such discrimination and imposes obligations upon parties to take positive steps to eliminate it in national laws and constitutions and to take steps to ensure the practical realization of this principle. Article 5 recognizes that legislation and policy directives are not by themselves sufficient, and accordingly require parties to take appropriate measures to change attitudes with respect to sexist stereotyping. Article 4 allows for positive discrimination during a transitional phase.

These initial articles make it clear that ratification of the Women’s Convention require States to study their domestic laws and practices in order to identify those which are discriminatory, to determine appropriate means of modification and to ensure that such legal changes are implemented in practice. Ideally, States should take such steps as desired after examining and adapting their policies in all fields, for example legislation, case law and policy directives with in the public and private sectors, educational curricula, media representation, introducing gender awareness programs for members of the judiciary.\footnote{Mohini Chatterjee (2005), \textit{Women’s Human Rights}, pp. 172-173.}

The remaining articles provide for implementation of the Women’s Convention. The uniform pattern of United Nations Human Rights treaties is followed through the establishment of a monitoring committee the committee on the elimination of discrimination against women, (CEDAW) comprising 23 independent experts (Article 17). The initial and periodic reports made by States in compliance with their obligations are scrutinized by the committee in advance of the presentation of individual reports by a representative of the relevant State, and the same is debated upon in open session.

In number of ways, this Convention represents a significant advance for the legal guarantee of women’s rights. It has been widely ratified by States from all regions of the world. It includes civil and political and economic, social and cultural rights, which was a radical departure from previous United Nations instruments, which had maintained a sharp division between the two.

The Women’s Convention also attempts to break through the public-private divide which feminists have identified in particular detrimental to women.
It is argued that one of reasons for women’s lack of participation in public policy and decision-making is their traditional consignment to private life. Liberal political theory distinguishes between public and private domains in the way that men are seen as properly functioning in the public areas as of governance and the workplace, while women are seen as properly located in the private world of family and the home.

The Convention aims at correcting the retrogressive influence of prevailing stereotype customs and norms that give rise to the multitude of legal, political and economic constraints on the advancement of women and thereby restrict women’s enjoyment of their civil, social, political or cultural rights on the basis of equality with men. The convention in particular under Articles 15 and 16 prohibits cultural prejudices against women.

**Article 15:**
1. States Parties shall accord to women equality with men before law.
2. States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States parties agree that all contracts and other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

**Article 16:**
1. States parties shall take all appropriate measures to eliminate discrimination against women in all matter relating to marriage and family relations and in particular shall ensure equality among men and women.
   (a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same right and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents irrespective of their marital status in matters relating to their children and that in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number of their children and means to enable them to exercise these rights.
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children or similar situations where these concepts exist in national legislation and that in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, the profession or occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and desperation of property, whether free of charge or for valuable consideration.

2.5.2 United Nations Declaration for Elimination of Violence Against Women
1993

The conception of violence as a Human Rights Violation expanded rapidly during the 1990’s. In 1992, the Committee on the Elimination of Discrimination against Women (CEDAW) formulated a broad recommendation that defined gender based violence as a form of discrimination, placing it squarely within the rubric human rights and fundamental freedoms and making clear that States are obliged to eliminate violence perpetrated by public authorities and by private persons. The doctrine asserts State responsibilities to protect women from violence, the obligation to protect them being an internationally recognized human right.

The United Nations General Assembly made a purposeful declaration which tends to set the standard of behavior in favour of women all over the world. It felt that violence against women is an obstacle to the achievement of equality,
development and peace. It constitutes a violation of the rights and fundamental freedoms of women and inspires or nullifies their enjoyment in human society. The violence against women has led to the ominous domination and discrimination against women by men and to the prevention of full advancement of women.

In the declaration, the term “violence against women” means 25

“Any act of gender based violence that results in, or is likely to result in physical abuse or psychological harm to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” Under Article 2, violence against women shall be understood to encompass, but not be limited to the following:

(i) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(ii) Physical, sexual, psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(iii) Physical sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

It is now widely acknowledged that violence against women prevents them from participating fully in the family, in the workplace and in their community. As with those who have a low level of literacy, those whose health is poor, those who earn an inadequate income, this reduced ability to participate in community life is a vast waste of capacities, capabilities, talent and education of one half of the world’s population. The inference to be drawn is that where

---

women are not treated equally not only they and their families suffer but the community itself losses access to extremely valuable human resources.  

Violence affects the lives of millions of women worldwide in all socio-economic and educational classes. It cuts across cultural and religious barriers, impeding the right of women to participate fully in society. In view of the alarming growth in number of cases of violence against women throughout the world, the Commission on Human Rights adopted resolution in March 1994, in which it decided to appoint the special rapporteur on violence against women. It has a mandate to collect and analyze comprehensive data and to recommend measures aimed at eliminating violence at the international, national and regional level. A preliminary report in 1994 by the special rapporteur Ms. Radhika Coomaraswamy, focused on three areas of concern where women are particularly vulnerable i.e. in the family (including domestic violence, traditional practices, infanticide), in the community (including rape, sexual assault, commercialized violence such as trafficking in women, labour exploitation, female migrant worker etc) and by the State including violence against women in detention as well as violence against women in situation of armed conflict and against refugee women. Governments agreed to adopt and implement legislation to end violence against women and to work actively to ratify all international agreements that relate to violence against women. They also agreed that there should be shelters, legal aid and other services for girls and women at risk and counseling and rehabilitation for victims. Governments also pledged to adopt appropriate measures in the field of education to modify the social and cultural patterns of conduct of men and women.  

The General Assembly in its meeting on 17 December 1999 adopted a resolution to designate 25 November as the International Day for the elimination of violence against women. It invited all appropriate governments, their relevant agencies, bodies, funds and programmes of the United Nations system and other


International Organizations and Non-Governmental Organizations to organize activities designated to raise public awareness on the problem of violence against women.\(^{28}\)

2.5.3 Optional Protocol to the Convention on Elimination of Discrimination against Women 1999

In the Convention on the Elimination of all forms of Discrimination against Women 1999, in which the State parties thereto condemned discrimination against women in all its forms and agreed to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

Under this protocol, the States agreed on:

1. To recognize the competence of the Committee to receive and consider communications submitted by or on behalf of individuals or group of individuals, under the jurisdiction of State party claiming to be victims of a violation of any of the rights set forth in the convention by that State party. Where a communication is submitted on behalf of individuals or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

2. The communication shall be in writing and shall not be anonymous or if it concerns a State party to the convention that is not a party to the present protocol no communication shall be entertained.

3. All available domestic remedies shall be exhausted before any communication is considered.

4. The Committee shall declare a communication inadmissible where:

(a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

(b) It is incompatible with the provisions of the Convention;

(c) It is manifestly ill-founded or not sufficiently substantiated;

(d) It is an abuse of the right to submit a communication;

(e) The events or violation that are the subject of the communication occurred prior to coming into force of the present Protocol, unless those occurrences or violation continued after that date.

5. At any time, after the communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned for its urgent consideration with a request that the State party take such interim measures as may be necessary to avoid irreparable damage to the victim or victims of the alleged violations. Where the Committee exercises its discretion above, this does not imply a determination on admissibility or on the merits of the communication.

6. Unless the Committee considers a communication inadmissible without reference to the State party concerned, and provided that the individual(s) consent to the disclosure of their identity to that State party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State party concerned. The receiving State party shall, within six months, submit to the Committee written explanations or statements clarifying the matter and the remedy taken.

7. The Committee shall consider communication received in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State party concerned provided that this information is transmitted to the parties concerned. After examining the communication, the Committee shall transmit its views on the communication, together with its recommendations to the parties concerned. The State party in the light of the views of the
Committee shall submit to the Committee within six months a written response, including information on any actions taken in the light of the views and recommendations of the Committee.

8. If the Committee receives reliable information indicating grave or systematic violations by State party of rights adopted in the convention, it shall invite the State party to co-operate in the examination of the information. If after submitting its observations it deems necessary, the Committee may designate one or more members to conduct an inquiry and submit its report. After examining the inquiry report, the Committee shall transmit the findings to the State party concerned with comments and recommendations. The State party concerned shall within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee. Such inquiry shall be conducted confidentially and the co-operation of the State party shall be sought at all stages of the proceedings.

The Committee may invite the State party concerned to include in its report details of measures taken in response to an inquiry conducted. The Committee may, after a period of six months, invite the State party to inform it of measures taken in response of the report.

9. The State party shall also ensure that individuals, as a consequence of communication with the Committee, are not subjected to ill-treatment or intimidation.

2.6 The United Nations and its Commission on the Status of Women

By the time the United Nations was formed in 1945, women were deeply involved in the public sphere, primarily in non-governmental organizations, but a number of countries had women among their delegations. The number of women’s organizations had increased; these organizations advocated issues ranging from study and self-improvement to social welfare and employed a variety of measures to draw attention to the causes. Women from many countries also had gained extensive experience in lobbying government officials locally, nationally and even internationally. The International Federation of Working
Women (IFWW), for example, had lobbied the International Labour Organization (ILO) and achieved adoption of the 1919 conventions on maternity protection and night work for women.

The work of women’s organizations internally came to fruition with the establishment of the United Nations. The equal rights of men and women clause in the U.N. Charter established a legal basis for the international struggle to affirm women’s human rights.

*Minera Bernardino* of the Dominican Republic (one of four women who signed the U.N. Charter in 1945) suggested that a committee of the Commission on the Human Rights be established to work on women’s right. The *New Zealand* chair of the Economic and Social Council (ECOSOC) organization committee took up that suggestion, and soon thereafter established. Within a year, the sub-committee became a free standing commission, the current Commission on the Status of Women (CSW).

The purpose of the full communication was to promote women’s rights in all fields of human endeavor. The object was to elevate the human rights and status of women, irrespective of nationality, race, and language or religion in order to achieve equality with men in all fields of human enterprise and to eliminate all discrimination against women statutory laws, legal maxims or rules or interpretations of customary laws.

The CSW reflected the work on women’s rights that had gone on before in the United Nations and earlier within various international bodies and women’s organizations. In 1951, as a result of a Commission initiative, the ILO adopted the convention and recommendation concerning equal remuneration for men and women for equal work and later issued recommendations on women’s right to employment opportunities, pensions, retirement, and social insurance. By 1952, the CSW succeeded in having the Convention on Political Rights of Women adopted. The Convention on the Nationality of Married women was drafted and adopted by the General Assembly in 1957, supplementing Article 15 of the UDHR. In 1962, the Commission’s Convention on the consent to marriage, minimum age for marriage and registration of marriages was adopted. CSW also
worked with UNESCO on an equal education convention, adopted in 1960, and made recommendations on political and civic education, women’s right to inherit property, a contentious issue that would surface again and again, and to equal treatment before the law. Also in 1967, CSW adopted a Declaration on Eliminating Discrimination against Women.

When the CSW draft of declaration came before ECOSOC’s Third committee, an article calling for the abolition of discriminatory customs and tradition and raising the issue of protection of women workers created a furore. Some third committee delegates had suggested that women be protected from “arduous work.” NGOs responded with vehemence that protecting women from arduous work was ridiculous because women worldwide did such work. Nursing, child care and household work were arduous, they insisted, and customary family law simply reinforced women’s subordinate status. By the end of their 1967 session, the commission unanimously adopted its draft, and with the support of women delegates to ECOSOC’s Third committee, an 11- Article Declaration was adopted by the General Assembly on 7 November, 1967. It covered the issues women had been working on for centuries.

Following the U.N. custom of moving from declaration to a convention, the polish CSW delegate proposed the move shortly after the declaration was adopted in 1967. In 1972, the U.N. General Assembly approved what had been a dream of some female delegates when the United Nations was formed- the holding of a World Women’s Conference. Moreover, 1975 was designated as International women’s year. Mexico city was selected as site for the conference and Helvi Sipila, a CSW representative since 1960, was chosen as Assistant Secretary General for Social Development and Humanitarian Affairs in-charge of the year and the conference. Equality, development, and peace were selected as the themes of the conference a clear tribute to the 1926 conference of the International Alliance of Women, which had first used the term “Women’s movement” and asserted that the goals of this movement were “Equality, International understanding and Peace.”
2.7 The World Women’s Conferences

The 1975 International Women’s Year Conference attracted 5,000 representatives, from all branches of the new women’s movement to Mexico city. The conference highlighted the themes of “Equality, Development and Peace.” The World Plan of Action adopted at the conference gave credit in its introduction to the work of CSW and to the numerous women’s rights conventions already adopted. The plan noted that the promotion and protection of human rights for all was one of the fundamental principles of the U.N. Charter and that “history has attested to the active role which women played in accelerating the material and spiritual progress of people.”

2.7.1 Copenhagen and Nairobi Conferences on Women.

The Second World Conference on women convened in Copenhagen in 1980, adopted a Programme of Action for the second half of the UN decade for women which emphasized “education, employment and health.” The Copenhagen Programme of Action, while building on the Mexico City plan, moved economic considerations to the fore. However, it emphasized that development was not only economic, but covered political, social and cultural realms as well and that economic development projects often disadvantaged women, depriving them of their traditional forms of livelihood.

By 1985, when the Third World Women’s Conference was held in Nairobi, Kenya, a 23-member expert Committee on the Elimination of Discrimination against Women (CEDAW), which was to receive reports from governments on convention implementation, had begun its work. The Nairobi Conference, with its approximately 15,000 attendees at the NGO forum held on the university of Nairobi campus, demonstrated to the world through extensive media coverage that the new international women’s movement was extremely diverse. The 1,200 forum workshops on a wide array of topic reflected the diversity of women and their interests. One multinational group mounted a workshop series on the convention. Out of this workshop series, a group called
the International Women Right’s Action Watch (INRAW) was formed to publicize and monitor the convention and its implementation.

During the NGO Forum, the issue regarding violence against women finally came out of the world’s closet and forced itself into public attention. Innumerable workshops were held on the topic and thousands of publications distributed. The “Forward Looking Strategies for the Advancement of Women to the year 2000” (FLS) document, adopted by the U.N. Conference in Nairobi, called for constitutional and legal reforms in accordance with the convention and for equality in social and political participation. As in Mexico city and Copenhagen documents, education was the priority. In the FLS it was called the basis for the full promotion and improvement of the status of women and the basic tool that should be given to women in order to fulfill their role as full members of society.29

2.7.2 Vienna Declaration 1993.

This declaration was adopted by the world conference of human rights on 25 June 1993. The relevant paras 36-44 of the declaration run as under:30

(36) The World Conference on Human Rights urges the full and equal enjoyment by women of all human rights and that this is a priority for Governments and for the United Nations. The conference also underlines the importance of the integration and full participation of women as both agents and beneficiaries in the development process, and reiterates the objectives established on global action for women towards sustainable and equitable development set forth in the Rio de Janeiro Declaration on Environment and Development and chapter 24 of Agenda 21, adopted by the United Nations Conference on Environment and Development (Rio de Janeiro, Brazil, 3, 14 June, 1992).

(37) The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These

29 Dr. Mohini Chatterjee (2005), Women’s Human’s Rights, pp. 53-54.
30 Supra note 27 at 257-59.
issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms. In particular, steps should be taken to increase cooperation and promote further integration of objectives and goals between the Commission on the Status of Women, the Commission on Human Rights, the Committee for the Elimination of Discrimination against Women, the United Nations Development Fund for Women, the United Nations Development Programme and other United Nations agencies. In this context, co-operation and co-ordination should be strengthened between the Centre for Human Rights and the Division for the Advancement of Women.

(38) In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment and exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional customary practices, cultural prejudices and religious extremism. The World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including murder, systematic rape sexual slavery, and forced pregnancy, require an effective response.

(39) The World Conference on Human Rights urges the eradication of all forms of discrimination against women, both hidden and overt. The United Nations should encourage the goal of universal ratification by all States of the Convention on the Elimination of All Forms of Discrimination against Women by the year 2000. Ways and means of addressing the particularly large number of reservations to the Convention should be encouraged. Inter alia, the Committee on the Elimination of Discrimination Against Women should continue its review of reservations to the Convention. States are urged to withdraw reservations that are
contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.

(40) Treaty monitoring bodies should disseminate necessary information to enable women to make more effective use of existing implementation procedures in their pursuits of full and equal enjoyment of human rights and non-discrimination. New procedures should also be adopted to strengthen implementation of the commitment to women's equality and the human rights of women. The Commission on the Status of Women and the Committee on the Elimination of Discrimination Against Women should quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. The World Conference on Human Rights welcomes the decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women at its fifth session.

(41) The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life-span. In the context of the World Conference on Women and the Convention on the Elimination of All Forms of Discrimination Against Women, as well as the Proclamation of Teheran of 1968, the World Conference on Human Rights reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

(42) Treaty monitoring bodies should include the status of women and the human rights of women in their deliberations and findings, making use of gender-specific data. States should be encouraged to supply information on the situation of women de jure and de facto in their reports to treaty monitoring bodies. The World Conference on Human Rights notes with satisfaction that the Commission on Human Rights adopted at its forty-ninth session resolution 1993/46 of 8 March 1993 stating that rapporteurs and working groups in the field of human rights should also be encouraged to do so. Steps should also be taken by the Division for the Advancement of Women in cooperation with other United
Nations bodies, specifically the Centre for Human Rights, to ensure that the
human rights activities of the United Nations regularly address violations of
women's human rights, including gender specific abuses. Training for United
Nations human rights and humanitarian relief personnel to assist them to
recognize and deal with human rights abuses particular to women and to carry out
their work without gender bias should be encouraged.

(43) The World Conference on Human Rights urges governmental, regional and
international organizations to facilitate the access of women to decision-making
positions and their greater participation in the decision-making process. It
encourages further steps within the United Nations Secretariat to appoint and
promote women staff members in accordance with the Charter of the United
Nations, and encourages other principal and subsidiary organs of the United
Nations to guarantee the participation of women under conditions of equality.

(44) The World Conference on Human Rights welcomes the World Conference
on Women to be held in Beijing in 1995 and urges that human rights of women
should play an important role in its deliberations, in accordance with the priority
themes of the World Conference on Women of equality, development and peace.

2.7.3 Beijing Declaration 1995

The Fourth World Conference on Women held in Beijing in 1995 is
notable in that it finally put the U.N. stamp on the concept that “women’s rights
are human rights” and also for the fact that it initiated gender mainstreaming
which denoted the acceptance of “gender” as a holistic approach to humanity
which includes both men and women. It took an exceedingly long time for the
realization that “gender” was not only about women’s issues, but was linked to
most other issues such as violence, health care or political participation. It was
agreed at the Beijing conference to involve all programmes of the United Nations
not just those relating to women in assessing the implications for men and women
of any planned action such as legislation, policies and programmes in all areas.

Gender mainstreaming seeks to empower women by removing obstacles
constructed by societies that operate to the disadvantage of women. By evaluating
laws, policies, programmes, customs, and practices and array of inequities from a
gender perspective, the women and men can identify those areas in which women
have been discriminated against and develop new policies to overcome that
discrimination.

In August 1995, the United States delegation to Beijing circulated a paper entitled
“Gender”, which summed up the need to mainstream gender concerns this way:\textsuperscript{31}

“At the base of the use of the word, gender is the Concept that
biology need not determine everything that men and women do. That
opens the door to change, to changing the balance of power and
responsibility between men and women- in the home /in the
workplace, the market place. That is what the U.N. Charter of 1945 is
about when it calls for equal rights of men and women.”

The 1995 conference has adopted the following declaration:\textsuperscript{32}

1. Take all necessary measures to eliminate all forms of discrimination
against women and the girl child and remove all obstacles to gender equality,
advancement and empowerment of women;
2. Encourage men to participate fully in all actions towards equality;
3. Promote women’s economic independence, including employment and
eradicate the persistent and increasing burden of poverty;
4. Promote people centered sustainable development, including sustained
economic growth, through the provision of basic education, life-long education,
literacy and training, and primary health for girls and women;
5. Prevent and eliminate all forms of violence against women and girls;
6. Ensure equal access to economic resources, including land, credit, science
and technology, vocational training, information, communication and markets, as
a means to further the advancement and empowerment of women and girls to
enjoy the benefits of these resources;

\textsuperscript{31} Supra note 29 at 60.

\textsuperscript{32} The Fourth World Conference on Women, Beijing (China) (4-15 September 1995).
7. Ensure equal access to and equal treatment of women and men in education and health care and enhance women’s sexual and reproductive health as well as education;
8. Promote and protect all human rights of women and girls;
9. Ensure respect for international laws, including humanitarian laws, in order to protect women and girls in particular;
10. Ensure success of the Platform of Action, which will require a strong commitment on the part of governments, international organizations and institution at all levels.

2.8 The Response of Human Rights Programmes to Gender Concerns

Building awareness of the human rights of women begins with making them visible. Indeed, much of the credit for putting this issue on the agenda of U.N. human rights bodies goes to the non-governmental women’s activists and organizations who mobilized their efforts in conjunction with the preparation for the World Conference on Human Rights, held in Vienna in 1993. Before this, women’s human rights were truly an invisibly subject for the U.N. human rights programmes.

In the years preceding the Vienna World Conference, women advocated theorized, conceptualized and conducted meetings locally and internationally. These meetings produced plans for the advocacy that would follow. The issue of violence against women became a focal point for much of the effort put into the conference, with women everywhere agreeing that violence was a priority matter directly affecting them and cutting across geography, class and race. Violence against women also most closely resembled concepts already examined and addressed by human rights bodies: the systematic use of coercive and forcible measures to ill treat, harass or otherwise impair the capacity of individuals to enjoy their human rights. Unlike most human rights initiatives at the U.N., the individuals on whom the spotlight was now placed were women and girls. Advocates identified patterns of violence directed against women, highlighted anti-violence strategies being used at the national level, clarified the international
legal framework applicable to violence against women and proposed government and inter-governmental measures that would combat such violence.

One of the key outcomes of their efforts was to call for creation, in the Commission on Human Rights, of a special rapporteur on violence against women. The special rapporteur, Radhika Coomaraswamy of Sri Lanka, has produced a series of path-breaking reports on each of these issues, providing an array not only of country-specific information, but of legal and social analyses demonstrating how these issues fall within the human rights agenda, and offering concrete proposals for actions to be taken to address them.

Prodigious efforts by women’s rights experts have helped to make clear to U.N. human rights specialists why certain abuses of human rights are specific to women and how they affect women, while also making clear that these are abuses of “traditional” human rights. Within the United Nations, agencies such as UNIFEM and the Division for the Advancement of Women have joined with the office of the High Commissioner for Human Rights to organize workshops on gender related aspects of human rights. Participants in those workshops pointed to the sources of information that experts could consult to examine these topics and addressed ways to ensure both the clarity and consistency of human rights standards at play. Participants emphasized on the political and cultural environment within which women pursued human rights; they outlined the institutional framework necessary to ensure respect for, and protection, promotion, and fulfillment of women’s human rights.

2.8.1 United Nations Development Fund for Women’s Work on Gender Justice

Working towards gender justice necessarily entails a women’s empowerment framework, a framework within which the United Nations Development Fund for Women (UNIFEM) functions. It was established as the voluntary Fund for the UN Decade for Women in 1976, in response to the demand for a fund for women within the UN system to work towards gender equality and gender justice. Empowerment, as UNIFEM sees it, is about changing
or transforming power relations in favour of those who previously exercised little power over their own hives. If power means access and control, then empowerment is the process of gaining access to and control over resources, knowledge, belief systems, values and the self. Power also means to enable or to facilitate. In this sense, empowerment entails creating enabling conditions for human well being, the building of human capacity and the process of inner transformation of the self. It is a framework that can tap powerful reservoirs of hope and enthusiasm among people who have been subjected to viewing themselves and their worlds in negative, fragmented or broken terms. UNIFEM is an aid to and advocate for women in the developing world, striving to give women voice and visibility in their search for gender justice. It is recognized that women are key player in families and communities. UNIFEM stresses that such institutions and organizations which draw strength from women should be strengthened. It is recognized that the development could accelerate in reality only when the meaningful partnership can be evolved between government and civil society. And the surest way of doing this is implementing safeguards to ensure women participation at every level of policy making.  

In order to make such scheme a reality, important shift is a necessity while introducing new ethics and morality. A new vision has to be worked out in which both men and women have equal access to resources and opportunities. Even the States have to accept the development and well being of its citizens rather than complicated tables of GDP only. At the same time, it is to be understood that improving the status of women is not a separate or isolated issue but an integrated part of creating just society with healthy institutions. Some important challenges in this direction are as follow:

1. First of all some alternative models of masculinity have to be explored and efforts should be made to make men gender sensitive and accept women in so far male reserved domains ranging from socio-economic to political fields.

33 Indian government has already introduced women reservation at Panchayati level. But deliberations are going on Loksabha for introduction of Women Reservation Bill for ensuring women representation in General elections.
2. A system has to be worked and education modules have to be developed to make men see women empowerment not a threat but as an important mean to well meaningful and enriched inclusion of each and every member of human family.

3. The goal of gender justice is enabled by adopting a holistic approach, which blends women’ empowerment and gender perspectives, decentralized approaches and treat women not as object of policy and programmes but as a part of process transformation of social attitudes.

UNIFEM worked to include women’s voices in the Ninth National Development Plan of India which led to the empowerment of women as one of the Plan’s objectives. It started with the creation of women think tank which worked for raising the concern of women in every sphere of life. After holding five regional meetings and national consultation, it managed to create a pool of women concerns which was shared with the policy planners at suitable platform. UNIFEM also worked with other South Asian countries to work on this methodology. One of the laying impact of this exercise was that now the process of engendering national development plan is replicated at State level which in a way help in evolving both gender sensitive public policy as well as data and statistics.\textsuperscript{34}

One of the mainstreamed activities of UNIFEM on Human Rights have been the impact made at the World Conference on Human Rights in Vienna. Women related issues held the centre stage, particularly the violence against women. In India, UNIFEM worked with government and provided all the technical support to finalize the periodic report which was required after the ratification of CEDAW through consultative process. In Asia, UNIFEM also collaborated with UNICEF to launch its publication “CEDAW KIT” an advocacy tool for both advocates and government representatives which examines the role

\textsuperscript{34} Supra note 26 at 195-97.
of CEDAW as the “Bill of Rights for Women.” In 1997, the Trust Fund for Action to Eliminate Violence Against Women was established within UNIFEM. It also works for awareness-raising programmes in advocacy, leadership building and legal literacy to prevent and deter violence. UNIFEM is pioneering to train AFGHAN, a women led NGO based in Pakistan. Even in India it is initiating research programmes to find bottle necks in justice system and advocating for conducting gender sensitive workshops for all male and female judges.35

2.8.2 United Nations Educational, Scientific and Cultural Organisation (UNESCO)

During the Second World War, on seeing the amount of violence generated by warring countries on the innocent civilians, the Allies got together as early as in 1942 to envisage a plan for peaceful co-existence and wider rights for the citizens. In United Kingdom the conference, named Conference of Allied Ministers of Education (CAME) of such nations was held. Upon the recommendations of CAME, a United Nations Conference for the establishment of an educational and cultural organization (ECO/CONF) was convened in London from 1 to 16 November 1945. It gathered the representatives of forty-four countries who decided to create an organization that would embody a genuine culture of peace. In their eyes, the new organization must establish the “intellectual and moral solidarity of mankind” and, in so doing, prevent the outbreak of another World War. At the end of the conference, thirty-seven countries founded the United Nations Educational, Scientific and Cultural Organization. The Constitution of UNESCO, signed on 16 November 1945, came into force on 4 November 1946 after ratification by twenty countries: Australia, Brazil, Canada, China, Czechoslovakia, Denmark, Dominican Republic, Egypt, France, Greece, India, Lebanon, Mexico, New Zealand, Norway, Saudi Arabia, South Africa, Turkey, United Kingdom and United States. The first session of the General Conference of UNESCO was held in Paris from 19th November to 10th

35 Supra note 26, pp. 199-200.
December 1946 with the participation of representatives from 30 governments entitled to vote. With the passage of time, with minor hiccups the signatory to UNESCO continue to expand (presently 193) and it became a well respected constituent of UN working for the betterment of the world and its inhabitants. Various schemes for the promotion of education and co-operation were introduced by UNESCO as it conferred “that ignorance of each other’s ways and lives has been a common cause of war and hostilities among different societies. However, soon it was also realized that if real liberty of human race is to be achieved then one half of human population namely women can not be left aside. Thus, series of plans were interrelated with the development of women and by integrating funding with women liberation the UNESCO in a way has managed to uplift women cause throughout the world. It also worked closely with CEFEM and ILO for safeguarding these issues. UNSECO collects report from different member-nations on the status of women in these respective countries to devise suitable mechanism for the empowerment of women. In 1989, it initiated practice of getting reports on status of women in South Asia. Wanting to assess the level of women empowerment after involving the strategies and plans adopted in Three World Conferences in *Mexico, Copenhagen and Nairobi*, many countries have established women ministries and initiated the programmes for women empowerment during the Decade of Women. There is no doubt that much data was available in different countries but it was scattered and not result oriented and hence the UNESCO decided to compile it into one report and was published in 1986.\[^{36}\] So far these various reports of different member nations have helped the

\[^{36}\] The Director-General of UNESCO, *Ms Irina Bokova*, signed the UN Joint Statement on Accelerating Efforts to Advance the Rights of Adolescent Girls. The other signatories are the Executive Heads of UNFPA, UNICEF, UNIFEM, ILO and WHO. The statement was launched on 3 March 2010 in New York, during the 54th Session of the Commission on the Status of Women. This Commission is currently conducting a fifteen-year review of the *Beijing* Platform for Action. The Statement expresses a common vision among the signatories to intensify their agencies’ support to advancing policies and programmes that empower the hardest-to-reach adolescent girls, particularly those aged 10 to 14 years old. For UNESCO, it furthers the Organization's commitment to the promotion of Gender Equality as one of its two global priorities. The Dakar Framework for Action (2000) aims to ensure Gender Equality in education. However, worldwide, girls still face a
various governments and NGOs to formulate strategies for women emancipation and sensitize masses about gender perspective by developing new educative tools.

2.9 Conclusion

The world has entered into the twenty first century with lots of visions and objectives. Humans understand the world much better than before. Communication and Information technology have gone through tremendous developments and global efforts for strengthening civil institutions have received lot of support from different quarters of the policy making. Still our is a warring planet in which religious, political and ethnic divisions resulted in numerous bloody conflicts. Dwindling natural resources and neo imperialistic expansion are also heightening the tension among different nations.

Historically, it is seen that women and children are subjected to worst of war crimes by the warring armies. The last two World Wars and many insurgent movements in Africa and Asia targeted women and children. Women were mutilated and raped to avenge unfounded fears or give vent to the anger by the warring soldiers. Numerous riots have also witnessed such a scenario where the women and children of other communities were singled out and made targets of aggression and atrocities. Realizing the vulnerable status of women and children many international conventions were signed under the guidance of UN and its allied organizations. Member-nations are made signatory to these decisions to safeguard the interest of women and different governments are directed, helped and co-ordinate to devise suitable policies to strengthen the women.

distinctive set of barriers to education that must be overcome if we want to meet our targets: gender-based violence in and around schools, early marriage - which prevents them from progressing beyond primary school and the lack of non-sexist and inclusive curricula that promote gender equality. Teachers’ attitudes and expectations as well as the quality of textbooks also play an important role in encouraging girls to attend and stay in schools.
Apart from war crimes, women are today facing more threat of their becoming commodities in the ever increasing economies of the global markets. Trafficking, prostitution and other forms of physical exploitation are occurring at more alarming rate. Poverty, illiteracy and lack of co-ordination between the different nation-governments failed to devise some joint venture to wipe out this evil which is robbing million of women of their right to a dignified life. Though some efforts have been made by International organizations and various Conventions have been signed by member nations to stop human trafficking and physical exploitation of women, yet a lot has to be done in is this field especially, in poor Asian and African countries. The human rights system has many features that are law like, but it lacks an enforcement mechanism parallel to that of State law. Like State law systems, human rights operate through statutes produced through quasi-legislative processes of commission meetings and deliberations with the assistance of experts under the auspices of United Nations Organizations. The precise text of the declarations and conventions achieved by a pain staking process of examining words and meanings in a variety of preliminary and working group meetings, are then presented to the General Assembly for approval. Once approved, conventions are submitted to the constituent nations of the United Nations for ratification and become binding internationally only when a sufficient number of nations has ratified the agreement. Declarations, on the other hand, are simply passed by the General Assembly. Laws suggested by the human rights conventions become part of national legal systems and are, in theory, enforced by these nations while declarations may gradually become part of customary international law, as has taken place with the Universal Declaration. Because, the United Nations system is grounded in a network of sovereign nations therefore, it has no binding power beyond the consent of these constituent nations.

Many countries like India who were signatory to these conventions had responded well to the clauses and special provisions and women cell were created to empower women like National Commission of Human Rights and National Commission For Women. Women have been given their due by initiating the
policy of reserving 33% seats in Parliament though it has become more a matter of politics for our Indian leaders. Many schemes of funding the States have been integrated with the welfare of the women so that the desired objective of the different international conventions can be carried out. India is witnessing changes in judicial and executive responses towards gender justice and women are participating more at all level of policy making. Still, women in India are suffering at the hands of society. Their sufferings begin at the very stage of their birth. Statistics are witness to the fact that female foeticide and infanticide is quite rampant. Dowry and honour killings are on increase and a large stratum of women have no access to their liberation and toiled endlessly under the traditional forms of biases and prejudices. Indian women need more effective empowerment when compared to other developed nations. An effort has to be initiated on war footing to introduce women orientated reforms and to educate male psyche in which women are seen as equal beings with equal political, social, economic rights. In this way only one can realize truly the dream of achieving human rights. It is to be understood that more liberty to women would usher more prosperity and well meaningful existence of the humanity as envisaged by the framers of many international conventions as studied above.
Chapter Third

GENDER EQUALITY AND CONSTITUTIONAL FRAMEWORK OF INDIA

Women constitute about one-half of the global population, but they are placed at various disadvantageous positions, due to gender difference and bias. They have been the victims of violence and exploitation by the male dominated society all over the world. Ours is a tradition bound society where women have been socially, economically, physically, psychologically and sexually exploited from times immemorial, sometimes in the name of religion, or on the pretext of writings with scriptures and sometimes by the social sanctions. The concept of equality between male and female was almost unknown to us before the enactment of the Constitution of India. Of course, the Preamble of the Constitution, which is the supreme law of the land, seeks, to secure its citizens including women folk, justice-social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and promote fraternity assuring the dignity of the individual.

For centuries past, women all over the world have not only been denied full justice-social, economic and political but as “a weaker sex” they have been used, abused, exploited and then discarded to lead immoral, street vagrant and destitute life till their death. The general, though unfortunate impression has ever since been that women are sub-human species, an object of contempt and ridicule a commodity for barter, an expendable asset and a plaything for mere sexual enjoyment..

Gender equality as an ideal has always eluded the constitutional provisions for equality before the law or equal protection of law. This is because equality is always supposed to be between equals and since the judges did not concede that men and women were equal, gender equality did not seem to be there a legally
forbidden inequality.\(^1\) In *Bradwell v. State of Illinois*\(^2\) Justice Bradley of the United States Supreme Court said:

> “The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”

It is also worthwhile to note that it took 75 years of struggle in courts for women to include themselves in term ‘persons’. It all started in the middle of the 19\(^{th}\) century, at that time majority of the statutes used the phrase ‘any person who is entitled to vote or to take admission or practice.’ But women were neither permitted to vote nor to take admissions. And soon a question was raised, ‘Does the word ‘person’ include women?’ It was consistently answered against them.

The House of Lords in *Narin v. Scottish University*\(^3\) expressly held that women did not fall within the meaning of the term ‘person.’ The US Supreme Court had held in *Minor v. Happier Sett*\(^4\) that a special category of citizen having inability to vote did not infringe upon their rights as citizens.

In India, the Calcutta High Court in *re Regine Guha* \(^5\) and the Patna High Court in *re Sudhansu Bala Hazre*\(^6\) rejected the applications of women for enrolment under the Legal Practitioners Act. The full benches of these courts on judicial side held that women were not included in the term ‘person’. The Allahabad High Court is the first court to enroll a lady named *Cornelia Sorabji* under ‘person’ clause on August 24, 1921. It was done on administrative side.

---


\(^2\) 83 US 130, 141 (1973).

\(^3\) 1909 AC 147: 100 LT 96.

\(^4\) (1875) 88 US 162.

\(^5\) AIR 1917 Cal. 161.

\(^6\) AIR 1922 Pat. 269.
As late as in 1961, the United States Supreme Court upheld a law placing women on the jury list only if they made a special request because, as Justice Harlan put it, “a woman is still regarded as the centre of home and family life.”

Gender justice is a comparatively recent concern of the law. The prosecution of a top police executive, who was considered a main pillar of the success in putting down terrorism in Punjab, for having misbehaved with a woman officer of the Indian Administrative Service Cadre and the directions given by the Supreme Court which have to operate until a suitable legislation is enacted by Parliament against sexual harassment of working women reflect the high priority given by the Apex Court to gender issues. From Mathura in 1978 to Vishaka in 1997, the Supreme Court has travelled from an extreme black letter law position to a liberal and gender sensitive legal position.

Our constitutional guarantees of individual freedoms are not static but are expressions of basic human values. They transcended day to day shifts in majority wishes and hence requires redefinition from time to time to meet narrowly recognized if not narrowly created human needs.

3.2 Judicial Approaches to Equality Rights in India

In our country, the Constitution makers while drafting the Constitution were sensitive to the problems faced by women and made specific provisions relating to them. The suprema lex, in its various articles, not only mandates equality of the sexes but also authorizes benign discrimination in favour of women and children to make up for the backwardness which has been their age

---

11 Supra note 9.
old destiny. But categorical imperatives constitutionalised by the Founding Fathers are not self-acting and can acquire socio-legal locomotion only by appropriate State action.\footnote{12 O.C. Sharma (1994), ed., \textit{Crimes Against Women- A Saga of Victimology Sans Penology}, p. 33.}

Gender justice challenges traditional rationality of law. The traditional rationality speaks of equality in the context of an assured secondary role for women even concerning decision making which affects their bodies and lives. Gender justice seeks to displace this secondary role itself by affirmative pro women action that puts them on equal footing with men. Formal equality for women is explicitly enshrined within Indian law. Notwithstanding formal guarantees of equality, Indian women's lives continue to be characterised by pervasive discrimination and substantive inequality. By examining the judicial interpretations of Indian constitutional law, this chapter will illustrate how the legal system itself contributes to the gap between the formal guarantees of gender equality and the substantive inequality that plagues women's lives. It will argue that with some notable exceptions, the judicial approach to the equality guaranteed by the Constitution is informed by a problematic approach to both equality, and gender difference.

The Supreme Court and the High Courts have played a significant role in protecting the fundamental rights of the people. The judges are after all part of the society and cannot be totally immune from the dominant trends of social thoughts prevailing therein. An analysis of the judicial decisions therefore is undertaken to show to what extent the judges shared the gender predilections prevailing in society and how in spite of such predilections they rendered decisions which advanced the progress of the law towards gender justice. This part of the chapter surveys protection of women given under national framework and their subsequent implementation by the courts particularly, the Supreme Court. It attempts to study how Courts have articulated gender equality and gender justice within the framework of the Constitution. India has had a long history of social
reforms, a considerable part of which was dominated by the struggles against patriarchy as well as caste hegemony. Some of the sociological writings help us understand how law and the courts were drawn in to further the cause of gender justice even during the colonial period. Knowledge of those struggles doubtlessly helps in obtaining proper insight into how societal attitudes slowly changed over the period of time. With those insights we are better equipped to appreciate why the ideal of gender equality and justice implied under the Constitution had to pass through such vicissitudes before its incorporation into the decisional law of the Supreme Court of India.

The Constitution of India, 1950 has certain provisions relating to women. It makes special provision for the treatment and development of women in every sphere of life.

3.2.1 The Preamble

The Preamble is the key to the Constitution. It does not discriminate men and women and treats them alike. The framers of the Constitution were well aware of unequal treatment meted out to the fair sex from the times immemorial. In India, the history of suppression of women is very old and long which is responsible for including general and special provisions for upliftment and development of the status of women. Undoubtedly, the Preamble appended to the Constitution of India, 1950 contains various objectives including “the equality of status and opportunity” to all the citizens. This objective has been inserted with a view to give equal status to men and women in terms of the opportunity. The aspect of social justice is further emphasized and dealt within the Directive Principles of State Policy.

3.2.2 Fundamental Rights

Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated into Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter – dependent and have mutual reinforcement. The human rights for women are, therefore, inalienable, integral
and indivisible part of the universal human rights. The full development of personality, fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social, family stability and growth. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. These human rights have been made enforceable as constitutional or fundamental rights in India.

3.2.3 Right to Equality

Right to Equality as envisaged under Articles 14, 15 and 16 of the Constitution means the equality of opportunity, equality before law, equal protection of laws, no discrimination against any person on grounds of sex, religion, race, caste and place of birth and no discrimination in the matters of public employment on the grounds of sex only as provided under Article 16 of the Constitution.

The Constitution guarantees the right to equality before law and equal protection of law. The Supreme Court has held that differential treatment could be given to people or objects if such differential treatment was based on reasonable classification.

Two requisites of reasonable classification are:

1. Those who are selected for different treatment must be distinct from those who are excluded from it and
2. The criteria of classification must have nexus with the object of such classification.

However, the courts realized that these Articles reflect only *dejure* equality to women. They have not been also to accelerate *defacto* equality to the extent the Constitution intended. Reflecting this in *Dimple Singla v. Union of

---

13 *Valsamma Paul v. Cochin University* AIR 1996 SC 1011.
the Delhi High Court expressed its apprehension that unless attitudes changes, elimination of discrimination against women cannot be achieved. There is still a considerable gap between constitutional rights and their application in the day to day lives of most women.

Privacy, liberty and equality are pillars of gender justice. These principles have been explained, established and reaffirmed in different decisions. The Indian judiciary has played a creative role in this regard and has upheld the basic principle of equality of sexes and tried to maintain the dignity and honour of women. This could best be seen in the observation of the Supreme Court in *C.B. Muthamma v. Union of India*\(^\text{15}\) that “the struggle for national freedom was also battle against woman’s thralldom.”\(^\text{16}\)

In this case Rule 8 (2) of the Indian Foreign Service (Conduct and Discipline) Rules 1961 was challenged on grounds that it requires a female employee to obtain the permission of the government in writing before her marriage is solemnized and further, at any time after her marriage she may be required to resign from service, if government is satisfied that her family and domestic commitments are likely to come in the way of due and efficient discharge of her duties. There were no alike provisions with regard to male members of the service. The Supreme Court struck down the said rule as it was discriminatory and smacked of bias against women and directed the government to overhaul all service rules to remove the stain of sex discrimination. Rule 18 of the Indian Foreign Service (Retirement, Cadre, Seniority and Promotion) Rules, 1961, which ran in the same prejudicial strain and denied to a female employee the right to be appointed to the service because she was a married woman, was also struck down by the court as it discriminated them against on the ground of sex alone and hence, it was in defiance of Article 16 of the Constitution. The fact

---


\(^\text{15}\) (1979) 4SCC 260.

\(^\text{16}\) Ibid., p.262.
that such discrimination against women in respect of public employment continued for nearly three decades after the coming into force of the Constitution showed the contradiction between the normative law and the law in action, Justice Krishna Iyyer, agonized over such discrimination and observed:

“At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of man acting the weaker sex forgetting how our struggle for national freedom was also a battle against woman’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. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III, especially when high political office, even diplomatic assignees has been filled by women, the inference of die-hard allergy to gender parity is inevitable.”\(^{17}\)

Striking down the rules as violating the principle of equality, it was said:

“We do not mean to universalize 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 handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable the rule of equality must govern.”\(^{18}\)

Similar view has been expressed by the Apex Court in Air India v. Nargesh Meerza case\(^{19}\) that to bring just social order the claims of women could not be brushed aside. In this case, the air hostesses of the Air-India International Corporation had approached the Supreme Court against discriminatory service

\(^{17}\) (1979) 4SCC 262.

\(^{18}\) Ibid.

\(^{19}\) (1981) 4SCC 335.
conditions within the Regulations 46 and 47 of the Air India Employees Service Regulation. The Regulation 46 provided for the retirement of an Air Hostess in the event of marriage taking place within four years of service or on first pregnancy, which ever occurred earlier. Whereas, Regulation 47 fixed the normal age of retirement of an Air Hostess at 35 years but simultaneously it authorized the Managing Director to extend the same to 45 years at his option subject to other conditions being satisfied. It was alleged on behalf of the Air hostesses that those provisions were discriminatory on the ground of sex as similar provisions did not apply to men employees doing similar work.

The Supreme Court upheld the first requirement that an air hostess should not marry before the completion of four years of service. The court held that it was ‘a sound and salutary provision.’ Justice Fazal Ali felt that, “apart from improving the health of the employee, it helps a great deal in the promotion and boosting up of our family planning programme.” The court observed that if a woman married near about the age of 23 years, she became fully mature and there was every chance of such a marriage proving a success. Further, if this bar was removed, Air India would have to incur huge expenditure on recruiting additional air hostesses either on temporarily basis or adhoc basis to replace the air hostesses who conceived. It is submitted that all concerns for the maturity of a marriageable woman and the ultimate success of her marriage were a camouflage for the real concern, which was to save the expenditure on appointing additional air hostesses in place of women employees who would go on maternity leave.

But so far as the rule regarding termination of service at first pregnancy was concerned, the Apex Court ruled that it was clearly violative of Article 14 of the Constitution as it was unethical and contained the quality of unfairness and exhibited naked despotism. It would amount to interference with and divert the ordinary cause of human nature. It was not only callous and cruel act but also an open insult to Indian womanhood, the most sacrosanct and cherished institution. Hence, such a course of action was held extremely detestable and abhorrent to the

Marriage of a woman is quite a normal incident of her life. It can be somewhat delayed but cannot be completely denied and it should not become a cause for loss of her service. The Court also held that the third condition that an air hostess should retire at the age of 35 was discriminatory and asked Air India to change its rules so as to make them eligible to work till they reached the age of superannuation as applicable to other employees. However, the constitutional prohibition to the State not to discriminate citizens only on the sex does not prohibit a special treatment to women in employment on their own demand. 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. The Constitution does not prohibit the employer to consider sex in making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan. In *Air India Cabin Crew Association v. Yeshawinee Merchant Case* the Apex Court held that fixing of retirement age of air hostesses from flight duties on international flights at the age of 50 years or opt for ground duties after 50 years of age up to the age of 58 years cannot be said to be discriminatory treatment given by the employer to the air hostesses only on the basis of their sex. Where terms and conditions are fixed through collective bargaining as a comprehensive package deal in the course of industrial adjudication and terms of service and retirement age are fixed under agreements, settlements or awards, the same cannot be termed as unfavourable treatment meted out to the women workers only on basis of their sex. The court did take resume of several agreements, settlements and awards made between Air India and AICCA being the recognized association with majority of male and female cabin crew members.

In all the demands, it insisted on maintaining two separate cadres for pre-1997 recruits and agreed for early retirement age for air hostesses compared to

---


males from flying duties with option to go for ground duty between 50 and 58 years of age. In the course of industrial adjudication through conciliation and negotiation the employer could legitimately acknowledge women perspective, their life experience and viewpoint. After giving consideration to the same, the employer could agree for terms and conditions which suited the airhostess. The condition of service agreed to by majority of air hostesses is that they would prefer to retire from flight duties on international flights at the age of 50 years or opt for ground duties after 50 years of age up to the age of 58 years is on a par with males colleagues so that at least in some period of their service they may not remain away for long periods from their homes and families and would be able to discharge their marital obligations. Duties on flight demands physical fitness, agility and alertness and sometimes is full of tensions. They have therefore agreed for comparatively early age of retirement with option to accept duties on the ground. For these reasons, the Supreme Court did not find anything objectionable regarding the condition of service applicable to the airhostesses both working in air or ground and held the same being not discriminatory under Articles 14, 15 and 16 of the Constitution.

In Maya Devi v. State of Maharashtra24, a requirement that married women obtain their husbands consent before applying for public employment was challenged as violating Articles 14, 15 and 16. The Supreme Court held:

“This is a matter purely personal between husband and wife. It is unthinkable that in social conditions presently prevalent a husband can prevent a wife from being independent economically just for his whim or caprice.”25

The Court emphasized the importance of economic independence for women, and the importance of not creating conditions that discourage such independence. The consent requirement was held to be unconstitutional. In this case, the Court was of the view that consent requirements were an anachronistic obstacle to women's equality. In order to achieve economic independence women must not, at least in

24 1986 1 S.C.R. 743.

this regard, be treated differently than men. The decision might be seen to reflect a formal model of equality, and a sameness approach to gender difference which requires that women and men be treated the same. However, the decision also supports a more substantive approach to equality - that is- a recognition that the consent requirement contributed to the subordination of women. The case exemplifies how a substantive approach to equality may still require a choice to be made about the relevance of gender. In this case, an inquiry into whether the rule contributed to or reinforced women's subordination revealed that in this particular context, gender ought to be irrelevant, and thus, a sameness approach was appropriate.

3.2.4 Section 497 of Indian Penal Code and Gender Equality as envisaged under Article 14 of the Constitution

The constitutional validity of Section 497 of Indian Penal Code was challenged in *Abdul Aziz v. State of Bombay*\(^{26}\) on the ground that it is violative of Articles 14 and 15 (1) of the Constitution. The Apex Court upheld the validity of the provision on the ground that the classification was not based on the ground of sex alone. The court relied upon the mandate of Article 15(3) of the Constitution to uphold the validity of the said provision of the Code. However, in the present case 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.

Section 497 of IPC shows that it punishes the offence of adultery committed with a married woman without the consent or connivance of her husband. The main feature of this offence is that the male offender alone has been made liable. This offence is committed by a person against a husband in respect of his wife. If an act of sexual intercourse takes place between a married man and woman and an unmarried woman or with a widow or with a married woman

---

\(^{26}\) AIR 1994 SC 321.
whose husband consented to it, this offence shall not be deemed to have been committed. It is not required for an offence under this Section that the offender should know whose wife the woman is, but he must know that she was a married woman.

In another case, *Smt. Sowmithrivishnu v. Union of India* 27 it was contended that Section 497 of IPC is violative of Articles 14 and 15 of the Constitution on the ground that it makes an irrational classification between men and women in that:

(i) It confers upon the husband the right to prosecute the adulterator but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;

(ii) It does not confer any right on the wife to prosecute her husband who has committed adultery with another woman and

(iii) It does not take in its fold cases where the husband has sexual relation with an unmarried woman with the result that it amount to having a free licence under the law to have intra marital relationship with unmarried woman.

However, the Apex Court rejected these aforesaid contentions and held that it cannot be said that in defining the offence of adultery so as to restrict the class of offender to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is seducer and not the woman. In this case, the Apex court observed that this position may have started changing but it is for legislature to take note of this transformation and amend Section 497 of IPC appropriately.

The woman petitioner also argued that the right to life as interpreted by the Supreme Court includes the right to reputation and its absence in Section 497 of IPC of the provision mandating the court to hear the married woman with whom the accused has allegedly committed adultery violates her constitutional

---

27 1985 Cri.L.J. 1302.
right to life under Article 21. Assessing that the right to be heard is concomitant with the principles of natural justice and believing that a trial court allows the married woman to depose her say before it records adverse findings against her, the Apex Court held that the absence of a provision mandating hearing the adulteress wife in Section 497 of Code does not make the Section unconstitutional.

According to the learned judge Chandrachud, C.J., women were not punishable for adultery because they were less likely to indulge in it. This is really no argument because no adultery would be committed unless a woman was a party to it. There was discrimination not only between the adulterer and adulteress but also between a man who had illicit sexual relations with a married woman or a widow or a divorcee. If the purpose of the law was to punish conjugal infidelity, any kind of illicit sexual behaviour should have been made punishable. The Section made an act of illicit sexual relations with a married woman punishable, not with a view to punishing conjugal infidelity but to protect the right of a man to the exclusive possession of his wife. It was his proprietary right over his wife that was sought to be protected by the impugned Section. This notion of wife as property is totally contrary to a woman’s fundamental right to gender equality and her right to life and liberty guaranteed by Article 21 of the Constitution. His praise of women’s qualities as compared to men was a subtle glorification of women’s subordination and a defense of the status quo. The Supreme Court refused to intervene and upheld the validity of the Section. Invalidation of this Section by the court would have had the effect of delimitating the ideology of women’s subordination. This is an instance of wrong use of the difference principle. Men and women are biologically different and therefore they need different treatment. Here the different treatment was not because of their biological difference but due to gender biased perception of their sexuality.\(^\text{28}\)

In *V. Revathi v. Union of India* \(^{29}\) the disability of the wife of the adulterer to prosecute her unfaithful husband was relied upon by a wife to challenge the constitutional propriety of Section 198(2) read with Section 198(1) Criminal Procedure Code which empower the husband of the adulteress wife to prosecute the adulterer but does not permit the wife of an adulterer to prosecute her promiscuous husband. Probably realizing that the Section also does not permit the husband of the adulteress wife to prosecute her for her infidelity and recalling the ratio of *Sowmithri Vishnu Case* \(^{30}\), she asserted that whether or not the law permits the husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her unfaithful husband. Such a statutory provision, which is premised on gender discrimination in contravention of the gender equality guaranteed in the Constitution, is, the petitioner wife argued, unconstitutional as it amounts to an “obnoxious discrimination.”

Upholding the constitutionality of Section 497 IPC and Section 198(2) Criminal Procedure Code, which according to the court ‘go hand in hand and constitute a legislative packet’ to deal with ‘an outsider’ to the matrimonial unit who invades the peace and privacy of the matrimonial unit. *Thakkar, J.* of the Apex Court Observed:

“The community punishes the outsider who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring ‘man’ alone can be punished and not the erring woman. There is thus reverse discrimination in ‘favour’ of the woman rather than ‘against’ her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus, there is no discrimination against the woman in so far as she is not permitted to prosecute her husband. A husband is also not permitted to prosecute his wife as she is not treated as an offender in the eyes of law. In the ultimate analysis the

\(^{29}\) (1988) 2 SCC 72.

\(^{30}\) 1985 Cri.L.J. 1302.
law has meted out even-handed justice to both of them in the matter of prosecuting each or securing the incarceration of each other.”

The constitutional validity of Section 497 is upheld ostensibly on the impression that it is favourable to the woman as it keeps her out of the purview of criminal law. Such judicial reasoning, in ultimate analysis, unfortunately endorses the patriarchal, property-oriented and gender-discriminatory penal law of adultery. It conveys that a man is entitled to have exclusive possession of and access to his wife’s sexuality and a woman is not eligible to have such an exclusive right and claim over her husband. She is, therefore, not entitled to prosecute either her promiscuous husband or the “outsider woman” who has poisoned (or helped her promiscuous husband to do so) her matrimonial home. The Apex Court, thus, failed to have a deeper sight into the gender-biased law of adultery.

3.2.5 Gender Equality and Women’s Reservation in Academic Institutions, Elections to Local Bodies and Employment etc.

Many of the rules, regulations and practices that impose restrictions on women's employment have been found to violate the equality guarantees. However, the decisions in this area are not entirely unproblematic. Firstly, some of the rules and practices which restrict women's employment have been upheld. Secondly, the approach to equality and gender difference informing these decisions are often problematic. The courts have overwhelmingly adopted a formal approach to equality. The approach to gender difference, however, is divided. Many judges have adopted a protectionist approach, while others have adopted a sameness approach.

The cases dealing the constitutional challenges to reservations for women in political institutions have been upheld. In Dattatraya Motiram More v. Bombay, Section10(1)(c) of the Bombay Municipal Boroughs 1925 Act for the reservation of seats for women was challenged as violating Articles 14, 15 and 16. With

---

31 (1988) 2SCC 76-77,

32 AIR 1953 Bom. 311.