CHAPTER 3
PROTECTIVE PROVISIONS UNDER THE CONSTITUTION AND COMMISSIONS IN INDIA

3.1 Introduction

The Constitution of India, which was adopted by the Nation in 1950, is our grundnorm. It envisages certain objectives and ideals to be achieved by the State. One of the specific objectives is the equality of status and opportunity. This objective has been inserted in Preamble of the Constitution of India, Fundamental Rights and Directive principles of State Policy.¹ The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the socio-economic, educational and political disadvantages that they could be facing. The Fundamental Rights, among others ensure equality before the law, equal protection of law, prohibit discrimination against any citizen on grounds of religion, race, caste, sex or place of birth, and grant equality of opportunity to all citizens in matters relating to employment.² A woman can go to the Court if she is subjected to any discrimination.³ The extent of women participation in various nation-building activities is an important indicator of social progress. The framers of the Indian Constitution desired that women should be assigned an equal status with men not merely on the grounds of justice but also as a condition

of growth and adequate steps should be taken for transforming 'de jure into de facto equality'. Subsequently, Indira Gandhi, India's first woman prime minister, observed that no society could progress if half of its members did not have equal opportunity and their talent and capabilities were ignored.

It would indeed be worthwhile examining the nature and content of the various Constitutional and legal provisions, which have a bearing on the status of women. The preamble to the Indian Constitution undertakes 'to secure to all citizens justice – social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunity to promote among them all fraternity, assuring the dignity of individual and the unity of the nation. For achieving these objectives the Constitution of India contains a number of provisions. Indian women were granted important Constitutional and legal rights following independence. The Constitution of India adopted a land mark step in this direction by guaranteeing full equality and liberty to women and prohibiting trafficking. There are several schemes for welfare and growth of women. Moreover, the Constitutional Amendment in India in 1993 ushered in a new era of affirmative action by reserving one third of seats in local Government bodies for women. Nearly one million women are members and chairpersons of these bodies. Another Revolutionary Bill, reserving 33 percent of parliamentary and State Assemblies seats for women has been cleared by cabinet on 25th

---


February, 2010. The Cabinet has approved the amendment of Article 243D of the Constitution of India to reserve 50 percent of the total number of seats in panchayats for women. This move would significantly empower women at the grassroots level.

3.2 Fundamental Rights

The Fundamental Rights are defined as the basic human rights of all citizens. These rights, defined in Part III of the Constitution of India, apply irrespective of race, place of birth, religion, caste, creed or gender. They are enforceable by the Courts, subject to specific restrictions.

(i) Right of Equality to Women

(a) Equality Before Law

Article 14 provides equality before law i.e. no person in the State will be denied equality before law or the equal protection of law. Thus women in Indian society enjoy the same protection and treatment as men which is guaranteed by the Constitution of India. In Air India v. Nargesh Mirza, there were three clauses, these are as follow:

(a) Upon attaining the age of 35 years.

(b) Air Hostesses cannot marry within four years of the job.

---

6 The Tribune, February 26, 2010 at 2.
7 The Tribune, August 28, 2009 at 1.
10 AIR 1981 SC 1829.
(c) If they get married, their services will be terminated on the first pregnancy whichever occurs earliest.\textsuperscript{11}

Justice Fazal Ali of the Supreme Court while declaring clause (c) of the above provisions, that is termination of services on the first pregnancy as the violative of the Article 14, observed that:

\begin{quote}
 it seems to us that the termination of the services of an Air Hostess under such circumstances is not a callous and cruel act but an open insult to women hood – the most sacrosanct and cherished institution.\textsuperscript{12}
\end{quote}

Although, the (a) and (b) clauses are also violative of the Article 14 of the Constitution of India but the Court did not consider them as the violative of the Article 14 of the Constitution of India.

Though Article 14 of the Constitution of India prohibits class legislation yet permits reasonable classification. Women as a class were different from men as a class\textsuperscript{13}. Having in view the object of the legislation, women can be treated as a class and special laws can be made in their favour. Accordingly, various provisions have been declared valid where women have been given special treatment\textsuperscript{14}. For example Article 42 of the Constitution of India enjoins the State to make provision for securing just and humane conditions of work and for maternity relief. A law made to implement this Directive Principle of State Policy, securing maternity relief to women workers, would not be violative of Article 15(1), but would be

\begin{footnotes}
\item[D1] Id. at 1837.
\item[D2] Id. at 1850.
\end{footnotes}
within the preview of clause (3) of this Article. Section 125 of the Criminal Procedure Code, 1974 (Section 488 of the Old Code), which requires the husband to maintain his wife and not vice versa, has been held not discriminatory, for it merely provides benefits and protection to women and children in certain circumstances.\(^\text{15}\) Order 5, Rule 15 of Civil Procedure Code, 1908, which makes service of summon on the male members of the family has been held not discriminatory and it is a special provision covered by Article 15(3).\(^\text{16}\) Likewise, Section 14 of the Hindu Succession Act, 1956, absolutely vesting the inherited property in women which was earlier held by them as limited estates, has been held to be protected from attack under Article 15(3).\(^\text{17}\) Such provisions of law are treated as “permissive classification” not violating the principle of equality under Article 14 of the Constitution of India provided the classification is not arbitrary.\(^\text{18}\)

(b) **Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth**

Article 15(1) – The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Article 15(2) – 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:

---


\(^\text{16}\) *Shahdad v. Mohd.Abdulla*, AIR 1967 J& K 120.


(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.

Article 15(3) of the Constitution of India specifically provides that the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth as contained in Article 15, shall not prevent the State from making any special provisions for women and children. Article 15(3) lifts that rigour and permits the State to positively discriminate in favour of women to make special provision, to ameliorate their social, economic and political justice and accords them parity. Clause (3) of Article 15, which permits special provisions for women and children, has been widely resorted to, by the State and the Courts discussed below have always upheld the validity of the special measures in legislation or executive orders favouring women. These provisions could be seen in the sphere of Criminal Law under Section 497, Indian Penal Code—which expressly excludes the woman who has equally participated in the crime from being punished even as an abettor; only man is liable to be punished under this Section. Sections 47(2), 19 51(2), 20 53(2), 21 64, 22 125, 23 160(2), 24 360, 25 415, 26 Criminal Procedure Code, etc.

---

19 Section 47(2) reads: "Search of place entered by person sought to be arrested—If such place is in the actual occupancy of a female and who, according to custom, does not appear in public, the police officer shall before entering into the apartment give notice to female that she is at liberty to withdraw and shall afford reasonable opportunity to withdraw then he can enter or break open the apartment, otherwise he cannot enter into the apartment".

20 Section 51(2) reads: “Search of arrested person - where a female is arrested by the police officer, she can be searched only by another female with strict regard to decency and no by a policeman. It is a mandatory provision”. 
The Constitution of India, in Article 15(3), allows legislation providing for discrimination in favour of women and children. It was this provision which could save from attack of Section 36 of the Special Marriage Act. This Section allows maintenance pendente lite in a divorce proceeding only in favour of wives. The argument was that the Section makes a sex-based discrimination. The objection was rejected.27

On the strength of Article 15(3), several other statutory provisions in favour of women have been upheld. These include provisions exempting from punishment for adultery under Section 497, Indian Penal Code, provisions giving special rights to women in respect of bail under Section 497, Indian Penal Code, provisions authorizing service of summons on men only under Section 64, 

---

21 Section 53(2) reads: “Examination of accused by medical practitioner at the request of police officer -if a female is arrested and medical examination is necessary as to afford an evidence of commission of crime, such examination shall be made only by or under the supervision of a female registered medical practitioner”.

22 Section 64 reads: “Service when persons summoned cannot be found -when the summons cannot be served to the person summoned, it can be served to the adult male member of the family residing with him and it cannot be served to any female adult members of the family”.

23 Section 125 reads: “Order for maintenance of wives, children and parents -which recognizes and gives effect to the fundamental and natural duty of a man to maintain his wife, children and parents”.

24 Section 160(2) reads: “Police officer’s power to require attendance of witnesses -an exemption for female witness from attending the place or thana as is required by the investigating police officer. The investigating police officer has to go to the place of residence where the woman resides to gather information from her”.

25 Section 360 reads: “Order to release on probation of good conduct or after admonition -special protection to an accused who is under twenty years of age or any woman (of any age) convicted of an offence not punishable with death or imprisonment for life. If no previous conviction is proved against such offender, the Court can order for release on probation, on good conduct and on entering into a bond to keep the peace”.

26 Section 415 reads: “Postponement of execution of sentence of death in case of appeal to Supreme Court -empowers the High Court to postpone the execution of death sentence in case the convicted woman is pregnant”.

Criminal Procedure Code, provisions for maintenance of women only under Section 125 and provisions for reservation of seats for women in local bodies under Article 243 D of the Constitution of India.

This particular advantage has been conferred on the women because the framers of the Constitution of India were well aware of the unequal treatment meted out to women in India from the time immemorial. The other reason for making special provisions for them is their physical structure and the performance of maternal functions which place them at a disadvantage in the struggle for subsistence. The Supreme Court in *T. Sudhakar Reddy v. Govt. of A.P.*, upheld the Constitutional validity of proviso to Section 31(1) (a) of the Andhra Pradesh Cooperative Societies Act, 1964 and of the Rules 22(c) and 22A(3)(a) framed thereunder relying upon the mandate of Article 15 clause 3. The proviso read with the said rules provided for nomination of two women members by the Registrar to the managing committee of the cooperative societies with a right to vote and to take part in the meetings of the committee. The Court upheld the validity of these provisions on the ground that Article 15(3) of the Constitution of India permitted the making of special provisions for women. Thus, it would be no violation of Article 15 if institutions are set up by the State exclusively for women – or places reserved for them at public entertainments or in public conveyances. The reservations made for women in educational institutions and public employment are protected by Article 15(3). In *C. Rajkumari*

---

29 1993(4) SCC 439.
v. Commissioner of Police, Hyd, a single Judge of the Andhra Pradesh High Court has held that if a beauty contest indecently represents any woman by depicting in any manner the figure of a woman, form, body or any part thereof in such a way so as to have the effect of being indecent, or defrogatory to or denigrating women be violative of the provisions of the Indecent Representation of Women (Prohibition) Act, 1986 and also unconstitutional as it violates Articles 14, 21 and 51A of the Constitution of India. In Yousuf Abdul Aziz v. State of Bombay, the validity of Section 497, Indian Penal Code, which punishes only the male counterpart – in the offence of adultery and exempts the women from punishment was challenged as violative of Articles 14 and 15(1) of the Constitution of India. The petitioner contended that even though the woman may be equally guilty as an abettor, only the man was punished, which violates the right to equality on the ground of sex. The Supreme Court upheld the validity of the provision on the ground that the classification was not based on the ground of sex alone. The Court obviously relied upon the mandate of Article 15(3) to uphold this provision. Similarly, in Sowmitri Vishnu v. Union of India, the petitioner challenged the validity of Section 497, Indian Penal Code on the ground that it violates Articles 14 and 21, because this provision recognizes only the husband of the adulterers as the aggrieved party and not the wife of the adulterer. It was contended that Section 497 is a flagrant instance of gender discrimination and male chauvinism. The Supreme Court held that the law does not violate either Article 14 or 15, on the ground that the offence will be

31 AIR 1954 SC 321.
32 AIR 1985 SC 1648.
committed only by a man. The Supreme Court obviously followed
the ratio of *Yousuf Abdul Aziz v. State of Bombay*, as declared by a
Constitutional Bench. In *Revathi v. Union of India*, the Supreme
Court held that Section 198(2) of Criminal Procedure Code, which
gives the husband of adulterers the right to prosecute the adulterer
but does not give the wife of the adulterer the similar right, is not
discriminatory.

(c) Women Reservation in State Services/Union Services and in
Local Bodies

Provisions providing for reservation of seats for women in
local bodies or in educational institutions are valid. The Supreme
Court has held in the case of *Govt. of A.P. v. P.B. Vijay Kumar*, that the reservation to an extent of 30% made in the State services by
Andhra Pradesh Government to women candidates is valid. The
power conferred upon the State by Article 15(3) is wide enough to
cover the entire range of State activity including employment under
the State. Thus making special provisions for women in respect of
employment or posts under the State is an integral part of Article
15(3). This power conferred under Article 15(3), is not whittled
down in any manner by Article 16. In *Union of India v. K.P.
Prabhakaran*, the Supreme Court upheld the decision of the
Railway Administration to reserve the posts of Enquiry-cum-
Reservation Clerks in Reservation offices in metropolitan cities of
Madras, Bombay, Calcutta and Delhi exclusively for women and the
further decision that the Reservation offices in the said metropolitan

---

33 *Supra* note 31.
34 AIR 1988SC 835.
35 AIR 1995 SC 1648.
36 (1997)1 SCC 635.
cities should constitute a seniority unit separate from the rest of the
cadre of Enquiry-cum-Reservation Clerks. The Court while coming
to the above conclusion relied upon the decision of Govt. of A.P. v. P.B. Vijay Kumar,\textsuperscript{37} wherein it was stated that since Articles 15(1) and 15(3) go together, the protection of Article 15(3) would be
applicable to employment under the State falling under Article 16(1)
and (2) of the Constitution of India.

The 73\textsuperscript{rd} and 74\textsuperscript{th} Amendments to the Indian Constitution
effected in 1992 provide for reservation of seats to the women in
Elections to the Panchayat and the Municipalities.\textsuperscript{38} Perhaps, this
was the first attempt by the parliament to provide reservation for
woman in legislatures. According to Article 243D of the
Constitution of India, not less than one-third of the total number of
seats to be filled by direct election in every Panchayat shall be
reserved for woman. Such seats may be allotted by rotation to
different constituencies in a Panchayat. Not less than one-third of
total number of offices the chairpersons in the Panchayat at each
level shall be reserved for women.

However the Cabinet has approved the amendment of Article
243D of the Constitution of India to reserve 50 percent of the total
number of seats in panchayats for women. A bill to this effect is
likely to be introduced in the winter session of Parliament. The
purposed amendment will increased reservation for women in the
total number of seats to be filled by direct election, offices of
chairpersons reserved for Scheduled Castes and Scheduled Tribes, to

\textsuperscript{37} Supra note 35.
\textsuperscript{38} The Constitution of India (73\textsuperscript{rd} and 74\textsuperscript{th} Amendment) Act, 1992.
50 percent in all tiers of panchayats. This would empower women at the grassroots level.\textsuperscript{39}

According to Article 243T of the Constitution of India, which was added by the Constitution (74\textsuperscript{th} Amendment) Act, 1992 makes similar provisions for reservation of not less than one third of the total number of seats to women in the direct elections to every Municipality. Therefore, there is a successful reservation of 33% seats for women in local bodies, which acquires poignant importance. It is well documented that the women of India made a distinguished contribution to the country in all spheres of life therefore there is nothing unreasonable or unconstitutional in making reservation for woman in legislatures. It is important to remember that the Article 15(3) of the Constitution of India empowers the State to make special provisions for women and children.

The Parliament introduced the Constitution (81\textsuperscript{st} Amendment) Bill seeking to reserve one-third of seats in Lok Sabha and State Assemblies for women in the month of September, 1996. The Bill has been referred to a joint committee of Parliament and finally it is cleared by Cabinet on 26\textsuperscript{th} February, 2010. Reservation represents a big step towards empowering the women to play their rightful part in a democratic set up and in the political process at the decision-making level. This measure is towards correcting the gender injustice. No doubt women’s participation in politics is growing, but very slowly.

The Protection of Women from Domestic Violence Act, 2005 promotes the rights of women guaranteed under Articles 14 and 15

\textsuperscript{39} Supra note 7.
of Constitution of India. Domestic Violence is one among several factors that hinders women in their progress and this Act seeks to protect them from this evil. It indeed effects a classification between women and men, protecting only women from domestic violence, but this classification is founded on an intelligible differentia, namely, gender, and also has a rational nexus with the object of the Act. Further, the Act is far from arbitrary, in that it is a well-thought and necessary attempt to curtail domestic violence and eventually vanquish it. It is to be remembered that it is generally women who are the victims of domestic violence, and not men. At this stage, it is also essential to keep in mind Article 15(3) which empowers the State to make legislations like this for the benefit of women, thus creating an exception in their favour against the operations of Article 15(1).40

(d) Equality of Opportunity in Matters of Public Employment

Article 16(1) guarantees that “there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State”. In this a reference may be made to the case of C.B. Muthamma v. Union of India,41 where the rules requiring female employees to get permission before marriage and denial of right to employment to married women were held discriminatory and violative of Article 16 of the Constitution of India. Justice V.R. Krishan Iyer of the Supreme Court of India declaring this rule to be in defiance of Article 16 went on to observe:

If a married man has a right, a married woman,
other thing being equal, stands on no worse

41 AIR 1979 SC 1868.
This misogynous posture is a hangover of the masculine culture of manaclng the weaker sex forgetting how our struggle for national freedom was also a battle against women’s thralldom. Freedom is indivisible, so is justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis half of India’s humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and law in action.42

He went on to observe further that:

We do not mean to universalize or dogmatize that men and women are equal in all occupations and all situations and do not exclude the need to pragmatize where the requirements of particular employment, the sensitivities of sex or peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equity must govern.43

Article 16(4) of the Constitution of India provides for the reservation of appointments or posts in favour of any backward class of citizens and its object has been beautifully stated by Justice Jeevan Reddy of the Supreme Court when he said: In short, the

42 Id. at 1870.
43 Ibid.
object behind Article 16(4) is empowerment of the deprived backward communities to give them a share in the administrative apparatus and in the governance of the community.\textsuperscript{44} Taking into consideration the fact of status and position of women they enjoy and the way they are ignored, they fulfill almost all the characteristics of a deprived backward community. As a class distinct from men they are considered backward in all the spheres, social, economic and educational. That is why it was thought that the women should not be treated unfavourably and every possible step should be taken in achieving this Constitutional goal of putting women at par with men.\textsuperscript{45}

(e) Protection of Certain Rights Regarding Freedom of Speech, etc.

Article 19 guarantees to all the citizens both men and women the ‘right to freedom of speech and expression’.\textsuperscript{46} Thus everyone has a fundamental right to form his own opinion on any issue or general concern.

(ii) Right to life

Life and personal liberty of everyone (may be a male or a female) is protected by the Article 21 of the Constitution of India which provides that ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’. Right to life is regarded as the most precious fundamental right. The expression ‘life’ assured under Article 21 does not connote mere animal existence but it has got a much wider meaning. The birth of a

\textsuperscript{44} Indira Sawhney v. Union of India, AIR 1993 SC 521.
\textsuperscript{45} Supra note 9 at 32.
\textsuperscript{46} Article 19(1), Constitution of India.
girl is not considered as a matter of pleasure even today in many parts of India. Nearly about 105 female infants were killed every month throughout the year 1997 in Dharampur District of Tamil Nadu. In Punjab every fifth girl child is missing.47 In Uttar Pradesh around one lac female fetuses are killed every year.48 The Hill State of Himachal Pradesh registered an estimated 7,500 female foeticide every year in the year of 2006, taking its gender ratio among the lowest in the country.49 According to the third National Family Health Survey, 2007 Himachal Pradesh is the second State after Punjab where preference for a son still prevails.50 The female sex ratio in the State of Himachal Pradesh in the age group of zero to six years of age, which was 851 in the year 2001, has been improved to 924 in the year 2008. In order to check female foeticide Himachal Government awards Rs. 10,000 to a person who gives authentic information about the female foeticide.

Female foeticide is increasingly being practiced by the educated upwardly mobile population of India. The educated people in the country consider sons as a source of wealth and poverty is only reason for these selective abortions. This is happening inspite of selective abortions being made illegal in the country.51 Thousand of female infants are murdered in their mother’s wombs, after determining the sex in spite of the enactment of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. Today, India tops the list in illegal abortions and female

47 The Hindustan Times, July 3, 2003 at 1.
infanticide in the world. According to the United Nations International Children’s Emergency Fund (UNICEF), 40 to 50 million girls have gone ‘missing’ in India since 1901 – missing because they were not allowed to be born, or if born, murdered within days or even hours of their birth.\(^5^2\) In the month of August, 2008, a couple moved the Bombay High Court to abort their 26-week-old foetus, which was diagnosed with congenital cardiac disorder. The Bombay High Court rejected the plea of Niketa Anand to abort her 26-week-old foetus and upheld the provisions of the Medical Termination of Pregnancy Act, which bans the abortion of foetus more than 20 week old.\(^5^3\) The Constitution of India may be interpreted to mean that the word ‘person’ applies to all human beings including the unborn offsprings at every state of gestation. The State can not discriminate against persons who are fetuses by offering them less or no protection than other persons. Therefore, the State is under an obligation under Article 21 not only to protect the life of unborn child from arbitrary and unjust destruction but also not to deny its equal protection under Article 14 of the Constitution of India.\(^5^4\)

The statement of objects and reasons declares that the Protection of Women from Domestic Violence Act, 2005 was being passed keeping in view the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution of India. Article 21 confers the right to life and liberty in negative terms, stating that it may not be taken away except by procedure established by law,

\(^{52}\) Supra note 18 at 64-65.
\(^{53}\) Vijay Sharma v. Union of India, AIR 2008 Bom 29.
which is required, as a result of judicial decisions, to be fair, just and reasonable. The right to life has been held to include the following rights (which are reflected in the Protection of Women from Domestic Violence Act, 2005) among others:

1. The right to be free of violence: In *Francis Coralie Mullin v. Union Territory of Delhi, Administrator*, the Supreme Court states, any act which damages or injures or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21 of the Constitution of India. This right is incorporated in the Protection of Women from Domestic Violence Act, 2005 through the definition of physical abuse, which constitutes domestic violence (and is hence punishable under the Act). Physical abuse is said to consist of acts or conduct of such nature that they cause bodily pain, harm, or danger to life, limb or health, or impairs the health or development of the aggrieved person. Apart from this, the Act also includes similar acts of physical violence and certain acts of physical violence as envisaged in the Indian Penal Code within the definition of domestic violence. By adoption of such an expansive definition, the Act protects the rights of women against violence.

2. The right to dignity: In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, the Supreme Court emphasized the fact that the right to life included in

---

56 AIR 1997 SC 152.
its ambit the right to live with human dignity. The right to dignity would include the right against being subjected to humiliating sexual acts. It would also include the right against being insulted. These two facets of the right to life find mention under the definitions of sexual abuse and emotional abuse, respectively. A praiseworthy aspect of the legislation is the very conception of emotional abuse as a form of domestic violence. The recognition of sexual abuse of the wife by the husband as a form of violation to the person is creditable, especially as such sexual abuse is not recognised by the Indian Penal Code as an offence. These acts would fall within the confines of domestic violence as envisaged by the Act, though the definition would not be limited to it.

3. The right to shelter: In *Chameli Singh v. State of U.P.*, the Supreme Court held that the right to life would include the right to shelter, distinguishing the matter at hand from *Gauri Shankar v. Union of India*, where the question had related to eviction of a tenant under a Statute. Sections 6 and 17 of the Protection of Women from Domestic Violence Act, 2005 reinforce this right. Under Section 6, it is a duty of the Protection officer to provide the aggrieved party’s accommodation where the party has no place of accommodation, on request by such party or otherwise. Under Section 17, the party’s right to continue staying in the shared household is protected. These

---

57 AIR 1996 SC 1051.
58 AIR 1995 SC 55.
provisions thereby enable women to use the various protections given to them without any fear of being left homeless.

(iii) Educational Rights

The most basic value is of survival and everything comes after that. The first right is the right to be born and not to be aborted purely because one is a girl. This right of survival is being snatched away (female foeticide) with the help of modern science and technology in contravention to existing laws that forbid any such activities. Women, due to their ignorance of such laws suffer unspeakably because they are not educated and hence are unable to defend their unborn and defend for themselves. If a girl is born, despite all effects to the contrary, the question comes of her right to remain alive and live with dignity, and as an individual a term not understood well in connection with female species. Here we are concerned, directly with the right to education. Right to education implies the right to information about law, health, care and opportunities in different fields of activity including the right to a career. Only when this right is protected one can expect to have a congenial atmosphere for the protection and promotion of human rights of women.  

Even when education is free, there are many costs to attending a school including uniforms, textbooks and participation in social activities of the school. Added to this is the opportunity cost of sending girls to school when they could be helping at home with household work or with family’s income – earning activities. This

---

59 www.punabnewsline.com/content/view accessed on 06.04.2009.
also explains the higher school drop out rate for girls when they are growing up, since their opportunity cost for staying at school keeps increasing for their families.\textsuperscript{60}

The other factors such as lack of conveniently located schools, flexible hours, irrelevant curricular, non-availability of female teachers and the absence of single sex schools play an even greater role in preventing girls from enrolling in schools. The location of a school is an important factor affecting parents' decision. Longer distance is often perceived as a threat to a daughter's security and might make the parents reluctant to send their daughters to school. Education helps a person grow cognitively, intellectually and emotionally and enables a person to take right decisions on the basis of logic and reason. Women are empowered and their human rights protected and promoted in India, if we concentrate on educating the girl child who is often discriminated against and whose rights are relegated to background in comparison to those of the male child and the irony of all this is that she is not even aware of the prevailing situation which undermines her worth as an individual and makes her a second grade citizen.\textsuperscript{61}

So education is a need because the children of educated mothers improve their capabilities and thereby enlarge their choices enjoying long and healthy life, educated environment and having access to better educated qualifications.\textsuperscript{62}

Despite the Constitutional guarantee of equality of sexes, rampant discrimination and exploitation of women continues. The

\begin{thebibliography}{99}
\bibitem{60} Ibid.
\bibitem{61} Ibid.
\bibitem{62} Ibid.
\end{thebibliography}
incidence of bride burning, woman battering, molestation and ill-treatment of women are on increase. Their discrimination and exploitation in father’s house, in in-law’s abode and at work place are still the order of the day. The real and viable solution to discrimination against the girl child lies in education.  

The relationship between education and poverty reduction is thus quite straight and linear as education is empowering, it enables the person to participate in the development process, it inculcates the knowledge and skills needed to improve the income earning potential and in turn the quality of life. Moreover, education of girls and women helps in improving the number of other indicators of human development.

Education has been recognized as the centerpiece of human resource development, it is realized at the highest levels that education will play a key role in balance socio-economic development. However, it has been observed that India suffers from very low literacy even compared to other developing countries. Though the number of literate people in India has increased over the years, but still has the largest number of uneducated children in the world. Two-third of them are girls. Government Reports indicate many children between 6-14 years do not attend school. Many Governments run schools do not have the most basic facilities such as sanitation facility, a reason good enough for girls to avoid going to school, as early as the age of 12. Many schools in rural areas are

---

64 Inaugural address by Hon’ble Justice Shri S. Rajendra Babu, Chairperson, NHRC at National Level Seminar on ‘Right to Education’ held on 11th & 12th September, 2008 in New Delhi.
too far for girls to reach and transportation in non-existent. Concerns for her security are reasons enough for parents to abandon educating their girl child. The number of sexual abuse and domestic violence cases against women clearly throw light on the fact the women in India do not enjoy even basic rights, their health, education and empowerment.

The Constitution of India provides provision for compulsory education to all children. According to Article 21-A\textsuperscript{66} of the Constitution of India, the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Even before insertion of the Article 21-A, new dimensions were given to the fundamental right to life and personal liberty and child’s right to education was one of the expanded meaning given by the Courts to enable the citizens to enforce this right as fundamental right. More than six decades after independence, the Indian Government has cleared the Right of Children to Free and Compulsory Education Bill, 2008.

The Bill providing for free and compulsory education as a fundamental right of children in the 6-14 age group was introduced in the Rajya Sabha in December, 2008 and after approval the Rajya Sabha passed Bill to The Lok Sabha for its consideration and approval in July 20, 2009.\textsuperscript{67} The Bill was also approved by the Lok Sabha. Now the Bill has been enacted into Act. The move should provide a much needed boost to the country’s education sector.

Key provisions of the Act include:

\begin{itemize}
  \item Inserted vide the Constitution of India (Eighty-Sixth Amendment) Act, 2002.
  \item \textit{The Tribune}, July 21, 2009 at1.
\end{itemize}
• 25% reservation in private schools for disadvantaged children from the neighbourhood, at the entry level. The Government will reimburse expenditure incurred by schools.

• No donation or capitation fee on admission.

• No interviewing the child or parents as part of the screening process.68

Under Article 41 the Constitution of India, the State is empowered to make effective provisions for right to education. Article 45 mandates the State to make provision for free and compulsory education for the children below the age of 14 years within the time limit of 10 years from the date of the commencement of the Constitution of India. Article 46 mandates the State to promote with special care the educational interest of the weaker sections of the society. The right to education, as understood in the context of Articles 45 and 46 means:

(a) every child-citizen of this country has a right to free education up to the age of 14 years.

(b) after the age of 14 years, his right to education is circumscribed by the limit of the economic capacity of the State and its development; and

(c) special care of the rural sections and weaker sections of the society shall be taken.

The active role of judiciary in the interpretation of Article 21 of the Indian Constitution had brought the right to education within

the scope of the Article 21 of the Constitution of India. In *Unni Krishnan J.P. v. State of Andhra Pradesh*, the Supreme Court was approached by the petitioners to re-examine the correctness of the decision delivered by the Hon’ble Supreme Court in *Mohini Jain v. State of Karnataka*. The petitioners running medical and engineering colleges in the State of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu, contended that if Mohini Jain’s verdict was implemented and followed by the State Governments, they would have to close down their colleges. The Supreme Court was approached to ascertain the precise position of the decision and its implications.

In Mohini Jain’s case, Karnataka Government had issued a notification dated 5th June, 1989 under Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984. The notification provided for charging the fee in private medical colleges into three categories. The first being reserved for those who are selected on the basis of merit by the Government. The fee fixed for them was only Rs. 2,000 per annum. The second category was of those who hailed from Karnataka State but could not get admission against Government seats. For them the fee was fixed at Rs. 25,000. The third category was of those who did not come from Karnataka State. They were to deposit Rs. 60,000 per annum as tuition fee.

Miss Mohini Jain from Meerut applied admission in MBBS course in one of the private medical colleges in Karnataka. She was informed by the college that if she pays Rs. 60,000 towards the first
year’s tuition fee and furnishes a bank guarantee for the fees payable for the remaining years of the MBBS Course, she would be admitted. She was also asked to pay capitation fee of Rs. 4,50,000 as a condition of admission. The Supreme Court held that every citizen has a right to education under the Constitution of India. The State is under the Constitutional obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligations through State owned or State recognised educational institutions. When the State Government grants recognition to the private educational institution it creates an agency to fulfill its obligation under the Indian Constitution. The students are given admission in recognition to their right to education under the Constitution of India. Charging capitation fee in consideration of admission to educational institutions was thus held to be patent denial of a citizen’s right to education under the Constitution of India.

The Court further elaborated that Indian civilization recognizes education as one of the pious obligation of human society. To establish and administer educational institution is considered a religious and charitable object. Education in India has never been a commodity for sale. Capitation fee brings to the fore a clear class bias. It enables the rich to take admission whereas the poor has to withdraw due to financial inability. A poor student with better merit cannot get admission because he has no money whereas the rich can purchase the admission. Capitation fee cannot be sustained in the eye of law.
In Unni Krishnan’s case, the right to education came to be more elaborately explained and engrafted to Article 21 of the Indian Constitution. The first question in this case was whether right to education is a fundamental right under the Article 21 of the Constitution of India. The Supreme Court of India declared Article 21 as the heart of fundamental rights which has received expanded meaning from time to time and there is no justification as to why it cannot be interpreted in the light of Article 45 wherein the State is obliged to provide education up to fourteen years of age. The education brings excellence, it enriches the mind and illuminates the spirit. It prepares a child for a good citizenship. It liberates from ignorance, superstition, prejudices and ultimately unfolds the vision and truth.

While declaring the children’s right to education as fundamental right under Article 21 of the Indian Constitution the Court clarified that the fundamental rights and directive principles are supplementary to each other. The Supreme Court of India reiterated its previous views that fundamental rights are empty vessels into which each generation must pour its contents in the light of experiences. Directive principles supply life and blood to fundamental rights.

Part III and Part IV of the Indian Constitution are like two wheels of a chariot and to give absolute primacy to one over the other is to disturb the harmony of the Constitution of India.

---

72 Supra note 69 at 2191.
Articles 41, 45 and 46 of the Constitution of India constitute a simple directive that for the advancement of the nation, the State is obliged to ensure that child is imparted good education.

Education develops the understanding and knowledge and it makes the human being powerful. Education right flows from Article 21. This right is, however, not an absolute right. Its contents and parameters have been determined in the light of Articles 21, 41, 45 and 46 of the Constitution of India. Right to education understood in the context of Articles 41 and 45, means: (a) every male or female child/citizen of this country has a right to free education until he completes the age of 14 years; and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.\(^7\)

Another question to be determined by the Supreme Court was whether a citizen has a right to establish educational institution as a part of his right guaranteed to him by Article 19(1)(g) of the Constitution of India. The Supreme Court held that a citizen of this country may have a right to establish an educational institution but no citizens, person or institution has a right much less a fundamental right, to affiliation or recognition, or to grant-in-aid from the State. Therefore, there is no fundamental right under Article 19(1)(g) to establish an educational institution, if recognition or affiliation is sought for such an educational institution. The establishment of educational institutions is not a trade, business or a profession or

\(^7\) Supra note 69 at 2179.
occupation as stipulated in Article 19(1)(g) of the Constitution of India.\textsuperscript{77}

The Supreme Court, however categorically held that education is the second highest sector of budgeted expenditure. Overruling the Mohini Jain’s verdict the Supreme Court held that in comparison to other countries, we spent only 3 percent (it is likely to be raised to 6%) of our gross national product on education.\textsuperscript{78}

The Supreme Court issued the following guidelines to this effect:\textsuperscript{79}

Firstly, the professional educational institution must be run by public trust registered under Societies Registration Act, 1860.

Secondly, at least fifty percent of the seats in every professional college must be filled by the nominee of Government on the basis of merit, and fifty percent seats shall be filled by those candidates who are prepared to pay fees prescribed therefore on the basis of inter se merit determined on the same basis as in the case of free seats. The number of seats shall be fixed by appropriate authority. The application for admission shall be issued by the competent authority. Each college shall intimate to the students and competent authority fee chargeable. Every State Government shall forthwith constitute a committee to fix the ceiling on the fees chargeable. The result of entrance, if any, held should be published at least in two leading newspapers in English and vernacular. There shall be no reserve quota for management or for any family.

\textsuperscript{77} Id. at 2182.
\textsuperscript{78} Ibid.
\textsuperscript{79} Id. at 2248.
However, the reservation can be made for constitutionally permissible classes with the approval of affiliating university.

The Supreme Court held that:

(a) The citizens of this country have a fundamental right to education. The said right flows from Article 21 of the Indian Constitution. This right is, however, not an absolute right. It contents and parameters have to be determined in the light of Articles of 41 and 45 of the Constitution of India. Thus, every child, who is citizen of this country, has a fundamental right to free education until he completes the age of fourteen years. Thereafter his right to education is subject to the limits of economic capacity and development of the State.

(b) The obligations created by Articles 41, 45 and 46 of the Constitution of India can be discharged by the State either by establishing institution of its own or by aiding, recognizing and/or granting affiliation to private educational institutions. Where aid is not granted, it may not be insisted that the private educational institution shall charge only that fees as is charged for similar courses in Government institutions. The private educational institutions have to and are entitled to charge a higher fee, not exceeding the ceiling fixed in that behalf. The admission of students and changing of fee in these private educational institutions shall be governed by the scheme evolved herein set out in Part III of the judgment.
(c) Affiliation or grant-in-aid can only be given on fulfilling certain conditions.

(d) Section 3-A which was added in the year 1992 by amending the Andhra Pradesh Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983, authorized the college to admit 50 percent seats on the basis of entrance examination without regard to their merit. Section 3-A came into force on April 15, 1992. On May 25, 1992 the Government of Andhra Pradesh issued a notification inviting applications for permission to establish Medical, Dental and Engineering Colleges.80

Section 3-A was challenged in the High Court of Andhra Pradesh. The High Court of Andhra Pradesh quashed the impugned Section holding the same as violative of Article 14 of the Indian Constitution. On special leave to the Supreme Court, the Supreme confirmed the decision of the High Court of Andhra Pradesh.81

The implications of Unni Krishnan's verdict were that right to education is available to children who are citizens of India and are below the age of fourteen years. The capitation fee had been retained with reasonable restrictions which, however, cannot be charged arbitrarily. The Apex Court has not touched the main problem that is the problem of child's education.82

Making education compulsory may prove to be more difficult. Despite the law banning child labour, a large number of children are still engaged in menial jobs. It will be a major national task to bring

80 Id. at 2253.
81 Id. at 2182.
82 Id. at 2179.
them all to school, considering that many of them add to the meagre income of their families.

(iv) Right Against Exploitation (Article 23, Constitution of India)

Irrefutable is the fact that trafficking in women and children, an obscene affront to their dignity and rights, is a gross commercialization of innocent human lives, indulged in by organized criminals. Trafficking violates all known canons of human rights and dignity. In this world of tragic and complex human abuse, women and children are from a particularly vulnerable class. In the existing social scenario in India, vulnerability is a product of inequality, low status and discrimination as well as the patriarchal and captivating authority unleashed on children, especially the girl child. All of this is further compounded by an apathetic attitude of society fuelled by a mindset which views women as mere chattels. With no freedom of choice and options for life with dignity, these helpless women and children are merrily trafficked and exploited forcing them to lead a life crippled with indignity, social stigma, debt bondage and a host of ailments including HIV/AIDS.\textsuperscript{83} Trafficking clearly violates the fundamental rights to life with dignity. It also violates right to health and health care, right to liberty and security of person, right to freedom from torture, violence, cruelty or degrading treatment. It violates rights for children who have been trafficked, or victims of child marriages,

their right to education, it violates the right to employment and the right of self determination.⁸⁴

Article 23 of the Constitution of India which prohibits traffic in human beings and forced labour provides that:

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

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

Traffic in human being means selling and buying men and women like goods and includes immoral traffic in women and children for immoral or other purpose. This Article protects the individual not only against the State but also against private citizens. It imposes an obligation on the State to undertake measures to abolish the evils of traffic in human beings and forms of forced labour wherever they are found.

 Trafficking consists of all acts involved in the recruitment or transportation of persons within or across borders, involving deception, coercion or force, debt bondage or fraud, for the purpose of placing persons in situations of abuse or exploitation, such as

⁸⁴ Ibid.
forced prostitution, slavery-like practices, battering or extreme cruelty, sweatshop labour or exploitative domestic services.85

Trafficking is the third most lucrative illicit business in the world after arms and drugs a major source of organized crime revenue.86

The trafficking is by and large a gendered phenomenon. Although trafficking of men and young boys is also taking place within and from the region, evidence from major Government and Non-Governmental Organisation sources indicates that the incidence of trafficking of women and girls over the past decade has escalated considerably. The majority of trafficking in India, both trans-border and in-country, happens for the purpose of commercial sex work and over 60 percent of those trafficked into sex work are adolescent girls in the age-group of 12-16 years. Traffic in human beings includes ‘devadasi system’.87

In South Asia, women are now reported to constitute up to 35 percent of new HIV infections. A complex web of socio-cultural and macro-economic factors affect women’s vulnerability to HIV, including poverty migration, urbanization, gender inequalities compounded by women’s lack of autonomy, abuse within and outside families, insufficient access to health care services, violence and ethnicity. Significantly, these factors also influence women’s vulnerability to trafficking.88

87 Ibid.
(v) Right to Constitutional Remedies (Articles 32-35, Constitution of India)

Right to Constitutional remedies 'is the very soul of the Constitution of India and the very heart of it'. It is true that a declaration of Fundamental Rights is meaningless in the absence of an effective machinery to enforce them. It is the remedy which makes a right, a right in reality. If there is no remedy there is no right at all.

Article 32 of the Constitution of India which itself is a Fundamental Right provides for an effective remedy for the enforcement of other Fundamental Rights. Not only this, Article 226 of the Constitution of India also empowers all the High Courts of India to issue the writs for the enforcement of Fundamental Rights.\(^8^9\)

Article 32(1) guarantees the right to move Supreme Court by appropriate proceedings for the enforcement of the Fundamental Rights. Clause (2) of the Article confers power on the Supreme Court to issue appropriate directions or orders or writs. Under this Article Supreme Court’s power to enforce Fundamental Rights is widest. However, it is guaranteed by the Constitution of India that whenever there is violation of Fundamental Rights any person can move to the Court for an appropriate remedy. This right is restricted and can also be abrogated in certain situations according to Articles 33 and 34.

3.3 Directive Principles of State Policy Relating to Women

The Directive Principles of State Policy contained in Part IV of Constitution of India incorporate many directives to the State to

\(^8^9\) Supra note 13 at 23-25.
improve the status of women and for their protection. Part IV of the Constitution of India enshrines the ‘Directive Principles of State policy’ where by the State shall strive to promote the welfare of the people by securing to all its citizens, justice-social and economic irrespective of sex.90

To achieve the objective of social and economic justice in order to bring equality of status certain directive principles have been provided in Part IV of the Constitution of India.91 Article 38(2) of the Constitution of India clearly provides that the State shall endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

The right to adequate food and the Fundamental Right to be free from hunger is a matter of International Law, specifically enshrined in a number of human rights instruments to which States are committed. The United Nations has identified access to adequate food as both an individual right and a collective responsibility. The 1948 Universal Declaration of Human Rights says: everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food.92 The International Covenant on Economic, Social and Cultural Rights (1966) stressed: The Fundamental Right of everyone to be free from hunger. This means that the State has an obligation to ensure, at the very least, that people do not starve. As such, this right is intrinsically linked to the

right to life. In addition, however, States should also do everything possible to promote full enjoyment of the right to adequate food for everyone within their territory. In other words, people should have physical and economic access at all times to food that is adequate in quantity and quality for a healthy and active life.

The sweep of the right to life conferred by Article 21 of the Constitution of India is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. This is one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the Constitutional right to life, the earliest way of depriving a person of his/her right to life would be to deprive him/her of his/her means of livelihood to the point of abrogation. Such deprivation would not only denude the life to its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life.93

(i) **Article 39(a), Constitution of India**

Article 39(a) of the Constitution of India which is a Directive principles of state policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally have the right to an adequate means of livelihood.

---

(ii) Article 39(d), Constitution of India

Article 39(d) of the Constitution of India directs the State to secure equal pay for equal work for both men and women. The State has enacted the Equal Remuneration Act, 1976 to give effect to this Directive Principle.

In *Randhir Singh v. Union of India*, the Supreme Court while applying this principle, it was explained that it is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution of India to be a fundamental right, but it certainly is a Constitutional goal. Article 39(d) of the Constitution of India proclaims 'equal pay for equal work for both men and women' as directive principle of State Policy which means equal pay for equal work for every one and as between the sexes.

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

(iii) Article 42, Constitution of India

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

(iv) Uniform Civil Code and Gender Justice, Equality

It is really unfortunate that anybody who speaks about civil code today is branded as a communalist. The impression is always

---

94 AIR 1982 SC 877.
created by the minority community, that the majority community is exterminating the minority by imposing its personal law on them. Truly speaking, this objection does not hold any water. What the Civil Code would do is to introduce unity in diversity. Its main aim is to create such set of rules which will govern the whole Indian society, irrespective of the religion, caste, creed of the subject. \(^95\)

Equal rights for women in matter of marriage, separation, custody of children, inheritance and property is today understood as the rationale for a Uniform Civil Code. \(^96\)

The fact is that all laws on marriage, inheritance and guardianship of children discriminate against women. Without Uniform Civil Code India cannot claim to be truly gender just as long as discriminatory personal laws exist. \(^97\)

Article 44 of the Constitution of India directs the State to secure for the citizens a Uniform Civil Code throughout the territory of India. This particular goal is towards the achievement of gender justice. Even though the State has not yet made any efforts to introduce Uniform Civil Code in India, the judiciary has recognized the necessity of the uniformity in application of civil laws like law of marriage, succession, adoption and maintenance etc., but as it is only a directive it cannot be enforced in a Court of law.

The issue of a Uniform Civil Code has been controversial right from the very beginning. There is a lot of opposition of implementing the provision of Article 44, particularly from the members of the Muslim Community in the Assembly. The scathing

\(^95\) [http://books.google.co.in/books?h1](http://books.google.co.in/books?h1) accessed on 11.01.2009.


\(^97\) [http://groups.google.co.in/g/5e47/feob/t](http://groups.google.co.in/g/5e47/feob/t) accessed on 17.01.2009.
attacks on the idea of having a Uniform Civil Code in India are made on the grounds that religious freedom permits them to be governed by the laws of their community in personal matters. There cannot be a Uniform Civil Code for such a diverse population with different religious faiths, customs, festivals, food and culture. Before Independence, the foreign ruler did not meddle with the personal laws of people and allowed them to be governed by their own laws and customs in matters of marriage, divorce, succession and property. If the personal law of inheritance, succession, custody of children, marriage, etc. is considered as a part of religion, the equality of women can never be achieved. In one important case in which the Supreme Court voiced its concern is *Mohd. Ahmed Khan v. Shah Bano Begum* case pertaining to the liability of a Muslim husband to maintain his divorced wife, beyond the period of Iddat, if the wife is not able to maintain herself. The Court in this case held that Section 125 of the Criminal Procedure Code which imposes such obligation on all the husbands is secular in character and is applicable to all religions. It applies to all Indian generally and override the personal law if there is a conflict between the two. The Court, through Chief Justice Y.V. Chandrachud, held that it is also a matter of regret that Article 44 of our Constitution of India has remained a dead letter. There is no evidence of any official activity for framing a Common Civil Code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A Common Civil Code will help the cause of National integration by removing disparate loyalties to laws which have conflicting ideologies. No

---

99 (1985) 2 SCC 556.
community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a Uniform Civil Code for the citizens of the country and, unquestionably it has the legislative competence to do so.\textsuperscript{100}

The obiter in this historic judgement rocked the Muslim community, leading to the enactment of the Muslim Women’s (Protection of Rights on Divorce) Act of 1986... (Act no. 25 of 1986).

The Constitutionality of this Act was challenged in \textit{Danial Latifi v. Union of India}.\textsuperscript{101} The petitioners, inter alia, submitted that provisions under Section 125, Criminal Procedure Code reflected the moral stance of the law and ought not to have been entangled with religion and religion – based personal laws; that the Act is violative of Articles 14 and 21 of the Constitution of India. The Supreme Court, while upholding the validity of the Act observed, that

if on a rule of construction a given statute will become ultra vires or ‘unconstitutional’ and, therefore, void, whereas on another construction which is permissible, that statute remains effective and operative, the Court will prefer the latter on the ground that the legislature does not intend to enact unconstitutional laws.\textsuperscript{102}

‘Before the passing of the impugned Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provision of Section 125,

\footnotesize
\textsuperscript{100} Id. at 572.
\textsuperscript{101} (2001)7 SCC 740.
\textsuperscript{102} Id. at 746.
Criminal Procedure Code until she may remarry and such a right if
deprived would not be reasonable, just and fair. Thus the provision
of the Muslim Women's (Protection of Rights and Divorce) Act,
1986 depriving the divorced woman of such a right to maintenance
from her husband and providing for her maintenance to be paid by
the former husband only for the period of iddat and thereafter to
make her run from pillar to post in search of her relatives one after
the other and ultimately to knock the doors of the Wakf Board does
not appear to be a reasonable and fair substitute of the provisions of
Section 125, Criminal Procedure Code. Such deprivation of the
divorced Muslim women of their right to maintenance from their
former husbands under the beneficial provisions of the Code of
Criminal Procedure which are otherwise available to all other women
in India cannot be stated to have been effected by a reasonable right,
just and fair law and, if these provisions are less beneficial than the
provisions of Chapter IX of the Criminal Procedure Code, a divorced
Muslim woman obviously been unreasonably discriminated against
and deprived of the provisions of the general law as indicated under
the Code which are available to Hindu, Buddhist, Jain, Parsi or
Christian women or women belonging to any other community. The
provisions prima facie, therefore, appear to be violative of Article 14
of the Constitution of India mandating equality and equal protection
of law to all persons otherwise similarly circumstances and also
violative of Article 15 of the Constitution of India which prohibits
any discrimination on the ground of religion or the Act would
obviously apply to Muslim divorced women only and solely on the
ground of their belonging to Muslim religion.
The Supreme Court clarified that to construe the provision of the Act as less beneficial than provisions of Chapter IX, Criminal Procedure Code and made husbands liable to pay maintenance only for the iddat period would result in reasonable discrimination against divorced Muslim women and would render the Act violative of Articles 14, 15 and 21. Therefore, the Court concluded:

1. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extends beyond the iddat period in terms of Section 3(1)(a) of the Act.

2. Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

3. A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, according to Muslim law, from such divorced women including her children and her parents. If any of the relative is unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.
4. The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.\textsuperscript{103}

It is unfortunate to note that there is no Uniform Code in India, however, there is a Uniform Criminal Code which is very much in existence. Consequently, the criminal law is applicable to all citizens irrespective of the fact as to what religion they belong to, there is no uniformity in civil laws pertaining to divorce, maintenance, marriage, adoption and succession governing the Hindus, Muslims, Christians and Parsis etc. There are different laws like the Hindu Marriage Act, the Hindu Minority and Guardianship Act, the Hindu Succession Act, the Hindu Adoption and Maintenance Act governing the personal matters of Hindus. Whereas Muslims are governed by their personal laws like the Sharicat Act, the Dissolution of Muslim Marriage Act and the Muslim Women (Protection of Rights on Divorce) Act, etc. Similarly, the Christians in India are governed by the Indian Christian Marriage Act, the Indian Divorce Act and Chochin Christian Succession Act, etc. Parsis are governed by a different set of their personal laws. Thus, it can be said that there is no uniformity in these personal laws based on different religions. It is submitted that no gender justice or gender equality can be achieved in its true sense, without making a Uniform Civil Code containing the provisions derived from all the religions.

3.4 National Human Rights Commission

(i) Introduction

National Human Rights Commission has made important strides in protecting the human rights of Indians. The Commission

\textsuperscript{103} Id. at 765.
has worked hard to reduce police brutality, poverty, violence against women and children, and discrimination against minorities. In addition, it has sought to promote good governance (i.e. stamping out corruption) as well as substantive legislation that meets the demands of those historically unrepresented. India is a much stronger democracy because of National Human Rights Commission. Domestic violence is a human rights violation and will fall under the purview of the National Human Rights Commission, among its others functions. Indira Jaising, the famous Supreme Court lawyer and women’s rights champion, argues that domestic violence ought to be considered a violation of human rights. Jaising calls for an overhaul of current State policies on domestic violence and suggests that until the needs of abused women are seriously addressed by those in power, equality in India will only exist in theory and not in practice.

(ii) Factors leading to the Formation of National Human Rights Commission

The history of Human Rights movement can be traced from 13th century. Magna Carta (1215), the Petition of Rights (1628), Bill of Rights (1689), Virginia Declaration of Rights (1776), the American Declaration of Independence (1776), the French Declaration of the Rights of Man and Citizens (1789) and the American Bills of Rights (1791) documents were the result of long struggles of the people. After the First World War, word community started showing its concern for global mechanisms to protect human

---

rights. After the formation of the League of Nations, first international effort was made for human rights on 25th September, 1926 in first Conference against colonialism and serfdom. Again on 28th June, 1930 a Conference was held on Forced Labour. But it was only after the formation of United Nations that human rights movement got momentum, they were defined scientifically and concrete measures were taken for the protection and promotion of human rights. On 10th December 1948 United Nations adopted the Universal Declaration of Human Rights and subsequently adopted two more Covenants (one as Economic, Social and Cultural Rights and other on Civil and Political Rights) on 16th December, 1966 and they came into force on 3rd January, 1976 and 23rd March, 1976 respectively. Both the Covenants were binding on the rectifying States. Another major development occurred in September, 1978 when Commission on Human Rights organized a seminar in Geneva where a set of guidelines was evolved regarding functions of National Human Rights Institutions (NHRI). These guidelines were endorsed by the United Nations Global Assembly. It created a lot of pressure on the Member States to constitute National Human Rights Institutions. A series of reports, workshops and seminars were organized by United Nations to prepare the Member States for cooperation between national-international agencies for human rights protection and promotion. The role of the National Human Rights Institutions was also emphasized in the Vienna Declaration and Programme of Action in 1993. The General Assembly through its resolution endorsed the same. Since India was closely and

---

actively participating in all these developments, it became obligatory to set up National Human Rights Institutions at home.107

On the domestic front also the demand for setting up of a specialized agency to deal with human rights issues was at the peak of it. On the alleged violations of human rights in Assam, Punjab and J & K by the armed forces and terrorists, India was facing criticisms by national and international Non-Governmental Organisations and media. Besides these issues like exploitation of women, child labour, exploitation of employees at work place, riots etc. were also haunting the Government of India. In the absence of any specialized agency the Government was in deep dilemma on how to tackle the problem.108

(iii) Constitution of National Human Rights Commission

Because of internal and international pressure Government of India introduced the Human Rights commission Bill in the Lok Sabha on 14th May, 1992. On 28th September, 1993 President of India, promulgated an ordinance namely Protection of Human Rights Ordinance. This ordinance was replaced by the Protection of Human Rights Act, 1993 which was passed by both the Houses of Parliament. Finally, the National Human Rights Commission was constituted under this Act on 12th October, 1993. This Act drew its inspiration mostly from International Covenants like the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th

December, 1966. Even in defining human rights the Act has mentioned about these Covenants frequently.\textsuperscript{109}

The primary focus of the Commission has been on the strengthening and extension of human rights to all sections of the society. The vulnerable groups and the weaker sections of the society, particularly, are guarded by the Commission against violation of human rights. The Commission’s purview covers the entire range of civil and political, as well as economic, social and cultural rights. The issues emerging from terrorism and insurgency, custodial death, rape and torture, reform of the police, prison conditions and others institutions such as juvenile homes, mental hospitals and shelter for women, along with the issue of health care and exploitation of children, their education have assumed special focus and attention.\textsuperscript{110}

The Commission has urged the provision of primary health facilities to ensure maternal and child welfare essential to a life with dignity, basic needs such as drinking water, food and nutrition, and highlighted fundamental questions of equity and justice to the less privileged, namely the scheduled castes and scheduled tribes and the prevention of atrocities perpetrated against them. Rights of the disabled, access to public service by disabled, displacement of population and especially of tribal by mega projects, food scarcity and allegation of death by starvation, right of the child, rights of women subjected to violence, sexual harassment and discrimination

\textsuperscript{109} \textit{Ibid.} \\
\textsuperscript{110} \texttt{http://nhrc.nic.in/disparchive.asp?fno} accessed on 18.01.2009.
and rights of minorities have been focus of the Commission’s action on numerous occasions.\textsuperscript{111}

By now, 28 State Governments and Union Territories have set up State Commissions for women to act as statutory ombudspersons. Human Rights Commissions have been set up in nine States.\textsuperscript{112} The 2006 Amendment to the Protection of Human Rights Act, 1993, that enables the National Human Rights Commission to transfer a case to the State Human Rights Commission.

In New Delhi on March 23, 2009, United Nations High Commissioner for Human Rights ‘Navanethem Pillay’, who was on a three-day visit to India, said the absence of women in the National Human Rights Commission (NHRC) and the Supreme Court was kind of ‘discrimination’. Pillay spoke at length about women’s empowerment in India and on expanding role of women in various spheres of the society at a conference organized by the National Human Rights Commission.\textsuperscript{113}

“Sixty years ago, as the drafter of the Universal Declaration of Human Rights got down to work, it was the Indian delegate, Hansa Mehta, who ensured that women’s equal entitlement to human rights would not be merely subsumed under the ‘rights of all men’ catch-all impression”, she said.\textsuperscript{114}

The first conference of National Human Rights Institutions of South Asian countries on ‘Human Rights Awareness and National

\textsuperscript{111} Ibid.
\textsuperscript{112} http://nrcw.nic.in/index2.asp accessed on 18.01.2009.
\textsuperscript{113} Statement Delivered by Navanethem Pillay, United Nations High Commissioner for Human Rights during her Visit to National Human Rights Commission, New Delhi on 23\textsuperscript{rd} March, 2009.
\textsuperscript{114} Ibid.
Capacity Building’, organized by the National Human Rights Commission of India, was held in New Delhi on 16-18 April, 2009. The following commissions participated in the conference:

1. Afghanistan Independent Human Rights Commission
2. National Human Rights Commission, Bangladesh
3. Human Rights Commission of the Maldives
5. Sri Lanka Human Rights Commission; and
6. National Human Rights Commission of India

The Conference reaffirmed the commitment to protect and promote human rights as enshrined in domestic laws and International Human Rights Conventions. The Conference noted the legal framework, institutional arrangements and measures undertaken by the participating countries in the region for promotion and protection of human rights. The Conference recognized the head of further national capacity building of National Human Rights Institutions to address human rights challenges faced by the countries in the region.

National Human Rights Institutions of South Asian countries passed a resolution and agreed to work towards National Capacity Building through sharing of experience, information and best practices on human rights. They also agreed to take steps to promote human rights awareness by holding Conference of National Human Rights Institutions at least once in two years in addition to exchanges of visits, programmes and bilateral or regional cooperation between these institutions. During this Conference, the
Chief Justice of India, Mr. Justice K.G. Balakrishnan said, public expectations from National Human Rights Institutions have increased with awareness about Constitutional rights. He said, promotion of human rights faces considerable challenges in the South Asian Region given the frequent terrorist attack, communal violence and pervasive exploitation on account of caste and gender differences.115

(iv) India Human Rights Report, 2008 on Violence Against Women

The Law criminalizes all forms of rape, including spousal rape. With the exception of spousal rape, which is evaluated on a case by case basis, rape is considered a public crime. A rapist can be prosecuted even if the victim does not press charges. The penalties for rape range from three to nine year’s imprisonment, and the courts enforced these penalties in practice.

Violence against women, including systematic killing (femicide) became increasingly widespread. The law criminalizes domestic violence with two to four years imprisonment. The only legal sanctions for lesser forms of domestic abuse are community service and 24 hour preventive detention if the violator is caught in the Protection of Women from Domestic Violence Act, 2005. The law provides a maximum sentence of three years imprisonment for disobeying a restraining order connected with the crime of interfamilial violence.

The Government did not enforce the law effectively with regard to domestic abuse. The Home Ministry stated that domestic violence accounted for most of the complaints it received and estimated that complaints during the year would exceed more than 8,000 recorded in 2007. On June 4, 2008 the Home Ministry announced it was dedicating 27 prosecutors to cover the growing trend of femicides.

While announcing their campaign to bring an end to ‘femicides’, the Centre of Women’s Rights and the Centre for Women’s Studies reported that 171 women had been killing through November 18, 2008 and that 90 percent of the deaths were unpunished.

The Government worked with CARE and other Non-Governmental Organisations to provide specialized training to police officials on enforcing the law relating to domestic violence. Two facilities, both operated by Non Governmental Organisations (NGOs), provided shelter for battered women. The shelter in Tegucigalpa could accommodate 20 women and their families. Additionally, six other private Centers for battered women offered legal, medical and psychological assistance. There were 61 civil society Non-Governmental Organisations grouped under the women’s collective against violence involved in combating violence against women.

Although adult prostitution is legal and relatively widespread, the law prohibits promoting or facilitating for purposes of prostitution. Women were trafficked for sexual exploitation and debt bondage.
The law prohibits sexual harassment in the workplace and provides penalties of one to three years imprisonment. Sexual harassment continued to be a problem, but the Government did not effectively enforce the law.

Although the law accords women and men equal rights under the law, including property rights in divorce cases, in practice women did not enjoy such rights.

Most employed women worked in lower-status and lower-paid informal occupations, such as domestic service, without legal protections or regulations. Women were represented in small numbers in most professions, and cultural attitude limited their career opportunities. By law women have equal access with men to educational opportunities. The law requires employers to pay women equal wages for equivalent work, but employers often classified women’s jobs as less demanding than those of men to justify women’s lower salaries. According to the National Institute of Statistics 2008 Household Survey, women’s salaries were 87 percent of those for men. Despite legal protections against such practices, worker in the textile export industries continued to report that they were required to take pregnancy tests as a condition for employment.

The National Women’s Institute develops women’s and gender policy. Several Non-Governmental Organisations actively addressed women’s issues, including the Centre for the Study of Women-Honduras, which dealt with trafficking in person, commercial sexual exploitation, garment factory employees and domestic worker.116

(v) India Human Rights Reports on the State of Himachal Pradesh

Asian centre for Human Rights is dedicated to promotion and protection of human rights and fundamental freedoms, in the Asian region by:

- Providing accurate and timely information and complaints to the National Human Rights Institutions, the United Nations Bodies and mechanisms as appropriate;

- Conducting investigation, research, campaigning and lobbying on country situations or individual cases;

- Increasing the capacity of human rights defenders and civil society groups through relevant training on the use of national and international human rights procedures;

- Providing input into international standard setting processes on human rights;

- Providing legal, political and practical advice according to the needs of human rights defenders and civil society group; and

- By securing the economic, social and cultural rights through right based approaches to development.117

Asian Centre for Human Rights (ACHR) released its India Human Rights Reports providing information about human rights situation in each State of India including State of Himachal Pradesh.

and providing information about reporting of total number of cases against women in the State of Himachal Pradesh.

(a) India Human Rights Report, 2005, on Violence Against Women in the State of Himachal Pradesh

The law enforcement personnel continued to use disproportionate force. On 11th February 2004, the Himachal Pradesh police violently dispersed a peaceful demonstration by the Tibetans at McLeodganj, Dharamshala. They were marching to Delhi to participate in the Tibetan uprising Day Celebrated on 10th March. Police dispersed the march on the ground that they had not obtained any permission. When Vice-President of the Tibetan Youth Congress, Samphel Tenzin opposed it, he was reportedly assaulted without any provocation. The policeman physically dragged nuns, monks and elderly marchers. One 81 year old Dorje reportedly received blows on the head and other parts of the body.118

(b) India Human Rights Report, 2006 on Violence Against Women in the State of Himachal Pradesh

India Human Rights Report 2006 covering the event from 1st January to 31st December 2005 reports about human rights violation in 27 States of India. India faces many human rights challenges-from the lack of access to justice from judiciary and quasi-judicial bodies like National Human Rights Commission to Kangaroo justice delivered by the Cultural Courts, the Panchayats or so called People’s Court the Java Adalats of the Maoists. The list of human rights violations to long-arbitrary arrests, detention, torture,

custodial death, disproportionate use of fire-arms, communal riots, rape, mis-use of national security laws, atrocities against the Adivasis and Dalits, violations of the prisoners rights etc.

Asian Centre for Human Rights (ACHR) provided information about reporting of total cases against women in the State of Himachal Pradesh.

Himachal Pradesh witnessed several incidents of crime against women. According to National Crime Records Bureau (NCRB), 793 incidents of crime against women were reported during 2005. Of these, 141 were rape incidents, 102 incidents were of kidnapping/abduction and two incidents of dowry deaths.119

Social malpractices showed a rise in 2005. Following the introduction of the ‘only two child’ norm in 2000 for contesting panchayat (Local Bodies) elections, which disqualified a candidate having more than two children from contesting panchayat elections, the number of abortion increased. In many cases, the third child was delivered surreptitiously. In April 2005, the State Assembly repealed the provision of two child norm for those contesting Panchayat election.120

In addition, the female male ratio in the 0-6 age group was 897 females per 1000 males which revealed a high incidence of female foeticide.121

120 The Hindu, May 4, 2005.
121 Ibid.
Crime against women increased in the State of Himachal Pradesh during 2006. As per the police records a total of 881 crimes against women were registered during the year. The figure was 874 in 2005, 910 in 2004, 801 in 2003, 920 in 2002, and 1032 in 2001. Out of 881 crimes recorded, 113 were rape cases, 274 molestations, 23 murders, 4 dowry deaths, 113 kidnapping/abductions, 259 cruelties to women, 29 eve-teasing, 2 cases of chain-snatching and 2 cases under Dowry (Prohibition) Act. Highest number of rape cases were reported from Shimla District with 34 cases.\textsuperscript{122}

On 9\textsuperscript{th} December 2008, Asian Centre for Human Rights (ACHR) released its India Human Rights Report 2008 providing information about human rights situation in each State of India and providing information about reporting of total cases against women in the State of Himachal Pradesh.

According to Himachal Pradesh Police, a total of 1132 cases of crime against women were reported in 2007. Of these, 30 murder cases, 159 rape cases, 7 dowry deaths, 153 kidnapping, 324 molestations and 343 cruelty to women. In the rape cases, most of the victims were minors. 87 cases or 54.71 percent of the total cases

\textsuperscript{122} India Human Rights Report, 2007 released by Asian Centre for Human Rights.
were minors. 7 cases of dowry death were also reported during the year.\textsuperscript{123}

(e) \textbf{Indian Human Rights Report, 2009 on Violence against Women in the State of Himachal Pradesh}

On 8 April 2008, the State Government passed the Himachal Pradesh Panchayati Raj (Amendment) Act, 2008 rising reservation for women to 50 percent from one-third in all Panchayati Raj Institutions and Urban Local Bodies.

However, crime against women continued to be reported. According to the police statistics, 1,106 cases of violence against women were registered in Himachal Pradesh in 2008. These included 36 cases of murder, 157 cases of rape, 137 cases of kidnapping and abduction, 297 cases of molestation, among others. The NCRB recorded a total of 1,018 cases of crime against women in the State during 2007.

3.5 \textbf{National Commission for Women}

(i) \textbf{Introduction}

It is said that the best way to know about society, a civilization and a culture, try to know as much possible about the women. While Indian women have fought against the patriarchal Indian society and triumphed at many levels but cases of rape, dowry deaths, female infanticide, sexual harassment at workplaces, female illiteracy, and similar problems are still rampant in Indian society.

\textsuperscript{123} India Human Rights Report 2008 released on 9\textsuperscript{th} December 2008 by Asian Centre for Human Rights.
The principle of gender equality is enshrined in the Indian Constitution. The Preamble, promotes “Equality of status and of opportunity”; the Fundamental Rights enshrined in Part III of the Indian Constitution and Directive Principles enshrined in Part IV of the Constitution of India all promote gender equality. The Constitution of India not only grants equality to women but has also made special provisions for ensuring equality. Thus, as per the recommendations of the Committee on the Status of Women in India (CSWI) and in order to uphold the mandate of the Constitution of India, in January 1992, the National Commission for Women (NCW), was set up as a statutory body under the National Commission for Women Act, 1990 (Act No. 20 of 1990 of Government of India) to carry out the mandate set by the Act as well as the Committee on the Status of Women in India (CSWI).

The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 (Act No. 20 of 1990 of Government of India) to:

- Review;
- recommend remedial legislative measures;
- facilitate redressal of grievances and
- advise the Government on all policy matters affecting women.

In keeping with its mandate, the Commission initiated various steps to improve the status of women and worked for their economic empowerment during the year under report. The Commission completed its visits to all the States/UTs except Lakshdweep and
prepared Gender Profiles to assess the status of women and their empowerment. It received a large number of complaints and acted suo-moto in several cases to provide speedy justice. It took up the issue of child marriage, sponsored legal awareness programmes, Parivarik Mahila Lok Adalats and reviewed laws such as Dowry Prohibition Act, 1961, PNDT Act 1994, Indian Penal Code 1860 and the National Commission for Women Act, 1990 to make them more stringent and effective. It organized workshops/consultations, constituted expert committees on economic empowerment of women, conducted workshops/seminars for gender awareness and took up publicity campaign against female foeticide, violence against women, etc. in order to generate awareness in the society against these social evils.¹²⁴

The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 (Act No. 20 of 1990 of Government of India) to review the Constitutional and legal safeguards for women; recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women.

(ii) Importance of the Commission

Women as a class neither belong to a minority group nor are they regarded as a backward class. India has traditionally been a patriarchal society and therefore women have always suffered from social handicaps and disabilities. It thus became necessary to take certain ameliorative steps in order to improve the condition of women in the traditionally male dominated society. The Constitution

¹²⁴  [http://ncw.nic.in/about_ncw.htm](http://ncw.nic.in/about_ncw.htm) accessed on 25.01.2009.
of India does not contain any provision specifically made to favour women as such. Though Article 15 (3), Article 21 and Article 14 are in favour of women; they are more general in nature and provide for making any special provisions for women, while they are not in themselves such provisions. The Supreme Court through interpretive processes has tried to extend some safeguards to women. Through judgments in cases such as Bodhisattwa Gautam v. Subra Chakraborty,\textsuperscript{125} and the Chairman Rly Board v. Chandrima Das,\textsuperscript{126} where rape was declared a heinous crime, as well as the landmark judgment in,\textsuperscript{127} the courts have tried to improve the social conditions of Indian women. But these have hardly sufficed to improve the position of women in India. Thus, in light of these conditions, the Committee on the Status of Woman (India) as well as a number of Non-Governmental Organisations, social workers and experts, who were consulted by the Government in 1990, recommended the establishment of a apex body for women.

The lack of Constitutional machinery, judicial ability and social interest formed the impetus and need for the formation of the National Commission for Women. It is apparent from the prior mentioned conditions and problems that women in India, though in a better position than their ancestors, were handicapped to a great extent in the early 1990s and these handicaps and injustices against

\textsuperscript{125} AIR 1996 SC 922.
\textsuperscript{126} AIR 2000 SC 988.
\textsuperscript{127} AIR 1997 SC 3011.
Indian women prompted the Indian Government to constitute the first National Commission for Women in 1992.128

(iii) Composition

The Commission consists of a Chairperson who is committed to the cause of women.129 The Commission shall consist of five members (at least one member from amongst Scheduled Castes and Scheduled Tribes respectively) from amongst persons of ability, integrity and standing and who have had experience in law or legislation, trade unionism, management of an industry or organisation committed to increasing the employment potential of women, women’s voluntary organisation (including women activists), administration, economic development, health, education or social welfare.130 The Commission shall also have a member-secretary who shall either be an expert in the field of management, organizational structure or sociological movement, or an experienced civil servant.131 The chairperson and all members have to be nominated by the Central Government for a term of three years. Under certain conditions the Government can remove them (except civil servant) after giving a hearing.

The Commission can appoint committee for dealing with special issues and to co-opt other persons as mentioned of various committees.132

128 Supra note 124.
129 Section 2(a), The National commission for Women Act, 1990.
130 Section 2(b), The National commission for Women Act, 1990.
131 Id. Section 2(c).
(iv) **Functions**

The Commission has been entrusted with the following functions:  

1. Investigation and examination of all matters relating to the safeguards provided for women under the Constitution of India and other laws.

2. Presentation to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards.

3. Making recommendations in such reports for the effective implementation of those safeguards for improving the conditions of women by the Union or any State.

4. Reviewing of the existing provisions of the Constitution of India and other laws affecting women and recommending amendments so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcoming in such legislation.

5. Taking up the cases of violation of Constitutional provisions and of other laws relating to women with appropriate authorities.

6. Looking into complaints and taking suo-motu notice of matters relating to (a) deprivation of women’s rights; (b) non-implementation of laws meant to provide protection to women and also to achieve the objective of equality and development; (c) non-compliance of policy decisions.

---

133 Section 10 (1) (a)-(n), National Commission for Women Act, 1990.
guidelines or instructions aimed at mitigating hardships, ensuring welfare and providing relief to women, and taking up issues arising out of such matters with appropriate authorities.

7. Calling for special studies or investigation into specific problems or situations arising out of discriminations and atrocities against women, and identifying the constraints so as to recommend strategies for their removal.

8. Undertaking promotional research so as to suggest ways of ensuring due representation of women in all spheres, identifying factors responsible for impeding their advancement, such as lack of access to housing and basic services, in adequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity.


10. Evaluating the progress of the development of women under the Union and any State.

11. Inspecting a jail, remand home, women's institutions or other places of custody of women and taking up with the authorities concerned for remedial action if found necessary.

12. Funding litigation involving issues affecting a large body of women.
13. Making periodical respect to the Government on any matter pertaining to women and in particular various difficulties under which women toil.

14. Any other matter which may be referred to it by the Central Government.

The Central Government has to consult the Commission on all major policy matters affecting women. The reports submitted by the Commission to the Government have to be laid before each House of Parliament along with memorandum.

The annual report of Commission containing a full account of its activities during the proceeding financial year has to be sent to the Central Government. The Central Government has to lay before each House of Parliament the report together with a memorandum of action taken on the recommendations.

(v) Achievements of the Commission

The Commission has proposed amendments to the Hindu Marriage Act, 1955, Medical Termination of Pregnancy Act, 1971 and the Indian Penal Code, 1960. The Commission has also proposed bills such as the Marriage Bill of 1994, the Domestic Violence to Women (Prevention) Bill of 1994 and the Prevention of Barbarous and Beastly cruelty against Women Bill, 1995 amongst others. Some of these bills, such as the Domestic Violence to Women (Prevention) Bill, have been passed. The Research Cell of the Commission has carried out a number of studies pertaining to topics such as social mobilisation, maintenance and divorcée women, women labour under contract, gender bias in judicial decisions, family courts,
violence against women, women access to health and education in slums and similar topics. A number of inquiry commissions have also been established by the Commission, under Section 8 (1) of the Act of 1990, to look into matters such as Law and legislation, political empowerment, custodial justice for women, social security, panchayati raj, women and media, development of scheduled tribe women, development of women of weaker sections, development of women of minority communities, transfer of technology in agriculture for development of women. Among other highlights are included the anti child marriage agitations in Rajasthan, Madhya Pradesh, Andhra Pradesh and Uttar Pradesh. Public hearings on problems of Muslim women, impact of globalization on women, on land related problems, economic empowerment of tribal women have been successfully organized.134

(vi) Weakness of the commission

The National Commission for Women does not have enforcing power but enjoys only a recommendatory role, which makes it a toothless body. The Commission can only recommend but it cannot prosecute.

The working of the Commission is hampered by lack of autonomy and a clear status. The Government is the controlling authority and therefore Commission members are susceptible to bureaucratic and politician’s interference and influence. One of the former chairpersons of the Commission felt that the bureaucratic

---

134 Supra note 124.
interference was one of the handicaps she had to face during her three-year tenure.

The National Commission of Women has not been granted an audience in Parliament or with the cabinet. Reports and recommendations of NCW are tabled in parliament by the Women and Child Development Wing of the HRD ministry.

The Commission cannot appoint or remove its own staff. The appointment and removable of staff belonging to the lower cadre belongs to the ministry. The usual red tapism has hampered the working of the Commission.

A major constraint of the Commission is that it has no investigating agency of its own as in the case of National Human Rights Commission. The Commission’s demand for the Commissioner being as an investigating officer has not yet materialized despite the assurances made by the Government.

The Government is often keen to appoint only those persons who are seen to be close to its own ideology.

The present method of nominating the Commission’s chairperson and members leaves it wide open to political manipulations.

The activist’s role played by NCW in the past has not been appreciated by the Government.
The Commission is not financially independent. Without sufficient fund and staff the Commission has been reduced to a highly decimated body.

Persons who came to the Commission with a great hope to find solutions to their problems often go disappointed, as the Commission does not have sufficient rights, powers and facilities to solve their problems.

In some States State-Commissions do not exist. So poor and destitute women are left with no option but to approach the National Commission.

Different State Commission have varying frameworks of powers, responsibilities and work atmosphere. In some State matters do not move quickly because of bureaucratic and political interference.

(vii) Suggestions to Make the Commission More Effective

The Act must be amended to bring it par with NHRC.

The Commission must be allowed to function as an autonomous body. The status of the Commission must be enhanced and it must be given more enforcement powers. It must be vested with mandatory powers to issues directives and punish the guilty.

The NCW and State Commission for Women (SCW) should be a Seven Members body having also representatives of Scheduled Castes, Scheduled Tribes and religious minorities.
The Commission has to be freed from both bureaucratic and politicians’ control.

The closed-door method of appointing the chairperson and member of the Commission needs to be changed to a more open and transparent one.