‘formal’ equality which is evident from various judicial explanations and elaborations in the judgments of the Supreme Court of India\(^4\) as well as the Indian High Courts. The latter dictates that only equals must be treated as equals and that unequal may not be treated as equals. This broad paradigm itself permits the creation of affirmative action by way of special laws creating rights and positive discrimination by way of reservations or special provisions in favour of weaker classes of society.

\(^4\) Mackinnon Mackenzie & Co. Ltd v. Audrey D’Costa, 1987 AIR SC 1281
Though Article 14 permits reasonable classification, yet classification based on sex is not permissible. In the case of AIR India v. Nargesh Meerza⁵, the Apex Court, while dealing with the fixation of different ages of retirement for male and female employees and the provision preventing the female employees from having child, expressed the view to the effect that the retirement of air hostesses in the event of marriage taking place within four years of service does not suffer from any irregularity or arbitrariness but retirement of air hostesses on first pregnancy is unconstitutional being violative of Articles 14 and 16 of the Constitution. It was considered that such a provision was callous, cruel and an insult to Indian womanhood. Therefore, such disability violates the equal protection of law and opportunity which is the cornerstone of our Constitution and legal system.

Payment of equal pay for equal work has also been justified under Article 14. Unequal pay for materially equal work cannot be justified on the basis of an artificial classification between the

⁵ AIR 1981 SC 1829
two kinds of work and employment. In the case of Mackinnon Mackenzie and Co. Ltd. v. Andrey D’Casta the question involved was getting of equal pay for equal work. Their Lordships ruled that when lady stenographers and male stenographers were not getting equal remuneration, that was discriminatory and any settlement in that regard did not save the situation. Their Lordships also expressed the view that discrimination between male stenographers and lady stenographers was only on the ground of sex and that being not permissible, the employer was bound to pay the same remuneration to both of them when they were doing practically the same kind of work. In Madhu Kishwar v. State of Bihar, the Chotanagpur Tenancy Act, 1908 was challenged on the ground that the Act denied the right to succession to scheduled tribe women to the tenancy lands and hence, it violates Articles 14, 15 and 21 of the Constitution. The Supreme Court, by admitting the petition, quashed the discriminative provisions of the Act and paved a way for tribal women to entitle their rights to tenancy lands along with men.

---

6 State of M.P. v. Pramod Bhartiya, AIR 1993 SC 286  
7 AIR 1987 SC 1281  
8 AIR 1996 SC 1864
Article 14 has also been invoked to prohibit sexual harassment of working women on the ground of violation of the right of gender equality. Article 14 indeed contains important provisions for protecting the rights of women and the interpretation of this Article by the judiciary enables the establishment of equality between the sexes.

**Article 15(3) protective discrimination in favour of women and children:**

**Article 15** of the Constitution specifically prohibits discrimination on the basis of sex. Clause (1) of this Article provides that, “the state shall not discriminate against any citizen on grounds only of religion, race, caste sex, place of birth or any of them.” And Clause (2) says that, “No citizen shall, not discriminate against any citizen on grounds only of religion, race, caste sex, place of birth or any of them be subject to any disability liability, restriction or condition with regard to:

(a) access to shops, public places; or
(b) use of wells and places of public resort maintain wholly or partly out of state funds or dedicated to the use of the general public.”

Article 15 Clause 3 constitutes exception to Article 15 Clause 1 & 3. It authorises the State to make special provisions for women and children.

Thus, Article 15(1) prohibits gender based discrimination and Article 15(3) softens the strictness of Article 15(1) and permits the State to positively discriminate in favour of women to make special provisions to improve their social condition and provide political, economic and social justice. The State as well as the Courts have resorted to Article 15(3) in the field of Criminal Law, Labour Law, Service Law, etc., numerous times to upheld the validity of protective discriminatory provisions in favour of women as this is the Constitutional mandate. In the case of Dattatraya v. State of Bombay⁹, the Bombay High Court held that the State can establish educational institutions for women only. Again in Yusuf Abdul Aziz v. State of Bombay⁰, the validity of Section 497 of the Indian Penal Code was challenged under

⁹ AIR 1952 SC 181
⁰ AIR 1954 SC 321
Articles 14 and 15(1) of the Constitution. Section 497 of the IPC deals with the provisions relating to the offence of adultery, which only punishes man for adultery and exempts the woman from punishment though she may be equally guilty as an abettor. This section was held by the Supreme Court to be valid since the classification was not based on the ground of sex alone. The Court upheld the Section 497 of the IPC as valid by relying upon the mandate of Article 15 (3) of the Constitution. Even Section 354 of the IPC is not invalid because it protects the modesty only of women and Section 488 (now Section 125) of the Cr.P.C. (Code of Criminal Procedure) is valid although it obliges the husband to maintain his wife but not vice versa.  

Similarly, Section 14 of the Hindu Succession Act, 1956 converting the women’s limited ownership of property into full ownership has been found in pursuance of Article 15 (3).  

When the matter relating to mother as natural guardian was questioned, the Supreme Court held that relegation of mother to inferior position to act as a natural guardian is violation of Articles

---


and 15 and hence, the father cannot claim that he is the only natural guardian. The guardianship right of women has undergone a sea change by this interpretation given by the Apex Court.\textsuperscript{13}

The scope of Article 15 (3) is wide enough to cover any special provision for women including reservation in jobs. Article 16 does not come in the way of such reservation. The two articles must be harmoniously construed. Women are a weaker section of our society for whose upliftment Article 15(3) is made which should be given widest possible interpretation and application subject to the condition that reservation should not exceed 50% limit as laid down in the case of \textit{Indra Sawhney v. Union of India}.\textsuperscript{14} The Court has also upheld an Orissa Government Order reserving 30% quota for women in the allotment of 24 hours medical stores as part of self-employment scheme.\textsuperscript{15}

Thus, the language of Article 15(3) is in absolute terms and does not appear to restrict in any way the nature or ambit of special provisions which the State may make in favour of women or children. In fact it recognises the fact that the

\textsuperscript{13} Gita Hariharan v. Reserve Bank of India with Vandana Shiva v. Jayanta
\textsuperscript{14} AIR 1992 SC 477
\textsuperscript{15} Gayatri Devi Pansari v. State of Orissa, AIR 2000 SC 1531
women in India have been socially and economically handicapped for centuries and, as a result thereof, they cannot fully participate in the socio-economic activities of the nation on a footing of equality. The purpose of Article 15(3) is to strengthen and improve the status of women. Article 15(3) thus relieves the state from the bondage of Article 15(1) and enables it to make special provisions to accord socio-economic equality to women.\textsuperscript{16}

**Article 16 — Equality of opportunity in matters of public employment:**

Article 16 is an instance of the application of the general rule of equality before law laid down in Article 14 and of the prohibition of discrimination in Article 15(1) with respect to the opportunity for employment or appointment to any office under the State. Explaining the relative scope of Articles 14, 15 and 16, Das, J. said:

“Article 14 guarantees the general right of equality; Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances.”\textsuperscript{17}

\textsuperscript{16} Jain M.P., in Indian Constitutional Law, 992 (2011)

\textsuperscript{17} Gazula Dasaratha Rama Rao v. State of A. P., AIR 1961 SC 564
Article 16(1) and (2) embody the general rule that the State shall provide equal opportunities for all citizens in matters relating to employment or appointment to any office under the State. There shall be no discrimination on the grounds of religion, race, caste, sex, and place of birth, residence or any of them in providing employment. These provisions are an extension of the principle of equality before law and of the goal of ‘equality of status and opportunity’ as set in the Preamble of the Constitution. The import of these provisions is that a woman has the same rights in matters of employment under the State as a man and the State shall not discriminate against women on this count. It operates equally against any such discriminative legislation or discriminative executive action. If any law is passed or any executive action is taken to prevent the women from taking up employment under the State, such law or executive action could be challenged under Articles 16(1) and (2). The principle of equal pay for equal work is also covered by equality of opportunity in Article 16(1).  

18 Difference in the pay scales and

18 Randhir Singh v. Union of India, AIR 1982 SC 879
promotional avenues between male and female employee is also prohibited by Article 16 (2).\(^{19}\)

In the case of C. B. Muthamma, IFS v. Union of India and others\(^{20}\), the constitutional validity of Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 and Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961 was challenged before the Supreme Court. The impugned provision Rule 8(2) requires a woman member of the service to obtain permission of the Government in writing before her marriage is solemnized and at any time after the marriage, a woman member of her service may be required to resign from the service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. Further, Rule 18(4) also runs in the same prejudicial strain, which provides that no married woman shall be entitled as a right to be appointed to the service. The petitioner complained that under the guise of these rules, she had been harassed and was shown hostile discrimination by the Chairman, UPSC from the

\(^{20}\) AIR 1979 SC 1868
joining stage to the stage of promotion. The Hon’ble Supreme Court held that these Rules are in defiance of Article 14, 16 and 21 and Krishna Iyer, J. pronounced:

“That, our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India’s humanity, viz; our women, is a sad reflection on the distance between the Constitution in the book and the law in action.”21

In the case of T. Sudhakar Reddy v. Government of Andhra Pradesh22, the petitioner challenged the validity of Section 31 (1)(a) of the Andhra Pradesh Co-operative Societies Act, 1964 and Rule 22 C,. 22 A (3)(a) of the Andhra Pradesh Co-operative Societies Rules 1964. These provisions provide for nomination of two women members by the Registrar to the Managing Committee of the Co-operative Societies, with a right to vote and to take part in the meetings of the committee. The Andhra Pradesh High Court quashed the petition and upheld these provisions in the interest of women’s participation in co-operative societies and opined that it will be in the interest of the economic development of

21 AIR 1979 SC 1868
22 AIR 1994 SC 544
the country. In **Government of Andhra Pradesh v. P.B. Vijaya Kumar**\(^{23}\), the legislation made by the State of Andhra Pradesh providing 30\% reservation of seats for women in local bodies and in educational institutions was held valid by the Supreme Court and the power conferred upon the State under Article 15(3) is so wide which would cover the powers to make the special legal provisions for women in respect of employment or education. This exclusive power is an integral part of Article 15(3) and thereby, does not override Article 16 of the Constitution.

At this juncture, it is also noteworthy to mention the case of **Associate Banks Officers Association v. State Bank of India**\(^{24}\), wherein the Apex Court held that women workers are in no way inferior to their male counterparts, and hence there should be no discrimination on the ground of sex against women. Recently, in **Air India Cabin Crew Association v. Yeshaswinee Merchant**\(^{25}\), the Supreme Court has held that the twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which

---

\(^{23}\) AIR 1995 SC 1648  
\(^{24}\) AIR 1998 SC 32  
\(^{25}\) AIR 2004 SC 187
is a positive measure in their favour. The Constitution does not prohibit the employer to consider sex while making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan. Further, in *Vijay Lakshmi v. Punjab University*,\(^\text{26}\) it has been observed that Rules 5 and 8 of the Punjab University Calendar, Vol. III providing for appointment of a lady principal in a women’s or a lady teacher therein cannot be held to be violative of either Article 14 or Article 16 of the Constitution, because the classification is reasonable and it has a nexus with the object sought to be achieved. In addition, the State Government is empowered to make such special provisions under Article 15(3) of the Constitution. This power is not restricted in any manner by Article 16. In this way, the Indian Judiciary has played a positive role in preserving the rights of women in the society.

**Article 16** of the Constitution ensures equality of opportunity for all citizens, including women, in matters relating to employment or appointment to

\(^{26}\) AIR 2003 SC 3331
any office under the state,\textsuperscript{27} and it reinforces this idea when it states further that no citizen shall on the ground of sex be ineligible for, or discriminated against in respect of, any employment or office under the State.\textsuperscript{28}

**Article 19(1)(g) — Freedom of Trade and Occupation:**

Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The right under Article 19(1)(g) must be exercised consistently with human dignity. Therefore, sexual harassment in the exercise of this right at the work place amounts to its violation. In the case of Delhi Domestic Working Women’s Forum v. Union of India\textsuperscript{29} relating to rape and violence of working women, the Court called for protection to the victims and provision of appropriate legal representation and assistance to the complainants of sexual assault cases at the police station and in Courts. To realize the concept of ‘gender equality’, the Supreme Court has laid down exhaustive guidelines in the case of

\textsuperscript{27} Article 16(1) of the Indian Constitution
\textsuperscript{28} Article 16(2) of the Indian Constitution
\textsuperscript{29} (1995) 1 SCC 14.
Vishaka v. State of Rajasthan\(^{30}\) to prevent sexual harassment of working women at their workplace. The Court held that it is the duty of the employer or other responsible person to prevent sexual harassment of working women and to ensure that there is no hostile environment towards women at their working place. These guidelines were framed to protect the rights of working women to work with dignity under Articles 14, 19 and 21 of the Constitution. Their Lordship also observed:

“Each incident of sexual harassment of women at workplace results in violation of fundamental rights of ‘Gender Equality’ and the ‘Right to Life and Liberty.’”\(^{31}\)

**Article 21 – Protection of life and personal liberty:**

Article 21 contains provisions for protection of life and personal liberty of persons. It states:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

---

\(^{30}\) AIR 1997 SC 3011  
\(^{31}\) ibid
This short one sentence in which Article 21 has been couched has made long strides due to the judicial interpretation received at the deft hands of judges of the Apex Court. Article 21, though couched in negative language, confer on every person the fundamental right to life and personal liberty and it has been given a positive effect by judicial interpretation. "Life", in Article 21, is not merely the physical act of breathing. This has been recognized by the Courts. The Rig Veda\textsuperscript{32} gives a subtle description of the mundane activity of speech. The soul (which, in the Rig Veda, is compared to a bird soaring high in the heavens) inspires or fills up the mind with speech. The "Gandharva" (the mind) carries it to the heart; and then, the luminous inspired speech takes shape in words that can be heard. One can pursue this imagery further. While the external mundane activities of life have their own place, they are the manifestations of an inner, unseen, unperceived activity – which, indeed is the real "life" that a human being lives, it is true that judicial decisions on Article 21 do not embark upon such an analysis in depth. But the judiciary does take note.

\textsuperscript{32} 10.177.2
to deal with the wide approach of the right to life.

In view of the global developments in the sphere of human rights the judicial decisions from time to time have played a vital role towards the recognition of affirmative right to basic necessities of life under Article 21. In the case of State of Maharashtra v. Madhukar Narayan Mardikar\(^{33}\), the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. This article has also been invoked for the upliftment of and dignified life for the prostitutes. The Supreme Court has placed emphasis on the need to provide to prostitute opportunities for education and training so as to facilitate their rehabilitation. \(^{34}\) Sexual harassment at workplace is a violation of Article 21 of the Constitution and hence, the Apex Court of the Country, in the case of Vishaka v. State of Rajasthan,\(^{35}\) has laid down detailed direction and guidelines on the subject which are to be strictly observed by all employers, public or private. Right

\(^{33}\) AIR 1991 SC 207, 211  
\(^{34}\) Gaurav Jain v. Union of India, AIR 1997 SC 3021  
\(^{35}\) AIR 1997 SC 3011
to life is recognized as a basic human right. It has to be read in consonance with the Universal Declaration of Human Rights, 1948, the Declaration on the Elimination of Violence against Women and the Declaration and Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights to which India is a party having ratified them. The right to life enshrined in Article 21 of the Constitution also includes the right to live with human dignity and rape violates this right of women.\textsuperscript{36}

In recent years, the judiciary has applied the principle of harmonious construction, which implies reading Fundamental Rights and Directive Principles of State Policy together. The Indian courts have also taken an immensely expansive definition of fundamental right to life under Article 21 of the Constitution as an umbrella provision and have included within it right to everything which would make life meaningful and which prevent it from making it a mere existence, including the right to food, clean air, water, roads, health, and importantly the right to shelter/housing. Additionally, though they are not justiciable and

\textsuperscript{36} Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 922; Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988
hence cannot be invoked to demand any right there under, or to get them enforced in any court of law, the Directive Principles of State Policy in Chapter IV of the Indian Constitution lend support to the paradigm of equality, social justice and empowerment which runs through all the principles. Since one of the purposes of the directive principles is to guide the conscience of the state and they have been used to constructively interpret the scope and ambit of fundamental rights, they also hit any discrimination or unfairness towards women. However, as mentioned above, notwithstanding the repeated and strong Constitutional guarantees of equality to women, the property rights of Indian women are far from gender-justice even today, though many inequalities have been ironed out in courts. Below are some of the highlights of the property rights of Indian women, interspersed with some landmark judgments which have contributed to making them less gender unjust.

Apart from Part III and Part IV the Constitution contains provisions in other parts also empowering women. These provisions include equality in matters relating to voting right has been assured by the Constitution to both men and women. Constitution provides for one general
electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State  

and then it states that “no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.”  

In other countries women had to fight a long battle to get their right to vote, and in Switzerland women were able to get the right only at the beginning of the seventies of this century. But, in India, the Constitution readily and unhesitatingly accepted the concept of equality in this field and ensured the voting right to women by prohibiting sex-based discrimination in preparing the electoral rolls in the country.

**Article 23 — Right against exploitation and prohibition of traffic in human beings:**

For centuries women have been humiliated, exploited, tortured and harassed in all walks of life — physically, mentally and sexually. To safeguard and protect women against exploitation,
Article 23(1) of the Constitution of India prohibits traffic in human beings and begar and other similar forms of forced labour. “Traffic in human beings” means selling and buying human beings as slaves and also includes immoral traffic in women and children for immoral or other purposes.\(^{39}\) To curb the deep rooted social evil of prostitution and to give effect to this Article, the Parliament has passed The Immoral Traffic (Prevention) Act, 1956.\(^{40}\) This Act protects the individuals, both men and women, not only against the acts of the State but also against the acts of private individuals and imposes a positive obligation on the State to take all measures to abolish these evil practices. Another evil practice of the Devadasi system, in which women are dedicated as Devadasis to the deities and temples, was abolished by the State of Andhra Pradesh by enacting the Devadasis (Prohibition of Dedication) Act, 1988. The Supreme Court has also held that traffic in human beings includes Devadasis and speedy and effective legal action should be taken against brothel keepers.\(^{41}\)

\(^{39}\) Raj Bahadur Singh v. Legal Remembrancer, AIR 1953 Cal 522
\(^{40}\) Formerly known as the Suppression of Immoral Traffic in Women and Girls Act, 1956
\(^{41}\) Vishal Jeet v. Union of India, AIR 1990 SC 1412
Similar evil practices are prevalent in India such as selling the female infants and girls to foreigners under the guise of inter-country adoption and marriages. The Supreme Court accepted a letter as a writ petition, complaining of malpractices indulged by non-government organizations and orphanages engaged in the work of offering Indian children, more specifically, female infants, in adoption to foreign parents. The Courts observed that in the guise of adoption, Indian children of tender age were not only exposed to the long dreadful journey to distant foreign countries at great risk to their lives, but in case they survive, they were not provided proper care and shelter and were employed as slaves and in the course of time they become beggars or prostitutes for want of proper care and livelihood. As there are no specific legislative provisions to regulate Inter-country adoptions, the Court laid down certain principles and norms which should be followed in determining – whether a child should be allowed to be adopted by foreign parents. Further a direction was given to the Government to enact a law regulating inter-country adoptions, as it is their constitutional obligation under Articles

42 Laxmi Kant Pandey v. Union of India, AIR 1984 SC 469
15(3), 23, 24 and 39(c) and (f) of the Constitution.

Article 23, which prohibits, among others, traffic in human beings and makes any contravention of the provisions of this Article an offence punishable in accordance with law, guarantees to women a right against exploitation.

Thus, these Articles of the Constitution have assured women the right to equality in law, right to equality in matters relating to government employment, right to protective discrimination and right against exploitation. To state briefly, the Constitution has provided three norms regarding the rights, status and welfare of women, and they are equality, privilege in the form of protective discrimination and safeguard against exploitation. In other words, these provisions of the Indian Constitution truly constitute the palladium of liberty of women in India.

The discussion of these provisions is also needed. Starting from the field of education, the governing provision is Article 29(2) of the Constitution which states, “no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of
State funds on grounds only of religion, race, caste, language or any of them”. This provision obviously omits the word “sex”. This has given rise to a presumption that if an educational institution discriminates on the basis of sex while admitting students it is not hit by the provisions of Article 29(2). In University of Madras v. Shantha Bai\(^{43}\) the High Court of Madras said that the omission of “sex” in Article 29(2) was a deliberate departure from the language of Article 15(1) and its object was to leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an obligation to admit women students. In another case, Anjali v. State of West Bengal\(^{44}\), the High Court of Calcutta stated that, although final opinion on the point was not yet expressed, it was inclined to hold the view that discrimination in regard to the admission of students into educational institutions on the ground of sex might not be unconstitutional. In this connection, it said that “the framers of the Constitution may have thought because of the physical and mental differences between men and women and considerations incidental thereto,

\(^{43}\) AIR 1954, Mad. 67
\(^{44}\) AIR 1952, Cal. 825
exclusion of men from certain institutions serving women only and vice versa would not be hostile or unreasonable discrimination.”

Thus, it is clear that sex can be a valid basis for discrimination in regard to admission of students into educational institutions. What is more, Article 29(2) says that even educational institutions maintained by the State may practice such discrimination. This power conceded to the State by Article 29(2) virtually takes away the effect of Article 15(1) which prohibits the State from making any discrimination on the ground of sex. Education is the most important instrument to bring about equality among human beings, and if the sex-based discrimination is permitted in the field of education it would blunt the instrument itself.

It is said that the provisions in Article 29(2) help to establish educational institutions exclusively for women and also for men. This is not in any way beneficial to women.

If there is any need for establishing separate educational institutions for women, sufficient scope is provided in Article 15(3) for the State to

---

45 AIR 1952, Cal. 831
satisfy any such need. The State may carry out its task in this respect either by reserving a few state maintained educational institutions to women only or by permitting private management to establish educational institutions exclusively for women. Besides, there are certain renowned educational institutions, which were established long ago, and admission into them was confined from the beginning to men students. Article 29(2), which allows them to continue the status quo with regard to admission of students, virtually prevents the admission of women into such prestigious and well-equipped educational institutions. Therefore, Article 29(2) is not only disadvantageous to women but detrimental to their interest as well. The High Court of Calcutta tried to justify this provision by a strange and archaic argument based on “the physical and mental differences between men and women and considerations incidental thereto”, which has lost its meaning in the modern world. The right to equality can be made more meaningful for women if its impact is made to be felt in the educational field, and this can be accomplished by amending Article 29(2) and adding the word “sex” in it between the words “caste” and “language”.

The Role of Directive Principles of State Policy in Protecting the Rights of Women:

Part IV of the Constitution from Articles, 36 to 51 contains what may be described as the active obligation of the State. The Directive Principles of State Policy are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws to secure a social order in which social, economic and political justice shall inform all the institutions of national life. These Directives Principles are ideals which are based on the concept of ‘Welfare State’ and they fix certain goals; social and economic; for immediate attainment by the Union and State Governments while formulating a policy or enacting a law.

After the Fundamental Rights under Part III, the Directive Principles of the State Policy are enumerated under Part IV. These are the positive duties imposed upon the State. Though they are not justiciable, they are fundamental in the governance of the country. Their basic aim is to persuade the government to provide social and economic justice in all spheres of life, keeping in view its limited material resources, at the earliest possible. Many
of them have been implemented very successfully. Actually, no government can afford to ignore these instructions as they are the mirror of the public opinion and also reflect the basic spirit of the Preamble of our Constitution. The Directive Principles relating to women are as follows:

**Article 38** seeks the State to secure a social order for the promotion of welfare of the people. The State shall strive to promote the welfare of the people by securing and protecting effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life. The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities.

**Article 39** indicates about certain principles of policy to be followed by the State. The State shall, in particular, direct its policy towards securing:

(a) That the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) That there is “equal pay for equal work” for both men and women;
(c) That the health and strength of workers, men and women, and the tender age of children are not abused.

Under Article 39(d), the State shall direct its policy towards securing equal pay for equal work for both men and women. This Article draws its support from Articles 14 and 16 and its main objective is the building of a welfare society and an equalitarian social order in the Indian Union. To give effect to this Article, the Parliament has enacted the Equal Remuneration Act, 1976 which provides for payment of equal remuneration to men and women workers and prevents discrimination on the ground of sex. Further Article 39(e) is aimed at protecting the health and strength of workers, both men and women.

A very important and useful provision for women’s welfare and well-being is incorporated under Article 42 of the Constitution. It imposes an obligation upon the State to make provisions for securing just and humane conditions of work and for maternity relief. Some of the legislations which promoted the objectives of this Article are the

Workmen’s Compensation Act, 1923, the Employees State Insurance Act, 1948, the Minimum Wages Act, 1948, the Maternity Benefit Act 1961, the Payment of Bonus Act, 1965, and the like. In the case of Dattatraya v. State of Bombay, the Court held that legal provisions to give special maternity relief to women workers under Article 42 of the Constitution does not infringe Article 15 (1). Recently, in the Municipal Corporation of Delhi v. Female Workers (Muster Roll), the Supreme Court case held that the benefits under the Maternity Benefits Act, 1961 extend to employees of the Municipal Corporation who are casual workers or workers employed on daily wages basis. Upholding, the claim of non-regularized female workers for maternity relief, the Court has stated:

"Since Article 42 specifically speaks of just and humane conditions of work, and maternity relief, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which though not enforceable at law, is nevertheless

---

47 AIR 1952 SC 181 : 1952 Cri LJ 955
48 AIR 2000 SC 1274
available for determining the legal efficacy of the action complained of.”

Article 42 directs the State to provide for just and humane conditions of work and maternity relief.

Article 44 of the Constitution imposes a duty on the State to secure a Uniform Civil Code for the citizens of India. This is intended to remove some of the outmoded rules found in various personal laws, which are discriminatory in character, and to treat all citizens without any discrimination as equals.

Article 44 provides that the State shall endeavour to secure for the citizens, a Uniform Civil Code, throughout the territory of India. India comprises of diverse religions, faith and beliefs and each of these religious denominations are governed by their distinct personal laws which vary from one another. In matters relating to marriage, divorce, adoption, maintenance and succession, different personal laws have treated and placed women on different levels. Due to these variations, people are being tempted to convert

49 AIR 2000 SC 1277
from one religion to another in order to seek the benefit under the guise of those personal laws. Placing, reliance on Article 44 by the Supreme Court in upholding the right of maintenance of a Muslim divorce under Section 125 of the Criminal Procedure Code has boomeranged resulting in a separate law of maintenance for Muslim female divorcee. Later the Court again reminded the State of its obligation under this Article and issued direction to it to take appropriate steps for its implementation and inform the Court of these steps. In the case of Sarla Mundgal v. Union of India, a Hindu husband married under Hindu Law and again married the second time by converting himself to Islam. As the State had not yet made any efforts to legislate the Uniform Civil Code, the Supreme Court directed the Government to report the measures taken for the implementation of Article 44 of the Constitution in the interest of unity and integrity and for the welfare and benefit of women.

---

51 AIR 1995 SC 1531
The Fundamental Duties under Article 51 A also imposes the duty to renounce practices derogatory to the dignity of women on the citizens of India.\(^{52}\)

In recent years, the judiciary has applied the principle of harmonious construction, which implies reading Fundamental Rights and Directive Principles of State Policy together.

**Reservation of Seats for Women in Election to Local Bodies:**

The parliament has succeeded in its efforts to provide for reservation of seats for women in election to the Panchayats and the Municipalities. Reservation of seats for women in Panchayats and Municipalities has been provided in Articles 243 D and 243 T of the Constitution of India. Part IX and IX A have been added to the Constitution by the 73rd and 74th Amendment Acts with Articles 243, 243A to 243D and Articles 243P, 243ZG\(^{53}\). According to Article 243D(3), “not less than one-third, (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats

---

\(^{52}\) Article 51 (A) (e)

\(^{53}\) The Constitution (Seventy-third Amendment) Act, 1992 and the Constitution Seventy-fourth Amendment Act 1992 popularly known as the Panchayat Raj and Nagarpalika Constitution Amendment Acts
to be filled up by direct election in every Panchayat, shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat. Article 243T(3) of the Constitution provides similar provisions for reservation of seats for women in direct election in every Municipality. Therefore, reservation of 33% of seats for women candidates to hold office and perform all public functions at the Panchayat and Municipal level is within the constitutional mandate.

As an extension the 73rd and 74th Amendments to the Constitution, the Constitution (81st Amendment) Bill was introduced in the Parliament way back in 1996 to reserve one-third of seats for women in the Lok Sabha and the State Assemblies. However, this bill has not yet been brought in to shape due to political overtures.

**Article 243D** provides for Reservation of seats in Panchayats. Not less than one third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.
Provided further that one third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women. It provided also that the number of offices reserved under this clause shall be allotted to different Panchayats at each level.

Similar reservation of seats has been provided in the Municipality also for women and such seats to be allotted by rotation to different constituencies in a Municipality under Article 243T.

**Conclusion**

The framers of our Constitution have incorporated certain provisions within the Constitution to ensure the enforcement of Fundamental Rights; the most important is the Right to Constitutional Remedies under Part III and made it a Fundamental Rights. This is the most unique feature of our Constitution. The citizen have right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is guaranteed. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of
**habeas corpus, mandamus, prohibition, quo warranto and certiorari,** whichever may be appropriate, for the enforcement of any of the rights conferred by Part III.

In the Constituent Assembly Debates Dr. Babasaheb Ambedkar once said, “if I am asked which is the most important provision of the Indian Constitution, without which the Constitution would not survive I would point to none other than Article 32 which is the soul of the Indian Constitution.”

The judicially enforceable “fundamental rights” provisions of the Indian Constitution are set forth in part III in order to distinguish them from the non-justiciable “directive principles” set forth in part IV, which establish the aspirational goals of economic justice and social transformation. Overtime, case law has come to interpret **Article 32** as allowing for ordinary citizens to petition the Supreme Court in matters where the government is accused of infringing upon the “fundamental rights” of the constitution. In addition, the Constitution includes Article 226 which the Courts have interpreted as giving any claimant the opportunity to file suit on behalf of the public in a High
Court, when there is a violation of fundamental right or a right guaranteed by statute. Thus, Article 32 is the soul of the Indian Constitution. When there is infringement of Article 21 the aggrieved person can approach the Supreme Court of India for enforcement of his fundamental rights.

Another highlighting feature of our Constitution is the Judicial Review dealt with under Article 13, which refers that the Constitution is the supreme power of the nation and all laws are under its supremacy. Article 13 states that:

1. All pre-constitutional laws, after the coming into force of constitution, if in conflict with it in all or some of its provisions then the provisions of constitution will prevail and the provisions of that pre-constitutional law will not be in force until an amendment of the constitution relating to the same matter. In such situation the provision of that law will again come into force, if it is compatible with the constitution as amended.

2. In a similar manner, laws made after adoption of the Constitution by the Constituent Assembly must be compatible with the constitution,
otherwise the laws and amendments will be deemed to be void-ab-initio.

In such situations, the Supreme Court or High Court interprets the laws as if they are in conformity with the constitution. If such an interpretation is not possible because of inconsistency, and where a separation is possible, the provision that is inconsistent with constitution is considered to be void. In addition to Article 13, Articles 32, 124, 131, 219, 228 and 246 provide a constitutional basis to the Judicial Review in India. Many of the discriminatory provisions of Pre and Post Constitutional legislations are invalidated by the Apex Court under this power of Judicial Review.

The above were the provisions of the Constitution favouring or helping women to regain their position in the society. A critical appraisal of these promises reveals that there exists some loopholes till date, but the Courts have been successfully removing these bottlenecks to establish social and economic justice in favour of women.

The discussion of these provisions is also needed. Starting from the field of education, the
governing provision is Article 29(2) of the Constitution which states, “no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them”. This provision obviously omits the word “sex”. This has given rise to a presumption that if an educational institution discriminates on the basis of sex while admitting students it is not hit by the provisions of Article 29(2). In University of Madras v. Shantha Bai\(^54\) the High Court of Madras said that the omission of “sex” in Article 29(2) was a deliberate departure from the language of Article 15(1) and its object was to leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an obligation to admit women students. In another case, Anjali v. State of West Bengal\(^55\), the High Court of Calcutta stated that, although final opinion on the point was not yet expressed, it was inclined to hold the view that discrimination in regard to the admission of students into educational institutions on the ground of sex might not be unconstitutional. In

\(^{54}\) AIR 1954, Mad. 67
\(^{55}\) AIR 1952, Cal. 825
this connection, it said that “the framers of the Constitution may have thought because of the physical and mental differences between men and women and considerations incidental thereto, exclusion of men from certain institutions serving women only and vice versa would not be hostile or unreasonable discrimination.”

Thus, it is clear that sex can be a valid basis for discrimination in regard to admission of students into educational institutions. What is more, Article 29(2) says that even educational institutions maintained by the State may practice such discrimination. This power conceded to the State by Article 29(2) virtually takes away the effect of Article 15(1) which prohibits the State from making any discrimination on the ground of sex. Education is the most important instrument to bring about equality among human beings, and if the sex-based discrimination is permitted in the field of education it would blunt the instrument itself.

It is said that the provisions in Article 29(2) help to establish educational institutions exclusively for women and also for men. This is not in any way beneficial to women.

56 AIR 1952, Cal. 831
If there is any need for establishing separate educational institutions for women, sufficient scope is provided in Article 15(3) for the State to satisfy any such need. The State may carry out its task in this respect either by reserving a few state maintained educational institutions to women only or by permitting private management to establish educational institutions exclusively for women. Besides, there are certain renowned educational institutions, which were established long ago, and admission into them was confined from the beginning to men students. Article 29(2), which allows them to continue the status quo with regard to admission of students, virtually prevents the admission of women into such prestigious and well-equipped educational institutions. Therefore, Article 29(2) is not only disadvantageous to women but detrimental to their interest as well. The High Court of Calcutta tried to justify this provision by a strange and archaic argument based on “the physical and mental differences between men and women and considerations incidental thereto”, which has lost its meaning in the modern world. The right to equality can be made more meaningful for women if its impact is made to be felt in the educational field, and this can be accomplished by amending
Article 29(2) and adding the word “sex” in it between the words “caste” and “language”.

After the commencement of the Constitution, Parliament enacted several pieces of legislation relating to institution of marriage, adoption and inheritance, which have brought revolutionary changes in the position of women. The Hindu Marriage Act of 1955, which applies to Hindus as defined in Section 2, states in Section 5(1) that a marriage may be solemnized between any two Hindus if “neither party has a spouse living at the time of the marriage.” A marriage solemnized in contravention of the condition contained in Clause(i) of Section 5 is invalid under Section 11 of the Act and on a petition by either party to such marriage, it may be declared null and void.

Besides, Section 17 declares that a marriage solemnized in contravention of Clause(i) of Section is void and is punishable as an offence under Sections 494 and 495 of the Indian Penal Code.

---

57 Section 2 of the Act gives a wide definition of “Hindu” and it includes Vaishnavas, Lingayats, followers of Brahma, Prarthana and Arya Samaj, Buddhists, Jains, Sikhs, etc.

58 Section 5 of the Act mentions a few more conditions.

59 Section 494 and 495 of I.P.C. make bigamy an offence punishable with imprisonment of varying terms according to the gravity of the offence.
Thus, Sections 5(i), 11 and 17 of the Hindu Marriage Act of 1955 have been so contrived as to prohibit the age-old practice of polygamy among Hindus, which was the bane of Hindu women, and to impose the system of monogamy on them. The judiciary in this country upheld the validity of these provisions and negated the contention that they were *ultra vires* the provisions of Articles 14, 15 and 25 of the constitution. A similar result is achieved by the provisions of Sections 4(a), 24, 43 and 44 of the Special Marriage Act of 1954, under which any two persons, no matter which religion or religions they follow, may solemnize their marriage.

But the principle of qualified polygamy found in the Mohammadan law remains still unaltered in India. Under the Mohammadan law, a male Muslim may contract four marriages and maintain four spouses at a time, whereas monogamy is strictly imposed on Muslim Women. First of all, this particular principle of Mohammadan law discriminates against women. So, it is discrimination based on sex, which is prohibited by Article 15(1) of the Indian Constitution. Secondly, since this rule is

---

60 Ram Prasad v. State of U.P., AIR 1961, All. 334
applicable to Muslims alone, it amounts to discrimination based on religion, which is also contrary to the provisions of Article 15(1). Thus, for these two reasons the rule of Mohammadan Law relating to polygamy is not in consonance with the principle of equality enshrined under the Constitution.

However, an argument has been advanced to the effect that different rules relating to marriage stipulated in Mohammadan law and distinction or discrimination resulting there from are based on personal law, which is outside the scope of definition of “law” in Article 13(3)(b) and hence outside the scope of Article 15(1) of the Constitution. 61 In other words, if the discrimination is based, or classification is founded, upon personal law, it is not violative of Article 15(1) of the Constitution. This seems to be a doubtful proposition. According to a principle laid down by the judiciary, when persons are classified or grouped together for the purpose of law, all persons found within the classification or so grouped together for the purpose of law, all persons found within the classification or so

grouped together must be treated alike. But, all Muslims, men and women, who are grouped together, must be treated alike in matters relating to marriage. The discriminatory treatment practiced by the Mohammedan law against a section of the people, namely, women, within the group is in violation of the concept of equality embodied in Article 14 of the Constitution. Besides, this personal law, which practices sex-based discrimination, requires the help of the State for its effective implementation or observance. When the State constantly lends its support to the effective observance of the personal law, the State becomes a party to the practice of sex-based discrimination inherent in the law, which the State is prohibited from doing by Article 15(1) of the Constitution. Apart from this Article 44 of the Constitution imposes a duty on the State to secure a Uniform Civil Code for the citizens of India. This is intended to remove some of the outmoded rules found in various personal laws, which are discriminatory in character, and to treat all citizens without any discrimination as equals.

**Protective discrimination** in favour of women provided under Article 15(3) of the Constitution

---

states that, “nothing in this article shall prevent the State from making special provision for women”. This is intended to give an initial advantage to women so that they could compete with men in various fields effectively. Since women were suppressed for a very long period, they lost their initiative, confidence in their capacity to face problems and opportunity to equip themselves for various types of professions and vocations. It is because of these facts that the Constitution makers considered them weaker sections of the people who required some definite help and initial advantage to compete with men in all spheres of life. Therefore, this provision has been described by various writers as “protective discrimination” and “adventitious aid” for women.

In the Constituent Assembly there was a controversy on this point. A few members held the view that the word “sex” should be deleted from the main provisions of Article 15 so that State could discriminate on the ground of sex and make special provision for women. But, a few other members opposed it and said that the word “sex” must be retained in the general clauses of Article 15 to ensure equality between men and women and a proviso must be appended to it to enable the State to make
special provision for women. The latter view finally prevailed resulted as framing of Clause (3) of Article 15.

The framers of the Constitution took a pragmatic view in incorporating this Clause because they expected that this provision might compensate the loss of opportunities suffered by women during the last several centuries. So, Clause (3) of Article 15 of the Constitution may be described as a compensatory provision for women.

The provision in Article 15(3) has enabled the State to make special provisions for women, for example, separate educational institutions exclusively for women, reservations of seats or places for women in public conveyances and places of public resort. Besides, many pieces of legislation conferred benefits on women, to which men are not eligible.

Then the Constitution provides for equality in the matters of employment opportunity as Article 16(1) of the Constitution guarantees equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. While, Article 16(2) states, inter alia, that no citizen shall be discriminated against on
grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them in respect of any employment or office under the State. This provision, no doubt, ensures equality of opportunity to women in matters relating to government employment.

But, in reality there existed the incidences where such equality of opportunity has not been conceded fully to women in matters relating to employment. This fact is brought to the fore in two important cases, namely, C. B. Muthamma v. Union of India\textsuperscript{63} and Air India v. Nargesh Meerza\textsuperscript{64}.

Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules 1961 provided that (1) a woman member of the service shall obtain the permission of the Government in writing before her marriage is solemnised; and (2) at any time after the marriage she may be required to resign from Service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. In \textit{Muthamma’s case}, characterising this Rule 8(2) as

\textsuperscript{63} AIR 1979, SC 1868
\textsuperscript{64} AIR 1981, SC 1829
one that practiced discrimination against woman in traumatic transparency. Justice Krishna Iyer said that if the family and domestic commitments of a woman member of the Service is likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. Further, "in these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species."⁶⁵

There are numerous instances of highlighting “woman’s physical capacity” and unreasonably denying women their right to equality of opportunity in various fields and also their right to equal pay for equal work. The Constitution prohibits sex-based discrimination. The salutary constitutional stipulation must be given full effect, “individualised approach to a woman’s physical capacity” to circumvent the constitutional mandate must be given up and women must be treated as normal human beings like men in all spheres of life, more particularly in the fields of education and employment.

⁶⁵ AIR 1979, SC 1868
It must be borne in mind that women, like the Backward Class of citizens, have been considered weaker sections by the Constitution because of their long suppression in the society. Owing to deprivation of their right to equality in society for a long period, their position has become so weak that they are not in a position to compete effectively with men the stronger section. Consequently, though they constitute approximately one half of the population, they are not adequately represented in the services under the State. A special provision in Article 16 for reservation of appointments or posts in favour of women would have helped to mitigate this situation. Therefore, it may be suggested here that in order to render the right to equality of opportunity in government employment more meaningful to women a suitable amendment must be carried out to Article 16 to incorporate in it a special provision for reservation of appointments or posts in government service in favour of women.

The Constitution of India lays that an Indian Woman will function as a citizen and as an individual partner in the task of nation building whatever her social position role or activities may be. While motherhood is an important function, the
Constitution implies that this is not the ‘only role’ for women of India. There are so many other roles for the Indian Women as a partner in the nation building. Since the independence of our country the Constitution has proven itself to be the guardian of gender equality. It is the basic document providing a strong framework for women empowerment. Although the above mentioned few complexities remain in the Constitution the overall picture is favouring women empowerment. It is because the Courts with the help of the harmonious construction have widened the scope of “the Right to Life” under Article 21 to effectuate the Directive Principles. Thus, the existing provisions for women in our Constitution are sufficient but their effectiveness depends upon the awareness of these rights among them.
The Role of Law in Empowering Women in India

Chapter 4
Women Empowerment under Personal Laws
Women Empowerment under Personal Laws

Hindu Law

After Independence, it was the codified Hindu Law which brought out radical reforms to improve the condition of Hindu women. Though Hindu women occupied a high position during Vedic times, later she was subject to so many social disabilities. She was always considered to be a mere object of pleasure keeping hearth and home. She had to be subservient. She was never considered an equal partner in life.

The Hindu Marriage Act, 1955, the first of the codified Hindu laws, was amended by the Hindu Marriage Act, 1964, and Marriage Laws Amendment Act of 1976 along with the Child Marriage Restraint Act 1978. The position of Hindu women under Hindu Law stands improved now. She has acquired a new status and position in the society. The Hindu Marriage Act, 1955 has also made provision regarding divorce. Under the provisions of this Act the wife may obtain a decree of divorce by the Court of law on more grounds than man.

1 (Act 3 of 1956, Act 44 of 1964)
2 (68 of 1976)
Rule of Monogamy

A Hindu now cannot have more than one wife living at a time. Monogamy means that one is permitted to have only one wife or husband at one time. The Act not only prohibits bigamy but it makes bigamous marriage void as well as a penal offence under sections 494 and 495 of Indian Penal Code, 1860.

Section 5(i) of the Hindu Marriage Act states:

“(i) neither party has a spouse living at the time of Marriage;”

In Priya v. Suresh, it was held by the Supreme Court that the second marriage cannot be taken to be proved by the mere admission of the parties, essential ceremonies and rites must be proved to have taken place.

In Yamuna Bai v. Anantha Rao, it was held by the Supreme Court that the fact that the husband has been treating a woman as his wife and did not inform her of his previous marriage is immaterial.

---

3 Section 5, The Hindu Marriage Act, 1955
4 Section 11, The Hindu Marriage Act, 1955
5 Section 17, The Hindu Marriage Act, 1955
6 (1971) 1 SCC 864
7 (1988) 1 SCC 530
and the principle of estoppels cannot be invoked to defeat the provisions of law.

The general rule of matrimonial law is that a party to a void marriage is entitled without recourse to any court to marry anyone else because that particular marriage is not in law a marriage at all. A person who is an innocent party to a bigamous marriage may go to a court for a declaration that the bigamous marriage is null and void.8

Divorce

Every Coin has two sides and in same way marriage is one side and divorce is the opposite side of Coin. Divorce means separation of husband and wife from a legally solemnized marriage in a legally and customarily prescribed way by which both acquires a right to remarry again legally. In ancient India there was not existence of word divorce because according to Hinduism the marriage is a sacrament known as “Sanskara” through which both husband and wife tie up themselves with each other in a divine knot for present life and upcoming life.

8 Section 11, The Hindu Marriage Act, 1955
The term Divorce came in India with the advent of Muslim and given legal shape by the Colonial Rulers. The first law on divorce was framed by Whitely Stokes. The Bill, after remaining for seven years before the Council of the Governor-General, received the assent of the Governor-General, on 26 February 1869 i.e. The Indian Divorce Act 1869 which later amended in 2001 through The Indian Divorce (Amendment) Act 2001.

The Hindu Marriage Act, 1955 established that marriage was a civil contract. Although marriage had characteristics of a contract, the most important being consent but it was always a sacrament and a social institution. In the so-called strict Hindu law, divorce was not allowed except in certain communities, in the lower social strata, where it was permitted by custom. There was a deep-rooted aversion against any provision for divorce in the new legislation which was being forged. It is worthwhile to mention here that some of the Smritikars, not dealing with divorce in the strict sense of the term, did declare certain conditions under which a woman could take a second husband. Narada declared, "if the husband be missing or dead, or retired from the world, or impotent or
degraded, in these five calamities, a woman may take another husband”.

**Common grounds for divorce**

The common grounds for divorce contained in Section 13(1) of the Act. They are adultery, cruelty, desertion, conversion, unsoundness of mind, venereal disease, incurable leprosy, renunciation of the world, presumption of death and failure to comply with a decree of restitution of conjugal rights. Apart from the grounds mentioned, a Hindu wife may invoke any of the special grounds, namely, remarriage by husband, husband being guilty of rape, sodomy or bestiality, non-resumption of cohabitation by the spouses in spite of a decree for maintenance of wife and option of puberty. These special grounds have been incorporated by the Marriage Laws (Amendment) Act, 1976 which amended Section 10 and 13 of the Hindu Marriage Act. Thus a Hindu wife is granted certain special grounds against the husband which places her in a better position as compared to a Muslim or a Christian wife.

---

9 Narada Smriti XII,37
Additional Grounds for Divorce available to wife

1. Husband having more than one wife living: If the husband has more than one wife living after the commencement of this Act, a wife may present a petition for divorce under clause (i) of sub-section (2) of Section 13 of the Act. Only limitation on the right of a wife who applies for divorce under this provision is that the other wife should be alive at the time of presentation of the petition irrespective of findings that the petitioner was aware of existence of the other wife and that the husband was not guilty of cruelty. Delays as leading to an inference of condonation or connivance or indifference to matrimonial wrong is not an appropriate consideration for cases under Section 13(2) (i) of the Act. The right of divorce given to the first wife by Section 13(2) (i) does not depend on her conduct prior to the commencement of the Act. The existence of the first wife at the time of performance of the second marriage need not be established by direct evidence and that fact may be inferred from other facts proved in the case.

2. Rape, sodomy or bestiality: Under Section 13(2) (ii) of the Act a wife is entitled to petition for divorce on the ground of rape, sodomy
or bestiality committed on her by the husband. Rape is also a criminal offence and defined in Section 375 of the Indian Penal Code. A man is said to commit rape who has sexual intercourse with a woman against her will, without her consent, with her consent which is obtained by putting her in fear of death or of hurt, with her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, or with or without her consent when she is under sixteen years of age. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. There is however one exception. No rape is committed by the husband on the wife if she is over fifteen years of age. Sodomy is committed by a person who has carnal copulation with a member of the same sex or with an animal, or has non-coital carnal copulation with a member of the opposite sex. Bestiality means sexual union by a human being against the order of nature with an animal. The commission of any of these offences by the husband must be proved by the wife either by witnesses as to fact or by evidence of admission made by the respondent, such as a plea of guilty of his trial. Though these are criminal
offences, but mere evidence of conviction for these offences is not sufficient to obtain a decree for divorce. In divorce proceedings these offences are required to be proved by the wife de novo. Where the wife is a consenting party to the commission of any of these offences, her evidence should not be accepted without corroboration.

3. Non-resumption of cohabitation: The Amendment of 1976 to the Act provided that where a decree for maintenance of wife under Section 18 of the Hindu Adoption and Maintenance Act 1956, or an order for maintenance of wife under Section 125, Cr.P.C. 1973, has been passed against the husband, the wife is entitled to present a petition for divorce provided two conditions are satisfied. First, she was living apart, and secondly, since the passing of such decree or order cohabitation between her and her husband has not been resumed for at least one year.

4. Marriage before attainment of the age of fifteen years: Wife is entitled to present a petition for divorce if her marriage was solemnized before her attainment of the age of fifteen years provided she has repudiated the marriage after attaining the age of fifteen years but before
attaining the age of eighteen years. But the petition may be presented after completing eighteen years of age.\textsuperscript{10} The girl can apply for divorce whether the marriage has been consummated or not. In absence of a school certificate, the parents are the best witnesses of the fact of the date of birth of their children. Entries in a horoscope can be used to prove the date of birth and also by examining the person who wrote it.

**Maintenance under Hindu law:**

“......the reason for awarding permanent alimony to the wife seems to be that if the marriage bond which was at one time regarded a indissoluble is to be allowed to be severed in the larger interest of society, the same consideration of public interest and social welfare also requires that the wife should not be thrown on the street but should be provided for, in order that she may not be compelled to adopt a disreputable way of life.”\textsuperscript{11}

One of the necessary incidents of a joint Hindu family is the right of the maintenance. The head of family was bound to maintain its members and in cases of daughters such maintenance extended only

\textsuperscript{10} Section 13(2)(iv), The Hindu Marriage Act, 1955
\textsuperscript{11} Jaspal Singh: Law of Marriage and Divorce in India (1983), p. 353
till their marriage. The wives were entitled to maintenance during their marital life as was the case with mothers who were entitled to be maintained by their children. Even widows were entitled to claim maintenance. 

Maintenance is a right to get necessities, which are reasonable from another. It has been held in various cases that maintenance includes not only food, clothes and residence, but also the things necessary for the comfort and status in which the person entitled is reasonably expected to live. Women have been provided right to maintenance under the Hindu Marriage Act, Hindu Adoption and Maintenance Act and Criminal Procedure Code.

**Maintenance under the Hindu Marriage Act, 1955**

1. **Maintenance pendente-lite:**

Section 24 of the Hindu Marriage Act makes a provision for grant of maintenance *pendente-lite* and expenses of proceedings to either spouse and Section 25 contains similar provisions regarding payment of permanent alimony and maintenance. The object of Section 24 is to ensure that a party to a proceeding does not suffer during the pendency of

---

the proceeding by reason of his or her poverty. The party standing in need of such relief may either be the petitioner or the respondent and prima facie there is no reason why Parliament should try to make a distinction in this context. The fact that under Section 24 relief can be granted to both the wife and the husband indicates that the legislature intended to make no such distinction. The object behind Section 24 is to provide financial assistance to the indigent spouse to maintain her (or himself) during the pendency of the proceedings and also to have sufficient funds to defend or carry on the litigation so that the spouse does not unduly suffer in the conduct of the case for wants of funds.

Section 24 thus confers a substantial right on the applicant during the pendency of the proceeding. When such a right has accrued to the applicant and the matter has been filed, allowance of temporary alimony is not regarded as a matter of right but as a matter within the judicious discretion of the court. A liberal interpretation however is to be given to Section 24, as its object is to secure that the indigent spouse should not suffer during the pendency of the proceedings. The court has to act in accordance
with sound judicial principles which are:

(1) Position and status of parties,

(2) Reasonable wants of the claimants,

(3) Income of the claimant,

(4) Income of the opposite party,

(5) Number of persons the opposite party has to maintain.

2. Permanent Alimony and Maintenance:

By Section 25 of the Hindu Marriage Act, 1955 the courts are empowered to direct the opposite party at the time of decree or subsequently to pay the petitioner maintenance. The court shall take into account the status of the opposite party in awarding the amount for maintenance. Powers also have been given to the court to rescind or modify the order at any subsequent stage.

Section 25 lays down as:

“25. Permanent alimony and maintenance—

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made
to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent’s own income and other property, if any, the income and other property of the applicant [the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, [it may at the instance of the other party vary,
modify or rescind any such order in such manner as the court may deem just.”

The section was amended by Section 17 of the Marriage Laws Amendment Act, 1976, before which the liability to pay maintenance was restricted to the period during which the applicant remained unmarried. The words “while the applicant remains unmarried” were omitted.

**Maintenance under the Hindu Adoption and Maintenance Act, 1956**

The right of a wife to claim maintenance is an incident of the status of matrimony and if the relationship of husband and wife is established as a matter of course the wife is entitled to maintenance. Section 18 of the Act confers a statutory right on a Hindu wife to live separately without forfeiting her claim for maintenance during the lifetime of her husband if living separately on the grounds provided therein. Section 18 runs as follows:

“18. Maintenance of wife:

(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.
(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance—

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to
separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.”

And Maintenance, has been defined under Section 3(b) of the Act which says, “Maintenance includes—

i. in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

ii. in the case of an unmarried daughter also the reasonable expenses of and, incident to her marriage.”

Under Hindu law, the liability to maintain others arises in some cases from the mere relationship between the parties, independent of possession of any property. It does not rest upon contract but arises out of jural relation between the parties. This liability is personal or absolute and in the cases where it depends altogether on the possession of property it is called limited liability.

The following persons are entitled to maintenance under the Hindu Adoption and Maintenance Act, 1956.
1. Wife;

2. Widowed daughter-in-law;

3. Children and aged parents;

4. Dependents as enumerated in Section 21 of the Act.

A Wife’s Right to Maintenance while living separately:

Section 18 confers a statutory right on a Hindu wife to claim maintenance in ordinary circumstances, i.e. living with the husband or living separately from the husband in exceptional cases.

A wife’s first duty to her husband is to fulfill her marital obligations and to remain under his roof and protection. Thus, as a rule, a wife is not entitled to separate residence from her husband, unless she proves that by reasons of his misconduct or refusal to maintain her in his own place of residence or other justifying cause she is compelled to live apart from him. Sub-section (2) of Section 18 however lays down circumstances in which a wife may live separately from her husband without forfeiting her claim to maintenance.

Even prior to the Hindu Adoption and Maintenance
Act, a right to separate residence and maintenance was conferred on married Hindu women under the Hindu Married Woman’s Rights to Separate Residence and Maintenance Act, 1964 on almost similar grounds.

According to Section 18(2), a Hindu wife can claim maintenance from her husband even while living separately in the following cases:

(a) If he is guilty of desertion,
(b) If he treats her with cruelty,
(c) If he is suffering from a virulent form of leprosy,
(d) If he has another wife living,
(e) If he keeps a concubine in the same house,
(f) If he is converted to another religion,
(g) If there is any other cause justifying her living separate.

It is thus clear that the above list is not exhaustive but only illustrative in nature.

There are however certain conditions under which a Hindu wife shall not be entitled to separate residence and maintenance. These are:

(a) When she ceases to be a Hindu by conversion,
(b) When she is unchaste,

(c) When she is living separately without any cause justifying the same, and

(d) When the separate living is by agreement between the husband and wife and wife forfeits her claim for maintenance. Such an agreement is valid and enforceable provided that it has not been entered into by fraud, coercion, force or mistake.

A Wife’s Right to have Interim Maintenance:

Although there is a divergence of opinion among different High Courts on the question whether interim maintenance can be granted to a wife in a suit filed claiming maintenance under the section, there is a definite tilt towards granting interim maintenance.

In *Sangeeta Piyush Raj v. Piyush Chaturbhuj*[^13] the Bombay High Court held that nothing debars a court from making an order for interim maintenance under Section 18. For doing real justice the court can exercise its power under Section 151 of the Civil Procedure Code to grant interim maintenance on a petition filed under this section. If this is

[^13]: AIR 1998 Bom 151
not done the entire purpose of the enactment would be defeated because of the proverbial delays in disposal of cases resulting in grave hardship to the applicant who may have no means of sustenance until the final decree.

Similar are the views of the Orissa and Delhi High Courts. The Orissa High Court in Purusottam Mahakud v. Annapurna Mahakud\textsuperscript{14} held that the right to claim maintenance in a suit is a substantive right under Section 18 of the Act. Since no form is prescribed to enforce the said civil right, the civil court in exercise of its inherent power can grant maintenance.

After considering the status of the husband the wife should be awarded maintenance pendente-lite, even though there is no separate provision in the Hindu Adoption and Maintenance Act, 1956 for grant of maintenance pendente-lite. It was held in Neelam Malhotra v. Rajinder Malhotra\textsuperscript{15} that the obligation to maintain the wife remains on the husband even though the wife might be living separately. A suit under Section 18 of the Act may take decades to decide, and the wife cannot be

\textsuperscript{14} AIR 1997 Ori 73
\textsuperscript{15} AIR 1994 Del 234
forced to face starvation and then subsequently be granted maintenance from the date of filing of the suit. Such a view will be against the very intent and spirit of Section 18 of the Act. It is settled law that a court empowered to grant a substantive relief is competent to award it on an interim basis as well, even though there is no express provision in the statute to grant it.

**Woman’s Right regarding Adoption under Hindu Law:**

The adoption under Hindu Law is governed by The Hindu Adoption and Maintenance Act, 1956. Adoption is recognized by the Hindus and is not recognized by Muslims, Christian and Parsis. Prior to this Act only a male could be adopted, but the Act makes a provision that a female may also be adopted.

Any male Hindu, who is of sound mind and is not a minor, has the capacity to take a son or daughter in adoption. Provided that if he has a wife living, he shall not adopt except with the consent of his wife, unless his wife has completely and finally renounced the world or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind. If a person has more than one wife living at the time of adoption the consent of all the wives is necessary unless
the consent of one of them is unnecessary for any of the reasons specified in the preceding provision.\textsuperscript{16}

Under the old Hindu law, the power of a female Hindu to adopt a son was restricted. The Act has provided the right, to a widow, an unmarried woman as well as a divorced woman, to adopt a child.\textsuperscript{17}

Section 8 runs as follows:

Any female Hindu –

a. who is of sound mind

b. who is not a minor, and

c. who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption.

Where the woman is married it is the husband who has the right to take in adoption with the consent of the wife.

\textsuperscript{16} Section 7 of the Hindu Adoption and Maintenance Act, 1956
\textsuperscript{17} Section 8 of the Hindu Adoption and Maintenance Act, 1956
Section 9 prescribes the capacity of a person to give a child in adoption to another. It states:

1. No person except the father or mother or guardian of the child shall have the capacity to give the child in adoption.

2. The father alone if he is alive shall have the right to give in adoption, but such right shall not be exercised except with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind.

3. The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu, or has been declared by a court of competent jurisdiction to be of unsound mind.

4. Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is unknown– the guardian of the child may give the child in adoption with the previous permission of the court. The court while granting permission shall be satisfied that the adoption is for the
welfare of the child and due consideration will be given to the wishes of the child having regard for the age and understanding of the child. The court shall be satisfied that no payment or reward in consideration of the adoption except as the court may sanction has been given or taken.

Other conditions for a valid adoption:

a. if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son’s son or son’s son’s son living at the time of adoption.

b. if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son’s daughter living at the time of adoption;

c. if the adoption is by a male and the person to be adopted is a male, the adoptive father is at least twenty one years older than the person to be adopted;

d. if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty one years older than the person to be adopted;
e. the same child may not be adopted simultaneously by two or more parents; the child to be adopted must be actually given and taken in adoption with an intent to transfer the child from the family of birth.

**Guardianship under Hindu Law**

The Dharmashastras did not deal with the law of guardianship. During the British regime the law of guardianship was developed by the courts. It came to be established that the father is the natural guardian of the children and after his death, mother is the natural guardian of the children and none else can be the natural guardian of minor children. Testamentary guardians were also introduced in Hindu law. It was also accepted that the supreme guardianship of the minor children vested in the State as *parens patriae* and was exercised by the courts. The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956.

**Guardianship of Minor Children**— Under the Hindu Minority and Guardianship Act, 1956, Section 4(b), minor means a person who has not completed the age of eighteen years. A minor is considered to be a
person who is physically and intellectually imperfect and immature and hence needs someone’s protection. In the modern law of most countries the childhood is accorded protection in multifarious ways. Guardian is “a person having the care of the person of the minor or of his property or both person and property.” It may be emphasized that in the modern law guardians exist essentially for the protection and care of the child and to look after its welfare. This is expressed by saying that welfare of the child is paramount consideration. Welfare includes both physical and moral well-being. Guardians may be of the following types:

1. Natural guardians,

2. Testamentary guardians, and

3. Guardians appointed or declared by the court.

There are two other types of guardians, existing under Hindu law, de facto guardians, and guardians by affinity.

**Natural Guardians**— As per Hindu law only three persons are recognized as natural guardian—father, mother and husband, Father. “Father is the natural guardian of his minor legitimate children,
sons and daughters.” Section 19 of the Guardians and Wards Act, 1890, lays down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. The effect of this provision has been considerably whittled down by judicial decisions and by Section 13 of the Hindu Minority and Guardianship Act which lays down that welfare of the minor is of paramount consideration and father’s right of guardianship is subordinate to the welfare of the child. The Act does not recognize the principle of joint guardians. The position of adopted children is at par with natural-born children. The mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian.

Proviso to clause (a) of Section 6– Hindu Minority and Guardianship Act lays down that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Thus, mother is entitled to the custody of the child below five years, unless the welfare of the minor requires otherwise.
In *Githa Hariharan v. Reserve Bank of India*\(^\text{18}\) the Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term ‘after’ used in Section 6(a) has been interpreted as ‘in absence of’ instead ‘after the life-time’.

**Rights of guardian of minor children** - The natural guardian has the following rights in respect of minor children:

(a) Right to custody,

(b) Right to determine the religion of children,

(c) Right to education,

(d) Right to control movement, and

(e) Right to reasonable chastisement

These rights are conferred on the guardians in the interest of the minor children and therefore of each- of these rights is subject to the welfare of the minor children. The natural guardians have also the obligation to maintain their minor children.

\(^\text{18}\) (1999) 2 SCC 228
Testamentary Guardians

When, during the British period, testamentary powers were conferred on Hindus, the testamentary guardians also came into existence. It was father’s prerogative to appoint testamentary guardians. By appointing a testamentary guardian the father could exclude the mother from her natural guardianship of the children after his death. Under the Hindu Minority and Guardianship Act, 1956, testamentary power of appointing a guardian has now been conferred on both parents. The father may appoint a testamentary guardian but if mother survives him, his testamentary appointment will be ineffective and the mother will be the natural guardian. If mother appoints testamentary guardian, her appointee will become the testamentary guardian and father’s appointment will continue to be ineffective. If mother does not appoint, father’s appointee will become the guardian. It seems that a Hindu father cannot appoint a guardian of his minor illegitimate children even when he is entitled to act as their natural guardian, as Section 9(1) confers testamentary power on him in respect of legitimate children. In respect of illegitimate children, Section 9(4) confers such power on the mother alone.
Muslim Law

Under Muslim Personal law which is still not codified for various known reasons, the position of women is subservient to men. Muslim personal law is still not codified for many known reasons despite of Supreme Courts repetitive directives. There are certain selective rights available to Muslim females under Muslim Law. Marriage is considered a contract binding more upon a female than a male as the male can have more than one wife and exit from the relationship much easily. Whereas the Muslim females have limited rights to move out from the contract of marriage unlike their Hindu sisters where they have certain additional grounds available for divorce.

Muslim law permit divorce by wife which can be categorized under three categories:

i. Talaaq-i-tafweez
ii. Lian
iii. By Dissolution of Muslim Marriages Act 1939.

Talaaq-i-tafweez or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power of
pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently. A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of *talaq* may be delegated to his wife and as Faizee observes, “this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India”. This form of delegated divorce is usually stipulated in prenuptial agreements.

**Lian:** If the husband levels false charges of unchastity or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a mode of divorce is called Lian. However, it is only a voluntary and aggressive charge of adultery made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of Lian. Where a wife hurts the feelings of her husband with her
behaviour and the husband hits back an allegation of infidelity against her, then what the husband says in response to the bad behaviour of the wife, cannot be used by the wife as a false charge of adultery and no divorce is to be granted under Lian.

**Dissolution of Muslim Marriages Act 1939:** Qazi Mohammad Ahmad Kazmi had introduced a bill in the Legislature regarding the issue on 17\(^{th}\) April 1936. It however became law on 17\(^{th}\) March 1939 and thus stood the Dissolution of Muslim Marriages Act 1939. Section 2 mentions the grounds on which a Muslim woman may obtain a decree of divorce. These are:

- That the whereabouts of the husband have not been known for a period of four years: if the husband is missing for a period of four years the wife may file a petition for the dissolution of her marriage. The husband is deemed to be missing if the wife or any such person, who is expected to have knowledge of the husband, is unable to locate the husband. Section 3 provides that where a wife files petition for divorce under this ground, she is required to give the names and addresses of all such persons who would have been the legal heirs of the husband upon his death. The court issues
notices to all such persons appear before it and to state if they have any knowledge about the missing husband. If nobody knows then the court passes a decree to this effect which becomes effective only after the expiry of six months. If before the expiry, the husband reappears, the court shall set aside the decree and the marriage is not dissolved.

- That the husband has neglected or has failed to provide for her maintenance for a period of two years: it is a legal obligation of every husband to maintain his wife, and if he fails to do so, the wife may seek divorce on this ground. A husband may not maintain his wife either because he neglects her or because he has no means to provide her maintenance. In both the cases the result would be the same. The husband’s obligation to maintain his wife is subject to wife’s own performance of matrimonial obligations. Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a judicial divorce on the ground of husband’s failure to maintain her because her own conduct disentitles her from maintenance under Muslim law.

- That the husband has been sentenced to imprisonment for a period of seven years or
upwards: the wife’s right of judicial divorce on this ground begins from the date on which the sentence becomes final. Therefore, the decree can be passed in her favour only after the expiry of the date for appeal by the husband or after the appeal by the husband has been dismissed by the final court.

• That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years: the Act does define ‘marital obligations of the husband’. There are several marital obligations of the husband under Muslim law. But for the purpose of this clause husband’s failure to perform only those conjugal obligations may be taken into account which is not included in any of the clauses of Section 2 of this Act.

• That the husband was impotent at the time of the marriage and continues to be so: for getting a decree of divorce on this ground, the wife has to prove that the husband was impotent at the time of the marriage and continues to be impotent till the filing of the suit. Before passing a decree of divorce of divorce on this ground, the court is bound to give to the husband one year to improve
his potency provided he makes an application for it. If the husband does not give such application, the court shall pass the decree without delays.

- If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease: the husband’s insanity must be for two or more years immediately preceding the presentation of the suit. But this act does not specify that the unsoundness of mind must be curable or incurable. Leprosy may be white or black or cause the skin to wither away. It may be curable or incurable. Venereal disease is a disease of the sex organs. The Act provides that this disease must be of incurable nature. It may be of any duration. Moreover even if this disease has been infected to the husband by the wife herself, she is entitled to get divorce on this ground.

- That she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated;

- That the husband treats her with cruelty, that is to say -
(a) Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) Associates with women of ill-repute or leads an infamous life, or

(c) Attempts to force her to lead an immoral life, or

(d) Disposes of her property or prevents her exercising her legal rights over it, or

(e) Obstructs her in the observance of her religious profession or practice, or

(f) If he has more than one wives, does not treat her equitably in accordance with the injunctions of the Holy Quran.

The Muslim Women (Protection of Rights on Divorce) Act, 1986 further specifies through Section 3 that dower is not an amount payable on divorce or for divorce. Section 3(1)(c) says:

“Mehr or other properties of Muslim woman to be given to her at the divorce:

Notwithstanding anything contained in any other law for the time being in force, a divorced Muslim woman shall be entitled to an amount equal to the sum of meter or dower agreed to be paid to her at the time
of her marriage or at any time thereafter according to Muslim law.”

**Widow’s Right of Retention of Estate**

The widow has a right of retention of estate against the unpaid dower. However, the widow’s right of retention does not create any right of the widow the property. She can simply retain the possession and appropriate the usufruct her dower debt is satisfied. The widow cannot be made to account for the sects of the estate without being allowed reasonable compensation; this compensation may be allowed in the form of interest upon dower.

**Maintenance under Muslim Law**

Under the “Women (Protection of Rights on Divorce) Act, 1986” spells out objective of the Act as “the protection of the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands.” The Act makes provision for matters connected therewith or incidental thereto. It is apparent that the Act nowhere stipulates that any of the rights available to the Muslim women at the time of the enactment of the Act, has been abrogated, taken away or abridged. The Act lays
down under various sections that distinctively lays out the criterion for women to be granted maintenance.

Section (a) of the said Act says that divorced woman is entitled to have a reasonable and fair provision and maintenance from her former husband, and the husband must do so within the period of *iddat* and his obligation is not confined to the period of *iddat*.

It further provides that a woman, if not granted maintenance can approach the Wakf board for grant as under section (b) which states that If she fails to get maintenance from her husband, she can claim it from relatives failing which, from the Waqf Board.

An application of divorced wife under Section 3(2) can be disposed of under the provisions of Sections 125 to 128, Cr.P.C. if the parties so desire. There is no provision in the Act which nullifies orders passed under Section 125, Cr.P.C. The Act also does not take away any vested right of the Muslim woman.

All obligations of maintenance however end with her remarriage and no claims for maintenance can be
entertained afterwards. The Act thus secures to a divorced Muslim woman sufficient means of livelihood so that she is not thrown on the street without a roof over her head and without any means of sustaining herself.

Protection to Divorced Women - Sub-section (1) of Section 3 lays down that a divorced Muslim woman is entitled to:

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after the divorce.

**Adoption under Muslim law:**

Adoption is the transplantation of a son from the family in which he is born, into another family by gift made by his natural parents to his adopting parents. Islam does not recognise adoption. Acknowledgement of paternity under Muslim Law is the nearest approach to adoption. The material difference between the two can be stated that in adoption, the adoptee is the known son of another person, while one of the essentials of acknowledgement is that the acknowledgee must not
be known son of another. However an adoption can take place from an orphanage by obtaining permission from the court under the Guardians and Wards Act.

**Guardianship under Muslim Law:**

The source of law of guardianship and custody are certain verses in the Koran and a few *Hadis*. The Koran, the *Hadis* and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor; the guardianship of the person is a mere inference.

In all schools of both the Sunnis and the Shias, the father is recognized as guardian which term in the context is equivalent to natural guardian and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father. The father’s right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father has the right to control the education and religion of minor children, and their upbringing and their movement. So long as the father is alive, he is the sole and supreme guardian of his minor children.
The father’s right of guardianship extends only over his minor legitimate children. He is not entitled to guardianship or to custody of his minor illegitimate children.

In Muslim law, the mother is not a natural guardian even of her minor illegitimate children, but she is entitled to their custody.[6]

Among the Sunnis, the father is the only natural guardian of the minor children. After the death of the father, the guardianship passes on to the executor. Among the Shias, after the father, the guardianship belongs to the grandfather, even if the father has appointed an executor; the executor of the father becomes the guardian only in the absence of the grandfather. No other person can be natural guardian, not even the brother. In the absence of the grandfather, the guardianship belongs to the grandfather’s executor, if any.

Testamentary Guardian

Among the Sunnis, the father has full power of making a testamentary appointment of guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian. Among the Shias, the
father’s appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a testamentary guardian. No other person has any such power. Among both the Shias and the Sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of her property of her minor children: first, when she has been appointed a general executrix by the will of the child’s father, she can appoint an executor by her will; and secondly, she can appoint an executor in respect of her own property which will devolve after her death on her children.

The mother can be appointed a testamentary, guardian or executrix by the father, or by the grandfather, whenever he can exercise this power. Among the Sunnis, the appointment of a non-Muslim mother as testamentary guardian is valid, but among the Shias such an appointment is not valid, as they hold the view that a non-Muslim cannot be a guardian of the person as well as of the property of a minor. It seems that the appointment of non-Muslim fellow-subject is valid, though it may be set aside by the kazi. According to the Malikis and
the Shafi law, a Zimmi can be a validly appointed testamentary guardian of the property of the minor, but not of the person of the minor. The Shias also take the same view. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian. A profligate, i.e., a person who bears in public walk of life a notoriously bad, character, cannot be appointed as guardian.
Under Christian & Parsi Law

Christian Law

The provisions relating to alimony pendente-lite and permanent alimony are contained in Sections 36 and 37 of the Indian Divorce Act, 1869. Section 36 of the Indian Divorce Act provides for alimony pendente-lite and says:

1. Alimony Pendente-Lite

“In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just.”

The proviso to the section, that “alimony pending the suit shall in no case exceed one-fifth of the husband’s average net income for the three years next proceeding the date of the order, and shall continue, in case of a decree for
dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be”, has been omitted by Section 21 of the Indian Divorce (Amendment) Act, 2001.

2. Permanent Alimony

Section 37 of the Indian Divorce Act which deals with permanent alimony authorises the court to make an order for the payment of a lump sum amount for permanent maintenance. In this section the husband can have a payment order varied from time to time in accordance with his means. Section 37 originally ran as follows (prior to the 2001 Amendment Act):

“The High Court may if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by his wife and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by their wife, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of
the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties."

After the Amendment of 2001, vide Section 22, in Section 37 for the portion beginning with the words "The High Court ... the husband shall", the following words were substituted:

"Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the district court may order that the husband shall........"

3. **Power to order monthly or weekly payments**

In every such case the court, under Section 37, may make an order on the husband to pay to the wife such monthly or weekly sums for her maintenance and support as the court may think reasonable, provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to discharge or modify the order, or temporarily suspend the same as to the whole or any part of the money so ordered to be paid and again to revive the same order wholly or in part as the court seems
4. **Payment to Trustee**

Under Section 38 of the Indian Divorce Act, 1869 it is stated that the court may direct, in all cases in which it makes any decree or order for alimony, that the same be paid either to the wife herself or to any trustee on her behalf to be approved by the court and may impose any terms or restrictions which to the court seem expedient, and may from time to time appoint a new trustee, if it appears to the court expedient to do so.

**Parsi Law**

The provisions of maintenance are contained in the Parsi Marriage and Divorce Act, 1936. The same were substituted in Sections 39 and 40 by the Amendment Act of 1988.

1. **Alimony Pendente Lite**

Section 39 of the Parsi Marriage and Divorce Act, 1936, which contains provisions of alimony pendente-lite says:

“Where, in any suit under this Act, it appears to the court that either the wife or the husband, as the case may be, has no independent income
sufficient for her or his support and the necessary expenses of the suit, it may, on the application of the wife or the husband, order the defendant to pay to the plaintiff the expenses of the suit and such weekly or monthly sum, during suit, as, having regard to the plaintiff’s own income and the income of the defendant, it may seem to the court to be reasonable.”

2. **Permanent Alimony and Maintenance**

The provisions regarding permanent alimony and maintenance are contained in Section 40 of the Parsi Marriage and Divorce Act, 1936, which states that:

1. Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff, for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff, as having regard to the defendant’s own income and other property, if any,

---

19 As amended by Amendment Act of 1988 (Act 5 of 1988)
the income and other property of the plaintiff, the
court of the parties and other circumstances of
the case, it may seem to the Court to be just, and
any such payment may be secured, if necessary, by
a charge on the movable or immovable property of
the defendant.

2. The Court, if it is satisfied that there
is a change in the circumstances of either party at
any time after it has made an order under sub-
section (1), it may, at the instance of either
party, vary, modify, or rescind any such order in
such manner as the court may deem just.

3. The Court if it is satisfied that the
party in whose favour an order has been made under
this section has remarried or, if such party is the
wife, that she has not remained chaste, or, if
such party is the husband, that he had sexual
intercourse with any woman outside wedlock, it may
at the instance of the other party vary, modify or
rescind any such order in such manner as the court
may deem just.

These provisions are as amended by the Amendment

The Parsi law provides for payment of alimony to
the wife or her trustee under Section 41 of the Parsi Marriage and Divorce Act, 1936. It says that in all cases in which the court shall make any decree or order for alimony, it may also direct that the same be paid either to the wife herself, or to any trustee on her behalf to be approved by the court. The Amendment further provides that the court may direct the said to be paid to the guardian appointed by the court on imposition of such terms which may seem expedient to the court.

The court also has power to appoint a new trustee or guardian from time to time.

**Maintenance under the Special Marriage Act, 1954**

The Special Marriage Act, 1954 provides for a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The consequential reliefs are provided in the Act itself. The provisions regarding maintenance and alimony are contained in Sections 36 and 37 of the Special Marriage Act, 1954.

1. **Alimony Pendente Lite**

It is provided in Section 36 of the Special
Marriage Act that where in any proceedings under restitution of conjugal rights and judicial separation or nullity of marriage and divorce it appears to the district court that the wife has no independent income sufficient for her support and necessary expenses for the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding and weekly or monthly during the proceedings such sum as, having regard to the husband’s income, it may seem to the court to be reasonable.

2. Permanent Alimony and Maintenance

Section 37 lays down the provisions relating to permanent alimony and maintenance. The section lays down that any court exercising jurisdiction under a petition of restitution of conjugal rights and judicial separation or of nullity of marriage and divorce may at the time of passing of any decree or subsequent to the decree, on application, order that the husband shall provide to his wife maintenance and support, if necessary, by a charge on the husband’s property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband’s property and
ability, the conduct of the parties and other circumstances of the case, as may seem to the court to be just.\textsuperscript{20}

Section 37(2), Special Marriages Act says further that if the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Section 37(1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as may seem to the court to be just. For maintenance in the light of chastity of the wife Section 37(3), SMA lays down that if the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just.\textsuperscript{21}

**Maintenance under Section 125, Cr.P.C.**

It is evident from the preceding pages that different personal laws contain different provisions of maintenance. The Code of Criminal Procedure, 1973, a secular code, provides a

\textsuperscript{20} Subs. By Act 68 of 1976, Section 35
\textsuperscript{21} Subs. By Act 68 of 1976, Section 36
comprehensive scheme for the maintenance of wife, children and aged parents. The provisions are contained in Sections 125-128, Cr.P.C. The proceedings under this section are not punitive but of a civil nature. The remedy provided under the section is in the nature of civil rights. The object of the provisions of Chapter IX, Cr.P.C. is to provide a speedy remedy by a summary procedure to enforce liability in order to avoid vagrancy. The primary object of Chapter IX of Cr.P.C. is to give social justice to women and children and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves to do so. These provisions provide a speedy remedy to those who are in distress. They are intended to achieve this social purpose. This section gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions apply and are enforceable whatever may be the personal law by which the persons concerned are governed. This section is a measure of social justice and falls within the Constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India.

The following provisions under Sections 125-127
have been made:

“125. Order for maintenance of wives, children and parents—

(1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury, unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:
Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this subsection, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

For the purpose of this section ‘wife’ includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.
Chapter 4

The Role of Law in Empowering Women in India

Code of Criminal Procedure (Amendment) Act, 2001

It was observed that an applicant had to wait for several years for getting relief from the court. Therefore it was felt that the following provisions should be made by the Criminal Procedure Code (Amendment) Act, 2001.

**Provision for interim Maintenance Allowance:**

During the pendency of the proceedings the Magistrate may order payment of interim maintenance allowance and such expenses of the proceedings as the Magistrate considers reasonable, to the aggrieved person.

The ceiling of rupees five hundred has been repealed as with the cost of living index consistently rising, retention of a maximum ceiling is not justified. If a ceiling is prescribed and retained, it would require periodic revision taking into account the periodic inflation which would unnecessarily be time consuming. Accordingly consequential changes were made to remove the ceiling of maintenance allowance.

There is no inconsistency between Section 125, Cr.P.C. and the Hindu Adoptions and Maintenance Act, 1956. The scope of the two laws is different.
This section provides a summary remedy and is applicable to all persons. It has no relationship to the personal law of the parties.

**Need for Uniform Civil Code in India**

Personal religious law and the need for a Uniform Civil Code constitute a key concern in the concept of secularism and religious freedom in India. Though the substantive laws of crime, commerce, economy etc. are now governed by secular law based on the principles of ‘justice, equity and good conscience’, personal religious laws continue to operate in the private domain of citizens. Certain personal laws, especially of the Hindus, have been codified (i.e. incorporated into statutes) accompanied by certain amendments in light of the compulsions of modern times, while others continue to apply to the respective religious groups in their long-established, traditional forms.

There are five broad sets of family laws in India based on the religions professed by its different communities. Hindu law governs all Hindus, as also Buddhists, Jains and Sikhs. Muslim law applies to Muslims, Christian law governs Christians, Parsee law applies to the Parsees. Jews
have their own personal law. Many provisions of the various Indian personal laws are notorious for being discriminatory towards women. A brief description of how women’s rights are undermined under various personal laws follows:

**Marriage:** The right of all men and women of certain to marry through free consent and with complete freedom in the choice of a spouse is recognized internationally. However, Indian personal laws are found wanting in this aspect. Muslim law, for instance, appears to recognize the right of a guardian to contract his minor ward into marriage. There is a remedy in the form of ‘option of puberty’ (right to repudiate marriage on attaining puberty) but it is restricted for as far as women are concerned. Under Hindu law (Hindu Marriage Act, 1955) too, it is not the mere absence of consent but the obtaining of consent by fraud or force or vitiation of consent by proved unsoundness of mind that renders the marriage void. Fortunately, Special Marriage Act, 1954, possibly the most progressive piece of Indian legislation enacted under family law, overcomes the bar or strict restrictions on inter-religious marriages under personal law. Polygamy is a contentious issue in today’s world where monogamy, fidelity and
family welfare are the norm. This institution used to prevail in Hindu society previously but modern legislation (The Hindu Marriage Act, 1956) prohibits bigamy (covering both polygamy and polyandry) the Penal Code makes it an offence. Muslim personal law, however, recognizes and permits the institution of polygamy. Many scholars believe that under Indian circumstances, polygamy is largely an anachronism from patriarchal times and that very few Indian Muslims practice it. This view may be correct to some extent but ignores that such a practice that is the prerogative of a select few creates fissures and religious tensions in society. There have been many instances in the past of abuse of this practice as permitted under Islam. Often, non-Muslims convert to Islam in order to marry more than once and while Courts examine the intention behind such conversions to decide on the question of validity of second marriages, such a phenomenon generates strife and also affects rights of the parties involved.

Divorce: Traditional Hindu law did not recognize the concept of divorce but modern law provides for it under the Hindu Marriage Act, 1956, which largely provided for fault-grounds which
either spouse could avail in order to obtain a divorce.

The most remarkable, and most discriminatory, feature of Islamic law of divorce is the recognition of the concept of unilateral divorce, wherein the husband can divorce his wife unilaterally, without any cause, without assigning any reason, even in a jest or in a state of intoxication, and without recourse to the court and even in the absence of the wife, by simply pronouncing the formula of repudiation. Muslim law also entitles the woman to ask for a divorce under certain restricted circumstances. Modern law (The Dissolution of Muslim Marriages Act, 1939) allows a wife to obtain a divorce through the intervention of a judge, before whom she must establish one of a limited number of acceptable bases for divorce. The fact that on a moral plane, divorce is reprehensible in Islam and has been denounced by Prophet does not provide relief to women as unilateral divorce continues to be an accepted practice in many countries including India.

Maintenance: Under Indian law, the right to maintenance is civil in nature but it is also
placed under the criminal code and can be pursued therein. Under

Hindu law, a wife has a right to be maintained during her lifetime as per the provisions of the Hindu Adoptions and Maintenance Act, 1956. In what can be called an attempt to reinforce the conservative idea of a Hindu wife, an “unchaste” wife is not entitled to separate residence and maintenance.

As far as Muslim law is concerned, many interpretations of the Shari’a do not grant divorced women a right to maintenance from their former husband’s beyond the three-month waiting period following the divorce, called the iddat period. In India, the Dissolution of Muslim Marriages Act, 1939 denies divorced Muslim women the right to claim maintenance. In the famous Shah Bano judgment, the judiciary attempted to get rid of this anomaly by explicitly bringing such Muslim women under the purview of the secular Code of Criminal Procedure, 1973 (wherein a wife is entitled to claim maintenance against the husband on the ground of the husband’s neglect or refusal to maintain her).
Shah Bano case\textsuperscript{22} was a classic conflict situation between the secular criminal code and religious personal law. In this case, an old Muslim woman had been divorced by her husband who invoked the Muslim personal law to deny maintenance to his wife. The Supreme Court, however, applied and interpreted the secular law, the Criminal Procedure Code, to grant maintenance. Though the judiciary is to be commended for giving a humane and holistic meaning while applying the relevant provisions, the judgment is often criticized for entering into a discourse of the Quran, taking pains to explain that the secular law was not in conflict with the Quran and in the process, sidelining the constitutional question of examining the personal law of husband on the anvil of equality and deciding the dispute as an \textit{equality} issue. The deliberate use of Quran and the endeavors to interpret it in a particular manner evoked the wrath of the Muslim conservatives, who stressed community fears of the loss of freedom of religious practice. Finally, the Government, yielded to pressure from the orthodox members of the Muslim community and, without any consultation, passed the Muslim Women’s (Protection of Rights in Divorce) Act, 1986.

\textsuperscript{22} (1985) 3 SSC 62
Act, 1986, in spite of protest from progressive Muslims and feminists. This Act ostensible protects women but in reality protects the husband by not requiring him to pay maintenance.

Inheritance: Under the Hindu law, the Mitakshara branch of law that primarily governs succession amongst Hindus in the country denied to a Hindu daughter a right by birth in the joint family estate and this flowed logically from the fact that her place in the paternal family was only temporary as she was belonged to her husband’s family on marriage. Modern day amendments to Hindu law of succession gave Hindu widows the right of succession her husband’s estate. Till recently, Hindu law was still discriminatory in that the Hindu Succession Act, 1956 excluded the daughter from coparcenary ownership of ancestral property. In 2005 the Parliament, by an amendment, took a radical but much-awaited step towards ensuring equality between Hindu men and women as far as succession is concerned, and conferred upon daughters the status of coparceners in the family of their birth, thereby bringing an end to the centuries-old rules of Hindu inheritance that have lost their relevance and justifications. Though the full extent of implications of this amendment are
yet to be observed, it is nonetheless a commendable and desired step in the effort to check in-built biases against women in personal laws of this country. More importantly, this radical amendment was brought by the Parliament without facing any resistance or impediment on the part of the Hindu community.

Islamic law prescribes, in almost all instances, that a man’s share of the inheritance is double that of a woman in the same degree of relationship to the deceased. This aspect of Islamic rules is most vehemently criticized for its discrimination against women, as it is a manifest sample of unequal treatment.

**Guardianship and Adoption:** A mother has been assigned a statutorily subservient position in the matter of guardianship and custody of her children. The father is designated the first natural and legal guardian of his minor; the mother is the natural guardian only after the father. Under Muslim law, the father is the sole guardian of the person and property of his minor child. Adoption is a salient feature of Hinduism, more so because the concept is alien to Christian, Muslim and Parsi law unless custom and usage among the above sects
permit it. The Hindu Adoptions and Maintenance Act, 1956 statutorily recognizes adoption and is applicable to Hindus. The Act brought about significant changes to the law of adoption amongst Hindus and has improved the position of women in this regard. However, despite these changes, adoption is another area in family relations where a female suffers discrimination based purely on her marital status. As with other aspects of Hindu personal law, amendments have recently been proposed so as to give women the same rights as men to guardianship and adoption of children irrespective of marital status.

**Article 44 and the Supreme Court**

Article 44 of the Indian Constitution requires the State to secure for its citizens a Uniform Civil Code throughout the territory of India. The term ‘civil code’ is used to cover the entire body of laws governing rights relating to property and personal matters such as marriage, divorce, maintenance, adoption and inheritance. The object of this code is to enhance national integration by eliminating contradictions based on ideologies. It aims to bring all communities on a common platform
on matters which are currently governed by diverse personal laws.

In the last two decades, the Supreme Court has emphasized that steps be initiated to enact a uniform civil code through various cases.

In *Ms. Jorden Diengdeh v. S.S. Chopra*\(^{23}\) the Supreme Court held ".....the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste...We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce...”

In *Sarla Mudgal v. Union of India*\(^{24}\) the Supreme Court directed the Union Government through the Secretary to Ministry of Law and Justice, to file an affidavit by August 1995 indicating the steps taken and efforts made, by the Government towards securing a uniform civil code for the citizen of India.

\(^{23}\) AIR 1985 SC 934

\(^{24}\) (1995) 3 SCC 635
In John Vallamattam v. Union of India\textsuperscript{25} a three Judges Bench of the Supreme Court has again expressed regret for non-enactment of Common Civil Code.

In Mohd. Ahmed Khan v Shahbano Begum\textsuperscript{26} the Supreme Court has ruled that a Muslim husband is liable to pay maintenance to the divorced wife beyond the iddat period. The court has regretted that Article 44 has remained “dead letter” as there is “no evidence of any official activity for framing a common civil code for the country. The court has emphasized: A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies”

In another landmark judgement in Danial Latifi v. Union of India\textsuperscript{27} a Five Judge Constitution Bench of the Supreme Court has discussed the problem of Muslim divorce women. Liberally interpreting Section 3 of the Muslim Women (Protection of Rights on Divorce) Act 1986, the Court has ruled that a Muslim divorced woman has right to maintenance even after iddat period.

\textsuperscript{25} (2003)6 SCC 611
\textsuperscript{26} (1985) 3 SSC 62
\textsuperscript{27} (2001) 7 SCC 840
In Shabana Bano v. Imran Khan\textsuperscript{28}, the Supreme Court held that Muslim women could not be deprived of the benefit of Section 125 of Cr.P.C. “Even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under section 125 Cr.P.C. after the expiry of the period of iddat as long as she does not marry.”

As recently on February 8, 2011, Justices Dalveer Bhandari and A.K. Ganguly of the Supreme Court were hearing petitions filed by the National Commission for Women’s Delhi chapter, which sought the formulation of uniform marriageable age because different stipulations in different statutes had created confusion. The Bench observed that the government’s attempts to reform personal laws did not go beyond Hindus, who, it said, had been more tolerant of such initiatives. “The Hindu community has been tolerant to these statutory interventions. But there appears a lack of secular commitment as it has not happened for other religions.”

Not much progress has been made towards achieving the ideal of a Uniform Civil Code which still remains a distant dream. The only tangible step taken in this direction has been the

\textsuperscript{28} AIR 2010 SC 305
codification and secularization of Hindu law. The codification of Muslim law still remains a sensitive matter. India is a secular country where the Constitutional philosophy reigns supreme.

Personal laws, howsoever scared, should not be allowed to encroach upon the inviolable collective values of the nation. The ‘Uniform Civil Code’ is required in India for the ensuring the equal rights and equal treatment before law for every citizen without any conditions. The aim is not to dismantle religious rituals or concerns but to vest individuals with the liberty and power to challenge discrimination and reverse regressive trends in the name of religious concerns. At present rights, especially women rights are located in their own cultures that prohibit their equality and liberty. I wish to reform those spheres that perpetuate this discrimination, and the reform can only take place through Uniform Civil Code.
The Role of Law in Empowering Women in India

Chapter 5
Women Empowerment through Property Rights under Personal Laws
Women Empowerment through Property Rights in India

From property rights point of view the women in India is divided in various religious groups. Their rights to property are governed by the personal laws of particular religion they belong to. Meaning thereby the Hindu women acquire, inherit and claim property as per Hindu Succession Act, the Muslim women as per Shariyat and so on. Most of the Hindu Personal Laws are codified now, whereas Muslims Personal Laws are not codified so far despite of many directions and calls of Universal Civil Code by the Apex Court. The codified laws are amended as per the need of the society and development in consonance with the provisions of our Constitution and international conventions which has positively resulted in empowering women economically and socially.

The Property Rights of Hindu Women

The property rights of women under the Hindu law can be traced under four stages, i.e., pre-1937, 1937-1956, 1956-2005 and post-2005.

Since time immemorial the framing of all laws have been exclusively for the benefit of man; woman has been treated as subservient, and dependent on
male support. In theory, in the ancient times, the woman could hold property but in practice, in comparison to men’s holding, her right to dispose-off the property was qualified, the latter considered by the patriarchal set up as necessary, lest she became too-independent and neglect her marital duties and the management of household affairs. This was the situation prior to 1937 when there was no codified law.

The Hindu Women’s Right to Property Act, 1937 was one of the most important enactments that brought about changes to give better rights to women. The said Act was the outcome of discontent expressed by a sizeable section of society against the unsatisfactory affairs of the women’s rights to property. Even the said Act did not give an absolute right to women. Under the said Act a widow was entitled to a limited interest over the property of her husband – what was to be termed as Hindu widow’s estate. The Act was amended in 1938 to exclude the widow from any interest in agricultural land.

The Hindu Succession Act, 1956 introduced many reforms and it abolished completely the essential principle that runs through the estate inherited by
a female heir, that she takes only a limited estate. The Supreme Court put a lot of controversy at rest by holding that the woman becomes the absolute owner under Section-14 of the Hindu Succession Act, 1956. The object of Section 14 is two-fold:

(i) To remove the disability of a female to acquire and hold property as an absolute owner, and

(ii) To convert the right of woman in any estate held by her as a limited owner into an absolute owner.

The provision was retrospective in the sense that it enlarged the limit of the estate into an absolute one even if the property was inherited or held by the woman as a limited owner before the Act came into force. Any property acquired under the 1937 Act held in capacity of a limited owner was now converted to her absolute estate. The Hindu Succession Act, 1956 abrogates all the rules of the law of succession hitherto applicable to Hindus whether by virtue of any text or rule of Hindu law or any custom or usage having the force of
laws in respect of all matters dealt with in the Act.

Therefore no woman can be denied property rights on the basis of any custom, usage or text and the said Act reformed the personal law and gave woman greater property rights. The daughters were also granted property rights in their father’s estate.

The Hindu Succession Act, 1956, is basically based on Mitakshara law, under which co-parcenary rights are in favour of male child by birth. The Act explicitly approved the continued application of the traditional concept of the joint family and the preferential rights of the male heir.

The other provisions under Hindu Succession Act, 1956 act states:

“When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara co-parcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act.
Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in Mitakshara co-parcenary property shall devolve by testamentary and intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1- For the purposes of this Section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the co-parcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

This provision was discriminatory towards women and was acknowledged by the Law Commission and while presenting its 174th Report, it suggested the
changes to provide women equal property rights. The report mentions that:

“The Law Commission is concerned with the discrimination inherent in the Mitakshara co-parcenary under Section 6 of the Hindu Succession Act, as it only consists of male members. The proviso to section 6 of Hindu Succession Act also contains another gender bias. It has been provided therein that the interest of the deceased in the Mitakshara co-parcenary shall devolve by intestate succession if the deceased had left surviving a female relative specified in class I of the Schedule or a male relative” specified in that class, who claims through such female relative. In order to appreciate the gender bias it is necessary to see the devolution of interest under Section 8 of the Hindu Succession Act. The property of a male Hindu dying intestate devolves according to Section 8 of the Hindu Succession Act, firstly, upon the heirs being the relatives specified in Class I of the Schedule. However, there are only four primary heirs in the Schedule to class I, namely, mother, widow, son and daughter. The remaining eight represent one or another person who would have been a primary heir if he or she had not died before the propositus. The principle of representation goes up
to two degrees in the male line of descent; but in the female line of descent it goes only up to one degree. Accordingly, the son’s son’s son and son’s son’s daughter gets a share but a daughter’s daughter’s son and daughter’s daughter’s daughter do not get anything. A further infirmity is that widows of a pre-deceased son and grandson are Class I heirs, but the husbands of a deceased daughter or granddaughter are not heirs. Keeping this background in mind\(^1\), the Hindu Succession Amendment Act, 2005 was enacted to enlarge the rights of a daughter, married and unmarried both and to bring her at par with a son or any male member of a joint Hindu family governed by the Mitakshara law. It also sought to bring the female line of descent at an equal level with the male line of descent, including children of pre-deceased daughter of pre-deceased daughter. By the way of the amendment Act, the daughter of a coparcener has been admitted in co-parcenary and after the commencement of the Amendment Act the daughter is a coparcener in her own right. The daughter now has the same rights and liabilities in the co-parcenary property as the son. This means that a daughter along with a son is liable for debts of joint family. The daughter is

\(^{1}\) Report by the team from Lawyers Collective Women’s Rights Initiative
also entitled to dispose of her share of the co-parcenary property or her interest thereof by way of a will.

The Hindu Succession (Amendment) Act, 2005 (39 of 2005) came into force from 9th September, 2005. The Government of India has issued notification to this effect.

The Section 6 of the Hindu Succession Act as it stands after the Amendment in 2005 is extracted hereunder for better appreciation:

Section- 6: Devolution of interest in co-parcenary property -

Sub-Section 1 - On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,

a. by birth become a coparcener in her own right in the same manner as the son;
b. have the same rights in the co-parcenary property as she would have had if she had been a son;
c. be subject to the same liabilities in respect in respect of the said co-parcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a
reference to a daughter of a coparcener: Provided that nothing contained in this sub-Section shall affect or invalidated any disposition or alienation including any partition or testamentary disposition of property which had been taken place before the 20th day of December, 2004.

Sub-Sections 2 to 4 deleted.

Sub-Section 5 - Nothing contained in this Section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation - For the purposes of this Section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) of partition effected by a decree of a Court.

The basic concept of co-parcenary is that only male members of a joint Hindu family can constitute a co-parcenary completely excluding the female members of the family. This concept has not been substantially modified with the amendment of Section 6 of the Hindu Succession Act However, although the daughter has been included as a coparcener by way of this amendment the wife,
mother and widow are still standing in queue for their admission in the co-parcenary.

The courts have played a vital role in making this amendment effective by interpreting it liberally and bringing in the concept of notional partition, without it being expressly mentioned in the amended section. In Gurupad v. Hirbai\(^2\) Supreme Court observed that ignoring a woman’s right to get a share at the time of notional partition essentially means that:

“One unwittingly permits one’s imagination to boggle under the oppression of the reality that there was in fact no partition between the plaintiff’s husband and his sons. The fiction created by Explanation I has to be given its full and due effect.”

In M. Yogendra and Ors. v. Leelamma N. and Ors.\(^3\), the Supreme Court held that “The Act indisputably would prevail over the Hindu Law. We may notice that the Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005.

\(^2\) AIR 1978 SC 1239
\(^3\) 2010 (1) ALL MR (SC) 490
Further in *G. Sekar v. Geetha and Ors*⁴, the Supreme Court held that:

“*It is, therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act.*”

Till now we have seen what the status of women regarding Ancestral property is. Now we move forward to next dimension of women property rights i.e. as an absolute owner of her own property. This finds specific mention under Section 14 of the Hindu Succession Act 1956.

Section 14 of the Act states that the property of a female Hindu is to be her absolute property:

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation:- In this sub-section “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of

---

⁴ AIR 2009 SC 2649
maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as Stridhan immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property. Plain reading of the section 14 reveals that female Hindu is conferred the absolute right to her property.

In Komalam Amma v. Kumara Pillai Raghavan Pillai and Ors. Supreme Court has laid down that, “Maintenance, as we see it, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the

---

5 2008(14) SCALE470, 2008(12) JT157
head. Provision for residence may be made either by giving a lump sum in money, or property in lieu thereof. It may also be made by providing, for the course of the lady’s life, a residence and money for other necessary expenditure. Where provision is made in this manner, by giving a life interest in property for the purposes of residence, that provision is made in lieu of a pre-existing right to maintenance and the Hindu lady acquires far more than the vestige of title which is deemed sufficient to attract Section 14(1).

In another decision of Tulasamma v. Sesha Reddy, apex court held that:

“Besides possessing an existing right of maintenance, woman in the Hindu family is also conferred right in the family property. It cannot be said that partition deed is something creating a new right in her in so far as the property is not concerned; nor it amounts to acquiring of the property by her by virtue of partition deed when the facts are so, there would be the application of sub-section (1) of Section 14 and not of sub-section (2) of the said Section. The Court further held that a widow is entitled to maintenance out of her deceased husband’s estate, irrespective of whether

---

6 (1977) 3 SCC 99
that estate is in the hands of his male issue or other coparceners.”

Further, Section 15 of the Hindu Succession Act specifies how the property of a female Hindu will devolve and it is discriminatory on face of it. It states that in the absence of Class I heirs (son, daughters & husband) of the property of a female Hindu will go to her husband’s heirs and only if these heirs are not then will the property devolve upon her mother and father. However, in the absence of the mother and father, the property will again devolve upon the heirs of the father and only if there are no heirs of father will the property devolve upon the heirs of the mother.

Here, it is apt to discuss G. Sekar v. Geetha and Ors.\(^7\) where the Apex Court laid Down:

“"The Act brought about revolutionary changes in the old Hindu Law. It was enacted to amend and codify the law relating to intestate succession amongst Hindus. By reason of the Act, all female heirs were conferred equal right in the matter of succession and inheritance with that of the male heirs........

By reason of Section 14 of the Act, a woman who had limited interest in the property but was

\(^7\)Civil appeal no 2535 of 2009
possessed of the same was to become absolute owner. Section 6 of the Act, however, makes an exception to the aforementioned rule by providing the manner in which the interest in the co-parcenary property shall devolve upon the heirs stating that the rule of survivorship would operate in respect thereof. The right, title and interest of an heir, whether male or female, thus, are governed by the provisions of the Act.

Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that Section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint co-parcenary property is concerned has been sought to be removed,""

The Amendment Act deletes Section 23 of the 1956 Hindu Succession Act, thereby giving all daughters (married or not) the same rights as sons to reside in or seek partition of the family dwelling house. Section 23 did not allow married daughters (unless separated, deserted or widowed) even residence rights in the parental home. Unmarried daughters had residence rights but could not demand partition.
The Supreme Court confirmed the equal property rights of an unmarried Hindu woman on 10\textsuperscript{th} May 2011 in its decision in a Civil Appeal of 2005.\textsuperscript{8} Co-parcenary refers to equal inheritance which was restricted only to male members of the Hindu Undivided Family but after successive amendments several states have chosen to extend the benefit to unmarried female members too.

A bench of justices G.S. Singhvi and K.S. Radhakrishnan said even if a decree of partition has been passed, a female claimant can enforce her equal property right if she was unmarried at the time of the amendment brought in by the respective state legislatures.

The Apex Court said the purpose of extending equal property right to women was to end discrimination on the ground of sex as part of the Constitutional obligation and social legislation. “Framers of the Constitution were great visionaries. They not only placed justice and equality at the highest pedestal but also incorporated several provisions for ensuring that the people are not subjected to discrimination on

\textsuperscript{8} Prema v. Nanje Gowda & Ors. [AIR 2003 Kant 104]
the ground of caste, religion or sex, the apex court said.

In **Ganduri Koteshwaramma v. Chakiri Yanadi** a Hindu woman or girl will have equal property rights along with other male relatives for any partition made in intestate succession. Thus gender discrimination has been removed to a larger extent by the 2005 Act. Now, daughters can claim equal right in the after September 2005, the Supreme Court has ruled. A bench of justices R.M. Lodha and Jagdish Singh Khehar in a judgment said that under the Hindu Succession (Amendment) Act, 2005 the daughters are entitled to equal inheritance rights along with other male siblings, which was not available to them prior to the amendment.

The apex court said the female inheritors would not only have the succession rights but also the same liabilities fastened on the property along with the male members.

"The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from ____________

---

9 Civil Appeal No. 8538 of 2011 (Arising out of SLP (Civil) No. 9586 of 2010)
9th September, 2005. The legislature has now conferred substantive right in favour of the daughters.

According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcener property as she would have been a son is unambiguous and unequivocal. Justice Lodha, writing the judgment, said, “The ‘term coparcener’ refers to the equal inheritance right of a person in a property. The apex court passed the ruling while upholding the appeal filed by Ganduri Koteshwaramma, daughter of late Chakiri Venkata Swamy, challenging the Andhra Pradesh High Court’s decision not to recognise equal property rights of women along with their male siblings.

Under the 2005 Act, married daughters will also benefit by the deletion of Section 23, since now they will have residence and partition rights in the parental dwelling house. In particular, women facing spousal violence will have somewhere to go. The only negative aspect is that allowing partition
could increase the vulnerability of elderly parents. A preferred alternative would have been to bar both sons and daughters from seeking partition during their parents’ lifetimes, if the family had only one dwelling.

The Act also deletes Section 24 of the Hindu Succession Act of 1956, which barred certain widows, such as those of predeceased sons, from inheriting the deceased’s property if they had remarried. Now they can so inherit.

The significant change — making all daughters (including married ones) coparceners in joint family property — is also of great importance for women, both economically and symbolically. Economically, it can enhance women’s security, by giving them birthrights in property that cannot be willed away by men. In a male-biased society where wills often disinheriot women, this is a substantial gain. Also, as noted, women can become Kartas of the property. Symbolically, all this signals that daughters and sons are equally important members of the parental family. It undermines the notion that after marriage the daughter belongs only to her husband’s family. If her marriage breaks down, she can now return to her birth home by right, and not
on the sufferance of relatives. This will enhance her self-confidence and social worth and give her greater bargaining power for herself and her children, in both parental and marital families.

Flavia Agnes says that female heirs are often deprived of their legitimate share in the property. The institution of property and women’s access to it has been a complex and contentious one within our legal system. In order to understand its complexity, we need to understand the institution of property and its changing character. We also need to contextualize women’s access to property within the prevailing ethos and women’s status in each era. Broadly speaking, women’s right to property is governed by the personal law regime.¹⁰

These amendments have empowered women both ways, economically and socially. The amendments have far-reaching benefits for the women and society. Independent access to agricultural land can reduce a woman and her family’s risk of poverty, improve her livelihood options, and enhance prospects of child survival, education and health. Women owning land or a house also face less risk of spousal violence. Land in women’s names can

¹⁰ Women and Law in India, Oxford University Press 2004 Edn.
increase productivity by improving credit and input access for numerous de-facto female household heads.

Making all daughters coparceners likewise has far-reaching implications. It gives women birthrights in joint family property that cannot be willed away. Rights in co-parcenary property and the dwelling house will also provide social protection to women facing spousal violence or marital breakdown, by giving them a potential shelter. Millions of women - as widows and daughters - and their families thus stand to gain by these amendments.

It is clear that the present Hindu Succession Act has made the daughter a member of the co-parcenary. It also gives daughters an equal share in agricultural property. These are significant advancements towards gender equality among Hindus. Empowerment of women, leading to an equal social status in society hinges, among other things, on their right to hold and inherit property.
The Property Rights of Muslim women

Indian Muslims broadly belong to two schools of thought in Islamic Law: the Sunnite and the Shiite. Under the Sunnite School which is the preponderant school in India, there are four sub categories; Hanafis, Shafis, Malikis and Hanbalis. The vast majority of Muslims in India, Pakistan, Afghanistan, and Turkey are Hanafis. The Shiites are divided into a large number of sub schools, the two most important of which, so far as India is concerned are the Ismailis and the Ithna Asharis, but they form a smaller section of the Indian Muslim population. The usual practice in this subcontinent is to use the terms ‘Sunni’ law or ‘Shia’ law. Strictly speaking, this is inexact; by the former is meant the Hanafi Law and by the latter, the Ithna Ashari school. Till 1937 Muslims in India were governed by customary law, which were highly unjust. After the Shariat Act of 1937 Muslims in India came to be governed in their personal matters, including property rights, by Muslim personal law as it “restored” personal law in preference to custom. However this did not mean either “reform” or “codification” of Muslim law and till date both these have been resisted by the patriarchal forced in the garb of religion. Broadly
the Islamic scheme of inheritance discloses three features, which are markedly different from the Hindu law of inheritance:

i. The Koran gives specific shares to certain individuals;

ii. The residue goes to the agnatic heirs and failing them to uterine heirs; and

iii. Bequests are limited to one-third of the estate, i.e., maximum one-third share in the property can be willed away by the owner.

The main principles of Islamic inheritance law which mark an advance vis-à-vis the pre-Islamic law of inheritance, which have significant bearing on the property rights of women, are:

i. The husband or wife was made an heir,

ii. The females and cognates were made competent to inherit,

iii. The parents and ascendants were given the right to inherit even when there were male descendants, and

iv. As a general rule, a female was given one half the share of a male. The newly created heirs were mostly females; but where a female is equal to the customary
heir in proximity to the deceased, the Islamic law gives her half the share of a male. For example, if a daughter co-exists with the son, or a sister with a brother, the female gets one share and the male two shares.

The doctrine of survivorship followed in Hindu law is not known to Mohammedan law; the share of each Muslim heir is definite and known before actual partition. Rights of inheritance arise only on the death of a certain person. Hence the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims dies, the order of deaths being the sole guide. The relinquishment of a contingent right of inheritance by a Muslim heir is generally void in Mohammedan law, but if it is supported by good consideration and forms part of a valid family settlement, it is perfectly valid. The rule of representation is not recognized, for example, if A dies leaving a son B and a predeceased son’s son C, the rule is that the nearer excludes the more remote and, there being no representation, C is entirely excluded by B. There is however no difference between
movable property and immovable property. Some of the features of the Hanafi School are being pointed out here to get a glimpse into the broad structure of the property rights of Muslim women in India. The Hanafi jurists divide heirs into seven categories; three principal and four subsidiaries. The 3 principal heirs are Koranic heirs, Agnatic heirs (through male lineage) and Uterine heirs. The 4 subsidiaries are the successor by contract, the acknowledged relative, the sole legatee and the state by escheat.

The following 12 heirs constitute Class I heirs (Koranic Heirs), Class II heirs (Agnatic heirs) & Class III heirs (Uterine heirs)

1. Class I heirs (Koranic Heirs) are as:

   a. Heirs by Affinity - Husband and Wife,
   b. Blood Relations - Father, True Grandfather (howsoever high), Mother, True Grandmother (howsoever high), Daughter, Son’s Daughter (howsoever low), Full sister, consanguine sister, uterine brother, and uterine sister.
Rules of Exclusion: The husband and wife are primary heirs and cannot be excluded by anyone, but they also don’t exclude anyone either. Law fixes the share of the spouses; if they exist they reduce the residue which may be taken by the Agnatic or Uterine heirs, but they do not exclude either wholly or partly any heir. The father does not affect the share of any Koranic heir except the sisters (full, consanguine or uterine) all of whom he excludes.

The mother excludes the grandmother, and the nearer grandmother excludes the more remote. The mother’s share is affected by the presence of children or two or more brothers or sisters. Her share is also greatly affected by the existence of the husband or wife and the father. In the case of a daughter she is the primary heir. She partially excludes lower son’s daughters, but one daughter or son’s daughter does not entirely exclude a lower son’s daughter. As far as the sisters are concerned, one full sister does not exclude the consanguine sister, two full sisters however exclude the consanguine sister. The uterine brother or sister is not excluded by the full or consanguine brother or sister. Another rule that requires consideration is that, ‘a person though
excluded himself, may exclude others.’ For example, in a case where the survivors are the mother, father, and two sisters: the two sisters are excluded by the father; and yet they reduce the mother’s share to 1/6th.

2. Class II heir (Agnatic heir):

Group I (Males) – the agnate in his own right,

Group II (females) – the agnate in the right of another,

Group III – the agnate with another. The first group comprises all male agnates; it includes the son, the son’s son, the father, the brother, the paternal uncle and his son and so forth. These in pre-Islamic law were the most important heirs; to a large extent they retain, in Hanafi law, their primacy, influence and power. The second group contains four specified female agnates, when they co-exist with male relatives of the same degree, namely, daughter (with son), and son’s daughter howsoever low with equal son’s son howsoever low, full sister with full
brother and consanguine sister with consanguine brother. The third group comprises the case of the full sister and consanguine sister. For example if there are two daughters and two sisters, here the daughter is preferred as a descendant to the sister who is a collateral; thus the daughter would be placed in Class I and she would be allotted the Koranic share and the residue would be given to the sister as a member of Class II. Under this system the rule that is followed is first the descendants, then the ascendants and finally the collaterals. The agnatic heirs come into picture when there are no Koranic heirs or some residue is left after having dealt with the Koranic heirs.

3. Class III (Uterine heir):

This class is constituted mainly by the female agnates and cognates. Classification is Group I descendants, which are daughter’s children and their descendants and children of son’s daughters howsoever low and their descendants, Group II-ascendants, which are false grandfathers
howsoever high and false grandmothers
howsoever high, Group III- collaterals,
which are descendants of parents and
descendants of grandparents true as well as
false. Members of this class succeed only
in the absence of members of Class I and
Class II. They also succeed if the only
surviving heir of Class I is the husband or
the widow of the deceased.

Property rights through marriage: The Supreme
Court of India has laid down in Kapore Chand v.
Kadar Unnissa\textsuperscript{11} that the \textit{Mahr} (dower) ranks as a
debt and the widow is entitled, along with the
other creditors of her deceased husband, to have it
satisfied out of his estate. Her right, however, is
the right of an unsecured creditor; she is not
entitled to a charge on the husband’s property
unless there is an agreement. The Supreme Court has
laid down that the widow has no priority over other
creditors, but that \textit{Mahr} as debt has priority over
the other heir’s claims. This right is known as the
widow’s right of retention. Will: There is a
provision against destitution of the family members
in the Islamic law in that it is clearly provided
that a Muslim cannot bequeath more than one third
\textsuperscript{11} (1950) SCR 74
of his property. However if he registers his existing marriage under the provisions of the Special Marriage Act, 1954 he has all the powers of a testator under the Indian Succession Act, 1925.
The Property Rights of Christian Women

The laws of succession for Christians and Parsis are laid down in the Indian Succession Act, 1925. Sections 31 to 49 deal with Christian Succession.

The Indian Christian widow’s right is not an exclusive right and gets curtailed as the other heirs step in. Only if the intestate has left none who are of kindred to him, the whole of his property would belong to his widow. Where the intestate has left a widow and any lineal descendants, one third of his property devolves to his widow and the remaining two thirds go to his lineal descendants. If he has left no lineal descendents but has left persons who are kindred to him, one half of his property devolves to his widow and the remaining half goes to those who are of kindred to him. Another anomaly is a peculiar feature that the widow of a pre-deceased son gets no share, but the children whether born or in the womb at the time of the death would be entitled to equal shares. Where there are no lineal descendants, after having deducted the widow’s share, the remaining property devolves to the father of the intestate in the first instance. Only
in case the father of the intestate is dead but mother and brothers and sisters are alive, they all would share equally. If the intestate’s father has died, but his mother is living and there are no surviving brothers, sisters, nieces, or nephews, then, the entire property would belong to the mother. A celebrated litigation and judgment around the Christian women’s property rights is **Mary Roy v. State of Kerala & others**\(^{12}\) in which provisions of the Travancore Christian Succession Act, 1992 were challenged as they severely restricted the property rights of women belonging to the Indian Christian community in a part of south India formerly called Travancore. The said law laid down that for succession to the immovable property of the intestate is concerned, a widow or mother shall have only life interest terminable at death or on remarriage and that a daughter will be entitled to one-fourth the value of the share of the son or Rs 5000 whichever is less and even to this amount she will not be entitled on intestacy, if streedhan (woman’s property given to her at the time of her marriage) was provided or promised to her by the intestate or in the lifetime of the intestate, either by his wife or husband or after the death of

\(^{12}\) 1986 AIR SC 1011, 1986 SCR (1) 371
such wife or husband, by his or her heirs. These provisions were challenged as unconstitutional and void on account of discrimination and being violative of right to equality under Article 14 of the Constitution. The Writ Petition was allowed by the Supreme Court and the curtailment of the property rights of Christian women in former Travancore law was held to be invalid on the ground that the said state Act stood repealed by the subsequent Indian Succession Act of 1925 which governs all Indian Christians. However, the provisions were not struck down as unconstitutional since the Court felt that it was unnecessary to go into the constitutionality issue of the provisions as Indian Succession Act.
Sections 50 to 56 of Indian Succession Act, 1925 govern succession for Parsis. Prima facie the property rights of the Parsis are quite gender just. Basically, a Parsi widow and all her children, both sons and daughters, irrespective of their marital status, get equal shares in the property of the intestate while each parent, both father and mother, get half of the share of each child.

However, on a closer look there are anomalies, for example, a widow of a predeceased son who died issue-less, gets no share at all. It is clear from the foregoing that though the property rights of Indian women have grown better with advance of time, they are far from totally equal and fair. There is much that remains in Indian women’s property rights that can be struck down as unconstitutional.

The response of the judiciary has been ambivalent. On one hand, the Supreme Court of India has in a number of cases held that personal laws of parties are not susceptible to fundamental rights under the Constitution and therefore they cannot be challenged on the ground that they are in violation
of fundamental rights especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India. On the other hand, in a number of other cases the Supreme Court has tested personal laws on the touchstone of fundamental rights and read down the laws or interpreted them so as to make them consistent with fundamental rights. Though in these decisions the personal laws under challenge may not have been struck down, but the fact that the decisions were on merits go to show that though enactment of a uniform civil code may require legislative intervention but the discriminatory aspects of personal laws can definitely be challenged as being violative of the fundamental rights of women under Articles 14 and 15 and can be struck down.

The Supreme Court in *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*\(^\text{13}\) has held that personal laws, to the extent that they are in violation of the fundamental rights, are void.

Apart from the ongoing struggle for a uniform civil code in accordance with the Constitutional framework, today the India women are fighting for rights in marital property, denied uniformly to

\(^{13}\) (1996 8 SCC 525)
them across all religious boundaries. There is also a significant movement in some of the hill states, towards community ownership of land by women by creating group titles and promoting group production and management of land and natural resources by landless women for joint cultivation or related farm activity. Land rights would be linked directly to residence and working on land under this approach being lobbied for under the Beijing Platform for Action. However, the challenges are many: social acceptance of women’s rights in property leads them. In a country where women continue to be property themselves, the true empowerment seems to be a farce.
The Role of Law in Empowering Women in India

Chapter 6
Domestic Violence Act, 2005 & Women Empowerment
Domestic Violence Act 2005 and Women Empowerment

Over the last two decades, domestic violence has emerged as one of the most serious problems faced by women in India. They are experiencing physical and psychological violence not only from their in-laws but also often from their intimate partner.

The Protection of Women from Domestic Violence Act, 2005 was brought into force by the Indian Government from October 26, 2006. The Act was passed by the parliament in August, 2005 and assented to by the President of India on 13th September, 2005. Domestic Violence Act 2005 is the first significant attempt in India to recognise domestic abuse as a punishable offence, to extend its provisions to those in live-in relationships, and to provide for emergency relief for the victims, in addition to legal recourse.

The Domestic Violence has been made wide enough to encompass every possibility of abuse/harm to the woman. It has been welcomed by all since it provides for the first time civil remedies to women by way of protection orders, residence orders and orders for monetary relief in the event of a
domestic violence incident. The Act is basically meant to provide protection to the wife or female live in partner from violence at the hands of the husband of male live-in-partner or his relatives. Domestic violence under the Act includes actual abuse or the threat of abuse, whether physical sexual, verbal emotional or economic. Harassment by way of unlawful dowry demands to the women victim, or her relatives would also be covered under the definition of domestic violence.

Protection from Domestic Violence under Earlier Legislations

The passing of Domestic Violence Act is an important marker in the history of the women movement in India. Prior to this Act, domestic violence survivors were hampered by reluctance to enforce domestic violence as a criminal offence. The following civil and criminal laws that already exist can be used to resist domestic violence. Married women facing domestic violence can take recourse to civil law and apply for maintenance and divorce. It should be remembered that civil law provisions for each community are different. Although criminal proceedings and injunctions were available under the Indian Penal Code and existing
legislation, domestic violence was regarded as a private family matter and police and courts were generally unwilling to take action against the offenders.

Protection under Criminal Law

Till 1983, there were no specific legal provisions pertaining to violence within home. Husbands could be convicted under the general provisions of murder, abetment to suicide, causing hurt and wrongful confinement.

Under Section 304B, Indian Penal Code, where the death of a woman is caused by burns or bodily injuries or occurs due to reasons other than normal circumstances within seven years of her marriage and if it is established that the wife is subjected to cruelty by her husband or his relatives, the death is termed as ‘dowry death’. The husband or relatives who subject the wife to cruelty is/are presumed to have caused the dowry death and will have to prove that the death was not a result of the cruelty.

According to Section 305, Indian Penal Code, often victims of domestic violence, especially brides harassed for dowry, are driven to commit
suicide. Abetment of suicide of a delirious person is an offence punishable with death or life imprisonment. Abetment of suicide is also an offence punishable with ten years imprisonment.

Various forms of domestic violence like female infanticide, forcing the wife to terminate her pregnancy had already been recognized under Sections 313 to 316 of Indian Penal Code.

Causing bodily hurt is a common form of domestic violence punishable under Indian Penal Code. The Indian Penal Code, 1860 defines hurt as causing “bodily pain, disease, pain or infirmity to any person”. A hurt may be ‘grievous’ if it results in serious injury such as a fracture, loss of hearing or sight, damage to any member or joint, etc.

The Indian Penal Code makes it an offence to voluntarily cause hurt or grievous hurt. The Act provides punishment for voluntarily causing of grievous hurt by dangerous weapons and voluntarily

---

1 Section 306, Indian Penal Code, 1860
2 Section 319, Indian Penal Code, 1860
3 Section 320, Indian Penal Code, 1860
4 Section 321
5 Section 322 & Section 323
6 Section 326
causing hurt to extort property\textsuperscript{7}. Another common
form of domestic violence is in the form of the
wrongful restraint\textsuperscript{8} or confinement\textsuperscript{9} of the spouse
within her matrimonial home.

In 1983, matrimonial cruelty was introduced as
an offence under the Indian Penal Code by inserting
Section 498A. Cruelty was defined as “any willful
conduct which is of such a nature as is likely to
drive the woman to commit suicide or to cause grave
injury or danger to life, limb or health (whether
mental or physical) of the woman”. It includes
harassment of the woman in connection with demands
for property and the like.

\textbf{Section 174, Criminal Procedure Code (Cr.P.C.)}
This was amended by the Criminal Law Act, 1983, to
provide for investigation by the police in cases of
suicide committed by women or death of women
occurring in suspicious circumstances within seven
years of marriage.

\textbf{Section 125 of Criminal Procedure Code} enables
women to file for maintenance and to get immediate

\textsuperscript{7} Section 327
\textsuperscript{8} Section 349
\textsuperscript{9} Section 340
relief. Muslim women also can use this provision until they are divorced.

In Indian Evidence Act Section 113A and 133B, These were inserted to emphasize that if a woman commits suicide within seven years of her marriage due to ‘cruelty’ by her husband or his relatives, the court may presume that such suicide had been abetted by her husband or by his relatives.

The Dowry Prohibition (Amendment) Act, 1986

Dowry death or related harassment is a unique kind of crime practiced in the Indian subcontinent. A legal ban was put on the practice of dowry way back in 1961 (Dowry Prohibition Act, 1961). The Act was amended in 1984 and then in 1986 to make it more stringent.

The Commission of Sati Prevention Act, 1987

‘Sati’ means the burning or burying alive of a widow along with the body of her deceased husband or any other relative, or with any article, object or thing associated with the husband or relative. The practice of ‘sati’ was declared unlawful during the colonial period itself. No Act, however, was drafted in post-colonial India to prohibit the occurrence of sati. It was only after the shocking
incidence of sati in Rajasthan in 1987 that a law was enacted in 1987; that Act declares the observance, support, justification or propagation of sati as criminal activity.

**The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994**

It is not only that women face violence during their lifetime but also even before birth. Female foeticide using the Pre-Natal Diagnostic Technique is widely prevalent in India. A law was drafted for the purpose of curbing female foeticide unless medically required.

**Protection from Domestic Violence under the Civil Laws**

In India the problem of domestic violence has always been looked upon from the perspective of both criminal and civil laws. Under the Civil Laws several provisions are available to deal with different types of domestic violence.

**Dissolution of Muslim Marriages Act, 1939** enumerates cruelty as one of the ground for divorce. Cruelty under this Act includes:
i. Habitually assaulting the wife or making her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment;

ii. Associating with women of ill-repute or leading an infamous life;

iii. Attempting to force the wife to lead an immoral life;

iv. Disposing of the wife’s property or preventing her from exercising her legal rights over it;

v. Obstructing the wife in the observance of her religion.

**The Hindu Marriage Act, 1955**

Even this Act includes ‘cruelty’ as a ground for divorce\(^{10}\) as well as judicial separation\(^{11}\). However, the term ‘cruelty’ is not defined in the Hindu Marriage Act. The Apex Court and various High Courts have explained and determined the act of cruelty which covers the acts of physical as well as mental cruelty in number of cases.

\(^{10}\) Section 13

\(^{11}\) Section 10
Other Matrimonial Laws

The Special Marriage Act, 1954, the Indian Divorce Act, and the Parsi Marriage and Divorce Act all allow ‘cruelty’ as a ground for divorce. However, all these laws are not sufficient as they do not elaborate the nature and extent of domestic violence.

Protection of Women from Domestic Violence Act, 2005

International treaties, agreements, and reports have played an important role in passing of this Act. The major forces behind this Act is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 1979, the Mexican Plan of Action in 1975, the Nairobi Forward Looking Strategies in 1985, the Beijing Declaration and Platform for Action in 1995, the Vienna Accord of 1994 and reports by the Special Report on Violence Against Women.

While most of the Western countries passed laws against domestic violence in the 1970s, in India only violence in matrimonial relationship, particularly dowry related violence, remained the focus of the women’s movements as well as that of
legislative institutions. It was since the 1990s that efforts were being made to draft a bill on domestic violence exclusively.

In the light of the “Government of India Report on Platform for Action: Ten Years after Beijing” and the crime scenario prevailing in the country the need was felt for an exclusive law on domestic violence. Initiatives in this direction began with the collaborative efforts of the UNIFEM and Lawyers’ Collective Rights Initiative (LCWRI). A delegation of representatives from women’s groups and State Women’s Commissions meet then HRD Minister regarding the need to enact a law on domestic violence. It finally resulted in the drafting of the Bill on domestic violence, that is, “Protection of Women from Domestic Violence the Act 2005”, which was passed by Parliament in September 2005 and came into force in October 2006.

Objectives of the Act

This law has been primarily enacted to provide protection to the wife or female live-in partners from violence at the hands of husband or male live in partners or his relatives, the law also extends protection to women who are sisters, widows or mothers. The salient features of this Act are:
Chapter 6
The Role of Law in Empowering Women in India

The Act seeks to protect women who are or have been in relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or relationship in the nature of marriage or adoption: in addition relationship with family members living together as a joint family is also included.

Domestic violence includes actual abuse or threat of abuse that is physical, sexual, verbal, emotional and economic.

One of the most important feature of the Act is woman’s right to secure housing.

The other important relief under the Act is the power of the court to pass protection orders that prevent abusers from aiding or committing an act of domestic violence.

The Act provides for appointment of protection officers. The Act defines domestic abuse as physical, sexual, emotional, verbal, psychological and economic abuse and threats of the same.

**Primary beneficiaries of the act**

Women and children are the primary beneficiaries under the Act. The provision for
The Role of Law in Empowering Women in India

Protection of women is given under section 2(a) of the Act. It will help any woman who is or has been in a domestic relationship with the respondent. This section empowers the woman to file a case against a person with whom she is having a domestic relationship in a shared household, and who has subjected her to domestic violence. Children too can file a case against parent or parents who are torturing and tormenting them.

Main features of the act

i. **Definition of Domestic Violence** - It includes physical, sexual, verbal, emotional and economic abuse that can harm, cause injury to, and endanger the life, limb, health, safety, or wellbeing, either mental or physical of the aggrieved person.

ii. **Definition of aggrieved person** - covers not just the wife but a woman who is the sexual partner of the male irrespective of whether she is his wife or not.

iii. Any woman residing in the house, mother, widowed relative, daughter who is related in some way to the respondent is also covered by the Act.
iv. Information regarding an act of domestic violence can be lodged by any person who has reason to believe that such an act has been or is being committed and not necessarily by the aggrieved person.

v. Magistrate has the powers to permit the aggrieved woman to stay in her place of bode and cannot be evicted by the husband even if she has no legal claim or share in the property.

vi. Allows magistrates to impose monetary relief and monthly payments of maintenance.

vii. Penalty of breach of protection order or an interim protection order is punishable with imprisonment of a period which may extend to one year or with fine which may extend upto Rs.20,000 or both.

viii. Act ensures speedy justice as the court has to start proceedings and have the first hearing within 3 days of the complaint being filed.

ix. Every case has to be disposed of within a period of 60 days of the first hearing.
The major rights of a woman under the Act

The law is so liberal and forward-looking that it recognises a woman’s right to reside in the shared household with her husband or a partner even when a dispute is on. Thus, it legislates against husbands who throw their wives out of the house when there is a dispute. Such an action by a husband will now be deemed illegal, not merely unethical.

Even if she is a victim of domestic violence, she retains right to live in 'shared homes' that is, a home she shares with the abusive partner. Section 17 of the law, which gives all married women or female partners in a domestic relationship the right to reside in a home that is known in legal terms as the shared household, applies whether or not she has any right, title or beneficial interest in the same.

The law provides that if an abused woman requires, she has to be provided alternate accommodation and in such situations, the accommodation and her maintenance has to be paid for by her husband or partner.
The law, significantly, recognises the need of the abused woman for emergency relief, which will have to be provided by the husband. A woman cannot be stopped from making a complaint/application alleging domestic violence. She has the right to the services and assistance of the Protection Officer and Service Providers, stipulated under the provisions of the law.

A woman who is the victim of domestic violence will have the right to the services of the police, shelter homes and medical establishments. She also has the right to simultaneously file her own complaint under Section 498A of the Indian Penal Code.

Sections 18 to 23 provide a large number of options for legal redressal. She can claim through the courts Protection Orders, Residence Orders, Monetary Relief, Custody Order for her children, Compensation Order and Interim/Ex parte Orders. If a husband violates any of the above rights of the aggrieved woman, it will be deemed a punishable offence. Charges under Section 498A can be framed by the magistrate, in addition to the charges under this Act. Further, the offences are cognizable and non-bailable. Punishment for violation of the
rights enumerated above could extend to one year’s imprisonment and/or a maximum fine of Rs. 20,000.

An important aspect of this law is that it aims to ensure that an aggrieved wife, who takes recourse to the law, cannot be harassed for doing so. Thus, if a husband is accused of any of the above forms of violence, he cannot during the pending disposal of the case prohibit/restrict the wife’s continued access to resources/facilities to which she is entitled by virtue of the domestic relationship, including access to the shared household. In short, a husband cannot take away her jewelry or money, or throw her out of the house while they are having a dispute.

If a husband violates any of the above rights of the aggrieved woman, it will be deemed a punishable offence. Charges under Section 498A can be framed by the magistrate, in addition to the charges under this Act. Further, the offences are cognisable and non-bailable. Punishment for violation of the rights enumerated above could extend to one year’s imprisonment and/or a maximum fine of Rs. 20,000.
The Supreme Court in the case of *S.R. Batra v. Taruna Batra*\(^{12}\), the first judgment on this Act said, “Section 2(s) of the Act which gives right of residence to a married woman in a shared household is not properly worded and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which is not lead to chaos in society.” The Bench, comprising Justices S. B. Sinha and Markandey Katju, in the judgment had ruled that “as regards section 17(1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and a shared household would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member.”

In *Vimalben Ajitbhai Patel v Vatslaben Ashokbhai Patel & Ors*\(^{13}\) the Supreme Court recognized the Right, of a woman in relationship with a man, to Reside in shared household. The Act clearly enumerates this right under Section 17.

(1) Notwithstanding anything contained in any other law for the time being in force, every woman

---
\(^{12}\) 2007 (3) SCC 169
\(^{13}\) 2008(2) AWC 1636 (SC)
in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

In D. Velusamy v. D. Patchaiammal\textsuperscript{14}, this Court considered the expression “domestic relationship” under Section 2(f) of the Act 2005 placing reliance on earlier judgment in Savitaben Somabhai Bhatiya v. State of Gujarat & Ors.\textsuperscript{15} and held that relationship “in the nature of marriage” is akin to a common law marriage. However, the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage.

In Chanmuniya v. Virendra Kumar Singh Kushwaha\textsuperscript{16} the Supreme Court amplified the term ‘domestic relationship’ so as to take it outside the confines of a marital relationship, and even

\textsuperscript{14} (2010) 10 SCC 469
\textsuperscript{15} (2005) 3 SCC 636
\textsuperscript{16} (2011) 1 SCC 141
includes live-in relationships in the nature of marriage within the definition of ‘domestic relationship’ under Section 2(f) of the Act. Therefore, women in live-in relationships are also entitled to all the reliefs given in the said Act.

The Court held that, “We are thus of the opinion that if the abovementioned monetary relief and compensation can be awarded in cases of live-in relationships under the Act of 2005, they should also be allowed in a proceedings under Section 125 of Cr.P.C. It seems to us that the same view is confirmed by Section 26 of the Protection of Women from Domestic Violence Act, 2005. We believe that in light of the constant change in social attitudes and values, which have been incorporated into the forward-looking Act of 2005, the same needs to be considered with respect to Section 125 of Cr.P.C. and accordingly, a broad interpretation of the same should be taken.

We are of the opinion that a broad and expansive interpretation should be given to the term ‘wife’ to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time, and strict proof of marriage should not be a pre-
condition for maintenance under Section 125 of the Cr.P.C, so as to fulfill the true spirit and essence of the beneficial provision of maintenance under Section 125. We also believe that such an interpretation would be a just application of the principles enshrined in the Preamble to our Constitution, namely, social justice and upholding the dignity of the individual.”

In the most recent judgment in V. D. Bhanot v. Savita Bhanot\(^\text{17}\), the Apex Court held that, “an estranged wife has a right to stay in her husband’s house and is entitled to maintenance from him under the Domestic Violence Act.” A Bench of Justices Altamas Kabir and J. Chelameshwar passed the ruling while dealing with a matrimonial dispute of a couple who are senior citizens of the Capital. The Supreme Court further said that the husband shall provide a suitable portion of his residence to the wife for his living together with all necessary amenities to make her stay habitable.

All the earlier legal remedies concentrated on violence in the matrimonial family. But the experience gained through women’s narration is valuable since so many women have also reported

\(^{17}\) AIR 2012 S.C. 265
violence from the natal family and from men with whom they have a live-in relationship in the nature of marriage. This Act extends protection to women in all these relationships.

Another important contribution of this Act is that it has made it difficult to render women shelter-less or throw them out of the home. It also makes provisions to put in place the necessary structures that would make it easy to access and implement. It provides immediate though temporary protection from domestic violence. There is a provision to obtain protection orders if the woman applies for relief. This is a civil remedy with the provision to combine a criminal remedy if needed and is applicable to all women irrespective of religion. Only Law or making an Act to protect women from domestic violence can’t stop women from violence, the understanding and change in social attitude in persons will change domestic violence on women, but not an Act/Law. Law can help as a preventive. But the change in attitude of all relations will no doubt make it a success. Otherwise law is blind and helpless.
The Role of Law in Empowering Women in India

Chapter 7
Women Empowerment under Other Legislations
Women Empowerment under Other Legislations

The intensity of change witnessed during recent years in the sphere of women and the law is not an accident or a sporadic occurrence. It seems to be the result of certain discernible trends. There is, in the first place, an increased awareness in the society of the injustice done to women in the past. Secondly, the rights and the position of women, in several of their facets, have received close attention at the hands of the Law Commission of India, whose contributions on the subject are of permanent value, thirdly the judicial approach on various issues concerning women has, by the large, been progressive and liberal. World-wide movement for women’s freedom has not left India untouched even though the form which the movement assumed in India may not be identical with the form assumed by it elsewhere. Even here there have been social movements which have insisted upon changes in our customs and beliefs.

The Constitution of India recognises equality rights of women and allows the state to take special measures for women as well as for children to realise the guarantee of equality. After the Constitution came in to effect, various gender
specific laws prohibiting gender discrimination based in the home and in the public sphere were passed. The empowerment of women is possible only when the sex based discrimination would be removed and equal rights as well as equal opportunity would be provided to women to bring them at par with their counterpart.

After independence numerous legislations have been passed, they can be classified into women specific laws and women related laws. But before that, a brief appraisal of pre-independence legislations for women’s emancipation is needed.

The Britishers also took notice of various problems like Sati, child marriages and banding of widows, etc., which were haunting women at that time. Despite of Britishers’ hesitation to touch upon personal laws of native Indians, various legislative initiatives and women’s reforms resulted from the efforts by social reformers who took up the cause of women’s oppression with passion. They did a commendable job of taking up the cause of women’s freedom from traditional modes of bondage. Indian society at the time was a completely oppressive one as far as women were concerned. There were myriad issues faced by Indian
women for centuries and they served to keep the women in a submissive role. Various outdated and harmful practices such as child marriage, Sati, female infanticide, polygamy, lack of women’s education and many more such evils were rampant in society and required an urgent redressal. It was with an aim of resolving these various issues that the campaign for reforms was undertaken. The various issues that were sought to be reformed covered the entire gamut of social evils that women were subject to. Issues like infanticide, child marriage as well as raising the marriageable age of women, widow remarriage, women’s education and Sati were some of the burning issues that were taken up at the time. A major surge in reform activities came about with the coming of the British in India as they were able to provide a boost to the works of the Indian reformers who were championing women’s cause.

Across India, there is a long list of reformers who undertook major efforts on women’s behalf. Reformers were found throughout India and among all communities. They addressed a number of issues, most of them relating to marriage and the importance of female education so that they can be treated at par with men. What is especially
interesting about these nineteenth century reformers is their activism. Discussing various laws relating to women would be incomplete without mentioning these reformers and activists.

In Bengal, Ishwar Chandra Vidyasagar championed female education and led the campaign to legalize widow remarriage, and Keshab Chandra Sen, a leader of the Brahmo Samaj, sought to bring women into new roles through schools, prayer meetings, and experiments in living. By the turn of the century, Swami Vivekanananda, the leader of an activist order of Hindu monasticism, was arguing that women could become a powerful regenerative force. In North India, Swami Dayanand Saraswati, the founder of the Arya Samaj, encouraged female education and condemned customs he regarded as degrading to women. These included marriages between partners of unequal ages, dowry, and polygamy. At the same time, Rai Salig Ram (also known as Huzur Maharaj), a follower of the Radhaswami faith, advocated female emancipation in his volumes of prose, ‘Prem Patra’.

Among the Muslim social reformers, mention must be made of Khwaja Altaf Husain Hali and Shaikh Muhammad Abdullah who introduced education for
girls. In western India, Mahadev Govind Ranade founded the National Social Conference to focus attention on social reforms. At the same time, the Parsee journalist Behramji Malabari captured the attention of the British reading public with his articles in ‘The Times’ on the evils of child marriage and the tragedy of enforced widowhood for young women. Dhondo Keshav Karve offered a practical solution with his institutions in Pune to educate young widows to become teachers in girls’ schools. In South India, R. Venkata Ratnam Naidu opposed the Devadasi system while Virasalingam Pantulu worked for marriage reform. Both sought to increase opportunities for female education.

Thus mentioned were some of the major social reformers in different parts of India who played a rather important role in bringing about awareness regarding the disparaging condition of women in society. It was this increased awareness and constant campaign for social change which ultimately led to a change in women’s position in India. The social reformers’ ideas on gender were rooted in personal experience, and during their lives they attempted to change those with whom they lived and worked. They were not simply reacting to
British pressure - these issues were very real and they responded to them with passion.

It was the philosophy of the reformers that where large communities are concerned, legislation is the only effective means of accomplishing social reform. There are certain matters of a serious nature in which considerations of humanity and the inalienable rights of a human being and that human being call for the immediate intervention of the Legislature. These reformers were the first being vocal and expressive about Equality of Status and of Rights between the Sexes.

**Pre-Independence Legislative Efforts**

Here is the brief account of the legislative efforts during colonial period:

The very first instance of legislation in favour of women was the Regulation No. XXI of 1795 and Regulation No. III of 1804 to declare the practice of infanticide illegal.

After that “Bengal Sati Regulation XVII of 1829” declared the practice of sati or self-immolation of widows as illegal and punishable by the Criminal Courts as culpable homicide.
Sati, self-immolation or self-sacrifice by a lady on the pyre of her husband’s dead body, was the most prominent discriminatory practice prevalent in India during British regime. Although the English East India Company viewed sati as a disturbing religious practice, they permitted it so as not to antagonize Hindu subjects. The debate over sati escalated when the East India Company, under pressure from evangelical groups in Britain, legalized sati in 1813 if the widow acted voluntarily. This legislation triggered intense debate in India and Britain both for and against sati. British missionaries as well as Indian advocates and opponents of sati sought sanction for their opposing positions in Hindu scriptural texts. Emboldened by support from Indians such as Ram Mohan Roy and influenced by the Utilitarian philosophy which sought the greatest good for the greatest number of people through legislation, Lord William Bentinck, governor-general of the Company’s possessions in India from 1828 to 1835, promulgated legislation criminalizing sati in 1829. Controversy persisted during the 1830 because of continuing episodes of sati. It proved difficult to enforce the prohibition in a climate where cremation took
place usually within 24 hours of death and British officials were widely dispersed.

The next women-centric legislation passed during British regime was the **Widow Remarriage Act, 1856**. Ishwar Chandra Vidyasagar devoted his life to improving the status of Hindu widows and encouraging remarriage. Social reformers and activists rallied extensively against the inhumane situation of widows and the legalizing of widow remarriage in modern India. Modern India saw an increased awareness about the plight of widows and the deplorable conditions of their existence. There were a number of religious and social reformers who cried for a betterment of their conditions and demanded that widow remarriage should be legalized. They pressed on and urged the British to pass legislation that would enable Hindu widows to remarry. To support this demand, Ishwar Chandra collected almost 1,000 signatures and sent this petition to the Indian Legislative Council. The Council received thousands of signatures for and against this measure but the members finally decided to support the “enlightened minority”. The Hindu Widow Remarriage Act was passed in 1856.
However, the Remarriage Act did not change the status of widows. Frequently blamed for the husband’s death, the high-caste widow was required to give up her jewellery and subsist on simple food. Young widows were preyed upon by men who would make them their mistresses or carry them away to urban brothels. Thus the widow’s situation was an extremely deplorable one, and even the passage of the remarriage act, despite the best intentions, did little to alleviate her situation.

Though immense efforts were put in for the purpose of widow remarriage it did not receive the approval of society, polygamy was not abolished, and the battle for female education had only begun in modern India. From the perspective of women’s rights, the new law often proved harmful. Remarried women from castes that had traditionally practiced remarriage were often deprived of their rightful inheritance and those castes were derogated as inferior. Widow celibacy was lauded by the elite as a hallmark of respectability. Moreover, the same colonial rulers who were critical of Indian customs were extremely hesitant in helping the reformers and bringing about social change. Thus, the situation of widow remarriage in modern India, though considerably better than in medieval times,
was still quite bad and there was still a long way to go for widow remarriage to become an accepted reality.

In 1945-47, a sample survey was taken by Laxmi Devi, of 805 Hindu women. Out of these 111 were widows with an average age of 22. Only two had remarried. Again in the last sample survey of middle class women taken in 1965-66, there were 51 widows with a mean age of 26 years. One was remarried.¹

British liberal socio-religious reform therefore came to a halt for more than three decades—essentially from the East India Company’s Hindu Widow’s Remarriage Act of 1856 to the crown’s timid Age of Consent Act of 1891, which merely raised the age of statutory rape for “consenting” Indian brides from 10 years to 12.

The Age of Consent Act, 1891 was the legislation introduced in British India to raise the age of consent of consummation from ten to twelve years. While an 1880 case in a Bombay high court by a child-bride, Rukhmabai, renewed discussion of such a law, the death of an eleven-year-old Bengali girl, Phulomnee, due to forceful

¹ Crime Atrocities and Violence against women and related laws and justice, Laxmi Devi; 1998
intercourse by her 35 year old husband in 1889, necessitated intervention by the British. The act was passed in 1891. It received support from Indian reformers such as Behramji Malabari and women social organisations and was opposed by Hindu nationalists including Bal Gangadhar Tilak. The law was never seriously implemented and it is argued that the real effect of the law was reassertion of Hindu patriarchal control over domestic issues as a nationalistic cause.

Afterwards, Indian Penal Code of 1860 provided for punishment for various offences against women like abduction, rape, adultery, bigamy, remarriage during the life time of a wife, cruelty and cheating against women, etc.

The Converts Marriage Dissolution Act, 1866 provided for dissolution of a marriage where one of the parties has deserted or been repudiated by other on the ground on the former’s conversion to the religion of Christianity.

Indian Divorce Act, 1869 empowered a wife to give petition for dissolution on the grounds of remarriage of husband, change in husband’s religion and in case where husband is guilty of incestuous
adultery bigamy with adultery, rape, sodomy or beastiality, adultery coupled with cruelty.

In earlier Indian society remarriage of Hindu widow was prohibited by custom. Hindu Widows Remarriage Act, 1856 made the remarriage and inheritance of Hindu widows lawful.

To ensure economic independence to a certain extent, Married Women’s Property Act was passed in 1874. It declared that the wages and earnings of any married women and any property acquired by her own self through the employment of her arts or skills and all savings and investments there of shall be her separate property. The Act further guarantees that a married woman may maintain a suit in her own name in respect of her own property. The importance of this Act is fully realised when we bear in mind that joint family with joint property was the norm in those days. It also created a natural trust in favour of the assured’s wife and children, in case the husband was insured.

The Power of Attorney Act, 1882 empowered a woman to appoint an Attorney on her behalf, earlier she was not so.
Civil Procedure Code, 1908 prohibits arrest or detention of women in civil prison in execution of a decree for the payment of money.

Social reformers including women expressed their strong dissent against child marriage. Due to this pressure the Child Marriage Restraint Act was passed in 1929 and amended in 1938. It was popularly known as Sarda Act. The first wrong notion people carried about this Act was that it applied only to the Hindus. However, it is applicable to all communities. This is a mild measure with a penalty of fine, but the marriage becomes irrevocable. The years have elapsed and the custom of child marriage still stands. However, the Act remained a dead letter during the colonial period of British rule in India.2

It was felt desirable that widows should have a share in their husband’s property. So in 1937–38, the Hindu Women’s Rights to Property Act was passed according to which if a Hindu dies intestate, his widow is entitled to a share equal to the son.

When the provinces were given autonomy under the Reforms Act of 1931, many measures were passed

2 Forbes, Geraldin H., Women in Modern India, Cambridge University Press, 1998 pp 89
giving some share to the widow, the daughter and other female members of the joint family. In some provinces provision was made for divorce and bigamy was prohibited.

The other appreciable step taken by the British rulers were in the field of education. In 1854, Sir Charles Wood sent a dispatch to the Governor-General to open primary schools both for boys and girls. In spite of India’s cultural advance, it was not considered proper for girls to attend any school; rather it was considered derogatory to the family’s social dignity. However, despite public censure, Jagannath Shankersheth sent his daughters to schools. He even provided a room in his bungalow for opening a girl’s school.

This thread of education was taken up by the newly started reformist sects like Arya Samaj and Brahmo Samaj who attached great significance to women’s education. Many women were trained as teachers and nurses. In 1883, we had the first woman graduate. In contrast, Western women had to fight for the right to enter the portals of universities. This was not the case with our universities, but pioneer women like Pandita Ramabai, Dr. (Mrs.) Anandibai Joshi and others had to face severe public criticism
Unfortunately, the enthusiasm and liberal attitude of the British rulers changed drastically after the mutiny of 1857. The masses became illiterate and even after Independence the percentage of literacy remain very low for decades, more so in the case of women, where it was only 15 per cent in the early decades after Independence. There is undoubtedly progress in women’s education at all levels but there is a great lag between boys and girls. Nobody now questions the necessity of adult literacy and primary education as necessary equipment in life for everyone to fulfil his different roles, including that of a citizen.

In pre-independence period there were a few men who worked selflessly to advance women’s education. There were also a significant number of people who advocated birth control when the word was a taboo.

With a sense of pride, Indian women can recall the part they played in the struggle for independence. Over 5,000 women willingly walked to the prisons to serve various terms of imprisonment within three years of Mahatma Gandhi’s start of the Satyagraha Movement in 1929. Further, in the struggle, they boldly faced indiscriminate firing
and even worked underground.

In the constitution of independent India, full rights are given to women as citizens of India. Men have fully accepted this equality and do not hesitate to entrust the most important post of Prime Minister to a woman. This recognition is in consonance with world trends.

There has been a fundamental change in the outlook towards women as towards other backward people. In pre-independence days the foreign rulers, and especially the reformers, felt that women were beings who must be pitied and provided with amenities and conditions to live as human beings. The post-independence attitude is to establish full equality and to remove all the barriers in the path of women to develop their full individuality. Furthermore, we have a welfare state.

To uphold the Constitutional mandate, the State has enacted various legislative measures intended to ensure equal rights, to counter social discrimination and various forms of violence and atrocities and to provide support services especially to working women.
Post-Independence Legislative efforts for empowering women against Crimes/gender specific atrocities:

Although women may be victims of any of the crimes such as ‘Murder’, ‘Robbery’, ‘Cheating’ etc, the crimes, which are directed specifically against women, are characterized as ‘Crime against Women’. The protection has been given to the women under various laws. The major protection from the crimes against women has been provided by the Indian Penal Code, 1860, and there are various other laws also which protect women from the other specific criminal acts against them.

The Indian Penal Code defines a number of crimes against woman and sets out punishments for such. Some other major Acts which involve women are Immoral Traffic (Prevention) Act, the Juvenile Act and the Criminal Procedure Code.

The Indian Penal Code is a penal law which has some major punitive provisions in case of offences against women and their punishments. These provisions are under the sections like section 294 (obscene acts and songs), 304 B (dowry death), section 311 to 318 with regard to causing of miscarriages, of injuries to unborn children, of the
Exposure of infants of the concealment of Births, 342 (wrongful confinement). Section 359 (Kidnapping) 361, 362, 366A, 366B, 372, 373 like kidnapping from lawful guardianship, Abduction, procuration of minor girl, importation of girl from foreign country, selling minor for the purpose of prostitution, Buying minor for the purpose of prostitution.

Offences relating to marriage in section 493, 494, 495, 496, 497, 498 about cohabitation caused by a man deceitfully inducing belief of lawful marriage, marrying again during lifetime of husband or wife, marriage ceremony fraudulently gone through without lawful marriage, adultery, enticing or taking away with criminal intent a married woman.

And finally and in great importance section 498A with regard to cruelty of husband or relatives of husband. Out of these provisions section 354, 304B and 498A attracts our attention in our context. We are proud of our heritage and civilization. But the quantum of cases shocks us to make a realization that we are such a bunch of barbarians.

Section 354 defines assault or criminal force to woman with intent to outrage her modesty – whoever assaults or uses criminal force to any woman
intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.  

The most serious crime against women listed in the code is Rape (Section 375), punishable with life imprisonment. There are five ways in which sexual Intercourse can become rape. First, if the intercourse was against the woman’s will. Second, if it was without her consent. Third, if the consent of the woman was obtained by putting her in fear of death or injury. Fourth, when the man knows that he is not her husband, but she consents because she believes he is her husband. Fifth, when the girl is under 16, whether she gives her consent or not.

There is an important exception, i.e. sexual intercourse with one’s wife cannot be rape unless the girl is under 15.

Rape is defined in IPC as intentional, unlawful sexual intercourse with a woman without her consent. The essential elements of this definition under

---

3 Roopan Deol Bajaj V. KPS Gill, 1995 (6) SCC 194
Section 375 of the Indian Penal Code are ‘sexual intercourse with a woman’ and the absence of consent. This definition therefore does not include acts of forced oral sex, or sodomy, or penetration by foreign objects; instead those actions are criminalized under Section 354 of the IPC, which deals with ‘criminal assault on a woman with intent to outrage her modesty’ and Section 377 IPC, covering ‘carnal intercourse against the order of nature’.

The narrow definition of rape has been criticized by Indian and international women’s and children’s organizations, who insist that including oral sex, sodomy and penetration by foreign objects within the meaning of rape would not have been inconsistent with any constitutional provisions, natural justice or equity. Their reasons have been succinctly encapsulated in a Public Interest Litigation before the Supreme Court.4

... the interpretation [by which such other forms of abuse as offences fall under Section 354 IPC or Section 377 IPC] is ... contrary to the contemporary understanding of sexual abuse and violence all over the world. There has been for some

4 (Sakshi v. Union of India, 2004).
time a growing body of feminist legal theory and jurisprudence which has clearly established rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex and not violence and thereby condone such behaviour.

But in *Sakshi*, the Supreme Court did not interpret the provisions of Section 375 IPC to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina penetration, finger/anal penetration, and object/vaginal penetration within its ambit. Instead, the judges sought refuge behind the strict interpretation of penal statutes and the doctrine of *stare decisis* - a view that any alteration [in this case, of the definition of rape] would result in chaos and confusion.

Then Section 375 to 376D provides punishment for committing rape against women in different circumstances. Requirement of the offence is seems to be strange which help accused to get certain advantages during the trial. Therefore anticipating
the need for stringent rape laws certain changes in
Rape laws were introduced in 1983 which improved
the situation to a great extent. Among other
things, the punishment for rape was made more
severe. Before, the punishment prescribed under
section 376 of the IPC provided for a maximum
sentence of life imprisonment but there was no
minimum limit. Thus, in theory a rapist could get
away with a sentence of say, just one month.

In 1983 although the legislature failed to
increase the maximum sentence to capital punishment
as was vehemently demanded by women’s
organizations, it prescribed a minimum sentence of
seven years imprisonment. Every rapist on being
found guilty thereafter bound to undergo a minimum
imprisonment of seven years. Besides, an important
provision, Section 376(2) was added to the IPC
which introduced the concept of some special kinds
of rape and prescribed a minimum of ten years for
these cases.

These included:

1. Rape by a police officer within the
   premises of a police station;
2. Rape by a public servant of his junior while taking advantage of his official position;
3. Rape by an official in a jail or remand home of an inmate;
4. Rape by someone on the staff of a hospital of a woman in the hospital;
5. Rape of a pregnant women;
6. Rape of a girl under 12 years of age and gang rape

According to the new provision section 114A of the Indian Evidence Act—in cases of custodial rape, gang rape and rape of a pregnant woman, if the victim states in court that she did not consent, then the court shall presume that she did not consent and the burden of proving consent shall shift to the accused. This was a major reform in the law.

Enhanced sentences were introduced by amendment in 1983, whereby the Legislature indicated that it considers aggravated rape (including gang rape) deserving of higher punishment. In continuation to amendment various special provision section—376A, 376B, 376C and 376D were added to the IPC. One must keep in mind that the rape is a degradation of the
very soul of the helpless female who is subjected to the offence. Rape victim demands more care and protection than any victim of other offences.

The IPC devotes Chapter XX to offences relating to marriage. The Code is over 120 years old, and the antiquity often shows in its provisions.

For example, in the case of adultery, the woman does not commit an offence. Only the man is punished with fine or five years in jail or both. The woman is not to be punished even as an abettor in the offence. Adultery is committed when a person has sexual intercourse with a woman “whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man.

Another offence is taking or enticing away a woman from her husband or guardian with intent to have illicit intercourse with her. Concealment of the woman is also included in this crime which is punishable with two years’ imprisonment and fine.

Polygamy is punishable with seven years’ imprisonment. The code says whoever, having a husband or wife living, marries again commits this offence. Partners of an invalid marriage are exempted from this rule. Also, if the spouse was
absent and not heard of for seven years, the other 
spouse can marry again. But he or she should inform 
the new partner “the real state of facts within his 
or her knowledge”.

Whoever goes through the marriage ceremony 
“dishonestly or with a fraudulent intention”, 
knowing that he or she is not lawfully married, 
also commits an offence punishable with the 
imprisonment up to 7 years and fine.

Any man who deceives a woman and makes her 
believe that he is her lawful husband and has 
intercourse with her or cohabits with her is 
committing a serious crime punishable with the 
imprisonment up to 7 years and fine.

The IPC also mentions an “unnatural offence” and defines it vaguely as “carnal intercourse 
against the order of nature with any man, woman, or animal”. This would include incest, homosexuality, 
sadism, masochism, exhibitionism, oral sex, 
voyeurism, sodomy and bestiality.

Marriage licenses only to normal sex and a man 
cannot force his wife to succumb to his curious sex 
behaviors like sodomy or oral sex. Though these are

---

5 Under Section 377
crimes, legally speaking, such occurrences are not uncommon and the women either cooperate or suffer in silence.

If the wife is a victim of sadism, forcible sodomy or such other crimes by her husband, she can get a divorce on the ground of cruelty. Homosexuality or Tran-sexuality would be ‘incompatibility’ in marriage and they can be grounds for divorce, in the case of oral sex and other less harmful cases, the courts may warn, but they are not considered adequate grounds for divorce. The IPC is very strict about unnatural offences and provides even imprisonment for life for such crimes.

There are some other crimes affecting women which are dealt with by the IPC. Defamation is one such. If a woman is wrongly accused of an act which will affect her reputation (“woman of loose morals” or “dowry-hungry mother-in-law”), she can complain to the police against her defamers or she can file a civil case against them claiming damages. Defamation has been dealt with in detail in another chapter.

Another crime, which is more common, is eve-teasing or as the Penal Code calls it, “insulting
the modesty of a woman”. This can be done in many ways by words, sounds or gestures, or by exhibiting an object. The intention must be to insult her modesty or to intrude upon her privacy.

Whoever does obscene acts or sings obscene songs in any public place can be punished. Similarly, sale of obscene objects (books, pictures, figures) to youth below 20 is also a crime.

Because of the rising number of reports of dowry killings and cruelty to wives by their husbands and relatives, Section 498A and 304B was to the Indian Penal Code as well as certain corresponding changes were also made in Evidence Act.

According to Section 498A, a husband or relative of a husband or relative of a husband who subjects a woman to cruelty shall be sentenced to imprisonment up to three years and shall also be liable to fine.

Cruelty is explained as “any wilful conduct which is of such nature as is likely to drive the

---

6 Section 294; Indian Penal Code
7 Section 293; Indian Penal Code
8 Section 113A Ins. by Act 46 of 1983, Sec. 7 and 113B Ins. by Act 43 of 1986, Sec. 12
woman to commit suicide or to cause grave injury or
danger to life, limb or health (whether mental or
physical) of the woman; or the harassment of the
woman where such harassment is with a view to
coercing her or any person related to her to me any
unlawful demand for any property or valuable
security or is on account of failure by her or any
person related to her to meet such a demand.”

Cruelty means any wilful conduct that drives the
woman to commit suicide or to cause grave injury to
herself, should be with a view to get any property
or valuable security.\(^9\)

According to the law of evidence, if a woman
commits suicide within seven years of her marriage,
and it is shown that her husband or his relative
had subjected her to cruelty, the court would
presume that the suicide was abetted by her husband
or such a relative.

The burden is on the accused to show that they
did not abet the suicide. Otherwise, they will be
punished for abetment of suicide.

498A was inserted into the Indian Penal Code in
1983 via an amendment. It was introduced to help

---

\(^9\) B.S. Joshi v. State of Haryana, AIR 2003 SC 1386
married women to fight against any harassment by her husband and her in laws. Though this law was written with good intentions, but was rarely used by women who is being really harassed (as using this provision of law would send the husband to jail and would eventually break her marriage and family). Even her kids may support their abused mother in seeking divorce, but most do not support their mothers in getting their fathers sent to jail even if they have personally been victims of abuse because having a father convicted and sent to jail mars and stigmatizes the life of children as well.

Section 498A made it obligatory for the police to take prompt action and arrest all those named by a woman alleging cruelty by her husband and in laws. The bail in such cases could be opposed and delayed. Thus all those included in the complaint are punished even before the trial actually began. Given the corrupt and lawless ways of police, this provision came to be misused and abused widely by the police to extract bribes as well as by unscrupulous women and their lawyers to blackmail the groom’s family even on trumped up charges.

As per the law, even dowry giving is an offence, but there is hardly ever an instance of the bride’s
family being prosecuted for giving dowry. The assumption is that only “takers” are guilty while “givers” are helpless creatures yielding to the greed and callous demands of the groom’s family.

Then again in 1986 one more provision was added to Indian Penal Code under Section 304B, with the amendment in Dowry Act i.e. Dowry Death and the corresponding amendments in the Indian Evidence Act were also made under Section 113A and 113B.

Section 304 B provides as: Where the death of a woman is caused by any burns or bodily injury or occurs otherwise that under normal circumstances within 7 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called “dowry death” and such husband or relative shall be deemed to have caused her death. Further, whoever commits dowry death; shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Kidnapping, abduction and slavery are some of the crimes which women fall prey to. According to the IPC, whoever takes or entices a minor (body under 16 and girl under 18) or a person of unsound mind out of the keeping of the lawful guardian without his consent is said to kidnap the minor.

It is abduction when a person compels by force, or by any deceitful means induces another to go away from any place. Kidnapping or abducting with intent secretly to confine a person will invite more rigorous punishment.

So also, kidnapping, abducting or inducting a woman to compel her to marry against her will or to force her to illicit intercourse may be punished with 10 years’ imprisonment.

Similar punishment will be given to those who induce a girl under 18 to go away from any place, or to do an act, which he knows will force her to illicit intercourse.

Importing girls under 21 from a foreign country for illicit intercourse is also punishable to the same extent.

Selling minors for prostitution is a grave crime and the IPC deals extensively with it.
Whoever sells, lets to hire or disposes of any person under 18 for prostitution or when he knows that she will be used for prostitution is guilty.

Similarly, whoever buys, hires or obtains possession of a girl under 18 for immoral purposes is guilty. In both cases, the law will presume that the person is guilty (of selling or buying) and it is for the accused to prove that he is innocent.

The Cr.P.C. also provides for some protective provisions dealing with women. Section 180 protects women from unnecessary harassment by police. A police officer can call a male to the police station for interrogation or to demand information during investigation. But in the case of a woman, or a male under 15 years, they are not required to go to the police station. The police officer must go to the place where the woman or boy resides. When a police officer searches a woman, “the search shall be made by another female with strict regard to decency”\(^\text{11}\).

\(^{11}\) Section 51; Cr. P.C.
When an accused woman has to be examined by a doctor for evidence, only a lady doctor or someone under her supervision is allowed to do so.\(^\text{12}\)

If an offender hides in a house of a woman, who according to custom does not appear in public, the police cannot enter the house or break it open without giving notice to the woman and telling her that she is at liberty to withdraw.\(^\text{13}\)

When a summons cannot be served on a person, it can be served at his house even if he is not available, but it cannot be served on a woman. Only an adult male member of the family of the person wanted can accept the summons in such cases.\(^\text{14}\)

If a woman sentenced to death is found to be pregnant, the High Court shall order the execution to be postponed. It may also commute the sentence to imprisonment for life.\(^\text{15}\)

Section 198 deals with prosecution for offences against marriage. It provides that a complaint of bigamy may be filed by any person related to the wife by blood, marriage or adoption after getting

\(^{12}\) Section 53; Cr.P.C.
\(^{13}\) Section 47
\(^{14}\) Section 64
\(^{15}\) Section 416; Cr. P.C.
consent of the court. This helps the aggrieved woman, when she herself cannot take action.

Lastly, the Cr.P.C. lists certain offences relating to women which may be compounded (compromised) in some cases. For instance, adultery may be compounded by the husband of the woman.\(^\text{16}\)

Similarly, the husband can compounded the sentence for enticing, taking away or detaining a married woman. A woman assaulted can compound the offence of using criminal force or outraging her modesty.

Marrying again during the lifetime of a husband or wife can be compounded by the husband or wife of the person so marrying. A woman who is insulted or whose modesty is offended can also show mercy towards the offender.

The other protections available to women under Cr.P.C. are as under:

**Exemption from Attendance:** Section 160 (1) requires the witnesses to attend the place or Thana as is required by the investigation police officer. But clause (2) thereof provides an

\(^{16}\) Section 320; Cr. P.C.
exemption from such requisition, for women and male person i.e. male child under the age of fifteen years. The investigating Police officer has to go to the place of residence where the woman resides to gather information from her. Thus, a woman cannot be compelled to come to the police station as a witness.

Post-Mortem in Case of the Death of Woman: The Criminal Law (Second Amendment) Act of 1983 has introduced a sub-section of 174 of the Code. This amendment was felt necessary as the number of dowry deaths or cases of cruelty on married women culminating in suicide were increasing day by day. This provision has been there for inquest by Executive Magistrate and for post mortem in all cases where a woman has within seven years of her marriage, committed suicide or died in circumstances raising a reasonable suspicion that some other person has committed an offence. Post mortem in all cases is necessary where a married woman has died within seven years of her marriage and a relative of such woman has made request in this behalf.

The Amendment Act of 1983 has also inserted Section 198-A of the Code. This Section provides
that no Court shall take cognizance of the offence under Section 498-A (cruelty by husband or relatives of husband) except a report or complaint made by the victim of the offence or by her father, mother, brother, sister, or by her father's, mother's brother or sister or with the leave of the Court by any person related to her by blood, marriage or adoption. Thus this provision widens the scope for prosecution and any relative of the wife can file a complaint.

Place of Trial: Section 181(2) of the Code provides that the offence of kidnapping and abduction may be inquired into or tried by a court within whose jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained. There is a departure from the general rule of place of trial namely the court in whose jurisdiction the accused is found can try the accused. But Section 181 (2) provides for place of trial with reference to the victim of the offence. Thus, it is a special favour of women who are generally the victims of such offences.

Prosecution of Offences against Marriage: Sections 198 and 198A are exceptions to the general rule that any person having knowledge of
an offence can set the law in motion. This section provides for offences against marriage e.g. offence of bigamy (Section 494), rape (Section 376), enticing or taking away or detaining with criminal intent, a married woman (Section 498), husband or relative of husband of a woman subjecting her to cruelty (Section 498A) etc. Some person other than the aggrieved person may be relative of the victim, can with the leave of the court, file a complaint against the accused. It is not at all necessary that the victim of rape or bigamy should make the complaint; any other person on her behalf, such as father, mother, sister, brother, son, brother-in-law, mother's brother or any other person related to the victim by blood, adoption or marriage can file a complaint of the offence. The Supreme Court went a step ahead when it declared in Ashwini Nanubhai's case\(^\text{17}\) that where after filing a complaint charging the accused under Sections 493 and 496 of the Penal Code, the aggrieved person dies, her mother can be substituted to carry on prosecution.

**Release of Woman on Probation on Good Conduct:**
The Code, under Section 360, provides special

\(^{17}\) AIR 1967 SC 983
protection to an accused who is under twenty years of age or any woman (of any age) convicted of an offence not punishable with death or imprisonment for life. If no previous conviction is proved against such offender, the court can order for release on probation on good conduct and on entering into a bond to keep the peace. Section 360 further provides that while releasing on bond, the court should have in view the age, character or antecedents of the offender. Thus, this section is a piece of beneficient legislation and it applies to first offenders only. If the offence is not of the serious character the powers under this section can be exercised by the court. But such powers are to be judiciously exercised. Section 361 of the Code requires that Court should, while exercising the power provided under Section 360, record the special reasons for doing so.

**Bail of Woman Offender in Non-bailable Offences:** Generally, the court or a Police Officer is empowered under Section 437 to release an accused in a non-bailable case, but shall not release on bail in the offence charged punishable with death or imprisonment for life. This section provides an exception to this rule that a woman
may be released on bail even if the offence charged is punishable with death or imprisonment for life. It is a special provision in favour of woman.

Though this Section makes a distinction between persons accused of grave offences and exceptions in favour of women but it cannot be said to be violative of equality clause i.e., Article 14 of the Constitution. The classification under Section 437 is based on intelligible differentia and further has reasonable relation to the object of legislation in the matter of grant of bail.  

The ten special provisions protecting the women are merely illustrative. The constitutionality of these special provisions has been examined by the courts from time to time. The major constitutional protection of these discriminatory clauses is from Article 15(3) of the Constitution of India which provides that the ‘State’ can make special provisions for women and children. Thus, the Indian Constitution itself has provided for special protective clause in favour of women. The study of special provisions

---

18 Nirmal Kumar v. State, 1972 Cr. L.J. 1582
protecting women in the light of Article 15(3) of the Constitution of India strengthens the view that they contain the spirit of Article 14 of the Constitution.

In the lesser known Information and Technology Act, 2000 there exists provision favouring women as Section 77A of the Act says that the crimes defined the Act are not compoundable if they are committed against the women.

Although all laws are not gender specific, the provisions of law affecting women significantly have been reviewed periodically and amendments carried out to keep pace with the emerging requirements. Many of the Acts have special provisions to safeguard women and their interests are these are as follows:

**Dowry Prohibition Act, 1961**

This Act prohibits the request, payment or acceptance of a dowry, “as consideration for the marriage” where “dowry” is defined as a gift demanded or given as a precondition for a marriage. Gifts given without a precondition are not considered dowry, and are legal. Asking or giving of dowry can be punished by an imprisonment of up
to six months, or a fine of up to Rs. 15000 or the amount of dowry whichever is higher and imprisonment up to 5 years. It replaced several pieces of anti-dowry legislation that had been enacted by various Indian states. Although the dowry was legally prohibited in 1961, it continues to be highly institutionalized. The groom often demands a dowry consisting of a large sum of money, farm animals, furniture, and electronics. Over the decades the law has been a useless piece of legislation and grossly misused one. Although it defines dowry taking and giving both as a crime but not a single punishment has ever been given to any dowry giver since its enforcement.

Even if there is no marriage there can be demand of dowry and are not excluded from the purview of Sec 304 B and Sec 498 A of Indian Penal Code.¹⁹

Medical Termination of Pregnancy Act, 1971

During the last thirty years many countries have liberalized their abortion laws. In our country, Shantilal Shah Committee (1964) recommended liberalization of abortion law in 1966 to reduce maternal morbidity and mortality

¹⁹ Koppisetti Subbharao @ Asubramanian v. State of A.P. [AIR 2009 SC 2684]
associated with illegal abortion. On these bases, in 1969 Medical termination of pregnancy bill was introduced in Rajya Sabha and Lok Sabha and passed by Indian Parliament in August 1971. Medical Termination of Pregnancy Act, 1971 (MTP Act) was implemented from April, 1972. Implemented rules and regulations were again revised in 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available.

The MTP Act, 1971 preamble states “an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto”.

The most important fact regarding this Act is that it does not provide women any right to abortion. The preamble is very clear in stating that termination of pregnancy would be permitted in certain cases and that too by a registered medical practitioner who is defined in Section 2(d) of the Act. The pregnancy not exceeding 12 week may be terminated by a registered medical practitioner as per his opinion in good faith that:

1. The continuance of the pregnancy would involve a risk to the life of the pregnant women ;or
2. A risk of grave injury to the her physical or mental health; or
3. If the pregnancy is caused by rape; or
4. There exist a substantial risk that, if the child were born it would suffer from some physical or mental abnormalities so as to be seriously handicapped; or
5. Failure of any device or method used by the married couple for the purpose of limiting the number of children; or
6. Risk to the health of the pregnant woman by the reason of her actual or reasonably foreseeable environment.

In case the pregnancy exceeds 12 weeks but not exceeding 20 weeks the opinion of not less than two registered medical practitioners is needed. The Act does not permit termination of pregnancy after 20 weeks.

The court has gone a step further to say that, “A welfare institution of Government cannot take a decision about termination of pregnancy of victim even though she is an orphan/mentally retarded/rape victim etc.”

---

20 Sujitha Sreevasthava and another v. Chandigrah Administration; 2009 (4) KLT (SN) 29
Women activists hailed this as a big step in empowering their kind. It was anything but that, as the choice to be exercised by the woman was in name only; the Act had left that choice with the medical practitioner. That the act was passed with the intent to also control the population is understandable, but this part of the Act which covered the failure of contraception was to cause devastation of such magnitude that the Child Sex Ratio (CSR) in the age group of 0 to 6 dropped sharply from 962 females per 1000 males in 1981, to 927 in 2001, that is a drop of 35 points in 20 years compared with a drop of 14 points for the previous 20 years from 1961 to 1981. The rate of decline had accelerated by 150%.

Female foetuses were being selectively aborted in very large numbers on grounds of failure of contraception in blatant contravention of the spirit of the Act. Ultrasonography arrived in the early 1980s, which explains the sudden drop thereafter, though the Act itself became law in 1972. Sex could be determined any time after 12 weeks and a simple tick or a signature in blue or black ink in an ultrasound clinic could mean a death sentence. The male child syndrome which has always been prevalent in India was now a realizable, low cost option.
Advances in technology, legislation gone badly wrong, and a disregard for ethics by the noble profession together achieved for India the dubious distinction of having one of the lowest CSRs in the world.

Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

The Parliament enacted the Act after the disturbing child sex ratios in the 1991 Census figures led to consistent campaigning on the issue by women’s groups and other civil society groups across the country. The Act has been upheld by the Mumbai High Court in the case of Mr. and Mrs. Soni vs. Union of India and CEHAT. The judgment states: “The right to life or personal liberty cannot be expanded to mean that the right to personal liberty includes the personal liberty to determine the sex of the child which may come into existence. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself be a right.”

The use of diagnostic techniques for sex-selection is discriminatory and violates the

---

21 2005 (3) MLJ 1131
fundamental right to equality, not to mention the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act - PC and PNDT Act of 1994.

The Act disallows the use of pre-natal diagnostic techniques for sex determination; it says that such techniques can be used only for detecting genetic or metabolic disorders, chromosomal abnormalities or certain congenital malformations or sex-linked disorders. The Act adds, “No person conducting prenatal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives the sex of the foetus by words, signs on in any other manner.”

The mere enactment of the PNDT Act, however, does not seem to have been enough. For one, under the Act, the government can overrule the decisions of the body set up to monitor facilities, which is empowered to suspend or cancel the licenses of offending clinics or laboratories. The government can also exempt any facility from the Act. An ordinary citizen cannot directly move the courts, but must approach the monitoring body instead; this body can refuse to release any records if it’s
deemed that it’s in public interest to keep them sealed.

The result of such partial regulation is that sex determination and selection facilities have been privatised and commercialised, and are mushrooming. Doctors indicated that despite bans, they would continue to communicate the sex of the foetus to parents who wanted to know, verbally rather in writing, and would hike the fees of the test to compensate for the legal risk.22

After the 2001 census revealed a further fall in the child sex ratio, the government amended the Act to give it more teeth, and also to cover new pre-conception sex selection techniques, in response to directives of the Supreme Court in a Public Interest Litigation filed about this issue. Thus, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) 1994, as amended in 2003, came into effect in February 2003.

The amended Act, called the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, not only prohibits determination and disclosure of the sex of the foetus but also

22 Sex Selection Issues & Concerns: A Compilation of Writings by Qudsiya Contractor, Sumita Menon and Ravi Duggal.
bans advertisements related to preconception and pre-natal determination of sex. All technologies of sex determination, including the new chromosome separation technique, fall under its ambit. The Act has also made it mandatory for ultrasonography units to prominently display a signboard that indicates that detection/revelation of the sex of the foetus is illegal.

The Act requires that all ultrasound scanning machines have to be registered with the “appropriate authority”, who could be the ward health officer in large cities and district medical officers in districts, towns and rural areas. Manufacturers are required to furnish information about clinics and practitioners to whom they have sold ultrasound machinery. Between 2001 and March 2006, 28, 422 facilities offering ultrasound tests were registered across the country. Three hundred and eighty four cases have currently been filed for various violations under the Act, such as communicating the sex of the foetus, non-maintenance of records and non-registration. The statistics, however, makes it clear that this is a sheer drop in the ocean, considering the massive number of facilities available in India among clinics and practitioners.
Immoral Traffic (Prevention) Act, 1956

The Suppression of Immoral Traffic in Women and Girls Act, 1956 was renamed as the Immoral Traffic (Prevention) Act in 1986. The Act was amended to cover all persons, male or female, who are exploited sexually for commercial purposes.

The Act makes trafficking and sexual exploitation of persons for commercial purpose a punishable offence. The Act was passed in line with the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, signed by India on May 9, 1950. Although the Act was amended twice (1978 and 1986), it did not prove to be an effective deterrent to trafficking or sexual exploitation for commercial purposes.

The Immoral Traffic (prevention) Act 1986 deals with sex as a business activity. Prostitution is defined as the “exploitation or abuse of persons for commercial purposes.”

Before 1986, a prostitute was defined as a woman who offered her body for promiscuous sex for hire. But now the law covers males also.
The main targets of the law are pimps, agents, managers or keepers of brothels and those who promote or aid prostitution as business. The law is lenient to the victims of exploitation, or the prostitutes themselves.

The Immoral Traffic (Prevention) Amendment Bill, 2006 is pending which aims to punish traffickers and provide for stringent punishment to offenders.

The law prescribes one to three years jail and fine for the keepers or managers of brothels. Any person who allows prostitution in his property or tenanted is also liable to imprisonment.

Punishment for living on the earnings of prostitutes is seven to ten years in jail and fine. Procuring and inducing persons for the sake of prostitution are more serious crimes, inviting jail up to 14 years.

The prostitutes themselves are punished only under two circumstances: (1) when they operate in a public place, like within 200 meters of schools, hospitals, nursing homes or places of worship, (2) when they make positive attempt to seduce or
solicit persons with word, gestures, and exposures and indulge in molestation.

The law enables the government to set up corrective institutions and protective homes for prostitutes. A woman found guilty of soliciting may be sent to a corrective institution, instead of being sentenced to jail.

Any person who is carrying on prostitution by will or by force may apply to the nearest magistrate to take him or her and be kept in a protective home and be provided care and protection by the court.

A magistrate can also direct the police to rescue persons in a brothel and produce them before him. The law also provides for special police officers to deal with prostitution, advisory bodies and special courts.

**The Indecent Representation of Women (Prohibition) Act, 1986:**

The Act provides protects women from their indecent representation. The “Indecent representation of women” according to the provision of this act means the depiction in any manner of the figure of a woman; her form or body or any part
thereof in such way as to have the effect of being indecent or derogatory to or denigrating women or as is likely to deprave, corrupt or injure public morality or morals. \(^\text{23}\) It makes the offence punishable not only for a person who publishes or causes to be published or arrange or take part in the publication or exhibition of any advertisement which contains indecent representation of women in any form\(^\text{24}\) but also for a person who produces or cause to be produced, sell, let to hire, distribute, circulate or send by post any material which contains indecent representation of women in any form\(^\text{25}\).

However, this Act provides certain exceptions also these are:

a. any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure;

b. the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting,

\(^{23}\) Section 2; Indecent Representation of Women (Prohibition) Act, 1986
\(^{24}\) Section 3; Indecent Representation of Women (Prohibition) Act, 1986
\(^{25}\) Section 4; Indecent Representation of Women (Prohibition) Act, 1986
photography, representation or figure is in the interest of science, literature, art or learning, or other objects of general concern; or

c. which is kept or used bonafide for religious purposes;  
d. any representation sculptured, engraved, painted or otherwise represented on; or  
e. in any ancient monument; or  
f. any temple or on any car used or the conveyance of idols or kept or used for any religious purpose;  
g. any film to which the provisions of Part II of the Cinematograph Act, 1952 are applicable.\textsuperscript{26}

The Act provides for the punishment of offences under it with imprisonment of either description for a term which may extend to two years and with a fine which may extend to two thousand rupees, and with an enhanced punishment in the event of a second or subsequent conviction.\textsuperscript{27}

\textsuperscript{26} Section 5; Indecent Representation of Women (Prohibition) Act, 1986  
\textsuperscript{27} Section 6; Indecent Representation of Women (Prohibition) Act, 1986
Legislative efforts for empowering women under Industrial Laws:

Under the Industrial laws the women have been bestowed the special position in the view of their unique characteristics, physically, mentally and biologically. Some of the Acts related to employment were enacted during British period as well as after independence. These Acts not only regulated the hours of work but also contained provisions of health, safety and welfare of women workers and guarantees equality before law and equal treatment to women workers. Most of these laws have been inspired by the Conventions and recommendations adopted by the International labour Organization. The main objectives for passing these laws are to enable the women to enjoy equally as men a fuller and richer life, to increase their efficiency, to increase their participation in useful services, to ensure their ante-natal, prenatal care and infant welfare and to provide equal pay for equal work.

Besides different measures adopted by the Government of India for implementation of ILO conventions many other provisions have been
incorporated as labour legislation for the protection of women workers. The important labour legislations bearing favourable/protective provisions for the women are:

**Factories Act, 1948:**

Factories Act is a labour welfare legislation where in measures have been laid down to be adopted for the health, safety, welfare, working hours, leave and employment of young persons and women. Exclusive provisions for women have also been incorporated in the Act keeping in view their soft and tender personalities. These provisions are:

2. Prohibition of employment of women during night hours.
3. Prohibition of work in hazardous occupations.
4. Prohibition of employment of women in pressing cotton where a cotton opener is at work.
5. Fixation of daily hours of work at nine.
6. Fixation of maximum permissible load.
7. Provision for crèche in every factory where in more than 30 women workers are
ordinarily employed, there shall be a suitable room for the use of children under the age of six years of such women.


**Employees State Insurance Act, 1948:**

Employees State Insurance Act, one of the most
important social legislation in India, it has been enacted to provide for various benefits in different contingencies. Under this Act, insured women workers get sickness benefit, disablement benefit, medical benefit and funeral expenses along with insured men worker. However in addition to these benefits, insured women workers also get maternity benefit in case of certain contingencies arising out of confinement, miscarriage, sickness arising out of pregnancy, confinement, premature birth of child or miscarriage and death. The duration of maternity benefit available to insured women in case of confinement is 12 weeks of which not more than 6 weeks shall precede the expected date of confinement. The maternity benefit is paid subject to the condition that the insured women do not work for remuneration on the days in respect of which the benefit is paid. In the event of the death of an insured women, the maternity benefit is payable to her nominee or legal representative for the whole period if the child survives, and if the child also dies until the death of the child.
Maternity Benefit Act, 1961:

International attention, on maternity protection of the world community was attracted when the first Maternity Protection Conference was convened in 1919 by the International labour organization where matters relating to maternity leave, economic benefits during absence from work, leave for bringing up children and non-termination of service during pregnancy and immediately after delivery were deliberated upon and a resolution passed. The resolution of this convention was amended in 1952, which increased maternity leave, economic benefits and added some more benefits to the mothers of new-born children. The fact that motherhood requires special care and attention is reflected in Article 25(2) of the Universal Declaration of Human Rights, 1948. However in India, back in 1931, in the Karachi Resolution, the congress under the head ‘labour’ recognized the need for providing maternity benefits to women workers and provided “protection of women workers and specially adequate provisions for leave during maternity period”. Keeping in view the convention of the International Labour Organization and the fact that there was a need for
providing maternity benefit, Article 42 in the constitution was incorporated which imposes an obligation upon the state to make provision for securing just and human conditions of work and for maternity relief. On these lines The Maternity Benefit, 1961 was passed, though in pre independent India in 1941 the Mines Maternity Benefit Act was passed and this Act was applicable to only those women who were working in mines. In 1948 the provisions for maternity benefit was made under the Employees State Insurance Act and in 1951 under the Plantation Labour Act. However the conditions for payment, the rate and period of benefit was not uniform under these Acts and in order to remove these disparities and to have uniform rules, the Maternity Benefit Act, 1961 was passed. This Act has been passed to regulate the employment of women in certain establishments for certain periods before and after child birth and to provide for maternity benefit and certain other benefits. It is no doubt a significant piece of labour legislation exclusively devoted to working women in factories, mines, plantations and establishments where in persons are employed for the exhibition of equestrian, acrobatic and other performances.
Equal Remuneration Act, 1976:

Equal pay for equal work for women and men is a vital subject of great concern to society in general and employees in particular. There was a common belief that women are physically weak and should be paid less than their male counterparts for the same piece of work. Women all over the world, had till recently been very much in articulate and were prepared to accept lower wages even when they were employed on the same jobs as men. Even in the economically and socially advanced countries where remarkable progress has been made, discrimination still exists. In India, in the initial stages when legislation for the protection of workers was hardly thought of, factory owners taking advantage of the backwardness and social handicaps of the poorer classes, recruited women on a large scale at lower wages and made them work under inhuman condition. International Labour Organization has evolved several conventions to provide protection to employed women. A number of I.L.O conventions have been ratified by India and some of these though not ratified have been accepted in principle. The principle of the I.L.O. has been
incorporated in the Constitution of India in the form of Article 39. Article 39, specifically directs the states to secure equal pay for equal work for both men and women. To give effect to this constitutional provision, the parliament legislated the Equal Remuneration Act, 1975.

Historically, equal pay for work of equal value has been a slogan of the women’s movement. Equal pay laws therefore usually deal with sex-based discrimination in the pay scales of men and women doing the same or equal work in the same organization.

Although the working women have been provided various benefits, concession, protection and safeguards under different labour legislations in order to provide security against various risk peculiar to their nature which are likely to occur in their lives yet their work participation is not up to mark. According to the Human Development Report, 1995, women’s participation in the labour force had risen only by four percent points in twenty years, from thirty six percent in 1970 to forty percent in 1990; women normally receive a much lower average wage than men, all
religious record a higher rate of unemployment among women than men; women work longer hours than men in every country, the deeply sharing of the adversities between women and men are still persisting.

There are various reasons why the employment of women has not been up to the mark. In a developing country like India the income, by and large is low but social conventions weight against employment of women. Due to labour surplus the unemployment and underemployment problems many men are available, hence the problem of participation of women, in economic activity become serious. The economic reason involving additional cost is an impediment to women employment. There is statutory obligation on the employer to pay maternity benefit and it is considered as burden by the employer and affect the employment of women. Some employers recruit only unmarried women on condition to resign their post on getting married. This has been discriminatory, unfair and unjust. Prohibition of night work of women under some legislation too has affected the employment of women.
Special Initiatives for Women

National Commission for Women:

In January 1992, the Government set-up this statutory body with a specific mandate to study and monitor all matters relating to the constitutional and legal safeguards provided for women, review the existing legislation to suggest amendments wherever necessary, etc.

Reservation for Women in Local Self-Government:

The 73rd Constitutional Amendment Acts passed in 1992 by Parliament ensure one-third of the total seats for women in all elected offices in local bodies whether in rural areas or urban areas.


The plan of Action is to ensure survival, protection and development of the girl child with the ultimate objective of building up a better future for the girl child.

National Policy for the Empowerment of Women, 2001:

The Department of Women & Child Development in the Ministry of Human Resource Development has
prepared a “National Policy for the Empowerment of Women” in the year 2001. The goal of this policy is to bring about the advancement, development and empowerment of women.

Discriminatory Provisions of some legislations against Women:

Despite of a lot of growth and development in gender based legislations some glaring discrimination in few of the provisions of various laws still exists. Physically man is stronger than woman. Due to these differences the status of woman is lower than that of man. Our Indian laws are also not devoid of considering the status of woman to be lower.

In some of our Indian laws the status of woman is considered to be lower than that of man. Under Section 497 of Indian Penal Code Adultery is an offence and Under Section 198 of Criminal Procedure Code only husband of adulteress can take action against the counterpart in the offence of adultery i.e. man. A wife of the adulterer has no such right of action. It indirectly implies that woman (wife) as a property of that man (husband). So he is taking action for the damage to his property.
Some laws, made for the benefit of women, became practically unjust to women, e.g. the Medical Termination of Pregnancy Act is being misused to stop the birth of girl child. Due to the provisions of Factory Act, Equal Remuneration Act and other laws the private factories generally do not employ women workers or if they employ do not make them permanent.

For the last hundred years, there has been increasing awareness in the part of women for equal justice. They won the right to vote though long drawn-out struggles in England, Europe and America. Our Constitution grants them this right. But there is still a long way to go in many other fields of law affecting women. The Constitution and the different Acts passed by the Union Governments and the states give special protection to women, aware of their weak position.

For the last hundred years, there has been increasing awareness in the part of women for equal justice. They won the right to vote though long drawn-out struggles in England, Europe and America. Our Constitution grants them this right. But there is still a long way to go in many other fields of law affecting women. The Constitution and the
different Acts passed by the Union Governments and the states give special protection to women, aware of their weak position.

In spite of all these pieces of legislation loaded in favour of women, their condition is improving only at a snail’s pace. Social taboos, tradition and poor literacy rate of women contribute to this situation. Owing to women’s educational backwardness, many laws remain only on paper, most women not even hearing about them. The result is that they tolerate insufferable marriages, never thinking of a divorce; they work without security of job and under humiliating conditions; they suffer the worst when they have to come into contract with the police. This is the reason why every intelligent and educated woman should have some preliminary knowledge of law – not only to save herself but also to help her less fortunate sister.

Another very long time debate and much politicised issue is the reservation of seats for women in parliament and state legislatures as the real test of democracy is the creation of equality of opportunity for the hitherto deprived sections of society. It requires both a favourable social
atmosphere and an individual attitude. Individual attitude and social atmosphere is a sort of reversible equation: one influences the other, in both directions. In practical terms it means that efforts have to be made at various levels of society simultaneously. Every attempt, in every direction, is bound to affect adversely some vested interests. So, one has to be prepared for a long drawn out struggle on all the fronts. Democracy in kitchen and bedroom goes hand in hand with democracy in Parliament and Panchayat. It has to become a way of life; it has to be adopted in literary vocabulary and in political discourse alike.

In the context of the present discussion it amounts to shedding of all mental reservations against reservation of seats for women in the Parliament and in Assemblies. The idea of making a legal provision for reserving seats for women in the Parliament and State Assemblies came into being during Rajeev Gandhi’s tenure as the Prime Minister of India when the Panchayati Raj Act, 1992 (73rd and 74th Constitutional Amendment) came into effect granting not less than 33% reservation to women in the Panchayati Raj Institutions or local bodies. Prime Minister H.D. Deve Gowda made the actual
promise for reservation of seats for women in Parliament and State Assemblies in 1996. I.K. Gujral proposed the present form and shape of the Bill during his term as the Prime Minister of India.

The Bill in its Current form envisages reserving 181 seats in the Parliament for women. In practical terms its efforts would be that 181 male members of Parliament would not be able to contest elections if the Bill is passed. Also, there is to be a rotation of seats, i.e., a male member of Parliament cannot represent the same constituency for more than two consecutive terms. Here lies the rub.

These two very provisions are seemingly the cause of the consensus arrived at by various political parties to dump the Bill. 181 seats in Parliament is too great a number to be sacrificed for the mere ideal of women’s empowerment or adequate political representation, the very idea makes the male politicians panicky. The clause of ‘rotation of seats’ is seen by the opponents of Bill to ‘strike at the very heart of democracy and democratic values’ as, according to their logic, the representative will not get a chance to nurture
his constituency nor the electorate will get a chance to reward or punish their representative, as a corollary to it hardly any ties would be established between the two. On this basis the male dominant parliament is trying to discard Women’s Reservation Bill altogether.

Securing 33% reservation for women in opening the doors of opportunity for political empowerment to almost 50% of our population. It will not only serve the cause of democracy as the Panchayati Raj Institutions are doing at the grassroots level but will also go a long way in ensuring political equality through active participation of woman from both urban and rural areas. Also, if social equality through political empowerment is to be achieved the, Bill should include clauses which guarantee quota within quota to women belonging to scheduled tribes, scheduled castes, other backward castes, and minority communities so that a level playing field is provided for them as well.

It is also argued that the Bill in its present form would end up ensuring seats in Parliament for the female relatives of those who are already in power. To counter this situation, provisions can be added in the Bill, which provides for no
reservation to women who have close relatives in active politics (An acceptable definition of ‘close relatives’ can easily be arrived at). These women can contest from general seats. There had been suggestions in the past in the form of alternatives to the Bill. One is to amend the Representation of People’s Act 1951, to compel political parties to nominate women for one-third of their seats or lose recognition. This, according to Rajindar Sachar, former Chief Justice of Delhi, is flawed, as it would violate the Constitution of India, which guarantees its citizens the right to form association under Article 19(1)(c) as a fundamental right. Another alternative is to increase the number of seats in the Lok Sabha, which is currently based on the figures of the census of India, 1971, when the population of India was 54 crores. The numbers of seats were limited to 530 till further amendments. Now the Delimitation Commission has been asked to take the 2001 census as the basis for delimiting constituencies. According to 2001 census, the population of India has risen to 102 crores, therefore the number of seats are bound to increase before the next general elections. This should be reason enough to pave the
way for the safe passage of the Women’s Reservation Bill.\textsuperscript{28}

Moreover, when the so called backward and fundamentalist society like Pakistan can grant 33% reservation to women in its Senate then why should India, the largest democracy in the world, lag behind?\textsuperscript{29} The most important question is from where this figure of 1/3\textsuperscript{rd} came? If we really believe in complete equality there should be 50% quota for women in legislature. The provisions for making reservations for women in Panchayat Raj institutions and other local bodies are aimed at enhancement of the extent of women’s participation in democratic process. This is likely to be widened by constitutional or some legislative amendment for women’s representation in legislatures by reservation.

\textsuperscript{28} Article by Aysha Sumbul available at http://www.pucl.org/Topics/Gender/2004/womens-reservation-bill.htm
\textsuperscript{29} ibid
The Role of Law in Empowering Women in India

Chapter 8
Judiciary as Harbinger for Women Empowerment
Judiciary as Harbinger for Women Empowerment

The legislations alone cannot make justice available to citizens in society. Seeking equality in an unequal society is a task demanding concerted action on the part of the individuals, the community, government and the judiciary on a continuing basis. This is what women as a class must realize in their struggle for equal justice in the democratic republic of India.

Gender justice is a concept understood differently in different cultures and at different periods in history. However, with the adoption of universal standards against inequality and discrimination and the evolution of a rights-based approach in the empowerment of women, the concept is today susceptible to judicial evaluation and judicial determination. In this process the Indian Courts have played a significant role during the last five decades with the support of the liberal provision of the Constitution, with the aid of a series of pro-women international human rights instruments and an increasingly assertive women’s movement within and outside the country. The complaint seems to be that more could have been done if the judges were so inclined. Furthermore,
it is argued that the judicial system as a whole did not change enough to absorb the emerging standards of equity and equality vis-à-vis women with the result the bulk of women approaching the subordinate courts neither receive equal treatment nor are able to access the full benefit of the principle of equal justice under law.

It requires a lot of research to prove or disprove the above proposition. As such, any assessment can only be provisional and tentative. It serves no purpose to apportion the blame for the status of women today on different wings of government on society at large. Given the fact that Indian Constitution demand gender justice on terms of equality and dignity and given the fact that Indian judiciary has come to play a decisive role in government based on fundamental rights and rule of law, what needs to be addressed is how the performance of judiciary in this regard can be further improved towards advancing the realization of the constitutional mandate of justice to women. Judicial performance in this regard involves not only few landmark decisions of superior courts against discriminatory practices but extends to the entire range of adjudicatory practices at staff of lawyers and courts towards women’s issues and the
extent of participation of women get from the system as a whole though progressive judgments from superior courts do provide the direction for change in substance and procedure.

The Constitution has paved the base of equal status and number of legislations has provided protection as well as support to the women in our country. The positive result can be seen and felt in all the walks of life around us. The status of women in our country has risen to the present level which may not be up to the mark but still satisfactory. The present status is owed not only to our Constitution and the legislations but to the active judiciary as well as public spirited people who successfully manoeuvred the status of women of our country to the present level. The unbiased and independent judiciary has always played the role of a true Guardian of justice. Since independence many a times the judiciary has pro-actively interpreted and amplified the ambit of legislative provisions in favour of the unprivileged half of the society, i.e., the women of our country. Sometimes, these actions have been initiated by the public spirited people with the help of PILs (Public Interest Litigations). These Public Interest Litigations
have strong reformist kind of public opinion behind them.

Though not welcomed by all, the action initiated by Public Interest Litigations and the pro-active role played by the Judiciary in interpreting these PILs has always been praised by most of the society, later on. Wherever the matters involving issues of masses the Apex Court relaxed the rule of “locus standi” and at the time of interpreting looked beyond the frame to deliver the decisions of far reaching consequences, we are aware of today. Since the precedents have the binding effect and as effective as law they are also known as “Judges made law”. I have used the term “judges made law” although a lot many people have the opinion that “judges declare law”. There is no need to get into the debate here as Sabyasachi Mukharji, C.J. also quoted that, “I believe that we must do away with ‘the childish fiction’ that law is not made by the judiciary.”

In C. Ravichandran Iyer v. Justice A.M. Bhattacharjee,¹ the court said that the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to

¹ 1995 SCC (5) 457
suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. The society demands active judicial roles which formerly were considered exceptional but now a routine.

In *S. P. Gupta v. President of India*² the court observed: The interpretation of every statutory provision must keep pace with changing concept’s and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation.

The court also went on to say that, “....law does not operate in a vacuum. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest, it with a meaning

---

² AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365
which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice.”

It is clear from the above statements that, not only constitutional interpretation, but also statutes have to be interpreted with the changing times and it is here that the creative role of the judge appears, thus the judge clearly contributes to the process of legal development.

The courts do not always follow the precedent blindly and do not always consider themselves bound by the given principles. The court does evolve new principles. However, the courts do always have to follow within the limits of the constitution and they cannot exceed the constitutional limits. “When new societal conditions and factual situations demand the Judges to speak, they, without professing the tradition of judicial lock-jaw, must speak out.”

Also, in M.C. Mehta v. Union of India (Shriram - Oleum Gas case) the court said that with the development and fast changing society the law cannot remain static and that the law has to

---

3Air 1987 SC 965. 142. 23
develop its own new principles. The above decision reflects that the courts do make law, they frame new principles; interpret the statutes and the constitution with the changing times.

Finally it can be summed up that, “The courts must not shy away from discharging their constitutional obligation to protect and enforce human rights of the citizens and while acting within the bounds of law must always arise to the occasion as ‘guardians of the constitution’, criticism of judicial activism notwithstanding.”

It has been accepted that judges filled the gaps left by rulers, by using their discretion. Austin accepted the utility of legislation by judges. He says, “I cannot understand how any person who had considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator.”

---

4 Web Article by Ashish Shrivastava available at http://www.legalserviceindia.com/articles/juju.htm
Despite of plethora of legislations due to ineffective enforcement, women are exploited by the male dominant society. Male dominant society has always found the ways to circumvent the provisions of the Act and act as a blockade against the women empowerment. Due to failure of legislations to protect the women the judiciary has come forward to protect women. In protecting women the Indian judiciary has removed all the procedural shackles and has completely revolutionized the constitutional litigations. The judiciary has encouraged widest possible coverage of the legislation by liberal interpreting the terms. The judiciary has shifted from pragmatic approach, which was 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 had filled up the gap created by the legislative machinery. The judiciary has extended helping hands to women when the legislature had denied it and enabled their political and social empowerment in the society.

All provisions of the Constitution and all laws enacted by the legislature get their real meaning and import through the process of judicial
interpretation. The Constitutional mandate and the various laws providing for protective discrimination in favour of women relating to several aspects of their social, economic and political life have come up before the courts. Through various devices like judicial review, judicial activism, social action litigation and the duty of enforcement of fundamental rights the superior Courts in India have evolved a gender jurisprudence which has given substance and life to the constitutional scheme of protective discrimination in favour of women. Below is detailed overview of the judicial approach in various cases, where the Courts have successfully delivered their verdict to strengthen position of women. If we go through the important decisions relating to women in the last six decades we can easily be convinced with the fact that the judiciary has been so sensitive, innovative and positive which deciding the cases relating to women and their rights.

The most important contribution of judiciary has been the decisions where the courts have interpreted the right to equality, right to life and liberty, right against exploitation, the directive principles of state policy and
fundamental duties in favour of women. Sometimes to justify the state’s action, sometimes to protect them and sometimes to remove gender inequity the courts have expanded the ambit of provisions of our Constitution.

1. Judicial Approach in the matters relating to Education:

Education is a part of the development of the personality of all in general and woman in particular. In early cases some High Courts allowed discrimination in matters of admission to educational institutions on the ground of sex only. In University of Madras v. Shanta Bai, the respondent was refused admission to the college by the Principal in pursuance of the directions given by the University not to admit women into the college. The respondent’s contention was that these directions were opposed to Section 5(1) of the Madras University Act, 1923 and that they were also repugnant to Article 15(1) of the Constitution in that they discriminate against her and therefore, void. Three contentions were raised by the University in this case viz., First, Article 15(1) prohibits discrimination only by the State, the

---

5 AIR 1954 Mad 67, (1953) IIMLJ 287
University of Madras is not a State and its directions were, therefore, unaffected by the operation of Article 15(1). Second, the right of a citizen to get admission into an educational institution is governed not by Article 15(1), but by Article 29(2) and the Article does not prohibit any restriction based on the ground of sex, and third, the directions given by the University do not deny the right of women to be admitted into colleges, but only regulates the exercise of that right and that having regard to the nature of the right, the restrictions are reasonable and not discriminatory.

The Court accepted all the three contentions in favour of the University. The Court observed that: Firstly, University is not a State, because it is not maintained by State. Secondly, the combined effect of Article 15(3) and 29(2) is that while men students have no right of admission to women’s colleges, the right of women’s to admission in other colleges is a matter within the regulation of the authorities of those colleges. Article 29(2) is a special Article dealing with admission in educational institutions and is the controlling provision when the question related to admission to the colleges arises. As in Article 29(2) word “sex”
has not been used, the State can deny admission to women in men’s educational institutions. Thirdly, the Commission, appointed in 1945 by the State Government on the State of higher education and its progress in the State of Madras, pointed out that there is no sufficient number of women’s colleges to accommodate all those who want to receive higher education. Co-education has become inevitable and unless that is properly controlled, it might result in evil and not good. The Syndicate of the University requires that colleges which seek permission to admit women students should provide the necessary facilities for them. In fact there is no regulation refusing admission to women students. Thus, it is difficult to see how these regulations can be regarded as discriminating against women.

It is submitted that the judgment is based on the following erroneous considerations: Firstly, the High Court interpreted Article 12 in a very restricted and technical sense. When it is technically observed that University is a State aided institution and is not maintained by the State and the educational institutions will be within the purview of Article 15(1) only if it is State maintained and not otherwise. Secondly, the Court by applying the rule of interpretation that
“special law should be preferred over general law” gave overriding effect to Article 29(2) on the basis that it is a special Article relating to the admission to colleges. It is submitted that constitution being the grundnorm, all the provisions are special provisions and should be given equal credence. Thirdly, the High Court justified discrimination keeping in view the report of fact finding body on which the rule made by the syndicate was based. This cannot be a legal criterion for allowing discrimination. The court should have looked into factual situation. If the factual position reveals the fact of discrimination, the motive, object or the basis of the rule, however sound it may be, it is unconstitutional. Fourthly, for want of adequate facilities, the Fundamental Rights conferred on women cannot be denied, because State itself is responsible for this by creating facilities for male students and in failing to create equal facilities for women. It would have been better if the Court would have directed the State and University to create equal facilities for both male and female colleges. If the State fails to discharge its responsibility, citizen should not be asked to suffer.
The view of Madras High Court did not hold the field for a long time and a shift in judicial outlook became clear during the second decade of the functioning of the Constitution. In *P. Sagar v. State of Andhra Pradesh*[^6], the Rules 5 and 6 of G.O. issued by Health Housing and Municipal Administration Department provided for reservation of 30 per cent seats to women candidates for admission to Medical Colleges in Andhra and Telangana area. These rules were challenged on the ground that they were meant for those who could not come up in open selection and that the procedure sought to be adopted by the Government in bringing all women candidates into the reservation quota without there being tested for open selection was uncalled for and unwarranted under rules and were, therefore, illegal. The Andhra Pradesh High Court observed that the contention raised by the petitioner ignores the provisions of Article 15(3) which is an exception engrafted to clause (1) of the said Article. Thus, in view of the Article 15(3) reservation for women cannot be denied. Similarly, the reservation for sports women does

[^6]: 1968 AIR 1379, 1968 SCR (3) 565
not offend the provisions of Articles 15(1) and 29(2) of the Constitution.\textsuperscript{7}

In \textit{Padmaraj Samarendra v. State of Bihar}\textsuperscript{8}, allotment of some seats for girl students in Medical Colleges was challenged on the ground that it is solely based on sex. The Court while justifying the allotment of seats for girl students observed that; firstly, allotment of seats is not a reservation in the strict sense of the term. It is an allotment of the source from which the seats have to be filled, secondly, the requirement in the State for a large number of lady doctors and the mental aptitude and psychological background of lady patients for treatment of gynaecological diseases and obstetric services by lady doctors, makes the allotment reasonable. Thus it cannot be said to be discrimination on the ground of sex alone.

2. Judicial Approach in the matters of Employment:

Rule 18(4) of the Indian Foreign Service (Recruitment, Seniority and Promotion) Rules, 1961, which required permission before marriage and denial of right to employment to married

\textsuperscript{7}Sukhdeo v. Government of A.P., 1966-1 Andhra WR 294
\textsuperscript{8}AIR 1979 Pat 266
women for panel employees in the government was declared discriminatory by the Supreme Court on the ground of sex and thus violative of Article 14. The Court upholding the principle of equality of status put the female employees at par with male employees. On the same lines the Allahabad High Court, has declared that the condition in service that a nurse, male or female, who married while in service was required to resign, is violative of Article 24 of the Constitution. The Patna High Court also, for ignoring the claim of woman officer, declared Rule 12 of Bihar Service Code 1952 as against Articles 14 and 16 of the Constitution. Similarly, the Orissa High Court has held the Orissa Service Rules violative of Article 14 of the Constitution which disqualified married women from being selected to the post of District Judges. The rule was declared discriminatory on the basis of sex.

Hostile discrimination against women has always been struck down by the Supreme Court of India from

\[9\] C.B.Muthamma v. Union of India, AIR 1979 SC 1868
\[10\] (1973) 1 Serv. L.R. 909(All.)
\[11\] 1975 Lab. I.C. 637 (Pat.)
time to time. Since sex, like race and national origin, is an immutable characteristic determined solely by accident of birth, the imposition of special disabilities upon the members of fair sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility. Therefore, for being of fair sex if some disability is attached, it amounts to hostile discrimination against women violative of Article 14 of the Constitution of India.

What is said about the fair sex equally applies to a pregnant women also as pregnancy also is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Thus, any unreasonable restriction on the basis of pregnancy is violative of Article 14 of the Indian Constitution. The landmark case in the history of women’s right on this point is *Air India v. Nargesh Meerza*\(^\text{13}\). In this case some of the provisions of Air India Employees Service Regulations and of Indian-Airlines (Flying Crew) Service Regulations were declared against the letter and spirit of Article 14 of the Constitution.

\(^{13}\) *AIR 1981 SC 1829*
of India. Regulation 46(1)(c) of the Air India Employees Service Regulations, provided that “An Air Hostess was to resign from her service: (a) upon attaining the age of 35 years, or (b) marriage, if it takes place within four years of service, or (c) on first pregnancy, whichever occurs earliest. “Justice Fazal Ali”, while declaring clause “c” of the above provision, i.e. termination of service on the first pregnancy as violative of Article 14, observed that, “It seems to us that the termination of the services of an Air Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood – the most sacrosanct and cherished institution.” The judges were constrained to observe that such a course of action is extremely detestable and abhorrent to the notion of a civilized society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Thus, such a provision was held not only manifestly unreasonable and arbitrary but containing the quality of unfairness and exhibiting naked despotisms this, therefore was clearly violative of Article 14 of the Constitution.14

14 AIR 1981 SC 1829 at 1850.
Regulation 47 further provided that “the Managing Director can extend the retirement age from 35 years to 45 years to his discretion.” About this, the court observed that this provision did not provide any guidelines, rules or principles which may govern the exercise of discretion by the Managing Director. Secondly, the provision did not even give the right to appeal to higher authorities in case of refusal to such extension. Therefore, the extension of the retirement of an Air Hostess depended on the “mercy and sweet will” of the Managing Director. Such wide and uncontrolled powers are clearly violative of Article 14, as the provision suffered from the vice of excessive delegation of powers. Similarly, in *Bombay Labour Union v. International Franchises Pvt. Ltd.*\(^{15}\), the Supreme Court has declared unconstitutional the clause in the regulation of the Corporation which required that unmarried women were to give up service on marriage.

In *C.B. Muthamma v. Union of India*,\(^{16}\) the writ filed by Miss Muthamma, a senior member of Indian Foreign Service, speaks a story which makes one wonder whether Articles 14 and 16 belong to myth or

---

\(^{15}\) AIR 1966 SC 942

\(^{16}\) AIR 1979 SC 1868
reality. It was a unique example of sex discrimination ultra-vires Articles 14 and 16 of the Constitution of India. Rule 8(2) of the Indian Foreign Services Rules, 1961 provided that “a woman member of the service shall obtain the permission of the Government in writing before her marriage is solemnized. At any time after marriage, a woman member of the service may be required to resign from service, if the Government is satisfied that her family and domestic commitments are likely to come in way of the due and efficient discharging of duties. Justice Krishna Iyer while delivering the judgment observed that “Discrimination against woman, in traumatic transparency, is found in this rule. In these days of nuclear families, inter-continental marriages and unconventional behaviour one fails to understand the naked bias against the gender of species.” Both the rules were declared violative of the principle of equality and held discriminatory.

In *Vijay Lakshmi v. Punjab University*¹⁷, the Division Bench of Supreme Court comprising M. B. Shah and Dr. A. R. Lakshmanan, JJ, held that Rules 5, 8, 10 of Punjab University Calendar, Volume III,  

---

¹⁷ AIR 2003 SC 3331
providing for appointment of lady Principal in Women’s college or a lady teacher therein, cannot be held to be violative of Articles 14 and 16 of the Constitution, because classification is reasonable and it has a nexus with the object to be achieved. In addition, the State Government is empowered to make such special provisions under Article 15(3) of the Constitution. This power is not restricted in any manner of Article 16. The Court said:

On the concept of equality enshrined in the Constitution, it can be stated that there could be classification between male and female for certain posts. Such classification cannot be said to be arbitrary or unjustified, rules providing appointment of lady principal or teacher would also be justified. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught.\(^\text{18}\)

In Uttarakhand Mahila Kalyan Parishad v. State of Uttar Pradesh\(^\text{19}\) the Apex court, very positively allowed the writ in favour of lady teachers and

\(^\text{18}\) AIR 2003 SC 3333
\(^\text{19}\) AIR 1992 SC 1695
female officials, where they demanded equal remuneration as their male counterparts for the similar work carried out by them.

In *Mrs. Neera Mathur v. Life Insurance Corporation of India*\(^2\) the Supreme Court recognized the right to privacy of female employee. Mrs. Neera had been appointed by the LIC without them knowing that she was pregnant. She applied for maternity leave and when she returned thereafter she was terminated. The reason given was that she had withheld information regarding her pregnancy when she had filled their questionnaire. The Supreme Court on perusing the questionnaire was shocked to find that it required women candidates to provide information about the dates of their menstrual cycles and past pregnancies. It considered them to be an invasion of privacy of a person and violative of Article 21 which guarantees right to life and privacy. It, therefore, directed the LIC to reinstate Mrs. Neera and to delete those columns from its future questionnaires. In this case the petitioner drew the attention of the Court to the Equal Remuneration Act (25 of 1976) Section 4. The Supreme Court upheld her contention and stated that

---

\(^2\) 1992 AIR 392
the employer was bound to pay the same remuneration to both male and female workers irrespective of the place where they were working unless it is shown that the women were not fit to do the work of the male stenographers.

In *Maya Devi v. State of Maharashtra*\(^{21}\), where the requirement of husband’s consent for wife’s application for public employment was struck down as an anachronistic obstacle to woman’s equality and economic justice, reflects this approach.

In *Ram Bahadur Thakur (P) Ltd. v. Chief Inspector of Plantations*\(^{22}\) a woman worker employed in the Pambanar Tea Estate was denied maternity benefit on the grounds that she had actually worked for only 157 days instead of the required 160 days. The Court, however, drew attention to a Supreme Court Decision\(^{23}\) wherein the Court held that for purposes of computing maternity benefit all the days including Sundays and rest days which maybe wage-less holidays have to be taken into consideration. It also stated that the Maternity Benefit Act would have to be interpreted in such a

---

\(^{21}\) 1986) 1 SCR 743
\(^{22}\) 1982(2) LLJ 20
\(^{23}\) B. Shah v Presiding Officer, Labour Court, Coimbatore; 1978(1) LLJ 29
way as to advance the purpose of the Act therefore upheld the woman worker’s claim.

Upholding a service rule that preferred women in recruitment to public employment to the extent of 30% of posts, the Supreme Court stated in *Government of A.P. v. P.B. Vijayakumar*\(^{24}\):

“To say that under Article 15(3) job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provision for women in respect of employments or posts under the state is an integral part of Article 15(3).”

Also, in *Mackinnon Mackenzie & Co. Ltd v. Audrey D’Costa*\(^{25}\) the Court observed that there was discrimination in payment of wages to lady stenographers and such discrimination was being perpetuated under the garb of a settlement between the employees and the employer. The Court finally not only made it mandatory to pay equal remuneration to lady stenographers as their male counterparts but also observed that the ground of financial incapability of the management cannot be

---

\(^{24}\) *AIR 1995 SC. 1648*

\(^{25}\) *1987 AIR 1281*
a ground to seek exemption from the Equal Remuneration Act, 1976.

The judiciary has played a significant role in protecting the interests of the women working in industries also. In *B.Shah v. Presiding Officer*\(^2^6\), labour court, the Supreme Court pointed out that, “Performance of the biological role of childbearing necessarily involves withdrawal of a women from the workforce for some period and she cannot work for her medical expenses also. In order to enable the woman worker to subsist during this period and to preserve her health, the law makes a provision for maternity benefit so that the women can play both her productive and reproductive roles efficiently”.

In another judgment of far reaching consequence, the Supreme Court in *Municipal Corporation of Delhi v. Female Workers*\(^2^7\) declared that the maternity benefit is applicable to casual workers and daily wage workers also. There is nothing in the Maternity Benefit Act, which entitles only regular women employees to the benefit of maternity leave and not to those who are

---

\(^{26}\) 1978 AIR 12, 1978 SCR (1) 701

\(^{27}\) (2000) 3 SCC 224
engaged on casual basis or on muster roll on daily wage basis.

Judiciary has played an active role in enforcing and strengthening the constitutional goal of “equal pay for equal work”.

In a plethora of cases such as Peoples Union for Democratic Rights v. Union of India\textsuperscript{28}, Randhir Singh v. Union of India\textsuperscript{29}, Sanjit Roy v. State of Rajasthan\textsuperscript{30}, Mackinnon Mackenzie and Co. Ltd. v. Andrey D’ Costa\textsuperscript{31} The Supreme Court reiterated that “equal pay for equal work” enshrined in Article 39(a) is implicit in Article 14 and 16 of the Constitution and hence become enforceable in the court of law. In other words we can say that the court has brought the equal remuneration within the contours of fundamental right of equality.

3. Judicial Approach in the matters relating political justice for women:

It is a matter of hot controversy whether provisions of Article 15(3) can be invoked for

\textsuperscript{28} AIR 1982 SC 1473
\textsuperscript{29} AIR 1982 SC 879
\textsuperscript{30} AIR 1983 SC 328
\textsuperscript{31} 1987 AIR 1281
giving rights to women for securing political rights. The Supreme Court at the very beginning ruled that the general prohibition against discrimination in clause (1) of Article 15 also extends to political rights and therefore, the umbrella of protective discrimination can be used to secure political rights to the women. Thus, it is clear that sex is a valid ground for discrimination in favour of women for securing political justice and hence will not be violative of Article 15(1) keeping in view provisions of Article 15(3).

In *Dattatrays Motiram v. State of Bombay*[^32], Bombay Municipal Borough Act, 1925 providing for reservation of seats for women in the election to the Municipality was challenged. It was argued on behalf of the petitioner that discrimination in favour of a particular sex is permissible provided it is not only on the ground of sex; it should also be based on other considerations. It was also argued that Article 15(3) must be read to mean that only those special provisions for women are permissible which do not result in discrimination against men. The Bombay High Court while rejecting

[^32]: AIR 1953 Bom 311, (1953) 55 BOMLR 323, ILR 1953 Bom 842
this argument observed that if that was the object of enacting Article 15(3), then Article 15(3) need not have been enacted at all as a proviso to Article 15(1). Therefore, as a result of the joint operation of Article 15(1) and 15(3), the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women. Thus, the legislation does not offend Article 15(1) by reason of Article 15(3). The Court also pointed out that even today women are more backward than men and it is the duty of the State to raise the position of women to that of men. It would be very difficult for women to be elected if there was no reservation in their favour and Government may well take the view that participation of women are necessary in local authorities before they decide any question relating to them.

The Assam High Court, in Beney Bhusan Chakravarty v. Govind Chandra Sharma\(^{33}\), upheld Rule 3 of the Election Rules under the Assam Municipal Act, 1923 providing discrimination in voting facilities in favour of female as constitutional and not as violative of Article 15(3) of the

---

\(^{33}\) AIR 1955 Assam 1780
Constitution. It is submitted that the court rightly decided the case. Because of exemption accorded to women, men stand benefited otherwise social burden on them will increase in the matter of looking after children, house hold duties etc. for which they are generally unfit.

In *Ram Chandra Mohtton v. State of Bihar*\(^3^4\), the provisions of Bihar Panchayat Samitis and Zila Parishads Act, 1961, providing for co-option of women to Panchayat Samiti where no woman elected, was challenged. The Patna High Court while upholding the validity of the provisions observed:

Conferment of the right is a special provision, so long as clause (3) of Article 15 stands as it is, there is no scope for die argument that any special right conferred upon women in the special circumstances prevailing in this country can be struck down as going against clause (1) of Article 15 as clause (3) operates in the nature of a proviso to clause (1).

The Kerala High Court upheld the validity of Co-operative Societies (Amendment) Ordinance, 1985, providing for reservation of one seat for women in

\(^{34}\) AIR 1966 Pat. 214
The Role of Law in Empowering Women in India

Chapter 8

The Rajasthan Government has provided for thirty per cent of wards in Municipalities, Municipal Corporations, Gram Panchayats for women through an amendment in the respective Acts to provide adequate representation to women in local bodies and Gram Panchayats. The judicial attitude to help women by way of special provision in view of Article 15 (3) is also discernible in another way. The judiciary has declared such provisions unconstitutional which put women in disadvantageous position by way of discrimination. Thus in Cracknell v. State of U.P., the validity of the provisions of Court of Wards Act, 1912 was challenged. The Allahabad High Court while declaring the provisions unconstitutional held that the section classified female proprietors in an arbitrary manner and placed them in a more disadvantageous position than male members without giving them any opportunity of being heard. The court also observed that Section 8(1)(b) of the Act discriminates against women solely on the basis of “sex” which is against the

36 AIR 1962 All. 746 [Section 8(1)(b) of the Act provides that proprietors shall be deemed to be disqualified to manage their own property when they are females declared by provisional Government to be incapable of Managing their own property]
very spirit of Article 15(1) and therefore, unconstitutional. The Parliament has provided opportunities in all levels of local government for women in the year 1992 by Seventy-third and Seventy-fourth constitutional Amendments. By these Amendments one-third of total seats of Panchayat have been reserved for women for their political upliftment.37

It would be relevant to raise a question here that why political empowerment of women and that too through reservation of seats in Legislatures has assumed importance? Answer is straight and simple. First, very few women have been voluntarily coming forward to take part in politics which has been rendered tough and filthy. Second, our social and political set up is dominated by the men who have vested interest in deliberately keeping women in the four walls of their houses. Third, all political parties have failed to promote their cause by giving them more tickets during elections. Though women have earned right to vote yet their struggle to exercise political power in proportion to their number appears to have just began.

37 Article 243 D (d), Constitution of India.
4. **Judicial Approach in the matters relating of crime against women:**

The most shameful thing is that even after good legislations the crimes against women are regularly increasing. There are many crimes against women’s but the most heinous crime against women is sexual harassment. Sexual Harassment is a social stigma which has increased in number. The sexual harassment not only includes rape or physical harassment of women but also includes:

“Unwelcome sexual gesture or behaviour whether directly or indirectly as sexually coloured remarks; physical contact and advances; showing pornography; a demand or request for sexual favours; any other unwelcome physical, verbal/non-verbal conduct being sexual in nature.”

Many instances showed the practice of sexual harassment of the women. Sexual Harassment not only hurts the physical body but also rips off the soul of women. It has rightly been observed by Justice Arjit Pasayat, “While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of helpless women.”
Sexual harassment is a stigma on the society; which not only hurts the women but also takes away her dignity. Not only this, disclosure of this in the society led to another trauma to the victim:

- Due to the non-acceptance in the society
- Keeping her apart from all the social activities
- Looking with suspicious eyes
- Defamation in the society.
- Fear of the society, fear of defamation of the family in the society.
- Due to the above reasons many sexual harassment cases goes unreported as they ruin the dignity of the women completely and she cannot live a peaceful dignified life in the society. The silence gives the strength to such criminals which are the greatest human rights violator. Here the fear of the society plays the greatest player who rips off the victim’s right.

In most of the rape cases the victim does not complain due to above mentioned fears and there exists a passive submission due to fear/threats by offender. In the earlier cases the approach of the
Apex Court was very primitive and most of the decisions relied upon literal interpretations of the provisions under Section 375. It seems that the Apex Court sought after the reasons like absence of penetration, unchaste character of women and absence of injury indicates the consent of victim, etc., to acquit the accused.

The cases like Pratap Mishra v. State of Orissa\(^{38}\) and Laiq Singh v. State of U.P.\(^{39}\) the Supreme Court reversed the consecutive convictions in two subordinate courts and acquitted the accused on the ground that absence of any injury on the prosecutrix indicates the consent of the prosecutrix.

But in 1978 when the Supreme Court acquitted the accused in TukaRam v. State of Maharashtra\(^{40}\), popularly known as the Mathura Trial, the judgement was not accepted silently. The facts of the case are as:

The Sessions Judge found the evidence insufficient to convict the accused. The Bombay High Court reversed the finding and sentenced the

\(^{38}\) 1977 (3) SCC 41

\(^{39}\) 1970 (2) SCC 561

\(^{40}\) 1979 (2) SCC 143
accused to rigorous imprisonment. In March 1972, a 16-year-old tribal girl was raped by two policemen in the compound of Desai Ganj police chowky in Chandrapur district of Maharashtra. Her relatives, who had come to register a complaint, were patiently waiting outside even as this heinous act was being perpetrated in the police station. When her relatives and the crowd threatened to burn the police chowky down, the two guilty policemen, Ganpat and Tukaram, reluctantly agreed to file a panchnana. At the Sessions Court, Mathura was accused of being a “liar” and that since she was “habituated to sexual intercourse”, her consent was given. The Nagpur bench of the Bombay High Court set aside the judgment holding that that passive submission due to fear induced by serious threats could not be construed as willing sexual intercourse. However, the decision of the Supreme Court remains a blot on its record to this day. The rationale for acquittal was that Mathura had not raised an alarm and there were no visible marks of injury on her body. The judgment did not distinguish between consent and forcible submission. This judgement highlighted the inadequacy of laws to protect women who are victim of rape and lack of enough safeguards to protect
women visiting or summoned to a police station. This marked judgement piloted the voice of amendment in the existing penal provisions to make them more effective in providing justice to victims.

Again in Prem Chand v. State of Haryana\textsuperscript{41} the Supreme Court reduced the minimum sentence of 10 years for rape to 5 years on account that the raped girl was a woman of easy virtue. This again caused an agitation and criticism by women organisations which resulted in filing of a review petition. The petition failed to sustain as the Apex Court just clarified position.

In another shameful decision\textsuperscript{42} the Delhi High Court allowed a rapist to go scot-free merely because there were no marks of injury on his penis, which the High Court presumed was an indication of no resistance. The most important facts such as the age of the victim (being seven years) and that she had suffered a ruptured hymen and the bite marks on her body were not considered by the High Court. Even the eye witnesses, who witnessed this ghastly act, could not sway the High Court’s judgment.

\textsuperscript{41} 1989 Supp (1) SCC 286
\textsuperscript{42} Mohd. Habib v. State, 1989 Cri LJ 137 (Delhi)
The above are the few examples, enough to highlight the insensitiveness of higher judiciary towards such heinous crime against humanity. The data of decisions in such cases by lower courts is not available for consideration but we can easily anticipate the critical situation. The real life truth is when the rapist or the offender in such cases is acquitted by lower courts only a few women courageous enough move to higher courts to ask for justice. The earlier attitude of higher courts was not as sensitive as it should be which is quite clear from the purview of above mentioned decisions. The sensitiveness of the courts in such crimes has improved over the time and visible in the decisions afterward. In the past few decades the higher judiciary has dealt with these issues not only very thoughtfully but also very proactively in a few cases.

As in State of Punjab v. Gurmit Singh⁴³, the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of loose character.

⁴³ 1996 SCC (2) 384
In *Chairman, Railway Board v. Chandrima Das*\(^4\), a practicing Advocate of the Calcutta High Court filed a petition under Article 226 of the Constitution of India against the various railway authorities of the eastern railway claiming compensation for the victim (Smt. Hanufa Khatoon) a Bangladesh national who was raped at the Howrah Station, by the railway security men. The High Court awarded Rs.10 lacs as compensation.

An appeal was preferred and it was contended by the state that:

a) The railway was not liable to pay the compensation to the victim for she was a foreigner.

b) That the remedy for compensation lies in the domain of private law and not public law, i.e. that the victim should have approached the Civil Court for seeking damages; and should have not come to the High Court under Article 226.

Considering the above said contentions, the Supreme Court observed:

---

\(^4\) AIR 2000 SC 988
“Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would be avoidable under public law. It was more so, when it was not a mere violation of any ordinary right, but the violation of fundamental rights was involved – as the petitioner was a victim of rape, which a violation of fundamental right of every person guaranteed under Article 21 of the Constitution.”

The Supreme Court also held that the relief can be granted to the victim for two reasons—firstly, on the ground of domestic jurisprudence based on the Constitutional provisions; and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948 which has international recognition as the ‘Moral Code of Conduct’ adopted by the General Assembly of the United Nation.

In *Sakshi v. Union of India*[^45], the judges sought refuge behind the strict interpretation of penal statutes and the doctrine of stare decisis—a view that any alteration [in this case, of the definition of rape] would result in chaos and

[^45]: 1999 (6) SCC 591
confusion, it directed the Law Commission of India to respond to the issues raised in the petition. The Law Commission, under the chairmanship of Justice P. Jeevan Reddy, responded by saying that the 156th Law Commission Report had dealt with these issues. The Supreme Court, however, agreed with Sakshi that the 156th Report did not deal with the precise issues raised in the writ petition. In August 1999, it directed the Law Commission to look into these issues afresh.

After detailed consultations with the organisations, the Law Commission released its 172nd Report on the Review of Rape Laws, in 2000. The Law Commission recommended changing the focus from rape to ‘sexual assault’, the definition of which goes beyond penile penetration to include penetration by any part of the body and objects, taking into account cunnilingus and fellatio.

The 172nd Law Commission report had made the following recommendations for substantial change in the law with regard to rape.

1. ‘Rape’ should be replaced by the term ‘sexual assault’.
2. ‘Sexual intercourse’ as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

3. In the light of *Sakshi v. Union of India* and Others ‘sexual assault on any part of the body’ should be construed as rape.

4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.

5. A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.

6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.

7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband
against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.

8. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

In recent case State of U.P. v. Chhotey Lal\(^{46}\), Highlighting the difference between ‘will’ and ‘consent’, the court said that a nod for sexual relations obtained by a man on the false pretext would not amount to a ‘legal or valid’ consent to save him from punishment for rape. Even if there were mutual consent, if the consent is based on a false pretext made by the man then the consent would stand as null and void and the intercourse be termed as Rape.

Another remarkable decision in the Delhi Domestic Working Women’s Forum v. Union of India\(^{47}\) clearly highlights the judicial sensitiveness towards this heinous crime. In this verdict the Court observed that, “It is rather unfortunate that in recent times, there has been an increase in

\(^{46}\) 2011 (2) SCC 550
\(^{47}\) 1995 (1) SCC 14
violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such crimes eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour values and generating and less fears. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings.” This Court further observed as under:

“The defects in the present system are: Firstly, complaints are handled roughly and are not even such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had had to suffer as a result of the rape itself. In this
background, it is necessary to indicate the broad parameters in assisting the victims of rape.

1. The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim’s advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant’s interests in the police station represents her till the end of the case.

2. Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police
station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

3. The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

5. The advocate shall be appointed by the court, upon application by the police at the earliest convenient movement, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

6. In all rape trials anonymity of the victims must be maintained, as far as necessary.
7. It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too dramatized to continue in employment.

8. Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of the child but if this occurred as a result of the rape.

In the present situation, the third respondent will have to evolve such scheme as to wipe out the fears of such unfortunate victims. Such a scheme shall be prepared within six months from the date of this judgment. Thereupon, the Union of India will examine the same and shall take necessary steps for the implementation of the scheme at the earliest.”
This decision recognises the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender subject to the finalisation of Scheme by the Central Government. If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme. On the basis of principles set out in the aforesaid decision in *Delhi Domestic Working Women’s Forum*\(^4\), the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life.

Apart from the above, this Court has the inherent jurisdiction to pass any order it consists fit and proper in the interest of justice or to do complete justice between the parties.

Having regard to the facts and circumstances of the present case in which there is a serious allegation that Bodhisattwa Gautam had married

---

\(^{48}\) 1995 (1) SCC 12
Subhra Chakraborty before the God he worshiped by putting Varmilion on her forehead and accepting her as his wife and also having impregnated her twice resulting in abortion on both the occasions, we, on being prima-facie satisfied, dispose of this matter by providing that Bodhisattwa Gautam shall pay to Subhra Chakraborty a sum of Rs. 1,000/- every month as interim compensation during the pendency of Criminal Case No. 1/95 in the court of Judicial Magistrate, I Class, Kohima, Nagaland. He shall also be liable to pay arrears of compensation at the same rate from the date on which the complaint was filed till this date.

The Supreme Court in State of Maharashtra v. Madhukar Narayan Mardikar,49 upheld the right to privacy of women of easy virtue against compulsions for sexual acts against her will. Anti-subordination vision in this approach infused aspects of human dignity into right to privacy in this case.

The case of Vishaka v. State of Rajasthan50 in 1997 has been credited with establishing sexual harassment as illegal. The litigation resulted from

---

49 (1991) 1 SCC 57
50 AIR 1997 SC 3011
a brutal gang rape of a publicly employed social worker in a village in Rajasthan during the course of her employment. The petitioners bringing the action were various social activists and non-governmental organisations. The primary basis of bringing such an action to the Supreme Court in India was to find suitable methods for the realisation of the true concept of “gender equality” in the workplace for women. In turn, the prevention of sexual harassment of women would be addressed by applying the judicial process.

Under Article 32 of the Indian Constitution, an action was filed in order to establish the enforcement of the fundamental rights relating to the women in the workplace. In particular it sought to establish the enforcement of Articles 14, 15, 19(1) (g) and 21 of the Constitution of India and Articles 11 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women.

In disposing of the writ petition with directions, it was held that:

“The fundamental right to carry on any occupation, trade or profession depends on the
availability of a ‘safe’ working environment. The right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, belongs to the legislature and the executive. When, however, instances of sexual harassment resulting in violations of Arts 14, 19 and 21 are brought under Art 32, effective redress requires that some guidelines for the protection of these rights should be laid down to fill the legislative vacuum.”

In light of these deliberations, the Court outlined guidelines which were to be observed in order to enforce the rights of gender equality and to prevent discrimination for women in the workplace.

These guidelines included the responsibility upon the employer to prevent or deter the commission of acts of sexual harassment and to apply the appropriate settlement and resolutions and a definition of sexual harassment which includes unwelcome sexually determined behaviour (whether directly or by implication) such as:
• physical contact and advances;

• a demand or request for sexual favours;

• sexually-coloured remarks;

• showing pornography;

• any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

Furthermore the guidelines set out that persons in charge of a workplace in the public or private sector would be responsible for taking the appropriate steps to prevent sexual harassment by taking the appropriate steps, including:

• The prohibition of sexual harassment should be published in the appropriate ways and providing the appropriate penalties against the offender;

• For private employees, the guidelines should be included in the relevant employment guidelines;

• Appropriate working conditions in order to provide environments for women that are not
hostile in order to establish reasonable grounds for discrimination;

- The employer should ensure the protection of potential petitioners against victimisation or discrimination during potential proceedings;

- An appropriate complaints mechanism should be established in the work place with the appropriate redress mechanism;

- Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

Finally, the court stated that the guidelines are to be treated as a declaration of law in accordance with Article 141 of the Constitution until the enactment of appropriate legislation and that the guidelines do not prejudice any rights available under the Protection of Human Rights Act 1993. The court gathered feminist vision as an input for its reasoning from Convention on Elimination of All Forms of Discrimination against
Women, Directive Principles of State Policy, affirmative action policy under Article 15(3) and the idea of human dignity. It is because of this vision that the extraordinary type of judicial law making in this case became non-controversial and acceptable.

Continuance of Vishaka reasoning in Apparel Export Promotion Council\(^{51}\) with more clarification, and the legislative efforts to concretise Vishaka guidelines vindicate tenability of this approach. This is the first case in which the Supreme Court applied the law laid down in Vishaka’s case and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by Article 21 of the Constitution.

Enhanced sentences were introduced by amendment in 1983, whereby the Legislature indicated that it considers aggravated rape (including gang rape) deserving of higher punishment. It is also pertinent to note at this stage that in earlier

\(^{51}\) AIR 1999 SC 625
cases the Supreme Court has ruled that the term “adequate and special reasons”.

The rule of “Corroboration of the Prosecutrix” has undergone a change through statutory amendments as also through decisions of this Court. In State of Himachal Pradesh v. Raghubir Singh, this Court observed as under, “There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which mitigate her veracity. In the present case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be looked for, though enough was available on the record. The medical evidence provided sufficient corroboration.”

In State of Karnataka v. Mahabaleshwar Gourya Naik, the Court went to the extent of laying down that even if the victim of rape is not available to give evidence on account of her having committed

---

52 1993 (2) SCC 622
53 AIR 1992 SC 2043
suicide, the prosecution case cannot be thrown away over board. In such a case, the non-availability of the victim will not be fatal and the Court can record a conviction on the basis of the available evidence brought on record by the prosecution.

In spite of the decision of this Court that (depending upon the circumstances of the case) corroboration of the prosecutrix was not necessary, the cases continued to end in acquittal on account of mishandling of the crime by the police and the invocation of the theory of “consent” by the Courts who tried the offence. To overcome this difficulty, the legislature intervened and introduced Section 114-A in the Evidence Act by Act No. 43 of 1983 reading as under:- 114-A. Presumption as to absence of consent in certain prosecutions for rape.— In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) or sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.” This Section enables a court to raise a presumption
that the woman who was the victim of rape had not consented and that the offence was committed against her will. The situation, however, has hardly improved. Conviction rates for rape are still lower than any other major crime and the woman continue to argue even today that in rape cases the victimized women, rather than the rapists, were put on trial. A large number of women still fail to report rapes to the police because they fear embarrassing and insensitive treatment by the doctors, the law enforcement personnel and/or the cross-examining defence attorneys. The fear has to be allayed from the minds of women so that if and when this crime is committed, the victim may promptly report the matter to the police and on a charge sheet being submitted, the trial may proceed speedily without causing any embarrassment to the prosecutrix who may come in the witness box without fear psychosis.

In the matters touching upon the issues like prostitution the approach of the courts has been very positive, in most of the cases they adopted the reformist attitude like in the case of Gaurav Jain v. Union of India\(^{54}\) where the court held that

\(^{54}\) (1997) 8 SCC 114
the women found in flesh trade, should be viewed more as victims of adverse socio-economic circumstances rather than as offenders in our society. The commercial exploitation of sex may be regarded as a crime but those trapped in custom-oriented prostitution and gender-oriented prostitution should be viewed as victims of gender-oriented vulnerability.

Though there is no movement against trafficking in women still, some mainstream feminists and human rights activists fight for the plight of these women. The case of Upendra Baxi v. State of Uttar Pradesh\(^\text{55}\) shows how deeply entrenched is the market for sex trafficking. The Agra Protective Home was constituted by and functioned under the penal law — The Immoral Traffic (Prevention) Act, 1956.

In a letter to the Indian Express a member of the Board of Visitors of the Agra Protective Home described the pathetic condition of the Home in which the girls were kept. Acting on this letter which was written by Dr. Upendra Baxi and Dr. Lokita Sarkar to the then Justice P.N. Bhagwati who treated it as a writ petition.

\(^{55}\) (1983) 2 SCC 308
The judgment transcending from 1989 to 1998 saw three phases and ultimately the Supreme Court transferred the case to the National Human Rights Commission with certain guidelines recorded by the Supreme Court. The guidelines were far reaching in the changes they proposed to the existing framework while staying within the framework of the Immoral Traffic Prevention Act (ITPA) and the Constitution. They required the person who is either “removed” under Section 15(4) or “rescued” under Section 16(1) of ITPA and produced before a Magistrate to be heard either in person or through a lawyer (assigned by the Legal Aid Committee of the District Court concerned) at every stage of proceedings including admission to a Protective Home, intermediate custody as well as discharge.

The Supreme Court further laid down that in camera trial be held and that it should be the duty of the court to ensure the presence of lawyers of both sides. If under Section 15(4) and Section 16(1) it was a child, the child should be placed in an institution recognised or established under the Juvenile Justice Act, 1986.

The guidelines also required Magistrates to maintain a list of those who have been given safe
custody of persons rescued or removed on furnishing undertakings. In the event of it being brought to the Magistrates’ notice that such person has returned to prostitution, the giver of the undertaking, after an enquiry, would be debarred from furnishing any undertaking in any proceeding under the ITPA.

It was further suggested that the post of special police officer shall, wherever possible, be held by a woman police officer and that there should be in place an Advisory Board consisting of five leading social workers to be associated with the special police officer.

In *Bholanath Tripathi v. State of U.P.*[^56] public interest litigation was filed alleging that a woman was held in confinement and was being used for earning money by prostitution. The Supreme Court directed the Commissioner appointed to make enquiry and if satisfied prima facie about the allegations, to remove her to a safe place and secure her production before the Court. The police and the other authorities of the State Government concerned were also directed to afford assistance to the Commissioner.

[^56]: 1990 Supp SCC 151: 1990 SCC (Cri) 543
In *Vishal Jeet v. Union of India*\textsuperscript{57}, in a public interest litigation filed by a lawyer, the Supreme Court confined itself to the issues of child prostitution and Article 23 in the context of prostitution. Interpreting Article 23, the court held that:

"The expression ‘traffic in human beings’ is evidently a very wide expression including the prohibition of traffic in women for immoral or other purposes."

Expressing its disappointment the Court said:

"Prostitution always remains as a running sore in the body of civilisation and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large, slowly but steadily making its way onwards, leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent. . . ."

Pained by the malaise, it added:

\textsuperscript{57} (1990) 3 SCC 318
“It is highly deplorable to note that many poverty-stricken children and girls in their prime youth are taken to the ‘Flesh Market’ and forcibly pushed into the flesh trade which is being carried on in utter violation of all canons of morality, decency and dignity of human kind.”

The Supreme Court Division Bench speaking through Justice S.R. Pandian, laid the following measures for the purpose of eradicating the evil of prostitution:

1. All the State Governments and Government of the Union Territories should direct their law-enforcing authorities concerned to take appropriate and speedy action under existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.

2. The State Governments and Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the secretary of the Social Welfare Department or Board, the Secretary of the Law Department, Sociologists, Criminologists, Members of
Women’s Organisations, Members of the Indian Council for Child Welfare and Indian Council of Social Welfare as well as the members of various voluntary social organisations and associations, the main aim of the Advisory Committee being to make suggestions of:

a. the measures to be taken in eradicating child prostitution, and

b. the social welfare programme to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims, namely, the children and girls rescued either from the brothel houses or from the clutches of prostitution.

3. All the State Governments and Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social-workers, psychiatrists and doctors.

4. A Committee should be set up to evolve welfare programmes to be implemented on the national level for the care, protection,
rehabilitation of the young fallen victims, namely, children and girls and to make suggestions for amendments to the existing laws or for the enactment of any new law, if so warranted for the prevention of sexual exploitation of children.

5. A machinery should be devised for ensuring proper implementation of the suggestions that would be made by the respective committees.

6. The Advisory Committee should also go deep into the Devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the government could do in that regard.

After the Vishal Jeet case another case where the Supreme Court delved into the problem of prostitution, especially child prostitution, with extreme sensitivity was Gaurav Jain v. Union of India58. In the initial PIL which dealt with prostitution in general and the plight of children of prostitute women in particular Ramaswamy, J. interpreted certain provisions of the ITPA without

58 (1997) 8 SCC 114
pronouncing on the constitutionality of several other offending ones. Wadhwan, J. felt that such a course was not correct since the parties had not been informed or heard and there were no pleadings. Ramaswamy, J., nevertheless issued directions. The entire judgment was thereafter reviewed and recalled by a Bench of three judges in Gaurav Jain v. Union of India.\textsuperscript{59}.

Dwelling on the causes of prostitution the Court said:

“\textit{The Mahajan Committee Report, indicates that in two villages in Bihar and some villages in West Bengal, parents send their girl children to earn in prostitution and the girls in turn send their earnings for maintenance of their families. It further indicates that certain social organisations have identified poverty as the cause for sending the children for prostitution in expectation of regular remittance of income from prostitution by the girls who have already gone into brothels.}

It is also an inevitable consequence that over the years the fallen women are accustomed to a certain lifestyle and in terms of expenditure they

\textsuperscript{59} ibid
need a certain amount of money for their upkeep and maintenance. When they bear children it becomes an additional burden for them. They are led or caught in the debt traps. The managers of the brothels are generally ladies. They do not allow the girls to bear children. In case of birth against their wishes, the unfortunate are subjected to cruelty in diverse forms. In the process of maintaining children again they land themselves in perpetually growing burden of debt without any scope to get out from the bondage. Thereby this process lends perpetuity to slavery to the wile of prostitution. Those who want to remain in prostitution have given absence of alternative source of income, their social non-acceptability, family customs, poverty, ill-health and their despondence as the reason and, thus, they want to continue in prostitution as the last resort for their livelihood. They do not like to remain in the red-light area but lack of alternative source of livelihood is the prime cause of their continuation in the profession.”

Referring to the plight of prostitutes the Court observed:

“"The prostitute has always been an object and was never seen as a complete human being with
dignity of person; as if she has had no needs and aspirations of her own individually or collectively. Their problems are compounded by coercion laid around them and torturous treatment meted out to them. When they make attempts either to resist the prostitution or to relieve them from the trap, they succumb to the violent treatment and resultanty many settle for prostitution. A prostitute is equally a human being. Despite that trap she is confronted with the problems to bear and rear children. Their children are equally subjected to discrimination, social isolation. . . In recent times however, there has been a growing body of opinion by certain enlightened sections of the society advocating the need to no longer treat the fallen women as criminals or as objects of shocking sexual abuse. They are victims of circumstances and hence should be treated as human beings like others so as to bring them into the mainstream of the social order without any attached stigma.”

Activists through intervention of the Supreme Court are compelling State Governments to initiate action against ultrasound centres encouraging female foeticide under the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse)
Act, 1994. Therefore, it is for the first time since the enactment of this law about eight years ago that States have started registering ultrasound machines for a better supervision of their use.

The Indian Medical Association, too, has called for action against doctors helping in such sex-selection procedures. Activist Sabu George says: 60:

“The problem with foeticide is that doctors are promoting and encouraging it. It is one organised crime against women encouraged by professionals.”

Not only is sex determination a crime against women but achieving a balance in sex ratio also a crucial part of population stability. Expressing its concern, an NGO, CEHAT, filed a Public Interest Litigation highlighting this issue.

Expressing concern over this issue the Supreme Court in CEHAT v. Union of India 61 moved in to stop illegal sex determination and directed all States to confiscate ultrasound equipment from clinics that are being run without licenses. The Health Secretaries of Punjab, Haryana, Delhi, Bihar, Uttar Pradesh, Maharashtra, Gujarat, Andhra Pradesh,

60 The Times of India dated May 7th, 2002
61 (2001) 5 SCC 577
Kerala, Rajasthan and West Bengal were present to explain the steps taken to implement the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

A Bench comprising Arijit Pasayat, M.B. Shah and B.N. Agarwal, JJ. said:

“State Governments are directed to take immediate action if such machines were being used in clinics without license. The machines are to be seized and sealed for the time being.”

When the petitioner’s counsel Indira Jai Singh said that the State Governments were casually granting licences to ultrasound clinics the court said:

“The authorities should not grant certificate of registration if the application form is not complete.”

The court also asked the manufacturers of ultrasound machines—Philips, Symonds, Toshiba, Larsen and Toubro and Wipro GE – to give the names and addresses of the clinics and persons in India to whom they sold these machines in the last five years “This”, the court said, “would help the
government find out whether these clinics or persons were registered.”

Again in a resumed hearing the Supreme Court warned that health secretaries of States failing to implement its orders banning sex determination of foetus would be required to be present before the court in the next hearing.

Shocked at the slackness of the Union and the State Governments, the Supreme Court in CEHAT v. Union of India 62 main asked the authorities to file within six weeks status reports regarding implementation of Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. A Bench comprising M.B. Shah and R.P. Sethi, JJ., said:

“We make it clear that there is total slackness on the part of administration in implementing the Act.”

It asked the authorities to implement the Act and prosecute clinics, centres and laboratories which aid and abet identification of the sex of the foetus illegally.

62 (2001) 5 SCC 577
When counsel for certain States said that the authorities have issued warnings to several such unregistered centres having ultrasound facilities, an anguished Bench expressed surprise and wondered “whether the implementing authorities are aware of law?” “The Act provides for prosecution and not warning. Authorities under the provision of the Act are not empowered to issue warnings and allow these centres to continue their illegal activities.”

It also castigated the Union Government for not setting up an Appropriate Authority to implement the Act. It should have set up the authority five years ago, the court added.

Such, then, is the attitude of the government towards a crime which hits at dignity even before conception. There has to be a concerted effort by all to stop this inhuman treatment of the female foetus. By the intervention of the Apex Court, prosecutions have been launched against the offenders but, in all cases, it is the will to protect the dignity of women which will ultimately succeed.
In CEHAT v. Union of India\textsuperscript{63}, further directions were issued by the Supreme Court. The Centre and State Governments were directed to issue advertisements to create awareness in the public that there should not be any discrimination between male and female child, and to publish annually the reports of appropriate authorities for the information of the public. National Monitoring and Inspection Committee is to continue to function for the effective implementation of the Act. Certain States were directed to appoint State Supervisory Boards and multi-member appropriate authorities.

The courts in cases of violation of human rights are sensitive to the international conventions and apply the same in a given case. Article 51 provides for promotion of international peace and security and Article 253 read along with List I of Seventh Schedule authorises the appropriate authority to make laws for honouring international commitments. It is the principle of \textit{jus cogens}, making the international law automatically incorporated in the municipal laws which applies, in the absence of domestic law in the field of sexual harassment.

\textsuperscript{63} (2003) 8 SCC 398
Taking up cudgels against these macabre crimes, a writ petition was filed in *Vishaka v. State of Rajasthan*\(^{64}\) for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With increasing awareness and emphasis on gender justice, there is an increase in the efforts to guard against such violations; resentment towards incidents of sexual harassment is also increasing. The present petition was brought as a class action by certain social activists and NGOs, with the aim of focusing attention towards this societal aberration and assisting in finding a suitable method for the realisation of the true concept of “gender equality” and preventing sexual harassment of working women in all workplaces through the judicial process, and filling the existing legislation. The immediate cause for the filing of the writ petition was an incident of brutal gang rape of a social worker in a village of Rajasthan. However, no mention was made of that case because it was the subject-matter of a criminal case. But the incident revealed the

\(^{64}\) (1997) 6 SCC 241
hazards to which a working woman was exposed and 
the depravity to which sexual harassment can 
degenerate and the urgency for safeguards by an 
alternative mechanism to fulfil this deeply felt 
and urgent social need. The judgment delivered by 
J.S. Verma, C.J., Sujata Manohar and B.N. Kirpal, 
JJ. highlighted the fact that, “each incident of 
like nature results in violation of fundamental 
rights of ‘Gender Equality’ and the ‘Right of Life 
and Liberty’. It is a clear violation of the rights 
under Articles 14, 15 and 21 of the Constitution. 
One of the logical consequences of such an incident 
is also the violation of the victim’s fundamental 
right under Article 19(1)(g) ‘to practise any 
profession or to carry out any occupation trade or 
business’. Such violations, therefore, attract the 
remedy under Article 32 for the enforcement of 
these fundamental rights of women.” This class 
action under Article 32 of the Constitution was for 
this reason and a writ of mandamus in such a 
situation if it is to be effective needs to be 
accompanied by directions for prevention as the 
violation of this fundamental right is a recurring 
phenomenon.

The Court realised that:
“The fundamental right to carry on any occupation, trade or profession depends on the availability of a ‘safe’ working environment. Right to life means life with dignity. The primary responsibility, for ensuring such safety and dignity through suitable legislation and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.”

Apart from Article 32 of the Constitution of India, the court referred to some other provisions like Articles 15, 42, 51-A(a) and (e), 51, 253 and the Seventh Schedule of the Constitution which envisage judicial intervention for the eradication of the social malaise of sexual harassment at the workplace. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at

65 (1997) 6 SCC 247
all workplaces, the contents of international conventions and norms played a significant role in interpreting the guarantees of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment being explicit therein.

The court was of the opinion that any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee. This fact was implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the union list in the Seventh Schedule of the Constitution. The Court found Article 73 also relevant as it provided that the executive power of the Union shall extend to matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till Parliament enacts legislation to expressly provide measures needed to curb the evil. Thus, the power of the Court under Article 32 for the enforcement of fundamental
rights and the executive power of the Union have to meet the challenge of protecting working women from sexual harassment and of making their fundamental rights meaningful. Governance of society by the rule of law mandates this requirement as a logical concomitant of the Constitutional scheme.

The progress made at each hearing in Vishaka v. State of Rajasthan\(^{66}\) culminated in the formulation of guidelines to which the Union of India gave its consent. through the Solicitor-General, indicating that these should be the guidelines and norms declared by the Supreme Court to govern the behaviour of employers and all others at workplaces to curb this social evil.

According to the Court:

“Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The international conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.”

\(^{66}\) (1997) 6 SCC 241
The obligation of this court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of the judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at

The Government of India, at the Fourth World Conference on Women in Beijing, made a commitment, inter alia, to formulate and operationalise a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women’s Rights to act as a public defender of women’s human rights, to institutionalise a national-level mechanism a monitor the implementation of the Platform for Action.

Taking sexual harassment to be violation of fundamental rights the Court said:

“"The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all facets of gender equality including prevention of sexual
harassment or abuse. Independence of judiciary forms a part of the constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial constitution that regard must be had to international conventions and norms for construing domestic law.”

Referring to another case, the court held:

“In Nilabati Behera v. State of Orissa67 a provision in the International Covenant of Civil and Political Rights was referred to support the view taken that ‘an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right as a public law remedy under Article 32’, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution or India which embody the concept of gender equality in all spheres of human activity it.

67 (1993) 2 SCC 746
In view of the above and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we Lay down Guidelines and Norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this court under Article 141 of the Constitution.”

Thus, the guidelines and norms given by the Supreme Court in **Vishaka v. State of Rajasthan** \(^{68}\) continue to govern, in the absence of legislation till now in the field of sexual harassment of women at workplaces. Indeed a historic judgment, responding to the needs of present-day society.

In a Public Interest Litigation by **Sakshi** \(^{69}\), the petitioner contented that the interpretation of Section 375 and 376 of Indian Penal Code and other

\(^{68}\) (1997) 6 SCC 241

\(^{69}\) 1999 (6) SCC 591
Sections are not consistent with current state of affairs in society. The Apex Court requested the Law Commission to examine the issue and the feasibility of making recommendations for amendment of Penal Code. The amendments are still pending in the form of the Protection of Women against Sexual Harassment at Workplace Bill, 2010.

Aghast with executive indifference coupled with people phobia for male issues, right thinking NGOs and individuals working against female foeticide and infanticide filed a Public Interest Litigation in the Supreme Court, i.e., CEHAT & Masoom and Sabu George v. Union of India. This case sought immediate action to stop and prevent the misuse of PNDT Act. An interim order was issued by the Supreme Court on 2nd May 2001, directing the Central and the State governments to set up an Appropriate Authority and Advisory Board under the Act and that the State government has to file quarterly reports to show that steps have been taken to comply with the Act. There was an order given to the Central government to consider amending the Act. Consequently the amendment was brought about in the Act (PNDT) and the ultra-sound and the pre-

70 2001 (5) SCC 577
conception diagnostic techniques have been brought under one ambit & control. The ultra sound procedures are clarified in detail. It also mandated the appointment of a State Policy making body.

In spite of the Centers pro-active stand, the judicial system, relying much on the necessary evidence, has not been able to nab the truant doctors and clients engaged in this nefarious exercise of continuing with pre-sex determination tests. However, the Delhi government has already banned X-Y separation as per Delhi Artificial Insemination Bill 1995.

In a very recent decision in *Budhadev Karmaskar v. State of West Bengal*\(^7\), the Apex Court dismissed an appeal against the conviction for murder of a sex-worker. In this case the Supreme Court has very sensitively declared that even the sex-workers being the citizens of the country are entitled to right to life and dignity.

The role and position of sex-workers in the society was noted by a bench of Justice Markandey

\(^7\) Criminal Appeal No. 135 of 2010, the order dated February 14, 2011
Katju and Justice Gyan Sudha Misra of the Supreme Court in the following terms:

“This is a case of brutal murder of a sex worker. Sex workers are also human beings and no one has a right to assault or murder them. A person becomes a prostitute not because she enjoys it but because of poverty. Society must have sympathy towards the sex workers and must not look down upon them. They are also entitled to a life of dignity in view of Article 21 of the Constitution.”

The Supreme Court further directed the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India. The schemes should mention in detail who will give the technical/vocational training and in what manner they can be rehabilitated and settled by offering them employment. For instance, if a technical training is for some craft like sewing garments, etc. then some arrangements should also be made for providing a market for such garments, otherwise they will remain unsold and unused, and consequently the woman will not be able to feed herself.
While the decisions in many cases demonstrate the instances in which the Supreme Court stepped in to safeguard the fundamental human rights of women there are several instances where such rights are brazenly violated.

After 22 years of the enactment of the Indecent Representation of Women (Prohibition) Act, 1986, the Gujarat government has recently authorised inspectors of every police station to take steps for implementation of the Act through a notification.

The notification has been issued on a public interest litigation (PIL) filed by a Vadodara-based organisation. Mahila Punaruthan Sangh had filed the PIL seeking court’s directive to the state authorities to take effective steps to prohibit publication or circulation of any book, pamphlet, paper, writing, photograph and the like representing women in an indecent manner by enforcing the Act.

It may be mentioned that the PIL was filed in 2001, but came before hearing after eight long years. A division bench of the Gujarat High Court headed by Chief Justice K. S. Radhakrishnan asked
the government to submit a status report of the implementation of this Act. After this, the government earlier this month, issued the notification appointing police inspectors to implement the Act.

5. Judicial Approach of protective discrimination favouring women for administrative convenience:

In Savitri v. K.K. Bose,72 while disposing of application for grant of license, the Excise Authorities preferred women applicants to men applicants without any provision. The Allahabad High Court held that “since no special provision had been made for women in respect of the grant of liquor license,” the grant of the license to the appellant only on the ground that she was a woman was not only made on an irrelevant ground but was also discriminatory and violative of Article 15(1). It is submitted that the Court rejected that license only because preference was given to female applicants over male applicants without any provision i.e. without any protective legislation of Article 15(3) of the Constitution.

72 AIR 1957 Mad. 622.
In Baghu Ban Saudagar Singh v. State of Punjab,\textsuperscript{73} the Division bench of the Punjab and Haryana High Court upheld the order of the Government of the Punjab rendering women ineligible for all posts in men’s jail except those of clerks, on the basis that convicts in jails were habitual and hardened criminals, guilty of heinous crimes of violence and sex. So the women performing jail duties would be in a more hazardous position that a male warden. The court stuck a balance between non-discriminatory treatment irrespective of sex and social interest of maintaining administrative efficiency and peace in jails. The court held that discrimination involved in the case was not based solely on the ground of “sex”, but administrative efficiency and social facts coupled with sex.

In Aparna Basu Mallic v. Bar Council of India,\textsuperscript{74} the Calcutta High Court has held that Bar Council cannot deny the petitioner to be enrolled as an Advocate. The petitioner did her LL.B. as non-collegiate student from Calcutta University. The Bar Council had failed to perform its functions of laying down the conditions of enrolment. Its function is to recognize the Indian Universities

\textsuperscript{73} AIR 1972 P & H 117
\textsuperscript{74} AIR 1983 Cal. 461
for purposes of the Advocates Act. The Calcutta University is recognized by the Bar Council. But the Bar Council had refused to enrol the petitioner on the ground that she had done her LL.B. as a non-collegiate student. In Smt. Choki v. State of Rajasthan,\textsuperscript{75} the Rajasthan High Court upheld Section 497 of Criminal Procedure Code, 1898 which prohibits release of a person accused of a capital offence on bail except women and children less than 16 years of age and sick men. The court held that the State can make special provision for the benefit of women and children.

Article 15(3) of the Constitution of India must be treated as applying to both existing and future laws for making special provisions in favour of women. In Yusuf Abdul Aziz v. State of Bombay,\textsuperscript{76} Yusuf was charged with an offence of adultery under section 497 of Indian Penal Code as violative of Articles 14 and 15. The challenge under Article 15(1) was based on the last Para of Section 497 which provides that the wife not to be punished as an abettor. The Chief Justice of the Bombay High Court, Mr. M. C. Chhagla repelled the challenge under Article 15(1) by observing that the

\textsuperscript{75} AIR 1957 Raj. 10  
\textsuperscript{76} AIR 1954 SC 321.
differential treatment was not based only on the ground of sex, but on the ground of social position of women in India. On appeal, Bose J. held that the challenge under Article 15(1) was effectively met by referring to Article 15(3). In dismissing the appeal he observed:

“IT was argued that Clause (3) of Article 15 should be confined to provisions which are beneficial to women and cannot be used to give them a license the commit and abet crime. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishments is tantamount to a license to commit the offence of which punishment has been prohibited.”

The two Articles 14 and 15 read together validate the impugned clause in Section 497 of the IPC.”

In **Girdhar Gopal v. State**, it was held that Section 354 of Indian Penal Code, which makes an assault or use of criminal force, whether by a man or woman, with intent to outrage the modesty of a

---

77 AIR 1954 SC 321.
78 Id. at 322 (para 6)
79 AIR 1953 MB 147
woman punishable, is based on a valid classification under Article 14, and does not violate Article 15(1) as it did not discriminate on grounds only of sex but also on consideration of propriety, public morals, decency decorum and rectitude. It is submitted that decision is correct but it should be rested on the ground that the section is covered by Article 15(3). Under clause 3 of the Article 15 of the Constitution discrimination can be made favouring the women and not against them.

Further, this clause protects both the pre-Constitution and post-Constitution laws the principle was reiterated by Krishna Iyer, J., in Bai Tahira v. Ali Husain Fiddalli Chothia. \(^{80}\)

6. **Judicial Approach in the matters relating to Personal Laws affecting women:**

Despite of many limitations to interfere into the personal laws, the higher courts have shown a lot of sensitiveness to the issues touching upon the condition of women in family matters. On the analysis of the case laws it is evident that the activism of the courts is limited to the codified

---

\(^{80}\) (1979) 2 SCC 318.
personal laws and that is mostly the Hindu laws, which means only a fraction of female population is benefitted.

Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, thus effectuating the right of equal status and dignity of person to women. In Pratap Singh v. Union of India\(^8\), the Hon’ble Supreme Court repelled the challenge made to Section 14(1) of the Hindu Succession Act, which provided that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as a full owner and not as a Limited Owner. The challenge to the validity of Section 14(1) was on the ground that the said section favoured Hindu women, on the ground of sex, to the prejudice of male members of the Hindu community. The Supreme Court held that Section 14(1) was enacted to remedy to some extent the plight of Hindu women and that there was hardly any justification for the men belonging to the Hindu Community to raise any objection to the beneficent provisions contained in Section 14(1) on the ground

\(^8\) AIR 1985 SC 1695
of hostile discrimination, since the said section was protected by the express provisions contained in clause (3) of Article 15 of the Constitution and was a special provision enacted for the benefit of Hindu women. The ambit and scope of Section 14(1) of the Hindu Succession Act was considered by the Supreme Court and its beneficial effect in further empowering women was taken due note of in Jagannathan Pillai v. Kunjithapadam Pillai\(^{82}\), Thotasesha Rathamma v. Thota Manikyamma\(^{83}\), C. Masilamani Muddaliar v. Idol of Sri Swaminathaswami\(^{84}\), and Velamuri Venkata Siva Prasad v. Kothuri Venkateswarlu\(^{85}\).

Judicial emphasis of Gender equality as the prime consideration in interpretation of statutes conferring property rights on women, has encouraged legislation in this regard. The Supreme Court paved way for other courts to follow it as a precedent while deciding cases of women’s right to property.

In Kotturu Swami v. Setra Verrawa\(^{86}\), a Hindu widow who was wrongfully dispossessed filed a suit

---

\(^{82}\) AIR 1987 SC 1493  
\(^{83}\) 1991 (4) SCC 312  
\(^{84}\) AIR 1996 SC 1697  
\(^{85}\) 2000 (2) SCC 139  
\(^{86}\) AIR 1959 SC 577
for possession in March 1956 before the passing of the Hindu Succession Act, 1956. The Court said that on coming into force of the said Act, she must be regarded as a female Hindu who possessed the property for the purposes of section 14 and so she became a full owner of it. The Supreme Court has almost flexed quite far to interpret the section 14 as also the Hindu female’s other situational status to her advantage. If not for such a liberal interpretation most of the widows would have been deprived of their right to inheritance of what is there due. In Mary Roy’s case\textsuperscript{87}, where the Supreme Court held that the Indian Succession Act will apply to the Christians of Kerala after the integration of states. Christian women, the Court said, cannot be given a lesser share in inheritance under the old state law.

In Kirtikant D. Vadodaria v. State of Gujrat\textsuperscript{88} it was held that the obligation of the Hindu male to maintain his wife, minor sons, unmarried daughters and aged or inform parents is personal, legal and absolute in character and arises from the very existence of relationship between the parties. The husband is liable to maintain his wife if he is

\textsuperscript{87} 1986 (2) SCC 209
\textsuperscript{88} (1996) 4 SCC 479
capable of earning. He cannot plead that he is unable to maintain his wife due to financial constraints.

While interpreting the Guardianship law in the light of Article 15 by the Supreme Court in *Githa Hariharan*\(^8^9\) equated the position of mother to that of father in the matter of guardianship. This is another feat in strengthening the position of women.

The sense of insecurity, humiliation and helplessness always keep a women mum. Our whole socialisation is such that for any unsuccessful marriage which results in such violence or divorce, it is always the woman, who is held responsible. Cultural beliefs and traditions that discriminate against women may be officially discredited but they continue to flourish at the grass root levels. Family relations in India are governed by personal laws. The four major religious communities are – Hindu, Muslim, Christian and Parsi each have their separate personal laws. They are governed by their respective personal laws in matters of marriage, divorce, succession, adoption, guardianship and maintenance. In the laws of all the communities,\(^8^9\) *(1999) 2 SCC 228*
women have fewer rights than that of man in corresponding situations. It is really that women of the minority communities in India continue to have unequal legal rights and even the women of the majority community have yet to gain complete formal equality in all aspects of family life.

Gender inequality is most apparent in personal laws. The best way to remove it is to enact uniform civil code but our founding fathers has included it as one of the Directive Principles of the State policy (Article 44); not enforceable in the courts of law. Directive principles are our goals; the fundamental rights are means to achieve them. The court decisions indicate that though the directive principles are not enforceable yet the courts are interpreting fundamental rights in their light. There is a sort of fusion between the two in most of the fields and the courts are in a way enforcing them; except in the field of personal laws (uniform civil code). Many have been urging the courts to take more active role in this direction. They say that:

- Article 13 does not make any distinction between personal law and in any other law.
• The Legislature is not likely to intervene to make any legislation for political reasons.
• Personal laws are also subject to part III of the Constitution.
• Many provisions of personal laws violate article 14 and 15(1) of the Constitution and should be declared un-constitutional.

The Courts made some progress in this regard in Sarala Mudgal v. Union of India\textsuperscript{90} and Madhu Kishwar v. State of Bihar\textsuperscript{91} but subsequently the Supreme Court dismissed the writ petition in Ahmedabad Women Action Group (AWAG) v. Union of India\textsuperscript{92} saying that:

"The arguments involve issues of State policies with which the court will not ordinarily have any concern. The remedy lies somewhere else and not by knocking at the doors of the Courts."

It is really a difficult task to sum up the judicial approach towards women and women related issues, as positive or negative. The approach, over

\textsuperscript{90} AIR 1995 SC 1531
\textsuperscript{91} AIR 1996 5 SCC 125
\textsuperscript{92} AIR 1997, 3 SCC 573
the years has been, transformed from traditionalist to activist.

By employing the traditional rules of construction the Courts defeated gender justice in adjusting challenges to bigamous marriages. In *Smt. Priya Bala Ghosh v. Suresh Chandra Ghosh*\(^93\) and *Gopal Lal v. State of Rajasthan*\(^94\) the courts said that marriages celebrated without proper ceremonies and in due from cannot be recognized as marriage to sustain conviction for bigamy.

Depending on dictionary meaning of “solemnized” the court elbowed out the policy and purpose of the legislation. By making the burden heavy on the prosecution without regard to the object of the legislation, the court helped accused in bigamy cases go scot-free and let women put to gross subordination and inequality.\(^95\)

In *Yamunabhai v. Anantrao*\(^96\) the Supreme Court even refused to accept the plea of the second “wife” to an order of maintenance under Section 125 of Cr.P.C. on the ground that the marriage was

\(^93\) AIR 1971 SC 1153
\(^94\) AIR 1979 SC 713
\(^95\) D. Sivaramayya, Fifty years of the Supreme Court, OUP and ILI (2000) pp. 291-92
\(^96\) AIR 1988 S.C. 644
void. No amount of social context and social justice arguments on the light of such women could change the traditional approach of the judiciary to the gender inequalities in the situation. The Court was however persuaded to consider sanction of interim maintenance pending decision of the validity of the second marriage.

The courts approach on violence against women varied between strict and liberal interpretations. In rape cases the court initially insisted on corroboration of the testimony of the prosecutrix, delay in filing the FIR against the prosecution case and reduced sentences of rapists including child rapists on extraneous considerations ignoring the trauma of rape victims.

Over the years, the legislature and the judiciary tightened the law of rape and came to the help of victims of sexual violence. In a recent case the Supreme Court turned activist and directed the National Commission for Women to frame a scheme for payment of compensation to the victims of rape on view of the gaps in the criminal law in this regard (1995) 1 SCC 14). Minor variations in the testimony of female victims are no longer
considered enough for impeaching the testimony of the victims of sexual violence.

In respect of construing property rights of women, the court has adopted a liberal approach and buttressed the rights of women to claim “constructive possession” under the Hindu Succession Act\(^97\) even in absence of actual possession. In fact, the approach of the court gave the widest possible interpretation and enlarged the traditional property rights of Hindu women. However, the Court showed reluctance to assert the same activist approach and refused to invalidate discriminatory feature of the customary Hindu Law of Succession\(^98\).

On the issue of preferential rights of a male to guardianship of a Hindu minor, the court found gender-based inequality in section 6(a) of the Hindu Minority and Guardians Act, 1956 and invoked the provision of CEDAW and Beijing Declaration to restore gender justice by interpreting the words “after him” in Section 6(a) to mean “in the absence of” for whatever reason\(^99\). Thus the constitutionality of the Statute was upheld while

\(^97\) AIR 1959 SC 577  
\(^98\) AIR 1996 SC 1864  
\(^99\) Gita Hariharan, 1999 (2) SCC 228
giving mothers of minor children equal rights become natural guardians when the father was alive.

On sexual harassment at work place, an activist court openly advanced the cause of gender justice based on international human rights instruments. The court felt that the absence of legislation should not be allowed to perpetrate gender based violence against women at work places and laid down a series of guidelines to be observed in all institutions employing women, until legislation is enacted for the purpose. The court literally legislated on what constitution sexual harassment and how complaints have to be processed promptly and fairly through a mechanism which the court itself devised through the judgment. The decision constitutes a landmark in gender justice development through judicial decision.

Maintenance is an issue on which the court has of late taken progressively liberal approach promotive of women’s right to equal justice. While in one case the court felt that maintenance should encompass provisions for residence in another it ruled that the Muslim Women (Protection of Rights

100 Vishakha, 1997 (6) SCC 241
101 Mangatmu v. Punni Devi; 1995 (5) SCALE 199
on Divorce) Act should be interpreted beneficially in favour of Muslim Women on the line of the Shah Bano judgment\textsuperscript{102}. This was done even when the legislature took a regressive step in denying a section of women what the secular law has provided to avoid deprivation and exploitation.

Recognizing the importance of the Directive Principle on Uniform Civil Code for promoting equality of women, the court on several occasions exhorted the legislature to initiate necessary steps in realizing the object of the Directive. Besides, the Courts itself tried to evolve, incrementally using constitutional rights and judicial review, some uniformity in matrimonial laws of different communities\textsuperscript{103}. However, on Uniform Civil Code, the Court later restrained itself stating that removal of gender discrimination in personal laws involves issues of State policies with which the court will not ordinarily have any concern\textsuperscript{104}. Thus perceived, the picture which emerges of judicial performance on gender justice is mixed of traditionalism and restraint giving hope and despair intermittently.

\textsuperscript{102} AIR 1985 SC 945  
\textsuperscript{103} Sarla Mudgal, AIR 1995 SC 1531  
\textsuperscript{104} Ahmedabad Women Action Group v. Union of India; AIR 1997 SC 3614
Of course, given the complex social reality and the reluctance of the legislature to give what is due to women though policy changes, courts can do very little to change the situation all of a sudden. Yet the court has compelled change and exposed the double standards of political parties and governments in their approach to the plight of women. In whatever, the judges did, they invoked the spirit of the Constitution and the provision of international human rights instruments. In fact, by doing so, they brought in a revolutionary principle of domestic application of international law through judicial interventions and gave to themselves a potential weapon for continuing improvement in delivery of justice to women and other weaker sections of society.

Equality is the cardinal principle of the Constitution of India. Several provisions under the Indian Constitution try to bring gender equality. It is evident from various cases discussed above that judiciary played a crucial role in protecting rights of women. In tune with constitutional aspiration of gender equality various laws have been enacted relating to prohibition of female infanticide, dowry, exposure of women in advertisements and films, female child marriage,
atrocities and molestation, abduction and rape, maternity benefits, medical termination of pregnancy, prohibition of prostitution and trafficking in women and protection in employment. The positive judicial activism, stimulus for the Indian legislatures to enact several new laws or to bring about the changes in the existing ones with a view to afford better protection to women is a demand of the time wherein there is emphasis upon women’s empowerment.

Unfortunately in this regard the vast bodies of decisional law of the subordinate courts where the bulk of women ordinarily seek justice are not available for review. Though in a precedent bound system, one can expect the decisions of superior courts to be the applicable law, it is common knowledge that approaches and attitudes towards facts and evidence of individual judges can make a lot of difference in the outcome of the case despite the law being common to all. In other words, evaluation of judicial decisions on gender justice can only give a partial not necessarily the true picture of judicial performance in this regard. A second yardstick for assessment of judicial performance in gender justice is the manner in which judges treat women in court whether
they appear before them as litigants, witness, victims, lawyers or subordinate staff. This is where women experience discrimination and develop perceptions of justice/injustice in the system which build or erode their confidence in the system. Therefore, it is a critical input in the assessment of the system in respect of gender justice.
The Role of Law in Empowering Women in India

Chapter 9

Conclusion & Suggestions
Conclusion

Empowerment of any section of a society is a myth until they are conferred equality before law. The foundation of freedom, justice and fraternity is based on the recognition of the inherent dignity and of equal and inalienable rights to all the members of the society. The Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations on 10\textsuperscript{th} December 1948, envisaged in Article 2 that “everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind.” Further, it also recognized that “the family is the natural and fundamental group unit of the society and is entitled to protection by society and the State.”

It has traditionally been accepted that the thread of family weaves the fabric of Indian society. Women are considered as the hub center of the family. Still, in the era of political domination by foreigners, the women in India suffered most. A few social reform measures were taken towards the later 19\textsuperscript{th} and early 20\textsuperscript{th} century during the British regime. The inception of Mahatma Gandhi in the National freedom movement ushered a new concept of mass mobilization. Women constituted
about 50% of the country’s total population, he, therefore, involved women in the nation’s liberation movement. The mass participation of women directly in the freedom struggle was the great divide in the history of (Feminist movement) empowerment of women. They shed age-old disabilities and shared the responsibility of liberation of their motherland with their counter parts. The freedom of India thus became synonymous with the empowerment of women. In this context the date of India’s political freedom (15th August, 1947) is a landmark in the history of women empowerment in India. It brought in its wake a great consciousness in our society for human dignity. It was realized that every citizen of independent India be accorded equal treatment under the law.

The framers of our Constitution ensured liberty, equality and dignity of all the citizens of India by eliminating almost all discrimination based on caste, creed, sex or religion. It accepted in principle the equality of men and women. To make this de-jure equality into a de-facto one, many policies and programmes were put into action from time to time, besides enacting/enforcing special legislation, in favor of women.
The role of Constitution in ensuring gender justice is being recognised in modern times. It is most appropriate that the supreme law of the land should meaningfully address the woman question and respond to the challenges by stimulating the whole legal system towards a greater concern for, and protection of women. All the wings and layers of government – legislature, executive and judiciary at central, state and local levels – have the responsibility towards empowerment of women in the light of Article 15(3) read with Article 12 of the Constitution. Although Article 15(3) is an enabling provision that authorises the state to make special provision for women, the discretion conferred there under shall be exercised without fail, and be exercised reasonably. It is also fundamental duty of every citizen to renounce the practices derogatory to the dignity of women. Thus social and individual responsibilities for feminist cause are contemplated in addition to democratic solutions.

No doubt, democracy provides equal opportunities for all in the decision making process. Women as free citizens, and constituting almost half of the population, are theoretically able to redress their grievances through democratic means. But due to socio-economic reasons and
cultural patterns they are not effective players of the game of democracy. The disadvantages of democratic process and risks of parliamentary majoritarianism make it imperative that a pro-woman and anti-subordination interpretation of Constitution and laws shall be made. In a patriarchal social construction, where power dictates freedom, lack of power on the part of women because of their position as incomplete agents in democratic participation is likely to marginalise their freedom. To countervail this lacuna and make freedom worthwhile to women, empowerment emerges as the true method of freeing women. Thus instead of uncritical reliance on democratic forces, appropriate technique of interpretation can rescue their interests.

Although Indian women played a major role in the freedom movement, it did not translate into continued participation in public life in the post-independence era. On the contrary, many women withdrew into their homes, secure in the belief that they had ushered in a democratic republic in which the dreams and aspirations of the mass of people would be achieved.

Women are under-represented in governance and decision-making positions. Less than 11% of the
seats in our Parliament are held by women. There have been only five women judges in the Supreme Court since Independence and women are still under represented in higher judiciary. At present, women occupy less than 8% of the Cabinet positions, less than 9% of seats in High Courts and the Supreme Court, and less than 12% of administrators and managers are women. In June 2009, out of 40 Cabinet Ministers, there were only three female Cabinet Ministers. There were only 4 female Ministers of State (MOS), out of 38 MOS in 2009. There is a sign of relief that we have four women Chief Ministers and as well as our President is a woman.

On 12th September 2011, when Justice Ranjana Desai from Bombay High Court sworn in as the Justice Supreme Court the number of women judges has gone up to two and the total strength to 29, of these Justice Gyan Sudha Misra is the other woman judge. In the High Courts, there were only 51 Female Judges among the total of 649 judges in 2010.

However, through the vehicle of the Panchayati Raj Institutions and Urban Local Bodies more than one million women have entered active political life in India, owing to one-third reservation in these bodies through the 73rd and 74th Amendments to
the Constitution. These amendments have spearheaded an unprecedented social experiment, which is playing itself out in more than 500,000 villages that are home to more than 600 million people. Women are heading one-third of the panchayats and are gradually learning to use their new prerogatives, have transformed local governance by sensitising the State to the issues of poverty, inequality and gender injustice. Since the creation of the quota system, local women – the vast majority of them being illiterate and poor – have come to occupy as much as 54% of the seats, spurring the election of increasing numbers of women at the district, provincial and national levels. Since the onset of PRI, the percentages of women in various levels of political activity have gone up to 36.7% in 2007.

Various legislations were passed to reinforce the provisions enshrined in the Constitution. The Government of India had enacted both women specific and women related legislations to safeguard the rights and interests of women, besides protecting against social discrimination, violence and atrocities and also prevent social evils like child marriages, dowry, rape, practice of sati etc. The Government has enacted around 50 legislations
having direct or indirect bearing on women. These Acts have been reviewed and amended from time to time to take care of the interests of women in the changing situations and societal demands and obligations.

Despite of existence of so many of legislations for women the crimes against women are ever rising and have become universal reality for all societies. Among the crimes committed against women in 2008, torture shares the highest percentage (42%), followed by molestation (21%). 11.0% cases are that of rape, 11.7% of kidnapping and abduction, and 1.0% of Immoral Trafficking. It is also significant to note that 6.0% cases are of sexual harassment and 4.1% of Dowry deaths. India ranks 134 in 2009 among 178 countries in terms of the UNDP Human Development Index (HDI) and 114 in terms of Gender Development Index (GDI). This is a contradictory position in a country which has seen its first women Prime Minister in the decade of seventies and the State Chief Minister in early sixties. We have a women President but we fail to pass the bill for women reservation. There is a sign of relief due to reservation for women in Panchayati Raj Institutions which has helped women at grass-root level to taste the benefits of having
edge in decision making. Much has been said about women representatives in panchayats. A common picture is that of women representatives functioning as proxy candidates under the close observation and supervision of their ‘guardians’. The use of phrases such as `pradhan-pati’ or ‘block pramukh-pati’ is common. At the same time there are many women representatives and pradhans who have taken bold initiatives. They have not only set an example for male dominated society but also demonstrate that changes are taking place, albeit slowly. On 27th August, 2009 the union cabinet of government of India approved 50% reservation for women in PRIs (panchayati raj institutions). The Indian states which have already implemented 50% reservation for women in PRIs are Madhya Pradesh, Bihar, Uttarakhand and Himachal Pradesh. As of 25-11-2011 Indian state of Andhra Pradesh, Chhatisgarh, Jharkhand, Kerala, Maharastra, Odissa, Rajasthan, Tripura are also having 50% reservation for women.

The laws enacted by the Government of India have direct and indirect bearing on the status women. Since the enactment of the laws women have been approaching the judiciary to safeguard their rights and interests. They have been seeking
justice against social discrimination, violence, rape, dowry, sexual harassment of working women at work places and immoral trafficking etc. Indian judiciary has been very sensitive to women and women related issues. It has showed great interest in discharging cases concerning women. The Apex Court of India took special interest in discharging its legal and constitutional obligations and safeguarding the interests of women in changing situation and societal demands.

The judgment proclaimed by the Judiciary in many of the cases show that its attitude towards women related issues is very impressive and progressive in nature. This has direct and indirect bearing on the society and its environment. People in general and women in particular are becoming more and more aware of their rights and probable redress through judiciary. They are approaching courts in greater number to get justice and to safeguard their human and constitutional rights. The old stigma and fear of being looked down upon by the society has been hammered by the judgments of the Hon’ble courts. The reporting of judgments and debate on important cases has strengthened the confidence of women in judiciary.
It must be admitted that legislation and judiciary has its own limits as the needs of the women are diverse and multiple. The problems like ignorance, illiteracy, discrimination and violence continue to persist. The judicial redress still remains a costly, time taking and rare commodity. Even with the provision of best safeguards and sensitive judicial approach, women’s rights continue to be a casualty in any conflicting situation with the other sex.

Law, the legal system and society are closely interlinked it is not possible to enforce the legal rights without changes in social institutions, values and attitudes. Social changes cannot be brought about just through law. It is only through the process of sensitizing various branches of government and more importantly the members of the society to the rights and concerns of women can women empowerment become a reality. Law is only one method by which the various problems of women can be resolved.

The findings of the study shows that there are sufficient provisions in our Constitution as it provides equality as well as the provisions in the form of protective discrimination in favour of women under the Fundamental Rights. The right to
life and liberty under Article 21 has proved to be the most empowering fundamental right in favour of women. Wherever the Courts found the legislative provisions curtailing the rights of women and denying them equal status they expanded the ambit of “right to life and liberty” to protect and empower the women. In our Constitution there has been no discrimination between men and women. The higher judiciary has interpreted these fundamental rights in favour of women very sensitively most in most of the cases whenever these issues are presented before them by the aggrieved party itself or by public spirited people through Public Interest Litigations.

There is abundance of legislations and legislative provisions favouring or protecting women. Almost every issue is addressed by these provisions but the biggest problem is the awareness of these provisions among women. The other problem is that the women who are aware of these provisions hesitate to initiate legal actions for many reasons; like the insensitive treatment in police stations while lodging complaints, then the delay in the course of delivering justice completely drains the aggrieved woman, mentally as well as emotionally.
There is no denying the fact that women in India have made a considerable progress in the last fifty years but yet they have to struggle against many handicaps and social evils in the male dominated society. The Hindu Code Bill has given the daughter and the son equal share of the property. The Marriage Act no longer regards woman as the property of man. Marriage is now considered to be a personal affair and if a partner feels dissatisfied she or he has the right of divorce. But passing of law is one thing and its absorption in the collective thinking of society is quite a different matter. In order to prove themselves equal to the dignity and status given to them in the Indian Constitution they have to shake off the shackles of slavery and superstitions.

Empowerment of women is a gradual and complicated process. It involves changing the way of thinking of the whole society. Constitutional provisions and the legislation enacted by the Government of India to safeguard the interests of women have been bringing slow but effective change in social, economic and political status of women in India and thus laying a strong foundation of women empowerment.
Suggestions

“Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind.”

- Swami Vivekananda

Women empowerment emphasizes that all the women are free to develop their personal abilities and make choices without the limitations set by stereotypes, rigid gender roles, political and other prejudices. Their different aspirations should be valued equally and they would be treated fairly according to their respective needs. For creating such environment the following suggestions and recommendations can be given to help the empowerment of women in the real sense:

It is suggested to incorporate compulsorily in to the curriculum for secondary education the material regarding “Constitutional rights and legal rights of women under various existing legislations”.

Regular insemination of information regarding women related Constitutional and legislative provisions through awareness campaigns with the help of NGOs and socially active media just like
“Jago Grahak Jago Campaign” for making consumers aware their rights.

The parents having two kids should be supported the government in the form of bearing 50% of the educational expenditure of these kids subject to the condition that both of these kids are girl child. This will help empowering women educationally.

To discourage the female foeticides and infanticide a lump-sum amount should be paid by the government in three or four installments i.e. at the time birth, after five years, ten years and then after completing fourteen years of age by the particular girl child.

To improve the working conditions of the women there should be the provision of flexible working hours for them wherever possible so as to enable them to look after their kids and family.

Police and other enforcement machinery should be made clearly accountable especially in the cases of sexual abuse, harassment at work place and other similar offences. This can be done by prompt filing of FIRs, registering immediate statements under 164
Cr.P.C. and a time bound investigation to avoid undue influences during the process.

The establishment of special courts at district level for women specific crimes like Rape, Dowry, Harassment, Trafficking, etc.

Another suggestion is to amendment the Criminal Procedure Code to make it mandatory for all rape cases to be tried only by woman judges.

It is also suggested to frame and implement the Uniform Civil Code as soon as possible to stop the discrimination between Muslim and other Indian women.

The appointment of more of the women public prosecutors to handle the cases relating to crimes against women and they need to be suitably sensitised.

Although, the people have an innate faith in the judicial system, the delays have become part and parcel of the justice delivery system. Therefore increasing the number of judges, filling up the vacancies and to speed up the process of justice by cutting down adjournments ruthlessly and ensuring prosecution of cases of crimes against women on a day to day basis is also recommended.
Moreover for the time-bound disposal of such cases the maximum time limit should be provided through amendment in Cr.P.C.

As the victim primarily approaches the police for redressal of the crime committed against her therefore the police needs to deal with such victim very sensitively. Since the police have a very harsh and rash image before public therefore the police personnel need to be sensitised to women’s issues. Police should be given special training in handling sensitive cases. They must be made fully aware of the laws. They must respond to every complaint concerning issues relating to women made even over telephone. They must react expeditiously.

At least one special cell should be created at the district level for ensuring better registration and progress of investigation and monitoring of crimes against women. This cell may consist of representatives of police, prosecution machinery, judiciary and the representatives of prominent individuals of women’s organizations in the Districts.

Since it is not possible to all the victims, of women related crimes, to approach the higher courts if they fail to get the justice from lower court,
there must be a committee consisting retired judges to review the quality of decisions delivered by the lower courts. The committee should be able to recommend to higher courts for the review where it finds gross injustice has been done to the victim by the decision.

It is the need of the hour to involve women at top level policy and decision making. Since the Women Reservation Bill requires the amendment in the Constitution it is taking too long to bring it in to reality. There is an alternative to and simple suggestion to amend the Representation of the People Act 1950, which applies to the union and state legislatures which can be amended by Parliament. Part II, Section 4 (4) of this Act reads as follows: “Every parliamentary constituency referred to in sub-section [2] shall be a single member constituency.” The last phrase can be amended to read: “shall be a double member constituency, in which one member will be male and one female”. It would double our expenditure on the MPLADs and related matters. But this is a small price to pay for settling this thorny issue for ever in a most equitable way. It will still mean that the average MP represents more than a million people. And the House will be in complete gender
balance. Political parties will have no difficulty in giving tickets to women. In fact they will be forced to give an equal number of tickets. The people will decide which men/women will get elected. The party with the majority of MPs will form the government. The system remains in place. All existing reservations will remain in place. Seats reserved for SCs or STs will remain so.

Last but not the least if only the existing laws were properly implemented, crime against women could be controlled. Investigation and prosecution should be a joint venture again as it was before the amendment of the Criminal Procedure Code during 1973.
TABLE OF CASES

A
Ahmedabad Women Action Group (AWAG) v. Union of India, pp. 396, 401
Air India Cabin Crew v. Yeshawinee Merchant, p. 61
Air India v. Nargesh Meerza, pp. 51, 97, 319
Anjali v. State of Bengal, pp. 73, 88
Aparna Basu Mallic v. Bar Council of India, p. 387
Apparel Export Promotion Council v. A. K. Chopra, p. 355
Ashwini Nanubhai’s case, p. 267
Associate Banks Officers Association v. State Bank of India, p. 61

B
B. S. Joshi v. State of Haryana, p. 258
B. Shah v. Presiding Officer, pp. 325, 327
Baghu Ban Saudagar v. State of Punjab, p. 387
Bai Tahira v. Ali Husain Fiddalli Chothia, p. 390
Beney Bhushan Chakravarty v. Govind Chandra Sharma, p. 330
Bodhisattwa Gautam v. Subhra Chakraborty, p. 67
Bradwell v. Illinois (1873), p. 7
Budhadev Karmaskar v. State of West Bengal, p. 383

C
C. B. Muthamma, IFS v. Union of India and others, pp. 59, 97, 318, 321
CEHAT & Masoom & Sabu George v. Union of India, p. 382
CEHAT v. Union of India, pp. 369, 371, 373
Chairman Railway Board v. Chandrima Das, pp. 67, 340
Chanmuniya v. Virendra Kumar Singh Kushwaha, p. 226
Cracknell v. State of U. P., p. 332

D
D. Velusamy v. D. Patchaiammal, p. 226
Danial Latifi v. Union of Indiam, p. 168
Dattatraya v. State of Bombay, pp. 54, 79, 329
Delhi Domestic Working Women’s Forum v. Union of India, pp. 63, 344, 349

E
Edwards v. Canada(Attorney General), p. 8

G
G. Sekar v. Geetha and Ors., pp. 182, 185
Ganduri Koteshwaramma v. Chakiri Yandi, p. 188, 189
Gaurav Jain v. Union of India, pp. 66, 359, 365
Gayatri Devi Pansari v. State of Orissa, p. 56
Gazula Dasaratha Rama Rao v. State of A. P., p. 57
Girdhar Gopal v. State, pp. 55, 389
Githa Hariharan v. Reserve Bank of India, pp. 56, 129, 394, 399
Gopal Lal v. State of Rajasthan, p. 396
Government of Andhra Pradesh v. P.B. Vijaya Kumar, pp. 50, 61, 325
Gurupad v. Hirabai, p. 181

Indra Sawhney v. Union of India, p. 56

Jagannathan Pillai v. Kunjithapadam Pillai, p. 386
John Vallamattam v. Union of India, p. 167

K
K.R. Gopinathan Nair v. Sr. Inspector-cum-STO, p. 332
Kaliya Perumal v. State of Tamilnandu, p. 260
Kapore Chand v. Kadar Unnissa, p. 200
Kirtikant D. Vadodaria v. State of Gujrat, p. 393
Komalam Amma v. Kumara Pillai Raghavan Pillai and Ors., p. 183
Koppisetti Subbharao @ Asubramanian v. State of A.P., p. 272
Kotturu Swami v. Setra Verrawa, p. 392

L
Laiq Singh v. state of U.P., p. 336
Laxmi Kant Pandey v. Union of India, p. 71

M
M. C. Mehta v. Union of India, p. 308
M. Yogendra v. Leelamma N. and Ors., p. 181
Mackinnon Mackenzie & Co. Ltd. v Andrey D’ Costa, pp. 50, 52, 78, 326, 328
Madhu Kishwar v. State of Bihar, pp. 52, 396
Maneka Gandhi v. Union of India, p. 49
Mary Roy v. State of Kerala & others, pp. 203, 393
Masilamani Mudaliar v. Idolof Sri Swaminathaswami Thirukoil, pp. 206, 392
Maya Devi v. State of Maharashtra, p. 325
Minor v. Happesett, p. 7
Mohd. Ahmed Khan v. Shah Bano Begum, pp. 81, 162, 163, 401
Mohd. Habib v. State, p. 338
Mr. and Mrs. Soni v. Union of India and CEHAT, p. 275
Mrs. Neera Mathur v. Life Insurance Corporation of India, p. 324
Ms. Jorden Diengdeh v. S. S. Chopra, p. 167
Muller v. Oregon, p. 48
Municipal Corporation of Delhi v. Female Workers (Muster Roll), pp. 79, 325

N
Nairn v. University of a St Andrew, p. 7
Neelam Malhotra v. Rajinder Malhotra, p. 121
Nilabati Behra v. State of Orissa, p. 380
Nirmal Kumar v. State, p. 269

P
P. Sagar v. State of Andhra Pradesh, p. 316
Padmaraj Samarendra v. State of Bihar, p. 317
Peoples Union for Democratic Rights v. Union of India, p. 328
Pratap Singh v. Union of India, p. 391
Prem Chand v. State of Haryana, p. 338
Prema v. Nanje Gowda p. 187
Priya v. Suresh, p. 103
Purusottam Mahakud v. Annapurna Mahakud, p. 121

R
Radha Charan v. State of Orissa, p. 318
Raj Bahadur Singh v. Lgal Remembrancer, p. 70
Ram Bahadur Thakur (P) Ltd. v. Chief Inspector Of Plantations, p. 325
Ram Chandra Mohton v. State of Bihar, p. 331
Ram Prasad v. State of U.P., p. 92
Randhir Singh v. Union of India p. 58, 78, 328
Re Regina Guha, p. 8
Re Sudhansu Bala Hazra, p. 8
Roopan Deol Bajaj v. KPS Gill, p. 249

S
S. P. Gupta v. President of India, p. 307
S. R. Batra v. Taruna Batra, p. 225
Sakshi v. Union of India, pp. 249, 341, 343, 381
Sangita Piyush Raj v. Piyush Chaturbhuj, p. 120
Sanjit Roy v. State of Rajasthan, p. 328
Sarla Mudgal v. Union of India, pp. 81, 167, 396, 401
Savitaben Sombhai Bhatiya v. State of Gujrat & Ors p. 226
Savitri v. K. K. Bose, p. 386
Shabana Bano v. Imran Khan, p. 169
Shahdad v. Mohd. Abdulla, p. 55
Smt. Choki v. State of Rajasthan, p. 388
Smt. Priyabala Ghosh v. Suresh Chandra Ghosh, p. 397
Srinivasa Iyer v. Saraswathi Amal, p. 93
State of Bombay v. Narasu Appa Mali, p. 93
State of Karnataka v. Mabaleshwar Gourya Naik, p. 356
State of M.P. v. Pramod bhatiya, p. 52
State of Maharashtra v. Madhukar Narayan Mardikar, pp. 66, 350
State of U.P. v. Chhotey Lal, p. 344
Sujitha Sreevasthava and another v. Chandigarh, p. 273
Sukhdeo v. Government of A. P., p. 317

T
T. Sudhakar Reddy v. Government of Andhra Pradesh, p. 60
Thamsi Goundan v. Kanni Ammal, p. 55
Thota Sesharathamma v. Thota Manokyamma pp. 55, 392
Tukaram v. State of Maharashtra, p. 336
Tulasamma Reddy v. Sesha Reddy, p. 184

U
University of Madras v. Shantha Bai, pp. 73, 88, 312
Upendra Baxi v. State of Uttar Pradesh, p. 359

V
V. D. Bhanot v. Savita Bhanot, p. 228
Vandana Shiva v. Jayanta, p. 56
Velamuri Venkata Siva Prasad v. Kothuri Venkateswarlu, p. 392
Vijay Lakshmi v. Punjab University, pp. 62, 322
Vishaka v. State of Rajasthan, pp. 64, 66, 350, 355, 374, 378, 381, 400
Vishal Jeet v. Union of India, pp. 70, 362

Y
Yamuna Bai v. Anantha Rao, pp. 103, 397
Yusuf Abdul Aziz v. State of Bombay, pp. 54, 388
Bibliography

Articles, Books and Reports

- D. Sivaramayya: Fifty years of the Supreme Court, OUP and ILI (2000)
- Dr. Anjani Kant: Women & Children, 2003, Central Law Publications Allahabad
Dr. V. N. Shukla: The Constitution of India, 2010, Eastern Book Company, Lucknow
• M.P. Jain: Indian Constitutional Law, 2011, Lexis Nexis Butterworths Wadhwa, Nagpur
• National Policy for the Empowerment of Women, 2001, Government of India
Parliamentary Debates [Online]
http://parliamentofindia.nic.in/ls/debates

Prof. S. N. Mishra: Indian Penal Code, 2012, Central Law Publications, Allahabad


R. Seyon: Legislative And Judicial Initiatives Towards Women Empowerment [online]
[http://www.airinfotech.in/article3.html]

Raghbendra Jha: Women and the Veda an Article [online]
http://www.ivarta.com/columns/OL_070503.htm

Ratanlal & Dheerajlal: The Indian Penal Code, 32nd Ed., Lexis Nexis Butterworths Wadhwa, Nagpur


http://www.ingentaconnect.com/content/bpl/decl/1999/00000030/0000003/art00125
- Search for a vision statement on women’s empowerment; [2002] National Commission for Women, New Delhi
- Search for a vision statement on women's empowerment; [2002] National Commission for Women, New Delhi
- Sex Selection Issues & Concerns: A Compilation of Writings by Qudsiya Contractor, Sumita Menon and Ravi Duggal [online]
- The Lawyers Collective Women’s Rights Initiative (June 2004)
- Towards Equality: Report of the Committee on Status of Women in India, Department of Social Welfare, Govt. of India, 1974
- United Nations Population Fund Guidelines for Women's Empowerment [online]

Women & Law in India (Introduction by Flavia Agnes), 2004 Oxford University Press, New Delhi

Statutes

Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]

Indian Penal Code, 1860

Juvenile Justice Act, 1986

National Commission for Women Act, 1990 (20 of 1990)

The Beedi & Cigar Workers (Condition of Employment) Act, 1966

The Bonded Labour System (Abolition) Act, 1976

The Child Labour (Prohibition & Regulation) Act, 1986

The Child Marriage Restraint Act, 1929 (19 of 1929)

The Christian Marriage Act, 1872 (15 of 1872)

The Cinematography Act, 1952

The Code of Criminal Procedure, 1973

The Commission of Sati (Prevention) Act, 1987 (3 of 1988)
- The Constitution of India
- The Contract Labour (Regulation & Abolition) Act, 1979
- The Dowry Prohibition Act 1961 (28 of 1961)
- The Employees’ State Insurance Act, 1948
- The Equal Remuneration Act, 1978
- The Factories Act, 1948
- The Family Courts Act, 1984
- The Foreign Marriage Act, 1969 (3 of 1969)
- The Guardians and Wards Act, 1860 (8 of 1890)
- The Hindu Adoption & Maintenance Act, 1956
- The Hindu Marriage Act, 1955 (28 of 1989)
- The Hindu Minority & Guardianship Act, 1956
- The Hindu Succession Act, 1956
- The Immoral Traffic (Prevention) Act, 1956
- The Indecent Representation of Women (Prohibition) Act, 1986
- The Indian Divorce Act, 1969 (4 of 1969)
- The Indian Evidence Act, 1872 (yet to be reviewed)
- The Indian Succession Act, 1925 (39 of 1925)
- The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979
- The Legal Practitioners (Women) Act, 1923
• The Married Women’s Property Act, 1874 (3 of 1874)
• The Maternity Benefit Act, 1961 (53 of 1961)
• The Medical Termination of Pregnancy Act, 1971 (34 of 1971)
• The Minimum Wages Act, 1948
• The Muslim Personal Law (Shariat) Application Act, 1937
• The Payment of Wages Act, 1936
• The Plantation Labour Act, 1951
• The Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994
• The Protection of Women from Domestic Violence Act, 2005
• The Special Marriage Act, 1954
• The Workmen’s Compensation Act, 1923

Newspapers, Magazines & Other References

• Decisions of the Supreme Court of India [online] www.indiankanoon.org
• Economic & Political Weekly [online] www.epw.org
• Frontline
• India Today
• Law Magazine [online magazine] www.lawzmagazine.com
- Lawyers Club [online magazine] www.lawyersclubindia.com
- Lawyers Update [online magazine] www.lawyersupdate.co.in
- Legal Era [online magazine] www.legalera.in
- Rashtriya Sahara, Weekly
- Tehelka
- The Edict
- The Hindu
- The Lawyers Collective
- The Outlook
- The Pioneer
- The Practical Lawyers
- The Times of India
- The Week
- www.lawyersclubindia.com
- www.lawyerscollective.org
- Yojna