CHAPTER III

POSITION OF WOMEN AS ENVISAGED
IN THE CONSTITUTION OF INDIA
WOMEN AND CONSTITUTIONAL LAW:

"Women constitute half the world population, perform nearly two-thirds of works hours, and receive one-tenth of the world's income and own less than one-hundredth percent of word's property."\(^7\)

Half of the Indian populations too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.\(^8\)

- Justice K. Rama Swamy

The Indian constitution adopted by the constituent Assembly on 26\(^{th}\) November, 1949 is a comprehensive document enshrining various principles of justice, liberty, equality and fraternity. These objectives specified in the preamble and elsewhere form part of basic structure of the Indian constitution. The

\(^7\) A Report of the United Nations, 1980

\(^8\) Madhu Kishwar Vs. State of Bihar (1996) 5 SCC 148.)
fundamental law of the land assures the dignity of the individuals irrespective of their sex, community or place of birth.

With regard to the women, the constitution contains many negative and positive provisions, which go a long way in securing gender justice.

While incorporating these provisions, the framers of the constitution were well conscious of the unequal treatment meted out to the fairer sex, from the time immemorial. The history of suppression of women in India is since long and the same has been responsible for including certain general as well as specific provisions for upliftment of the status of women. The rights guaranteed to the women are on par with the rights of men and in some cases the women have been allowed to enjoy the benefit of certain special provisions.

The general provisions relating to the equal rights available to them are, the right to vote and other political rights; the fundamental rights contained in part III of the Constitution and the directive principles etc.
The preamble to the Indian Constitution contains various goals including "The Equality Of Status and Opportunity" to all the citizens. This particular goal has been incorporated to give equal rights to the women and men in terms of the status as well as opportunity. It has been the basis for many legislations like the modern Hindu laws which aim at giving equal status and rights to the women.

Even though, all the fundamental rights contained in part III, Articles 12 to 35 are applicable to all the citizens irrespective of sex, certain fundamental rights contain specific and positive provisions to protect the rights of women.

**Part III of the Constitution of India**

**Fundamental Rights and Duties**

**RELEVANT ARTICLES OF THE CONSTITUTION OF INDIA RELATING TO GENDER EQUALITY** -

**Article 14 : Equality Before Law :**-

The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
Article 15 : Prohibition Of Discrimination
Of Grounds Of Religion, Race, Caste, Sex
Or Place Of Birth :-

The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

No citizen shall, 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 –
Access to shops, public restaurants, hotels and places of public entertainment : or
These of wells, tanks, bathing ghats, roads and places of public resort maintain wholly or partly out of state funds or dedicated to the use of general public.

Nothing in this article shall prevent the state from making any special provision for women and children.

(4)\(^9\) Nothing in this article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward

\(^9\) Added by the constitution (first Amendment) Act, 1951, Section 2. – Introduction to the Constitution of India by D.D. Basu Eighteenth Edition
classes of citizens or for the scheduled castes and the scheduled tribes.)

Article 15 (3) of the Constitution specifically provides that the Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth as contained in Article 15, shall not prevent the state from making any special provisions for women and children. In other words, the state is empowered to make any such provisions and it shall not be violative of Articles 15. Article 15 (1) prohibits gender discrimination. Article 15 (3) lifts that rigor and permits the state to positively discriminate in favour of women to make special provisions, to ameliorate their social, economic and political justice and accords them parity.

Clause (3) of Article 15, which permits special provisions for women and children, has been widely resorted to, by the State, and the courts have always upheld the validity of the special measures in legislation or executive orders favouring women. These provisions could be seen in the sphere of
criminal law, Labour and Industrial laws, Service law and criminal procedure etc.

Article 15 (3) embodies one of the two exceptions to the prohibition contained in clauses (1) and (2) of Article 15. It empowers the state to make special provisions for women and children. This particular advantage has been conferred on the women because the framers of the constitution were well aware of the unequal treatment meted out to women in India from the time immemorial. The other reason for making special provisions for them is their physical structure and the performance of maternal functions, which place them at a disadvantage in the struggle for subsistence.\(^\text{10}\)

Hon’ble the Supreme Court has upheld the constitutional validity of proviso to section 31 (1) (1) of the Andhra Pradesh cooperative societies Act, 1964 and of the Rules 22 © and 22 A (3) (a) framed there

\(^{10}\text{Muller vs. Oregon, 52 L.E.D. 551 as Quoted in J.N. Pandey, Constitutional Law of India, 26\textsuperscript{th} Edn. 1994 at P. 100.}\)
under relying upon the mandate of Article 15 clause 3.

The proviso read with the said rules provided for nomination of two women members by the Registrar to the managing committee of the cooperative societies with a right to vote and to take part in the meetings of the committee. The court upheld the validity of these provisions on the ground that Article 15 (3) of the constitution permitted the making of special provisions for women.\textsuperscript{11}

Thus it would be no violation of Article 15 if institutions were set up by the state exclusively for women or places reserved for them at public entertainments or in public conveyances. The reservations made for women in educational institutions and public employments are protected by Article 15 (3). The following few cases may be helpful in understanding the concept of protective discrimination in favour of women.

In Yousuf Abdul Aziz Vs State of Bombay.\textsuperscript{12}

\textsuperscript{11} T. Sudhakar Reddy vs. Govt. of A.P. 1993 Supp (4) SCC 480.

\textsuperscript{12} AIR, 1954 SC 321
The validity of section 497, Indian Penal Code, which punishes only the male counterpart in the offence of adultery and exempts the women from punishments was challenged as violative of Art 14 and 15 (1) of the constitution. The petitioner contended that even though the women may be equally guilty as an abettor, only the man was punished, which violates the right to equality on the ground of sex. The Supreme Court upheld the validity of the provision on the ground that the classification was not based on the ground of sex alone. The Court obviously relied upon the mandate of Article 15 (3) to uphold this provision.

Similarly, in Saumitri Vishnu vs. Union of India\(^\text{13}\) the petitioner challenged the validity of section 497, Indian penal code on the ground that it violates Articles 14 and 21, because this provision recognizes only the husband of the adulteress as the aggrieved party and not the wife of the adulterer. It was contended that section 497 is a flagrant instance of 'gender discrimination' and 'male

\(^{13}\text{AIR 1985 SC 1618.}\)
chauvinism. The Supreme Court held that the law does not violate either Art 14 or 15, on the ground that the offence will be committed only by a man. The Supreme Court obviously followed the ratio of Yousuf Abdul Aziz vs. State of Bombay, as declared by a constitutional Bench.

In Revathi vs. Union of India. The Supreme Court held that section 198 (2) of Criminal procedure code which gives the husband of adulteress the right to prosecute that adulterer but does not give the wife of the adulterer the similar right, is not discriminatory following the aforementioned Judgment.

Article 16: Equality Of Opportunity In Matters Of Public Employment

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. No citizen shall, on grounds only of religion, race caste, sex descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

\[14. \text{ AIR 1988 SC 835}\]
Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office *(under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that state or Union territory) prior to such employment or appointment. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the state. 

**Article 16(4-A):** Nothing in this article shall prevent the state from making any provision for reservation in matters of promotion of any class on classes of posts in the services under the state in favour of scheduled castes and the scheduled Tribes.

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*Subs. by the constitution (Seventh Amendment) Act, Section 29 and sch. for” under any state specified in the first schedule or any local or other authority within its territory, any requirement as to residence within that State.”

*Ins. by the constitution (Seventy –Seventh Amendment) Act. 1995-Constitutionla Law of India by Dr. J. N. Pandey.*
which, in the opinion of the State are not adequately represented in the services under the state).

Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious of denominational institution or any member of governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 21: Protection Of Life And Personal Liberty:

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

Article 23: Prohibition Of Traffic In Human Beings And Forced Labour:

Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Nothing in this article shall prevent the State from imposing compulsory service for
public purposes, and imposing such service
the state shall not make any discrimination on
grounds only of religion, race caste or class
or any of them.

**Article 24 : Prohibition Of Employment Of
Children In Factories, etc. :-**

No Child below the age of fourteen years
shall be employed to work in any factory or
mine or engaged in any other hazardous
employment.

**Article 25 : Freedom Of Conscience And
Free Profession, Practice And Propagation
Of Religion :-**

Subject to public order, morality and
health and to the other provisions of this part,
all persons are equally entitled to freedom of
conscience and the right freely to profess,
practice and propagate religion.

Nothing in this article shall affect the
operation of any existing law or prevent the
state from making any law – Regulating or
restricting any economic, financial, political
or other secular activity which may be
associated with religious practice:
Providing for social welfare and reform or the throwing open of Hindu religious institution of a public character to all classes and sections of Hindus.

**Explanation I :-**

The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

**Explanation II :-**

In sub-clause (b) of clause 92) the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion and the reference to Buddhist religion and the reference to Hindu religious institution shall be construed accordingly.

**Part IV of the Constitution of the India**

**Certain Directive Principles Of Policy To Be Followed By The State :-**

**Article 39 :** The State shall, in particular, direct its policy towards securing – That the citizens, men and women equally, have the right to an adequate means of livelihood:
That the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good.

That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment:

That there is equal pay for pay for equal work for both men and women:

That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength:

17(f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment).

**Article 39 (A)**

**Equal Justice And Free Legal Aid:**

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17 Subs. by the constitution (forty – Second Amendment Act, 1976 Section 7(w.e.f. 3-1-1977)

18 Ins by the constitution (forty – fourth Amendment) Act 1976 Sec 8 (w.e.f. 3.1.1977).
The state shall secure that the operation of the legal system promotes Justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities).

**Article 42 : Provisions For Just And Humane Conditions Of Work And Maternity Relief :-**

The state shall make provision for securing an humane conditions of work and for maternity relief.

**Article 44 : Uniform Civil Code For The Citizens :-**

The state shall endeavour to secure to the citizens a uniform civil code throughout the territory of Indian.

**Article 51(A) : Fundamental Duties :-**

It shall be the duty of every citizen of India :-

(e) To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional
diversities: to renounce practices derogatory to the dignity of women:

JUDICIAL EXPLORATION- (Menaka's Case):

The apex court has laid foundation in momentous Menaka Gandhi Vs. Rani Jethmalani's case. It was held that, "life under Art 21 does not mean mere animal existence but right to live with basic human dignity."

This judgment has become the starting point for expansion of the horizons of art.21. In 1980's Supreme Court played a vital role making clear the problems of oppressed and depressed class like women, children, labour, prisoners etc. The press, NGO's social workers helped it in the process and the rigid rule of locus standi was relaxed. Which resulted in easy access to justice by way of public interest litigation. It is a innovative judicial process for direct access to the supreme court. The Supreme Court has also given recognition to international covenants and declaration in United Nations.

THE PANCHAYATS

Article 243(D): Reservation Of Seats: -

(1) Seats shall be reserved for a the Scheduled castes : and the Scheduled Tribes. The number of seats so reserved shall be, as

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19. AIR 1978 SC 619
nearly as may be, the same proportion to the total number of seats to be filled by direct election in that panchayat as the population of the scheduled castes in that panchayat area or of the scheduled Tribes in that panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a panchayat.

(2) Not less than one - third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the scheduled castes or, as the case may be the scheduled Tribes.

(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 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.

(4) The offices of the chairpersons in the panchayats at the village or any other level shall be reserved for the scheduled castes, the scheduled Tribes and women in such manner
as the legislature of a state may by law, provide:

Provided that the number of offices of chairpersons reserved for the scheduled castes and the scheduled Tribes in the panchayats at each levies in any state shall bear, as nearly as may be, the same proportion to the total number of such offices in the panchayats at each level the population of the scheduled castes in the state or of the scheduled Tribes in the state bears to the total population of the state:

Provided further that not less than one-third of the total number of offices of chairpersons in the panchayats at each level shall be reserved for women:

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different panchayats at each level.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.
(6) Nothing in this part shall prevent the legislature of a state from making any provision for reservation of seats in any panchayat or offices of chairpersons in the panchayats at any level in favour of backward class of citizens.
THE MUNICIPALITIES

Article 243 T: Reservation Of Seats:

Seats shall be reserved for the scheduled castes and the scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that municipality as the population of the scheduled castes in the Municipal area or of the scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

Not less than one – third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the scheduled castes or as the case may be, the scheduled Tribes.

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 to be filled by direct election in every

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21 Inserted by constitution Seventy Fourth Amendment, Act 1992 Section
Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

The offices of chairpersons in the Municipalities shall be reserved for the scheduled castes, the scheduled Tribes and women in such manners as the Legislature of a state may, by law, provide.

The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

Nothing in this part shall prevent the Legislature of a state from making any provision for seats in any Municipality or offices of chairpersons in the Municipalities in favour of backward class of citizens.

In *Air India vs. Nargesh Mirza* 22, The Supreme Court struck down the Air India regulations relating to retirement and pregnancy bar on services of Air hostesses as unconstitutional on the ground that the

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22 1981 (4) SCC 335
conditions laid down therein were entirely unreasonable and arbitrary. The impugned Regulation 46 provided that an air hostess would retire from the service of corporation upon attaining the age of 35 years or on marriage, if it took place within 4 years of service or on first pregnancy, whichever occurred earlier. Under Rule 47, the Managing Director was vested with absolute discretion to extend the age of retirement prescribed at 45 years. Both these regulations were struck down as violative of Article 14 which prohibits unreasonableness and arbitrariness.

**RESERVATION FOR WOMEN IN ELECTIONS**

Provisions providing for reservations of seats for women in local bodies or in educational institutions are valid, the Supreme Court has held in the case of Government of A.P. Vs. P.B. Vijay Kumar. That the reservation to an extent of 30% made in the State services by Andhra Pradesh Government to women candidates is valid,

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The Division bench of the Supreme Court emphatically declared that, the power conferred upon the State by Article 15 (3) is wide enough to cover the entire range of State activity including employment under the state. Thus making Special provisions for women in respect of employment or posts under the States is an integral part of Article 15 (3). This power conferred under Article 15 (3), is not whittled down in any manner by Article 16.

The 73rd and 74th Amendments of the Indian constitution effected in 1992 provide for reservation of seats to the women in Elections to the panchayat and the Municipalities. Perhaps, this is the first attempt by the Parliament to provide reservation for women in legislatures. According to Article 243 D of the constitution of India, not less than one third of the total number of seats to be filled by direct election in every panchayat shall be reserved for woman. Such seats may be allotted by rotation to different constituencies in a panchayat. Not less than one third of total
number of offices the chairpersons in the Panchayat at each level shall be reserved for women.

According to Article 243 T of the constitution of India which was added by the constitution (74th Amendment) Act, 1992 makes similar provisions for reservation of seats to women in the direct elections to every Municipality. Therefore there is a successful reservation of 33% seats for woman in local bodies, which acquires poignant importance. It is well documented that the woman of India made a distinguished contribution to the country in all spheres of life Therefore; there is nothing unreasonable or unconstitutional in making reservation for woman in legislatures. It is important to remember that the Article 15 (3) of the constitution of India empowers the states to make special provisions for woman and children.

The parliament introduced the constitution 81st Amendment Bill seeking to reserve one third of seats in Lok Sabha and State Assembly for woman in the month of September, 1996. The bill has been referred to
a joint committee of parliament and is yet to be passed. In a way, the move is only an extension of the 73rd and 74th Constitution Amendments, under which a similar quota has been provided for woman in the elected bodies at various levels in the Panchayat Raja and Nagar Palika systems and as such represents a big step forward in empowering the women to play their rightful part in democratic government and in, the political process at the decision making level. This measure is towards correcting the gender injustice.

In the Sarla Mudgal Vs Union of India it was held that Article 23 of the constitution specifically prohibits traffic in human beings. In this context traffic in human beings includes "devadasi system". Trafficking in human beings has been prevalent in India for a long time in the form of prostitution and selling and purchasing human beings for a price just like vegetables. On the strength of Article 23 (1) of the constitution, the legislature has passed the suppression of

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24 AIR 1995 SC 1531
Immoral Traffic Act 1956 (now renamed as The Immoral Traffic (prevention) Act, 1956) which aims at abolishing the practice of prostitution and other forms of trafficking. This is an Act made in pursuance of the International convention signed at New York on the 9th day of May 1950 for the prevention of immoral traffic. Recently the Andhra Pradesh Legislature has enacted the Devadasis (Prohibition of Dedication) Act.1988 to prohibit the practice of dedicating women as Devadasis to Hindu deities, idols and temples etc. which invariably results in evils like prostitution”.

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)** directs the state to direct its policy towards securing that the citizen, men and women, equally have the right to an adequate means of livelihood.

**Article 39 (d)** directs the state to secure equal pay for equal work for both men and
women. The state has enacted The equal Remuneration Act, 1976 to this Directive Principle.

**Article 39 (e)** Specifically directs the State not to abuse the health and strength of workers, men and women.

**Article 42** of the constitution incorporates a very important provision for the benefit of women. It directs the state to make provisions for securing just and humane conditions of work and for maternity relief. The state has tried to implement this directive by enacting the maternity Benefit Act, 1961.

**Article 44** directs the state to secure for the citizens a uniform civil code throughout the territory of India. This particular goal is towards the achievement of gender justice. Even though the state has not yet made any efforts to introduce Uniform civil code in India, the Judiciary has recognised the necessity of the uniformity in application of civil laws like in marriage, succession, adoption and
maintenance etc. in the case of Sarala Mudgal vs. Union of India\textsuperscript{25} and other cases. Apart from these specific provisions all the other provisions of the constitution are equally applicable to the men and women. This clearly establishes the intention of the framers of the constitution to improve the social, economic, education and political status of the women so that they can be treated with men on equal terms.

In Ramavati Devi Vs State of Bihar\textsuperscript{26} the Supreme Court has dealt with the validity of the Chotanagpur Tenancy Act, 1908 of Bihar which denied the right to succession to Scheduled Tribes woman as violative of right to livelihood under Article 21 of the constitution. The Majority Judgment however upheld the validity of the legislation on the ground that such enactment was in accordance with the custom of inheritance/succession of the Scheduled Tribes.

However the dissenting judgment was delivered by Justice K. Rama Swamy who felt that the law made a gender - based

\textsuperscript{25} AIR 1995 SC 1531
\textsuperscript{26} AIR 1983 SC 154
discrimination and that it violated Articles 15, 16 and 21 of the constitution of India. The Majority Judgment does not appear to be in consonance with the right to equality enshrined in the constitution. During the course of his dissenting opinion Justice K. Rama Swamy had an occasion to refer to various International Declarations and conventions along with the relevant provisions of the Indian constitution as regards the gender discrimination in India. The learned Judge observed:

"Legislative and executive actions must be conformable to and for effectuation of the fundamental rights guaranteed in part III and the directive principles enshrined in Part IV and the preamble of the constitution which constitute the conscience of the constitution. Covenants of the United Nations add impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument
of social change as well as the defender of social change. Article 2 (e) of CEDAW (The Vienna convention on the Elimination of all forms of Discrimination Against Women which was ratified by the UNO on 18-12-1979 and which was ratified by the Government of India on 19-6-1993) enjoins this court to breathe life into the dry bones of the constitution, international conventions and the protection of Human Rights Act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights." (at p. 148)

These remarks made by the learned Judge highlighted the plight of the Indian women and also the necessity of the state action that should be taken to rectify the historical inequity that discrimination against the women.

**Development of woman law:**

The interpretation of word 'consent' in Mathura's case\textsuperscript{27} has in fact became the wind marker to show where the wind blows. In

\textsuperscript{27} State of Maharashtra V/s. Tukaram AIR 1979 SC 185
changing social scenario there was alarming increase in crime against women. The bride burning, dowry death, rape, cruelty, harassment, suicides are evil side of our civilization. The right thinking citizen's social organizations woman activities lawyers & many other leaded the march against such social evil. There was discussion, debate, reporting of this evil which has taken shape in sweeping changes in women's law to cure this menace.

Clause 2\textsuperscript{nd} of S 375 of Indian penal code was amended by deleting words "free & voluntary consent" modified the same with only." without her consent " S376 (A) to 376(G) were inserted which relates to custodial rape, gang rape etc. S 498 was inserted in IPC pertaining to combat the 'cruelty' by Husband or relatives of husband mentally or physically. The wider definition of cruelty in S 498 A IPC has brought about a sea change in attitude of Indian womanhood. In fact this legal weapon is in use like anything. It has become the 'shield' of security for married women & hanging
'Sword' to in laws members. The number of cases filed under section 498 A Indian Penal Code no doubt shows the trend of married women's oppression in house & their awareness about their legal rights. I do admit there is misuse of this section but not in all cases.

Apart from it, there are amendments in Indian evidences Act also. The very purpose of the amendments, insertion of some presumption in Indian Evidence act like S 113A,S 113B,S114A is to overcome from the heavily burdened prosecution to cannons of real justice to womenhood, Generally, as per criminal jurisprudence the prosecution has to prove guilt of accused beyond reasonable doubt. In case of atrocities on woman the evidence, which is expected normally, cannot available only because of secondary position of woman in their family & society. Therefore these directory & mandatory presumption are inserted to prove abatement to commit suicide (S 113A) dowry death (S 113 B) about consent in rape S.114 (A) Evidence Act.
As well as Manjushri Sarda’s case is the index to show the development of position of woman in domain of law. S304 (B) is inserted in IPC & Dowry prohibition (amendment) Act 1986 was amended.

In Shama saheb Vs state of Karnataka held that,
“Composition of offence under section 304B of IPC is vastly different from formation of the offence under section 302 of IPC i.e. Murder under section 302 IPC accused has no burden but under section 304 B if accused failed to rebut the presumption under section 113 B of Evidence Act as a package with section 304 B IPC Dowry death, the court is bound to act on it”

**Dowry system**

Dowry system is one of the most degrading social practices to offer their daughter to the groom with some agreed money. In old Hindu tenets there was no provision for giving proprietary right to female. Female did not heritate their paternal property. Moreover in society the female can

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28 AIR 1984 Sharad Sarada Vs. State of Maharastra
29 2001 CrLJ 1075 S.C.
attain her status only on her marriage, which is not in case of male. Consequently, the female gets a secondary position in the family and she became sellable in the pious name of 'kanyadan.' I don't mean to say that the very inception of Dowry system was a evil because it was there with a view to give some proprietary share (though not equal) to female members at the time of marriage.

However, as like other laudable customs in Hindu law, this custom has also taken worst shape in progressive society due to outmost greed of easy money and materialistic approach in marriage bargaining.

The incorporation of section 304 B in IPC and section 113 B in evidence Act and amendment in Dowry prohibition Act is encouraging step towards gender equality. However, still the social atmosphere is not attuning with legal one. It has still one of the instruments of secondary position of woman in society much less in marriage bargaining instead of considering it as 'sacradontal tie'. The rampant thing is that 'marriages are not
considered to be made in heaven but settled by hywans'.

In a survey of Shakshi NGO of Delhi of 109 judges\textsuperscript{30}, the judges attributes pervasiveness of Dowry to number of reasons like unequal economic condition, weak husband, failure of parents to take back the daughter from situation of dowry harassment. The judges laid emphasis on changing woman rather those alerting attitudes, which affect woman adversely. Some judges affirmed that while they would not demand dowry for their son, they would have to provide dowry for daughter where in lies the crux of the problem with gender bias.

**Creative role of judiciary in development of women's law**

As mention before early 1980's is the most pervasive theme of women's oppression\textsuperscript{31}, then I have proud to say that early 1990 and 20\textsuperscript{th} century is the righteous recognition and activism of judiciary of woman's emancipation. I have already

\textsuperscript{30} www.sakshi.org

\textsuperscript{31}
discussed the land mark decisions of our apex court in Sarada’s case\textsuperscript{32} while understanding social evil of dowry & dowry death the apex court has described the pathetic position of women in family and society which compelled her to bear all the tortures. \textbf{The Apex court held},

“The Indian woman is brought up and trained in a traditional atmosphere and told that it is better to die in the husband’s home than return to her parent’s home and bring disgrace to them. She finds it very difficult to violate this cardinal principle and prefers to die at her husband’s place. This is the social reality of a women’s life. The legal agents in power need to understand this and be sensitive to it.”

Manjushri Sarda’s case moved not only the public opinion but also the apex court. The Apex court in realm protected and guarded the women’s right as per letters and sprit of the constitution. Then only there were amendments in Indian penal code, Evidence act and Dowry prohibition (amendment) act 1986 as mentioned supra.

\textsuperscript{32} AIR 1984 SC 1622
Position of women in early 1990s and onward

In early 80s women faced mainly the domestic violence i.e. cruelty dowry, & gang rape in Mathura’s case. However, in 1990s there was a sudden change and addition in crime against woman in a different form. The very ‘modesty’ of a woman, which is fragrance of her life, was at stake. Such torturer is known as ‘sexual harassment’. The cases of molestation came up 24,117 in 1994 i.e. 24.37 % of total crime reported against women in 1994. The cases of sexual harassment constituted 10.60% of total crime against women in 1994.33

In 1988 Inspector General of Police, Chandigarh molested a senior lady IAS officer. In this case the Supreme Court held the word ‘modesty’ has not defined in IPC. Ultimate test for ascertaining whether ‘modesty’ has been outraged or not is the action of offender could be perceived as one, which is capable of shocking the sense of

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33 Roopan Deol Bajaj v/s. KPS Gill AIR 1996 CrLJ 38 SC
decency of a woman. As per oxford dictionary 'modesty' means conduct (in man or woman) reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. Thus appeal filed by IAS officer Rupandeo Bajaj was allowed

Moreover, in the case of state of A.P.Vs. Bodensundra Rao\textsuperscript{34} the Apex court came down heavily on A.P.High court for awarding grossly inadequate sentence and held,

'Crimes against women are on the rise. Imposition of grossly inadequate sentence and particularly against the mandate of legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment'.

In another pioneer decision in Bodhi satwa Gautam Vs.Shubra Chakrabarty\textsuperscript{35} the apex court held that,

'Rape is not only a crime against a person of a woman (victim) it is a crime against entire

\textsuperscript{34} AIR 1996 S.C.530
\textsuperscript{35} AIR 1996 S.C.922
society. Rape is the most hated crime. It is crime against basic human rights and is also violative of the victims most cherished fundamental right namely right to live contained in article 21 of the constitution. The rape laws do not unfortunately take care of the social aspect of the matter and are inept in many respects’.

Relying upon the ruling supreme court in Chairman Railway Board Vs. Chandrima Das\(^{36}\) where a Bangladeshi national namely Hanoofa Khatoon was gang raped by many including rail way employees in Yatri-nivas at Hawrah station confirming her fundamental right under article 21; the court held that ‘state was under constitutional liability to pay compensation to her’.

Despite these decision of our apex court there is no gender sensitivity amongst all strata of society. In fact article 51A (e) of constitution casts a duty on all citizens to renounce practices derogatory of women. Still it is shocking to note that on an average, 41 women are raped in the country every day.

\(^{36}\) 2000 CrLJ 1473 (S.C.)
Actually most of the rape victims preferred not to report this heinous incident as social stigma is attached to it. Thus, incident of rape is not a challenge to a particular woman but it is an indicator to show how the social order is deteriorating. And therefore, there was a social cry that rape accused is hang till death. This offence is serious in nature as it causes experience of death to a victim every day due to shame and spoiling her purity. In such circumstances neither the legal system nor the attitude of society helps the rape victims in any way. Victims suffer in silence and tears.

**Vishakha’s case on sexual harassment**

Vishakha’s case reported in Vishakha & othersVs. state of Rajasthan & others[^37] is a innovative decision of our apex court has not only shown the stronger contempt to the derogatory practices in society against woman in general but also created a new class of woman working woman and the sexual harassment they suffer at working place.

[^37]: AIR 1997 S C 3011
The plight of social activists Banwaridevi could be seen as an example of a social scenario. Banwaridevi was harassed, ostracised and finally gang-raped when she prevented to child marriages in her village in Rajasthan. In male dominated society like Banwari thousands of women have been subjected to various kinds of harassment and exploitation within and outside family circle.

Therefore, some social activists and NGOs moved the supreme court for enforcement of the fundamental rights of working women under article 14, 19 & 21 of the constitution in view of prevailing climate in which violation of such rights is not common. With increasing awareness of gender justice there is increase in the effort to guard against violation. The said petition was filed as a class action with an aim of focusing attention towards this societal aberration and assisting in finding suitable methods of the true concept of gender justice and to prevent sexual harassment of working women in all work places through judicial process to fill the vacuum in the existing legislation.
In this case the apex court has elaborately discussed the present constitutional provision and made applicable the international declaration into our Indian law with the aid of article 51&253 of the constitution and defined sexual harassment for this purpose which includes such unwelcome sexually determined behavior (whether directly or by implication) as—physical contact and advances
A demand or request for sexual favors
Sexually coloured remarks
Showing pornography
Any other unwelcomes physical, verbal or non-verbal conduct of sexual nature.

The apex court directed all the employer to take preventive steps by forming rules etc.and further held that,

'Sexual harassment of women at work place amounts to violation of right to gender equality and right to life & liberty. And laid down guidelines and norms by taking aid of international convention which is to be treated as law declared under article 141 of the constitution.'
In apparel export Vs. A.K. Chopra\textsuperscript{38} the apex court again confirms the above ruling and held

'The sexual harassment of a female at the place of work is incompatible with dignity and honour of a female and needs to be eliminated and there can be no compromise with such a violation admits of no debate'.

Amendment in Maharashtra Civil Service (conduct) Rules & in Bombay High court (conduct rules)

As a result of Vishakh's ruling rule 22 (a) & 22(2) were inserted in Maharashtra civil service (conduct) Rules on 29-9-98 & rule 24 A was inserted in Bombay High Court conduct. Rules on 21-09-2000 about sexual harassment at place of work. & One committee is formed of two Hon able judges out of whom one shall be a lady judge.

Thus we can see the judicial exploration of our apex court from Mathura in 1980s to Vishakha in 20\textsuperscript{th} century.

\textsuperscript{38} AIR 1999 SC.625
The position of woman in law is not only because of legislative enactments but also due to strong, firm & sensitive role of our apex court who has created the history by adapting the cannons of international conventions & declaration in our laws with aid of article 51 & 253 of our constitution & has become the protector & guardian of our constitution in realm. Vishakha's case is judicial innovation. The social activists NGOS moved to apex court with outmost belief that the guardian of the constitution would only sail the ship of women's oppression as being saviour.

In progressive society like India like Mains theory of labour to contract & contract to labour just like that the position of women in domain of law is equal from legislation to judicial & judicial to legislation. The public interest litigation has become boon for all the oppressed class of society & mainly for women. The Supreme Court has taken cognizance of all sorts of grievances even on letters sent to it. Thus, the judicial review of all legislative action has made the
development of woman in right direction with maintaining pace as per public opinion.

**Extension of the Act to the State of J & K.**

**Role of N.G.O's**

For the just a cause the NGO's of our country are playing pivotal role for protection of the victims of sexual abuse & exploitation. Sadhana Mukharjee who forced into prostitution at the age of 15 formed Mahila Samannya Committee comprising 1700 sex workers of Calcutta. She has achieved her mission of dignity & preventing exploitation by a tremendous progress.

**The Apex Court & Family Law**

The provisions of S.9 of the Hindu Marriage Act 1955 providing for restitution of conjugal rights have been challenged several times on various grounds. The supreme court finally upheld the constitutional validity of S.9 of the Hindu Marriage Act 1955 in Saroj Rani Vs. Sudarshan Kumar[^39]

The apex court held,

[^39]: AIR 1984 SC 1562
‘The right of the husband or the wife to society of the other spouse is not merely creature of the statute; rather it is inherent in the very institution of marriage. The decree for its restitution serves social purpose as an aid to the prevention of the break up of marriage. Therefore, S.9 is not violative of article 14 of the constitution.

In the matters of Hindu succession, in Pratapsing Vs. Union of India⁴⁰ the Supreme Court held

‘That section 14(1) of Hindu Succession Act 1956 a providing absolute ownership to a Hindu female over her inherited property was enacted to redress the problems faced by Hindu women who were unable to claim absolute interest in their inherited properties, rather who could only enjoy these properties with the restrictions attached to widow’s estate under the Hindu law, as a special provision indented to benefit and protect woman who had been traditionally discriminated against in terms of access to property. And hence, it was not open to Hindu

⁴⁰AIR 1985 S.C.1695
males to challenge the provision as hostile discrimination. Such a provision according to the court was protected by article 15(3), which in its view overrides article 15(1) of the constitution.

The apex court in *Kalawatibai Vs. Soirabai*\(^{41}\) emphasized on the fact that Hindu Succession Act 1956 was enacted in order to do away with invidious discrimination against women and it was a step towards social amelioration as they had been subjected to gross inequality and discrimination in the matter of inheritance.

The apex court in *C.Masilamani Vs. Shri Swaminandaswami* reported\(^{42}\) emphasized that,

"Section 14 of Hindu succession Act should be construed harmoniously consistent with the constitutional goal of removing gender biased discrimination and effectuating economic empowerment of Hindu females. It is imperative for the state to eliminate obstacles and prohibit all kinds of gender-based discrimination as mandated by article 14 and

\(^{41}\) AIR 1991 SC.1581

\(^{42}\) AIR 1996 sc.1697
15 of the constitution. It was further held that, "the state should take all appropriate measures including legislation to modify or abolish all forms of gender based discrimination in the existing laws, regulations, customs and practices which constitute discriminations against women. Legislative action according to court should be devised suitably to constellate economic empowerment of women in socio-economic restructured for establishing and egalitarian social order." Quoting the various provisions of CEDAW the court opined that,

"law is an instrument of social change. Article 2(e) of CEDAW enjoins this court to breathe life into the dry bones of the constitution, international conventions, the protection of human rights act, the act to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women.

In a recent landmark decision on gender equality the apex court in Githa Hariharan
Vs.RBI\(^43\) where in RBI has questioned the authority of the mother even when she had acted with the concurrence of the father held, ‘That mother was the natural guardian because the father was not taking any interest in his minor daughter’s affairs.’

**Role of Judiciary in Protection of Human Rights of Women in India**

The Indian judiciary has played important role in recognition of enforcement of various human rights of the women & children in India. The Supreme Court in catena of cases held that right to decent life, life with human life & it does not mean animal physical existence. Right to life includes basic necessities of life like right to food, right to health, right to speedy trial, right to education and legal aid, right to compensation to victims and life with human dignity.

In Sunil Batra Vs. Delhi administration\(^44\) the apex court observed,

\(^{43}\text{AIR 1999 - 2 Scc 237}\)

\(^{44}\text{AIR 1978 Supreme Court 1675}\)
"That the treatment of a human being which offends the human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under article 14 of the constitution."

It is to be noted that the protection of human rights act 1993 not only covers the fundamental rights but also international covenant. As I have already discussed the Supreme Court has shown great judicial activism while bringing into our law of land all the cannons of the CEDAW Declaration. Not only the apex court but the various high courts have played vital role in this regard. In Shahnaz Sani's case in 1998 the honorable justice Shrikrushna directed employer of Mrs. Sani, a ground hostess in Saudi Arabian Air lines at Bombay to reinstate her with full packages of 13 years during which she was rendered unemployed due to wrongful termination. This is the first even judgment of the high court on sexual harassment at workplace has set a new trend in the protection of
the human right to dignity of working women in India.

In Sheela Barse Vs. State of Maharashtra\textsuperscript{45} the apex court entertained the Public Interest litigation on letter of journalist complaining of violence on women prisoners while in police lock up. The court directed a fact finding team to visit the Bombay central jail and interview the women prisoners as together they had been subjected to any torture or ill treatment and to submit report. Then gave direction -

Lock up female only in female lock up guarded by the female constables

Interrogate female prisoners only in the presence of female police officers among other directions.

In All India democratic women’s association vs. union of Indian\textsuperscript{46} In PIL against ‘Sati’ allegedly to be committed by Rupkanwar in Rajas than held,

\textsuperscript{45} AIR 1983 Sc.378
\textsuperscript{46} AIR 1989 Sc.1280
'That the restraint imposed on holding chunry ceremony should continue without any variation to prevent glorification of sati.

In Gaurav Jain Vs union of India\textsuperscript{47} the apex court issued directions for rescue and rehabilitation of child constitute and the children of fallen women and further directed the establishment of Juvenile Homes for them.

\textbf{Gender equality principle under constitution in position of woman in different fields}:

The preamble of the constitution is the solemn resolve to secure social economic & political justice, liberty, equality & dignity to every person, man & woman. However, this constitutional principles are whittled down by the social evil. They turned their deaf ear to the women's liberation movement & continued to exploit the women in its highest extend. The women were harassed at home & by society at every walk of their life.

\textsuperscript{47} AIR 1997 Sc 3021
Gender Equality :-

The principle of quality is one of the milestones embodied in the preamble of the constitution of India. In order to achieve the goal of gender equality & to provide gender justice to woman. The Government of India has initiated served programmes for empowering women.

Position in Education :-

As per 2001 census report of India three fourth male and a little over half of the literacy has increased from and percent in 1951. 54% in 2001 it shows a positive trend of gender parity in education. But development rate is slow & they are legging far behind in comparison to their male counter parts. Resultantly, there is backwardness in the field of employment.

Position of Women in Employment :-

During 19 th century due to western impact education & advancement & knowledge there had been rise in the awareness of women about their status they became aware to protect their rights. Consequently the doors of empower
employment were opened for women. But still they are not freed from their household activities.

The constitution prohibits discrimination & provides that equals should be treated equality because injustice arises when equals are treated unequally. So this principle must be read as equality & injustice. The directive principles lay down guidance & direct state to strive to minimize gender inequality amongst citizens. It directs to all citizens to renounce practices derogatory to the dignity of women. Thus special care has been taken in Indian constitution to provide socio-economic justice to women & to put them on the same footing of equality.

However as per the Decennial censuses from 1991 to 2001, the women workers population is less than half of male workers into men constitute a major chunk of the labour force in primary sector of Indian industries but it is not productive. The disproportionate representation of female employee also exists in judiciary. Class I services & in other Govt. services.