CHAPTER V
STATUS OF WOMEN, CONSTITUTIONAL MANDATE AND LEGAL DEVELOPMENTS

The Constitution of India is founded on the principle of equality and non-discrimination, striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. The rights of women have their source in the Supreme law of the country i.e. the Constitution of India. All Indian laws are emerged from and are in consonance with the provisions of the Constitution. Various laws and constitutional provisions provide a place of honour, non-discrimination and equality to women.

Even much before the Constitution, in the Karachi Session of the Indian National Congress in 1931; a resolution was adopted on the fundamental rights, which incorporated the concept of equality of sexes.\(^1\) Articles 14 and 15 pronounce the rights of men and women to equality before law and prohibit discrimination on the basis of sex by the State. Article 14 declares that ‘the State shall not deny to any person equality before law or the equal protection of laws within the territory of India’.

Besides this general declaration of the right to equality and well versed with the discriminatory practices prevalent in the country, the Constitution makers went a step ahead and laid down a specific provision under Article 15 (3) for ‘positive discrimination’\(^2\), i.e., to enable the State to take appropriate measures including legislation to modify or abolish gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

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\(^1\) D. Bandopadhyay, “Gender and Governance in India”, Economic and Political Weekly, 2696 to 2699 at 2696 (July 29, 2000).

Article 16(1) guarantees "equality of opportunity for all citizens in matters relating to any office under the State". Under this article, the obligation not to discriminate on ground of sex in matters relating to employment or appointment of any office under the State has ensured a significant position and status to Indian women.

The Supreme Court in C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, has observed that after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of society. It was further observed that democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants of natural development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. In Madhu Kishwar v. State of Bihar, it was observed by the Supreme Court that Article 13, 14, 15 and 16 of the Constitution of India and other related Articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. Among women, the tribal women are the lowest of the low who have suffered discrimination and social inequalities. It is mandatory, to render them socio-economic justice so as to ensure their dignity of person,
so that they be brought into the mainstream of the national life. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46, 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. They frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing.

The Supreme Court in its landmark judgment in *Air India v. Nargesh Meerza* has noted that in considering the fundamental right of equality of opportunity a technical, pedantic or doctrinaire approach should not be made. Article 14 forbids hostile discrimination but not reasonable classification. The provision according to which the services of Air Hostesses would stand terminated on first pregnancy is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is clearly violative of Article 14 of the Constitution. The termination of the services of an Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood which is the most sacrosanct and cherished institution. It is extremely detestable, abhorrent to the notions of a civilized society and grossly unethical in regard of all human values. Pregnancy is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life.

Giving meaning to the provision of 'positive discrimination' in reality, this Court in a recent judgment *Air India Cabin Crew Assn. v. Yeshaswinee*

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7 Id. at 148, 149.
8 Id. at 152.
9 (1981) 4 SCC 335
10 Id. at 353.
11 Id. at 367.
Merchant\textsuperscript{12} held that the twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour.\textsuperscript{13} The early retirement age of 50 years from flying duties for female members of the crew with an option to them to accept ground duties beyond 50 years up to the age of 58 years being a service condition agreed to and incorporated in a binding agreement or settlement and award reached with the employer, while fixing 58 years as age of retirement for male member, cannot be said to be violative of Articles 14, 15, 16 and 51-A (e) of the Constitution.\textsuperscript{14}

In another recent decision \textit{Vijay Lakshmi v. Panjab University and others}\textsuperscript{15} the Supreme Court relied on the established propositions of law while interpreting Articles 14 to 16 that sex is a sound basis for classification; Article 15(3) categorically empowers the State to make special provision for women and children; and Articles 14, 15 and 16 are to be read conjointly. The Court observed that there could be classification between male and female for certain posts. Such classification cannot be said to be arbitrary or unjustified. If separate colleges or schools for girls are justifiable, rules providing appointment of a lady Principal or teacher would also be justified. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught.\textsuperscript{16} Hence, rules empowering the authority to appoint only a lady Principal or a lady doctor or a lady teacher or a woman superintendent cannot be said to be violative of Article 14 or 16 of the Constitution.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{12} (2003) 6 SCC 277
\item \textsuperscript{13} \textit{Id.} at 302.
\item \textsuperscript{14} \textit{Id.} at 306.
\item \textsuperscript{15} (2003) 8 SCC 440.
\item \textsuperscript{16} \textit{Id.} at 443.
\item \textsuperscript{17} See also \textit{Rajesh Kumar Gupta v. State of U.P.} (2005) 5 SCC 172 at 179. Particularly viewed in the background of the fact that a large number of young girls below the age of 10 years
\end{itemize}
In *Uttarakhand Mahila Kalyan Parishad and others v. State of U.P.*\(^\text{(1)}\) the Supreme Court observed that under the constitutional arrangement there is no occasion for a differential treatment between male teachers and employees and lady teachers and employees in the education department doing administrative business, when they are doing the same job. It was held that preferential treatment to male teachers and male employees is not justified. Article 14, 16(1) & (2) of the Constitution of India provide for parity in employment. Accepting ‘sex’ to be a permissible classification this Court in *C.B. Muthamma v. Union of India*\(^\text{(19)}\), observed:

We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable. The rule of equality must govern\(^\text{(20)}\).

In *Yusuf Abdul Aziz v. State of Bombay*,\(^\text{(21)}\) the Supreme Court while negativising the contention that Section 497 of the Indian Penal Code is violative of Article 14 and 15 of the Constitution as the offence of adultery can only be committed by a man and the wife/woman is not punishable as abettor, referred to Article 15(3) which provides that nothing in the Article shall prevent the State from making special provisions for women and held thus:

\(\text{were taught in the primary school and recognizing that it would be preferable that such young girls are taught by women, the reservation of 50% of the posts in favour of female candidates was held to be justified and cannot be styled as arbitrary or liable to be hit by Article 14.}\)

\(^{18}\) 1993 Supp (1) SCC 480.

\(^{19}\) (1979) 4 SCC 260.

\(^{20}\) Id. at 262.

\(^{21}\) AIR 1954 SC 321.

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Article 14 is general and must be read with the other provisions, which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code.22

The Supreme Court in Savitaben Somabhai Bhatiya v. State of Gujarat,23 while considering the purpose of Section 125 Cr.P.C. observed that it is enacted for social justice and specially to protect women and children as also old and infirm poor parents and falls within the Constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions are applicable and enforceable whatever may be the personal law by which the persons concerned are governed.24

The sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. It is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.25

Article 19 (1) (g) guarantees to every citizen the right “to practice any profession, or to carry on any occupation, trade or business”.26

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22 Id. at 322. (Emphasis supplied)
23 (2005) 3 SCC 636.
24 Id. at 640.
25 Id. at 642.
26 In Vishaka v. State of Rajasthan, (1997) 6 SCC 241, in order to prevent incidents of sexual harassment at workplace, the Supreme Court issued binding directions. The directions were
Article 21 of the Constitution guarantees and secures two rights, namely, right to life and right to personal liberty. Article 21 embodies within its vast ambit not only the right to life but also provides protection of life and a right to live with dignity upto natural death.\(^{27}\) However, right to life certainly includes right to be born as a natural right. Extermination of a foetus constitutes an infringement of the right to be born alive.

Article 21 of the Constitution of India reinforces “right to life”. Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person’s life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure will encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. The State should create conditions and facilities conducive for women to realize the right to economic development including social and cultural rights.\(^{28}\)

In Lata Singh v. State of U.P.\(^{29}\) considering instances of harassment, violence and threats against young man and women who marry outside their religion or caste to be an infringement of right to life, freedom of conscience and expression, the Court expressed its concern towards such instances sometimes leading to “honour killings”. The Hon’ble Court has categorically said that there is nothing “honourable” in such killings and in fact they are nothing but barbaric and shameful acts of murder committed.

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\(^{28}\) Supra note 3 at 536; See also Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125 at 147,148.

\(^{29}\) (2006) 5 SCC 475.
by brutal, feudal-minded persons. The Court further clarified that there is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes.³⁰

Article 23, a fundamental right against exploitation specifically prohibits trafficking in human beings, with main objective of ending sexual exploitation of women. Article 24 lays down that no child below the age of fourteen years be employed to work in any hazardous employment.

Taking serious note of child labour, the Supreme Court in M.C. Mehta v. State of T.N.³¹ observed:

[[If employment of child below the age of 14 is a constitutional indiction insofar as work in any factory or mine or engagement in other hazardous work, and if it has to be seen that all children are given education till the age of 14 years in view of this being a fundamental right now, and if the wish embodied in Article 39(e) that the tender age of children is not abused and citizens are not forced by economic necessity to enter avocation unsuited to their age, and if children are to be given opportunities and facilities to develop in a healthy manner and childhood is to be protected against exploitation as visualized by Article 39 (f), ... the least we ought to do is to see to the fulfilment of legislative intendment behind enactment of the Child Labour (Prohibition and Regulation) Act, 1986.³²

The Court expressed its concern that despite various legislative enactments and constitutional provisions, the stark reality is that children in our country are an exploited lot.³³

³⁰ Id. at 479, 480.
³² ld. at 771.
³³ ld. at 760.
The Directive Principles of State Policy are enunciated in Part-IV of the Constitution, though non-justiciable, impose obligation on the State to take positive action in certain directions towards the welfare of the people and are fundamental in the governance of the country.34

Directive Principles embody major policy goals of the Indian State. They cover wide range of state activity embracing economic, legal, social, educational and international problems. Some of them are directly “women specific” while some are indirectly by necessary implication concerned with women. These principles are embedded as integral part of our Constitution and now stand elevated to inalienable fundamental human rights.35 These principles provide for affirmative action for securing adequate means of livelihood for men and women36, equal pay for equal work, for both men and women37, protection of health and strength of workers, men, women and children from abuse and entry into avocations unsuited to their age and strength38 and just and humane conditions of work and for maternity relief.39

Article 39-A promotes justice, on the basis of equal opportunity and providing free legal aid by suitable legislation or scheme or in any other way ensuring that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

In *Bholanath Tripathi v. State of U.P.*40 a public interest litigation was filed under Article 32 alleging that a woman was held in confinement under

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34 See Article 37 of the Constitution. It provides “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”.


36 Article 39(a).

37 Article 39(d).

38 Article 39(e).

39 Article 42.

40 1990 (Supp) SCC 151
the guise of marriage and was being used to earn money from prostitution. Sensing the urgency for interim action to save the lady from further indignity and violations of her person, the Court asked the Supreme Court Legal Aid Committee to nominate Commissioner to make inquiry into the matter with further direction to remove the woman to a safe place on prima facie satisfaction about the allegations.

In Municipal Corporation of Delhi v. Female Workers (Muster Roll)41 the issue of granting maternity leave to the female workers on muster roll came before the Court. In the background of the Preamble, Article 14 and 15(3) in Part III and Articles 38, 39 (a), (b), (c), 42 and 43 in Part IV of the Constitution of India, denial of maternity benefit by the Municipal Corporation of Delhi to the female workers on muster roll was held not to be justified in law and the Municipal Corporation, Delhi was directed to extend the benefits of Maternity Benefits Act, 1961 to such muster roll female employees who were in continuous service of the management for three years or more. Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief", the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable by law, is nevertheless available for determining the legal efficacy of the action complained of.42

Article 44 provides for a uniform civil code for all the citizens throughout the country.43 Maximum number of pleas have been made by

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42 Id. at 231.
43 The Supreme Court has recommended to the State to carry out its obligation under Article 44 of the Constitution and formulate a uniform civil code in a number of cases, namely –Mohd. Ahmad Khan v. Shah Bano Begum (1985) 2 SCC 556; Sarla Mudgal v. Union of India, 130
the Supreme Court to the State for the enactment of the Uniform Civil Code but with no results. If repeatedly the State has chosen to ignore a directive principle, the least the Court can do is to test the existing personal laws on the touchstone of fundamental rights and strike down the odious aspects, which discriminate against women. Striking down these provisions will certainly not lead to uniform civil code but will definitely lead to the removal of legal discrimination against women.44

Personal laws continue to be diverse because of the over-burden of traditional practices linked to the faiths of various communities. Any personal law which discriminates against women would by its very nature be unequal and discriminatory and be on the face of it, be in violation of Articles 14 and 15 of the Constitution, would also be in violation of the expanded meaning of right to life and personal liberty under Article 21 of the Constitution of India and to that extent be void.45 Dr. Ambedkar was of the view that already uniformity of law had been achieved in several areas, diversity of laws existed only on matters like marriage and succession.46

The Supreme Court in Mohd. Ahmad Khan v. Shah Bano Begum47, took note of the need of uniform Civil Code and expressed its regret that Article 44 of our Constitution has remained a dead letter. The Court observed that a common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the State which is charged with the duty of securing a

44 Flavia Agnes, "Constitutional Challenges, Communal Hues and Reforms within Personal Laws" Combat Law, Vol. 3 Issue 4, 4-10 at 6 (November-December 2004).
47 (1985) 2 SCC 556.
procedures prescribed by Section 118 of the Act. Such a burden, procedural burden and substantive law burden is not falling upon Hindu, Muhammadan, Jaina or Parsi testators. Therefore, the Court declared Section 118 of the Act to be violative of Articles 14, 15, 25 and 26 of the Constitution.\footnote{Id. at 633.}

Reiterating its view about the need of common civil code in Sarla Mudgal’s case the Supreme Court observed that any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation.\footnote{Id. at 627.}

Looking at this provision from another angle that an Indian Christian in terms of the impugned provision is forbidden from making any bequest excepting in the manner provided for therein. Such bequest is prohibited only in the event the testator has a nephew or a niece or any near relative. The wife of a testator, in terms of the definition as contained in Section 28 read with the first schedule of the Act would not be a near relative, although an adopted son would be. The Court observed that why a testator would be entitled to bequeath his property by way of charitable and religious disposition if he has a wife but he would be precluded from doing so in the event he has a nephew or a niece.\footnote{Id. at 622.}

Pointing to the practical aspect, the Supreme Court in Panna Lal Bansilal Pitti v. State of A.P.\footnote{(1996) 2 SCC 498.} has opined that a uniform law, though is highly desirable, enactment thereof in one go perhaps may be counterproductive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. The
Supreme Court further observed that it would be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect, which is most acute, can be remedied by process of law at stages.61

In *Danial Latifi v. Union of India*,62 the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged63, under which Section 125 of the Criminal Procedure Code, 1973 providing for maintenance to wives, including divorced women by their former husbands, was made inapplicable to divorced Muslim women. It was alleged in the submissions made by petitioners that firstly, the Act is un-Islamic; has the potential to suffocate Muslim women and to undermine the basic secular character of the Constitution. Secondly, Section 125 Cr.P.C. also furthers the concept of social justice embodied in Article 21 of the Constitution of India; hence excluding divorced Muslim women from its protection is a discrimination against them. Thirdly, the Act is violative of Articles 14 and 21 of the Constitution. The provisions of the Act *prima facie*, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion.64 Fourthly, the remedy provided under section 4 is illusory because the Muslim divorced wife cannot get sustenance from the parties who were stranger to the marital relationship, which led to divorce. Fifthly, Wakf boards would usually not have the means to support such destitute women since they are themselves

61 Id. at 510.
63 See also Ahmedabad Women Action Group v. Union of India, (1997) 3 SCC 573.
64 Id. at 752, 753.
perennially starved of funds. Sixthly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support. The Court pointed out that if a given statute becomes void for being "ultra vires" or "unconstitutional" according to one construction; whereas on another construction which is permissible, the statute remains effective and operative, the Court will prefer the latter on the ground that the legislature does not intend to enact unconstitutional laws. Upholding the validity of the Act, the Court concluded –

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

(2) The provisions of the Act do not offend Articles 14, 15, 21 of the Constitution of India.

The Court observed that a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. At the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs.

However, the interpretation given by the Supreme Court does not seem to be a happy one and has attracted criticism. It has been alleged that the court has wrongly preferred an interpretation of law according to which the constitutionality of the statute was upheld. It is true that the legislature never intends to enact unconstitutional law. But it is equally true that if an unconstitutional enactment has been enacted by the legislature.

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65 Id. at 756.
66 Id. at 765, 766.
then it is the obligation of the court to strike it down in exercise of its power if judicial review to uphold the rule of law.\textsuperscript{67}

Against the Court's ruling upholding the validity of the Act, the Act appears to be violative of Article 14 of the Constitution, which is aimed at ensuring equality before law and equal protection of laws to all persons otherwise similarly circumstances.\textsuperscript{68}

However, the Supreme Court in \textit{Lily Thomas v. Union of India},\textsuperscript{69} has expressed its inability by reiterating the position that Directive Principles of State Policy as detailed in Chapter IV of the Constitution which includes Article 44 are not enforceable in courts as they do not create any justiciable rights in favour of any person and the Supreme Court has no power to give directions for the enforcement of Directive Principles.

Article 45 provides for early childhood care and education for all children until they complete the age of six years. Article 47 provides for raising the level of nutrition and the standard of living of the people and improvement of public health.

The Fundamental Duties incorporated in Part IV A of the Constitution of India by the Constitution (Forty-Second Amendment) Act, 1976 are of immense significance. Article 51 (A) (e) imposes fundamental duty on every citizen to renounce practices derogatory to the dignity of women.\textsuperscript{70} These duties may be enforced by enacting legislation by the appropriate legislature. The courts may give directions to the government to take steps for their enforcement.

\textsuperscript{67} See Paramjit S. Jaswal, "Constitutional Law-I (Fundamental Rights)", XXXVII, \textit{ASIL} (2001), 123-156 at 134.
\textsuperscript{68} \textit{Id.} at 134, 135.
\textsuperscript{69} (2000) 6 SCC 224.
\textsuperscript{70} See \textit{Chandra Raj Kumari v. Police Commissioner, Hyderabad}, AIR 1998 AP 302 at 318, The Andhra Pradesh High Court observed that holding of beauty contests 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 derogatory to or denigrating women offended Articles 14, 21 & 51(A)(e).
In order to empower women politically at the grass-root level, the Constitution Seventy-third (Amendment) Act, 1992 and Seventy-fourth (Amendment) Act, 1992 have made significant changes.

Article 243 D(3) provides that not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats are to be filled by direct election in every Panchayat to be reserved for women and such seats are to be allotted by rotation to different constituencies in a Panchayat.

Article 243 D(4) further says that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level are to be reserved for women.

Article 243 T(3) provides that not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality are to be reserved for women and such seats are to be allotted by rotation to different constituencies in a Municipality. Article 243 T (4) further provides for reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

Besides these constitutional commitments, other procedural laws also tend to provide gender justice. However, many provisions of the Indian Penal Code, the Criminal Procedure Code and other laws pre-date the Indian Constitution and have been amended sparingly. Various provisions need a thorough revision, restructuring and orientation in consonance with the Fundamental Principles of democracy, equity, freedom and equality embodied in our constitution. While the Constitution of India was framed in 1950, after India attained independence, the
criminal laws date back to the colonial period and have not been modified in conformity with many of the constitutional provisions.

Provisions relating to obscenity\textsuperscript{71} sexual assault\textsuperscript{72}, flesh trade\textsuperscript{73}, kidnapping and abduction\textsuperscript{74} and custodial intercourse\textsuperscript{75} have been spelt out separately in the Indian Penal Code.

In \textit{K.A. Abbas v. Union of India}\textsuperscript{76}, the Supreme Court has held that "Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral."\textsuperscript{77}

A crucial question that came before the Supreme Court in a latest judgement in \textit{Director General of Doordarshan v. Anand Patwardhan}\textsuperscript{78}, was about defining "obscenity". The Court observed that the purposeful omission of the definition of obscenity has led to attack of Section 292 of the Penal Code as being too vague to qualify as a penal provision. The Court observed that a film must be judged from an average, healthy and common sense point of view\textsuperscript{79}. Communal riots, caste and class issues and violence against women are issues that require every citizen's attention for a feasible solution. The documentary film Father, Son and Holy War, showcases a real picture of crime and violence against women and members of various religious groups perpetrated by politically motivated leaders for political social and personal gains.\textsuperscript{80} The Court opined that the correct approach to be taken is to look at the documentary film as a whole and not in bits, as any message that is purported to be conveyed by way of a film cannot be conveyed just by watching certain bits of the film. In this film

\textsuperscript{71} Sections 292 to 294, The Indian Code, 1860.
\textsuperscript{72} Sections 354, 375, 376, 376-A, 376-B, 376-C, 376-D, 377, 509, \textit{ibid.}
\textsuperscript{73} Sections 373, 373., \textit{ibid.}
\textsuperscript{74} Sections 366, 366-A, 366-B, \textit{ibid.}
\textsuperscript{75} Sections 376-B, 376-C and 376-D, \textit{ibid.}
\textsuperscript{76} (1970) 2 SCC 780.
\textsuperscript{77} \textit{Id. at} 802.
\textsuperscript{78} (2006) 8 SCC 433.
\textsuperscript{79} \textit{Id. at} 444.
\textsuperscript{80} \textit{Id. at} 446.
too, scenes must be seen in context of the message of exploitation of women through insecurities created in men and the film must be evaluated in its entirety. Reluctance on the part of Doordarshan in displaying this film has been considered to be highly irrational and blatant violation of the right guaranteed under Article 19(1) (a) of the Constitution.

In case of rape, the general principle is that if a man has sexual intercourse with a woman below the age of sixteen years with or without her consent, he is guilty of rape. On the other hand, non-consensual intercourse or intercourse where consent has been obtained through instilling fear of death or a hurt is not rape, if the couple is deemed to be legally married. The linking up of chastity to the requirement of consent has resulted in denial of women’s sexual autonomy and dignity.

Rape law had undergone substantial change by the Indian Penal Code Amendment Act, 1983. These amendments were a result of countrywide criticism by all sections of society including women and social organizations and also Parliamentarians of the Supreme Court judgement in Tukaram v. State of Maharashtra, which is popularly known as Mathura rape case. Mathura was a tribal girl, about 14 to 16 years, victim of rape. She was in a police station. She was raped by the Head Constable of the Station while under detention. She was also molested by a police constable. The Sessions Judge who tried the case acquitted the policemen on the ground that there was no evidence that Mathura was below 16

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81 Id. at 448. See also Bobby Art International v. Om Pal Singh Hoon, (1996) 4 SCC 1; K.A. Abbas v. Union of India, (1970) 2 SCC 780.
82 Id. at 438.
83 Section 375, IPC.
84 Exception to Section 375.
86 (1979) 2 SCC 143.
years of age. He did not accept medical opinion in regard to her age. He rejected her statement that sex was inflicted on her without her consent. The acquittal was reversed in the High Court which again was reversed by the Supreme Court. Mathura’s version was disbelieved by the Supreme Court that she put stiff resistance and shouted loudly for help and the accused were acquitted. A public agitation followed on the demand for the rehearing of the case. The Law Commission, on directions from Government made very meaningful recommendations based on which the law relating to rape was significantly amended. Absence of consent in custodial rape cases, it was provided could be presumed based only, on victim’s statement. The gravity of custodial rape came to be accepted and established. In order to nullify the effect of this judgement Sections 376A to 376D were incorporated in the Indian Penal Code and Section 114-A was introduced in the Indian Evidence Act.

The offence of rape is given in Chapter XVI of the Indian Penal Code, 1860. It is an offence affecting the human body. Separate heading for “Sexual offences” has been given, which encompasses Sections 375, 376, 376-A, 376-B, 376-C and 376-D. “Rape” is defined in Section 375. Section 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e., Sections 376-A, 376-B, 376-C and 376-D. The Supreme Court in State of M.P. v. Munna Choubey, has noted the fact that sweeping changes were introduced reflects the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is “the ravishment of a woman, without her consent, by force, fear or fraud”, or as

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87 Id. at 146, 147.
89 (2005) 2 SCC 710.
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"the carnal knowledge of a woman by force against her will." The Court further opined that Article 21 of the Constitution also covers right to dignity and reinforces protection against rape and other sexual infractions of the person.

Asserting the same view the Supreme Court in *Dinesh v. State of Rajasthan* observed that sexual violence apart from being a dehumanising act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. Rape is not only a crime against the person of a woman; it is a crime against the entire society. It is a crime against basic human rights, and is also violative of the victim's most cherished fundamental right, namely, the right to life contained in Article 21 of the Constitution.

The Supreme Court in *State of Punjab v. Gurmit Singh* observed that rapist not only violates the victim's privacy and personal integrity but inevitably causes serious psychological as well as physical harm in the process. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.

The Supreme Court through its various decisions has already given new dimensions, meaning and purpose to many of the fundamental rights especially the Right to Freedom and Liberty and Right to Life.

In *Bodhisattwa Gautam v. Subhra Chakraborty*, "Right to Life" does not merely mean animal existence but means something more, namely, the right to live with human dignity. Right to Life, would, therefore, include

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90 Id. at 713.
92 Id. at 774.
94 Id. at 403.
all those aspects of life which go to make a life meaningful, complete and worth living.  

Rape is the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.

In *Delhi Domestic Working Women's Forum v. Union of India*, the Supreme Court had suggested, on the formulation of a scheme, that at the time of conviction of a person found guilty of having committed the offence of rape, the Court shall award compensation to the victim.

The Court pointed out the defects of the existing system dealing with rape cases, such as, the complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably, found rape trials traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had to suffer as a result of rape itself.

The Supreme Court felt that necessity of speedy trial is one of the essential requisites of law. In a case of this character such a trial cannot be frustrated by prolongation of investigation. It was felt that the Court has to spell out the parameters of expeditious conduct and investigation of trial; otherwise the rights guaranteed under Article 14 and 21 of the Constitution will be meaningless.

Broad parameters have been indicated by the Supreme Court in assisting the victims of rape, such as:

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96 Id. at 499, 500.
98 Id. at 19.
99 Id. at 17.
(1) To provide the rape victim with legal representative.
(2) Duty of police to inform the victim of her right to representation.
(3) In rape trials, anonymity of the victim must be maintained.
(4) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue in employment.
(5) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and expenses of childbirth if this occurred as a result of rape.\textsuperscript{100}

Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such cries eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear.\textsuperscript{101}

In Chairman Railway Board v. Chandrima Das\textsuperscript{102}, rejecting the contention on behalf of the Board that the rape victim should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, the Court observed that it is not a mere matter of violation of an ordinary right of a person but the violation of fundamental right which is involved. “Rape”\textsuperscript{100} \textsuperscript{101} \textsuperscript{102}

\textsuperscript{100} Id. at 20.
\textsuperscript{101} Id. at 18.
\textsuperscript{102} (2000) 2 SCC 455.
is an offence which is violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law.\textsuperscript{103}

It has been clarified by the Court that the meaning of the word “Life” with reference to Article 21 of the Constitution cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country but also to a “person” who may not be a citizen of the country. On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions.\textsuperscript{104}

In \textit{Tulshidas Kanolkar v. State of Goa},\textsuperscript{105} the view taken by the court was that a mentally deficient girl who was ravished by the accused could not be said to have suffered sexual intercourses with consent. It was further made clear by the Court that act has to be conscious and voluntary. Consent is different from submission as every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law.\textsuperscript{106}

\textsuperscript{103} Id. at 477.
\textsuperscript{104} Id. at 483-484.
\textsuperscript{105} (2003) 8 SCC 590.
\textsuperscript{106} Id. at 592-593.
On the corroboration of victim's evidence the Supreme Court in a landmark judgement in *State of H.P. v. Raghubir Singh*\(^{107}\) observed that there is no legal compulsion to look for corroboration of the evidence of prosecutrix before recording an order of conviction. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity\(^{108}\).

To deal with the difficulty of corroboration of the prosecutrix Section 114-A\(^{109}\) of the Indian Evidence Act, 1872. This section enables the court to raise a presumption that the woman who was the victim of rape had not consented and that the offence was committed against her will.

Dealing with a very sensitive but ugly situation where the father had committed rape against his own daughter the Supreme Court in *State of H.P. v. Asha Ram*\(^{110}\), observed that ordinarily offence of rape is grave in nature, more so, when perpetrator of the crime is the father against his own daughter and is the rarest of rare case which warrants strong deterrent judicial hand. A father is the fortress, refuge and the trustee of his daughter.\(^{111}\) Here is a case where the crime committed by the accused not only delicts the law but has a deleterious effect on civilized society.\(^{112}\)

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\(^{107}\) (1993) 2 SCC 622


\(^{109}\) Inserted by Act. No. 43 of 1983: *The Indian Evidence Act*, 1872, Section 114-A – Presumption as to absence of consent in certain prosecutions for rape – In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of Sub Section (2) of Sec. 376 of the Indian Penal Code (45 of 1860), "where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."


\(^{111}\) Id. at 776.

\(^{112}\) Id. at 775.
Manifesting the positive trend of judiciary, the Supreme Court in *Madan Gopal Kakkad v. Naval Dubey*\(^\text{113}\), observed that: "Judges who bear the Sword of Justice should not hesitate to use that sword with most utmost severity, to the full and to the end if the gravity of the offences so demand."

In *State of A.P. v. Bodem Sundara Rao*,\(^\text{114}\) it was observed by the Supreme Court that crimes against women are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals.\(^\text{115}\)

The Courts shoulder a great responsibility while trying an accused on charges of rape and must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradiction or insignificant discrepancies in the statement of the prosecutrix, which are not of fatal nature, to throw out or otherwise reliable prosecution case.\(^\text{116}\)

With the passage of time theory of reformation postulated by Krishna Iyer, J. in *Phul Singh v. State of Haryana*\(^\text{117}\), had been rejected by the Supreme Court in a series of recent decisions starting with *State of*
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Karnataka v. Krishnappa\textsuperscript{118} wherein the Court emphasized that a socially sensitised judge is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.\textsuperscript{119} It was further held that public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court.\textsuperscript{120}

In \textit{State of Maharashtra v. Rajendra Jawanmal Gandhi}\textsuperscript{121}, the Supreme Court held that a rapist not only violates the victim’s personal integrity but leaves indelible marks on the very soul of the helpless female keeping the objects of the amendments in IPC in view, the law as it exists today and various decisions of this Court on the question of sentence, the message is loud and clear that no person who commits or attempts to commit rape shall escape punishment. It was observed by the Court that unnecessary publicity to the rape victim causes great harm. There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is the very anti-thesis of rule of law.\textsuperscript{122}

In \textit{Kamalanantha v. State of T.N.}\textsuperscript{123}, the Supreme Court observed that having regard to the amplitude of the gravity of the offence, perpetrated in an organized and systematic manner, the nature of offence and its deleterious effects not only against the victims, but the civilized society at large, needs to be curbed by a strong judicial hand. It was held by the Court that no remission of sentence or amnesty be allowed.\textsuperscript{124}

\textsuperscript{118} (2000) 4 SCC 75.
\textsuperscript{119} \textit{Id.} at 83.
\textsuperscript{120} \textit{Id.} at 84.
\textsuperscript{121} (1997) 8 SCC 386.
\textsuperscript{122} \textit{Id.} at 403.
\textsuperscript{123} (2005) 5 SCC 194.
\textsuperscript{124} \textit{Id.} at 229.
In *State of M.P. v. Santosh Kumar*¹²⁵, the Supreme Court held that in cases of sub-sections (1) and (2) of Section 376, the Court has discretion to award sentence below the statutory minimum for “adequate and special reasons” which are to be recorded in the judgement. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated. What is applicable to the trial courts regarding recording reasons for a departure from a minimum sentence is equally applicable to the High Court.¹²⁶

The Courts are usually impacted by conventional notions of morality in handling cases relating to rape-notions of honour and chastity of women rather than physical violation of the victim involved.¹²⁷ Conventional views at times lead to bizarre findings as happened in famous *Sathin’s*¹²⁸ case from Rajasthan in which the sessions judge acquitted the accused with reference to their age, social status, caste etc and also for having made immediate report of her rape by the victim straight to the police without first informing her in-laws which was deemed to be unnatural.

Another significant amendment in the Criminal Procedure Code concerning rape cases is to Section 327¹²⁹ which provides for rape trials to be conducted in camera so as to protect the victim. The Court must ensure that the cross-examination is not made a means of harassment and humiliation for the victim.¹³⁰

¹²⁶ Id. at 7.
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A new Section 228-A\textsuperscript{131} has been incorporated in the Indian Penal Code which makes disclosure of the identity of a rape victim punishable. This section aims to prevent social victimization or ostracism of the victim of a sexual offence. Despite these provisions and various landmark judgements of the Apex Court, there is usually miscarriage of justice. It is because of the procedural defects that the law enforcement in rape cases is often hindered, for instance – police refuse even to lodge First Information Report on the crime; copy of FIR is not given to the complainant; FIR is lodged in a haphazard or incomplete manner; statements of all the witnesses are not taken by the police; medical evidence is inadequate; the accused manage to exert influence on the investigating officials.\textsuperscript{132}

Matrimonial laws in India, provide 'rape' as a special ground of divorce to a wife and is considered as a matrimonial offence. The legal provisions incorporated in the matrimonial laws which declare rape as a ground of divorce are:

- Section 12 (2) (ii) of the Hindu Marriage Act, 1955.
- Section 27 (1A) (4) of the Special Marriage Act, 1954.
- Section 10 of the Indian Divorce Act, 1869.

The language of these sections is identical to the extent that, "her husband has, since the solemnization of marriage, been guilty of rape, sodomy or bestiality".\textsuperscript{133}

Section 354 and 509 of the Indian Penal Code lay down punishments for assault, use of criminal force, words or gestures intended to outrage the modesty of a woman. All kinds of sexual assaults other than

\textsuperscript{131} Inserted by the Section 2, Criminal Law (Amendment) Act, 1983, (43 of 1983).
\textsuperscript{132} Supra note 88 at 274.
\textsuperscript{133} Gour's Empowerment of Women in India at 36 (2003).
rape are now dealt with under Section 354. Culpability under this section can be pressed only if sexual assault is with the intention of outraging the modesty of a woman. Any public gesture of sexuality towards women is outrageous to their modesty but similar actions by women towards men are outside the purview of law. The word modesty has not been defined in the Indian Penal Code, thus adding to the inadequacy of the provision. The Apex Court in the case of Rupan Deol Bajaj v. Kanwar Pal Singh Gill,\textsuperscript{134} gave an extended interpretation to Section 354 so as to include acts derogatory to human dignity. The Supreme Court held that the ultimate test for ascertaining whether the modesty has been outraged is the action of the offender such as would be perceived as one, which is capable of shocking the sense of decency of a woman.\textsuperscript{135}

Recently, the issue of sexual harassment of women in work place has come to the fore and demands for measures to deal with this problem have been made. Nonetheless, the penal provisions relating to sexual assault\textsuperscript{136} or eve-teasing\textsuperscript{137} deal with this issue, but they are inadequate. The Supreme Court in Vishaka v. State of Rajasthan\textsuperscript{138} has given guidelines for prevention and punishment of sexual harassment at work place. The Court relying on Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defined sexual harassment as including any unwelcome sexually determined behaviour that could result in humiliation to victim or could adversely affect her health and safety; and

\textsuperscript{134} (1995) 6 SCC 194. In a latest incident a lieutenant colonel of the Army was held guilty by the General Court Martial (GCM) of the Army of outraging the modesty of a girl cadet of the National Cadet Corps (NCC) during an annual training camp. The GCM presided over by Brig. Arjun Menon, sentenced Lt. Col. S.S. Madra to five years loss of service for the purpose of pension and gave him a severe reprimand as reported in The Indian Express, Chandigarh Newsline at 1, November 30, 2006 and HT Chandigarh Live at 1, November 30, 2006.

\textsuperscript{135} Id. at 206.

\textsuperscript{136} Section 354 IPC.

\textsuperscript{137} Section 509 IPC.

\textsuperscript{138} (1997) 6 SCC 241.
such behaviours as the victim reasonably believes, would create hostile working environment on being objected.  

Sections 372 and 373 of Indian Penal Code deal with the offences of selling and buying of minors for the purpose of prostitution and provides extra protection to women. Explanation to these sections lay down the presumption that possession of a female by a prostitute or a brothel-keeper is for the purpose of prostitution. However, both these sections recognise that a minor, either a male or a female, may be sold for the purpose of illicit intercourse or for any unlawful and immoral purpose. The dedication of minors to the service of a temple as dasis (servants) amounts to a disposal of such minors, knowing it to be likely that they will be used for the purpose of prostitution within the meaning of this section.  

Whereas Sections 366, 366-A and 366-B of the Indian Penal Code dealing with kidnapping, abduction, inducing, procuring, importing for the purpose of illicit intercourse are applicable only when directed against women. While Sections 366-A and 366-B apply to a girl below the age of 18 and 21 years respectively, section 366 applies to female of all ages.

All offences relating to sexuality, except rape of a wife between 12-15 years of age, are cognisable. The more serious offences are punishable for up to ten years of imprisonment and life imprisonment.

Chapter XX of the Indian Penal Code deals with offences relating to marriage. The Criminal Law (Amendment) Act, 1983 (Act 46 of 1983) introduced a new Chapter XX-A ‘Of Cruelty By Husband Or Relatives Of Husband’ consisting of only one section 498-A to combat the menace of dowry death. For Section 498-A to be applicable:

- There should be reasonable nexus between cruelty and suicide.

\[139\] For details see infra chapter VI.
\[140\] (1881) 1 Weir, FB; Basava, (1891) 15 Mad 75; Jallili Bhasin, (1869) 6 BHC (Cr.C) 60; Tippa, (1892) 16 Bom 737 as referred in Ratanlal & Dhirajlal, The Indian Penal Code at 419 (1994).
\[141\] Indian Penal Code, Sections 366, 366B, 372, 373, 375.
\[142\] Ibid. Sections 375 and 376.
The cruelty has to be of such gravity as to drive an ordinary woman to commit suicide. Constant demands for dowry, taunts, ill treatment, cruel behaviour etc. are serious enough for a woman to be driven to commit suicide.

Every harassment does not amount to cruelty. It should be linked to the objective of coercing the woman or any person related to her to comply with an unlawful demand for property or valuable security.

The conjunctive application of Section 498-A of IPC and Section 113-A\textsuperscript{143} of Indian Evidence Act does not take away the responsibility of the prosecution to bear the burden of proof primarily. Section 113-A raises the presumption regarding abetment of suicide by a married woman within a period of seven years of her marriage. Section 304-B, IPC specifically deals with dowry deaths and the offence is punishable for minimum seven years which can extend to life imprisonment. Section 304-B\textsuperscript{144} was introduced in the Indian Penal Code in order to strictly deal with and punish the offence of dowry death. It was a new offence created with insertion of the provision in the Indian Penal Code providing for a more stringent offence than provided by Section 498-A of the same Act. The ingredients necessary for the application of Section 304-B are:

- when the death of a woman is caused by any burns or bodily injury.
- or occurs under unusual circumstances
- within seven years of the girl’s marriage
- and ‘soon before’ her death, she was subjected to cruelty and harassment by her husband or any relative of her husband and
- this is in connection with the demand of dowry.

\textsuperscript{143} Inserted by the Criminal Law (Second Amendment) Act, 1983 (No. 46 of 1983).
\textsuperscript{144} Inserted by Act 43 of 1986, S.10 (w.e.f. November 19, 1986).
If these conditions exist, it would constitute a dowry death, and the husband and/or his relatives shall be deemed to have caused her death and the punishment for the offence is imprisonment for a term not less than seven years but which may extend to life imprisonment. The words "soon before" found in Section 304-B IPC have come up for consideration in a large number of cases. The Court has consistently held that it is neither possible nor desirable to lay down any straitjacket formula to determine what would constitute "soon before". It depends upon the facts and circumstances of each case.\textsuperscript{145}

In a recent case \textit{Kamlesh Panjiyar v. State of Bihar},\textsuperscript{146} the Supreme Court held that a conjoint reading of Section 113-B of the Evidence Act and Section 304-B of the Indian Penal Code shows that there must be material to show that "soon before her death", the victim was subjected to cruelty or harassment "for or in connection with the demand of dowry". Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances".\textsuperscript{147} The expression "soon before her death" is very relevant where Section 113-B of the Evidence Act and Section 304-B of the Indian Penal Code are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates.\textsuperscript{148}

\textsuperscript{145} See \textit{Hira Lal & Ors. v. St. (Govt. of NCT) Delhi}, (2003) 8 SCC 80 at 86; \textit{Yashoda v. State of Madhya Pradesh}, 2004(1) RCR (Criminal) 850; \textit{Kans Raj v. State of Punjab and Others}, (2000) 5 SCC 207. The words "soon before" are not synonymous with the term "immediately before" and is a relative term, required to be considered under specific circumstances. If the cruelty or harassment or 'demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstances showing the non existence of such treatment is not brought on record, before such alleged treatment and the date of death.

\textsuperscript{146} (2005) 2 SCC 388.

\textsuperscript{147} \textit{Id.} at 393.

\textsuperscript{148} \textit{Id.} at 394.
The expression "soon before her death" used in the substantive Section 304-B of the Indian Penal Code and Section 113-B of the Indian Evidence Act presents the idea of proximity test. The determination of the period which can come within the term "soon before" is left to be determined by the Courts, depending upon the facts and circumstances of each case. Normally, the expression "soon before" would imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effects of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.149

In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of direct or indirect evidence. This Section lays down stringent provisions by shifting the burden on to the accused by bringing in deemed clause.

In **Devinder Singh and others v. State of Punjab**150, it was noted by the Supreme Court that the lady could be the best person to speak about any demand for dowry. In the absence of the deceased, testimony of her parents would be most relevant to whom she would be supposed to mention about such demands. Evidence regarding continuous dowry demands and consequent cruelty and harassment to the wife becomes more believable where a young woman having a small child of 15 months and another in the womb ended her life.

The Supreme Court in a significant judgement **Reema Aggarwal v. Anupam & Others**151, gave a very broad connotation to the 'dowry related'

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149 Ibid.
151 2004 (1) RCR (Criminal) 776 (SC).
provisions so as to give real meaning to legislative intent. The question before the Court was that if the validity of the marriage itself is under scrutiny, whether the demand of dowry in respect of an invalid marriage would be legally recognizable. The Supreme Court said that though such a marriage would be legally not recognizable, even then the purpose for which Sections 498-A and 304-B – IPC and Section 113-B of the Indian Evidence Act, 1872 were introduced cannot be lost sight of. The Court further said:-

Such legalistic niceties would destroy the purpose of the provisions. Such hair-splitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature ‘dowry’ does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. If such restricted meaning is given it would not further the legislative intent.152

Substantive Section 498-A of the Indian Penal Code and presumptive Section 304-B of the Indian Evidence Act have been inserted in the respective statutes by Criminal Law (Second Amendment) Act, 1983. These two sections cannot be held to be mutually inclusive. The provisions deal with two distinct offences. A person charged and acquitted under Section 304-B can be convicted under Section 498-A without that charge being there, if such a case is made out. If the case is established, there can be a conviction under both sections.153 Section 498-A IPC and Section 113-B of the Evidence Act include in their amplitude past events of cruelty.154

152 Id. at 781-782.
The insertion of Section 498-A and 304-B in the Indian Penal Code, 1860 followed by consequential amendments incorporated in the Criminal Procedure Code, 1973 and the Indian Evidence Act sought to strengthen the existing laws to curb the evil of dowry. Now the offence of dowry is treated as cognisable and non-bailable, giving and taking dowry is prohibited, cruelty by others to the woman driving her to suicide is punished.

Section 198-A of the Criminal Procedure Code provides for prosecution of offence under Section 498-A of the Indian Penal Code. It requires that courts can take cognisance of this offence only on a police report or complaint by the woman, her closest relatives or with the leave of the court by any other person related to her by blood, marriage or adoption. This is the limitation on the initiation of prosecution under this section that it prevents the State to take action suo motu.

155 Code of Criminal Procedure, 1973. Section 174 (3) is applicable when –
(i) the case involves suicide by a woman within seven years of her marriage; or
(ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or
(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or
(iv) there is any doubt regarding the case of death; or
(v) the police officer for any other reason considers it expedient so to do. Section 176 deals with inquiry into cause of death, when the case is of the nature referred to in Cl (i) or Cl (ii) of sub section (3) of Section 174.

156 Indian Evidence Act, 1872. Section 113-A. – Presumption as to abetment of suicide by a married woman. – When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Section 113-B – Presumption as to dowry death. – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Sections 125 to 128 of the Code of Criminal Procedure 1973 are meant to provide protection to women. Under Section 125 Cr. P.C, any man who deserts or divorces a wife, who cannot support herself, is liable to pay a stipulated compensation. Pursuant to the recommendations of the Committee on the Status of Women in India (CSWI) on maintenance, the ceiling on the maximum amount payable as maintenance has been removed by amending Section 125.

Section 312 to 318 of the Indian Penal Code deal with causing miscarriage (consensual and non-consensual), injuries to unborn children, exposure of infants and concealment of births. Abortion (except for the purpose of saving the life of the woman) causing death of the woman in an attempt to abort, preventing a live birth or causing death of child after birth, causing death of quick unborn child and exposure and abandonment of a child under twelve years of age are all offences of serious nature under the Indian Penal Code. The periods of imprisonment prescribe range from seven years to ten years and life except under Section 312 and 318. All offences except that under Section 312 are cognisable and non-bailable. However, sensitivity of law towards women is depicted in the provisions that lesser punishment is prescribed.

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158 This protection under the general law was held by the Court to be applicable in Mohd. Ahmad Khan v. Shah Bano Begum, (1985) 2 SCC 556, where the Supreme Court upheld the maintenance right of divorced Muslim Women.

159 Recommendations of CSWI on Maintenance as referred in supra note 88 at 255.

160 Ceiling of Rs. 500/- as monthly allowance has been omitted by Act 50 of 2001, Sec. 2 (w.e.f. 24.9.2001).

161 'Miscarriage' is the premature expulsion of the child or foetus from the mother's womb at any period of pregnancy before the term of gestation is completed.

162 The Indian Penal Code. Sections 312 and 313. The Medical Termination of Pregnancy Act, 1971 has decriminalized abortion in case of contraceptive failure and in case the pregnancy is against the mental or physical well-being of the mother.

163 Ibid. Section 314.

164 Ibid. Section 315.

165 Ibid. Section 316, quickening is the name applied to peculiar sensations experienced by a woman about the fourth or fifth month of pregnancy.

166 Ibid. Section 317.
where offence is committed with consent of the woman while greater punishment is laid down where the act is without consent of the woman.

The Indian Penal Code does not consider abortion or causing miscarriage at any stage of pregnancy as murder. To put it differently, a foetus is not given the status of a ‘person’.

However, under the Hindu Law the presumption is that a child comes into existence at the time of its conception. A Coparcener conceived at the date of partition, has the right to get the partition reopened subsequently.

The Transfer of Property Act, 1882 recognizes a child in the mother’s womb or a child en ventre sa mere a competent transferee. Under the Hindu Disposition of Property Act, 1916, a gift can be made to an unborn person. The resulting position is that a Hindu can make a bequest in favour of an unborn child. The result of this is subject to the limitations in Chapter Two of the Transfer Of Property Act and Sections 113, 114, 115 and 116 of the Indian Succession Act, no transfer inter vivos or by Will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

Constitutional provisions promising gender justice and catena of provisions in various procedural as well as personal laws generally exhibit gender neutrality. The patriarchal attitudes, the technicalities, the societal set up prevent the enforcement of these provisions towards ‘gender justice’ in real terms.

In words of Justice Sujata V. Manohar, “it is not easy to eradicate deep seated cultural values or to alter traditions that perpetuate

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discrimination. It is fashionable to denigrate the role of law reform in bringing about social change. Obviously law, by itself, may not be enough. Law is only an instrument. It must be effectively used. This effective use depends as much on a supportive judiciary as on the social will to change. An active social reform movement, if accompanied by legal reform properly enforced, can transform society. Unless laws create equality and fairness, there is no way of getting rid of discrimination. If discrimination is permitted or sanctioned by law, social attitudes will not change, and if they do, there will not be a law to give effect to the new aspirations.

Nevertheless, role of Constitutional provisions and other statutes as the instrument of social change has widely been acknowledged. Law by itself provides a parameter of righteousness of one’s behaviour in the society and contributes in the maintenance of status quo. Women-specific provisions in various laws were necessitated owing to the wide ‘gender disparity’ in terms of discrimination, exploitation, sex-related crimes; in order to provide woman extra protection in our society. To translate these provisions in real terms, the vulnerability and intrinsic gender differentials have to be recognized, to ensure real equality. Law reform, however, remains a vital measure for improvement in the status of women.

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\(^{171}\) Quoted in supra note 88 at 280.

\(^{172}\) Supra note 2 at Preface (viii).