

Contextualizing Gender, Law And Judiciary: An Observation On Judicial Activism In Protecting The Rights Of Women In India

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ABSTRACT

Gender disparity has become an inherent characteristic of human society. Everywhere, societies are diversified on the basis of attached social labeling such as caste, creed, race, region, religion, language, gender, etc. At the same time, these labels also become the basis of discrimination in society. Despite the advancements in various sectors of society, women at large are lagging behind as compared to men. They are being denied access to basic facilities such as health, economy, property, education, equal wages, political participation, etc. Further, crime and violence against women have become very rampant in contemporary society. This paper attempts to highlight the role of the higher judiciary in addressing issues of women related to equality, justice, and liberty in Indian society. Authors have also tried to mention legal and constitutional rights for mainstreaming of women in India.

Keywords: Gender Justice, Constitutional Provisions, Legal Enactments, Crime against Women, Judiciary, India.

Introduction

Man is gregarious by nature and always wants to live in a society. However social divisions add their own dynamics to this social living. Division of labour and the consequent unequal distribution of power has been the focal point of discrimination, disparity, and often violence in a given society. The caste and patriarchy-ridden Indian society create a uniquely challenging situation for the woman and girl child. The Indian Judiciary is playing a very active and positive role in protecting the rights of marginalized sections, including women. For a progressive society, the development of its entire population is not only essential but also becomes necessary for its sustainability. Sustainable Development Goals (SDGs) have taken centre stage in defining developmental priorities. Poverty eradication, inequality, good health, decent work, economic growth, etc. are some of the main targets of SDGs' priorities in bringing gender parity and empowering women across the nations. Wellbeing of women and children is essential for the realization of demographic dividend of the country¹. 'Empowerment' seems to reflect more as 'power to' rather than 'power over'. In fact, empowerment

¹ Ministry of Women and Child Development, Government of India, 'Annual Report 2020-21' https://wcd.nic.in/sites/default/files/WCD_AR_English%20final_.pdf.

may be understood as an effort to create/increase ‘power over’². Sathe³ has mentioned that there are four methods of empowerment: through conferment of rights or power on persons to be empowered; by creating penal sanctions against certain types of behaviour that violate the dignity or liberty of women; property or assuring them a right to work and on equal wages, etc.; by providing preferential treatment to women or providing for compensatory discrimination in their favour by reserving jobs or seats in local self-governing institutions, and by facilitating the exercise of liberty or freedom by such persons.

The great reformer and visionary, Swami Vivekananda once said, ‘There is no chance of for the welfare of the world unless the condition of women is improved. It is not possible for a bird to fly on only one wing’⁴. Today gender has become the focal point of discussion on many platforms. At the same time, gender discourse is not limited to women’s issues only but it has also reshaped the notion of gender and thus making it a public issue. “Femininity” does not exist in isolation from “Masculinity”. The construction and power of one determine the construction and power of the other. Gender relations are neither “natural” nor given, they are constructed to make unequal relations seem “natural”, and can be naturalized only under the duress of socialization. Thus, there is undue pressure on boys and girls to live up to the established “norms” of masculinity and femininity. While girls endure unwarranted social control, discrimination, and domination, boys too suffer from the stereotyping that exists in a patriarchal culture. Discouraged from being emotional, gentle or fearful they are thrust into the role of breadwinners, protectors, and warriors. Thus, unequal gender relations stunt the freedom of all individuals to develop their human capacities to their fullest. Therefore, it is in the interest of both men and women to liberate human beings from existing relations of gender⁵.

Gender and the Constitution of India

Gender has been a very debatable issue in contemporary society. Societies are gendered and gender is also compartmentalized. The notion of equality is a kind of myth because rarely do all people in every society receive equal treatment. Beginning from Preamble to Fundamental Rights and Fundamental Duties, and then the Directive Principles of the State Policy, the Constitution of India has shown the deep-rooted motives of gender equality. All these facets of the Constitution of India try to ensure gender parity in society without any kind of preference for anyone in the name of attached [so called] labelling such as caste, creed, race, religion, region, language, sex, etc. The Preamble is

² M.M. Verma, *Empowerment of weaker sections in India: Perspectives and approaches*, (...edition, Serials Publications 2011).

³ S.P. Sathe, *Empowerment of women: Legal strategies*, (...Edition, Oxford University Press 2005).

⁴ P. Ishwara Bhat (n 3) p. 529.

⁵ Bir Pal Singh, ‘Gender, education and tribal development: Status, issues and the way forward’ (Quoted in Behera, Jayant Kumar (ed.), ‘Tribal women in Central India’, The Women Press, 2017).

considered the soul of the Constitution and by laying emphasis on equality, liberty, fraternity, and justice to all citizens, it signifies the inclusive approach to development. It should be noted here that nowhere in the Constitution of India, the word gender is used. Articles 14, 15, and 16 of the Constitution have a reference for non-discrimination on the basis of sex. Narain⁶ quotes Austin, “The Indian Constitution is a live document in a society rapidly changing and almost frenetically political. The touchstone for public and many private affairs, the Constitution is employed daily, if not hourly, by citizens in pursuit of their personal interests or in their desire to serve the public good.” This is evident in the distribution of powers between the federal government and states, the pattern of decentralization of authority, and the nature of the political institutions⁷.

The Indian Constitution is premised on fundamental principles of democracy, the rule of law, federalism, division of powers, and an independent judiciary. Through the judicial review of laws and administrative actions, the Constitution has enabled the judiciary to act as a check on executive power, insisting on access to justice for the poor, thus enabling bottom-up constitutionalism⁸. Women often find it more difficult than men to access the justice system. This may be the result of discriminatory norms and practices within the justice sector and society as a whole; or it may reflect inadequate training and/or a lack of awareness by actors within the justice system⁹.

Sankaran and Madhav¹⁰ have noted that ‘Committee on Status of Women in India’ (CSWI) (1971-74) found increasing marginalization of women in the economy and society. The Committee noted demographic trends of declining sex ratio, growing disparity in life expectancy, and death rates of men and women, and wide disparities in their access to literacy, education, and livelihood. Taking its postcolonial constitutional mandate for social reform through judicial activism seriously, the Indian Supreme Court has been remarkably enthusiastic about interpreting the Constitution to reach decisions in favour of equality rights¹¹. Article 21 of the Constitution of India does not merely have reference to ‘right to life’ but it has its literal interpretation i.e. a dignified life of a person in the society. The Supreme Court has aptly remarked in a landmark judgement:

Equality, dignity of person, and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person’s life including culture, heritage and tradition with

⁶ Vrinda Narain, Postcolonial constitutionalism in India: Complexities & contradictions, Southern California Interdisciplinary Law Journal 2016, p. 110.

<https://gould.usc.edu/why/students/orgs/ilj/assets/docs/25-1-Narain.pdf> accesseddate. 1.07.2023.

⁷ Yogendra Singh, ‘Social change in India: Crisis and resilience’ (First Edition, Har-Anand Publications 1993).

⁸ Yogendra Singh (n 7) p. 125.

⁹ Report of the partners for gender justice conference: The role of the judiciary in promoting gender justice in Africa (2008) ACCRA, Ghana accessed date 30.06.2023.

<https://newilac.wpengine.com/wp-content/uploads/2012/01/Ghana-Report-English.pdf> p.7.

¹⁰ Sankaran, Kamala and Madhav, Roopa, ‘Gender equality and social dialogue in India’ Geneva International Labour Office, 2011 accessed date 30.06.2023.

https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_150428.pdf

¹¹ Vrinda Narain (n 6), p.114.

dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development, women are entitled to enjoy economic, social, cultural and political rights without discrimination and on a footing of equality . . . but also all forms of gender-based discrimination should be eliminated¹².

Programmes and Schemes Empowering Women

Gender parity is essential for the development and growth of humanity in any society. Highlighting the issues and concerns of women, India declared the year 2001 as the 'Year of Women Empowerment'. Focusing on the mainstreaming of women, a separate Ministry of Women and Child Development was created in 2006 at the level of the Central Government. Statutory bodies like National Commission for Women, National Commission for Protection of Child Rights, and Central Adoption Resource Authority, etc. have also played major roles on the issues of women and children in India. The National Commission for Women (NCW) is a National apex statutory body set up in 1992 for protecting and safeguarding the rights of women. National Commission for Protection of Child Rights (NCPCR) was set up on 5th March, 2007 as envisaged in the Commission for Protection of Child Rights Act, 2005. CARA is the Central Authority that functions as a nodal body for promoting and regulating adoption of Indian children at the National level, as per the provisions under Section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2015¹³.

The National Plan of Action for Girl Child (1992) recognizes the rights of the girl child to equal opportunities and seeks to eliminate all forms of violence perpetrated against the girl child. Various growth-oriented development initiatives have been taken both at micro and macro levels for the economic empowerment of women in India. Leading national financial institutions, like Small Industries Development Bank of India (SIDBI), National Bank for Agriculture and Rural Development (NABARD), Swayamsidha, or the Integrated Women's Empowerment Programme (IWEP), and Rashtriya Mahila Kosh (RMK), have played a significant role in promoting micro-credit and economic empowerment of women. The National Commission on Labour (1966-69) established important principles of labour policy in India which included an emphasis on women. This was followed by the second National Commission on Labour (2002) that set up a Task Force on Women and Children and examined the rationalization of labour laws and legislation for unorganized or informal workers¹⁴. A comprehensive rural employment guarantee legislation named as The National Rural Employment Guarantee Act (which later became Mahatama Gandhi National Rural Employment Guarantee Act) was enacted in the year 2005. This Act provides that 'priority shall be

¹² Ibid, p.115.

¹³ Ministry of Women and Child Development Government of India (n 1), p.3.

¹⁴ Sankaran (n 11).

given to women in such a way that at least one-third of the beneficiaries shall be women who have registered and requested for work under this Act'. The National Commission for Women Act of 1990 became functional on 31st January 1992. Section 10 of this Act lists functions of the Commission such as Monitoring the proper implementation of all legislation enacted to protect the rights of women to enable them to achieve equality in all spheres of life and equal participation in the development of the nation¹⁵.

Constitutional and Legal Efforts for the Mainstreaming of Women

For fulfilling obligation of equality and justice, various privileges have been provided through the different provisions of the Constitution relating to the security, protection, and righteous living of women in society. The Part III of the Indian Constitution deals with the Fundamental Rights of its citizens. Article 14 (right to equality); Article 15 (non-discrimination on the ground of sex); Article 15 (3) (welfare of women and children); Article 16 (equality of opportunity in matters of public employment), and Article 23 (prohibition of traffic in human beings and forced labour), etc. have special obligations for mainstreaming women in the society. The Directive Principles of State Policy enshrined under Part IV of the Constitution also have specific provisions for women. Though not enforceable, these principles have moral obligations on the part of the State to apply the notion of social justice to all its citizens without any kind of discrimination against anyone in the name of any attached (discriminatory) social labels. Article 39 (a) secures that the citizens, men, and women have the right to an adequate means of livelihood. Article 39 (d) lays emphasis on equal pay for equal work without any kind of gender biases. Article 42 has provision for just and humane conditions of work and maternity relief. And further, Article 44 lays emphasis on a uniform civil code for all its citizens. Certain Fundamental Duties under the IV A of the Constitution have been assigned to the citizens of India and also special mentions of certain provisions for showing respect to women in the society. Participatory involvement has the participatory development of all its citizens. The involvement of women in the political process of the country becomes essential for their role in the decision-making of developmental activities of society. Part IX (Panchayats) and Part IX A (Municipalities) of the Constitution deal with local self-government for strengthening the democratic values of the country both for rural and urban India. Article 243 D (3), Article 243 D (4), Article 243 T (3), and Article 243 T (4) have a reference to the reservation of seats of women in Panchayats and Municipalities respectively for strengthening the value of grassroots democracy.

Law is an efficacious means of social control in any society. It is the safest mechanism to help the helpless people, give power to powerless persons, create fear among the fearless people (law breakers), and try to secure a just society for an unjust system. Women have been the victim of various adversaries in the form of discrimination, violence, harassment, abuse, and atrocity since time

¹⁵ Ministry of Women and Child Development Government of India (n 1).

immemorial. By upholding the spirit of the Constitution, and developing the faith of common people in law, various legal enactments have been made in India specially for the mainstreaming of disadvantageous sections. Thus, both constitutional rights and legal rights have paved the way for the evolution of feminist jurisprudence. The security and safety of women have utmost become priority of the Government when cases of violence against women are rising. The Indian Penal Code has identified certain behavioural acts as crimes that are against the dignity of women and girl children. Two major categories of crimes have been identified such as under Indian Penal Code and Crimes under Special Laws and Local Laws. Section 376 (Rape); Sections 363-373 (Kidnapping and abduction); Section 302/304 B (dowry death or attempt to dowry); Section 498 A (mental and physical torture); Section (354); Section 509 (sexual harassment); Section 354 C (Voyeurism); Section 354 D (Stalking), and Section 326 A & B (acid attack), etc. are the crimes under Indian Penal Code. Certain legal enactments have been brought as Special Laws and Local Laws to protect the dignity, equality, and equity rights of women in society and these include- 'Minimum Wages Act, 1948; Plantation Labour Act, 1951; Family Courts Act, 1984; Special Marriage Act, 1954; Hindu Marriage Act, 1955; Hindu Succession Act, 1956 (amended in 2005); Immoral Traffic (Prevention) Act, 1956; Maternity Benefit Act, 1961 (amended in 1995); Dowry Prohibition Act, 1961; Indian Divorce Act, 1969; Medical Termination of Pregnancy Act, 1971; Contract Labour (Regulation and Abolition) Act, 1976; Equal Remuneration Act, 1976; Prohibition of Child Marriage Act, 2006; Indecent Representation of Women (Prohibition) Act, 1986; Commission of Sati (Prevention) Act, 1987; Legal Services Authorities Act, 1987; Protection of Women from Domestic Violence Act, 2005, and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

International Forums for the Protection of Women's Rights

Various international conventions and covenants are also very instrumental in protecting and preserving the rights of marginalized sections specially women and children. The Universal Declaration of Human Rights (UDHR) prohibits sex-based discrimination. Covenant of UDHR talks about the equality rights of all human beings without any kind of prejudices against any individual in any society. Fulfilling the civil and political obligations of human beings, the International Covenant on Civil and Political Rights (ICCPR) guarantees many rights such as 'the right to life; freedom from torture; freedom from slavery; the right to liberty and security of the person; rights relating to due process in criminal and legal proceedings; equality before the law; freedom of movement; freedom of thought; conscience and religion; freedom of association; rights relating to family life and children; rights relating to citizenship and political participation'¹⁶. Another international legal instrument, 'The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979'

¹⁶ Geneva Office of Commissioner, UNHR Report on 'Women's rights are human right' 2014 accessed on 8.07.2023, p.4. Retrieved from <https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>.

opposes any kind of discrimination against women and lays emphasis on the principle of equal rights for women. Article 3 states, “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”¹⁷. CEDAW is much more than just a policy statement and general commitment to the principles of equal rights for women and men. In the past quarter century, it has been a powerful tool for holding governments accountable to their commitment *vis á vis* gender equality and women’s rights¹⁸. Article 2 of the Convention on the Rights of the Child and Article 7 of the Convention on Protection of the Rights of All Migrant Workers and Members of Their Families have the mandate to prohibit sex-based discrimination. Further, Article 6 of the Convention on the Rights of Persons with Disabilities focuses that the State parties shall adopt “all appropriate measures to ensure the full development, advancement, and empowerment of women in the enjoyment of their human rights”¹⁹.

In 1993, the World Conference on Human Rights was held in Vienna. The Conference was successful in adopting the Vienna Declaration and Programme of Action²⁰. The Beijing Declaration and Platform for Action (1995) states that women’s equal participation in decision-making is not only a demand for mere justice or democracy but can also be seen as a necessary condition for women’s interests to be considered. Without the active participation of women and the incorporation of women’s perspectives at all levels of decision-making, the goals of equality, development, and peace cannot be achieved²¹. The problem of women is global and thus it needs global efforts among different nations to chalk out strategies and plans. For example, human trafficking is a global issue and it needs global concern to combat human trafficking especially the trafficking of women and children. The different international forums provide the right platform to discuss, debate, and argue the plans and schemes which are helpful for the overall growth of women in society.

Constitutional Obligations and Judicial Activism

The Constitution guarantees rights of equality to each and every citizen in the country. The judiciary has always major role in enforcing the mandate of Constitutional obligations ensuring justice to marginalized sections of society. R Shunmugasundaram quoted Justice A. S. Anand, former Chief Justice of India and former Chairperson of the Human Rights Commission of India, who mentioned

¹⁷ P. Ishwara Bhat (n 3) p. 526.

¹⁸ Sarah Douglas, UNDP Report on ‘Gender equality and justice programming: Equitable access to justice for women’ 2007 accessed 08.07.2023, p.8.

<https://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/gender-equality-and-justice-programming-equitable-access-to-justice-for-women1.html>.

¹⁹ Geneva (n 16), p.7.

²⁰ ‘World Conference on Human Rights’ 1993 accessed on 08.08.2023 <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>.

²¹ Gender and Economic Policy Discussion Forum Report on ‘Gender equality in the workplace in India’ 2015 accessed https://in.boell.org/sites/default/files/uploads/2013/10/briefing_paper_18.pdf..

in an address on “Judicial review – judicial activism – need for caution” and said, “The legislature, the executive and the judiciary are three coordinate organs of the state. All three are bound by the Constitution. The ministers representing the executive, the elected candidates as Members of Parliament representing the legislature and the judges of the Supreme Court and the High Courts representing the judiciary have all to take oaths prescribed by the Third Schedule of the Constitution. All of them swear to bear true faith and allegiance to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all three wings of the state function in complete harmony.²² The judiciary has Constitutional obligations. It has to exercise its power to protect the fundamental rights of the citizens of the country. The impact of judicial rulings has far-reaching effects on the status of women in India. However, in many cases, delayed/adverse judicial decisions also had critics questioning the role of the judiciary. The adverse ruling in the *Tukaram v. State of Maharashtra*²³ (Mathura case) led to widespread protest in the country. The case of *Madhu Kishwar and Others v. State of Bihar and Others*²⁴ is also significant here. This case was related to the succession rights of tribal women. The customary law of the tribal society permits only the male successor, the rights of property. The majority judgment in this decision recognized the violation of the equality rights of women. However, dissenting judgment was given by Ramaswamy J. who noted that the principle of equality talks about equality of all with equal treatment in every sphere. A plethora of other cases such as *Pratap Mishra v. State of Orissa*²⁵, *Raju v. State of Karnataka*²⁶, *Smt. Sowmithri Vishnu vs Union of India & Anr*,²⁷ and *Revathi v. Union of India*²⁸ also showed the patriarchal approach of the judiciary.

Conceptualizing Judicial Activism

According to Mr. Justice A. H. Ahmadi, the former Chief Justice of India, judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern²⁹. Judicial activism is the life of India’s Constitutional vision. In the absence of such judicial activism, ‘a constitution would become stultified and devoid of the inner

²²R Shunmugasundaram, ‘Judicial activism and overreach in India,’ *Amicus Curiae*, Issue 72 Winter 2007 accessed on 07.08.2023 <https://core.ac.uk/download/pdf/112282.pdf>. pp. 22-23.

²³ (1979) 2 SCC 143.

²⁴ (1996) 5 SCC 125.

²⁵ A.I.R. 1977 S.C. 1307.

²⁶ A.I.R. 1994 S.C. 222.

²⁷ 1985 AIR 1618, 1985 SCR Supl. (1) 741

²⁸ (1988) 2 SCC 72.

²⁹ S.P. Sathe, ‘Judicial activism: The Indian experience’ (*Washington University Journal of Law & Policy* 2001) accessed date https://openscholarship.wustl.edu/law_journal_law_policy/vol6/iss1/3.

strength necessary to survive and provide normative order for the changing times'³⁰. An individual has the right to approach courts in case of the violation of his/her fundamental rights in special situations. Article 32 and Article 226 of the Indian Constitution provide Constitutional remedies to seek justice against injustice. The Apex Court of India has developed a new normative regime of rights in the public interest. The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of society. There is no need for judges to feel shy or apologetic about the law-creating roles. In the last few years, the Supreme Court has, through intense judicial activism, become a symbol of hope for the people of India. It has augmented its moral authority and acquired new credibility with the people through judicial activism and judicial creativity³¹. Sathe³² has aptly remarked:

A court becomes strong only when it identifies itself with the disadvantaged minorities and they see the court as an independent institution, a bulwark against oppression and tyranny. A court gains strength only by carving a niche for itself in the minds of the people. A court must appear to the people as their protector. It must not only be, but also must appear to be impartial, principled, and capable of achieving results.

The rise of judicial activism shows the realization among some sections of the judiciary that the present legal system is not adequate for giving justice to the people who need it the most. Judicial activism is an effort on the part of the judiciary to establish the result-oriented credibility of the system³³. Address delivered at the Berkeley Seminar Series on Law and Democracy which was held at the University of California in which Prof. N. R. Madhava Menon³⁴ mentioned that the expansion of civil liberties through Courts happened as a result of three independent processes. 'Firstly, he talked that the assumption of judicial activism and liberalization of the doctrine of locus standi opened the doors of court for large sections of disadvantaged people to seek justice through what is called public interest litigation (PIL). Secondly, through a liberal and ingenious construction of the phrase "procedure established by law", the Court brought in the American concept of "due process" in the interpretation of the right to life and liberty under Article 21. Thirdly, and more importantly, the Court invented the now-celebrated theory of "Basic Structure" under which the Court put limitations on Parliament's power to amend certain fundamental aspects of the Constitution.' In the *Keshavananda Bharati v. State of Kerala*³⁵ case, the Apex Court held that Parliament does have the power to amend any part of the Constitution, but it cannot be so exercised as to alter or destroy the 'basic structure' of the Constitution. The jurisdiction of the Indian Supreme Court is the widest in the world; the

³⁰ *ibid.*

³¹ P.N. Bhagvati, 'Judicial activism in India' (Edition, year) accessed date Retrieved from <http://media.law.wisc.edu/m/4mdd4/gargoyle1713.pdf>.

³² S.P. Sathe (n 31).

³³ Indra Deva, *Sociology of law*, (Edition, Oxford University Press 2005).

³⁴ Madhava Menon, 'N.R. Law and justice: A look at the role and performance of Indian judiciary' (Southasia 2008) accessed date [http://southasia.berkeley.edu/sites/default/files/shared/events/2008 Indian Democracy/Menon-LawANDJustice-ALook .pdf.](http://southasia.berkeley.edu/sites/default/files/shared/events/2008%20Indian%20Democracy/Menon-LawANDJustice-ALook.pdf)

³⁵ (1973) 4 SCC 225.

challenges of India's social changes are the sharpest; the dynamics of functional jurisprudence are the creative expression or judicial response to the crisis of hunger for justice. Public interest litigation is the offspring of these social forces. This burgeoning process, seminal and innovative, makes the court a catalyst of social justice, a defender of the constitutional faith, and the protagonist in the drama of human rights for the common man³⁶.

Access to Justice and Empowerment of Women

The judiciary has a vital role to play in the legal culture of contemporary Indian society. The proactive approach of the higher judiciary on issues of women's equality rights has really developed the faith of people in justice. As a guardian of social justice, the Supreme Court of India has always been the last hope of justice for common people. Indian Constitution gives exclusive power to the Supreme Court and thus the decision given is binding to all without any territorial limitations inside the country under Article 141 of the Constitution. Articles 15 (1) and Article 16(2) prohibit discrimination in general on any ground and sex is one of the prohibited grounds of discrimination. Equal opportunity is the basic right of every citizen and no office is permitted to have discrimination in employment between male and female employees. Adopting a proactive approach to equality right, the Supreme Court in *Bombay Labour Union Representing the Workmen of Messrs v. Messrs International Franchises Pvt. Ltd.*,³⁷ struck down a rule that required only unmarried women to work and once they were married, to give up their jobs. The same was the case of *C.B. Muthamma v. Union of India*.³⁸ In many other cases such as *Dattatraya Motiram More v. State of Bombay*³⁹, *Shamsher Singh v. State*⁴⁰, *Choki v. State*⁴¹, *Giridhar Gopal v. State*,⁴² *Sanaboina Satyanarayana v. Govt. of A.P.*⁴³, *Yusuf Abdul Aziz v. State of Bombay*,⁴⁴ etc., the Indian judiciary gave remarkable and path-breaking judgments protecting the dignity, and equality and equity rights of women in Indian society.

Considering mother as natural guardian of a child and hoping that she is the best person to do better caring for and upbringing her child, the Court handed the custody of the child to the divorced mother in the *Githa Hariharan v. RBI*⁴⁵ case. Self-esteem and dignity are both considered as the basic physio-behavior of one's public life. *Vishaka v. State of Rajasthan*⁴⁶ evolved the peak notion of judicial activism in the country and resulted in the issue of guidelines by the Apex Court vis-à-vis amendment in criminal law against the offences of sexual harassment at the workplace. Traditional and cultural aspects also sometimes act against the dignity of women furthering the supremacy of the patriarchal mentality by sidelining the self-esteem of women in a community and society at large. Bai

³⁶ V.K. Krishan Iyer, 'Towards an Indian jurisprudence of social action and public interest litigation' in Deva, Indra (ed), *Sociology of law* (Edition, Oxford University Press 2005).

³⁷ AIR 1966 SC 942.

³⁸ (1979) 4 SCC 260.

³⁹ AIR 1953 BOM 311.

⁴⁰ AIR 1970 P&H 372.

⁴¹ AIR 1957 Raj 10.

⁴² AIR 1953 MB 147.

⁴³ AIR 2003 10 SCC 78.

⁴⁴ AIR 1954 SC 321.

⁴⁵ AIR 1996 SC 1864.

⁴⁶ AIR 1997 SC 3011.

Tahira v. Ali Hussain Fidaali Chothia⁴⁷, Fuzlunbi v. K. Khader Vali,⁴⁸ and Mohd. Ahmed Khan v. Shah Bano Begum⁴⁹ are some of the landmark judgments redefining the notion of the *iddat period*.⁵⁰

The victimization of women is multidimensional. And at the same time, the promptness of the Judicial System is quite noteworthy in securing the rights of women by issuing the writ order even against private persons for saving the dignity and life of battered women. In Vidya Verma v. Dr. Shiv Narain Verma⁵¹, State of W.B. v. O.P. Lodha⁵² and Re Balwant Singh⁵³, the Court took a quite humane approach to save the dignity of women. The Apex Court commented seriously in the State of W.B. v. O.P. Lodha & Anr⁵⁴ on delay of more than one month in placing the letter by the Registrar and mentioned:

It is making a mockery of the judicial process if a matter where a woman complains of illegal confinement is not treated as important enough to be placed before the court forthwith. If a matter of this nature is not considered as urgent enough for being listed on priority basis, no other matter deserves to be listed on priority basis⁵⁵.

In Nandini Sathpathi v. P.L. Dani⁵⁶ case, the court directed that the arrest of a woman shall be done only by women police officers and the investigation should only be in the presence of her lawyer. In Sheela Barse v. State of Maharashtra⁵⁷, the Supreme Court directed the establishment of separate female lockups. The sensitivity of the Supreme Court has been seen in many other issues as well such as custodial rape, sexual assault, dowry harassment or directing the State authorities to take rehabilitative and reformatory measures for the children of sex workers. The notable cases in this regard are P. Rathinam v. State of Gujarat⁵⁸, Delhi Domestic Working Women's Forum v. Union of India⁵⁹, Upendra Baxi v. State of U.P.⁶⁰, Vishal Jeet v. Union of India⁶¹, Gaurav Jain v. Union of India⁶², State of Punjab v. Iqbal Singh⁶³, Mulakh Raj v. Satish Kumar⁶⁴. In Paniben v. State of Gujarat⁶⁵, the case

⁴⁷ AIR 1972 SC 362.

⁴⁸ AIR 1980 SC 1730.

⁴⁹ AIR 1985 SC 945.

⁵⁰ As per Section 2 (b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, "iddat period" means, in the case of a divorced woman,— (i) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; and (iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier. accessed date

http://legislative.gov.in/sites/default/files/A1986-25_1.pdf.

⁵¹ AIR 1956 SC 108.

⁵² AIR 1997 SC 2021.

⁵³ (1996) 3 SCC 592.

⁵⁴ AIR 1997 SC 2021.

⁵⁵ P. Ishwara Bhat (n 3).

⁵⁶ (1978) 2 SCC 424.

⁵⁷ (1983) 2 SCC 96.

⁵⁸ (1994) SCC (Cri) 1163

⁵⁹ (1995) 1 SCC 14.

⁶⁰ (1983) 2 SCC 308.

⁶¹ (1990) 3 SCC 318.

⁶² (1997) 8 SCC 114.

⁶³ (1991) 3 SCC 1.

⁶⁴ (1992) 3 SCC 43.

⁶⁵ (1992) 2 SCC 474.

which was related to dowry death, the apex court didn't grant any sympathy to mother in law who was found guilty and also observed:

We are clearly of the opinion that it would be a travesty of justice if sympathy is shown when such a cruel act is committed. It is rather strange that the mother-in-law who herself is a woman should resort to killing another woman. The language of deterrence must speak in that it may be a conscious reminder to society. Undue sympathy would be harmful to the cause of justice. It may even undermine confidence in the efficacy of the law⁶⁶.

One of the serious social issues, India is facing i.e. an adverse child sex ratio. As per the census 2011, the child sex ratio is only 914/1000. This is a very alarming situation in the country which ultimately would affect the future sex ratio of the population. The discriminatory approach of parents and even society has created the problems of female foeticide and infanticide. In search of a son (thinking of him as the carrier of the next generation of the family), either the number of daughters in the family is increasing and giving a complete threat to family planning norms of the country or parents are killing their female fetus by misusing technology. In spite of legislation 'Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994' to prevent fetus killing (considering it a crime), the patriarchal mentality of the family is not in favour of accepting the daughters as one of the founding stone of human society. The judiciary in India has always reflected the equality spirit for all its citizens without giving any kind of preference in the name of personal laws. In landmark cases such as *Sarla Mudgal v. Union of India*⁶⁷, and *Jorden Diengdeh v. S.S. Chopra*⁶⁸, the Supreme Court emphasized the need for the implementation of a uniform civil code. Uniform civil code is the mandate of the Indian Constitution under Article 44.

Traditions, customs, mores, morals, etc. are the basic norms of every known human society all over the world. Customs that are against the individual's liberty and seem gender-biased always get criticism in society. Islam as a religion does not believe in the discrimination of any person on any ground. But at the same time, the wrong interpretation of its religious obligation in the matter of matrimonial disputes gives more privilege to men than women, and thus women become the victim of the age-old practice of instant *talaq* or divorce in *Muslim* society. This social arrangement (as it gets social sanction by the society at large) clearly violates the mandate of the Indian Constitution, which under Articles 14 (equality), 15 (non-discrimination), 21 (right to dignified life), and 25 (freedom of religion) permit every citizen to enjoy religious liberty and matrimonial obligation without any kind of prohibition or victimization. In a historic judgment of *Shayara Bano v. Union of India and Others*⁶⁹, the Supreme Court held instant *talaq* (*talaq-e-bidet*- three pronouncements of '*talaq*', at one and the same time) unconstitutional and thus gave relief to millions of *Muslim* women

⁶⁶ P. Ishwara Bhat (n 3).

⁶⁷ AIR 1995 SC 1531.

⁶⁸ AIR 1985 SC 935.

⁶⁹ (2017) 9 SCC 1.

in India. Though, this decision of the Apex Court received much criticism in the hands of some *Muslim Ulemas* (scholars) and some of the political leaders giving the plea that the Court cannot interfere in the matter of personal laws. Setting aside all these arguments, the Supreme Court applied the basic norm of gender justice in matrimonial disputes and thus gave a sigh of relief to millions of *Muslim* women who have been the victim of biased applicability of the traditional practice of instant *talaq* under personal law. The Court concluded that the 1937 Act is void to the extent that it recognizes and enforces instant *talaq*, on the basis that as per Article 13(1) all laws in force immediately before the commencement of the present Constitution (which includes the 1937 Act) shall be void in so far as they are inconsistent with the fundamental rights set out in the Constitution. The historic judgment has been widely celebrated in India by various women's groups and promoters of human rights and social justice. In tune with this judicial decision, the Government of India also enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 (No, 20 of 2020). The main purpose of this Act is to protect the rights of married Muslim women and prohibit divorce by pronouncing *talaq* by their husbands and providing for matters connected therewith or incidental thereto. Section 3 of this Act says that any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal. Section 4 further provides that any Muslim husband who pronounces *talaq* referred to in Section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to a fine.

Thus, this judgment will have a path-breaking effect on the protection of rights of women who become the victim of instant *talaq* in the hands of their husbands in *Muslim* society. The Apex Court categorically mentioned that instant divorce is unconstitutional and violates the basic premise of gender justice. Renowned jurist Tahir Mahmood also advocated for the codification of *Muslim* Personal Laws. Justin Jones quoted his remark:

..... for the Muslims of India to shut their eyes to the tremendous progress in the fields of personal law and succession made in a major part of the world of Islam. A unified, codified, and modernized law of personal status is now the order of the day in a large number of countries where Muslims constitute overwhelming majorities. In India, Muslims have to live in the company of a dominant non-Muslim majority and other co-minorities, all of whom are now governed by largely modernized and codified personal laws. How can they afford to insist on an absolutely undisturbed continuance of their classical and uncoded personal law? And if they do so it would be to their own sheer detriment⁷⁰.

Religion is a personal affair of a person. But, there have been various disabilities in the name of religious sanctions against women in the country giving it more political tunes. In the name of customary practices, women being the part of same social stratum are not allowed to enter the premises of certain temples in the country. The Supreme Court mentioned in the Sabarimala temple

⁷⁰ Justin Jones, Towards a Muslim family law Act? Debating Muslim women's rights and the codification of personal laws in India (Contemporary South Asia 2020, VOL. 28, NO. 1, 1–14) accessed date 12.07.2023, p.4 <https://doi.org/10.1080/09584935.2019.1684444>.

case, “it is a universal truth that faith and religion do not countenance discrimination but religious practices are sometimes seen as perpetuating patriarchy thereby negating the basic tenets of faith and of gender equality and rights”. Gender discrimination has become a norm in Indian society. In spite of legal enactments, women of the country one way or other always become part of discriminatory treatment. Though in many cases, this discrimination also gets its legitimacy from the legislation itself. For instance, here, Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 traditionally bar the entry of women in a place of worship as customary norms. Every human being deserves to get equal treatment as enshrined in the Constitution of India and any kind of discrimination is treated as an injustice against the person. Being a personal affair, religious freedom is not extended to women and girls in the country (in many temples) and the latest edition in this regard is the case of Sabarimala temple in Kerala. It is said that the entry of women during their menstrual cycle would pollute the sanctity of the idol (Lord Ayappa) and would affect the idol’s celibacy and austerity. Women’s organizations claim that this is a denial of the right to access sacred places and is thus, in direct conflict with the constitutional mandate. Setting aside the pre-conceived notions, the Supreme Court by a majority (4:1) judgment in *Indian Young Lawyers Association v. State of Kerala*⁷¹ (known as the Sabarimala temple case) delivered the historic judgment on September 28, 2018, holding that banning entry of Hindu women to shrine amounts to gender discrimination. Like their male counterparts, women too have equal rights to access sacred places. The senior counsel, Ms. Indira Jaising, reiterated that the exclusion from the Sabarimala temple is unconstitutional and it is a kind of untouchability. Dhananjaya Y. Chandrachud, J. has the following observation in this case:

To exclude women from worship by allowing the right to worship men is to place women in a position of subordination. The Constitution should not become an instrument for the perpetuation of patriarchy. The freedom to believe, the freedom to be a person of faith, and the freedom of worship, are attributes of human liberty. Facets of that liberty find protection in Article 25. Religion then cannot become a cover to exclude and to deny the basic right to find fulfillment in worship to women. Nor can a physiological feature associated with a woman provide a constitutional rationale to deny her the right to worship which is available to others. Birthmarks and physiology are irrelevant to constitutional entitlements which are provided to every individual. To exclude from worship is to deny one of the most basic postulates of human dignity to women. Neither can the Constitution countenance such exclusion nor can a free society accept it under the veneer of religious beliefs⁷².

The noteworthy part of this landmark judgment is the view/opinion given by Indu Malhotra, J. being a woman herself, she gave a dissenting note in this case and thus tried to uphold the customary practice related to the non-entry of women in Sabarimala temple. She said that religion is build up on faith and courts are not supposed to enter in the areas of faith. She further mentioned: ‘Constitutional morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practice their faith and belief in accordance

⁷¹ WRIT PETITION (CIVIL) NO. 373 OF 2006.

⁷² *Id*, Para 15, pp. 20-21.

with the tenets of their religion, irrespective of whether the practice is rational or logical. The limited restriction on the entry of women during the notified age -group does not fall within the purview of Article 17 of the Constitution'⁷³.

In spite of legal enactments and judicial promptness, crime and violence against women have become the inherent realities of contemporary Indian society. Crime statistics of every coming year, present an alarming situation as the number of cases of crime against women is increasing every year and thus posing a threat to law and order on one side and developing a sense of insecurity among women for their free movements on the other. A total of 50,74,634 cognizable crimes comprising 31,32,954 Indian Penal Code (IPC) crimes and 19,41,680 Special & Local Laws (SLL) crimes were registered in 2018. Though it shows an increase of 1.3% in the registration of cases over 2017 (50,07,044 cases), however, the crime rate per lakh population has come down from 388.6 in 2017 to 383.5 in 2018⁷⁴. The majority of cases under crimes against women out of total IPC crimes against women were registered under 'Cruelty by Husband or His Relatives' (31.9%) followed by 'Assault on Women with Intent to Outrage her Modesty' (27.6%), 'Kidnapping & Abduction of Women' (22.5%) and 'Rape' (10.3%). The crime rate per lakh women population is 58.8 in 2018 in comparison with 57.9 in 2017. In percentage terms, the major crime heads were 'Crime Against Children' during 2018 was Kidnapping & Abduction (44.2%) and under the Protection of Children from Sexual Offences Act, 2012 (34.7%) including child rape. The crime rate per lakh children population was 31.8 in 2018 in comparison with 28.9 in 2017⁷⁵. crime against women in general and rape, in particular, is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection of the attitude of indifference of society toward the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys physical body of his victim, a rapist degrades very soul of helpless female (*State of Punjab v. Gurmit Singh and Others*).⁷⁶ Further in *State of Karnataka v. Krishnappa*⁷⁷, the Supreme Court held: 'Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity — it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic

⁷³ Id, Para 16, p. 74.

⁷⁴ Ministry of Home Affairs, Government of India, National Crime Records Bureau Report on 'Crime in India-2018' (ncrb.gov, day and month) <https://ncrb.gov.in> accessed date.

⁷⁵ Id, p. XII.

⁷⁶ (1996) 384 SC.

⁷⁷ (2000) 75 SC.

experience. The courts are, therefore, expected to deal with cases of sexual crime against women with the utmost sensitivity. Such cases need to be dealt with sternly and severely (Para 15)'.

The procedural law of court has its own intricacies or legal bindings for the quick decision of a particular case. The much-awaited Nirbhaya case verdict finally came in March 2020 penalizing death sentence for accused persons. *Mukesh & Anr. v State For Nct Of Delhi & Ors.*⁷⁸, *Vinay Sharma & Another v. State (NCT of Delhi)*⁷⁹ (known as Nirbhaya case), The Supreme Court awarded death sentence to all four accused. As one of the rarest of rare cases, the incident happened on the intervening night of 16-17, December 2012, a 23-year-old paramedic student named Nirbhaya (not her real name) was raped by a group of six persons in South Delhi. The assault was so fatal that the victim died on December 29, 2012, at a hospital in Singapore. The incident was condemned widely both at the National and International levels. The public reaction burst in the form of mass protest raising the questions against the Government which failed to secure a peaceful and dignified life of women in country. This brutal nature of crime brought National shame as it also happened in the capital of the Nation, the highest security zone of the country. The gravity and sensitivity of the incident forced immediate action on the part of the Central Government and thus, the Government appointed a judicial committee under the chairmanship of a former justice of Supreme Court of India, Justice J. S. Verma to suggest amendments to criminal law for more stern actions on sexual assault cases against women. Submitting the report within a month of its constitution on January 23, 2013, the committee recommended that rape deserves a serious punishment as it demonstrates a total contempt for the personal integrity and autonomy of the victim.

After eight long years of waiting, the decision of the Supreme Court finally came on March 20, 2020, upholding the death penalty for all four accused in Nirbhaya case and thus again developing the faith of common people in the judicial system of the country. Various arguments like non-criminal background and poor socio-economic background of accused were given by the advocates of defendants in support of the accused. A number of cases have been cited by the Court as precedent in the present case, justifying its own actions in rape cases and penalizing the death sentence. Some of the cases referred to as such are *Molai & Anr. v. State of M.P.*⁸⁰; *Bantu v. State of Uttar Pradesh*⁸¹; *Ankush Maruti Shinde and Ors. v. State of Maharashtra*⁸²; *Mohd. Mannan @ Abdul Mannan v. State of Bihar*⁸³; *Rajendra Pralhadrao Wasnik v. The State of Maharashtra*⁸⁴, etc. In spite of stringent

⁷⁸ Criminal Appeal Nos. 607-08 of 2017@ SLP(CRL) Nos. 3119-3120 Of 2014.

⁷⁹ Criminal Appeal No. 609-10 of 2017 @SLP(CRL) NOS. 5027-5028 OF 2014.

⁸⁰ (1999) 9 SCC 581.

⁸¹ (2008) 11 SCC 113.

⁸² (2009) 6 SCC 667.

⁸³ (2011) 5 SCC 317.

⁸⁴ (2012) 4 SCC 37.

actions on the part of the judiciary against rape cases and tough legal regulations, the crime against women is unstoppable. The remark of R. Banumathi, J. in Nirbhaya case is quite apt:

Stringent legislation and punishments alone may not be sufficient for fighting increasing crimes against women. In our tradition bound society, certain attitudinal change and change in the mind-set is needed to respect women and to ensure gender justice. Right from childhood years children ought to be sensitized to respect women. A child should be taught to respect women in the society in the same way as he is taught to respect men. Gender equality should be made a part of the school curriculum. The school teachers and parents should be trained, not only to conduct regular personality building and skill enhancing exercise, but also to keep a watch on the actual behavioural pattern of the children so as to make them gender sensitized. The educational institutions, Government institutions, employers and all concerned must take steps to create awareness with regard to gender sensitization and to respect women⁸⁵.

Concluding Remarks

Preceding paragraphs reflect the promptness and sensitivity of judicial activism in India. Crime against women has become a routine phenomenon. Noted sociologist Durkheim once said that crime is an inevitable aspect of society. Being a social pathology, crime is very inherent in the social structure of human society. Crime against women bars the progress of a nation. It is the duty of the society as a whole to provide a secure and safe atmosphere to women as they are also the part of same social stratum and deserve the same treatment in every arena of their development. The issues related to women must be heard with due care and sensitivity. Speedy justice delivery mechanism is the only hope for millions of women all over the world who face victimization in their life and lives. At the same time, the applicability of a strong criminal justice system creates a deterrent effect in the minds of offenders. The fear of the law is the necessity of hour to combat crime against women. Long and pending litigations initially defeat the purpose of both law and justice. Justice has become a costly affair in modern society, especially for poor and marginalized sections of Indian society. Everybody is not in a comfort zone to seek the advice of experienced and seasoned advocates as they charge much. Special Courts are required to provide speedy trials in cases related to women. Lingering any case creates doubts in the mind of common people who always have lost hope of ray and belief in the judicial system of their country to get justice against their atrocities/harassment. No doubt that the judiciary in India is playing a very vital role in the mainstreaming of common people. Many times, it also seeks *suo motu* on important issues which affect the public at large or which are having immediate attention and need immediate measures to cope with the existing situations.

⁸⁵ R. Banumathi, J. in Nirbhaya case, Para 5, p. 319.