Chapter 2
2.1 HUMAN RIGHTS - SAFEGUARD TO THE DIGNITY AND WORTH OF A WOMAN

According to Sir Hersch Lauterpatch an eminent jurist in International law “the protection of human personality and its fundamental rights is the ultimate purpose of all law, national and international”. The objective has been set in the proper perspective. But the culture of violence spreads more quickly than the culture of discipline. There is the need for the development of culture of Human Rights as the ultimate goal.

Human Rights are not merely ideals or aspirations, nor are they some rights granted to us by the existence of particular set of laws. We cannot delegate the authority to a group of persons to define these rights. Human Rights are violated not only by unjust acts but also by unjust National and International structures. Violation of Human Rights against women take specific forms against the back drop of civil, political, economic or social conditions of the country. Gender violation is a phenomenon, which takes many forms across culture, race and class.

Human Rights for women is the¹ “Collective rights of a woman to be seen and accepted as a person with the capacity to decide or act on her own

---

behalf and to have equal access to resources, an equitable social economic and political support to develop her full potential". At the international level the provisions relating to Human Rights are set forth in UN Charter and Universal Declaration of Human Rights. These two documents of International Rights ensure freedom from social, sexual and religious discrimination. The General Assembly of the United Nations established International Research and Training Institute for the Advancement of Women to carry out research training and international activities worldwide to promote women as key agents of developments. The General Assembly also created United Nations Development Fund for women to improve their economic, social and political position. It emphasises the involvement of women in mainstream development activities at National Regional and International levels. It also extends support to innovative and experimental activities, which benefit women and are in line with national and regional priorities.

The UN charter makes clear at its outset the International community’s basic commitment to equality. Among the purposes of the United Nations it states, are developing friendly relations among Nations based on respect for the principles of equal rights and self determination of people\(^2\) and promoting and encouraging respect for Human Rights and Fundamental Freedoms for all without distinction as to race, sex, language

---

\(^2\)U.N. Charter Art. 1(1).
or religion. The United Nations shall place no restrictions on eligibility of men and women to participate in any capacity and under conditions of equality in the principal and subsidiary organs.

Among the powers of the General Assembly are initiating studies and making recommendation for the purpose of “...assisting in the realisation of Human Rights and Fundamental Freedoms for all without distinction as to race, sex, language or religion”. The United Nations shall promote “...universal respect for and observance of Human Rights and Fundamental Freedom for all without distinction as to race, sex language or religion”.

The Universal Declaration of Human Rights is concerned with the notion of equality. The preamble recognises the inherent dignity and the equal and inalienable rights of all members of human family as the foundation of freedom, justice and peace in the world and reaffirms faith “… in the equal rights of men and women”.

---

3 U.N. Charter Art 1(3).
5 Ibid Art.13(1).
6 Ibid Art.55(c).
7 Universal Declaration Preamble Para 1.
8 Ibid para 5.
Out of the thirty Articles of International Bill of Human Rights ten Articles mention about the equality. Article 1 states that every one is entitled to all the rights and freedom set forth in the Declaration without distinction of any kind, such as race, sex, language, colour, religion, political or other opinion, national or social origin, property, birth or other status. Under Article 4 no one shall be held in slavery or servitude. Article 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law. According to Article 16, men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family and are entitled to equal rights as to marriage. Article 23 explains that everyone without any discrimination has the rights to equal pay for equal work.

In addition to these references to equality there are also references which show that everyone has the right to liberty,⁹ to effective remedies before competent tribunals,¹⁰ to freedom of movement,¹¹ to nationality¹² and other rights.

⁹Universal Declaration Art. 5.
¹⁰Ibid Art.8.
¹¹Ibid Art.13.
¹²Ibid Art.15.
2.1.1 Violation of Women’s Human Rights

In relation to women the right to life with dignity is itself a very complicated one. The areas where women’s dignity is attacked are numerous. Violence against women regardless the nature of the perpetrator occurs not only outside the house but also within the family. It takes the form of sexual or physical assault or harassment, female foeticide or infanticide, female circumcision, dowry death, denial of her autonomy and authority over her body.

In remote tribal and rural areas the scheduled caste and backward classes suffer worst humiliation and atrocities. This is a serious violation of Human Rights of the women. The foster parents while adopting a child give priority to male rather than female because they have to shoulder more responsibilities if a girl is taken in adoption. Some practices like the system of ‘Karva Chouth’ has no meaning or social value in the modern living. According to this practice the women drink the drinking water collected from cleaning the toe of the husband’s feet, which is a symbol of mental slavery.

2.1.2 Manifestation of Violation in India

The problem of battered women remains a hidden crime because it happens within the four walls of the house and goes unreported. Fears of
living, so called family prestige, apprehension about the future of children, financial problems and fear of divorce also contribute.\textsuperscript{13}

Torture of women in Police custody and indiscriminate arrests are rampant instances. The molestation of women is done to demoralise the people so that no one should dare to raise their voice against any type of injustice by the State. Police come to villages and interrogate women like criminals.

Two major incidents, which attracted widespread attention, were from urban areas Vikarabad and Hyderabad. Shri A.Rajaub reported a theft in his house. On June 17, 1983 police arrested his servant, Mehboob and on June 18, 1983 his maidservant Parvatamma was raped by the circle Inspector at his house. Later on June 20, 1983 she was taken to Dharoor Police Station. On the way she was again raped at the Anantagiri forest.\textsuperscript{14} It created furore and disturbance inside and outside the Assembly. The State Government announced the suspension of the policemen involved. The Civil Liberties Committee, which visited Vikarabad and investigated the case, found out that the policemen were not suspended but were only transferred. This type of behaviour of the erring officials has increased and this has resulted in women showing unwillingness to report these incidents.


\textsuperscript{14} Report of People's Union For Democratic Rights, 1984.
In *Arvinder Singh Boga v. State of U.P.*\(^{15}\) is a case of police atrocities where police officers were guilty of illegal arrest and torture in police station. They subjected a married woman to physical, mental and psychological torture calculated to create fright to make her submit to the demands of the police and abandon her legal marriage. Her husband and family members were tortured. The court took serious note of the Human Rights violation and directed the State to launch prosecution against the police officials concerned and directed to pay compensation of Rs.10,000 to the victim woman and her husband and Rs.5,000 to each of the other victims. The court further held that upon such payment it would be upon the State to recover personally the amount of compensation from the police officers concerned.\(^{16}\)

### 2.1.3 Attitude of the Judiciary

The new concept of ‘personal liability’ of the police officials, committing police atrocities leading to Human Rights violation depicts the judicial wisdom in such cases and is a welcoming feature of the Indian judiciary.\(^{17}\)

\(^{15}\)AIR 1995 S.C.117.

\(^{16}\)Ibid p.119.

Even where civil and political rights have been adopted in the National Constitution and have been made enforceable through judicial process it is largely the rich and powerful who have taken the advantage of the judicial process. When the basic rights which touch the people at the grass root level has not received the sufficient attention, the Apex court of India adopting the creative approach with humane touch has done a lot of judicial activism in some cases. But the courts at the lower level are yet to be sensitive.

In Hussainnorra Khatoons\textsuperscript{18} case the Supreme Court censured the Bihar Government for keeping quite a few women in jails in the name of “protective custody” without even being accused of any offence and described such imprisonment as a “blatant violation” of personal liberty guaranteed under the Constitution. The affidavit filed by the State of Bihar gave details of under-trial prisoners in 17 jails in the State. The expression “protective custody” mentioned in the affidavit, for women kept in jails merely because they happened to be victims of an offence or they were required for the purpose of giving evidence, the court observed is a euphemism calculated to disguise what is really and in truth nothing but imprisonment. Observing that the court was not aware of any provision of law under which a woman could be kept in jail by way of “protective custody” the judges directed the Bihar Government to release all women

\textsuperscript{18}AIR 1979 S.C. 1360.
and children who were in jail in the State under “protective custody”. This case relates to four girls in protective custody in Dhanbad district Jail and the continued violation of the Supreme Court directive. All the four girls were victims of rape, kidnapping or abduction. Vasudha Dhagamwar in her article comments\textsuperscript{19}: “Without missing as much as a heartbeat, so to speak, after the scathing criticism by the Supreme Court... the three fold subordinate law enforcement machinery – police, courts and jail - had continued to put innocent girls in jail for safe custody”.

2.1.4 Judicial Guidelines

Giving a number of guidelines on protection for women prisoners in police lock ups, the Supreme court directed that police authorities should select lock ups in reasonably good localities where only female suspects should be kept and they should be guarded by women constables. These were the observation of justice P.N.Bhagawati on a writ petition filed by Sheela Barse\textsuperscript{20}, a Bombay based journalist. In her letter addressed to the court she had narrated about the custodial violence on women prisoners whom she had interviewed.


In spite of legislative provisions providing protection against indiscriminate arrests under the code and the Constitution, yet it is difficult to ensure protection of freedom of individuals from the arbitrary exercise of powers by the police unless there are proper provisions for supervision and accountability for non conformance to the guarantee of human liberty and dignity.\textsuperscript{21}

The Supreme court in its directive regarding the performance of duty by police while effecting arrest observed\textsuperscript{22} "Whenever a person is arrested by the police without warrant he must be immediately informed of the grounds of his arrest and in case of every arrest, it must be made known to the person arrested that he is entitled to apply for bail. The Maharashtra State Board of Legal Aid shall forthwith get a pamphlet prepared setting out the legal right of an arrested person and printed copies of the pamphlet in Marathi, Hindi and English should be affixed in each cell in every police lock up and should be read out to the arrested person in any one of the three languages which he understands as soon as he is brought to the police station".


\textsuperscript{22} AIR 1983 S.C .382.
The court held that right to legal aid to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty or constitutional imperative mandated not only by Article 39-A but also by Articles 14 and 21 of the Constitution. It is necessary to protect the accused from torture and ill treatment or oppression and harassment at the hands of his custodian.

The illustration reveal that how important issues have been taken by individual petitioners on their own behalf with active support from women’s organisations.

The concept of equality and non-discrimination finds its due place in the Constitution of India and many other legal documents.

The real protection of Human Rights cannot be achieved by only good codification but also by the concrete action by the Government. Violation of gender equality does not affect a small core group consisting of women. They are inalienable rights of women, which may constitute crime against humanity. These core rights are binding on each State irrespective of its being a party to any of these Human Rights instruments.24

\[\text{Ibid at p.380.}\]

2.1.5 Rights Reinforced by National Commission

In India the Government has taken a major step in 1993 to establish two Commissions, the National Commission on Women and the National Human Rights Commission. Some State Governments have initiated the steps towards setting up of State level Commissions.

State Commissions can play role of a watchdog to ensure that when offences are registered with the police their investigation and prosecutions are conducted properly. They have also the task to ensure that the rights of women are properly implemented and special laws regarding women are made known to the agencies dealing with them. It is their responsibility to activate voluntary organisations to be advocates in this regard. The State Commissions would have to network effectively with the National Commission for Women. The National Commission could monitor and review the cases of atrocities against women. But their main task is to report about a particular incident to the Government. They are without punitive teeth. "A Commission, which may at least bark but not bite, is still a good beginning altho' Indian Womanhood does deplore its lot and asks how long 'O' Republic, how long".25

2.2 HUMAN RIGHTS - PART OF FUNDAMENTAL RIGHTS

Independent-India wanted to uphold Human Rights and this is reflected in its various provisions. While drafting the Constitution the chapter on Fundamental Rights was incorporated which asserts the principle for equality for all the citizen so that they could secure justice, social, economic and political; liberty of thought, expression belief, faith of worship; and equality of status and of opportunity. Only so much power was meant to be given to the state and no more as would be required to check excessive exercise of one’s right by one individual to the detriment of another. These rights enshrined in the Constitution have its base in the Human Rights instruments having been passed by the United Nations to eradicate gender inequality in all its forms and facts.

Human Rights are Birth Rights ipso-facto had been bestowed by the Almighty to both Adam and Eve before shifting them from heaven to this planet. From the day man and woman come into existence the equality between the sexes had been emphasised. When women’s rights are routinely and inversely violated and rarely adhered to the world organisation like the United Nations and the Universal Declaration of Human Rights wanted to ensure equality of sexes in variety of ways.

Article 55 declares that the United Nations shall promote Universal respect for and observance of Human Rights and Fundamental Freedoms for all without distinction on account of sex or other reasons.\textsuperscript{27}

In the year 1946 the Economic and Social Council of the United Nations established a Commission on the Status of Women. The objective of the Commission was to prepare a report and make recommendations to promote the rights of women. The International Labour Organisation (ILO) has adopted Convention concerning equal remuneration for men and women workers for work of equal value Convention concerning night work of women employed in industry 1948 and the Convention concerning maternity protection 1952.

The International Covenant on Civil and Political Rights 1946 and the International Covenant on Economic, Social and Cultural Rights 1946 forbid discrimination on account of sex (Article 3 of the Covenant). The General Assembly has clearly adopted the Convention against discrimination in education, which prohibits, "any distinction, exclusion, limitation or preference", on account of sex and affecting thereby the equality of treatment in education.

The keynote was struck when the General Assembly passed a Covenant on the Elimination of All forms of Discrimination against Women in 1979. The objective of the Convention is to implement the rights

\textsuperscript{27} See note 6, \textit{Supra}.
already existing. India ratified the Convention on 9th July 1993. While all other Conventions address particular aspects of women’s rights, this Convention is the first universal instrument, which focuses on the general prohibition of discrimination against women and contains modest control machinery. The Convention has imposed a responsibility on the states to eliminate discrimination and ensure equality.

The Convention defines discrimination against women in various Articles. From the definition it is clear that discrimination should be prohibited not only in public life but also private life. Not only is sex discrimination anathema to the paramount law but also realism has persuaded the framers to justify special provisions in favour of women and children.

2.2.1 Framework of the Equality Clause

Inequality arises because of differences in natural qualities like height, weight and abilities. Inequalities can also be artificial and imposed, like those based on sex, race, descent or holding of property. In the

28 See notes 5 and note 6, Supra.
30 Ibid., p.44.
twentieth century most socialist and democratic countries tried to eradicate these inequalities. In India before independence the inequalities existed in a manifest form, very often deriving their sanction from religion. Efforts were made with much difficulty to eradicate the inequalities. Taking note of the United Nations objectives of Conventions, in order to eradicate discrimination and inequality and to provide enough opportunities for the exercise of their claims the framers of the Constitution have incorporated the following principles in the formulations of its several provisions regarding women:

Prohibition of discrimination on the ground of sex.

The State has been vested with the power to make special provision for women to enable them to take special care of women in the light of their physiological, biological and socio-economic position.

The chapter on Directive Principles of State Policy contains certain measures with respect to women and their socio-economic amelioration.

2.2.2 Contours of Equality in the Fundamental Rights

Articles 14, 15 and 16 underlines the significance which our Constitution makers attached to the principle of equality. Taken together the Articles are found to supplement each other. The three provisions are the part of the same constitutional code of guarantee. These Articles are so interwoven that one Article can be invoked to construe the scope of other.
Article 14 guarantees the general right of equality. Articles 15 and 16 are instances of the same right in favour of citizens of some special circumstances. The Articles 16(1) gives effect to the principle of equality before law under Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Thus the clear application of the will of the framers of the Constitution establishes that no discrimination should be made on the basis of sex.

2.2.3 Analysis of Article 14, Article 15 and Article 16 of the Constitution

Article 14 states: "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

The provisions of the Indian Constitution relating to right to equality prohibit all kinds of unjustified inequalities. It may be stated that in earlier decisions the Article was identified with the doctrine of classification because the view taken was that the Article forbids discrimination and there would be no discrimination where classification making the differential fulfils two conditions namely (1) the classification is founded on an intelligible differential which distinguished persons or things that are grouped together from others left out of the group (ii) that the differential has a rational relation to the object sought to be achieved by the impugned
legislative or executive action. The judiciary has also realised that the women are no longer going to be satisfied by being treated as beneficiaries of welfare doles but wish to be actively involved in the developmental process of the country.

In a country governed by rule of law the equality has to be placed on a high altitude. The court further stated that any arbitrary act is arbitrary if it is implicit in it that it is unequal both according to political, logic and constitutional law and therefore violates Article 14. Article 14 has two limbs: the State is not to deny to any person (1) equality before the law or (ii) the equal protection of the laws. The equality clause as laid down in Article 14 by them can hardly be expected to usher in the desired social change. Thus many special enactments to prevent and remove the discrimination against women have been passed. But sometimes they themselves discriminate against women. In the sphere of family laws, law applicable to a person on the basis of his religion exhibits strong features of discrimination against women. The Supreme Court has clarified in its decision and has come out with a standing that nothing prevents the enacting of a common civil code for the entire country as per the directives of Article 44 of the Constitution. Till such time the personal laws may appear to be in violation of the fundamental rights.

---


The rationalisation or justification advanced in favour of not taking steps to reform some personal laws is to be considered. It is said, that law by itself cannot bring about social change and it therefore serves no purpose to confer legal equality. The argument ignores the point that legal equality is a sine qua non for the enforcement of social equality.\textsuperscript{34}

In the case of \textit{Ajay Hasia v. Khalid Mujil}\textsuperscript{35} the Supreme Court emphasised that a ‘New dimension’ has been given to Article 14, namely that it embodies a guarantee against arbitrariness. This concept has been criticised as a shift away from the reasonable classification approach by some commentators.\textsuperscript{36} The new reasoning has incorporated the doctrine of classification into its folds and thus continues to be premised on a formal model of equality.

Article 15 lays down that:

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

2. No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them or be subject to any disability, liability, restriction or condition with regard to:


\textsuperscript{35}\textit{Ajay Hasia v. Khalid Mujib}, op.cit., pp.487, 499.

Access to shops, public restaurants, hotels and places of public entertainment or, the use of wells, tanks, bathing ghat, roads, and places of public resort maintained wholly or partly out of State Funds or dedicated to the use of the general public

3. Nothing in this Article shall prevent the State from making any provision for women and children.

4. Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Prohibition of discrimination on the basis of sex is stressed in Article 15. This Article has given powers to the State to make special provisions for women. This provision has been a matter of controversy in some cases. It has been questioned whether Article 15(3) authorises discrimination in favour of women or against women. From the language used in the Article it has been understood that the intention of the framers of the Constitution was to protect the interests of women and children. Further the protective discrimination clause enjoins the State to make special provisions under Art.15 (4) and Art.16 (4) in fields of education and employment. Thus the position of women in this context is similar to that of the backward classes who also enjoy the protective discrimination. However it has to be pointed out that identification of backward class has not been properly made, and no
proper line of demarcation can be made between the backward class and other section of the society. While they enjoy more privileges extended by the Government, women who are also weaker section of the society are yet to derive all the benefits enjoyed by the backward classes.

On the question of special treatment to be accorded to women under Art.15(3) the problem is to identify the meaning of discrimination within Art.15. It has been understood as any classification or distinction on the prohibited grounds. This approach tries to give a formal meaning to the term. While using this approach courts tend to give preferential or compensatory meaning. Another interpretation is understood as an adverse distinction on the prohibited grounds. Anjali Roy's case\(^{37}\) reflects this attitude. All differentiation is not discrimination but only such differentiation as is made not because any real difference in the conditions or any natural differences between the persons dealt with which makes different treatment necessary but because of the presence of some characteristics or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiations as a justifying reason.\(^{38}\) The court in this case has taken an approach, which is directed towards a substantive model of equality.


\(^{38}\) *Ibid*, p.829 of para 16.
Art.15(1) prohibits discrimination on the grounds only of religion, race, caste, sex, place of birth or any of them. This clause can be interpreted, as, if discrimination is found to exist on grounds other than those enumerated in clause 15(1), it does not violate the Article of the Constitution. Discrimination based on sex coupled with one or more of these Articles discrimination on other non-enumerated grounds would not constitute violations.\(^{39}\)

The focus on “the grounds only of sex” has been used primarily to uphold legislation that provides preferential treatment for women. The constitutional stress is not to make any laws on the grounds only of sex. In order to uphold this special legislation the courts have taken the criteria ‘backward’ social status of women, financial need of wives for support and on public morality as grounds for discrimination. These criterias are not stated in Art.15(1). Thus to justify the basis on which the special legislations for women are made the courts are taking a formal approach to equality. There are some legislation which have caused more disadvantage than benefits because of searching for other grounds to uphold the legislation. For example, the law prohibiting women from voting is based not only on sex but also on the backward position of women.\(^{40}\) In *Walter Alfred Baid v. Union of India* the courts inability to properly appreciate the


\(^{40}\) AIR 1976, DI,302.
phrase 'only on the grounds of sex' can be seen. "Sex and what it implies cannot be severed. Considerations, which have their genesis in the sex and arise out of it, would not save such discrimination. What could save such a discrimination is any ground or reason independently of sex such as socio-economic conditions, marital status and other disqualifying conditions such as age, back ground, health, academic accomplishment etc.\textsuperscript{41}

The connection between sex and the social implication of sex has been brought out in W.A.Baid. The decision is firmly rooted within a formal model of equality and the consequence of the case was to strike down a recruitment rule that had benefited women. Thus under Art.15 if the courts are able to give a more substantive approach to equality it would benefit women rather than giving a formal approach.

Article 16 provided that,

1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State;

2. No citizen shall, on grounds only of religion, race, caste, sex, descent place of birth, residence or any of them is ineligible for, or discriminated against in respect of any employment or office under the State.

3. Nothing in this Article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or

\textsuperscript{41} Ibid, p.308 para 10.
appointment to any office, (under the Government of or any local or other authority within a State or Union Territory, any requirement as to residence within that State or Union Territory) prior to such employment or appointment.

4. Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State.

5. Nothing in this Article shall affect the operation of any law, which provides that the incumbent of an office in connection with the affairs of any religion or denominational institution or any member of the governing body thereof shall be a person professing a particular denomination.

This Article guarantees equality of opportunity and prohibits discrimination in matters relating to employment or appointment to any office.

The approach taken by the courts in the case laws has been very formal. In *All India S.M. and A.S.M.'s Assn. v. General Manager, Central Railway* 42 The Supreme Court held that equality of opportunity in matters of promotion guaranteed by Art.16(1) must be interpreted to mean equality among members of the same class of employees and not equality among

---

42 AIR 1960 S.C., 384.
members of different classes. The special provisions made under Art. 16 are some times seen as interpreting the general guarantees. Some High courts have gone to the extent of interpreting Articles 14, 15 and 16 constituting a single code.\(^4\) In response to this the Supreme Court in \textit{Kerala v. N.M. Thomas}\(^4\) held the Articles 15 and 16 are facets of Article 14. In the \textit{Marri Chandrashekhar Rao v. Dean Seth G.S.M.}\(^5\) the approach of the apex court from a formal model has been shifted. In the above case the court recognised the fact that disadvantaged persons may have to be treated differently.

It observed:

\begin{quote}
"... those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality... The State must therefore resort to compensatory State action for the purpose of making people who are formally unequal in their wealth, education or social environment, equal in specified areas".\(^6\)
\end{quote}

This trend taken by the Supreme Court has to be appreciated because the approach is a shift from the formal model and more over there is a possibility of looking into the reasons that led to the inequality and to take steps to wipe it out.


\(^4\) AIR 1976 S.C. 490.

\(^5\) 1990 3 S.C.C. 130.

\(^6\) \textit{Ibid} at p.138.
2.3 GENDER JUSTICE IS THE GOAL

While interpreting the Articles relating to equality the courts have been oscillating between a formal approach and a substantive approach. With regard to women as beneficiaries of these provisions, the courts have played the role of a protectionist, corrective agent or treating men and women same.\textsuperscript{47} In the protectionist approach the courts have justified in giving special consideration to women because of their weakness and subordinate nature. Hence special or differential treatment has to be accorded to them but the approach only tends to derogate the status and place them in a subordinate state.

In the sameness approach a formal attitude is taken to equality. By adopting this approach legislation which have treated men and women differently has been struck down. Special treatment provided to women will only work to their disadvantage. Historically women were discriminated and this has retarded their progress to a great extent. They were not allowed to vote, not admitted to pursue their education and not allowed to participate in the economic and political activity of the country. Hence advocates of the sameness approach wanted women to be on par with men.

The corrective approach is a more effective approach in improving the status of women. The differential treatment is seen as relevant and as

requiring recognition in law. Proponents of this approach view the gender-neutral rules of formal equality are based on male standards and male values. Under the corrective approach substantive equality for women can be achieved. The courts have thus adopted either of these approaches while deciding the cases that have come before them. To what extent they have been successful can be seen from the cases relating to women in field of employment, political and civil activities, education and family law.

2.3.1 Employment Rights

The equal rights issue challenging many of the rules, regulations and practices which debar or restrict women in employment has been brought before the knowledge of the court and the judges have either taken a protectionist or formal approach. In *Raghuban Soudahar Singh v. State of Punjab*\(^\text{48}\) the Government order made women ineligible for appointments to all positions in men's jail with exception of the position of clerks and matrons. This was challenged as discrimination on the basis of sex. The court held that the discrimination was not based on sex only. Hence the restriction on employment of women was upheld. The court emphasised that physical strength may be required for discharging the duties. The gender-based classification seems to give only a formal approach to

\(^{48}\)AIR 1972, P & H, 117.
equality. A more appropriate recourse is to find out whether the individual candidate has the required physical strength to meet the demands.

In *C.B.Muthamma v. Union of India and Other*\(^4^9\) is another case relating to the IFS rule framed for female employees requiring permission before marriage and denial of right of employment to married women. These rules were challenged under Articles 14 and 16 of the Constitution. The Government itself repealed these conditions after the petition was filed. The court held that the rule is discriminatory and application was dismissed in the light of the subsequent promotion of the petitioner. The court gave a direction to the Government to overhaul all service Rules to remove the stain of sex discrimination without waiting for ad-hoc inspiration from writ petitions or gender charity. “We dismiss the petition but not the problem” were the memorable words of the court.

The reference made to women as “the gentler of the species” only suggest that as weaker sex they need protection.

*Air India v. Nargesh Meerza*\(^5^0\) was the case where a combined hearing of the cases of airhostesses of both Indian Airlines and Air India on the issue of discrimination in service conditions and rules relating to retirement, marriage and pregnancy. The regulations of Air India provided that an air hostess could not get married before completing four years of

---

\(^4^9\)AIR 1979 S.C.868.

\(^5^0\)AIR 1981 S.C.1829.
service. Usually an airhostess was recruited at the age of 19 years. After recruitment for four years she has to remain unmarried, which means that till the age of 23 years. If she got married within the period she had to resign. After reaching the age of 23 years if she married and becomes pregnant she had to resign over coming all these, which meant that she either did not get married or if married did not become pregnant she could, serve until she reached the age of 35 years. Thus the airhostesses as discriminatory on the ground of sex as similar provisions did not exist for men employees doing similar work challenged these regulations. The restriction on marriage was upheld on the ground that it fostered the State family planning programme. The Corporation would incur much financial constraints if an airhostess marries within the four-year period after the training. After undergoing training she may have to forgo her job on marriage and the corporation should recruit new girls to replace the ones who marry and conceive and a period of less than four years is too short for undertaking this work.

The Supreme Court also applied its mind on the basic rule of reasonable classification under Article 14. Based on its findings, it stated that airhostess constituted a separate class of Air India employees. Their service conditions and recruitment is different from that of the male Air Flight Pursers although both are cabin crew. Hence the discrimination does not violate of Article 14. However the uncontrolled power of the Managing
Director to extend the service of the airhostess violates Article 14. "The judges here condemn the rule that she must retire at age 35 or on first pregnancy as callous and cruel and an open insult to Indian womanhood. The retirement age of airhostesses has been fixed at 45 while that of the flight pursers is fixed at 58. This was not considered discriminatory. The view of the judges is that the authorities have fixed the lower age limit for airhostesses on rational and logical considerations.\(^51\) Pregnancy and maternity were not seen as a biological difference. Rather in court view, it was also a difference in the rules of women and men and served to reinforce the ideology of motherhood that has been contributing factor for the physical differences.\(^52\)

In the case of *Omana Oomen v. Fact Ltd.*,\(^53\) female apprentices were denied the opportunity to appear for internal examination on the basis of the Section 66 of the Factories Act. The court struck down the restrictions since it was based on sex and violated Article 14 and 15.

In *Maya Devi v. State of Maharashtra*,\(^54\) the petitioner challenged the condition, which required the woman to obtain the consent of her husband before applying for public employment. The court found the requirement to be anachronistic obstacle to women’s equality. In an era

---


\(^{53}\)AIR 1991, Ker.129.

\(^{54}\)1986, SCR 743.
when one is speaking on empowering women such requirement will only cause an impediment to women’s freedom. The court took the sameness approach while striking down the requirements.

On the basis of giving preferential treatment to women they are discriminated against men. In Shamsher Singh v. State the employment practices of the State Educational System were challenged as a violation of Article 16(2). The educational system had two branches, one exclusively run for women in which the Assistant District Inspectors were granted a special pay scale. When the office was later reorganised the female and male Assistant District Inspectors were designated as Block Education officers undertaking identical work. Aggrieved by this the male workers challenged the pay increase as discrimination and violation of Article 16(2). The court interpreted Art.16(2) by reading Articles 14, 15 & 16 as a single code and thereby Article 15(3) could be invoked. Hence the increase in pay for women workers was upheld.

In Walter Alfred Baid v. Union of India the recruitment rules of the school of nursing, made male candidates ineligible for the position of Senior nurse tutor. The rule was struck down by the court as violation of Article 16(2), which did not permit a classification on the basis of sex.

---


56 See, supra note 40.
A formal approach to equality and the sameness attitude taken by the Court did not make them to address the broad range of socially constructed inequalities that women suffer.

2.3.2 Civil and Political Rights

Women were considered as chattels for long time. Hence women holding land or property was very uncommon. Later evolutionary changes took place and they were entitled to hold property. Certain States introduced legislations, which restricted their rights to own land, and these legislations were challenged before the courts. In *Pritam Kaur v. State of Pepsu* Section 5(2) of the Pepsu Court of Wards Act was challenged as violating Article 15(1). Section 5(2) authorised the Government to make an order directing that property of landholder be placed under the supervision of the Court of Wards if the landholder was incapable of managing his affairs. Section 5(2)(a) authorised such an order to be passed if a landholder by reason of being a female was incapable of managing the property. The court observed that being women was taken as a criterion for depriving her of her estate. This was in clear violation of Article 15. In two other cases, which followed this, took a different approach. The restrictions imposed by

---


the legislation dealing with women holding land ownership was justified on
the ground that "a daughter has to go to another family after her marriage in
due course."\(^{59}\) This attitude only indirectly nurtures the demand of dowry
by the bridegroom and his family at the time of marriage.

The Civil Procedure Code the provision relating\(^{60}\) to the courts
discretion to order security for costs where the plaintiff is a women and
does not possess sufficient immovable property in India was challenged as
discrimination on the basis of sex, in *Mahadeb Jiew v. Dr.B.B. Sen.*\(^{61}\) The
court held that the order to provide security for cost was not
unconstitutional, the reason being that women did not possess property in
India to pay litigants costs. It however failed to see that men without
sufficient immovable property in India were not required to provide
security for costs. It stated that the discrimination was not on sex alone but
on the ground of property also. Hence any factor if added to the phrase ‘on
the ground of sex’ can justify the action taken by the court. The object of
the legislation may be that women who are dependent economically should
not be put into trouble.

In *Shahbad v. Mohd. Abdullah*\(^{62}\) the provision of the Civil Procedure
Code\(^{63}\) dealing with service of summons on a male member of the family

\[^{59}\text{Order XXV Civil Procedure Code, Rule (3).}\]
\[^{60}\text{AIR 1951 S.C. 563.}\]
\[^{61}\text{Ibid.}\]
\[^{62}\text{AIR 1967, J & K, p.120.}\]
\[^{63}\text{Civil Procedure Code Order V Rule 15.}\]
was challenged as violative of Article 15. The Court upheld the procedure and stated that "Until recently it was in exceptional cases that ladies took part in any other activity than those of housewives... in enacting this rule the legislature had in view the special conditions of the Indian Society and therefore enjoined service only upon male members and did not regard service on females as sufficient." Though the court takes a formal approach in this case the reasons given to justify the action taken regarding service of summons is trying to undermine the position of women. Their responsibilities are minimised and they are made in-equal to the male members of the family. The stereotype role of the women as housewife is also emphasised in this case. However the rule has been amended in 1976. The amendment now makes it clear that service can be made on adult female members also. The rule in its present form was substituted by the Code of Civil Procedure Amendment Act 1956, which is as follows:

On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman the court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within India.

2.3.3 Education

Reservation of seats in educational institutions has been made for the weaker sections of the society. Women are also identified as a special

---

64 Ibid at 12, para 32.
group. The admission procedure followed has not been proper in some schools and colleges, which has come up as challenges before the court on the basis of violation of Article 15 of this Constitution. The procedure adopted has been seen as giving preferential treatment to women under Article 15(3). In Anjali Roy v. State of West Bengal\(^65\) a women candidate was denied admission to a particular institution. The refusal was justified on the ground that due to the introduction of a comprehensive scheme for the provision of education facilities to both male and female students.\(^66\) For the advancement of women’s education a better institution was available. Hence she was denied admission in the concerned college. The admission practice seems to be centered on the preferential treatment under Article 15(3) and is based on the formal approach to equality. The disadvantages they suffered for years because of denial of education did not come to the attention of the court.

The omission of the word sex in Article 29(2)\(^67\), which deals with admission to educational institutions, was discussed. The framers of the

\(^{65}\)AIR 1952 Cal.825.

\(^{66}\)Ibid at 830 para 17.

\(^{67}\)Art.29 of the Constitution provides:

(i) Any section of the culture of its own shall have the right to conserve the same.

(ii) No citizen shall be denied admission into any educational institution maintained by the State of receiving aid out of State funds on citizens residing in the territory of India of any part thereof having a distinct language, script or rounds only of religion, race caste, language or any of them.
Constitution may have thought that because of the physical and mental differences between men and women and considerations incidental thereto exclusion of men from certain institutions serving women only and vice versa would not be hostile or unreasonable discrimination. In *University of Madras v. Shanta Bai* the court studied the scope of Article 29(2) with reference to Article 15. It held: The true scope of Article 15(3) is that notwithstanding Article 15(1) it will be lawful for the State to establish educational institutions solely for women and that the exclusion of men students from such institutions would not contravene Article 15(1). The combined effect of both Article 15(3) and 29(2) is that while men students have no right of admission to women’s colleges the right of women to admission in other colleges is a matter within the regulation of the authorities of these colleges.

Thus the stand taken by the judiciary on the issue of allotment of seats of female candidate in educational institution has been varying.

2.3.4 Family Law - Conversion of Religion for the Purpose of Marriage

At the outset it must be stated that in family law the individuals are governed by their personal laws, which is more or less based on religious doctrines of the community. Constitutional challenges on the ground of

---

68 AIR 1954 Mad.67.
discriminating women of one religious community from women of another community has come before the court. Yet another set of cases are those which treat women differently from men and thus discriminatory of the equality guarantees. Some cases recognise that the discriminatory treatment is based on sexist attitudes and practices, which reinforce women’s subordination. The Supreme Court’s latest case Sarla Mudgal has been making waves because the court has directed the legislatures to think in terms of introducing a uniform civil code. It will increase the rights of women.\(^\text{70}\)

In *Lily Thomas etc. v. Union of India and Others*\(^\text{71}\) Criminal liability was fixed on the Hindu husband who converted to Islam to marry second time during the lifetime of his first wife. Such marriage apart from being void under Sec.11 and 17 of the Hindu Marriage Act would also constitute an offence under Section 494 IPC. The court held conversion to Islam or apostasy does not automatically dissolve a marriage already solemnised under Hindu Marriage Act, between two Hindus. In this case the petition was also filed to review Sarla Mudgal’s case.\(^\text{72}\) The judgement in Sarla’s

\(^{70}\text{Dhagamwer Vasudha - The Hindu ‘Who’s afraid of the uniform code?’ June 18, 1995, p.8.}

\(^{71}\text{2000(4) Scale 176.}

\(^{72}\text{Sarla Mudgal (Smt.) President Kalyani and Others v. Union of India and Others. 1995(3) SCC 635.}

case was challenged as contrary to fundamental rights as enshrined in Articles 20, 21, 25 and 26 of the Constitution.

It was contended in Sarla Mudgal's case that making a convert Hindu liable for prosecution under the Penal Code would be against Islam, the religion adopted by such person upon conversion. The Court expressed the desirability of enacting uniform civil code under Article 44.

In Ahmedabad Women Action Group and Others v. Union of India73 the court held:

"We may further point out that the question regarding the desirability of enacting a uniform civil code did not directly arise in that case. The questions, which were formulated for decision by Kuldip Singh J. in his judgement, were these (SCC p.639 para 2).

Whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise a second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage, qua the first wife who continues to be a Hindu? Whether the apostate husband would be guilty of the offence under Section 494 of the IPC?"

Justice Sahai expressed the desirability of uniform code in the above case but the time was not yet ripe and the issue should be entrusted to the Law Commission, which may examine the same in consultation with the Minorities Commission.

In Lily Thomas case the desirability of enacting uniform civil code was discussed. The court referred to the opinion of Justice Kuldeep Singh in

731997 (3) SCC 573.
Sarla Mudgal’s case where in his judgement he only requested the Government to have a fresh look at Art 44 of the Constitution. Apprehension was raised on behalf of Jamiat Ulma Hind and Muslim Personal Law Board. The court had not issued any directions for codification of common civil code. Government of India did not take any action on the basis of the judgement in Sarala Mudgal’s case for the enactment of common civil code.

Justice R.P.Sethi held that the review petition alleging violation of Article 20(1) of the Constitution is without any substance and is liable to be dismissed.

About the apprehension raised by the religious group the court held that “there is no substance in the submission made on behalf of the petitioners regarding the judgement being violative of any of the fundamental rights guaranteed to the citizens of this country”.

2.3.5 Divorce—Discrepancy in Law - Is it really a matrimonial remedy?

The Indian Divorce Act (1869) is a piece of legislation where it is blatantly clear that there is outright discrimination towards men. Section 10 of the Act provides that a husband may petition for divorce on the basis of his wife’s adultery alone. On the other hand the wife has to file a petition for divorce on the ground of her husband’s adultery coupled with desertion cruelty, rape, incest or bigamy. This has been challenged as violation of
Articles 14 and 15 in Dwaraka Bai v. Professor N. Mathews. The court held that Section 10 was based on the risk factor involved when the woman commits adultery and stated that the difference is based on sensible classification.

A husband commits adultery somewhere but he does not bear a child as a result of such adultery and make it the legitimate child of his wife to be maintained by her. But if the wife commits adultery she may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child under Section 488.

The court for laying down different grounds for divorce advanced this justification.

In Swapna Ghosh v. Sadananda Ghosh Section 10 of the same Act was again put to test. The justification for this provision that a husband would not bear a child to be maintained by his wife but a wife might bear a child to be maintained by her husband was reviewed and the court held that:

"I would like to think that even assuming that the ability to conceive as a result of adulterous intercourse may otherwise be a reasonable ground for classification between a husband and a wife, permissible under Article 14 since a wife conceives and the husband does not only because of the peculiarities of their respective sex any discrimination on

74 AIR 1953, Mad. 792.
75 Ibid at 800 para 30.
76 AIR 1989 Cal. 1.
such ground would be a discrimination on the ground of sex alone against the mandatory prohibition of Art.15”. 77

The court held that the case could be decided without determination of these issues. The court further stated:

My only endeavour is to draw the attention by our concerned legislature to these anachronistic incongruities and the provisions of Article 15 of the Constitution forbidding all discrimination on the ground of religion or sex and also to Article 44 staring at our face for four decades with its solemn directive to frame a UCC.78 The Courts have struck down certain sections of the Indian Divorce Act 1869 which is the personal law for the Indian Christians as being unconstitutional on the ground of being violative of women’s equality.79

The court confirmed the divorce decree in favour of the wife on the grounds of the husband’s adultery cruelty and desertion. The court has accepted that the difference between men and women might be the basis for a reasonable classification for the purpose of Article 14. However the decision in Ghosh was turned on the approach to Article 15. The court adopted, the ‘only on the ground of sex’ approach to Article 15(1) and that any differential treatment on the basis of the reproductive differences


78Ibid at p.3 para 4.

between men and women would constitute discrimination ‘only on the ground of sex’. The court in Ghosh confirmed the divorce decree ‘on the ground that the husband respondent is guilty of adultery coupled with such cruelty as without adultery would have justified a decree of judicial separation and also of adultery coupled with desertion without reasonable excuse for two years and more.

The court in Dwaraka Bai\textsuperscript{80} stuck to the difference between men and women as a justifiable ground for divorce. Both the decisions are centered on the biological differences of reproduction with the gender differences that have also come to be viewed as natural and inevitable. Although the two decisions have different result they only reinforce the approach to gender difference.

In Swayamprabha v. Chandrasekhar\textsuperscript{81} the lower court had granted divorce to the husband on his charges of adultery against the wife. The High Court however ruled that adultery had not been proved. The lower court's approach had been irresponsible and the making of frivolous charges for adultery amounted to cruelty, which entitled the wife to divorce her husband. To what extent an allegation can be made against a woman and she is put to humiliations and aspersions are seen from the observation of the lower court. Granting that adultery cannot be proved, by direct evidence

\textsuperscript{80}\textit{Op cit.}

\textsuperscript{81}\textit{AIR 1982 Kar. 295.}

75
but mainly on circumstantial evidence the High Court observed. “It would be hazardous these days to jump to conclusion of adultery if a lady is going on the scooter of some other person or was talking with some other than her husband”. The court disbelieved a great deal of the evidence presented by the husband especially that of a servant maid who seemed to be obviously biased and unreliable. The court also passed strictures on the lower court saying: The learned civil judge has followed these artificial, unreliable and improbable versions of these witnesses without proper scrutiny... the charge of adultery is a grave one... the degree of proof required to establish it is of a very high order... the approach of the learned civil judge in appreciating the evidence on record is therefore erroneous being light hearted and casual.

Holding that the charge of adultery was not proved, the High court said that levelling allegations of adultery without proper foundation and basis would constitute mental cruelty on the other spouse, setting aside the decree of the civil judge the High Court allowed the petition of the wife for a decree of divorce on the ground of mental cruelty. This is a rare case where the courts have passed strictures against the erring lower court when baseless charges are levelled against a woman improperly.

The focus on the provisions of the divorce law covering Christians which are violations of Article 14 and unfair to Christian woman was challenged in R.Hemalatha v. Siryandan.\(^{82}\) In this case the A.P. High

\(^{82}\)AIR 1979 A.P.1.
Court ruled that under Section 10 of the Indian Divorce Act, "a wife is not entitled to ask for dissolution of marriage merely on the ground of cruelty". The proper decree that ought to have been passed by the district judge in the circumstances of the case is a decree for judicial separation under Section 22. The High Court substituted the decree of divorce by a decree for judicial separation.

Under Section 10 of the Act a wife can get a divorce on the grounds that her husband has embraced another religion and gone through a form of marriage with another woman; has been guilty of incestuous adultery, or of rape, sodomy or bestiality; adultery coupled with cruelty; adultery coupled with desertion without reasonable excuse. Thus mere cruelty does not entitle her to divorce, but it does entitle her to a judicial separation under Section 22 of the Act.

The special bench of three judges commented:\(^\text{83}\):

"It is somewhat strange that in the second half of the 20th century a Christian wife is not in a position to get a decree for dissolution of marriage on the ground of cruelty only or adultery only. The Indian Divorce Act of 1869 was modelled on the English Matrimonial Causes Act of 1857. Whereas the law has been amended in England from time to time and the position in England today is that a decree for divorce can be granted on the ground of cruelty, the law in India under the Indian Divorce Act has unfortunately remained unchanged".

\(^{83}\)Ibid.
Even the law regarding divorce among Hindus has undergone a considerable change under the Hindu Marriage Act, especially after the latest amendment in 1976.

"Under the Indian Divorce Act although a husband can ask for divorce on grounds of adultery alone, a wife must prove incestuous adultery, adultery with bigamy or adultery with cruelty the judges added."\(^8^4\)

Even though a suggestion was made as far back as 1968 in *Selvaraj v. Mary*\(^8^5\) and the same was reiterated in *Bashism v. Victor*,\(^8^6\) steps have been taken by the legislature to make any suitable amendments to the Indian Divorce Act by enacting the Indian Divorce (Amendment) Act 2001. This is indeed a right step to remove inequality existing between spouses.\(^8^7\)

The Supreme Court had issued a notice to the Union Government to show cause why a provision in the Indian Divorce Act should not be struck down as discriminatory on the basis of sex. According to Section 10 a Christian woman can seek divorce from her husband if she can prove he was guilty of "incestuous adultery but in the case of the husband he can seek a divorce on the ground that the wife was guilty of adultery with anyone. The provision was challenged as discriminatory against women and therefore violation of Articles 14 and 15 of the Constitution. The petition

\(^{8^4}\) *Ibid.*

\(^{8^5}\) 1968 Mad L J 289.

\(^{8^6}\) AIR 1970 Madras 12 (SB).

was from six women's organisations on behalf of an anonymous Christian woman who had been ill treated by her husband since according to counsel Kapila Hingorani the antiquated Indian Divorce Act is heavily loaded against woman. She challenged several provisions in the Act.

Major changes had been proposed in the Christian Marriage Bill 1994 and are with regard to marriage and divorce. The bill had liberalised the grounds for divorce and ends the unequal and blatant discrimination against women in matters of divorce by making possible equal grounds for both men and women. (Section 31). It also provides for divorce by mutual consent. (Section 33). Thus the passing of the Indian Divorce Act 2001 liberalised the grounds for divorce and also provides for divorce by mutual consent.

The conflict that arises due to inter religious marriage is all the more grave. This issue was raised before the Supreme Court in the case of Ms Jorden Diengdeh v. S.S Chopra. In this case the wife who was the petitioner belonged to Khasi Tribe of Meghalaya but was brought up as a Christian. The husband who was the respondent in the case was a Sikh. They were married in 1975 under the Indian Christian marriage Act 1972. The petitioner sought nullity of marriage, on the ground of impotency of the husband. It was submitted before the court on behalf of the petitioner that the marriage had virtually broken down irretrievably. The High Court

\[88\] AIR 1985 S.C .935.
rejected the plea for the nullity of marriage and ordered for judicial separation. The appeal was taken to the Supreme Court. After analysing the various laws viz., Indian Divorce Act 1869, Hindu Marriage Act 1955, Parsi Marriage and Divorce Act 1936; Special Marriage Act 1954 and Dissolution of Muslim Marriage Act 1936 and provisions therein regarding the dissolution of marriage Justice Chinnappa Reddy emphasised the need for one common code relating to judicial separation divorce and nullity of marriage and opined.\(^8^9\)

"The time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religious caste. It is necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases".

The court stressed that it is for the legislature to take initiative in this direction and ordered that a copy of the decision must be supplied to Law Ministry. The fact is when two persons cannot remain together then the better way is that they must be separated by law. If the law is handicapped then this situation can make the life of both more miserable.

In the case of *Moosa v. Fatima*\(^9^0\) a Muslim wife’s right to dissolution of her marriage on the ground that her husband has failed to provide maintenance for two years was the issue involved. The court held that she is entitled to dissolution whether or not the husband has reasonable cause for

\(^8^9\)AIR 1985 S.C. 940.
\(^9^0\)AIR 1983 Kerala 283.
withholding such maintenance. Several previous judgements have taken conflicting views. In this case Justice P.C. Balakrishna Menon relied on the decision of Justice Krishna Iyer in *Yusuf Rowtham v. Souramma*. In the Moosa’s there were two suits before the High Court one by the wife for dissolution of the Muslim marriage and other by the husband for restitution of conjugal rights. Both suits were tried together and both the courts below pronounced common judgements. All grounds under clause (ii) of Section 2 of the Dissolution of the Muslim Marriage Act 1939 had been made out by the wife against the husband. Under this clause a woman married under the Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on the ground “that the husband has neglected or has failed to provide for her maintenance for a period of two years. The lower courts found that this ground has been substantiated and decreed the wife’s suit for dissolution and dismissed the husband’s suit for restitution of conjugal rights. This decision was upheld by the Kerala High Court. The husband’s counsel had argued that the wife is entitled to a dissolution decree only if she can satisfy the court that the maintenance was withheld without reasonable cause.

Justice Krishna Iyer’s decision in the Yusuf Rowtham case had discussed the conflicting views on this issue decided by various High

---

91 AIR 1970 Kerala 261.
Courts in India. His ruling had followed the *Noor Bibi v. Pir Bux* case where the court held that the question whether there was failure to maintain was a pure question of fact, which did not in any manner depend on the circumstances in which the failure had occurred. It was pointed out that although under Muslim law a wife’s right to maintenance depends on her readiness to submit to and obey her husband the requirement under clause (ii) of Section - 2 is not dependent on the wife’s entitlement to maintenance. In his decision Justice Krishna Iyer had held that such a view was in consonance with modern trend of thought in civilised societies.

Subsequently Justice Krishna Iyer in *Aboo Backer Haji v. Mariakoya* reviewed the Rowtham case and again summed up the law to mean: “where there has been the an actual failure to provide for the maintenance of the wife, even if it be because the wife improperly declined to live with the husband Section 2 clause (ii) is fulfilled”.

The provisions on Christian divorce in the Indian Divorce Act is self explanatory and also shows that concrete action is required to amend the law. Regarding Muslim divorce there has been surpassingly little comment on aspects other than ‘talaq’. The unfairness of the Muslim divorce law towards women was widely discussed in the relevant chapter on the status of women report. The central issue dealt with in the *Moosa v. Fatima* case

---

92 AIR 1930 Sind 8.  
93 1971 Ker. L. T 663.  
94 AIR 1983 Kerala 283.
was extensively discussed in the status of women report. The report supported the precedent set in 1970 by Justice Krishna Iyer’s approach added “We recommend that the right of the wife to divorce on the failure of the husband to maintain her, irrespective of her conduct which may be the main contributory cause, should be clearly spelt out”.

The High Court of Kerala and Orissa in the case of M.Alave v. T.V.Sofia and Bishnu Charan Mohanty v. Union of India respectively tried to give harmonious construction to Section 125 of the Criminal Procedure Code and Sections 3 and 5 of Muslim Women (Protection of Right on Divorce Act 1986). In M.Alave v. T.V. Safia it was contended before the High Court that the wife who was leading adulterous life after divorce was not entitled to maintenance either under Section 125 of the Criminal Procedure Code or under Section 3 of the Act of 1986. It was held by the court that a divorced Muslim woman can file an application under Section 3 claiming various relief provided therein. The provisions of the Act do not say that she would not be entitled to get the relief if she had been living in adultery. The Act has not dealt with this issue and so it is not possible to read something that is not stated in the Act. Regarding Section 125(4) the court said:

Section 125(4) itself has no application to woman who has already been divorced by her husband. The simple reason is
that a divorced woman can never be said to be committing adultery even if she has got promiscuous sexual relationship with other persons.

The status of Muslim woman has been on some occasion elevated by the judiciary by taking a strong stand to the effect that it would be highly inequitable to compel Muslim wife against her wishes to live with her husband who always administers cruelty on her.\textsuperscript{98} The Muslim husband has stripped off his powers to inflict divorce on his innocent wife, which he uses to claim as a matter of right because it finds supports in the Muslim scriptures.\textsuperscript{99}

Justice Krishna Iyer has very clearly opined that the provisions of personal laws must always be seen in accordance with the provisions of the Constitution.\textsuperscript{100} It is the function of the judiciary to construe the words of personal laws with the passage of time, which is the need of the hour in the light of constitutional mandate.

2.3.6 Restitution of conjugal rights – offends equality test

Section 9 of the Hindu Marriage Act provides for a decree for “restitution of conjugal rights” if it is proved that a spouse has withdrawn from the society of the other “without reasonable cause”. This issue has

\textsuperscript{98} Itwari v. Asghari AIR All p.687.
\textsuperscript{100} Refer Makka Rawather's Children v. Manahapia Charayil AIR 1972 Ker.27., D.Chelliah Nadar v. G.Lalitha Bai AIR 1978 Mad. 66.
often been put to debate. The most controversial judgement where the constitutional validity of Section 9 was questioned is in case of *T.Sareetha V.T. Venkatasubbiah.* In the cases of *Mohinder Kaur v. Bhag Ram,* *Robindranath Barik v. Pramila Barik* and *Smt.Bitto v. Ram Deo* are examples where the courts using its discretion and interpreting Section 9 for the benefits of wives and not compelling them to go back to their husbands.

After the judgement in the Sareetha case there had been much debate over the utility of Section 9 and whether scrapping it would help women in any way.

In this case the film actress Sareetha had appealed to the High Court against an order passed by the Cuddapah sub-judge rejecting her preliminary objection to the jurisdiction of the court to hear her husband’s petition for a restitution of conjugal rights. She had also questioned the constitutional validity of Section 9 of the Hindu Marriage Act, which provides for a restitution decree. While the High Court upheld the jurisdiction of the Cuddapah Court the single judge, Justice P.A.Chowdhary ruled that Section 9 violated Articles 14 and 21 of the Constitution and prohibited the lower court from disposing of the husband’s petition. The court spelled out the meaning of human dignity and privacy with many

---

101 AIR 1983 AP 356.
102 AIR 1979 Punjab 71.
103 AIR 1979 Orissa 85.
104 AIR 1983 Allahabad 371.
105 AIR 1983 AP 356.

85
references to judgements in the British and American courts, the writings of Havelock Ellis and Bertrand Russel as well as a Telugu poet Shri Sri who described forced sex as ‘Rakshasa Rati’.\(^{106}\) The main theme of this judgement is that restitution decree implies that by an order of the State, a woman can have sex forced on her against her will which violates her fundamental right to life and liberty under Article 21. The judgement also ruled that Section 9 violates Article 14, by discriminating against the female sex since in practice it is almost always used by a husband against his wife.

The remedy of restitution of conjugal rights is a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Article 21 protects the right to privacy and promotes the individual dignity mentioned in the preamble to the Constitution.

The court observed that decree for restitution of conjugal rights denies the woman her free choice whether when and how her body is to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprives a woman of control over her choice as to whether and by whom the various parts of her body should be allowed to be served. The woman losses her control over the most intimate decisions. At a time when she may be contemplating of going for a divorce

the implementation of Section 9 against an estranged wife could irretrievably alter her position by bringing about conception.

When a court decrees an order for restitution of conjugal right it amounts to the State trying to interfere in the personal identity and individual’s zone of intimate decision. The only purpose served by Section 9 is that it can provide evidence for a subsequent divorce sanction but this remedy can only be obtained at enormous expense to human dignity. After considering all these aspects the Scarman Commission in Britain recommended abolition of this remedy and the law relating to this matrimonial remedy has been struck down.\textsuperscript{107}

Section 9 does not in any form offend the equality test. In reality it is used by the husband most often and rarely by the wife. The enforcement of the decree can cripple the wife’s future plans of life and prevent her from using the self-destructive remedy. By treating the wife and the husband who are inherently unequal as equals, Section 9 offends the rule of equal protection of laws and is therefore violation of Article 14 of the Constitution. Besides it promotes no legitimate public purpose nor subserve any social good.

The judgement recognised the old Hindu system of Hindu wife’s so called duty to submit but merely asserts that the laws cannot compel her to perform her duty against her will. Like many other laws, which were

\textsuperscript{107} \textit{Ibid.}, p.370.
imported into India from Britain, this law also was brought into our country and it has remained in the statute book even though the country from where it originated has abolished it.

However in the case of Harvinder Kaur v. Harmander Singh Chowdhury the decision the Andhra Pradesh High Court was cited and Justice Avadh Behari Rohatgi disagreed with the opinion expressed by Justice P.A. Chowdhary. In this case the court upheld the Constitution validity of Section 9 and stated that it is not violative of Article 21 and 14 of the Constitution. The court highlighted the objective of remedy of restitution of conjugal right and stated that the restitution decree is to bring about cohabitation between the estranged parties. The purpose of Section 9 is to preserve the institution of marriage. Sexual intercourse is one of the elements that make up a marriage but it is not the only element. The remedy aims at cohabitation and consortium and not only sexual intercourse. The long arms of the law cannot compel a person to a positive sex act. It is a fallacy to think that restitution of conjugal rights constitutes “the starkest form of governmental invasion” on “marital privacy”.

In this case the wife had alleged ill treatment by the husband and the mother in law. She was willing to live with him provided he sets up a separate residence. The husband’s contention was that he had to take care of

---

108 AIR 1984 Delhi 66.

109 Ibid., p.66.
his aged parents and could not set up a separate home. The High Court ruled that the wife could not make any unilateral decision, regarding staying away from the in-law's house and that such a unilateral decision was unreasonable. It has to be pointed out that the wife was also employed.

The Indian legislature believes in reconciliation. So when the spouses are separated it tries to bring them together by the decree of restitution of conjugal right. If the decree is not obeyed for a period of one year and the parties continue to live separately it is undoubtedly the best evidence of break down of marriage. The next action for them to take is to go ahead for divorce under Section 13 (1-A). There is complete equality of the sexes to seek the remedy of divorce and hence Section 9 is not violation of Article 14 the court stated. The attorney general criticised the views expressed in Sareetha's case and pointed out that if that case was allowed to prevail it might destroy the very foundation of marital life.

The attorney general asserted that the Constitutionality of Section 9 has to be adjudged by the generality of the cases it covers and not by the freaks and exceptions. There may be exceptional cases where the parties may not reconcile but the exceptions cannot be made a ground for invalidating Section 9.

The society that existed in 1955 when the law was made necessitated the concept of marital unity and Section is representation of a wise conservatism of the law, as divorce was the product of liberalism. There are
instances where husbands tend to drive their wives out of the house and then by using Section 9 with Section 13 seek to get a divorce. Hence while implementing Section 9 judges have to take a fair approach, establish whether wives were thrown out and have refused to decree restitution in such cases.

_Saroj v. Sudarshan Kumar Chada_\(^{110}\) is another interesting case where the wife obtained a decree of restitution of conjugal rights but it was not complied with by the husband. After one year of the passing of the decree the husband moved the court for divorce. The lower court dismissed the petition but the High Court granted divorce. In appeal against the order of divorce the wife’s counsel challenged the constitutional validity of Section 9. The argument was that if Section 9 was unconstitutional then Section 13, which creates a ground for divorce, should also be held as unconstitutional. The Supreme Court upheld the constitutional validity of Section 9 and upheld the decree of divorce passed by the High Court. The significance of the judgement is that the apex court has set a precedent on the issue of restitution of conjugal rights, which will be mandatory for all the other courts to follow. The court pointed out to the social reality where in the Indian social condition it is highly difficult for a divorced wife to live in society.

\(^{110}\) _AIR_ 1984 S.C. 1562.
The landmark judgement in Sareetha’s case can be considered as historic in the context of women’s struggle for equality and against oppression. There was confused reaction in the media and women’s movement regarding this issue. The Section has been referred to archaic and it is considered that claiming conjugal rights would tantamount to rape. Although the current media focus on Section 9 relates to the theme of ‘forced sex’ what is more pertinent to the women’s movement is how the courts make the interpretation of 'reasonable excuse' concerned. The committee on the Status of Women Report had described the cases where women who wished to pursue their career in a place away from their husband’s residence were denied this option, the court not accepting this as a ‘reasonable’ excuse for living apart.

The socio-economic conditions are fast changing. Many women are slowly taking some employment and hence when they are forced to live in a matrimonial home with harassment by in-laws and dowry related problem, her refusal to stay in the joint family should be viewed with more sympathy and understanding. Sanctity of marriage should be retained but interpreting the relationship between the husband and wife in the context of fundamental rights is unnecessary. The court’s interpretation of ‘reasonable excuse’ should be in tune with the present equality climate in the society.


2.3.7 Succession Laws - A Mirage

Many changes have been made in the laws of succession in order to benefit the women. In *Mukta Bai v. Kamalaksha* the Hindu personal law that excluded the illegitimate daughter from maintenance from the estate of their putative fathers was challenged as violation of Article 14. The court rejected the contention and held that "the fact that the law makes no provision for the maintenance of an illegitimate daughter cannot be said to amount to discrimination against illegitimate daughters. Such act would amount to violation of Article 14 of the Constitution." The reasoning in this case did not make any analysis of why the distinction did not amount to discrimination.

Challenges to the discrimination on the basis of sex were questioned in *Kaur Singh v. Jaggar Singh*. The female Hindu had absolute ownership over her property was challenged as discriminatory. The plaintiff in the case contented that Section 14 of the Hindu Succession Act was discriminatory as it made women as the absolute owner of her property and had the absolute right of alienation while men who were governed by the Punjab Customary law were not free to alienate the ancestral immovable property by will. The court held that "it may be that in view of the

---

113 AIR 1960 Mysore 182.
114 Ibid at 183 Para 5.
115 AIR 1961 Punj 489.
116 Ibid at 493 para 13.
inferior status enjoyed by the females the legislature thought fit to put the females on a higher pedestal” which was within the preview of the Article 15(3). In order to remove the disability attached to women they were treated as a class different from men.

In *Sonubhai Yeshwant Jabhar v. Bala Govinda Yadav and Others*\(^{117}\) Section 15(2) of the Hindu Succession Act was challenged as discriminating on the basis of sex and thus being in violation of Articles 14 and 15. Section 15(2)(b) provides that the property inherited from a husband of a female dying intestate will devolve upon the heirs of the husband. Section 8 dealing with the property of a male Hindu dying intestate does not make any such provision regarding property inherited from his wife. The court rejected this argument and held that the rules were enacted with the clear intention of ensuring the continuity of the property within the husband’s line. The assumption that property should be passed down through the male line is deep-rooted. The historic discrimination against women in inheritance has created a norm that property passed through the male line and this has to be questioned.

In *Ashutosh Seal v. Uma Shashi Satra*\(^{118}\) the dispute was over inheritance. The sister opposed her brother who had produced a so-called ‘will’ left by the father, which excluded the daughter from the property

\(^{117}\) AIR 1983 Bom.156.

\(^{118}\) AIR 1984 Cal.223.
right. The Calcutta High Court upheld her appeal ruling that the will was a forged document.

It may be stated that in large number of instances the parents make a will bequeathing the property to the sons only as already heavy expenses are incurred in getting the daughters married. Also property is given in the form of dowry at the time of marriage. Again if the daughter takes another share by way of inheritance she will be getting a “second Dowry”.

*Anant Shende v. Jankibai*<sup>119</sup> is a dispute over the partition of a dwelling house. Section 23 of the Hindu Succession Act states that where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the schedule and his or her property includes a dwelling house wholly occupied by members of his or her family then not withstanding anything contained in this Act the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein. But the female heir shall be entitled to a right of residence of therein. Where such a female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

In the above case one Gopal Rao Shende died leaving behind his widow Jankibai and a son Anant, four married daughters and one unmarried

<sup>119</sup> AIR 1984 Bom.319.
daughter. The property left behind was a double storied residential house where Janaki bai resides on the ground floor and the son on the first floor. Janakibai wanted a partition to be effected. Her claim was resisted by the son on the ground that she had no right to ask for partition of the house in view of Section 23 where the female heir has no right to ask for partition.

The trial court dismissed the petition of Jankibai’s suit. The lower court reversed the finding and allowed Jankibai’s claim based on the decision of the Calcutta High Court in *Hemalata Devi v. Umashankari*. In this case the court observed that when there is only one male heir the female heirs are entitled to claim partition and are not excluded from doing so by Section 23. The Madras High Court dissented from the Orissa ruling in *Janabai v. Palani* saying that such an approach would cause gross injustice to the single male heir and nullify the very object of Section 23.

The various High Courts have been giving different interpretation to Section 23 and there is legal ambiguity in the law. In the case of a daughter who is thrown out of the matrimonial house and the situation arises where she has to reside along with her brother and his family in the dwelling house. She may be interested in setting up a separate establishment and if she files a petition for partition of the dwelling house, what stand the court will take is not clearly laid down in the act. This is an obstacle, which some

---

120 AIR 1975 Orissa 208.
121 AIR 1981 Mad 62.
women have to face. A proper direction should come from the Apex court to clear the legal ambiguity to protect such helpless women.

In recent time there have been a number of Articles and letters and discussion going on highlighting the anomalies governing the succession rights of Christian women in Kerala. Three laws on property rights govern them. The Travancore Christian Succession Act the Cochin Christian Succession Act and the Indian Succession Act. Women in the former Malabar area of Kerala come under the last mentioned act. Daughters and widows are at a disadvantage under the first two acts. These Acts stress Streedhan, which goes against the provision of the Dowry Prohibition Act. According to the Travancore Syrian Christian Act a daughter’s share in the family property is equal to a quarter of the share of the son or Rs.5000 which ever is less. It is high time to bring the change for improving the property rights of Kerala Christian Women.

The Indian Succession (Amendment) Bill 1994 proposes amendment to some provisions of the Indian Succession Act 1925. It provides that there should be one law of succession for all Christians, irrespective of the regions they belong to, giving equal rights to men and women in property. The Act needs amendment to reflect the concept that the wife has full rights to the property of her husband, if the husband dies without making a will and without leaving children and parents. His assets should not be shared with remote kindred of the deceased.
Section 22 provides that the minor's property may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father is dead or absent from India, with the approbation of the High Court. The Section envisages no role for the mother in the settlement of the minor's property. The Bill seeks to overcome this lapse by providing that the father or mother should do the settlement. If they are dead or absent from India, then only the High Court's role comes into the picture.

Under Section 32 the property of the intestate devolves upon the wife or husband or upon those kindred of the deceased, in order and according to the rules specified in the Act. Under the Explanation to the Section, a widow is not entitled to the provision made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share for her husband's estate. The Bill provides for the deletion of this Explanation, which is against the interest of a widow by virtue of a pre-nuptial contract.

Under Sections 33, 41 and 48 where property is to be divided among the surviving kindred the widow gets only one-half of the share. The Bill modifies the provisions by which the widow gets full share.

Under Section 33-A special provision is made where an intestate has left a widow and no lineal descendants. It also makes for a minimum guaranteed payment to the widow. For example, where the net value of the
property does not exceed five thousand rupees, the whole of the property will belong to the widow. But where the net value of the property exceeds five thousand rupees, the widow will be entitled to only five thousand rupees. However, this provision does not apply to Indian Christians. The Bill proposes that the benefit of this Section should also be extended to the Indian Christians and the minimum amount is raised owing to the spirally inflationary conditions.

Under Section 37 where the intestate has left surviving a child or children but no more remote lineal descendants through deceased child, the property shall belong to the surviving child, if there is only one or shall be equally divided among all his surviving children. Under this Section, "child" means a natural and legitimate child. It has been held that it does not include an illegitimate or an adopted child. The Bill suggests an Explanation to be added to this Section to include in the definition of "child" an illegitimate and adopted child.

Under Sections 42 and 46 where the intestate's father is living and there are no lineal descendants, the mother gets no share at present. This anomaly has been remedied in the Bill by which the father and mother share equally.

Under Section 60 the intestate's father, irrespective of his age, may, by will appoint a guardian for his child during minority. The Bill suggests an amendment to the effect that the father or mother, whatever his or her
age may be may by will appoint a guardian for his or her child during minority; if the father is dead, absent her age may be, may by will appoint a guardian for her minor child.

The Bill proposes a new Section, namely, Section 118-A which prohibits a Christian who has a spouse and/or lineal descendants from bequeathing more than half of his or her property by will.

2.3.8 Adultery, Maintenance and Bail Provisions – Purpose is to be Beneficial

Constitutional provisions have interpreted in Section 497 of the Indian Penal Code, which deals with adultery and makes, only adultery committed by the man an offence and Section 198 of the Code of Criminal Procedure allows only the husband of the ‘adulteress’ to prosecute the man with whom she committed adultery. It does not allow the wife of the man who committed adultery to prosecute him.

Under Section 497 of the IPC a man guilty of the offence of adultery can be punished with imprisonment up to five years or with a fine or both. The wife shall not be punished as an abettor. In Abdul Aziz v. Bombay122 the accused was charged with committing adultery under Section 497 challenged the section as discriminating on the basis of sex and in violation of Articles 14 and 15. The High Court concluded that the difference of

122 AIR 1954 S.C .321.
treatment was not based on sex but on the social position of women in India. On appeal the Supreme Court held that any challenge under Art.15(1) was met by 15(3). The court observed that Art.15(3). "should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes". The court thus held that adultery provision are beneficial to women.

The Court has adopted a holistic approach to Article 5. It has stated that Article 14 and 15(3) should be read together but by doing so preferential treatment is given to one group of women. Yet at another level the adultery laws are based on problematic assumptions about women, about women’s sexuality and about the relationships between women and men. Women are considered as helpless victim in the hands of male aggressive sexuality in adultery. If this presumption is drawn the men are punished and women being helpless are simply set free though they are participant to the crime. The court and the legislature need to think from a different angle.

In Sowmithri Vishnu v. Union of India Section 497 of the IPC was challenged as unconstitutional by the petitioner Sowmithri Vishnu, school teacher from Madras. She had filed a divorce suit against her husband who

123 Ibid at p.322 para 5.
125 AIR 1985 S.C. 1618.
was contesting it. Her petition challenging the adultery law was filed soon after her husband filed a complaint of adultery in the Madras Court against a man whom Sowmuthri has described as her landlord’s brother. She argued that the Section was discriminatory because the husband had a right to prosecute the adulterer. The wife on the other hand had no right to prosecute either her adulterous husband or the woman with whom the husband had committed adultery. In the above case the petitioner also contented that it is motivated with an eye on the custody of the two children of the marriage. If the man cited in the case is convicted she would be branded as ‘immoral’ and may lose custody of her children. It would also jeopardise the opportunities of her getting or even finding a house to live in. This is the legal battle the petitioner had to fight.

The court while dismissing the petition held that confirming the definition of adultery to men was not discriminatory as “it is commonly accepted that it is the man who is the seducer and not the woman”.\textsuperscript{126} Again in the court’s view, a wife who is involved in an adulterous relationship is the victim rather than the author of the crime. The offence is committed against the sanctity of the matrimonial home and it is the man who defiles that sanctity.\textsuperscript{127} In this case also the court has taken the view that women are passive and are incapable as agency in sexual relations.

\textsuperscript{126}Ibid at 1620 para 6.
\textsuperscript{127}Ibid at 1620 para 7.
In the case the petitioner also pointed out that the Section did not take into account situations where the husband had sexual relations with an unmarried women. While upholding the adultery provisions the court held that confining the definition of adultery to men was not discriminatory. The court tried to bring out the difference in the relationship between married man and an unmarried woman, and a married man and a married woman. In the former case it is often a relationship with a prostitute who needs less rights or protection under the law than all other women. In the case of adultery the main concern is to protect the matrimonial relationship and therefore the law operates against those who cause a threat to matrimonial harmony.

The question why the wife of the adulterer cannot prosecute him came up in the case of Revathi v. Union of India.\(^{128}\) In this case Section 477 of the IPC and Section 198(2) of the Criminal Procedure Code was challenged. According to the court these provisions. "...go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit and 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.\textsuperscript{129}

The general rule of criminal law is that anyone can set the law in motion but in the case of adultery the exception is that wife of the adulterer is prohibited from prosecuting her husband. On what basis this exception is made has to be interrogated. Adultery is seen as a violation of a husband’s property rights, to be more specific, of his wife’s sexuality. It is not seen as a violation of a wife’s rights since she is not seen as having claim over her husband. Hence it is the husband who can prosecute an adulterer since he is seen as a person who suffers from the harm caused. Based on the attitude towards women sexuality, a difference is made in understanding the offence of adultery and this assumption is extended to justify the law relating to adultery.

The Status of women report had expressed the present situation whereby adultery is seen as a criminal offence, which goes against the dignity of an individual and should be removed from the Indian Penal Code. It is a ground for seeking divorce in a matrimonial proceeding. The report says there are many examples of lawyers or house owners reluctant to assist a woman seeking divorce or separation from a husband because the latter threatened to bring a charge of adultery against man who helped her.

\textsuperscript{129}Ibid at 838 para 5.
What ever may be the sociological implications, if adultery is retained as an offence in the Indian Penal Code the question to be raised is whether the wife can challenge the fidelity of the husband in a criminal court.

Maintenance

Several challenges have been made to Sec.125 of the code of Criminal Procedure, which requires men to pay maintenance in favour of their wives, but no corresponding right is available to the men to claim maintenance from their wives. The earliest case to challenge this Law under Sec.488 of the old code as violation of Article 14 of the Constitution is Thamsi Counden v. Kanni Ammal.130

The court held that the classification was based on the difference between men and women. The court observed that "women as a whole suffer from several disabilities from which men do not suffer. They have no right at least under Hindu law to participate along with their brothers in the inheritance to the property of their parents...., Instances can be multiplied without number to show how women have no equal rights with men. As a class they are weaker than men and this cannot be disputed. In fact they are even called by the appellation "Weaker Sex". The very provision in clause

130 AIR 1952 Mad. 529.
3 of Article 15, that special provision may be made for women suggest the existence of disparity.\textsuperscript{131}

The court held that Section 488 "applied to all women in similar circumstances", that is to all women who are deserted by their husbands and the legislation in favour of this class of people is not arbitrary.\textsuperscript{132}

A woman who is deserted by her husband cannot be considered equal to a man who is deserted by his wife and therefore they cannot be treated as equals. The court observed that there has been historical discrimination against women in so far as they are denied property rights. There is no further interrogation of the deeper relationships of oppression that create these inequalities such as the sexual division of labour which renders women economically dependent on men.\textsuperscript{133}

The court’s view in \textit{K. Shanmukhan v. G. Sarojin}\textsuperscript{134} was to differentiate between a divorced woman and married woman who were living separately from their husband without obtaining divorce. In this case Section 125(1)(b) of the Criminal Procedure Code was challenged as being violation of Article 14. The provision entitled a divorced woman to maintenance while a married woman is not entitled to maintenance if she

\begin{multicols}{2}
\begin{itemize}
    \item \textsuperscript{131} \textit{Ibid} at 530 Para 3.
    \item \textsuperscript{132} \textit{Ibid}.
    \item \textsuperscript{133} \textit{Gupteshwar Pandey v. Smt. Ram Peari Devi}. AIR 1971 Pat 181.
    \item \textsuperscript{134} AIR 1981 Cr. LJ 830 (Ker.).
\end{itemize}
\end{multicols}
refuses to live with her husband without sufficient reason or lives in adultery or lives separately by mutual consent. The court held that the difference between married and divorced women were to be seen as a natural difference. The divorce women who remarried were disentitled to maintenance whereas this cannot be equated to women living separate. The court has failed to take into consideration the disadvantaged position of woman living separate. The court has taken into consideration only a difference that results from the legal regulation of marriage that is married women and divorced women are different because the law treats them differently. The economic conditions and the economic need which should be the criteria for awarding maintenance has been totally overlooked. When the court tries to differentiate between married woman and divorced women it should understand that both the category of women may be in dire need of economic support.

On the basis of religion the constitutional validity of Section 125 of Cr PC has been challenged in a number of cases. In Mustt. Sohida Begum v. Md.Mofizul Haque\(^ {135}\) the court held that the religion cannot be a basis of reasonable classification. Under Muslim law a divorced woman cannot claim any further maintenance beyond the period of iddat. This was challenged as discrimination between divorced Muslim women and divorced women belonging to other religions. The court rejected the

\(^{135}\)1986 Cr. L.J 102 (Ori).
challenge. The court upheld the premises on which maintenance was granted which is economic necessity. Irrespective of their religion or caste a divorced women should be maintained till her remarriage.

The case *Bai Tahira v. Ali Hussain Fassalli Chothia*\(^\text{136}\) illustrates the special problems relating to maintenance in the Muslim personal law. It stated that the payment of the Mehr money to the divorced wife cannot absolve the husband from paying maintenance unless the ‘mehr’ quantum is large enough to be equal to maintenance allowance. In this case the man married the woman as a second wife in 1956 and had a son by her. He divorced her in 1962. As part of an agreement, the husband transferred in the wife’s name, flat in Bombay and shares in the relevant co-operative housing society. Mehr money of Rs.5000 and money for three months period of Rs.180 were adjusted by the compromise terms which contained the clause: “The plaintiff declares that she has no claim or right whatsoever against the dependent or against the estate and properties of the dependent.

Finding herself in financial constraints she moved the magistrate’s court under Section 125 of the Cr.P.C for a monthly allowance of maintenance for herself and her child. The magistrate keeping in record the cost of living in Bombay granted this. The husband challenged the order as the Sessions Court and the High Court ruled in favour of the wife. When the appeal came to the Supreme Court the husband argued that under Personal

\(^{136}\)AIR 1979 S.C .362.
law a divorced Muslim wife has no right to claim maintenance when the mehr amount has already been settled and therefore sec.125 had no application. The Supreme Court observed\textsuperscript{137} "The spirit of Article 15(3) of the Constitution must be read the meaning of the Section 125. Article 15(3) has compelling compassionate relevance in the context of Section 125 and the benefit of doubt, if any belongs to the ill-used wife and the derelict divorcee". The court further observed,

"...surely Parliament in keeping with Article 15(3) and deliberate designs, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Article 39 is part of social and economic justice specified in Article 38 fulfilment of which is fundamental to the governance of the country (Article 37)".\textsuperscript{138}

The court added,\textsuperscript{139}

"...the defence based on 'mehr' payment merits serious attention. The payment of illusory amount by way of customary or personal law will be considered in the reduction of maintenance rate but cannot annihilate the rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation and not by a ritual exercise rooted in custom... The proposition therefore is that no husband can claim under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance".

\textsuperscript{137} Ibid p.365.
\textsuperscript{138} Ibid., p.365.
\textsuperscript{139} Ibid Page 365 p.66.
The Supreme Court then restored the order of the trial court, which had granted maintenance allowance to the divorced wife.

In Fuzlunbi v. Khader Vali\textsuperscript{140} the issue of maintenance under Criminal Procedure Code and payment of mehr money and iddat allowance was again raised before the Supreme Court. Fuzlunbi was married to Khader Vali in 1966. Thereafter she was ill treated by her husband and she went to her parents home along with her child. She filed a petition for maintenance under Section 125 Cr.P.C. for herself and her child before the Magistrate. The maintenance amount was granted by the magistrate court. The husband appealed to the High court against the order of the Magistrate Court but the decision was upheld. But to relieve himself from the burden of paying maintenance amount he restored to the technique of talaq and tendered the sum of Rs.500/- towards mehr and Rs.750/- towards maintenance during the iddat period. On the request of respondent the Magistrate cancelled the orders of maintenance on the ground of divorce and payment of mehr and iddat. A revision petition was filed by the appellant but was of no use. Finally the matter came to the Supreme Court. Justice Krishna Iyer while delivering the judgement of the bench for himself and on behalf of Chinnappa Reddy and A.P Sen observed:\textsuperscript{141} Whatever the facts of a particular case, the code by enacting Sections 125-

\textsuperscript{140} AIR 1980 S.C. 1730.

\textsuperscript{141} Ibid p.1736.
127 charges the court with humane obligation of enforcing maintenance or its just equivalent to ill used wives and cast away ex-wives, only if the woman has received voluntarily a sum at the time of divorce sufficient to keep her going according to the circumstances of the parties”. The court further added:142 “Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127(3)(b) as much as it does Section 125. So a farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance. The amount earlier awarded is the minimum”.

The division bench highly criticised the working of the lower courts and observed:143 “No disciplined judge bound by the decision of the Supreme Court which lays down the law for the nation under Article 141 could have defiled the crystal clear ruling of the Supreme Court in Bai Tahira v Ali Hussain interpreting Section 127(3)(b) of the Cr.P.C.

The Supreme Court concluded that there is no conflict between the provisions regarding mehr and iddat of Muslim law and the provisions under Cr.P.C. regarding maintenance. If the divorced Muslim women is unable to maintain herself then it is the obligation of the Muslim husband to maintain his wife and therefore the provisions of the Cr.P.C have a overriding effect over the personal laws of the religious communities.

142 Ibid 1736-37.
143 Ibid 1737.
In *Mst. Zohra Khatoon v. Mohd Ibrahim*\(^{144}\) the issue of maintenance was raised before the Supreme Court. The Allahabad High Court cancelled the maintenance allowance passed by the Magistrate on the ground that when the divorce proceedings from the wife side under the dissolution of Muslim Marriage Act 1939, then wife cannot claim maintenance from her husband neither under the Muslim law nor under Criminal Procedure Code. The issue was whether she can claim maintenance under Section 125 and 127 of the Criminal Procedure Code or not. The husband’s contention was that the Muslim Koranic law did not provide for maintenance after divorce.

Justice Fazil Ali delivered the judgment on behalf of the majority held\(^ {145}\)

"The view taken by the High Court is erroneous and is based on using interpretation of Cl(1)(b) of the explanation to sec.125(1) of the Cr.P.C... Under Cl(b) the wife continues to be a wife within the meaning of the provisions of the code even though she has been divorced by her husband or has otherwise obtained a divorce and has not remarried”.

He further observed\(^ {146}\) that the High Court therefore erred in quashing the order of the Magistrates. The appellant in the eyes of law continues to be the wife of respondent inspite of the decree of dissolution of marriage and is entitled to maintenance allowance awarded by the Magistrate.

\(^{144}\) AIR 1981 S.C. 1243.

\(^{145}\) Ibid 1248.

\(^{146}\) Ibid 1251.
The landmark judgement of the application of sec.125 in the case of divorced Muslim woman was delivered by the Supreme Court in *Mohd Ahmad Khan v. Shah Bano Begum*.[147] The brief fact about the case, which came on appeal to the Supreme Court, is that Shah Bano Begum was married to Mohd.Ahmed Khan in 1932. In 1975 the appellant was driven out of the matrimonial home by the respondent. Thereafter the respondent filed a petition against the appellant under Section 125 of the Cr.P.C. before the Magistrate of Indore for the maintenance of Rs.500/- per month. But the appellant divorced the respondent by an irrevocable talaq. His defence was that as he has divorced her she was not entitled to maintenance. The dower amount was already deposited in the court. The trial court decided in favour of the respondent. It ordered the appellant to pay a sum of Rs.25 per month to the respondent. In the High Court the amount was enhanced to Rs.179.20 per month in revision. It was against this decision that an appeal was made to the Supreme Court. The appellant contended that the decisions in Bai Tahira and Fuzlanbi were not correctly delivered and therefore may be reconsidered by the larger bench.

Chief Justice Chandrachud who delivered the Judgement for himself and on behalf of D.A.Desai O.chinnappa Reddy, E.S.Venkataramiah and Ranganath Misra JJ, opined.[148]

---

"The statements in the books viz Mulla’s Mohamohan law Tyabji’s Muslim Law and Dr. Paras Diwan's Modern Muslim law are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. Sec. 125 deals with cases in which a person who is possessed of sufficient means neglects or refuses to maintain herself. Since the Muslim Personal Law which limits the husband’s liability to provide for maintenance of the divorced wife during the period of iddat, does not contemplate or countenance the situation envisaged in Section 125. The true position is... if she is unable to maintain herself she is entitled to take recourse to Section 125 of the criminal procedure code. Therefore there is no conflict between Section 125 and Muslim Personal Law on the question of maintenance for a divorced wife who is unable to maintain herself”.

Thus the overriding operation was given to the general law of the land by ignoring the texts of the personal law. This is a step of the judicial activism to achieve and encourage the goal of one common code intended to by the makers of our National Charter.

After Shah Bano Begum’s case the Supreme Court was asked to render its opinion regarding different grounds of divorce under different personal laws in the case Mr. Jorden Diengdeh v. S.S. Chopa149 which came before the apex court. In the case of Goutam Kundu v State of West

149 AIR 1985 S.C. 935.
the husband filed a criminal miscellaneous application to the High Court demanding that the child be subjected to blood test to determine her paternity. This case was against the order of the lower court which passed an order awarding a sum of Rs.300 per mouth for the wife and Rs.200 for the child. When the matter was dismissed by the High Court the husband went on appeal to the Supreme Court.

Justice Mohan speaking for himself and Justice Ahmadi, observed that such a demand for subjecting the child to blood test was contrary to the right to personal liberty guaranteed by Article 21 of the Constitution. The patriarchal ideology is centered on the chastity of a woman whereas the feminist jurisprudence argues that a woman is presumed to be chaste until the contrary is proved.

The issue, which was decided in Shah Banu Case, was again raised before the Supreme Court in *Begum Subanu alias Saira Banu v. A M Abdul Gafoor*.\(^{151}\) The matter raised in this case was whether a Muslim wife whose husband has married again under their personal law can be taken as a mistress to claim maintenance from her husband. The defence taken by the husband was that since he is permitted by Muslim law to take more than one wife his second marriage cannot afford a legal ground to the wife to live separately and claim maintenance. But the Supreme Court held\(^{152}\) "that

---

\(^{150}\) (1993)3 SCC 418.

\(^{151}\) AIR 1987 S.C .1103.

\(^{152}\) Ibid, 1107.
irrespective of the husband’s right under his personal law to take more than one wife his first wife would be entitled to claim maintenance and separate residence if he takes a second wife. The Supreme Court analysed the provisions of Explanations to sub Section (3) of sec.125 and held\textsuperscript{153} that the explanation has to be construed with reference to the two classes of injury, namely taking of a second wife and taking of a mistress as contemplated by the Explanation to the sub Section (3) of Section 125, caused to the matrimonial rights of the wife and not with reference to the husband’s right to marry again. Therefore whether the woman chosen by the husband to replace the wife is a legally married wife or a mistress is immaterial. The respondent husband’s contention that his taking another wife will not entitle the appellant to claim separate residence and maintenance cannot be sustained. The Supreme Court concluded by stating\textsuperscript{154} that the Explanation of sub Section (3) of sec.125 is uniform application to all wives including Muslim wives whose husbands have either married another wife or taken a mistress.

The decision of Shah Banu invited lots of criticism among the Muslim fundamentalists. The Union Government considered the demands made by Muslim fundamentalists and introduced the Muslim women (Protection of Rights on Divorce) Bill in the Lok Sabha on 25th February

\textsuperscript{153} Ibid, p.1108.

\textsuperscript{154} Ibid, p.1109.
1986. The bill was passed in the House. The objective of the Act was to enable the divorced Muslim women to get more rights and protection than under Sections 125 and 127 of Cr.P.C.

Section 3 of the Muslim women (Protection of Rights on Divorce) Act was challenged before the Calcutta High Court in the case *Mangila Bilu v. Noor Hussain*.\(^{155}\) In this case the petitioner Mangila Bilu was married to Noor Hussain on March 6, 1986. At the time of marriage ‘kabinnama’ was exercised by which the power to give divorce which primarily belongs to the husband was delegated to his wife in accordance with the personal law.

The contention of the petitioner was that after marriage she was ill treated at the husband’s place and driven away from his house. With the power delegated to her she dissolved the marriage and communicated about this to the husband and also to the Muslim marriage registrar and Kazi. In the petition she filed she made an application under sec.3 of the Act before the Magistrate that the husband did not pay any maintenance, dower or other properties given to her at the time of marriage as stated in the Kabinnama. The Magistrate refused to grant claim on the ground that the exercise of power by the petitioner was not according to Kabinnama and hence the marriage between the two is a valid marriage. On appeal, the High Court held:\(^{156}\)

\(^{156}\) *Ibid.*
“The power to give divorce which primarily belongs to the husband may be delegated to his wife either absolutely or conditionally. There is no authority, which prohibits the wife to exercise the power of divorce delegated to her by her husband... In the instant case, even though the Kabinnama bears the signature of both the spouses the groom of his own will bound himself with the condition that his wife would be in a position to give talaq exparte and at her will. Such a stipulation cannot be regarded as a bilateral delegation of the power to give talaq. Thus the husband had unilaterally delegated to the wife a power to divorce unconditionally and since it is not prohibited even by the personal law of the parties”.

Thus the wife was considered to be a divorced wife and in the light of sub Section (3) of 125 of Cr.PC, Section 3 of the Muslim Women (Protection of Rights on Divorce) Act was interpreted by the court.

The object of the judiciary is made clear in the case. What women of other community enjoy or benefit should not be deprived to women belonging to the Muslim community. The main object of the Section 125 is to prevent vagrancy among women. This may lead them to commit crime or make them victims of crime.

In *P.Jayalakshmi v. Ravichandiran*¹⁵² a case before the Andhra Pradesh High Court the controversy arose over the jurisdiction of the Family Courts and Magistrate under Section 125 Cr.PC. During pendency

¹⁵²AIR 1992 AP 190.
of the suit for restitution of conjugal rights before the Family Court the petitioner filed an application under Section 125 for maintenance. The defence of the husband the respondent was that the matter was sub-judice before the competent authority and therefore the application for maintenance under Section 125 was not maintainable. This plea of the respondent was rejected by the High Court which held158 “Right to seek maintenance under Section 125, Cr.PC is an independent right and the pendency of the proceedings under the Hindu Marriage Act in the Family Court is no bar for its maintainability outside the jurisdiction of Family Court”.

The High Court of Kerala and Orissa in M.Alavi v. T.V Safi159 and Bishnu Charan Mohanty v. Union of India160 tried to give a harmonious construction to Sections 3 and 5 of the Muslim Women (Protection of Right on Divorce) Act. It was argued that a woman leading an adulterous life after divorce was not entitled to claim maintenance either under Sec.125 Cr.PC or under Section 3 of the Act of 1986. It was held161 “that an application under Section 3 claiming various relief provided therein the provisions of the Act do not say that she would not be entitled to get the relief if she had been living in adultery. It is not possible to interpret something into the Act,

159 AIR 1993 Ker. 21.
160 AIR 1993 Orissa 176.
161 AIR 1993 Ker.21 at p.22.
which is not there. The court observed\textsuperscript{162} Sec.125(4) itself has no application to a woman who has already been divorced by her husband. The simple reason is that a divorced woman can never be said to be committing adultery even if she has got promiscuous sexual relationship with other persons.

The High court of Madras in an earlier case \textit{Rajagopalan v. Kamalamma}\textsuperscript{163} took the stand that decree of divorce does not disentitle an earring wife to permanent alimony or maintenance. However the High court reduced the quantum of maintenance commenting that the wife was clearly the guilty party.\textsuperscript{164} It is well established that a guilty party cannot take advantage of her guilt and make a profit out of such a guilty conduct. Therefore the respondents conduct cannot be completely ignored when quantifying the maintenance payable". The High Court reduced the amount of Rs.111 granted by the lower court to Rs.75.

In \textit{Bishnu Charan Mohanty v. Union of India}\textsuperscript{165} the constitutional validity of Sec.5 of Muslim Women (Protection of Rights on Divorce) Act 1986 was challenged. The contention was that Section 5 provides right of option on the basis of sex and therefore this provision was in violation of Articles 14 and 15(1) of the Constitution and therefore it should be struck

\textsuperscript{162} \textit{Ibid}.
\textsuperscript{163} \textit{AIR} 1982 Mad. 187.
\textsuperscript{164} \textit{Ibid} p.189.
\textsuperscript{165} \textit{AIR} 1993 Ori. 176.
down as unconstitutional. Chief Justice Hansaria who delivered the judgement held\textsuperscript{166}

Merely because the basis of classification made by the legislation is based on religion would not ipso facto make the legislation offensive of Article 15(1). The same has to be discriminatory in the sense that it involves an element of unfavourable bias. This apart, the classification must have been made only on the basis of religion, which would not be so if there exist historical personal or other persons, supporting the classification. Thus the provision of Section 5 of the Act permitting Muslim husband to opt to be governed by Section 125 Cr.PC has no unfavourable bias.

The court reiterated in this case also that the statutory provision for maintenance under sec.125 should be made available to all women and religion should not be a bar.

From the foregoing study it is revealed the judicial response to encourage women to achieve the rights as guaranteed in the Constitution has been quite appreciative on some occasion and disappointing in some case. So far as maintenance cases listed in this study dispel several misconceptions. This obligation to maintain one's daughter, wife and mother is a very important duty of the father or husband or son. Majorities of women have no property rights and are dependent on others. If not

\textsuperscript{166} \textit{Ibid} p.177.
maintained in order to eke out their living they will have the tendency to
commit crime or they may be exposed to crime.

The Status of Women report had also called for an amendment of the
law to make an economically independent women share with her brothers
the duty to maintain indigent parents.167 The exclusion of daughters from
the obligation may be used as an argument to deprive them of their share in
the father’s property.

It should also be noted that the fight to maintenance depends on the
wife’s “moral” behaviour as held in Rajagopalan v. Kamalammal.168
Unless a wife leads a virtuous life and is sexually loyal to her husband even
after divorce she has no right to claim maintenance. This ruling of the lower
court was set aside by the High court. The High Court held that since there
was a clear cut case of a wife leading an adulterous life and the principle
was that no woman could claim to have the right to be kept by two men.
Though the wife who is at fault cannot be denied maintenance the quantum
was reduced by the High Court for “a guilty party and cannot be allowed to
make profit out of such guilty conduct”.169

In this chapter a review of some constitutional cases on sex
discrimination have been made. In most of the cases the courts have
adopted a formal approach to equality that, understands equality as

168 See note 154 supra.
169 Ibid p.189.
sameness. In some cases, the biological differences and the weakness of women have been identified to differentiate them from men. Such approaches will only dis-entitle them of the benefits that can be derived from special legislation. Likewise a protectionist approach will continue to keep them as dependants. A corrective approach will try to undo the subordination they had undergone in the past.

Thus each case has to be studied with reference to the social values of the society and a substantive approach to equality has to be taken. This approach with the background of the social values will safeguard the interest of each case keeping in mind the inequalities, subordination that women had undergone.

2.4 PROTECTION OF WOMEN’S DIGNITY - DUTIES OF THE STATE - CONCERN OF THE CONSTITUTION

Directive Principles of State Policy in Chapter IV of the Constitution has taken care to incorporate special provisions for the welfare of women. It is not ‘Pious Platitude’ as observed by a critic, rather it is the mirror of Indian Polity through which one can make an estimate of the expectation of the people of India. They are like mandates or commandments, which are binding on all organs of the State. The Constitution has emphasised that the

---

egalitarian society can arise by placing responsibility upon the State to
direct its policy towards securing equality between men and women.

The Articles dealing with the welfare of women in the Directive
Principles are Article 39: The State shall, in particular, direct its policy
towards securing:

(a) That the citizens men and women equally have the right to an
adequate means of livelihood,

(b) that the ownership and control of the material resources of the
community are so distributed as best to observe the common good,

(c) that the operation of the economic system does not result in the
concentration of wealth and means of production to the common
detriment.

(d) that there is equal pay for equal work for both men and women.

(e) that the health and strength of workers, men and women and the
tender age of children are not abused and that citizens are not forced
by economic necessity to enter avocations unsuited to their age or
strength.

(f) That children are given opportunity and facilities to develop.

The objective of Article 39 is to secure a socialistic pattern of
society. Women’s liberation is highlighted in clauses (a) and (d) of Article
39. In order to liberate our women folk from moral and material
abandonment many legislations have been passed. Most significant among
them is the Equal Remuneration Act 1976 but the implementation aspect of it has caused much difficulty. In the sectors where both men and women are employed and the physical capacity is the determining factor naturally, the men dominate and bag higher payments, the women labourers get lower payments, because of their inherent physical incapacity but their wants are equal, so they remain exploited for no fault of theirs. Women's employment has not increased significantly. Employers avoid employing women because they may incur more expenditure if they are to provide crèche and grant them leave with salary during the women's maternity leave. The restriction on women employment is bound to have a telling effect in other spheres of their life.

An important change brought in the last decade is to make legal aid movement an active movement. It is not considered as a charity or benevolence but a civil right. In the Directive Principles of State Policy an amendment was made in the year 1976 and Article 39-A dealing with equal justice and free legal aid was added. It states:

The State shall secure that the operation of legal system promotes justice on the basis of equal opportunity and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure

that opportunities for securing justice are not divided to any citizen by reason of economic or other disabilities.

The Report of the Expert Committee on Legal Aid 1973 highlighted that 'A comprehensive scheme of legal aid must be, involving the State financially and to the extent the judicial and executive wings of the State have to work for it. The Committee listed out nine categories of ideal legal aid clients amongst whom women are identified as one category.

Starting from the decisions of Maneka Gandhi v. Union of India\textsuperscript{172} there are many Supreme Court ruling which laid down that the Fundamental Right in Article 21 of the Constitution should expand its wings of personal liberty to reach the goals set in the Directive Principles of State Policy. In the words of J.Bhagwati in Sheela Barse v. State of Maharashtra\textsuperscript{173} "Legal assistance to poor or indigent accused is a constitutional imperative mandate not only by Article 39-A but also by Articles 14 and 21 of the Constitution.

A specific mention of maternity relief clearly reveals the anxiety of the Constitution makers to make it abundantly clear that maternity was a social obligation and women would not be handicapped because of maternity.\textsuperscript{174} Article 43 mentions about the maternity benefits extended to

\textsuperscript{172}(1978) ISCC 248.
\textsuperscript{173}(1983) 2 SCC 96.
\textsuperscript{174}D.N.Saraf, Social Policy Law and Protection of Weaker Sections of Society (Ed) \textit{op.cit.}, p.305.
women. It states "the state shall make provisions for securing just and humane conditions of work and for maternity relief".

Various labour laws provide special facilities such as maternity\textsuperscript{175} and crèches.\textsuperscript{176} As a consequence of such legislations the employers are reluctant to keep women workers in their factories and industries. Thus these legislations adversely affect women.

Part IV-A incorporated in the Constitution enumerates the Fundamental Duties in Art 51-A, and sub clause (e) mentions the Fundamental Duties towards women. It reads as follows:

Art.51-A Fundamental Duties. It shall be the duty of every citizen of India (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious linguistic and regional or sectional diversities, to denounce practices derogatory to the dignity of women.

It is clear that the dignity of womanhood is a special factor of personhood, has been the salutary, cynosure of constitutional concern.\textsuperscript{177}

If the promises assured by the Constitution were implemented India would be women's paradise. But gender inequality continues. Women's rights are Human Rights and if it is not understood, women will be continued to be exploited or they will exploit themselves. The nexus

\textsuperscript{175}Maternity Benefits Act 1961.
\textsuperscript{176}Factories Act 1968, S.48.
between criminals and women is increasing. So women commit more and more crime and crimes are committed against them. The study of this aspect is highlighted in the subsequent chapters.