Chapter-V

Dignity of Women: Role of protecting agencies
CHAPTER-V
DIGNITY OF WOMEN
ROLE OF PROTECTING AGENCIES

"We, the people of India, having solemnly resolved to constitute India in to a sovereign, socialist, secular, democratic, republic and to secure to all its citizens, justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunities, and to promote among them all fraternity assuring the 'dignity' of the individual and the unity and integrity of the nation...”

-Preamble of the Indian Constitution

5.1 General

The role of played by the three branches of government, the legislature, the executive and the judiciary under the Constitution of India is so comprehensive that it encompasses the entire gamut of governance of the State. The Constitution recognises the fact that women have been subjugated for a very long period and provided scope for the enactment of special laws to improve the position of women. Though the Parliament had enacted considerable number of legislations during the post-constitutional era, the position of women has not been substantially improved. The equality clause in the Constitution has made very little impact on the social and economic life of women in India for the simple the reason that they are not effectively implemented on account of social inertia. The law relating to gender justice in India is inadequate to give protection to the suppressed women of India, and the law-enforcing agency is probably not sufficiently concerned and awake to the gravity of the situation. The object of law is to protect rule of law. Law is an instrument of social change. It is therefore necessary not only to legislate but also to see that they are implemented. An effort is made in this chapter to point out the areas where the law is failing to achieve the goals enshrined in
the Constitution for the emancipation of women in India. The areas where the law is lagging behind to protect the human rights of women are:

a. The only personal law, which has remained impervious to the changing trend from polygamy to monogamy, is Muslim law. There should be no compromise on the basic policy of monogamy. Monogamy should be strictly enforced for all communities. Any compromise in this regard will only perpetuate the existing disparity in the status of women.

b. Child marriage is another harsh reality of the Indian society where thousands of child marriages are performed every year. The policy of law, which does not render illegal a child marriage and rather permits such marriage of a girl before she is physically and mentally mature, is open to serious question.

c. Due to non-registration of marriages, no check can be put on child and bigamous marriages. In view of the fact that such registration is recommended by the United Nations, as it facilitate the proof of marriage.

d. Dowry is another burning problem without any solution. Inspite of the Dowry Prohibition Act, 1961 and the subsequent amendments to the Act, though the Act is made very harsh and punishments are very severe but dowry deaths are alarmingly increasing defyng all solutions.

e. Inspite of the strict grounds of divorce in the Hindu and Christian personal laws there is an increase in the rate of divorce in the cities and villages. Of course marriages, which have failed beyond repair, should break.

f. The provisions relating to marriage, maintenance, inheritance, adoption, and guardianship in various laws have been a subject of sharp controversies. Inheritance and succession are the areas where women are greatly discriminated.
In the criminal law, the problems like rape, adultery, bigamy, and other crimes against women are on the increase, causing great concern to the lawmakers. The indecent representation of women in films and other modes of media are a matter of shame for everybody.

5.2 ROLE OF LEGISLATURE AND EXECUTIVE

There are a host of legislations enacted from time to time to protect the rights of women. There is no dearth of enactments in this direction. Each enactment is perfect in its tone and tenor to achieve the desired results but the problem is successful implementation of the enactments in the day-to-day life.

Pre Independence Legislations

- Regulation No: XXI of 1795 and Regulation No: III of 1804
  These regulations declare the practice of infanticide, illegal
- Bengal Sati Regulation XVII of 1829
  This Regulation declares the practice of sati or self-immolation of widows as illegal and punishable by the Criminal Courts as culpable homicide
- The Hindu Widow's Remarriage Act, 1859 (15 of 1859)
  This Act legalises the marriage of Hindu widows
- Indian Penal Code, 1860 (45 of 1860)
  It provides for punishment for various offences against women like abduction, rape, adultery, bigamy remarriage during the lifetime of a wife, cruelty and cheating against women, etc.
- The Converts Marriage Dissolution Act, 1866
This Act provides for dissolution of a marriage where one of the parties has deserted or been repudiated by other on the ground on the formers conversion to the religion of Christianity.

Indian Divorce Act, 1869 (4 of 1869)
This Act empowers a wife to give petition for dissolution on the grounds of remarriage of husband, change in husband's religion and where husband is guilty of incestuous adultery, bigamy with adultery, rape, sodomy or bestiality, adultery coupled with cruelty.

The Married Women's Property Act, 1874 (3 of 1874)
It declares 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 the married women may maintain a suit in her own name in respect of her own property.

The Power of Attorney Act, 1882 (7 of 1882)
Under this Act, a woman is empowered to appoint an attorney on her behalf.

Civil Procedure Code 1908 (5 of 1908)
It prohibits arrest or detention of women in civil prison in execution of a decree for the payment of money.

The Legal Practitioners (Women) Amendment Act, 1923 (23 of 1923)
Under this Act, no women can be disqualified from being admitted as a legal practitioner by reason of her sex.

Indian succession Act, 1925 (39 of 1925)
Under this Act, the woman has the same right to the property as the husband has on the death of his wife.

The Child Marriage Restraint Act, 1929 (19 of 1929)
It fixes the minimum age of marriage at 18 years for boys and 15 years for girls.

Bombay Prevention of Hindu Bigamous Marriage Act, 1946
It imposes penalty for the offence of bigamy up to 7 years of
imprisonment and fine.

Post – Independence Legislations

- The Special Marriage Act, 1954
  This Act permits marriage of a) people from different religious faith without changing their religion and b) stipulates minimum age of marriage as 18 years for girls and 21 years for boys

- Hindu Marriage Act, 1955
  This Act fixes a) minimum age for marriage as 18 years for girls and 21 years for boys. The salient feature of this Act is that it makes monogamy as Universal. The Hindu Marriage Act, 1955 and Special Marriage Act, 1954 were amended in 1976 to provide for the right of a girl to repudiate, child marriage before attaining maturity whether the marriage has been consummated or not. Cruelty and desertion were added as grounds for divorce and mutual consent was recognised.

- Hindu Succession Act, 1956
  This Act confers the right of absolute ownership over property and the women can make a 'Will' leaving her share of property to the heirs. Section 10 of the Act provides for the property of an intestate being divided among the heirs in accordance with certain prescribed rules for the benefit of women.

- Hindu Adoption and Maintenance Act, 1956
  This Act makes it permissible to any female Hindu a) who is of sound mind and b) who is not a minor and who is not maimed or if maimed whose marriage has been dissolved or whose husband is dead or has completely renounced the world or has ceased to be Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, to take a son or daughter in adoption. The consent of father and mother is necessary for giving the child in adoption unless otherwise.

- The Suppression of Immoral Traffic in Women and Girls Act, 1956
This Act prohibits trafficking in women and girls for the purpose of prostitution as an organised means of living.

The Immoral Traffic (Prevention) Act, 1986

The salient features of this Act are a) widening the scope of Act to cover all persons, whether male or female, who are sexually exploited for commercial purposes, enhancement of period of imprisonment where offences are committed against minors and children, appointment of Trafficking Police Officers, who will have the powers to investigate inter-state offences, prescribing punishment as laid down for rape under the Indian Penal Code or the seduction of victims of trafficking while in custody, interrogations of women and girls removed from the brothels to be held by women police officers or in their absence in the presence of women social workers, and setting up of special courts.

Hindu Minority and Guardianship Act, 1956

Under this Act, the consent of wife is required for adopting a son or a daughter.

The Dowry Prohibition Act, 1961

The Dowry Prohibition Act was first legislated in 1961 and amended in 1984 to make the offence cognisable, to enhance the penalty both in fine and imprisonment and to widen the scope of the Act to make it more effective. The Act was further amended in 1986 to make the penal provisions more effective. The Act was further amended in 1986 to make the penal provisions more effective and stringent. A new offence of ‘dowry death has been included in the Indian Penal Code consequential to the amendment in the Act.

The Maternity Benefit Act, 1961

This Act is applicable to every establishment, plantation, factory or mine and provides for payment of maternity benefit at the rate of average daily wage for the period of women’s actual absence.

The Medical Termination of Pregnancy Act, 1971
This Act makes it possible to have legal induced abortion by a qualified doctor on humanitarian and medical grounds. This is primarily a welfare measure to protect the health of women, though; it has also a family planning aspect.

The Factories Act, 1976 (as amended)
This Act provides for establishment of crèche where 30 women are employed (including casual labourers or contract labourers) as against one of every 50 hitherto.

The Equal Remuneration Act, 1976
This Act provided not only payments of equal wages for same work of a similar nature, but also for a machinery for its implementation and advising the government on measures to ensure increased employment to women.

The Child Marriage Restraint (Amendment) Act, 1978
This Act provides minimum age for marriage for girls to 18 years and for boys to 21 years. The offence under this Act has been made cognisable.

The Contract Labour (Regulation) Act, 1978
The Act regulates the working conditions of contract labour, payment of wages and provides for welfare facilities and crèches for the children of working women engaged in construction work.

Criminal Law (Amendment) Act, 1983
The Indian Evidence Act, the Indian Penal Code and the Criminal Procedure Code were amended in 1983 to make the crimes against women much more stringent and effective and also to make a new provision in the IPC to make cruelty against women by the husband and other relations punishable.

The Family Courts Act, 1984
This Act was passed for the setting up of Family Courts in the country with a view to promoting reconciliation in and securing speedy
settlement of disputes relating to marriage and family affairs and for matters connected therewith.

- Indecent Representation of Women (Prohibition) Act, 1986
  Under this Act, representation of women in an indecent or derogatory or denigrating manner in all advertisements and publications is prohibited. Offences under this Act are made punishable with imprisonment and fine.

- The Commission of Sati (Prevention) Act, 1987
  Under this Act commission of Sati and its glorification and for matters connected therewith or incidental to such an abatement is punishable by a maximum penalty i.e. death or imprisonment of life. This Act provides more effective prevention for a widow being sacrificed as Sati.

All the legislations, which have been enacted for protection of human rights of women so far, have not reflected the aspirations of the legislature because of the legislative lacunae, executive inertia and narrow interpretation of dignity of women by the judiciary. Indian culture, tradition and religious practice come in the way and become stumbling blocks towards the protection of dignity of women. Government's attempt to make uniform civil code, which could be applicable to all, became futile exercise because of the religious diversities.

"Enacting laws concerning women's rights is difficult terrain, particularly regarding issues such as indecency, trafficking, and sexual assault on women and children. The existing laws have done more harm than good to the groups they were intended for."¹ Many of the legislations, which were initially instituted in response to the reform movement of the nineteenth century, have, subsequently, been revised to meet the Constitutional commitments. The Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardian Act, 1956, the Suppression of Immoral Traffic Act,

1956, the Prohibition of Dowry Act, 1956, were major steps towards the liberation of women, in that they categorically established the principles of rational humanism over exploitative practices that were earlier legitimised as requirements of the Hindu religion. Uniform civil code, protects women against discriminative patriarchal personal laws. The constituent bench comprising of Y.V. Chandrachud C.J., in Mohd. Ahmed Khan v. Shah Bano Begam held that it is a matter of regret that Article 44 of the Indian Constitution has remained a dead letter. From this, it is evident that it has been left to the Muslim community to take the initiative while reforming the Muslim personal law. The purpose of the common civil code, the court added, will help in removing the disparities and help the cause of national integration. In this regard, it is to be remembered that no community is prepared to bell the cat by making gratuitous concessions; it is thus left ultimately to the State, which is charged with the duty to legislate. The court added further, that in spite of the sensitivities involved, one should give the meaning to the Constitution by making a beginning thus assuming the role of a reformer by removing the palpable injustices. But this should never be a substitute in filling the gaps, on par with common code.

Although the reformed Hindu law is projected as the ideal piece of legislation, which liberated Hindu women, the underlying motive of the reform was consolidating the powers of the State and building an integrated nation. This crucial objective could be achieved only by diluting women's rights to arrive at a level of minimum consensus so that the agenda of reform could be affected without much opposition. Several customary rights were sacrificed to arrive at uniformity. The statutes that were finally enacted were merely ornamental instead of being markers of genuine and concrete efforts at rectifying the gender discrimination written into the Hindu law. Some of the anomalies within the reformed laws, as well as the complex and laborious process of the reform is analysed here.

AIR 1985 SC 935
In the years that followed, several discriminatory aspects of the personal laws came up for judicial scrutiny under the Constitutional mandate of equality and non-discrimination. But the courts, in most cases, stopped short of declaring the discriminatory aspects as unconstitutional. Over the years, the courts have held that the discrimination under the personal laws of various communities is based on reasonable classification. This has thrown further stumbling blocks in the path of gender equality.

The Hindu Law Committee, set up in 1941 to look into the anomalies of the 1937 Act, recommended a comprehensive code of marriage and succession, which led to the setting up of the second Hindu Law Committee in 1944. After soliciting opinions of jurists and the public, the Committee submitted its report to the Federal Parliament in April 1947. The recommendations were debated in the Provincial Parliament between 1948 and 1951 and again from 1951 to 1954. Finally, a diluted version, in the form of four separate Acts could be passed only in 1955-56. The representatives of Hindu fundamentalist parties termed it as anti-Hindu and anti-Indian and raised the demand for uniform code as a delaying tactic. At this point, the women Parliamentarians who had initially propagated a uniform code reversed their position and supported the Hindu law reform. This is a significant political move, since an uncompromising demand for a uniform code would have meant an alliance with the most reactionary and anti-women lobby and would have caused a further setback to women's rights. In a secular country like India State has to secure justice social, economic and political with liberty of thoughts, expression, faith and worship, equality of status, opportunity and fraternity assuring the dignity of the individual and the unity of the nation. Uniform civil code is necessarily required to maintain harmony among all sections of society.
The reforms did not introduce any principle which had not already existed somewhere in India. Despite this, the reforms were projected as a vehicle for ushering in western modernity. There were, however, several liberal customary practices, which were discarded by the Hindu code for the sake of uniformity. In their determination to put an end to the growth of custom, the reformers were in fact putting an end to the essence of Hindu law, and ironically, persisted in calling the codification ‘Hindu’. There is a general presumption that the Hindus are governed by a secular, egalitarian and gender just code and that this code should now be extended to Muslims to liberate Muslim women. The judiciary has contributed to this myth by reiterating that Hindus have forsaken their personal laws and are governed by a common code. This misconception forms the basis of the demand for the uniform civil code. Since the political impediment to reform Hindu law was grave, several balancing acts had to be performed by the State while reforming the Hindu law. Crucial provisions empowering women had to be constantly watered down to reach the level of minimum consensus. While projecting to be pro-women, male privileges had to be protected. While introducing modernity, archaic Brahminical rituals had to be retained.

Unfortunately, the anomalies and anti-women bias within the Hindu code were not discussed widely in public forum. They remained hidden in statute books and legal manuals. There seemed to be almost a conspiracy of silence beneath which there inadequacies were crouched. This led to a fiction that the Hindu code is sufficiently modernised and hence it is the perfect family code, which ought to be extended to other religious denominations in order to liberate women. The extent of opposition within the Congress to daughter inheriting property was such that the then Law Minister C.C. Biswas, in 1954, on the floor of the house, publicly expressed his disagreement with

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5 Sara Mudgal v. Union of India & Others (1995) 3 SCC 635
6 Section 7(2) of the Hindu Marriage Act, 1955
the provisions relating to inheritance rights. Due to severe opposition, the coparcenary system had to be maintained, which resulted in the denial of rights to women in the ancestral home and property. When compared to the position of the brother, the sister's share was dismal. Since the earlier safeguard provided by the ancient lawgivers to women by way of stridhana, a necessary concomitance to male coparcenary had been corroded due to judicial decisions, denial of equal rights to daughter only served to widen the gulf between the gender divide. The daughters had equal rights only in the separate property by throwing the property back into the common stock using the doctrine of blending or by forming new coparcenaries.

While at one level coparcenary was retained, all the safeguards for the protection of women's rights were abrogated. The main feature of the traditional Hindu joint family was its inalienability. But the new right granted to the male members to will away the property, further weakened the position of female members. While there were no safeguards to protect the right of daughters in their natal family, the capitalist, consumerist forces transformed the ancient custom of stridhana into a modern distortion called dowry. Under its modern guise, the daughters lost control upon this property, which was presumably given on her behalf, to secure her happiness in her matrimonial home. In the subsequent years, the demand for dowry became an instrument of violence and subjugation of the newly married brides.

The Hindu Marriage Act, 1955 was based on a formal concept of equality where the spouses were deemed equal and had equal rights and obligations towards each other. Both men and women were granted equal right to matrimonial remedies and ancillary reliefs. So, while a basic inequality

Section 6 of Hindu Succession Act, 1956
Under Section 29(2) of the Hindu Succession Act, a power was granted to individuals to will away their property and in subsequent years this provision was used mainly to deprive the Daughters their share in their parental property.
between men and women persisted within the scheme of inheritance rights, under the perverse logic of equality the Hindu woman was under a legal obligation to maintain her husband. The concept did not exist under any prevalent notion of marriage in the Indian context-Hindu law, either scriptural or customary, or the Muslim law or even in the modern and secular Special Marriage Act, enacted in 1954. The concept was introduced for the first time under the Hindu Marriage Act and was based on the western notion of formal equality.

It is pertinent to note that the enactment of 1955 did not grant Hindu women the right of divorce by mutual consent which had already been introduced under the Special Marriage Act, 1954 as it was considered too radical for the conservative Hindu society and yet women from such conservative societies were deemed to be sufficiently progressive, liberated and economically advanced so as to provide maintenance to their husbands. Despite the social reality that a large number of women are engaged in unpaid domestic work and among those who are engaged in wage labour, a significant percentage are in law paying jobs or in the unorganised sector. For decades after the enactment, in a series of decisions, the courts held that Hindu marriage is a sacrament and it is the sacred duty of the wife to follow her husband and reside with him wherever he chooses to reside. In all the cases, the women were working and supporting the family. The husbands had approached the courts for restoring conjugality just to spite the women. The courts upheld the husband’s rights and granted them a decree of restitution. The decisions are summarized below: In Ram Pakash v. Savitri

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10 Hindu Succession Act, Note 13
11 Sections 24 and 25 of Hindu Marriage Act, 1955
12 Section 39 and 40 of Hindu Marriage Act, 1955
13 The remedy of divorce by mutual consent was introduced into the Hindu Marriage Act in 1976, through Section 13-B of the Act. Cruelty and desertion as grounds of divorce were also introduced in 1976
14 As per the Report of the Committee on the Status of Women, Towards Equality in the year 1971 only 11.89% of women were employed and they constituted only 17.35% of the total labour force and women constituted only 10.8% of the labour force in the organized sector.
the court held that "according to Hindu Law, marriage is a holy union for the performance of marital duties with her husband where he may choose to reside and to fulfil her duties in her husband's home. In *Tirath Kaur v. Kirpal Singh*, the wife pleaded that she was willing to continue the marriage but was not prepared to give up the job. But the court disallowed her plea and ruled in favour of the husband and held that the wife's refusal to give up the job amount to desertion. This would entitle the husband for a decree of restitution of conjugal rights. In 1966, the Madhya Pradesh High Court held that a wife's first duty to her husband is to submit her obediently to his authority and to remain under his roof and protection. In *Surinder Kaur v. Gardeep Singh* it was held that the Hindu law imposes on the wife the duty of attendance, obedience to and veneration for the husband to live with him wherever he chooses to reside. In 1977 the issue came up before the Full Bench of the Punjab and Haryana High Court in the case of *Kailash Wati v. Ayodhya Prakash*. It was held that the wife was employed prior to the marriage. Seven years after the marriage, the husband asked the wife to resign her job and on her refusal to do so, filed for restitution of conjugal rights. The wife stated that she was prepared to honour her matrimonial obligation but was not prepared to resign her job. The Full Bench decided that according to Hindu law marriage is a holy union for the performance of marital duties with her husband where he may choose to reside and to fulfil, her duties in her husband's home. The court reaffirmed that the wife's refusal to resign her job amounts to withdrawal from the husband's society, and granted the decree in favour of the husband.

Although it was claimed during Parliamentary debates that Hinduism is not a religion but a conglomeration of culture and the Act transformed the Hindu Marriage from status to a dissoluble contract, the form of solemnizing

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15 AIR 1958 Punjab 87
16 AIR 1964 Punjab 28
17 *Gaya Prasad v. Bhagwat* AIR 1966 MP 212
18 AIR 1973 P&H 134
19 ILR (1977) 1 P&H 642 FB
the contract remained Brahminical and scriptural with saptapadi (seven steps round the sacred fire) and vivaha homa (the sacred fire) as its essential features, but within a pluralistic society, the Act also had to validate diverse customary practices. But the notion of a valid custom remained ancient and that of time immemorial, as stipulated under the English law. This mingling of Brahminical rituals at one end, customary practices at the other, with English principles thrown in for good measure, has resulted in absurd and ridiculous rulings regarding the validity of Hindu marriages and women have been the worst sufferers of these legal absurdities.

The Bombay High Court in State of Bombay v. Narasu Appa Mal held that the personal laws are not 'laws in force' and hence they are not void even when they come into conflict with the provision of equality under the Constitution. In a subsequent case, Srinivasa Aiyar v. Saraswati Amma it was argued that prohibiting polygamy denied Hindu men equality before the law and equal protection of law and further that it discriminated against Hindu men on the grounds of religion as it restricted the right to freely profess, practice and propagate religion. The Madras High Court did not address the issue whether the term 'laws in force' includes personal laws but held that even assuming that the Act does not offend Article 15 which stipulates non-discrimination on the basis of sex. The judgments ruled that discriminatory personal laws do not violate the Constitutional provision of equality. In C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil the Supreme Court held that the personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental right. The second issue, which came up for judicial scrutiny, was

20 Section 7 (1)&(2) of Hindu Marriage Act, 1955
21 AIR 1952 Bom 84
22 AIR 1952 Mad 193
23 (1996) 8 SCC 525
the provision of restitution of conjugal rights under Section 9 of the Hindu Marriage Act. Justice Chowdhary of Andhra Pradesh High Court in July 1983 struck down this provision as unconstitutional on the ground that it constitutes the grossest form of violation of an individual’s right to privacy." The court held that it denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being and hence is violative of the right to privacy guaranteed by Article 21 of the Constitution. Although Section 9 of Hindu Marriage Act is based on formal equality and there is no distinction between the rights of husband and wife the court held that equality of treatment regardless of equality of the unequal situation is neither just nor equal. By treating husband and wife who are inherently unequal as equal, the judge held that this Section offends the rule of equal protection under the laws ensured by Article 14 of the Constitution. He further added that in actual fact, the remedy works only for the benefit of husbands and is oppressive to women.

Under the English and Indian legal systems, marriage constituted an indissoluble bond and the husband was entrusted with a legal obligation of maintaining the wife for life. Later, the English law accepted the Islamic concept of marriage as a dissoluble contract in the nineteenth century and by the Hindu law in the twentieth century, but under these legal systems, the husband’s obligation to maintain his wife continued even after the dissolution of marriage. Only the wife’s remarriage or unchastity would redeem the husband of his obligation. During the debate on the Dissolution of Muslim Marriages Act, 1939 the primary concern of the reformers was the absence of women’s right to divorce in contrast to the husband’s right of arbitrary divorce. And perhaps due to the fact, that as the economic rights conferred upon women by the Islamic law were superior to the rights granted to women under

25 The English women were granted the right of divorce through the Matrimonial Causes Act of 1857 and the upper caste Hindu women acquired this right under the Hindu Marriage Act, 1955.
other legal systems, the reformers did not address the issue of economic rights of divorced women. The Act did not contain any provision of ancillary reliefs found in other matrimonial statutes based on English law. The political events which followed the Supreme Courts judgment in the Shah Bano case \(^{26}\) eventually resulted in the enactment of Muslim Women (Protection of rights on Divorce) Act, 1986. But the issue of maintenance to divorced Muslim women, which marked the controversy, had a long and turbulent history, which is reflective of collusion between two different legal systems.

Within the social reality, a divorced Muslim woman was left with no economic options to escape from destitution upon divorce. As a corrective measure, in 1973, Section 125 of Criminal Procedure Code, which granted the deserted or destitute wife the right to claim a maximum amount of Rs 500 as maintenance from her husband, was extended to a divorced wife by expanding the scope of the term wife to include divorced wife. The two significant decisions of the Supreme Court delivered by Justice Krishna Iyer in 1979 and 1980 respectively had placed the divorced Muslim woman’s right to maintenance on secure footing without arousing a political controversy around this issue. \(^{27}\) But the controversial Shah Bano’s judgment delivered by Chief Justice Y.V. Chandrachud in 1985, apart from affirming the right of a divorced Muslim woman, also commented upon Islam and interpreted the Muslim personal law while deciding a right under a secular and uniform statute. The call for a uniform civil code and the comments on the Quoran evoked a communal backlash. Relenting to the pressure exerted by the Muslim orthodoxy, the government introduced a Bill in Parliament titled, The Muslim Women (Protection of Rights on Divorce) Bill to exclude divorced Muslim women from the purview of Section 125 Cr.P.C. This move met with severe opposition from women’s organizations and progressive sections.

As the controversy over the judgment escalated, the 'Muslim' was defined as the 'other', both of the nation and of the Hindus. Muslims all over India, in turn could be mobilized to view this as yet another threat to their tenuous security. The communal turn to the event finally, led to Shah Bano herself withdrawing her claim to maintenance. This strengthened the popular misconception that to maintain the religiosity in Islam, women's economic rights have to be subordinated and further the Islamic religion is opposed to granting women economic rights. The Muslim Women's Act has been projected as the most glaring instance of the defeat of the principle of gender justice for the Indian women, as well as the defeat of secular principles within the Indian polity.28

Implementation of these laws is the onerous responsibility of the executive. The expression 'executive' comprises both 'political executive' i.e., Council of Ministers and 'permanent executive' i.e., civil servants. The civil servants carry out the policies laid down by the legislature and political executive. They exercise large discretion in the discharge of their official functions. Thomas Carlyle had centuries ago warned that a nation must be ruled by its best elements or it will perish. An administrative responsive in true sense of the term, has to be fulfilment of the public needs and sensitive to public grievances. After independence the scope of administration continued to enlarge, to shoulder new responsibility and undertake tasks covering a wide spectrum of activities ranging from planning and implementation of development schemes to removal of public grievances and human resources development and further to make available human rights to all and to protect them being interfered with. Both the plausibility and the persuasiveness of the general idea of human rights are at once dependent on, and endangered by, efforts to give specific applicable formulations, to the raw material of human rights rhetoric, to recruit authoritative political and legal procedures to provide

28 Mukhopadhyay, M., Between community and State: The question of women's right and personal laws, in Hasan Z(ed), Forging identities: Gender, Communities and the State, New Delhi, Kali for women (1994), p 109
effective protection for such specified rights and to ensure adequate remedies when they are violated.\textsuperscript{29} The essence of the matter is that in the era of human rights consciousness the \textit{habeas} writ has functional plurality and the Constitutional regard for human decency and dignity is tested by this capability.

The executive machinery in the three branches of the State has a duty to test its actions by the yardstick of human rights. Executive actions can be challenged only if they are done outside the law or if found \textit{malafide}. An effective guarantee of the freedom of the media is a basic requisite for the promotion of human rights. \textit{Dr. Rajendra Prasad}, the first President of Indian Republic says that 'if the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If are lacking in these, the Constitution cannot help the country. India needs a set of honest men who will have the interest of the country before them. The police excesses, corrupt practices of executive, lack of integrity of executive authorities in monitoring and implementation of laws, scams in administration, denial of equal opportunities to women in executive positions, indifferent attitude of officialdom to the problems of women etc, which are discussed in the analysis of cases laws and judicial pronouncements. Improper execution of law is a principle cause of increasing number of crimes and judicial involvement. This causes irreparable loss to the women while seeking justice.

\section*{5.3 Role of Judiciary}

It has been proved to the hilt that woman's dignity is in jeopardy owing to masculine aggressive behaviour and extraterritorial intrusion of women's life since times immemorial. Die hard nature of men and woman reconciling

\textsuperscript{29} Tom Campbell, Introduction: \textit{Realizing Human Rights in Human Rights from Rhetoric to Reality} (1986), p 13, Edited by Campbell, David Goldberg, Sheila Mclean and Tom Mullen.
to the masculine whims and fancies in the veneer of religiosity is an unending
story where judiciary as the custodian of law of the land and protector of
human rights has done very little to emancipate women from the rut of misery,
if not totally blind to the atrocities heaped on her. Thus a woman has miles to
go to attain equal status and non-discriminatory parity. "Law is what law
does, not what law prates. Judged by performance test, gender justice laws
have failed to takeoff hardly any statute promotive of the power, status and
equal protection of the girl child, the working women, the destitute damsel or a
divorced has done her a fair deal." 30 Indian Muslim women have been
withdrawn from the provision for maintenance under code with a difficult
statutory dope instead. Judiciary is not an exception of male domination.
Very few women are found on the seat of judgement. Justice Pandian in a
recent Supreme Court judgement has emphasised women as an
underprivileged sector in the higher judiciary. Harsh reality and statistical
verity demonstrate that only 15 women judges out of the sanctioned posts of
512, as on January 1993 are working. During nearly 45 years of the Supreme
Court's life, no woman ever sat on the bench there, save one for a short
period of less than 3 years. Five High Courts have never seen women as
judges, although until recently the primacy of power to appoint judges
belonged to the Prime Minister, recommended by the Chief Justice.
Inferentially, both these eminences have masculine preferences while
selecting higher judicial functionaries, may be. Women are often blacked out
even while choosing for other higher posts. 31

"Recognition of the inherent dignity and of the equal and inalienable
rights of all members of the human family is the foundation of freedom, justice
and peace in the world; and disregard and contempt for human rights have
resulted in barbarous acts which have outraged the conscience of mankind" 32

Publications, New Delhi p. 236
31 Ibid
32 Preamble of the Universal Declaration of Human Rights, 1948
"Human Rights are those minimal rights which every individual must have against the State or other public authority by virtue of his being a 'member of the human family', irrespective of any other consideration."\textsuperscript{33} It has become a noteworthy feature of judiciary to resort to the technique of 'judicial activism' for human right protection. Judicial activism views law, not as an antique to be taken out, dusted and returned back to the shelf, but as a dynamic instrument fashioned by society for the purpose of eliminating friction and conflict. Unless social justice is done to the people, it fails in its duty.\textsuperscript{34} Here it is apt to recapitulate the opinion of Krishna Iyer, V.R., that the fight is not for woman's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender but for cosmic harmony, which never comes till woman comes.

The procedure followed by judiciary while examining women is often humiliating; especially sensitive issues of women are infra-dig. This can be corrected only when women judges examine such delicate issues with a sense of impartial justice. True intentions of legislature must be interpreted in human rights perspective by the judiciary because legislative bodies are composed of heterogeneous group representations basing on vote banks rather than human rights. The microscopic minority of women legislator's voice is not loud and clear in the pandemonium of legislative circus. They have little say in the matters of enactments. 33% of reservations to women in the houses of legislations are a distant hope as it is a broken promise of every government that comes in to power. In Chhetriya Pardushan Sangharsh Samiti\textsuperscript{25} case Sabyasachi Mukharji, C.J., cautioned: 'while it is the duty of this court to enforce fundamental rights, it is also the duty of this court to ensure that this weapon under Article 32 should not be misused or permitted to be

\textsuperscript{34} Bhagawati P.N., Human Right and Democratisation of Remedies, Indian Bar review, 1988 vol. X (4) p.584
\textsuperscript{35} Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P AIR 1990 SC 2060
misused creating a bottleneck in the superior court preventing other genuine violations of fundamental right being considered by the Court. That would be an act or a conduct which will defeat the very purpose of preservation of fundamental rights. Therefore at this juncture, hope lies in judicial activism, which is a potent force to help solve women's problems by liberal interpretation of legal issues relating to women.

In *Pritam Kaur v. State of Pepsu*, Section 5(2)(a) of the Pepsu Court of Wards Act was challenged as in violation of Article 15(1). Section 5(2) authorized the government to make an order directing that property of a landholder be placed under the supervision of the Court of Wards, if the landholder was incapable of managing his affairs or by reason of being a female who was incapable of managing the property. The court noted that 'to be a woman is an additional reason on the basis of which the government can deprive her of the management of her estate. In case of woman it can be so taken merely for the reason that she is a woman. The court concluded that Section 5(2) of the Act discriminated on the basis of sex, and thus violated Article 15.

However, two subsequent cases dealing with restrictions on women's land ownership have been upheld. In *Such Singh Bajwa & Sadhu Singh Bajwa v. The State of Punjab*, Section 5 of the Punjab Land Reforms Act was challenged as violating Article 15 on the grounds that it allowed the holder or owner of the land to select the separate permissible area in respect of adult sons, but not adult daughter. The High Court held that the subject of the legislation is the person owning or holding land, and not his or her children. Every person described in Section 5 whether male or female is allowed the same permissible area and there is no discrimination qua one landowner and the other on the ground of sex. In *Nalini Ranjan Singh and*

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36 Supra
37 AIR 1963 P&H 9
38 AIR 1974 P&H 162
The State\textsuperscript{39} Section 2 (e) of the Bihar Land Reforms Act was challenged as violating Article 15. The definition of family in the Section did not include an adult daughter, for the purposes of claiming a separate unit of land, and was thus alleged to discriminate as between adult daughters and adult sons. On the basis of principles of Hindu personal law, the Court held that daughters are not members of the coparcenary.

In \textit{Smt. Sowmithi Vishnu v. Union of India & Another}\textsuperscript{40} the petitioner challenges the validity of Section 497 of the Indian Penal Code, 1860 that defines the offence of 'adultery' and prescribes punishment for it. The petitioner filed a petition for divorce against her husband on the ground of desertion. The trial court dismissed that petition, holding that the petitioner herself had deserted the husband and not the other way about. Thereafter, the husband filed a petition for divorce against the petitioner on two grounds; firstly, that she had deserted him and secondly, that she was living in adultery with a person called \textit{Dharma Ebenezer}. The petitioner conceded in that petition that in view of the finding recorded in the earlier proceeding that she had deserted her husband; a decree for divorce may be passed against her on the ground of desertion. While his petition for divorce was pending against the petitioner, the husband filed a complaint against \textit{Dharma Ebenezer} under Section 497 of IPC charging him with having committed adultery with the petitioner. The petitioner for quashing that complaint on the ground that the very provision, which creates the offence of 'adultery' namely, Section 497 of the Penal Code, is unconstitutional had filed this writ petition. \textit{Nalini Chidambaram}, who appeared on behalf of the petitioner, contended that Section 497 of the Penal Code is violative of Article 14 of the Constitution because, by making an irrational classification between men and women, it unjustifiably denies to women the right, which is given to men. This argument rests on the following three grounds:

1. Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;

2. Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and

3. Section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free license under the law to have extra-marital relationship with unmarried women. The learned counsel complained that Section 497 is a flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism'. It is urged that the Section may, at first blush, appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the Section is a kind of 'Romantic Paternalism' which stems from the assumption that women, like chattels, are the property of men.

It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation', which the society has undergone. The Law Commission of India in it's 42nd Report, 1971, recommended the retention of Section 497 in its present form with the modification that, even the wife, who has sexual relations with a person other than her husband, would be made punishable for adultery. The suggested modification was not accepted by the legislature. Man, not by a woman, as defined in Section 497 can only commit the offence of adultery. Indeed, the Section provides expressly that the wife shall not be punishable even as an abettor. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in this Section is
considered by the legislature as an offence against the sanctity of the matrimonial home, an act, which is committed by a man, as it generally, is. Therefore, those men who defile that sanctity are brought within the net of the law. Law does not confer freedom upon husbands to be licentious by gallivanting with unmarried women. It only makes a specific kind of extra-marital relationship an offence, the relationship between a man and a married woman, the man alone being the offender. The law as it is does not offend either Article 14 or Article 15 of the Constitution. Incidentally, the demand of the petitioner that sexual relationship of a husband with an unmarried woman should also be comprehended within the definition of 'adultery' is a crusade by a woman against a woman.

In *Mahadeb Jiew v. B.B. Sen*\(^4\) the Calcutta High Court held that Article 15(3) could not be used to authorise discrimination against women but rather, from the language used in the Article, it was clear that the intention of the framers of the Constitution was to protect the interests of women and children. According to the Court, Article 15(3) did not use the language 'discriminate against' but rather use of 'special provisions for'. The provisions of the Criminal Code under which women and children below 16 can be released on bail even for a capital offence was held valid by Supreme Court.

In *Dattatraya Motiram More v. State of Bombay*\(^4\) the Court held that the effect of the joint operation of Article 15(1) and 15(3) was that the State could discriminate in favour of women against men, but could not discriminate in favour of men against women. Article 15(3) has thus been limited to upholding legislation that benefits women; not extended to authorizing discrimination against women. This interpretation is useful, as far as it goes. At the legal of application, when the Courts must interpret whether legislation benefits or discriminates against women, the doctrine provides little guidance.
The absence of a substantive approach to equality that attempts to contextualize the legal regulation of women within gender oppression allows the courts to classify laws as 'protection'. This approach was also followed in Anjali Roy v., State. In this case the court held that 'all differentiation is not discrimination but only such differentiation as is invidious and as is made, not because any real difference in the conditions or natural differences between the persons dealt with which makes different treatment necessary, but because of the presence of some characteristics or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiations made as a justifying reason. The Court held that special provisions for women do not mean identical treatment as those given to men. This substantive approach to discrimination was also hinted at in Kathi Ranning Rawal v. Saurashtra. The difference between these understandings of discrimination and have the relationship between the articles remain unarticulated, and the relationship to the broader models of equality is obscured in both the case law and the commentaries. For example, in Dattatraya case the court adopted the formal approach to discrimination, yet was also shown to have adopted the more substantive approach to the relationship between the Articles. Conversely, in Anjali Roy's case the court adopted a more substantive approach to discrimination, but the formal approach to the relationship between the Articles. In Abdul Aziz v. Bombay the court rejected the argument that Article 15(3) should be restricted to provisions that benefit women, the court stated that Article 14 is general and must be read with the other provisions, which set out the ambit of fundamental rights. In Kerala v. N.M. Thomas, and Shamsher Singh v. State, the Supreme Court has held that Articles 14, 15 and 16 constitute a single code.

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43 AIR 1952 Cal. 852
44 AIR 1952 SC 123, 125
45 AIR 1954 SC 321
46 (1976) 1 SCR 906;
47 AIR 1970 P&H 372
In *Choki v. State* it was held that it was not a violation of Article 15(1) when educational institutions are opened exclusively for women.\(^4^9\) In *Subhash Chandra v. State*\(^4^9\) the court held that the allotment of seats for women in medical school was a reservation and thus, to be taken into account in calculating the total reservation of seats. It was obviously to make special provision for their advancement. The court thus concluded that such reservation were within the scope of Article 15(3) and did not offend Article 15(1). In *Padmaraj Samarendra v. State of Bihar and Another*\(^5^0\) the court held that the allotment of sets for female students was not a reservation in the strict sense. Reservations involve the allotment of seats for the reasons that the persons for whom the seats are earmarked should be educationally, socially or culturally backward and require protection. According to the court the allotment of seats for women was not for this reason, but rather, based on the state’s need for more female doctors in government hospitals. Thus court held that the allotment was not a reservation but an allotment of source and not violates Article 15(1). *K.R. Gopinath Nair v. The Senior Inspector cum Special Sale Officer of Cooperative Societies and others,*\(^5^1\) the Kerala High Court held that Section 28 A of the Kerala Cooperative Societies Act, which provided for the reservation of a seat in the committee of every cooperative society, did not violate Articles 14 and 15. The court stated that even on a global view, women still suffer the pangs of inequality, though women constitute about 50 per cent of the population, effective participation in the political administration is, to them, still a teasing illusion.

The Delhi High Court, in *Walter Alfred Baid v. Union of India*\(^5^2\) held that 'it is difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex 'alone' because it is based on 'other considerations' even though these other considerations have their

\(^{4^9}\) AIR 1957 Raj. 10  
\(^{4^9}\) AIR 1973 All. 295  
\(^{5^0}\) AIR 1979 Pat 266  
\(^{5^1}\) AIR 1987 Kerala 167  
\(^{5^2}\) AIR 1976 Del. 302
genesis in the sex itself. It virtually amounts to saying that woman were being discriminated against, not because she belonged to a particular sex but because of what the sex implied. The court concluded that sex and what it impels cannot be served. Considerations, which have their genesis in sex and arise out of it, would not save such discrimination. What could save such discrimination is any ground or reason independently of sex such as socio-economic conditions, marital status, and other disqualifying conditions such as age, background, health, academic accomplishments, etc.

In *C.B. Muthamma v. Union of India and others* the discourse of decision suggests an underlying protectionism. The references to women as 'the gentler of the species', suggests that the court does see women as different, as weaker, and as in need of protection. Indeed, the recurring references to women as 'the weaker' and 'the gentler' sex reinforces images of women as weak, and in need of protection. While the court's reference to misogynous and masculinist culture suggest that women's differences are the product of these oppressive relations. The court further stated that this misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against men's thraldom, which suggests that women are naturally and essentially weak.

In *Maya Devi v. State of Maharashtra* a requirement that married women obtain their husbands consent before applying for public employment was challenged as violating Article 14, 15 and 16 of Indian Constitution. The Supreme Court held that this is a matter purely personal between husband and wife. It is unthinkable that in social conditions presently prevalent a husband can prevent a wife from being independent economically just for his whim or caprice. The court emphasised the importance of economic

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53 AIR 1979 SC 1868
54 1986 1 SCR 743
independence for women, and the importance of not creating conditions that discourage such independence. The consent requirement was held to be unconstitutional. In this case, the court was the view that consent requirements were an anachronistic obstacle to women's equality. In order to achieve economic independence women must not, at least in this regard, be treated differently than men. In this case, an inquiry into whether the rule contributed to or reinforced women's subordination revealed that in this particular context, gender ought to be irrelevant.

In Gupteshwar Pandey v. Smt Ram Peari Devi, the court held that Section 488 was a special provision designed for the benefit or protection of women or children whose husbands or fathers failed to maintain them in spite of sufficient means, and thus within the scope of Article 15(3). The court adopts a formal approach to equality within which Article 15(3) is understood as an exception to equality and a protectionist approach to gender difference, according to which Section 488 is justified on the basis that women are the weaker sexes, and in need of special protection. In Mustt Sahida Begum v. Md. Mofizul Haque, the court held that if the personal law was held to be final, with the conclusion that a divorced woman cannot claim any further maintenance beyond the period of iddat, discrimination would occur between the divorced Muslim woman and divorced women belonging to other religions or castes. The court states that the relevant criteria must be economic necessity, and that the Section is meant to protect the distresses of all wives, including divorced women, irrespective of religion or castes, for their future life until remarriage. At the same time the court does not outline the reasons for women's economic dependence. It is stated as a fact, and the implicit assumption is that it is a natural and unalterable condition of women.

55 AIR 1971 Pat 181
56 1986 Cr.L.J 102 (Ori)
Before 1990, no married woman was entitled to be appointed to the Indian Foreign Service. She required a special written permission of the government before her marriage was solemnized and could be made to resign if the government was satisfied that her family and domestic commitments were likely to come in the way of the efficient discharge of her duties. Ms Muthamma, a brilliant member of the Indian foreign Service came with a complaint that as a result of the service Rules she had been denied promotion to Grade 1 in the Indian Foreign Services, a grade that entitled her to be appointed as Ambassador. The judges found in the rules what they described as 'transparent discrimination' against women. But what is of interest and importance is that an enlightened member of the Bar, the then Solicitor-General of India, appearing for the Union of India volunteered to review the rules and the seniority of Ms Muthamma. The court whilst pronouncing the marriage rule invalid said that it wished to impress upon government. "The need to overhaul all service rules to remove the stain of discrimination without waiting for ad hoc inspiration from writ petition or gender charity". 

What is needed today is evidence of a visible absence of gender bias in all decision making. Not the gender charity not the sort of judicial gender charity exhibited in the Air India v. Nargesh Meerza & Others\textsuperscript{57} case some years ago. In the early eighties air hostesses claimed parity in retirement age, under the statutory regulations, when they attained 35 years or on marriage whichever was earlier, but this was extendible at the discretion of the Managing Director to 45 years. Male air pursers retired at 58. The court said that conferment of discretion on the Managing Director to extend the date of retirement of airhostesses from 35 to 45 years was arbitrary, so that airhostesses would henceforth retire at 45 years. The obvious differentiation of 45 years for females and 58 years for males was simply wished away as neither arbitrary nor discriminatory. Five years later counsel for the air

\textsuperscript{57} 1981 4 SCC 335
hostesses asked for a reconsideration of the previous decision of 1982 but the Judges said: "we do not feel personally to accept this request". An attempt was then made to extend the date of retirement of air hostesses, this time on the basis that British girls recruited by Air India abroad retired at 55 years whereas those recruited in India had to retire at 45, but the challenge was negative, and an assurance, was taken from Counsel that even British girls recruited by Air India would retire at 45 years. Commenting on the regulation requiring the Airhostess to retire upon the first pregnancy is nothing but denying her the ordinary course of human nature. It is submitted that the court tried its best to protect the women’s right, which till then was in its initial stage of perception and development under the Indian context. It has rightly been observed that the termination of the services of an airhostess under such circumstances is not only a callous and cruel act but also an open insult to Indian womanhood the most sacrosanct and cherished institution. The court added, that it is constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of civilised society. The court tried to hit upon the deep sense of selfishness at the cost of all human values. It is apt to refer to the observations made by the Supreme Court to the argument that an airhostess should be young and attractive with an ability to look after the passengers with her pleasant behaviour, which is not possible with elderly women. Such a type of understanding given to a woman is an open insult to the institution of sacred womanhood, the court added. The decision is important as it tries to protect the well-cherished human values and uphold the dignity of human being in general and women in particular.

In Muthamma’s case the judge just hacked through the Foreign Services Recruitment Rules, expressing in cold print his wonderment as to how sex prejudice against Indian women pervaded Indian Service Rules even 30 years after freedom was won. He wrote: "If a married man has a right, married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of man scaling the
weaker sex forgetting how the struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is justice. That the founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis half of India's humanity, viz., Indian women, is a sad reflection on the distance between Constitution in the book and the law in action. And if the Executives as the surrogate of Parliament make rules, in the teeth of part II, especially when high political office, even diplomatic assignment has been filled by women the inference of die-hard allergy to gender parity is inevitable. Judiciary has to wipe out the gender bias.

_R v. Court_,58 related to Section 14(1) of the Sexual Offences Act, 1956 which in so far as material provides: 'it is an offence-for a person to make an indecent assault on a woman". The House of Lords held that the Section did not exclude _mens rea_ and intention to commit indecent assault, i.e. an essential element of the offence. In _Girdhar Gopal v. State of M.B_58 the court adopted preferential treatment approach to uphold the Constitutionality of Section 354 of Indian Penal Code, 1860 i.e., outraging the modesty of women. The court held that 'if the discrimination is based not merely on any of the grounds stated in Article 15(1) but also on considerations of property, public morals, decency, decorum and rectitude, the legislation containing such discrimination would not be hit by the provisions of Article 15(1). It cannot be denied that an assault or criminal force to a woman with intent to outrage her modesty is made punishable under Section 354 not merely because women are women but because of the factors enumerated.'

_Prabhatha Rani v. Suraj Kumar & Another_,60 the position of _stridhana_ of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes—she may spend the whole of it or give it away at her

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58 (1988) 3 All ER 221, p. 228(HL).
50 AIR 1953 MB 147
1985 Cr.L.R (SC) p 149
own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value, when he is able to do so. It may be further noted that this right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt. The court further remarked that it is impossible to uphold the view that once a married woman enters her matrimonial home her stridhana property undergoes a vital change so as to protect the husband from being prosecuted even if he dishonestly misappropriates the same. For instance, properties like jewellery, clothing, cash, etc. given by her parents as gifts cannot be touched by the husband except in very extreme circumstances, viz., where the husband is in imprisonment or is in serious distress. If husband refuses to return stridhana, wife can recover it by properly constituted suit.

In Bhai Sher Jang Singh & Another v. Smt Virinder Kaur the Punjab and Haryana High court observed that 'it might be that some of the articles which were presented to her are for the use of both the spouses but the ornaments and things of the like nature are certainly meant for her and her alone. When she makes an allegation in the complaint that either her husband or her parents-in-law had converted to their own use the ornaments forming the part of her stridhana which she had entrusted to them, the Court has to give legal effect to such allegation and to assume that such ornaments had been made the subject matter of criminal breach of trust. It is settled law that even in a criminal complaint the complaint is under no obligation to plead the legal effect of the allegations made. All that is required is that the facts constituting a complaint should be specifically mentioned so that the Court may be able to perform its duty of punishing the accused under the appropriate provision of law if such allegations are made out. Furthermore, in a case like
this a complaint cannot be quashed without giving the aggrieved wife an opportunity of proving that the ornaments had been given to her at the time of her marriage for her use only.'

The right to go abroad found its fullest manifestation in Maneka Gandhi v. Union of India, Bhawati, J., observed that the expression 'personal liberty' was of the widest possible amplitude, and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Articles 19 and 21, inter alia, safeguards the right to go abroad against executive interference which is not supported by law; and law here means enacted law or statutory law. Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure cannot be arbitrary, unfair or unreasonable. A law depriving a person of 'personal liberty' and prescribing the procedure for that purpose within the meaning of Article 21 has to stand the test of one or more fundamental rights conferred under Article 19 that may be applicable in a given situation, ex-hypothesis, it must also be liable to be tested with reference to Article 14. With this decision a new dimension is given to personal liberty, and the dynamic interpretation is placed on Article 21.

Bhagwathi, J., drew support not merely from the provision of the Indian Constitution but also from Article 13 of the UDHR. The learned judge said that freedom to go abroad was one of the national rights resulting from the dignity of the human being as the bearer of the highest spiritual and moral values. Krishna Iyer, J., gave it a still wider perspective. The learned judge was of the view the UDHR and the European Convention of Human Rights have elaborated the freedom to travel abroad as an integral part of liberty of the person. In his characteristic way of expression, the learned judge opined that UDHR, the resurgence of international fellowship, the vulnerability of

62 AIR 1978 SC 597
freedoms, even in Constitutional democracies conditioned the thought processes of visionaries and juris-statesmen who drew up the great title-deed of Indian Republic.

In Dr. Upendra Baxi v. State of Uttar Pradesh & Another\(^{53}\) the court issued and order giving various directions in order to ensure that the inmates of the protective home at Agra do not continue to live in inhuman and degrading conditions and that the right to live with dignity enshrined in Article 21 of the Constitution is made real and meaningful for them. In pursuance to the orders made by the court it was found that the statement dated March 31, 1982 filed by Miss Tej Srivastava and the statement date April 2, 1982 filed by Mr. S.S.L. Srivastava, Deputy Director, Harijan and Social Welfare, Agra that most of the directions have been carried out by the State Government. The court noted that the State government had responded to the various directions given by us and taken steps with a view to improving the conditions of living of inmates of the Agra Protective Home so as to ensure them a life of basic human dignity.

In Asiad Workers Case\(^{64}\) Justice Bhawati, J., observed that these statues, in fact, guaranteed the worker's human dignity and Article 21s' guarantee of the right to life and personal liberty is not confined to right to physical existence but also includes within its scope and ambit the right to live with basic human dignity, and the State could not deprive any one of this right as no procedure regarded as fair, just and reasonable. Francis Coralie Mullin v. UT of Delhi\(^{65}\) Bahgwaiti, J., observed that the fundamental right to life which is the most precious human right and which form the arch of all other rights, must, therefore, be interpreted in a broad and expensive spirit so as to invest it with significance and vitality which may endure for years to come and entrance the dignity of the individual and the worth of the human person.

\(^{53}\) (1983) Cr.L.J (SC) p 560
\(^{64}\) People's Union of Democratic Rights v. Union of India, AIR 1982 SC 1473
\(^{65}\) (1981)1SCC 608
Bhagwati, J., enlarged his Maneka’s dimension to include the political parties’ slogan of *rodi kapra our makan* i.e. food, clothes and shelter. The learned judge, first, elaborated the concept of the ‘right to life’ to include the ‘faculties of thinking and feeling’ he further observed that “the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.” The learned judge interpreted the ‘right to live’ to include ‘human dignity’, ‘basic needs’ and socialise with members of the family and friends. The Francis ratio was further applied to evolve the ‘basic human dignity’ of labourers in the *Asiad worker’s case*. The personal liberty was connected not only with the other fundamental right in Article 23 but also with the Directive Principle of State Policy in Article 39. Then the mixture thus produced was dissolved in the Constitutional goal of new socio-economic order. Justice Bhagwati opined that any form of ‘forced labour’ was violative of human dignity and contrary to basic human values.

It has been stated by the court that the right to life mentioned in Article 21 is not merely confined to the right to mere physical existence but it includes a broad matrix, the right to the use of every faculty or limb through which life is enjoyed as also the right to live with basic human dignity. Thus no one can be deprived of his rights to live with basic human dignity except by reasonable, fair and just procedure. Thus the State cannot deprive any person of his right to life. Torture or cruel, inhuman or degrading treatment or punishment, which trenches upon human dignity, would be impermissible under the Constitution. The Supreme Court thus elevated immunity against torture or

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66 Supra 753  
67 Supra 754  
68 *Francis Coralie v. Union Territory of Delhi* AIR 1981 SC 746  
69 *Peoples Union for Democratic Rights v. Union of India* AIR 1982 SC 1473  
70 Supra 1487  
71 *Francis Coralie Mullin v. Union Territory of Delhi*, AIR 1981 SC 746
cruel, inhuman or degrading treatment or punishment to the status of fundamental right under Article 21, though it is not specifically enumerated as a fundamental right in the Constitution and incorporated under Article 7 of the International Covenant on Civil and Political Rights into the Constitutional jurisprudence of the country. The Supreme Court held in Vishaka's case that international conventions would be accepted and interpreted by the court if they are in consonance with the Fundamental Rights and general scheme of the Constitution. Reference has been made to the judgment of Australian Court in Minister of Immigration and Ethnic Affairs v. TEOH. The power of Indian courts to enforce the treaties/conventions which are in consonance with the Constitution has been laid down in Prem Shankar Shukla v. Delhi Administration Mackaninnon Mackenzie & Co v. Audrey D'Costa, Sheela Barse v. Secretary Children's Aid Society, People's Union for Civil Liberties v. Union of India and D.K. Basu v. West Bengal.

It has been pointed out that human rights are derived from the dignity and worth of the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights, the democracy, development, and respect for human rights, and fundamental freedoms are interdependent and have mutual enforcement. It has been pointed out in Mrs. Valasamma Paul v. Cochin University and others that the human rights for women including girl child are inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitant for national development, social and family stability and growth culture, social and economical.
Therefore all forms of discrimination on grounds of gender are violative of fundamental freedoms and human rights.

The right to livelihood was extended to include better standard of living, hygienic condition in the workplace and leisure. All the essential facilities and opportunities to the poor people were treated as fundamental means to development to live with minimum comforts, food, shelter, clothing and health. The Court in Samatha's case insisted upon the minimum requirements, which must exist in order to enable a person to live. In this respect K. Ramaswamy, J., aptly observed: The right to live with human dignity with minimum sustenance and shelter and all those rights and aspects of life which could go to make a man's life complete and worth living would form part of the right to life. In Smt. Shama Bai v. State of Uttar Pradesh the decision of the court was progressive in many important respects. Most significantly the court was prepared to consider the work of prostitute women as a trade rather than a crime. It reconized that women entered the profession because of social and economic hardship, rather than immorality.

Supreme Court in M.H. Hoskot v. State of Maharashtra held that the right to free legal service is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and is also implicit in Article 21 of Constitution. The term 'right to life and liberty' includes the right to lead it with dignity and enjoying the worth of the human person. This enjoyment of the right becomes feasible when the State plays its role as implementing machinery by providing circumstances conducive for them to exercise. Article 21 of the Constitution guarantees that no person shall be deprived of life and personal liberty except by procedure established by law. It has been

AIR India Statutory Corporation v. United Labour Union, AIR 1997 SC 645, 669
Ibid at 764
Samatha v. State of Andhra Pradesh AIR 1997 SC 3297
Ibid at 674
AIR 1959 All. 57
AIR 1978 SC 1548
interpreted in *Maneka Gandhi v. Union of India* that the word ‘right to life include right to live with human dignity’. \(^{85}\) Personal liberty includes right to privacy; right to live with human dignity, which are mostly beneficial for women including the right against torture, custodial violence, right to livelihood, right to medical aid and health care and the life. The High Court of Andhra Pradesh observed in *Sathyanarayana v. State of Andhra Pradesh* \(^{66}\) that right to privacy is part of the right to life. The court discussed the opinion of the Supreme Court on earlier occasions where in it took support on the international treaties to which India is a signatory came to the conclusion that Article 21 read with relevant article in the international treaty, covenant would lead to a conclusion that right to privacy is part of Article 21. The meaning of personal liberty was extended to include the customs followed among the tribes in the matter of successions and inheritance, \(^{67}\) protection of woman against rape, \(^{68}\) the right to reputation in the matter of national political figure, \(^{69}\) health hazards from use of harmful drugs, \(^{90}\) right to social justice and economic empowerment \(^{91}\) and the suitable building and other facilities to the advocates association. \(^{92}\)

The Supreme Court has held in *Mullin’s Case* that any form of torture or degrading treatment would be offensive to human dignity and would, therefore, violate Article 21. \(^{93}\) In an earlier case, *Justice Krishna Iyer* observed that courts should come to the rescue of detenues who are tortured in prisons. \(^{94}\) Supreme Court held that though this right is not specifically guaranteed as a fundamental right but it is implicit in the broad sweep and

\(^{85}\) AIR 1981 S.C 746  
\(^{86}\) (1999) 2 ALT 497 (A.P)  
\(^{87}\) Madhu Kishwar v. State of Bihar, AIR 1996 SC 1864  
\(^{88}\) Bodhisattwa Goutam v. Subhra Chakraborty, AIR 1996 SC 922  
\(^{89}\) Lal Krishna Advani v. State of Bihar, AIR 1997 Pat. 15  
\(^{90}\) Dr. Ashok v. Union of India (1997) 5 SCC 10  
\(^{92}\) Advocates Assoco, Bangalore v. Chief Minister, Govt. of Karnataka, AIR 1997 Kant. 18  
\(^{93}\) Francis Corale v. ADM Union Territory of Delhi & Others, AIR 1981 Sc 753  
\(^{94}\) Charles Sobraj v. Superintendent Central Jail, Tihar, New Delhi, AIR 1978 SC 1514,p.1517
content of Article 21, which deals with the right to life and personal liberty. *Jwala Devi v. Bhoop Singh* is another decision falling in the above category. It was alleged by an old woman that she was assaulted, tortured and paraded in the street after rubbing black shoe polish on her face by police officials. These allegations could not be proved before the court and the claim for compensation was rejected. But the court directed the State to pay Rs 5,000/- to the petitioner. The court in *Medical Mishap case*, where the eyes of the patients were irreversibly damaged after operation by a team of doctors, passed a similar order. Justice Bhagawati held in *Hussainara Khatoon v. Home Secretary* "no procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21." In *Sheela Barse v. State of Maharashtra* the learned judge recognising the rights of child ordered the offender to be tried without undue delay.

The cruel and inhuman treatment to women confined in the police lock-ups is not uncommon. The custodial violence to women prisoners in police lock up was complained of before the court in the case of *Sheela Barse*, where women were assaulted in Bombay Central Jail. The court held that it violated Article 21. The Supreme Court laid down detailed guidelines in this regard which included:

i) That four or five police lock ups should be selected in reasonably good

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95 AIR 1989 SC 1441  
96 ibid. at 1443  
98 AIR 1979 SC 1360  
99 AIR 1986 SC 1773  
100 Sheela Barse v. State of Maharashtra AIR 1983 SC 378  
101 Ibid at 1094
localities where only female suspects should be kept and they should be guarded by female constables.

ii) That interrogation of females should be carried out only in the presence of female police officers/constables.

iii) Whenever a person is arrested without warrant, he must be immediately informed of the grounds of his arrest and he must be immediately made known that he is entitled to apply for bail. A pamphlet setting out legal rights of arrested persons shall be affixed in each cell in every police lock up in Marathi, English and Hindi.

iv) Whenever a person is arrested and taken to the police lock up, the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee which will take step for providing legal assistance to such person at State cost provided he is willing to accept such legal assistance.

v) Surprise visit by the Sessions Judge.

vi) As soon as a person is arrested, the police must immediately obtain from him the name of his relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform him about the arrest.

vii) That the magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him that he has right under Section 54 of Criminal Procedure Code to be medically examined. To make the above directions effective, it is suggested, that the draconian prison rules must be replaced by humane condition regulations.
The liberalisation of locus standi in the matter of disadvantaged people was extended in the S.P. Gupta case to any member of the public acting pro-bono publico. Under this rule a social action group, voluntary organisation, social and public worker, the State itself, a journalist and even a law student was allowed to enforce the right to personal liberty of the poor people through the court. Thus, as a result of the above development a person can claim for the violation of his or her right as well as for the violation of the right to personal liberty of other persons.

The public interest litigation has been proved very useful in ameliorating the condition of girls in Agra Protective Homes. It has been successful in providing compensation to poor victims of police firing in Bihar by evolving new right to compensation for the violation of Article 21. It is true that the Supreme Court has regarded the poor and the disadvantaged as entitled to preferential consideration but in few cases the Court could not provide the actual relief asked for. The Court felt its concern in the matter of death of a child, victim of police torture through PIL and awarded compensation for violation of Article 21. It extended its arms to prevent the death in police lockups and custody and to protect Chakma refugees settled in Arunachal Pradesh from forceful eviction. The similar power is widely used by the High Court while exercising its power under Article 226.

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102 S.P. Gupta v. President of India, AIR 1982 SC 149
103 Peoples Union for Democratic Rights v. Union of India AIR 1982 SC 1973
104 D.S. Nakara v. Union of India AIR 1983 SC 130
105 Kishen v. State of Orissa, AIR 1989 SC 877
106 State of W.B v. Union of India AIR 1996 Cal. 181
107 Sheela Barse v. State of Maharashtra, AIR 1983 SC 1363
108 R. Gandhi v. Union of India, AIR 1985 Mad. 205
110 Peoples Union for Democratic Rights v. State of Bihar, AIR 1975 SC 355
111 Bihar Legal Support Society, New Delhi v. C.J. of India, AIR 1987 SC 38, 39
112 Vincent v. Union of India, AIR 1987 SC 990
116 Rajasthan Kisan Sangthan v. State, AIR 1989 Raj. 10
While admitting a letter written by tribal woman alleging police atrocities the court thought it is the duty of the Court in PIL cases to grant relief to the needy persons who were really oppressed, illiterate and uneducated and observed: On the other hand such sort of litigation must not be encouraged, otherwise the traditional litigation will suffer and the courts of law instead of dispensing justice will have to take upon themselves administrative and executive functions. In a PIL normally any public spirited person or organisation comes before the court for obtaining relief in favour of persons economically or socially oppressed and unable to approach the court for vindication of their fundamental or legal right complaining against State action or inaction. A unique application as PIL was moved before the Calcutta High Court where the State itself came up before the court championing the cause of numerous small depositors of the residuary non-banking companies. In this historic case the court laid down that the State could move public interest litigation for protection and vindication of the legal and Constitutional right of the underprivileged and the determinate class of persons who were unable to approach the court who sometimes were not even aware of their rights to save themselves from exploitation. The above interpretation, it is submitted, will go a long way in the effective performance of State’s duty to protect the public interest through PIL. Nilima Priyadarshini discloses such a situation, where a letter was placed before the court after a lapse of two and half months. In this respect the court directed the matter to be place before the Chief Justice of India for taking action against responsible officials for such delay. Subsequently it was found that the letter was forged and the girl prayed for the prosecution of persons committing such forgery. The court taking the case as unfortunate story, however, did not proceed with the prosecution. Such a case brought unnecessary suffering and

117 Supra 16
120 Ibid AIR 1989 SC 490
embarrassment to the Court as well as to the girl for whose benefit the PIL was meant.

Article 21 coupled with PIL has brought into light certain humiliations meted out to women. For instance, through Public Interest Litigation it was brought to the notice of the court that the female inmates of care home, Patna were compelled to live in inhuman conditions in old ruined buildings. The court directed to State to take immediate steps for the welfare of the inmates and immediately ordered for renovation of the ruined buildings and to provide for the facilities.

In Stone Quarries case, Justice Bhagwati laid down the basic postulates of human dignity reading Articles 39(e) and (f), 41 and 42. These Articles envisage health and strength of workers, opportunity and facilities to develop in a healthy manner, the right to work and further just and humane conditions of work respectively. The postulates developed by Justice Bhagwati included the protection of health and strength of workers; work in a healthy manner, condition of freedom and dignity, educational facilities and just and humane conditions of work. Another case worth mentioning in the form of public interest litigation is the one initiated by a freelance journalist Sheela Barse through a letter addressed to the Courts in which the issue of treatment of women in police lockups was considered by the court. The letter added further of custodial violence to women prisoners while they were being confined in the police lockups in Bombay. Treating this letter as a writ petition and after issuing notice to the State of Maharashtra and considering the report given to improve the conditions in lockups and providing adequate protection to the arrested persons in general and women in particular who were confined in police lockups.

121 Bandhua Mukti Morcha v. Union of India AIR 1984 SC 502
122 Supra 811-812
123 AIR 1983 SC 378
In the comprehension of the Supreme Court the right to life and liberty includes, right to human dignity, right of privacy, right to travel all over the world, right to speedy trial, right to free legal aid, right of prisoner to be treated with dignity and humanity, right to bail, right to compensation for custodial death, right to know, right of livelihood, right to protection of health and medical care, right to protection of childhood, right to equal pay for equal work, right of workers to fair wage and to human conditions of work, right to social security, right of workers to participate in the management, right to shelter, right to education, right to healthy environment. Ad hoc palliatives in judiciary are not a comprehensive solution to the problem of exploitation of women. Radical judiciary is *sine quo non* for radically burning problems of life and dignity of women. The landmark judgements cited no doubt, speak volumes of judicial activism but the degree of judicial activism is not commensurate with the exponential rate of growth of the crime against women. This is the crux of the problem. It is not high time that there is immense need for higher degree of *judicial radicalism*. The inadequacies can be made good only when judicial activism percolates deeper in to the vortex of gender violence to expand the ambit of dignity especially in the context of globalisation, privatisation, liberalisation and other emerging negative trends with all concomitant evils of *commoditification* of women at the cost of the very life and dignity.

Section 9 of Hindu Marriage Act, which provides for the remedy of restitution of conjugal rights, has repeatedly been challenged as violating Article 14. In *Sareetha v. Venkata Subbaiah*,

Section 9 did not meet the traditional classification test and was thus unconstitutional. The court noted that Section 9 did not discriminate between husband and wife on its face, in so far as the remedy of restitution of conjugal rights is equally available to both wife and husband, and it thus apparently satisfies the equality test. The court in Sareetha's case concluded that notwithstanding the gender neutrality

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124 AIR 1983 A.P 356
of the provisions regarding the restitution of conjugal rights, the law had a
disparate impact on women. The law is used primarily by husbands against
their wives; not by wives against their husbands. Accordingly, the court
concluded that the law operated as an 'engine of oppression' against women.
The court thus moved beyond a formal equality approach to consider the
substantive inequalities, which are produced by the operation of the law.

The Supreme Court in Saroj Rani v. Sudarshan Kumar considered the
Constitutionality of Section 9 of the Hindu Marriage Act. The court held that
restitution of conjugal rights did not violate Article 14, thus affirming the
decision in Harvinder Kaur's case and overruling the decision in Sareetha.
According to court 'in India it must be borne in mind that conjugal rights, i.e.,
the right of the husband or the wife to the society of the other spouse is not
merely a creature of the statute. Such a right is inherent in the very institution
of marriage itself.' The courts have rejected challenges to the Hindu
Succession Act, 1956, on the ground that it discriminated on the basis of sex,
brought overwhelmingly by men. For example, in Kaur Singh v. Jaggar
Singh Section 14, which provides a female Hindu with the right of absolute
ownership over her property was challenged as discriminatory. The court
held that 'it may well be that in view of the inferior status enjoyed by the
females, the legislature thought fit to put the females on a higher pedestal',
which was within the purview of Article 15(3).

In Mohd.Ahmad Khan v. Shah Bano Begum &Others Section 125
Cr.P.C is too clear and precise to admit of any daunt or refinement. The
religion professed by a spouse or by the spouses has no place in the scheme
of these provisions. Whether the spouses are Hindus or Muslims, Christians
or Parsis, pagans or heathens, is wholly irrelevant in the application of these
provisions. Clause (b) of the Explanation to Section 125(1), which defines

125 AIR 1984 SC 1562
126 AIR 1961 Punj. 489
127 Cri L.R (SC) 1985 p 317
wife as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Section 125 is truly secular in character. Therefore a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of Section 125. The statutory right available to her under that Section is unaffected by the provisions of the personal law applicable to her. A divorced Muslim woman is entitled to apply for maintenance under Section 125. The court held that mahr is not a sum which is payable on divorce. According to Chandrachud, C.J this appeal does not involve any question of Constitutional importance but that is not to say that it does not involve any question of importance. Some questions, which arise under the ordinary civil and criminal law, are of a far-reaching significance to large segments of society, which have been traditionally subjected to unjust treatment. 'No sree swatantramaharhat' said Manu, the Lawgiver: The woman does not deserve independence. And, it is alleged that the fatal point in Islam is the degradation of woman. To the Prophet is ascribed the statement, hopefully wrongly, that woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.

In Purnananda Banerjee v. Smt. Swapan Banerjee and Another, Section 36 of the Special Marriage Act, which provides for a grant of alimony pendente lite to a wife was challenged as violating Article 15. In upholding the Section, the court held that it did not discriminate only on the basis of sex, but rather provided maintenance where the wife had no independent income sufficient for her support. The court further held that even if Section 36 did discriminate on the basis of sex alone, Article 15(3) would protect it. Aftermath of Maneka's case expanded the right under Article 21 to include a number of rights into the 'right to life and personal liberty'. The court upheld the right to education, which included participation in the activities of the University Students Union under Article 21. Justice Deshpande, following

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128 AIR 1981 Cal 123
129 A.V Chandal v. Delhi University Air 1978 Del 308
the Maneka’s wavelength, opined that the expression ‘life and personal liberty’ in Article 21 included variety of rights, though not included in part III of the Constitution, provided they were necessary for the full development of the personality of the individual.\textsuperscript{130}

\textit{Vishakha & others v. State of Rajasthan}\textsuperscript{131} the Supreme Court upheld the rights of workingwomen against sexual harassment in working places relying on the provisions of the CEDAW and the fundamental rights conferred by articles 14,15,19(1)(g) and 21 of the Constitution of India. The Court declared that “in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international covenants and norms are significant for the purpose of interpretation of the guarantee 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 implicit thereon. 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 the Constitutional guarantee.

In \textit{Sunil Batra Case}\textsuperscript{132} the court held that the State should take steps to keep up to the standard minimum rules for treatment of prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies. In this latter aspect, the holistic development of personality shall be kept in view. In \textit{D.K. Basu v. State of West Bengal}\textsuperscript{133} the Supreme Court came down heavily against custodial torture. Relying on article 5 of the Universal Declaration of Human Rights, the court observed, “Custodial torture is a

\textsuperscript{130} Supra at 314
\textsuperscript{131} (1997) 6 SCC 241 CEDAW has also been relied in \textit{Valsamma Paul v. Cochin University}
\textsuperscript{132} (1996) 3 SCC 545 and \textit{Madhu Kishwar v. State of Bihar}
\textsuperscript{133} AIR 1980 SC 1578
\textsuperscript{134} (1997) 1 SCC 416
naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward-flag of humanity must on each such occasion fly half-mast"

Sheela Barse v. State of Maharashtra, this writ petition is based on a letter addressed by Sheela Barse, a journalist, complaining of custodial violence to women prisoners whilst confined in the police lock up in the city of Bombay. The petitioner stated that she interviewed fifteen women prisoners in Bombay central jail with the permission of the Inspector General of prisons between 14th and 17th May 1982 and five out of them told her that the police in the police lock-up had assaulted them. The court said that of these five who complained of having been assaulted by the police, the petitioner particularly mentioned the cases of two namely, Devamma and Pushpa Paeen who were allegedly assaulted and tortured whilst they were in the police lock up. The court further stated that it is not necessary for the purpose of this writ petition to go into the various allegations in regard to the ill treatment meted out to the women prisoners in the police lock up and particularly the torture and beating to which Devamma and Pushpa Paeen were said to have been subjected. The court treated the petitioner’s letter as writ petition and issued notice to the State of Maharashtra calling upon them to show cause why the writ petition should not be allowed. Pursuant to the order made by the court Dr. (Miss) A.R. Desai visited Bombay central prison and after interviewing woman prisoners lodged there, made a detailed report to the court. The report provided an insight into the problems and difficulties faced by the woman prisoners. The court pointed out that legal assistance to a poor or indigent accused that is arrested and put in jeopardy of his life or personal liberty is a Constitutional imperative mandated not only by Article 39-A but also by Articles 14 and 21 of the Constitution. It is therefore absolutely essential that legal assistance must be made available to prisoners in jails

134 1983 Cr.L.J (SC) p 207
whether they be under-trial or convicted prisoners. The court directed that the female suspects should not be kept in a police lock up in which male suspects are detained.

In *Aravindh Singh Bagga v. State of U.P*\(^{135}\) the court awarded compensation to the victim of police atrocities against a married women. In *Asiad’s*\(^{125}\) case, Bhagwati, J., speaking through the court, opined that if workmen were deprived of any of rights and benefits to which they were entitled under the social welfare legislation it would be a clear violation of Article 21, because the State was responsible for securing such right and benefits to the workmen. The enforcement of fundamental rights is secured through Supreme Court under Article 32 and High Court under Article 226. Similarly in *Delhi Domestic Women’s Forum v. Union of India*\(^{137}\) Upendra Baxi brought to the notice of the courts about the flesh trade in the protective homes of Agra and the Supreme court has given necessary directions to protect the women and to ameliorate the conditions of women. Another petition was filed by Delhi Domestic Working Women Forum to expose the pathetic life of poor domestic servants who were subject to severe sexual assault by seven army personnel when these women were travelling from Ranchi to Delhi.\(^{138}\)

The Court in *Vishaka’s case* defined what ‘sexual harassment’ means and also framed guidelines to handle it which have to be strictly enforced as law over and above the criminal proceedings and the disciplinary action which is possible against such as employer or employee who indulges in sexual harassment. The Supreme Court has used its powers under Article 141 of the Constitution to treat the guidelines laid down by it “be treated as the law declared. In defining ‘sexual harassment’ the Court followed General

\(^{135}\) AIR 1994 4 S.C 602
\(^{126}\) Peoples Union for Democratic Rights v. union of India, AIR 1982 SC 1473
\(^{137}\) 1995 1 SCC 14
\(^{138}\) Ibid
Recommendation No: 23 under Article 11 of the CEDAW, which reads as follows:

Sexual harassment includes such unwelcome sexuality determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem, it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment. Effective complaints, procedures and remedies, including compensation would be provided. It was on this basis the Supreme Court framed the definition of sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as;

a) Physical contact;
b) A demand or request for sexual favours;
c) Sexually-coloured remarks;
d) Showing pornography

e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

It is not easy to discern the truth in sexual harassment cases because alleged sexual activities are carried out in the private. "Many crimes are committed in the absence of non-participant eyewitnesses. The power held by the perpetrators of sexual harassment is the threat of making the sexual abuse public knowledge. It has been found that this particular threat allows perpetrators to blackmail, to silence the victim and allow the abuse to continue. It is a well-established fact that public knowledge of sexual abuse is often worse for the abused than for the abuser. The victims who choose to complain must have enough courage to live on it. The risk of making public
their entire personal life that has no link with the incidents complained of is always at stake. These cases suggest that if legal initiative is set-up right from the beginning and if the meaning of such abuses is derived from women's real experience of violation, it can make some difference to a degree that women's experience can be written into law, even with some tension within doctrinal framework. The remedy for sexual harassment cases and the burden of proof has to be systematically worked out in order to make them effective and enforceable against such a pernicious social wrong. Besides disciplinary actions have to be supplemented by the civil action like injunctions, tort as well as by criminal law. Finally, sexual harassment is a problem which will have to be tackled both socially and legally to uphold the dignity of women as an equal human being with men in all walks of life.\textsuperscript{139}

The Court in Vishaka's case observed "the power of this court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful, governance of the society by the rule of law, mandates this requirement as a logical concomitant of the Constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.\textsuperscript{9}

J.S. Verma, C.J., Supreme Court in Vishaka v. State of Rajasthan,\textsuperscript{140} speaking for the Court, included the right to gender justice including the prevention of sexual harassments or abuse within the content of life and personal liberty guaranteed under Article 21 of the Indian Constitution, in view of the legislative vacuum. The Court laid down the principle of far reaching

\textsuperscript{140} AIR 1997 SC 3011
consequences that in the absence of domestic law the contents of International Conventions and norms could be read into the right to work with human dignity in Article 21. It may be mentioned here that in order to lay down the law for the protection of these rights to fill the legislative vacuum the court took into account the definition of human rights in Section 2(d) of the Protection of Human Rights Act, 1993. Thus the human rights contained in any International Convention would be significant for interpreting the concept of life and personal liberty under Article 21.

In a case where guidelines were issued to prevent sexual harassment of women and to enable gender equality in employment, the court referred to Articles 11, 24 and general recommendations 22, 23 and 24 in that respect of the Convention on the Elimination of All Forms of Discrimination against women and observed: "any International Convention not inconsistent with the Fundamental Rights and in harmony with its spirit must be read into these provisions (Articles 14, 15, 19 and 21 of the Constitution) to enlarge the meaning and content thereof, to promote the object of Constitutional guarantee".141

5.4 ROLE OF OTHER AGENCIES

The setting up of a national institution is a step towards human rights. Such an institution raises human rights awareness through education, training, research and conduct of impartial investigation into alleged violations. The Protection of Human Rights Act, 1993 passed and led to the Constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of ‘human rights’ and for matters connected therewith or incidental thereto. Section 2(d) of the Act defined the expression human rights by stating that human rights means the rights relating to life, liberty, equality and dignity of the individuals guaranteed.

141 Vishaka v. State of Rajasthan AIR 1997 SC 3011, p. 3014
by the Constitution or embodied in the International Covenants and enforceable by courts in India.

National Human Rights Commission (NHRC)

The Act set up a National Human Rights Commission and the State Human Rights Commissions in the States and the Human Rights Courts in the districts. The Commission may, after completing the inquiry recommend to the appropriate Government or authority to take action against the person concerned where the inquiry discloses the violation of human rights.\textsuperscript{142} The most important function of the Commission is to inquire/investigate the complaints of the human rights violation. "The NHRC has explicitly stated that women's rights will be a part of its concerns."\textsuperscript{143} In the first meeting of the Commission held on November 1, 1993, it took \textit{suo moto} notice of a firing incident by the BSF on a gathering of people at Bijbehana and issued notice to the Government of India seeking a report on the incident. The Commission since then has received a number of complaints. The following figures suggest that there has been a rapid rise in the number of complaints received by the Commission: 496 during 1993-94, 6987 during 1994-95, and 10195 during 1995-96, and 20514 during 1996-97.

The above figures of complaints include the reports sent by State agencies on custodial deaths and rapes. Complaints made to the Commission related to the custodial death, custodial rape, disappearance, illegal detention/arrest, false implications, police excesses, failure in taking action, indignity to women, terrorists and naxalites violations and jail conditions etc. Majority of complaints were received from Uttar Pradesh followed by Bihar. The two states together accounted for 54 per cent of the fresh cases received during 1996-97. By the end of March 1997, the Commission has submitted

\textsuperscript{142} Section 18(1)
\textsuperscript{143} Justice Bhatt, J.N, Judge, Gujarat High Court, Ahmedabad, \textit{Gender Equality: Turmoil or Triumph} AIR 1998, p.83
four reports to the Government and a number of recommendations were made therein for making the functioning of the Commission more effective and for the promotion and protection of human rights. The Commission recommended for the amended for the amendments to the Protection of Human Rights Act 1993 to ensure more autonomy to the Commission by being empowered to grant relief to the victim or to his family members. The Commission recommended that in order to make people aware of their human rights, there is a need for the movement, which unfortunately is not there in spite of the existence of a large number of NGOs. It is therefore absolutely necessary that the Commission's own investigating wing is strengthened.

State Human Rights Commission (SHRC)

The State Commission is empowered to perform all those functions, which have been entrusted to the National Human Rights Commission. A country like India with diversities needs Human rights Commissions at the State level. The reasons are obvious. The redressal of grievances must be swift and inexpensive, the message of human rights must reach the grass-root level in the languages of the people of the country, the federal character of Indian Constitution must be respected, the nation-wide challenge needs an army of activists in each State and in each district, if societal and attitudinal changes are to be brought about. The State Commission may inquire into violation of human rights only in respect of matters related to any of the entries enumerated in List II and III in the Seventh Schedule to the Constitution.¹⁴⁴ The State Human Rights Commission have been established in West Bengal, Himachal Pradesh, Madhya Pradesh, Assam and Tamil Nadu in that order by March 1997. Later, such a Commission has been established in Punjab. Kerala is the ninth State, which has established the Human Rights Commission on December 11, 1998. It is to be noted that certain State Governments have informed the NHRC of their difficulty in establishing the

¹⁴⁴ Section 21(5)
Commissions because of financial constraints or because of the non-
availability of retired Chief Justice or Justices of the High Court whose presence is essential to the proper composition of the five member Commissions envisaged under the provision of the Section 21(2) of the Protection of Human Rights Act of 1993. An amendment therefore is required to be made in the Act to remove the difficulty.

It is true that no national institution or human rights commission, howsoever effective it might be, cannot implement the human rights without appropriate powers. The Commissions develop a culture of human rights. The culture of human rights can be achieved by making people aware of their rights. This can be done by educating people, children and adults, about what human rights are and what is required for their continued protection.

**National Commission for Women (NCW)**

The concept of Women's Commission was mooted as far back as 1975 in the report submitted by the committee on the status of women 14 years ago. The centre acted on this proposal when V.P. Singh's Government introduced the National Commission for Women Bill in 1989. "I am happy that a National Commission for Women has at long last come into existence. The Committee on the Status of Women in its report submitted in 1976 recommended the establishment of an autonomous Commission with a mandate 'to review, evaluate and recommend measures and priorities to ensure equality between men and women and full integration of women in all sections of national life'. The National Commission for Women Act enacted by Parliament in 1990 has assigned several important tasks to this Commission including a careful study of all matters relating to the safeguards provided for women in our Constitution."\[145\]

Mass media, both print and electronic, is a potent force to disseminate the values upholding the dignity of women, because the widespread use of television channels, newspapers, especially weeklies could be very good source of communication of the message. The contents of communication are reflective of the values of society, which in turn, are nurtured and sustained through communication. The treatment meted to women and girls in different modes of human communication, mirror the prevailing attitudes and values towards women in a particular society. Image portrayal through communication reinforces reality. In India, the dominant stereotype images of women and girls are that of; less competent human being, instruments for exploitation by men; and key to commercial success in this age of advertising. Freedom of speech and expression is guaranteed under Indian Constitution under Article 19(1)(a) which includes freedom of press. Such a freedom is misused or abused for commercial advancement at the expense of true values. Even the limited exposure is mainly in the form of entertainment films or film-based programmes providing little opportunity for education about new values, tasks, or skills. Media content and production also leave much to be desired in terms of making educational programmes meaningful or attractive enough for the common men/women. In these circumstances, the expansion of media facilities, especially of electronic mass media, is both an opportunity and a risk in the case of women and girls. Used wisely on the basis of well thought out communication policy for women and girls, mass media like the television can be a great instrument for social transformation towards women’s greater participation, equality and dignity. Therefore the legislative measures must be tightened to impose rigorous censorship before the publication, broadcast and telecast.

In India, like many other developing countries much has to be done for the better protection of human rights in general and women’s human rights in particular. Although other social and economic problems like poverty, illiteracy, unemployment, population growth, and law and order have
surpassed the importance due to human rights, all efforts are required to be made to make the people aware of their rights. The strong will and determination, for the promotion of human dignity and worth will certainly make the human rights movement a great success.

Non-governmental Organisations (NGOs)

Voluntary action in India has always been an integral part of the cultural and social tradition. A variety of social services were provided by non-governmental organisations prior to independence and in the first few decades of planned development in India. Traditionally, NGOs undertook a wide variety of activities in the areas of social reform in the pre-independence period. Independence resulted in government policy and commitment to support and strengthen voluntary agencies. NGOs have contributed immensely to the new directions and impetus provided to women's programmes during the decade for women. A number of innovative features in several government-formulated schemes/programmes are based on the experience of the projects run successfully by NGOs. The rationale for involvement of voluntary agencies in women's development is quite clear. Women in India suffer from multifarious constraints such as a low level of literacy, lack of access to resources and obstacles caused by the cultural and social customs and traditions that are discriminatory of women. In a situation such as this, the role of voluntary agencies in creating awareness among women of their rights and mobilizing women as well as developing in them appropriate motivation and leadership to realize those rights cannot be minimized. To encourage the efforts of NGOs working in the field of human rights is a statutory responsibility of the Commission under Section 12(i) of the Protection of Human Rights Act, 1993. In reality, this is not just a responsibility but a necessity. The promotion and protection of human rights cannot possibly gather the momentum it requires without the fullest cooperation between the Commission and NGOs. The Commission took
initiative pertaining to the problems of dalits and tribals, child labour, child prostitution, and other vulnerable groups.

NGOs do play an important role in promoting the dignity of women when they work in consonance with government policies and enactments. They play the complementary role to achieve the ends. Most of the NGOs who have the spirit of service and who want to do many things are languishing for funds. The financial constraints deter the progress of NGOs. The Governments must be liberal in granting assistance to NGOs to promote the dignity of women.

Women Organisations and Activist Groups

Unity cannot be expected to be achieved all at once, ceaseless effort only paves the way. The building of unity has to be constructed in stages. To aspire for immediate results in the path of unity is wrong. Many steps-negotiations, discussions, thought-sessions, rapprochements, identification of agreed points, subjects and problems, search for solutions- have to be taken gradually. Even with the best of intentions one should not desire to achieve merger of federations, societies and institutions of women; efforts shall not be undertaken to make merger an immediate probability. Attempt should be made to bring about coordination between various sections of women's movement allowing the leaders to keep the particularity, reputation and popularity of one's own organisation in fact, strides shall be made with coordination as the single aim.

As a first step towards actualising coordination a meeting of leaders of federations associations and institutions of women shall be held. They must make declarations about the ideals and policies of their organisations, ideals and goals acceptable to all shall be recognised and identified. As a second step they should acquaint one with the other, the programmes on which they
would like to draw their attention. They shall list out agreed points in the programmes. As a third step they shall indicate the ways and means of implementing the same. As a fourth step they shall determine the moments, stages and manner in which the programmes have to be put into effect.

There exist federations of women, which in the popular view follow the thought process of political parties. Organisations of women, which believe in the autonomous nature of women's movement, do coexist. Associations of women, which are not affiliated to federations, or confederation of women are subsisting. All the workers of these organisations must take up the task of attaining coordination of the women's movement. There exists such a coordination committee at the all India level. The representatives of All India Women's Conference, National Dakshata Samiti, Joint Women's Action Programme, Young Women's Christian Association and Associations doing research in women's studies happen to be the members there of. Similar coordination committee has to be formed in Andhra Pradesh.

Women activists' movement is slow not because of their lofty ideals and objectives but, they are lagging behind owing to cultural, social inhibitions and loop holes in the law and the patriarchal hegemony. Financial constraints discourage many activists' movements. Liberal grants and constant encouragement will accelerate the protracted slow process of movement for achievement of women's dignity, women's radicalism in view of changing global current trends.