Chapter 4: Constitution, Law and Some Issues of Gender Justice

4.1: The Constitution and Gender Justice

Any discussion on justice for women would be incomplete without relating it to the Constitution of India. The Constitution of India, rightly described as the "cornerstone of a nation" embodies provisions for social, economic and political revolution in India. It is the foremost document that defines and guarantees equality, justice, liberty and democracy to the citizens of India. The Preamble declares that one of the most fundamental provisions of the Constitution is to secure social, economic and political justice for all its citizens.

In this chapter I examine the provisions of gender justice in the Constitution and the role of law in securing justice to women. In doing so, I shall also study the feminist challenges to the interpretation of the provisions of the Constitution as well as to the legal discourse. Though the legal terrain has been valuable in the struggle against gender discrimination and injustice, some patriarchal notions guiding the interpretation of legal provisions have compelled a feminist rethinking of law as a tool for gender justice. This
feminist intervention has to do with the concept of justice and equality as incorporated in the Constitution.

In this section I examine the some important provisions of the Constitution, which guarantee gender justice and non-discrimination on the basis of sex. These provisions primarily fall under Part III, the Fundamental Rights and Part IV, the Directive Principles of State Policy.

One of the main provisions of equality is embodied in Article 14, which states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

In this Article, ‘equality before law’ is a negative concept that “implies the absence of any special privilege in favour of any individual. It ensures that all are equal before the law and no person is above the law. It ensures that all persons are equally subject to the ordinary laws of the land”. On the other hand ‘equal protection of laws’ is a positive concept, which suggests the need for affirmative action. It implies equal treatment of those who are equally situated. “This concept should be taken to mean that all persons in similar circumstances shall be treated alike both in privileges conferred and liabilities imposed. This concept implies equality for equals and aims at
striking down hostile discrimination or oppression of inequality. Thus, its aim is to protect persons similarly placed against discriminatory treatment.\textsuperscript{3}

D. D. Basu argues that different persons who are differently placed require separate treatment. Hence, this principle does not take away the power from the state to classify people for "legitimate purposes". In this sense, differential treatment \textit{per se} does not constitute the violation of Art 14. It is violated only when equal protection is denied under no reasonable basis for differentiation. Both these concepts, that is 'equality before law' and 'equal protection of laws' together imply 'equality of status'. According to Anjali Kant Article 14 of the Constitution confers on women the equality of status and also protects them against any violation of this principle.\textsuperscript{4}

Article 14 recognises `women' as a class\textsuperscript{5} and using this article many legislations were passed that aimed at removing the disabilities attached to women on account of their sex. Thus positive discrimination in favour of women is not considered discriminatory, since it is aimed at improving the status of women in society and the conditions of their existence. Such positive interpretation of Article 14 implies the presence of fairness inherent in the guarantee of equality, which enjoins on the State to uphold a law that makes `protective discrimination'. The State has to consider \textit{de facto}
inequalities, which exist in the society and take an affirmative action by giving preference to socially and economically disadvantaged persons over those who are more advantageously placed. Basu opines: “Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker section of the community on a footing of equality, with the more powerful sections so that each member of the community may enjoy equal opportunity of using to the full his natural endowments”. In this sense different treatment for differently placed is not only permitted but also required.

Analysing the various equality provisions of the Constitution, Ratna Kapur and Brenda Cossman have made an interesting classification of the concept of equality. They make a distinction between formal and substantive equality. According to them, formal equality has been explicitly guaranteed to all by the Constitution. Yet women’s lives are characterised by inequality and discrimination. This, they argue, is a result of the substantive inequalities from which women suffer. They note that “the legal system itself contributes to the gap between the formal guarantees of gender equality and the substantive inequality that plagues women’s lives”. Further they illustrate how “the judicial approach to the equality guarantees of the Constitution is informed by a problematic approach to both equality and gender
Formal equality, though a necessary pre-condition for equality of status and equal human dignity, is rendered deficient in addressing problems of gender injustice due to the presence of substantive inequalities.

As discussed earlier, ‘equality’ implies like treatment for similarly situated persons. Difference in treatment is acceptable only when the involved persons or parties are placed in different circumstances. However this understanding fails to recognise that sometimes similarly situated persons also require different treatment. This is the founding basis for a substantive model of equality. While a formal model emphasises sameness, a substantive one recognises that equality requires differential treatment based on disadvantage. The focus of substantive model is not only on equality before law and equal protection by law, but also on the actual impact of the law on women. Kapur and Cossman define: “The explicit objective of a model of substantive equality is the elimination of substantive inequality of disadvantaged groups in society”.

According to Paramanand Singh a model of substantive equality takes into account social, economic and educational inequalities among people and seeks to eliminate them by positive measures. The emphasis thus is not on sameness or even on difference. The focus here is on disadvantage. This
disadvantage is built on and generated by ‘difference’, where difference is used to create inequalities in power.

Kapur and Cossman note: “In [the formal equality] approach there is no interrogation of substantive inequalities – of such social and economic disadvantages that may have produced differences between persons”. On the other hand substantive equality aims at “eliminating individual, institutional or systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society”. In this sense, discrimination is when a disadvantaged group is treated in a manner, which further disadvantages or oppresses that group. Such a shift of focus from sameness/difference to disadvantage broadens the concept of equality.

Kapur and Cossman argue that though the Indian courts have progressively adopted the substantive approach, the interpretation of equality as formal equality still underlines most endeavours, especially in the interpretation of Article 14. Basu notes: “This doctrine of equality is a dynamic and evolving concept, which has many facets. It is embodied not only in Art 14 but also in Arts. 15-18 of the Part III as well as in Arts. 38, 39, 39A, 41 and 46 of Part IV [The Directive Principles]. The object of all these provisions is to
attain – ‘Justice, social, economic and political’, which is indicated in the Preamble and which is the sum total of the aspirations incorporated in Part IV. In a society where glaring inequalities of income, social injustice and exploitation, inequality of status and opportunity exist, there is no room for equality before the law”. There are thus, two aspects of the concept of gender equality as understood in Article 14. On the one hand it is used to strike down hostile discrimination against women. On the other, it is also used to justify progressive laws in favour of women.

Article 14 primarily seeks to guarantee formal legal equality to all its citizens. Nonetheless laws favouring women are not considered a violation of the fundamental guarantee of equality contained in this article. For instance, section 354 of the Indian Penal Code criminalizes the use of force or assault to outrage the modesty of a woman. This section does not include ‘men’ within its purview, yet it is not viewed as being in violation of Article 14.

I examine a few more articles that favour progressive discrimination against women. One such provision is contained in Article 15.

Article 15 (1) states: “The state shall not discriminate against any citizen on the grounds of only religion, caste, sex, place of birth or any of them.”
15 (2) states: "No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to —

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public."

15 (3) states: "Nothing in this article shall prevent the State from making any special provision for women and children."12

This fundamental right is a guarantee against being subjected to discrimination by the state or state machinery in rights, privileges and immunities that are accorded to a citizen by the Constitution. In this sense, the right conferred by Art 15 is 'personal' and the prohibition in this article is against the State and not against other individuals.

Art 15(3) clearly states that Art 15(1) shall not stop the state from making any special provisions for women and children. This means that if special provisions are made by the state in favour of women and children, it does not constitute a violation of Art 15(1). For example, special seating
arrangement for women in buses and trains is not considered unconstitutional. According to section 497 of the Indian Penal Code the offence of adultery can be committed only by men and women cannot be persecuted ever as abettors. Thus the state has made special provisions for women under 15(3).

Analysing some judicial decisions Kapur and Cossman have given two approaches to the relationship between Articles 15(1) and 15(3). The first one is the 'exceptional' approach, which considers that Article 15(3) is an exception to the general guarantee of equality. Seen in this light, it is based on formal equality, which reads equality as sameness. Hence any difference in treatment is considered an exception to equality. The second approach called the 'holistic' approach considers Article 15 as a whole and hence Article 15(3) is used to interpret equality more broadly. According to this approach any difference in treatment is not considered as an exception to equality. Rather it considers that equality sometimes requires different treatment. In this sense, it is based on substantive model of equality. Special treatment embedded in Article 15(3) is not seen as an exception but as a fundamental part of equality.
The Court has used this article to uphold legislation that gives preferential treatment to women. In doing so, the Court has also taken into consideration other factors such as the backward social and economic condition of women and public morality to justify such legislations.

Kapur and Cossman note that the backward position of women is due to social, economic and political inequality of women and therefore,

Legislation designed to promote women's position and/or provide for the financial needs of economically dependent women should not be seen as discrimination against women...precisely because these provisions are based on ameliorating the conditions that women have suffered on the grounds of sex.13

According to the substantive approach to equality, we find that ‘sex’ is a category that denotes disadvantage, in the sense that sex of a person has been used as a basis for discrimination and has resulted in women being
disadvantaged as compared to men. However sometimes the Court views all other social and economic factors that fortify disadvantage, as separate from 'sex', instead of seeing the fundamental relationship between them.

Nevertheless Article 15(3) has been useful for legislating in favour of women. Many laws have been passed to prohibit female infanticide, dowry, exposure of women in films and advertisements, child marriage, molestation, abduction and rape, providing maternity benefits and protection in employment.

Another article directed at bringing about equality among sexes is Article 16 that guarantees equality of opportunity to all citizens.

Article 16(1) states: “There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.”
16(2) states: "No citizen shall, on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state".

16(4) states: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the State."14

Article 16, in conjunction with Article 14, has been used to guarantee equality of opportunity and non-discrimination on the basis of sex in employment. It has been used to defeat discrimination against women in employment on the grounds of sex. Any discrimination in employment on
the basis of sex is considered a violation of this article. Moreover the marital status or pregnancy of a woman if used to discriminate against her in employment is also held as a violation of Articles 16 and 14.15

Some High Courts have in fact stated that Articles 14, 15 and 16 constitute a single code. In a judgement Justice Mathews has argued that formal equality is achieved when all people are treated equally. However “men [and women] are not equal in all respects”. Hence some sort of proportionate equality is required to achieve justice. Such a proportionate equality can be achieved only when equals are treated equally and unequals are treated unequally.16

Some other articles that are important to gender justice include Article 21, which states: “No person shall be deprived of his life or personal liberty except according to the procedure established by law”.17 This Article guarantees protection of life and personal liberty and has often been employed for the protection of women. For example, this article has formed the basis for the provision of protective and humane treatment for inmates of women’s remand homes. Here the ‘right to life’ implies more than mere existence, it implies the right to live with human dignity. On this ground rape is considered a crime against basic human right of life with dignity, and hence in violation of Article 21.
In a similar vein, Articles 23 and 24, which prohibit traffic in human beings and forced labour, and employment of any child below the age of fourteen respectively, can also be viewed as provisions that are positive and progressive towards women. These provisions have inspired many laws including those for the prevention of traffic in girls and women, and the Indecent Representation of Women (Prohibition) Act, 1986.18

In addition to the Fundamental Rights, some provisions of gender justice are also contained in the Directive Principles of State Policy. These Directive Principles though non-enforceable by law, identify certain social and economic goals that the state must strive towards. According to Article 37, it is the duty of the state to consider these Directive Principles while making laws.

Article 39 provides for an adequate means of livelihood to men and women, and equal pay for equal work. This implies equal pay for equal work irrespective of sex. Many laws regarding labour and wages have been based on this provision of the Constitution. Moreover the provision for equal pay for equal work has to be read as an extension of Articles 14 and 16. Article 42 provides for 'securing just and humane conditions of work and for maternity relief'. According to Article 43 it is the duty of the state to provide
'work, a living wage, conditions of work ensuring a decent standard of life'.

Both these Articles, 42 and 43, define the obligation of the State in making legislations providing just and humane conditions of work and maternity benefits for women. Article 44 assures the formulation of a uniform civil code for the citizens of India. Such a uniform code is aimed at replacing the existing personal laws of different communities, most of which discriminate against women.

Such pro-women provisions are seen in the Indian Penal Code (IPC). Though the IPC is uniform and there is no space for discrimination on the basis of sex, enough care has been taken to grant women some protection on account of their sex. There are several provisions for the protection of women under the Criminal Procedure Code (CrPC). For instance, a female can be arrested by a male police officer, but can be searched only by another female. Similarly section 64 of the CrPC provides for summons to be served only to an adult male member of the family. Summons cannot be served to any adult female member.

Despite the broad horizon provided by the Constitution, the interpretations of these provisions have echoed the patriarchal and conservative nature of the Indian society. Though there have been some progressive laws and
positive interpretations of these provisions of the Constitution, the approach of the Court has mostly been a protectionist one, upholding patriarchal notions of female sexuality, marriage, and the role of women in society.

Kapur and Cossman identify three approaches to gender difference in the Indian context. These approaches relate to the way in which gender difference is perceived by courts and translated into legislation and law in India. These three approaches are the protectionist, sameness and corrective. The protectionist approach, as the name suggests, perceives women as subordinate and weak, and hence in need of protection. Any differential treatment to women is thus justified on the premise that women and men are different and that women need to be protected. According to Kapur and Cossman: "This approach tends to essentialise difference, that is to say, to take the existence of gender difference as the natural and inevitable. There is no interrogation of the basis of this difference, nor consideration of the impact of the differential treatment on women". Hence this approach, in the name of protecting women, often reinforces the subordination that built on difference.
The sameness approach emphasises equal treatment. According to this approach, for the purpose of law men and women are the same and must be treated the same. Therefore any legislation or judgement that treats women differently is held in violation of the guarantees of the Constitution.

According to the corrective approach, women require special treatment because of past discrimination. Under this approach the recognition of gender difference is relevant because its failure leads to the reinforcement of those inequalities that are a result of gender difference. Unlike the protectionist approach however the difference in treatment is not to be justified on the basis of protecting women, who are weak but rather as a measure of compensating for past injustices. This approach demonstrates the myth of gender neutrality of formal equality and law, and strives to show that the recognition of gender difference would work at bringing about substantive equality for women.

However the approach of the courts in interpreting the Constitutional provisions of gender justice and gender equality has been problematic to a certain extent. For instance, in Shahdad Vs. Mohd. Abdullah, the provisions of the Civil Procedure Code were challenged as violating Article 15, because it stated that service of a summons can be made only on a male member of a
family. The court rejected the challenge stating that since most women in India were housewives and some were behind veils, it would be improper in the context of the Indian society to issue summons on a female member.24

In this case the court used sexual difference to justify differential treatment and viewed women as requiring protection. However Kapur and Cossman argue:

The approach did not challenge the stereotype of woman as housewives; it did not examine the extent to which these stereotypes of women have served to reinforce women's inequality, nor the extent to which the underlying sexual division of labour has produced such inequality. Rather, the difference is taken as natural. The decision exemplifies the way in which the recognition of gender difference under the guise of protection can perpetuate women's subordination. The recognition of difference in sexual division of labour serves only to reinforce the negative stereotypes of women as housewives.25

In adultery provision (section 497 of IPC) women are considered not even as abettors in crime. Here also the court is informed by a protectionist
approach. But while this provision seeks to protect women from criminal prosecution, it is based on a problematic view of women’s sexuality. Women are seen as victims of male sexuality and not as having an agency in the sexual relation. The Court thus finds it necessary to protect women. Similar notion of female sexuality guide the laws regarding restitution of conjugal rights.

The above cases illustrate that the fundamental problem in the interpretation of the provisions of the Constitution is of gender-insensitivity. While appeals to equality and gender justice have been made on arguments of sameness or difference, it is important to realise that both these approaches suffer from an inherent concurring flaw. The sameness approach aims at extending to women those liberties and rights that men have defined and enjoyed. It denies the relevance of gender difference before law and also works at devaluing difference. It reinforces the underlying social inequalities in trying to judge women according to the norms that have been derived out of male experiences.

Conversely, in the difference approach, ‘difference’ is construed in terms of a departure from the pre-existing male norms. Male becomes the standard against which female difference is measured. This approach, in a bid to
affirm differences, reinforces the accompanying social inequalities. As Kapur and Cossman note: “Pregnancy and childrearing exemplify the dilemmas of gender difference in women’s lives”. While difference in this case is a result of a particular social arrangement, legal discourse assumes this difference to be natural and inevitable. The role of the familial ideology in constructing and continuing this difference is immense. By essentialising this difference, both legal and familial discourses place women at a disadvantage. As discussed in chapter 2, sexual difference is natural; gender difference is a social construct. This difference carries with itself a range of socio-economic and political inequalities, which have to be accounted for.

Indian feminist theory and women’s movement have depicted that women’s inequality of gender is by conditioned the particularities of class, caste and community. Thus the deconstruction of difference then would require considering these specificities too. Calling for a radical redefinition of politics and society, Cavarero argues:

It is possible to be both different and equal, if each of the two different beings is free and if the kind of equality at stake radically abandons any foundation in the logic of the abstract, serialising universalisation of the male One. It is possible to be both different and equal if not only a new logical foundation of
the concept of equality can be developed, but a new model of society and politics.27

Such a model would have to go beyond the confines of the equality/difference debate and explore the dynamics of gender relations with caste, class and community concerns. As I have discussed above, the emphasis on sameness or difference presumes a conformation to or a deviation from a pre-defined and universalised norm. To secure gender-justice, equality should be interpreted in terms of accounting for those inequalities that are produced by a complex interplay of oppressions based on gender, caste, class and community. A rethinking of equality could follow the concept of substantive equality, which considers the present disadvantage and the actual impact of law on the lives of women.

One of the characteristics of modern societies is their reliance on law to bring about social justice. For a country like India, which had experienced long years of colonial rule, this becomes even more relevant. Legislation became one of the main instruments in the "tasks of social reconstruction, development and nation-building" for a newly emergent India.28 Thus independent India relied on legislation to bring about a change in the society whereby conditions of discrimination and inequality could be obliterated.
Like most women's movements around the world, the IWM has appealed incessantly to law. Law and legislation have been important instruments for furthering gender justice.

The provisions of equality and justice that the Constitution guarantees are translated into rights by law. The IWM has on several occasions appealed for law reform and new legislation for remedying gender discrimination. Two concerns that have engaged the IWM immensely and raised demands for law reform are those of rape and dowry. In the next section I briefly review the development of the IWM after Independence, and in section 4.3, I examine legal responses to the issue of rape and dowry in India.

4.2: A Brief Introduction to the IWM in Independent India

After Independence the Congress made attempts to fulfill the promises made during pre-Independence. Perhaps the most important of them was the enshrinement of equality of men and women in the Constitution and many administrative bodies were set up for creating new opportunities for women. By 1955, the Constitution included some of the most progressive laws for women. Nandita Gandhi and Nandita Shah note that during this period "many middle class women found a place in the expanding service
and educational sectors, governmental structures or the professions. This numerically small but conspicuous entry into the formerly prohibited areas gave rise to an image of the 'new' emancipated Indian woman”.

Gradually the number of organizations and institutions for women began increasing. The government supported the spread of *mabila mandals* and reformist programmes. Yet many of the feminists' expectations suffered a setback in post-Independence period. The Hindu Code Bill was severely watered down. The Bill had proposed equal inheritance rights, prohibited polygamy, and attempted to liberalise divorce and custody rights for women. Moreover, the demand for a Uniform Civil Code, which then was on the feminist agenda, was shrugged off.

After Independence feminists were more fragmented than before due to the lack of a common enemy, which could be identified, like the foreign rulers during colonial period. In addition, many women leaders were now members of the Congress, which sought to symbolise the improvement in women's conditions. Radha Kumar observes:

> In the fifties and the sixties, therefore, there was a lull in feminist campaigning and the movement which started in the
seventies and the eighties was a different one, growing out of a number of radical movements of the time.\textsuperscript{30}

A situation of relative calm remained for the first fifteen years after Independence. By the mid 60s several indicators depicted that the government had failed to deliver the promised goods. Poverty was rampant. Land reform had proved inadequate which led to land- and caste-based tensions. Ilina Sen notes: “Planned development, heavy industrialisation, capital intensive agriculture, and commercial forestry had given rise to a host of new contradictions as they benefited few at the expense of large sections of the people”.

There was widespread unemployment, ecological degradation and poverty all over the country. In the face of all this, even the opposition was exposed as a totally ineffective political force. This gave rise to a new ferment of political action, when people raised organised protests and struggles around various issues. As Ilina Sen observes:

There was a new wave of nationwide unrest, and its rumblings could be heard in many parts of the country. It heralded a new chapter in the area of political action and once again women were among its important protagonists.\textsuperscript{31}
The Telangana Movement, a peasant movement during the 1948-50, Jayprakash Narayan’s ‘Total Revolution’ in Bihar during the 1970s, the Chipko movement in the Garhwal, the Shahada and anti-price rise in Maharashtra, and the SEWA and Nav Nirman in Gujarat could be identified as some important people’s movements in post-Independence India. Though these movements were not feminist *per se*, they had the massive participation of women. Some movements like the Shahada challenged the practice of wife-beating; movements in many other parts of India saw anti-liquor agitations, wherein alcohol was identified as a main reason for wife-battering. Thus such people’s movements saw the massive participation of women in raising issues that affected the family and/or women.

The year 1974 turned out to be a major landmark in the history of women’s movement. This was the year when ‘Towards Equality’, a report on the status of women in India was published. In 1971 the Ministry of Education and Social Welfare appointed a committee “to examine the Constitutional, legal and administrative provisions that have a bearing on the social status of women, their education and employment and to assess the impact of these provisions”.

The report suggested that the Constitutional guarantees of equality and justice for women had not been met with. It also argued that the status of women had not improved but in fact had deteriorated since Independence. An important argument it put forth was that most of the Indian women had not benefited from modernity – whether social, economic, political or technological. Another impetus to the IWM was given by the UN declaration of the year 1975 as International Women's Year. It was in response to a request by the UN, that 'Towards Equality' was prepared.

However with the declaration of emergency in 1975, there was a break in the movement. Many political organisations were forced to go underground, activists were arrested and those activists who were not, focussed entirely on securing civil rights.

After the lifting of the emergency, new ‘feminist’ groups were formed. These groups and organisations took up several issues highlighting the denial of just conditions for women’s survival. One of the major issues that engaged the attention of the IWM in the post-emergency period was the rise in sexual violence against women. ‘Towards Equality’ had stated that cases of violence against women had risen since Independence. In responding to these issues, the IWM was the most articulate. Several protest campaigns
were organised and legal reforms were demanded to alter laws concerning sexual violence. These campaigns included protests against dowry, rape, sexual harassment at work and public places, domestic violence and other crimes of sexual nature.

In the next section I examine rape and dowry as specific issues of violence against women. While rape is a kind of violence that is witnessed in all societies across the world, dowry is specific to the Indian context. I examine the reforms in law, which were in response to women’s protests against these issues. In exploring these two aspects of violence against women, I examine the theoretical bases for these and the biased/prejudiced position of the judiciary as well as the familial ideology that helps reinforces such violence.

4.3: Justice, Law and Legal Reform: Examining the Issues of Rape and Dowry

Rape is noted as the most frequent and most gruesome of crimes against women. The issue of rape has been internationally protested against by feminists, for the reasons Kumar points: “Sexual assault is one of the ugliest and most brutal expressions of masculine violence towards women, because
rape and the historical ‘discourse’ around it reveal a great deal about the social relations of reproduction, and because what it shows about the way in which the woman’s body is seen as representing the community”.33 Some feminist scholars believe that the women’s movement after the 1970s and later came into existence around the issue of rape.34

The new feminist and women’s groups that were formed in the late seventies were already well acquainted with such categories of rape like those by landlords and the police. However the gang rape by police of a woman called Rameeza Bee in Hyderabad propelled a massive agitation against police rape. This incident fetched heavy public criticism of police rape and the misuse of power. The protest against this incident went to such an extent that it had to be suppressed by the declaration of President’s rule in the state. Many feminists felt that the success of the issue lay in the fact that it created a mass upheaval and identified police rape as common and grotesque. In addition to police rape, there have also been several incidents of rape by military and para-military forces. As Gandhi and Shah note: “Gang rape has been a time-honoured method of demoralising one’s opponents and crushing protest movements”.35 It has thus been used to suppress communities posing rebellious threats or secessionist tendencies.
Cases like Maya Tyagi and Mathura also revealed the brutality of police rape. These cases were not different or extraordinary. They were made unusual by the extensive media coverage they received. Such media coverage revealed the complex dimensions of rape. These cases also attracted the attention of women's and civil rights organisations. New groups like the Forum Against Rape (Bombay) and Stree Sangharsh (Delhi) were formed around the issue of rape in the early 1980s. The organisations formed during this period targeted personal and day-to-day problems facing women. Some of the other issues that these organisations addressed include wife beating, alcoholism, and sexual harassment. These autonomous groups and organisations also aimed at consciousness-raising through street-plays, skits, songs, posters, exhibitions and by circulating related literature.36 Gandhi and Shah note: "With each case, the newly initiated campaign highlighted different aspects of violence against women".37 They also pointed out the inadequacy of the legal system in protecting the fundamental rights of the woman in question and the denial of justice to her.

The Mathura rape case is identified as a watershed in the IWM's campaign against rape. According to Agnes, two factors in this case acted as catalysts to the anti-rape campaign. One was the initiative taken by the local group, which had gathered outside the police station on the night Mathura was
being raped. The second was a letter written by some legal experts to the Chief Justice condemning the judgement of acquittal in the Mathura case. This letter was also widely circulated all over the country.\footnote{38} This led to many progressive women's groups rising up against the issue of rape. Soon people in villages, towns and cities began protesting vehemently against incidents of rape. Both feminist groups and political parties had also joined in the protests.

Rape as a social phenomenon and as an act of violence against women posed certain theoretical problems for women's organisations. Women's organisations criticised police atrocities and violations of women's rights. According to Gandhi and Shah:

When women's groups condemned the state and society they were, in fact, saying that it is not nature but human society, its laws and institutions, which have created hierarchies between men and women, class and caste; that rape is not a random unpremeditated act but a form of violence by the powerful on those who are powerless, poor and disadvantaged.\footnote{39}

And hence an integral part of the campaign against rape was to demand legal reform. Though it was admitted that the patriarchal basis and interpretation
of the existing laws was on one of the reasons for the failure of these laws to deliver justice, the Mathura case had helped raise some immediate issues. One of them was the redefinition of ‘consent’ in a rape case. The Mathura case showed that in a rape case it is extremely difficult for a woman to prove that she had not consented. Thus feminist groups and organisations demanded that the onus of proving consent in a rape case should be shifted to the accused. Moreover it was necessary to differentiate between passive submission and consent; the former could be a result of threat or fear. The absence of injuries in the case of Mathura was used against her, to assume that she had consented. Another important demand was that the woman’s past sexual history and general character should not be used as evidence against her in a rape case.

As a response to these demands, the government asked the Law Commission to look into the matter. The Law Commission presented its report by incorporating the demands of various women’s organisations. Based on these recommendations a Bill was presented in the Parliament in August 1980. However many positive recommendations of the Law Commission were absent in the Bill. The demand for shifting of the onus of proving consent was accepted only partially, that is in case of custodial rapes alone, while the demand for not considering a woman’s past sexual history
in a rape case found absolutely no expression in the Bill. Thus the amendment to rape laws that came in 1983, by which sections 375 and 376 of the Indian Penal Code were revised suffered from the same lacunae. This amendment reflected only in a distant manner the concerns that were initially raised by the women's movement and the recommendations of the Law Commission.

These inadequacies in the Amendment Act were further fortified by the patriarchal character of the law and judiciary. The post-amendment period not only saw fewer convictions due to more stringent punishments, it also continued to uphold conservative notions of female sexuality. Female sexuality was held in a negative light emphasising the values of chastity, morality and the importance of virginity as central to female sexuality. Moreover the approach of leniency adopted towards youth offenders resulted in according less than the minimum punishment.

The negative notions of female sexuality were accompanied by a highly patriarchal definition of rape. The vaginal penetration still continues to guide this definition. As a result the insertion of finger, sticks, bottles and iron rods, especially in case of young girls, is not categorised as rape but as sexual assault or violation of modesty, which is liable for lesser punishment.
Though the injuries caused in such cases are multiple and severe, since the male organ is not involved it is not considered a case of rape. As Agnes notes: “Penis penetration continues to be the governing ingredient of the offence of rape. The concept of ‘penis penetration’ is based on the control men exercise over women. Rape violates these property rights and may lead to pregnancies by other men and threaten the patriarchal power structure.”

In this manner, the very definition of rape reflects patriarchal notions.

Agnes argues that the pre-amendment period had witnessed some progressive interpretations of rape laws, especially that of ‘consent’. In the case of Rao Harnarain Singh in 1958, the Supreme Court had held that passive submission due to fear or duress could not be considered as a valid consent. Thus it proclaimed in clear words the difference between consent and submission under terror. This judgement was accepted as a settled legal position and it continued to guide many later judgements in the pre-amendment period. Similarly in a landmark judgement of 1983 the Supreme Court held that corroborative evidence of a victim was not necessary since it worked at aggravating the injuries of the victim.

While on the one hand we can infer that the judiciary could have read the laws of the pre-amendment more progressively, on the other one cannot
overlook the emphasis on the patriarchal notions guiding the very judgements that secured convictions during the pre-amendment period. For instance, the convictions were premised on the importance of chastity and virginity to a woman. In the post-amendment phase also the emphasis was not in terms of the failure of the system to deliver justice to women. It was seen in terms of ‘protecting the honour’ of women rather than viewing it as a violation of a woman’s body. Kumar notes that “the feminist discussion of rape as an expression of class and gender-based power was shouldered aside by the patriarchal view of rape as a violation of honour, accompanied by demands for the ‘protection’ of women”.45 The prevalence of patriarchal values in rape laws is seen in the fact that marital rape is still not recognised under law. The amendment to rape laws tried to address the issue partially by recognising the rape of a woman living separately from her husband. However rape within an existing marriage is still not recognised.

The judgements in rape cases highlight what Carol Smart has called the ‘binary logic’ of law. A woman’s sexual experience is included in the legal discourse only in the sense of consenting or not consenting to male pressure. Nivedita Menon notes:

Consent itself, a state of mind constituted in a complex way, has to be rigidly pegged to a linear notion of physical growth if
it is to make sense within a legal discourse. Below the Age of Consent a woman cannot be expected to have an agency in sexual interaction, she can only be understood as a victim or dupe. Above this age, even if it is by a few months, she is radically transformed from victim to accomplice. Thus, while recognising the relative powerlessness and lack of autonomy that characterise women's relation with men, the point is to question the possibility of addressing this experience in the realm of legal discourse.46

Menon argues that when convictions are secured in rape cases, it is done so in terms of violating a woman's honour, which according to Menon “re-enacts and resediments patriarchal and misogynist values”. Thus the Indian feminists have displayed concern about the fact that judgements in rape trials are not based on concern for violence against women, but on patriarchal notions of ‘protecting’ women.

Another major protest movement that took off fervently in many parts of India was the campaign against dowry. The concept of Streedhan in traditional Indian society was a form of inheritance for a woman in a land-dominated, agricultural economy. However its form perverted and today
dowry consists of gold, utensils, clothes and consumer items like refrigerators, scooters and cash. According to Gandhi and Shah, the first voice that protested against dowry was that of M. K. Gandhi, during the National Struggle. Gandhi viewed dowry as a "corrupt social evil linked to caste system". In the Bihar movement in post-Independence, students refuted dowry by arranging their own marriages and performing them in a simple manner.

Around the year 1977 women's groups noticed a large number of 'accidental' deaths of young married women. Such deaths, which included burning women alive, were given the name of 'dowry murders'. Women's groups demanded that the cases of 'mysterious' deaths should be considered as murders and must be dealt with likewise. On the one hand this campaign pressurised the police for thorough investigations. On the other, it pointed to the male-biases in existing laws and court procedures and to the inadequacy of such laws. Gandhi and Shah note:

There has not been much of an effort by either the law or the courts to understand the character of the crime, its invisibility, its personal nature or indeed to empathise with the situation of women. By demanding concrete proof and witnesses...and
disregarding circumstantial evidence, the court has given the majority of the accused the benefit of doubt.\textsuperscript{47} This depicted the unsympathetic and sexist attitude of judges.

Kishwar notes that the viciousness of the custom of dowry is noticed only when a woman is killed.\textsuperscript{48} The campaign against dowry that was taken up widely by women's organisations resulted in two successive amendments in the Dowry Prohibition Act, first in 1984 and the other in 1986. These amendments were aimed at making the law more stringent by redefining the existing provisions, and by inserting certain modifications.\textsuperscript{49}

Legal attitudes towards dowry murders have however been changing. In 1983 the Criminal Law (Second Amendment) Act was passed which introduced section 498-A under which “cruelty to a wife was made a cognisable, non-bailable offence, punishable upto three years' imprisonment and fine”. Cruelty was redefined so as to include mental harassment as well. In addition “Section 113-A of the Evidence Act was amended so that the court could draw an inference of abetment to suicide”.\textsuperscript{50} Moreover, section 174 of the Criminal Procedure Code was amended, which made compulsory the post-mortem of the body of a woman who dies within seven years of marriage.\textsuperscript{51}
The aim at making the laws more stringent, without changing the complex conditions within which the practice of dowry operates, rendered this legislation ineffective in addressing injustice against women. A few reasons could be cited for this ineffectiveness. Firstly, the laws were formed or amended as a consequence of the demand from various women’s groups rather than their budding out of a real concern for changing the status quo within the family and the society. Secondly, there was a wide disparity between the initial demands of women’s movement, the recommendations of the Law Commission and the final enactments. As in the case of rape laws, these amendments in dowry laws aimed at strengthening the machinery of the state rather than challenging or addressing the issue of disparities of power within the family.

Kishwar has presented ‘dowry calculations’, wherein she argues the changing of the colonial economy and land settlement system led to the erosion of women’s economic importance and inheritance rights. While on the one hand women were losing their inheritance rights in the natal family, on the other efforts of the social reformers during the nineteenth century focussed on questioning the discriminated position of women as wives. Their efforts sought to strengthen a woman’s position in her marital home without strengthening her rights as a daughter.
Other than lack of inheritance rights, there is also the lack of power within the family that subjects a woman to violence and harassment. Kishwar observes: “The harassment of wives is related to the utterly dependent and powerless position of women in our present family structure which concentrates economic and decision-making power in the hands of men. What we need to fight is not a phoney symbol such as dowry but the power relations within the family”.

Dowry happens to be just one of the reasons for the torture and harassment of women, but it is precisely the helplessness that compels them to put up with the violence. Thus the subservient and dependent position of women within the family structure needs to be challenged. Kishwar notes: “There can be no equality in marriage if women enter their marital homes as dependents or as disinherited daughters”.

Dowry as a form of sexual violence is a classic example of how the sexual regulation of women takes place within the family, rendering them victims of violence within the family structure. This violence is justified and reinforced by the dominant familial ideology. The familial ideology provides for the legal regulation of women within and outside the family. It upholds conservative notions of women’s role and identity within the family, which in turn find expression in law. According to Kapur and Cossman, the two basic dimensions of the familial ideology involve “moral regulation through
which women are constructed as, and judged in accordance with the standards of, good wives and sacrificing mothers; and economic regulation through which women are constructed as, and rendered into positions of, economic dependence”.

The family can be defined as a dominant discourse through which structures of kinship and household are given meaning. It represents a dominant ideology “through which a particular set of household and gender relationships are universalised and naturalised” and “through which unequal power relations are obscured and legitimated”.

Feminist scholarship, especially socialist feminism has examined and critiqued the role of the family in the oppression of women.

The aspects that characterise the family are its patriarchal nature, the sexual division of labour and the economic dependence of women on men. The idea of the ‘family wage’ and the subsequent sexual division of labour within the family works at making the women economically dependent on men. Feminist scholars have also demonstrated how the familial ideology shapes and reinforces the public/private dichotomy and the identification of the family as private. Kapur and Cossman argue:
This understanding of the family as private, and beyond state intervention has operated to both immunise the oppression of women within this domestic sphere, as well as to obscure the extent to which this private sphere is itself created and protected by state regulation.\textsuperscript{57}

Moreover with the tremendous increase in the entry of women in the labour market the idea of sexual division of labour gets extended beyond the family to define gendered roles in the market and to relegate and restrict women to low paying and low skilled jobs. Feminist theorists have also argued that factors of caste and class mediated the nature of women's work and the sexual division of labour.\textsuperscript{58}

The familial ideology constitutes certain identities for women, which inform the legal regulation of women, both within the family and outside it. The two aspects of the familial ideology, moral and economic, have specific implications on the way law interprets justice for women. These two aspects are interconnected and work towards the relegation of women. Kapur and Cossman define them as follows:

[Moral regulation implies] the ways in which women's identities as wives and mothers are constituted – self-sacrificing
mothers, loyal and chaste wives, dutiful and virginal daughters— to name a few of the more central features. Familial ideology, which constitutes these identities for women, shapes and informs the legal regulation of women in the family ... [D]ivorce law, the restitution of conjugal rights, as well as many aspects of criminal intervention in the family, are all informed by this moral regulation, and in turn, operate to reinforce the identities ascribed for women therein. Women who live up to the ideals of motherhood and womanhood are accorded some protection; those who fail to measure up are penalized. [Economic regulation implies] the ways in which the assumption of economic dependency contained within familial ideology and sexual division of labour operates in women’s lives. Many aspects of legal regulation are shaped by assumptions of women’s economic dependency ... on male members of their families – fathers, husbands, adult sons ... [M]aintenance and property laws as well as the legal regulation of women’s work are shaped by and serve to re-inscribe women’s economic dependency.59
The major thrust of the campaigns against rape and dowry was on legal reform, yet after the enactment of laws the pressure could not be maintained. As a result the new laws were not used effectively by the courts to deliver justice to women. Moreover the campaigns themselves were limited in scope since they failed to address some fundamental questions like power balance between men and women, women's economic rights in the family and status quo in society. The solutions sought through legal reform did not transcend the patriarchal nature of the society, providing no new feminist analysis of the issues and women's empowerment. In cases particularly of rape, the emphasis on women's chastity, virginity and servility were seldom challenged by the IWM.

Despite the limitations of legal reform, we find that the women's movements takes recourse to law for addressing issues of gender justice, especially issues of sexual violence. In the following section, I examine the factors that impel this recourse, at the same time examining the very potential of law in comprehending sexual violence and ensuring gender justice.
In the first section of this chapter, section 4.1, I discussed some important provisions of the Indian Constitution that encourage gender justice and equality and some of their interpretations. It would be improper to say that the Indian Constitution completely lacks gender-sensitivity. The Fundamental Rights embody both the promise of equality and non-discrimination on the basis of sex, as well as provisions for positive discrimination or affirmative action favouring women. As I have described in this chapter the Court has interpreted several laws very progressively and taking into consideration the vulnerable and subordinate position of women in the Indian society.

Martha Nussbaum opines that the Indian Constitution has a number of resources to empower women. Firstly the Indian Constitution has an explicitly stated provision of non-discrimination on the basis of sex, which is not incompatible with affirmative action programmes for improvement of the social conditions of women. Secondly, “the explicit attention to freedom of assembly, freedom of travel, equality of opportunity, and labour rights sets up a favourable situation for women who may need to appeal for protection of just such rights in connection with their pursuit of social
equality". And thirdly, the understanding of 'equality' in the Indian Constitution is substantive rather than merely formal or abstract. Hence positive discrimination or protective legislation is not considered discriminatory *per se.*

However the very approach of the Court, though progressive, has mostly, though not entirely been a protectionist one. The Court does acknowledge the disadvantageous condition of women. However the purpose of these provisions is overridden by patriarchal protectionism and conservative notions of the family, sexuality, marriage and women's role in the society. Thus despite the very progressive nature of the Constitutional provisions, feminists have critiqued their implementation in practice.

In a similar vein, there has been a great deal of debate within feminist scholarship regarding the efficacy of law in the delivery of justice to women. Feminists have pointed out that law suffers from the same and gender-insensitivity that informs mainstream political discourse, and reflects parochial attitudes towards women. Nonetheless it is also being increasingly recognised that law could act as a potential discursive site for women.
Feminists argue that conditions of inequality and injustice arise out of a failure to accept and comprehend female sexual difference. These inequalities and conditions of discrimination then, cannot be addressed unless the concept of ‘sexuality’ is explored and thematised. Such thematisation facilitates the comprehension of sexual difference as well as its inclusion in political and legal discourses. The suppression of female experience in the discourse on sexuality is reflected in the way in which law understands the concept of sexuality (especially female sexuality) and its violation. Such an approach overlooks the aspect of power inherent in the definition of sexuality and sexual violence. Thus feminist scholars have tried to introduce into public discourse, the concept of power as a component of sexuality. This power is reflected as domination of one kind of sexual experiences over others.

This domination often manifests as sexual violence (in its multifarious forms), or ‘sexual terrorism’. Carole Sheffield defines sexual terrorism as a system in which males dominate and control females by frightening them. Under such a system, all females are potential victims of sexual violence, such as rape or harassment. Addressing these issues of violence requires a better and deeper understanding of the victimisation of women, which is itself a result of relationships of power.
The pervasive nature of sexual terrorism according to Sheffield is characterised by the “erosion of public support for victims and acquisition of respectability for one’s own cause [and] the exclusive focus of the law and the media … on the sexual nature of the crime”. Moreover the association of masculinity with aggressiveness and femininity with submissiveness underline most notions of sexual behaviour and sexual norms. Due to this sometimes the victims of wife-battering, for instance are counselled against arousing or angering the batterers. This way the victim is encouraged to internalise victimisation.

In exploring the concept of sexuality, some feminist researchers have argued that while some kind of discrimination has caste, class or community linkages, sexual violence can affect women cut across age, religion, ethnicity or class. This is what Jaggar asserts when she argues that “all women are liable to rape, to physical abuse from men in the home, and to sexual objectification and sexual harassment; all women are primarily responsible for housework, while all women who have children are held responsible for the care of those children; and virtually all women who work in the market work in sex-segregated jobs. In all classes, women have less money, power and leisure time than men”. Nonetheless one cannot ignore the caste, community or class affiliations that make some women ‘more vulnerable’ to
sexual violence. This is to say that the possibility of a woman being raped, or harassed depends by the socio-economic conditions within which she lives.

Analysing the feminist recourse to law against sexual violence, Menon presents an ingenious thesis of reconsidering the ‘body’ as the marker of selfhood, thus freeing the body from its sexuality. According to Menon the difficulty in acknowledging the sexual nature of an act is because “sex is not a clear and specific physical phenomenon always recognisable as such under all circumstances”\textsuperscript{65}. Yet when identified as a sexual attack the terror and pain involved is significantly transformed, because sexual violence is so constructed that it is ‘the most feared, most terrifying an humiliating form of attack’. Precisely due to this nature of the act, Menon explores a fundamental question:

Does the impact, and may be even sexual violence itself flows from the discourse which constructs ‘sex’, ‘sexual violence’ and ‘sexuality’ as aspects of the individual’s ‘real’ and ‘private’ self, so that to violate the sense of wholeness in this area is to threaten one’s belief in one’s unique selfhood?\textsuperscript{66}
According to Menon, feminist analyses of sexuality share a common assumption with the sexist and misogynist ideas, which defines sexuality as 'truest, deepest expression of selfhood'. Sexual violence is then considered as a violation of this sense of selfhood. Sexuality and violation of selfhood thus comes to be understood and perceived as associated with the 'body'. Based on this understanding, rape comes to be redefined as the 'violation of bodily integrity'. In cases of sexual violence thus, the emphasis is "not so much in the physical assault, but in the transgression of the victim's conceptions of sovereignty and selfhood".

The harm involved in acts of sexual violence like rape cannot be understood in physical or material terms so long as the 'body' as a physical object, is considered prior to all discourse. The assumption of the body as the site of selfhood governs the present discourse. However we need to comprehend the self in terms of a historical and cultural construct rather than a natural 'reality'. Menon argues:

The possibility of realising the emancipatory impulse of feminism lies not in concretising and more fully defining the boundaries of 'our bodies' through law, but in accepting 'the self' as something that is negotiable and contestable.67
With the acceptance of such a notion of selfhood and identity feminist practice can create a space wherein a constant negotiation of one’s identity and what constitutes ‘selfhood’ takes place. The endeavour of such an exercise is to free the self from some of the limitations that flow from its confinement and narrow association to the body. When the self is thus defined, sexual attack would not longer mean an attack on the selfhood of a woman. When the notion of the self is extracted from the body as its sole defining source to explore other dimensions that constitute the self, feminist engagement with law would lead to new horizons in defining and addressing sexual violence.

Various reasons could be cited for the universal vulnerability of females to sexual violence. One of them is the construction of the norms of masculinity and femininity, which have a reciprocal relationship with the ‘sex-role conditioning’ in the family. The familial ideology as discussed above informs the way in which legal regulation of women takes place. The construal of female sexuality in legal discourse has led feminists to pose a more fundamental question regarding recourse to law. As mentioned earlier, most feminist campaigns have aimed for legal reforms to address the existing gender-based inequalities and injustice. However it is increasingly being recognised that legal reforms are limited in addressing the existing
structures and patterns of domination. For instance, the Constitutional guarantees of formal legal equality are defeated by the ubiquitous assumptions of female roles and responsibilities that the familial ideology defines.

On the one hand, incessant appeals to law have marked feminist movements around the world. On the other, the potential of law as an emancipatory site is being questioned. This leads us to a fundamental question that feminist scholars have been debating on, and which Menon puts as: “Does law have the capacity to pursue justice? Can justice be conceived of in a universal sense?”68 There are two interrelated aspects of this question. On the one hand one must examine the potential of law to secure justice. On the other one also needs to examine the conception of justice from a feminist viewpoint.

In this light, Menon calls for a reconsideration of the engagement of feminism with law. Law has been an important premise to which demands for justice have been put forth by the women's movement. Menon however notes:

The experience of the last decade not only raises questions about the capacity of law to act as a transformative instrument,
but more fundamentally, points to the possibility that functioning in a manner compatible with legal discourse can radically refract the ethical and emancipatory impulse of feminism itself... The failure of the law to deliver justice in feminist terms is understood to be a result of the interpretation of the law in sexist ways, so that the law's capacity to be just would be freed from the biases of individuals.69

Nonetheless feminist recourse to law is seen as necessary and inevitable because law delivers rights to us. The feminist critique of law is accompanied by its recognition as a potential discursive terrain. According to Kapur and Cossman, relinquishing the terrain of law would imply surrendering a subversive site in favour of communal or patriarchal hegemony. Since law plays an important role in the construction of identity, feminists need to engage with law to point out the complex and contradictory ways in which it constitutes women. Feminists have used the equality-rights discourse to challenge the underlying structural inequalities. Similarly law could play an important role in feminist struggles if a fundamental shift is brought about in the way in which law is conceptualised. Kapur and Cossman argue:
Feminist engagement with law can be seen as an effort to transform the meaning of equality, gender and gender difference. It is a part of an effort to challenge dominant meanings, and the construction of women therein and supplant these meanings with alternative visions about women’s roles and identities in the world.⁷⁰

The feminist engagement with law indicates an endeavour to challenge through law the dominant constructions of gender, sexuality and family. “[Law] is a terrain of contested meanings, where the women’s movement has won important victories, particularly in condemning violence against women.”⁷¹ As described in the earlier section, despite the limitations of law reform, the campaigns against sexual violence managed to raise substantial consciousness and public awareness regarding issues that were unrecognised hitherto, or considered private.

Kapur and Cossman also see law as an instrument for enhancing women’s participation. According to them the reconceptualisation of law would require a shift in the focus from outcome to process. The process of engaging with law should encourage women’s participation. They argue that since the history of women’s movement has been for fuller and equal
participation in decision-making in the family and community, the bid for legal reform should also aim at the same. While laws have been formulated or amended to remove the obstacles or barriers from women's participation as equal members, it has failed to change the underlying substantive inequalities that reinforce their subordination. Therefore law needs to be rethought in a manner that addresses these inequalities. Since the fixing of identity and meaning takes place through law, its redefinition would require a dynamic understanding of women's experiences.

The feminist engagement with law is not only an attempt to inspire new legislations but also an attempt to critique the premise on which laws are based. This however does not mean abandoning law and legal strategies altogether. In this regard Menon draws from Derrida's theory of deconstruction. According to Derrida deconstruction does not result in the formation of an entirely 'new' discourse, which is free from the old one being deconstructed. Rather this deconstruction "always remains related to the discourse being deconstructed while transforming the terrain on which it operates revealing that which had been repressed".72

Similarly when feminist theory tries to deconstruct legal discourse, it should not abandon the terrain of law. Rather it should make visible what has been
hitherto repressed by the dominant discourse. When such a vision is reviewed, it will not only provide important insights into feminist engagement with law, but will also depict the ways in which such an engagement contrasts with the feminist visions of emancipation.

The concept of gender justice as embedded in the Indian Constitution and its feminist critiques have provided insights into the concept of justice. In this chapter I have tried to examine and demonstrate how justice for women in India is constrained by narrow understanding of women’s sexuality and their role in the society, as well as by a failure to incorporate female sexual difference in the understanding of law and justice. Thus despite the presence of several gender-justice provisions, justice still remains a distant goal for women. Similarly law too fails to account for the disadvantage that emanates from sexual difference. Judgements favouring women are based on patriarchal or conservative notions, and can do little to further the cause of gender justice.

Another important concern of gender justice in India is found in the debate over the UCC, which I examine in the next chapter.
NOTES AND REFERENCES

1 Granville Austin has called his work on the Indian Constitution by this name. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Oxford University Press, 1999).
3 Kailash Rai, *The Constitutional Law of India*, p. 100
8 Ratna Kapur and Brenda Cossman, ‘On Women, Equality and the Constitution’, p. 199
10 Ratna Kapur and Brenda Cossman, ‘On Women, Equality and the Constitution’, p. 200
14 c.f. D. D. Basu, p. 81. Only the clauses relevant to this study have been quoted.
15 Refer Anjali Kant, *Women and the Law*, pp. 133-135, for instances of the use of Article 14 in favour of women, especially with regard to employment.
16 Refer Ratna Kapur and Brenda Cossman, ‘On Women, Equality and the Constitution’, p. 213 and footnotes 43 and 44.
19 Mahendra P. Singh, *V. N. Shukla’s Constitution of India*, p. 306
20 The debate over the uniform civil code and personal laws is discussed in Chapter 5.
21 Refer Refer Anjali Kant, *Women and the Law*, pp. 153-162 for a list of the offences against women punishable by the IPC; also for some drawbacks of these provisions.

Ratna Kapur and Brenda Cossman, *Subversive Sites*, p. 180

Refer Ratna Kapur and Brenda Cossman, 'On Women, Equality and the Constitution', pp. 234-5

Ratna Kapur and Brenda Cossman, 'On Women, Equality and the Constitution', p. 235

Ratna Kapur and Brenda Cossman, *Subversive Sites*, p. 185


Workshop on women and law, NCERT, 1982, p. 44


Radha Kumar, *The History of Doing*, p. 128


Nandita Gandhi and Nandita Shah, *The Issues At Stake*, p. 41


Nandita Gandhi and Nandita Shah, *The Issues At Stake*, p. 40

Flavia Agnes, 'The Anti-Rape Campaign', pp. 103-4

Nandita Gandhi and Nandita Shah, *The Issues At Stake*, p. 48

Flavia Agnes has demonstrated how the pre-amendment period had witnessed progressive interpretation of laws regarding rape and the subsequent failure of the same in post-amendment phase. Refer Flavia Agnes, 'The Anti-Rape Campaign', pp. 125-7.

For these recommendations refer Flavia Agnes, *State, Gender and the Rhetoric of Law Reform* (Bombay: Research Centre for Women's Studies, SNDT, 1995), pp. 11-12
43 Flavia Agnes, 'The Anti-Rape Campaign', p. 130
44 Refer Flavia Agnes, *State, Gender and the Rhetoric of Law Reform*, p. 14; Agnes, 'The Anti-Rape Campaign', pp. 125-6
45 Radha Kumar, *The History of Doing*, p. 133
47 Nandita Gandhi and Nandita Shah, *The Issues At Stake*, p. 56
48 Refer Madhu Kishwar, *Off the Beaten Track: Rethinking Gender Justice for Indian Women* (New Delhi: Oxford University Press, 1999), p. 9
49 Refer Flavia Agnes, *State, Gender and the Rhetoric of Law Reform*, pp. 94-107 for the statements of the Amendment Acts.
50 Radha Kumar, *The History of Doing*, p. 124
52 Madhu Kishwar, 'Dowry Calculations: Daughter’s Rights in her Parental Family', in *Off the Beaten Track*, pp. 20-36
53 Madhu Kishwar, 'Rethinking Dowry Boycott', p. 13
54 Madhu Kishwar, 'Dowry Calculations', p. 36
56 Ratna Kapur and Brenda Cossman, *Subversive Sites*, pp. 88-9
57 Ratna Kapur and Brenda Cossman, *Subversive Sites*, p. 90
58 Ratna Kapur and Brenda Cossman, *Subversive Sites*, p. 93
59 Ratna Kapur and Brenda Cossman, *Subversive Sites*, pp. 97-8
62 Carole Sheffield, 'Sexual Terrorism', p. 183
63 Refer Carole Sheffield, 'Sexual Terrorism', p. 178


66 Nivedita Menon, ‘Embodying the Self: Feminism’ p. 101

67 Nivedita Menon, ‘Embodying the Self: Feminism’ p. 104

68 Nivedita Menon, ‘Rights, Bodies and the Law’, p. 285

69 Nivedita Menon, ‘Rights, Law and Feminist Politics’, p. 15


71 Ratna Kapur and Brenda Cossman, *Subversive Sites*, p. 290

72 Nivedita Menon, ‘Rights, Bodies and the Law’, p. 288