

'Women's Rights As Human Rights': A Dynamic Approach Towards Gender Justice

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"Fear not, for thou shalt conquer,
Thy doors will open, thy bonds break
Often thou lovest thyself in sleep,
And yet must find back thy world
Again and again"

-Rabindranath Tagore (Nai Nai Bhoy)²

"The extension of women's rights is the basic principle of all social progress"

-Charles Fourier³

INTRODUCTION

As inheritors of unequal socio-cultural legacy and biased legal environment, and victims of sex-based discriminations and violence, women deserve and need special care and protection. The social transformative competence of human rights has great relevance, moral content and active role in providing this protection by sensitizing the legal rights of women from the angle of human rights. To say that women's

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² According to the poet, the call comes from the earth and sky to get rid of pain, shame and fear and sing with gladness mingled by the elements of nature.

³ Cited by Justice K S Radhakrishnan in Voluntary Health Association of Punjab v. Union of India AIR 2013 SC 1571 paragraph 27

rights are human rights is not only going beyond recognition of natural and ideal position that women are human beings but is also suggesting that the operation of the legal system should be reoriented to help the cause of women. Since law and legal system are parts of culture, the historical biases that operated against women continued and still continue in the legal regime to some extent. All the organs of government, local bodies, governance system and mechanism of federalism have immense responsibility to enhance the level of human right content in the gender related laws and their implementation so that women get better protection. The recent legal scholarship on feminism has laid focus on women's rights as human rights as an instrument to raise the societal capability for empowerment of women, in order that they may overcome the fear, lose the bonds and conquer the new opportunities of wellbeing.⁴ This paper tries to locate gravitational centre of human rights approach in recent pro-woman legal developments, and argues that unless every legal right of woman is perceived as human right with special protective measure, the much aspired women empowerment may not take off; that human rights can combat patriarchy-skewed cultural norms; and that enhancing the level and content of human rights in women's legal rights goes a long way in women empowerment.

THE CONCEPT AND THE CONTEXT

Human rights emphasize three vital factors: human wellbeing with bodily integrity and autonomy; recognition of equality of status and dignity; liberty to take decisions and effectuate them in action. All these are to be supported by due process and rule of law. In the context of woman, these have special implications towards the goal of attaining gender justice. The concept of gender justice implies a comprehensive goal and scheme of protecting the class of subordinated gender from the exploitations and denials inflicted by the dominant gender.⁵ The strategy requires that women's subordination in a socio-legal regime should be countered by anti-subordination interpretation and dominance analysis, and a patriarchal social construction which makes power to dictate freedom ought to be

⁴ See for example, Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Revision of human Rights' (1990) 12 (4) Human Rights Quarterly 486, where Bunch views that women are often discriminated on the basis of gender, which has the deeper effect of violating their human rights, and which pose serious challenge to human rights.

⁵ P Ishwara Bhat, Law and Social Transformation (Eastern Book Co., 2009) 515.

tackled by empowerment as the true method of freeing women.⁶ Convention on Eradication of Discrimination Against Women (CEDAW) obligates the State Parties to legislate and replace discriminatory practices against women by egalitarian norms and practices.⁷ Kabaskal Arat argues that in contemporary patriarchal societies, cultural values and hierarchical structures conflict with women's rights, and that human rights can set them right through active involvement of state authority.⁸ She observed, "Human rights are closely linked to culture, and the expansion, full recognition and protection of rights would demand the transformation of cultural norms and their material foundations. Thus, compliance with international human rights would require a shift in cultural mores, as well as political commitment."⁹

The transformative competence of human rights for women is established globally over the centuries. It is with the recognition of woman's valuable rights through sense of humanism and respect for dignity that her legal and social position was elevated. Patriarchy's shocking practices like sati, female infanticide, indignities of widowhood, dowry and peculiar notions of chastity could be addressed in India through laws whose conscience was human rights. From Magna Carta (1215) to Human Rights Act 1998 in England, from Universal Declaration of Human Rights 1948 to CEDAW and beyond, the story unravels gradual enhancement of women's human rights through law. Being a strong instrument of public policy and social reason, law's sensitivity to human rights/feminist movement imbibed the radical spirit of reform to assert women's right to be human and be dignified. Patriarchy's clutches got slackened through law owing to the alchemy of human rights.

One of the most telling way through which human rights could be infused into legal rights is by creative application of constitutional provisions as they are superior norms that influence the ordinary legal norms. Feminist

⁶ Tracy E.Higgins, 'Democracy and Feminism', 110 Harv. L.Rev. 1657 at 1676-85.

⁷ Article 2 (f), 3 and 5 of CEDAW

⁸ Zehra F Kabaskal Arat, 'Women's Rights as Human Rights: The Promotion of Human Rights as Counter culture' (2008) XLV (2) UN Chronicle <https://unchronicle.un.org/article/womens-rights-human-rights> visited on 27/5/2018.

⁹ Ibid. She contemplates that cultural norms shall be analysed in conformity with human rights principles and that diversity should be recognised for this purpose.

constitutionalism¹⁰ brought constitutional feminism¹¹ that expanded the rights and protections to women. In this process, constitutions became the medium for women's human rights advocacy. Rosalind Dixon and Martha Nussbaum consider that the state shall shoulder the responsibility of ensuring minimum ten capabilities¹² and that for the marginalized section like women equality argument becomes crucial for asserting their right to dignity in controversial issues like abortion.¹³ Constitutional 'hermeneutics' focuses on woman question in avoiding interpretations that impose disproportionate burden upon women.¹⁴ Liberal feminist approach of narrowing down the differences between men and women, cultural feminist interpretation that brings ethic of care through expansion of social rights and radical feminist view of harassment as discriminatory or pornography as action enormously fill human right elements in legal rights.¹⁵ Jennifer Nedelsky views, "Feminist constitutionalism brings together rights, values, and participation in norm creation to give a sense of urgency about finding ways to reflect on what our core values really are and to hold ourselves and our institutions to account."¹⁶ Looking to the need for comprehensive or holistic approach, Justice J. S. Verma Committee opined, "Empowerment of women means the advancement of women as contemplated under Articles 14 and 21 of the Constitution through integrated strategies, frameworks, programmes, plans, activities, budgets, which aim to eliminate structural inequalities and which enable

¹⁰ While constitutionalism connotes supremacy of the constitution, limited government and rights of individuals and groups, feminist constitutionalism engages in exposing their hidden assumptions challenging their claims to gender neutrality. See Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana (eds.) *Feminist Constitutionalism* (Cambridge University Press, 2012) 2-3.

¹¹ This connotes use of judicial activism and providing higher protection to women through application of constitutional provisions. See P Ishwara Bhat, 'Constitutional Feminism: An Overview' (2001) 2 SCC (Journal) 1

¹² These include: normal length of life; bodily health; bodily integrity; senses, imaginations and thought; emotions; practical reason; affection; co-existence with other living beings; play, laugh and leisure; and control over one's political and material environment. See Martha C Nussbaum, *Frontiers of Justice* (2006) 76-8

¹³ Rosalind Dixon and Martha C. Nussbaum, 'Abortion, Dignity and Capabilities Approach' in Beverley Baines et al., (n 9) 64 at 69 and 79.

¹⁴ Daphne Barak-Erez, 'Her-meneutics: Feminism and Interpretation' in Beverley Baines et al., (n 9) 85 at 97.

¹⁵ Ibid 86-9

¹⁶ Jennifer Nedelsky, 'The Gendered Division of household Labor' in Beverley Baines et al.,(n 9)15 at 47.

women to gain power and control over decisions and resources which determine the quality of their lives in a sustainable manner.”¹⁷

Feminist jurisprudence vehemently argues for strong regime of rights. I. M. Young views that the five principal types of oppressions viz., exploitation, marginalization, powerlessness, cultural imperialism and violence calls for structural reforms, redistribution of resources and alteration of cultural image.¹⁸ While liberal feminists like Wendy Williams argued for formal equality for women since a differential treatment even for favouring women is inherently discriminatory, the radical feminists like Catherine Mackinnon and Littleton argue that tracing the site of domination and dispelling its influence through equal power of women are needed.¹⁹ Mackinnon holds that protection is a measure of dignity and not a special privilege, and asserts, “Take your foot off our necks, then we will hear in what tongue women speak.”²⁰ Littleton points out that a reconstructed equality norm shall be applied beyond the differences, and that the differences shall be made costless without waiting for major cultural change.²¹ Nicola Lacey states that public-private distinction has given scope for state’s escape from responsibility of preventing or remediating exploitations in private spheres, and argues for integrated approach to avoid discrimination in disguise.²² The strategy of empowerment of women has heavily relied on higher level human rights values to percolate to legal norms and moral principles.

Analytically speaking, the role of human right component in woman’s legal right situation is substantial and vindicated in vast spheres. The human right approach to women’s legal right has potentiality of making at least the following contributions:

¹⁷ Page 55 paragraph 44 of JS Verma Committee Report 2013

¹⁸ Iris Marion young, *Justice and the Politics of Difference* (1990) extracted in MDA Freeman (ed), *Lloyd’s Introduction to Jurisprudence* 8th Ed (London: Sweet & Maxwell, 2008) 680-694.

¹⁹ Wendy Williams in 61 NYUL Rev (1984-5)1003; Catharine Mackinnon, *Difference and Dominance: On Sex Discrimination* (1987) pp 32-45 extracted in MDA Freeman (n 17) 1337-46; Christine A Littleton, *Reconstructing Sexual Equality* (1987) extracted in MDA Freeman pp 1347-59

²⁰ Catharine Mackinnon, p.45

²¹ Christine A Littleton, *supra* p. 1359.

²² Nicola Lacey, *Unspeakable Subjects* (1998) 97 cited in MDA Freeman, (n 17) 1294.

Firstly, when woman's body, mind and personality get a serious threat due to sexual crimes or domestic violence, her legal right needs to be looked from the heightened prism of human right. Hence, legal vacuum, if any, as in case of Vishaka is to be remedied by invention of new right through human right perspective. Legislative attempt to consolidate the judicially evolved legal protection against sexual harassment in workplace is in support of human right. Similarly, inadequacies of criminal law are to be eradicated through reform of both substantive and procedural law. Such reforms might take place either through judicial decisions or legislative actions. Human rights approach imposes positive duty upon the State and fellow beings to help and negative duty to abstain from acts of indignity. The Criminal law reforms of 2012 and 2013 have substantive human rights approach. Organized crimes like honour killings have been the worst attacks upon women's honour and dignity in the name of community's honour. Again, on the basis of Law Commission report Parliamentary attempt to deal with such social deviance has potentiality of reform through human rights approach. The reforms in the field of law of marriage, divorce, domestic violence and maintenance have significant human right agenda.

Secondly, non-discrimination in the matter of access to good things like education, employment, economic opportunity, ownership of property, family life and political participation has considerable human right component. Constitutional feminism spearheaded gender justice with affirmative action policy. Family law being intensively influenced by socio-religious and cultural factors, was a site of glaring gender discriminations, and continues some in spite of gender justice reforms. Sometimes, judicial hesitations and half hearted approaches have obstructed the process of infusing human rights values into the personal law and control its application, whereas instances of active judicial intervention to provide remedies by recourse to liberal/feminist interpretation also abound. The biased operation of property law, by not recognizing women's work, economic contribution and wealth, had pushed them to the position of perpetual dependence. But recent positive developments have resulted in recognition of coparcenary right of daughters. While generally the development and poverty alleviation jurisprudence had not much assisted the women folk, who could not overcome formal equality and cold legalism, the present scenario has transcended the gloom and bristles with optimistic and highly positive approach from the side of the Constitution and all wings of the government.

Thirdly, liberty arguments could successfully challenge laws that declined women's autonomy in reproductive rights, in participation in commercial world including bar service and to be free from indecent expositions. When there is abuse of expressional freedom through obscenity which makes woman's body a medium of communication of sensuous feelings that have snowball effect towards violence against women, it is the human right component of restraint of abuse that comes to the forefront.

In all the above circumstances, a state-centric approach to human rights falls far short of gender justice standards especially when women's rights are contested and challenged in private spheres and by private or non-state actors. Realizing the woman's human rights in her horizontal social relations would expand the scope and content of her legal right. Sensitizing of each and every tissue of the legal system by a gender justice approach is something expected from the idea that women's rights are human rights. It also follows that substantive equality approach requires the support of civil society, awareness programmes, feminist social leadership and change in the mind set of khap panchayat members. The dichotomy between human rights and legal rights relegates to the background in front of mutual assistance and balancing between the two. It is essential to locate and evaluate such an approach in human right discourse, constitutional jurisprudence and application of ordinary law.

INTERNATIONAL HUMAN RIGHTS FOR WOMEN THROUGH STATE LAW

A feminist vision of human right is complementary to the jurisprudence of both human rights and social justice.²³ Universal Declaration of Human Rights and the Covenants prohibited sex-based discriminations, which were not adequate to build up a comprehensive policy of gender justice.²⁴ The Convention on the Elimination of all forms of Discrimination Against Women, 1979, to which India is also a party subject to reservation, came into existence with a realization that discrimination against women violates the principles of equality of rights and respect for human dignity, is an

²³ Charlotte Bunch, 'Feminist Visions of Human Rights in the Twenty first Century' in Kathleen Mahoney and Paul Mahoney, *Human Rights in the Twenty-first Century*, 1993, p.967.

²⁴ Article 2 of UDHR, 1948, International Covenant on Economic, Social and Cultural Rights, 1966 and International Covenant on Civil and Political Rights, 1966.

obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth and prosperity of society and family. It bears in mind the great contribution of woman to the welfare of the family and to the development of the society, so far not fully recognized, the social significance of maternity and role of both parents in the family and in the upbringing of children. It warns that the role of women in procreation should not be a basis for discrimination and exhorts for sharing of responsibility of upbringing between men and women and society as a whole. Condemning discrimination against women in all its forms, it obligates State Parties to embody the principle of equality of men and women in their national constitutions and legislations, to provide effective legal protection of women through public institutions, and to repeal or modify discriminatory laws and practices (Art. 2). 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." The comprehensive approach to effectuate women's rights in their various dimensions through legislations substantiates the theme of the present paper. The range of objectives for legislative measures include protection against trafficking, equal rights at work place, equal opportunities to have education, employment, health service etcetera.²⁵

'Women's right as human right', a slogan initiated in Beijing Conference in 1995, has gained a focus of attention in India when human rights organizations addressed the abuse of amniocentesis and prompted the passing of Pre Natal Detection Technique Act in 1994 to prevent 'vanishing

²⁵ Temporary special measures to accelerate de facto equality between men and women (Art.4); Modification of social and cultural patterns of conduct of men and women by eliminating prejudices, inferiority/superiority distinctions or stereotype roles (Art.5); Suppression of all forms of traffic in or exploitation of women (Art.6); Equal opportunities in public and political life, in all levels of education, vocational training and career guidance with effective measures against drop outs(Art.7-10); Equality of opportunity in employment and equal remuneration for works of equal value and right to safety, social security and health in the context of employment (Art.11); Elimination of discrimination in access to health care services and family planning but entitlement to special and appropriate services relating to maternity and right to family benefit, access to finance and participation in cultural life (Art.12 and 13); Ensuring rural women to participate in and benefit from rural development without discrimination (Art.14); Equal legal capacity to enter into contract and equality in all matters relating to marriage and family relations (Art.15 and 16)

of girl child'.²⁶ The Vienna Declaration made comprehensive proposals for integrating the women's rights into the UN's system-wide activity, and pressed upon the member nations to eliminate sexual harassment, trafficking and gender- biased administration of law and alleviate the harmful effects of traditional or customary practices, cultural prejudices and religious extremism upon women's rights (II.B.37 and 38). Here, the control of abuses of religious freedom and cultural right for protection of women's rights is a laudable harmonious approach. Katherina Tomasevski views that developmental policies do not sufficiently orient towards greater participation of women in labour force and equal sharing in access to resources and that effective application of Vienna Declaration alone would overcome the abyss between 'woman' and 'human rights'²⁷

The United Nations Fourth World Conference on Women held at Beijing contributed towards putting women's perspectives on global agenda on highest priority. It recognized that poverty affects women disproportionately and substantially.²⁸ It called upon governments to develop and implement National Action plan on critical areas such as health, violence against women, sexual exploitation, political participation, girl child and economic justice. This development had its own impact upon national legislations and policies of international bodies like World Bank. Beijing Conference's powerful ripple effect has raised hopes for women's empowerment and for making them a serious political constituency.²⁹

²⁶ Temma Kaplan, 'Women's Rights as Human Rights : Grassroots women redefine citizenship in a global context' in Patricia grasimshow. et. al., *Women's Rights and Human Rights* (New York : Palgram, 2001) p. 290 at 304.

²⁷ Katarina Tomasevski, 'Women's rights' in Janusz Symonides, *Human Rights: Concept and standard* (Darthmouth : Ashgate, UNESCO Publishing, 2000), p. 231 at 251.

²⁸ Arvanne Fraser, US Abassador to the UN Commission on the Status of Women, cited by Amrita Das, 'Beyond Beijing' in Abha Avasthi and A.K.Srivastava, *Modernity, Feminism and Women Empowerment*, (Jaipur: Rawat Publications, 2001) p. 163.

²⁹ Bella S,Abzug, cited by Amrita Das, Arvanne Fraser, US Abassador to the UN Commission on the Status of Women, cited by Amrita Das, 'Beyond Beijing' in Abha Avasthi and A.K.Srivastava, *supr n 9* p.163.

CONSTITUTIONAL FEMINISM

Indian cultural ethos has been basically favouring a benevolent approach towards women that where women are respected the Gods are pleased.³⁰ However, there were accumulations of gender injustices in social practice. The provisions in the Constitution of India, coming to the assistance of women and supplying a strong protective force to them are spread over Part III (Articles 14, 15 (1), 15 (2), 15 (3), 16 (1), 16 (4), 21, 23, 24, 25 (2), 29 (2) and 32), Part IV (Articles 38, 39, 41, 42, 44 and 46), Part IVA Fundamental Duty (51A, a, e, f), equal rights in Elections (Article 325) and reservation of membership of board in Local Self Government (Articles 243 C and 243 T) and cooperative societies (243Z). Gender justice is the essential principle promoted through these provisions.³¹

The constitutional development in all the above spheres has been towards building a strong instrument of constitutional feminism. The achievement is unparalleled due to judicial activism, women's movement that agitated for such change and the innovative tools employed in the course of development. It can be highlighted as follows:

There is a movement from formal approaches to equality based on differences to substantive approach of equality in order to overcome slippery slope of equality. Accommodating reservation within special provision, Sujata Manohar J. observed for the Court, "it is in order to eliminate the socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Art. 15(3) is placed in Art. 15".³² In *Indra Sawhney* it was said, "Women are a vulnerable section of the society, whatever the strata to which they belong. They are more disadvantaged than men in their own social class. Hence reservation for them on that ground would be fully

³⁰ Manu Smriti (yatra naryastu pujiyante rante tatra devata); this is in contrast to its own approach to the effect that as woman is protected by father, husband and son at various stages of her life, she is not eligible for freedom (na stri swatantryamarhati) .

³¹ As Justice Dr.A.S.Anand has observed, "The process of gender justice, broadly speaking, covers the rights of women against exploitation and victimization...Unless we recognize her rights—her basic human rights—gender justice would only be 'lip service' with no tangible result." Justice V.R.Krishna Iyer has put it emphatically, "The fight is not for woman's status but for human worth. The claim is not for woman's status but for human worth. The claim is not to end inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender but for cosmic harmony which never comes till woman comes." Also see P Ishwara Bhat, 'Constitutional Feminism: An Overview, (2001) 2 SCC(Jour) 1

³² *Government of Andhra Pradesh v. P B Vijay Kumar*, AIR 1995 SC 1648.

justified, if they are kept in the quota of the respective class, as for other categories of persons.”³³

In the background of ambivalence and hesitation to apply right to equality to nullify personal laws, customs and reformative statutes, using of Article 21 as a source of right to maintenance has avoided emotional controversies and ensured reform.³⁴ Both the Madhu Kishwar and Danial Latifi judgments engage in detailed discourse in human rights principles and funneled them to the domestic law of maintenance. The most important development that took place in application of the Article 21 jurisprudence in the context of woman’s dignity is elevation of the legal right against rape in terms of human right component. In Bodhisattwa Gautam, the Supreme Court observed,

“Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the raps, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Right to Life contained in Article 21.”³⁵

Judiciary introduced pro-woman changes in both the procedural and substantive law relating to rape in light of human right values.

Bold judicial activism in Vishaka v. State of Rajasthan³⁶ resulted in laying down of elaborate guidelines having the force of law on protection of women against sexual harassment in workplace to replace silence of the law. The judicial method was involved reference to and use of international human rights instruments and interpretation of fundamental rights under Article 15, 19 (6), 21, 32 and Directive Principles of State Policy under Articles 42 and 43. The policy that international human rights principles/

³³ *Indra Sawhney v. Union of India*, 1993 SC para 514.

³⁴ *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864; *Danial Latifi v. Union of India* AIR 2001 SC 3958.

³⁵ *Bodhisattwa Gautam v. Subhra Chakraborty*, AIR 1996 SC 922.

³⁶ AIR 1997 SC

instruments shall be read as part of the Constitution unless the domestic law explicitly excludes such effect was a radical approach. For more than fifteen years, only on the basis of Vishaka guidelines that women's right was protected against sexual harassment in work place. Empowerment of women was substantially achieved through this trend setting judgment, which was followed in number of cases.³⁷ The enactment of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is indicative of the impact of human rights on legal rights.

Abandonment of distinctions between public and private entities and between state and non state actors in the matter of protection of life and personal liberty has greatly added to the worth and content of legal rights especially because of their pro-woman human rights approach. As a result, protection of women against private acts of kidnapping by application of writ of habeas corpus,³⁸ violence,³⁹ dowry harassment,⁴⁰ invasion upon privacy⁴¹ and woman's physical autonomy⁴² were protected by application of constitutional provisions. The approach of ignoring public – private distinction has great importance in dealing with organized crimes like honour killing or other collective prejudice like witch hunting. Evolution and expansion of Public Interest Litigation has brought procedural fairness and dignity in custodial detention of women in prisons and protective homes. Statutory law has supported constitutional values.

Affirmative action for protection of the interests of prostitutes, children of prostitutes and child prostitutes in few cases also strongly reflects human rights approach to the problem at hand.⁴³ Reference to CEDAW and other human rights instruments was helpful in judicial reasoning.

³⁷ *Export Promotion Council v. A.K. Chopra*, (1999) 1 SCC 759, AIR 1999 SC 625; *Medha Kotwal Lele v Union Of India* (2013) 1 SCC 297, AIR 2013 SC 93

³⁸ *Nilima Priyadarshini v. State of Bihar*, AIR 1989 SC 490; AIR 1987 SC 2021. This is in contrast to a restrictive approach in *Vidya Verma v. Shiv Narain Verma* AIR 1956 SC 108 where the Court declined to give a remedy of habeas corpus in case of private detention of a girl for persuading for marriage.

³⁹ *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378

⁴⁰ *Joint Women's Programme v. State of Rajasthan*, AIR 1987 SC 2060; 1987 Supp SCC 707.

⁴¹ *Neera Mathur v. LIC*, AIR 1992 SC 392

⁴² *State of Maharashtra v. Madhukar Narayan*, AIR 1991 SC 207; (1991) 1 SCC 57.

⁴³ *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308

Accommodation of pro-woman religious reforms against temple dancing, nude worship etc has also human right dimension as it upholds dignity of woman. Creative use of the DPSP concepts of equal pay for equal work, safety in workplace, and protection of health had also enhanced human right content of labor welfare measures.

Gradual evolution of reservation in representative bodies at the lowest rungs of democracy is another factor of empowerment as the participation of women in public life and decision making process has a positive snow ball effect. After two decades of Panchayati Raj experimentation, women's autonomous participation with less interference by their male counterparts is on the increase. Training in the art of self-governance and public life is likely to inspire women generally.

Looking at the Indian constitutional development, an eminent feminist scholar, Catherine MacKinnon has observed,

“Building on the activism of India's women, exemplary and renowned worldwide, on the courage and principle of its progressive judiciary, and on its propitious equality foundations, India is perfectly positioned to develop substantive sex equality. It values individuals but sees group membership as constitutive of human dignity rather than in tension with it. It understands that there is no contradiction between economic and social rights such as family maintenance and political and civil rights such as equality, knowing that economic and social rights make access to rights of citizenship meaningful. It is a country that understands that equality and freedom are not opposed, but work together. By experimenting with new partnership between legislative and judicial branches, India is well-situated to exercise leadership to promote substantive equality under law between and among women and men – even if initially less-than-ideal solution – in the so-called personal realm as well as everywhere else.”⁴⁴

⁴⁴ Catherine A MacKinnon, *Are Women Human?* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2006) pp 137-8

APPLICATION OF HUMAN RIGHTS PERSPECTIVE IN CRIMINAL LAW

The concept of women's right as human right has great potentiality of bringing comforts in the field of criminal law. Violence against women is a serious inroad to women's rights because of the patriarchal bias operating upon them. Their powerlessness and dependence have also put them into a vulnerable position, and made men unjustifiably superior. Some of the provisions of the Indian Penal Code, and social reform statutes like Dowry Prohibition Act, sati prohibition Act, Domestic Violence Act, Immoral Traffic Prevention Act, Medical Termination of Pregnancy Act and Pre-Natal Detection Technique Act provide for various provisions for protection of the interests of women, and impose criminal liability upon the perpetrators of crimes. Law of evidence and Criminal Procedure Code also contain some special provisions for women. There is gradual up-gradation of human rights content of these laws either through amendments or judicial interpretations. But some aspects still need to be refined.

RAPE

Law on rape has undergone incremental and substantive changes since 1980s either by judicial interpretation or by legislative reforms by bringing in human right components in several ways. The judicially evolved changes include the following components: (a) consent based on deception, promise of marriage and fake marital ritual are considered as no consent at present⁴⁵; (b) the rule relating to requirement of corroboration of circumstantial evidence⁴⁶ is generally dispensed with by the judiciary;⁴⁷ (c) in evolving a rule that the character, reputation or status of a raped victim was not a relevant factor for consideration by the court while awarding the sentence to a rapist, the Court was keeping in mind decency and honour of womanhood⁴⁸; (d) victim compensation principle is activated responding to the fact that rape impairs personal relationship, brings emotional crisis,

⁴⁵ *Bodhisattwa Gautam v. Subhra Chakravarthy*

⁴⁶ As insisted in *Ramakrishna Aggarwala* 1976 SCC (Cri) 244; *Bishram* (1945) Nag 523; *Boya Chinnappa* (1951) Mad. 973;

⁴⁷ *Bharwada Bhognibhari Hirjibhai v. State of Gujarat*, AIR 1983 SC 753; *State of Maharashtra v. Chandraprakash Kewalchand Jain*, AIR 1990 SC 658

⁴⁸ *State of Haryana v Prem Chand.*, (1990)1 SCC 249.

and disturbs the life opportunities;⁴⁹ (e) appropriate or adequate punishment⁵⁰ has been insisted in several cases so that it will operate as deterrent;⁵¹ (f) opportunity to conduct trial for rape in camera and the statutory obligation upon media not to disclose the identity of the rape victim have made the trial procedure fair and fearless.⁵²

In *Lilu* (2013), for holding that the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity and that even if the report is affirmative, it cannot ipso facto, give rise to presumption of consent, the Supreme Court gathered support from human rights discourse.⁵³ The Court observed,

“In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with her privacy.”⁵⁴

⁴⁹ *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14; *P.Rathinam v. Union of India*, 1989 Supp. (2) SCC 7168; *Thekkamalai v. State of Tamil Nadu* (2006) Cr L J 1997 Mad. Where a compensation of Rs.5 lakhs was awarded when a police personnel had committed rape; *Chairman, Railway Board v. Chandrima Das* AIR 2000 SC 988

⁵⁰ For commission of rape, punishment is prescribed in section 376 (1) and (2). Minimum punishment is imprisonment for seven years and it may extend to ten years; rape of one's own wife below the age of 12 years is two years. For aggravated forms of rape the punishment is imprisonment for a term not less than 10 years and it may be extended to life imprisonment.

⁵¹ *State of Karnataka v. Puttaraja*, (2004) 1 SCC 475 at 477; *Jugendra Singh v. State of UP*, (2012) 6 SCC 297 at 300

⁵² *State of Punjab v. Gurmit Singh* AIR 1996 SC 1393

⁵³ *Lilu v. State of Haryana*, AIR 2013 SC 1784

⁵⁴ *Ibid*

In evolving guidelines to be followed for assisting the victims of rape, again it is the human rights norms that moulded the course of development. In *Delhi Domestic Working Women's Forum v. Union of India*, in a circumstance of gang rape committed in train by military personnel, the Supreme Court formulated guidelines under Article 14 and 21 providing for legal assistance and representation of victims, maintenance of anonymity and compensation.⁵⁵ In *Sakshi v. Union of India*, regarding the protection that shall be made available to child victims of sex abuse or rape at the time of trial, the Supreme Court imposed a requirement that the child shall be shielded by a screen to safeguard herself against apprehended threats.⁵⁶ The Court gathered support from CEDAW and Child Right Convention for this requirement. In *Delhi Commission for Women v. Delhi Police*, the High Court of Delhi issued elaborate guidelines to be followed by police, hospitals/doctors, session courts, child welfare committee, prosecutors and the concerned authorities.⁵⁷ On the basis of civil society initiative and extensive consultation and refinements the guidelines were framed, and they reflect commitment to human right values of safety to the victims of sexual offences and effective inquiry and prosecution. Formation of Rape Crises Cell in each police station, special rooms and forensic evidence kits in all government hospitals, Child Welfare Committee's role in rehabilitation, responsibilities of prosecutors and courts have been prescribed under the guidelines as mandatory requirements. In *Verinder* case the Delhi High Court gave important guidelines to the police for taking cognizance of the offence of rape against the child, register the FIR, conduct investigation, and ensure medical examination of the victim; to the Magistrate to record the evidences promptly and at the earliest, and to ensure that the child is not separated from the parents/guardians; to the doctors to provide the emergency service, medical assistance against Sexually Transmitted Disease, and medical examination of the girl child by lady doctor; to the courts to create child friendly environment, to ensure in camera trial, to keep anonymity about the child, and to ensure trial by lady judges (whenever possible) and speedy trial.⁵⁸ Two important points to be noted here are: first, various participants and authorities are burdened with duties to assist the victim of sexual offence at the post-crime scenario; and

⁵⁵ 1995 (1) SCC 14

⁵⁶ AIR 2004 SC 3566

⁵⁷ WP (Cri) 696/2008 order dated 23/4/2009; http://www.ncw.nic.in/PDFFILES/Delhi_High_Court_judgement_on_guidelines_for_dealing_rape_cases_by_various_authorities.pdf

⁵⁸ *Verinder v. NCT of Delhi*, <http://indiankanoon.org/doc/97850168/>

second, the duties are born out of human right obligations to protect the traumatized victim and successfully prosecute the offender with quality evidence.

The Delhi gang rape of Nirbhaya in December 2012 was a shocking incident that moved the public opinion for greater safeguard against rape and preparedness of the legal system to deal with various sorts of crimes against women in a stern manner. The Committee on Amendments to Criminal Law headed by Justice J S Verma reported in January 2013: "Crimes against women are an egregious violation of several human rights demanding strict punishment with deterrence to prevent similar crimes in future by the likeminded."⁵⁹ The Committee referred to the international human rights instruments⁶⁰ and reminded the constitutional obligation to implement them. It made important recommendations for police and administrative reform, comprehensive changes to IPC, Cr PC, POSCO Act and Indian Evidence Act, and expressed concern about the extent of deviations, severity, and callous approach of the administration and the public.

A glance over the changes brought into IPC in the matter of rape in 1983 and 2013 would point out the enhanced elements of human rights. While the former was piecemeal, the latter has been far reaching. In 1983, in response to the public opinion against Tukaram case,⁶¹ quantum of punishment for rape was increased from maximum of 10 years of imprisonment to minimum of seven years of imprisonment, aggravated forms of rape like custodial rape, rape by persons in authority or in fiduciary relations, rape during the order of judicial separation and gang rape were identified, and punishments were prescribed. In case of custodial rape rule of presumption against consent was introduced into the Evidence Act. Disclosure of the identity of rape victim in media is made an offence and in camera trial is ensured under Cr PC. The Amendment Act of 2013 altered the very definition of rape in a big way. All forms of penile penetrations and non penile penetrations into the vagina, mouth, urethra or anus of a woman by a man or any manipulation of woman's body for that purpose or application of mouth to the same or getting such acts done by

⁵⁹ Page 15 para 7 available at <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

⁶⁰ UDHR, CEDAW, ICCPR, ICESCR, CRC etc and the Millennium Development Goal

⁶¹ *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

her with him or any other person are covered if such acts come under the seven categories mentioned in section 375. Age of consent has been enhanced to 18 years.⁶² Sexual intercourse or act with wife below the age of 15 years (instead of 12 years under the earlier law) is regarded as rape.⁶³ Consent as an exception is to be proved through unequivocal voluntary agreement where the woman verbally or non-verbally expresses her willingness to participate in the specific sexual act.⁶⁴ Woman's abstinence from physical resistance to the act of penetration does not amount to consent for sexual activity.⁶⁵ In the category of aggravated forms of rape under section 376 (2) for which the punishment is rigorous imprisonment for not less than ten years, but which may extend to imprisonment for life, more circumstances or persons are included. Rape during communal or sectarian violence, rape on pregnant woman, on woman below the age of sixteen years, on woman incapable of giving consent, on woman under dominance of the perpetrator, on woman with mental or physical disability, and violent or repeated acts of rape are also added to this category. In all circumstances coming under section 376 (2), as per the new provision under the Evidence Act (section 114A), regarding the issue of consent, when the woman states in her evidence that she did not consent, the court shall presume that she did not consent. The new proviso to section 146 of the Evidence Act prohibits adducing of evidence or cross examination of the victim as to the general immoral character or previous sexual experience of such victim in order to establish woman's consent. Section 53A of the Evidence Act excludes evidence as to the victim's sexual experience from being relevant on the issue of consent or quality of consent in prosecutions for offences relating to sections 354, 354A to 354D, 376, 376A to 376E of the penal code. The overall impact of these legislative reforms is definitely towards enhancing the protective capacity of the legal system so that women's rights are better safeguarded. How the human rights discourse has further taken up for higher levels of achievement can be seen by looking at some of the recent cases.

⁶² Section 375 *Sixthly*.

⁶³ Section 375 *Exception 2*. In *Independent Thought* case by resolving the incongruity between this provision and related provision in POCSO woman's right is better protected.

⁶⁴ Section 375 *Explanation 2*.

⁶⁵ Section 375 *Proviso to Explanation 2*.

Rape of a woman is suggestive of an inferior mindset and leads to absolute devastation. Robbing a woman of self dignity has a tremendous bearing on her very existence. The degree of devastation and miseries touches greater heights when the victim is impregnated with the responsibility of a little life as a consequence of a heinous act. Furthermore, when a victim is mentally unstable or a destitute or an orphan with nobody to care for, the miseries keep escalating. In such cases the task of deciding whether the child should be born is immensely challenging and agonizing. The Apex Court has exhibited a highly sensible attitude to these issues with a remarkable human right discourse. In *Suchita Srivastava v Chandigarh Administration*⁶⁶, the Court has endeavoured to honour the decision making autonomy of a mentally retarded victim of rape. The victim in this case was a mentally retarded and orphan woman who was raped while she was an inmate of a Government run welfare institution. The High Court directed the termination of the pregnancy despite the victim's unwillingness to terminate the same. Reversing the decision, the Supreme Court decided that the victim's consent must hold greater value more so when the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons above the age of majority.⁶⁷ Since in this case the victim suffered from 'mild mental retardation' which suggested that she was not altogether incapable of giving consent, the court thought it appropriate to respect her decision. The court also directed that best care and supervision should be provided to her during the pre and post natal and childcare stages. The Court gathered support from the UN Declaration of Rights of Mentally Retarded Persons 1971 as well as Article 21 of the constitution for its conclusion.

The case of *Ms. Z v State of Bihar*⁶⁸ presents yet another heart wrenching story of a rape victim who was an abandoned destitute woman brought to a shelter home from footpath. The functionaries of the home accompanied her to the hospital with the intent to get her aborted with her consent.

⁶⁶ AIR 2010 SC 235

⁶⁷ The Court observed, "The woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected." However, the Court also recognized the legal restraints within which her right could be exercised and mentioned 'compelling State interest' in protecting the life of the prospective child.

⁶⁸ Civil Appeal No. 10463 of 2017 Decided On: 17.08.2017

Furthermore, the woman was identified as HIV+ve. Despite the victim's reluctance to give birth, the hospital authorities failed to terminate the same and eventually the period of pregnancy extended to 20 weeks. By the time the High Court passed its verdict on the issue, the foetus was 23-24 weeks old and termination of pregnancy would prove to be hazardous. The Supreme Court was critical of the callous attitude and unnecessary delay made by the hospital authorities while dealing with such a sensitive case. The Court observed that "retardant attitude and laxness to the application of the provisions of law at the appropriate time by the authorities that can cause a disastrous affect on the mind of a hapless victim". Considering the mental shock and agony of the victim and that the situation is unredeemable the court directed that the victim be compensated and that the child be born and proper care, treatment and nutrition were to be given by the State. The Court relied on Nilabati Behera and other cases for award of compensation on the basis of international human rights norms.⁶⁹

Compared to Suchita and Ms Z cases, the human right position of pregnant women who are inclined to have abortion on genuine grounds of health in countries where abortion is absolutely prohibited is precarious. In Ireland, owing to orthodox Catholic beliefs abortion was absolutely prohibited until recently. In 2012 a pregnant woman, Savita Halappanavar, who was in need of abortion in order to save her life in a circumstance of continued miscarriage was denied of permission to do so in spite of country- wide and international protest.⁷⁰ The death of Savita was a cruel outcome of obstinate adherence to cultural prejudice. If human right principle had been applied to soothe the harshness of law, her legal right and life could have been better protected. In 2013, an Irish statute relaxed the prohibition in case continuity of pregnancy was inimical to the health of pregnant mother. Referendum in 2018 favoured further liberalization.⁷¹ The development demonstrates the fruitfulness of human right discourse.

⁶⁹ Nilabati Behera v. State of Orissa, AIR 1993 SC 1060; Chandrima Das v. Chairman, Railway Board, AIR 2000 SC 988

⁷⁰ <http://www.dailymail.co.uk/news/article-2233341/Savita-Halappanavar-Husband-watched-pregnant-wife-died-Irish-doctors-refused-perform-abortion.html>

⁷¹ <https://www.hindustantimes.com/india-news/we-ve-got-justice-says-savita-halappanavar-s-father-after-ireland-votes-to-repeal-abortion-ban/story-DKlWJvomEf7P4OQg0yn8gP.html>

A remarkable breakthrough in the arena of marital rape is the decision of the Supreme Court in the case of *Independent Thought v Union of India*⁷². The verdict attempted to settle down a major incongruity between the Exception 2 of Section 375 of the Indian Penal Code and that of the Protection of Children from Sexual Offences Act, 2012 and Prohibition of Child Marriage Act 2006 on the question of precise age for marital sex and declared that sexual intercourse by a man with his wife, the wife not being under eighteen years is not rape. Finally rejecting all the possibilities of upholding the discrimination imbued in exception 2⁷³, the Court adopting a purposive and harmonious approach and keeping forth the best interest of a girl child read down Exception 2 in the following words: “Sexual intercourse or sexual acts by a man with his wife, the wife not being under eighteen years of age, is not rape.”

The methodology of judicial reasoning consists in human rights approach. The Supreme Court referred to the international opinion on child marriage as evolved by UN Human Rights Council, data gathered by UNICEF sponsored research projects, analysis of census data on child marriage, harmful traditional practices identified by Secretary General to the UN in the matter of violence against women, National Charter and National Policy on children developed by the Government of India from 2003 to 2016 and Report of Universal Periodic Review on Human Rights which had categorically held against child marriage/sexuality and emphasized on removal of differences amidst married and unmarried child girls below the age of 18 years insofar as rape is concerned. The Court gathered from Child Rights Convention and CEDAW the need to protect childhood from the evil of child marriage. The pro-woman rights jurisprudence as developed in earlier cases inspired the Court to consider the POCSO as overriding upon section 375 and to read down Exception 2 to section 375 as above. It is the human rights approach that could avoid a narrow and legalistic interpretation. This endeavour has come as a welcome step insofar as it aims at removing the discriminatory barrier between a married and an unmarried girl child by harmonizing the age of consent with the laws of marriage.⁷⁴

⁷² AIR 2017 SC 4904; Writ Petition (Civil) No. 382 Of 2013

⁷³ Exception 2 of Section 375 says that sexual intercourse with a woman who is above 15 by her husband does not amount to rape regardless of her consent.

⁷⁴ Pratiksha Baxi, 'Her Right To Choose' The Indian Express (19 October 2017) <<http://indianexpress.com/article/opinion/columns/her-right-to-choose-supreme-court-marital-rape-4897111/>> accessed 26 October 2017

ACID ATTACKS AND OUTRAGING WOMAN'S MODESTY

Legal responses to the growing problem of acid attacks⁷⁵ on young girls and women have substantively relied on human rights principles. Section 357-A obligating the States to prepare schemes for victim compensation was incorporated in 2008. Section 357-A (6) of Cr P C provides, "The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit." In the context of victims of acid attacks the Supreme Court laid down guidelines for compensation of Rs 3 lakhs, proper treatment, aftercare and rehabilitation, free medical service including medicine, food and bed.⁷⁶ Private hospitals are also under such obligation. Stringent punishments against acid attack or attempts to throw acid as provided under sections 326A and 326B have exhibited concern for human rights of women especially in light of growing instances of acid attacks on women.⁷⁷ In a case, when a High Court reduced the duration of imprisonment to thirty days, the Supreme Court intervened in appeal and restored the punishment prescribed by the trial court for one year.⁷⁸

Involving all the health care providers, both public and private, in providing first-aid or medical assistance free of cost to the rape victims and acid attack survivors is another humanitarian factor that aims at better human rights position in post-rape circumstance. Under section 357C of the Cr PC such obligation is imposed whereas contravention of this duty is punishable under section 166B of the IPC with imprisonment for one year. This falls in line with the international human rights principles.

⁷⁵ In 2014, there were 282 instances of acid attacks in India, out of which 182 occurred in UP as per affidavit of Union Government in *Laxmi v. Union of India* AIR 20015 SC 3662.

⁷⁶ *Laxmi v. Union of India* AIR 20015 SC 3662.

⁷⁷ For intentional causing permanent or partial damage or deformity by throwing or administering acid the punishment under section 326 A is minimum ten years of imprisonment and it may extend to life also. For voluntarily throwing or attempting to throw acid with an intention of causing permanent damage, the punishment under section 326 B is a minimum of 5 years of imprisonment and which may extend to seven years.

⁷⁸ *Ravada Shashikala v. State of Andhra Pradesh* AIR 2017 SC 1166.

A series of new provisions in IPC from section 354A to 354D aims to protect women against sexual harassment. The Vishaka principle has become a rule of criminal law under 354A. Assault to disrobe woman, voyeurism, and stalking are punishable under sections 354B to 354D, and proportionate penalties varying with the gravity of offence are prescribed.

IMMORAL TRAFFICKING OF WOMEN

Protection of women against immoral trafficking is a legislation explicitly made to comply with the International Convention signed in New York in 1950. Various changes made to the Act in 1978 and 1986 have also been in response to the human rights issues. The amendment to section 370 of IPC in 2013 has also similar approach. The involvement of social service voluntary organizations in the implementation of the Act has an approach of collective social effort. In various judgments under the Act, especially about fair conditions in protective homes, rehabilitation of prostitutes and care and protection of child prostitutes and children of prostitutes, the guidelines given by the Supreme Court in Upendra Baxi and Gaurav Jain cases have great bearing in upholding the human rights values.⁷⁹ In Gaurav Jain III, instead of approving the guidelines laid down by judiciary, the apex court left the matter to be governed by legal norms created by the State.⁸⁰

POCSO

The Protection of Children from Sexual Offences Act, 2012, enacted to protect children from offences of sexual assault, sexual harassment and pornography, is another statute which explicitly refers to human rights in the Preamble. The expediency of the Act is for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of judicial process involving the child and that the law operates towards promotion of best interests and wellbeing of the child. In RD Upadhyay, it is by relying on

⁷⁹ *Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308; *Gaurav Jain v. Union of India*, AIR 1997 SC 3021; *Gaurav Jain v. Union of India*, AIR 1990 SC 292; *Gaurav Jain v. Union of India* (1998) 4 SCC 270 : (AIR 1998 SC 2848); *Vishal Jeet v. Union of India* AIR 1990 SC 1412.

⁸⁰ *Gaurav Jain v. Union of India*, AIR 1998 SC 2848.

International Covenant on Civil and Political Rights and Child Right Convention that rights of children living with their mothers in prisons were protected.⁸¹

RIGHT TO MARRIAGE

Honour killings of married couples by usurpation of authority by khap panchayat (caste panchayat) on the ground of sagotra marriage, inter-caste marriage, inter-religious marriage and intra-village marriage have been in large numbers in some of the northern and north-western states. There has been condemnation of such acts in Parliamentary debates, judicial observations and the media. Sometimes marriage by elopement is resisted by alleging rape. National Commission of Women has drafted a Bill providing for special law. About sufficiency of the present law under IPC to deal with khap killings there are diverse views. Further, legislative competence of Union Government to enact a law on the subject some reservation is expressed. On the other hand, there has been persuasion from khap panchayats to rigidly deal with sagotra marriages. The Supreme Court in *Arumugam Servai* and in *Lata Singh*⁸² has directed the administration all over India to avoid harassment of the parties to sagotra, inter-caste and inter-religious marriages. The Court observed in *Arumugham*,

“We have in recent years heard of 'Khap Panchayats' (known as katta panchayats in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in *Lata Singh*'s case (supra), there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality.”⁸³

⁸¹ *R D Upadhyay v. State of AP*, AIR 2006 SC 1946.

⁸² *Lata Singh v. State of UP* AIR 2006 SC 2522

⁸³ *Arumugham Servai v. State of Tamil Nadu*, AIR 2011 SC 1859

On February 6, 2018 the Supreme Court bench headed by Dipak Misra CJI categorically told the khap panchayats not to act as conscience keepers of society and that courts will go by law rather than tradition relating to gotra considerations to determine legality of marriage.⁸⁴ The court ruled that no one individually or collectively, has the right to interfere in a marriage between two consenting adults. The Court lamented that the government was not taking matter seriously and inclined to constitute a high level police officers committee to deal with the matter.

Regarding pornography and indecent representation of women the test adopted is not reflecting the social will to condemn the human right violation that occurs in the preparation of obscene material or its inherent tendency to induce human right violation against women.

PERSONAL LAW AND HUMAN RIGHTS DISCOURSE

Largely influenced by culture and religious values, personal laws have not only diversity but also reflect male bias. They seriously contest human right discourse. Legislative attempts to bring reforms reflect the approach of self-restraint and insistence on near consensus from the concerned community. While this has obstructed the goal of Uniform Civil Code, diversity of personal laws has obstructed absorption of human rights values into the personal law. However, the trend of legislative amendments and judicial decisions is largely giving scope for human rights inclusion. Although post-Shah Bano⁸⁵ legislative intervention had challenged human right and gender justice, the astute interpretation of the Muslim Women (Protection on Divorce) Act, 1986, Danial Latifi⁸⁶ has restored the rights discourse. In fact, reference to human rights values in Danial Latifi could enable that development.⁸⁷ In Shayara Bano (Triple Talaq case) the court

⁸⁴ <https://timesofindia.indiatimes.com/india/nobody-has-right-to-interfere-if-two-adults-get-married-says-supreme-court/articleshow/62796304.cms> visited on 27/5/2018.

⁸⁵ *Mohd. Ahmed Khan v. Shah Bano Begum*, (AIR 1985 SC 945 : 1985 Cri LJ 875) : (1985) 2 S C C 556

⁸⁶ *Danial Latifi v. Union of India*, AIR 2001 SC 3958

⁸⁷ Per Rajendra Babu J: "The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion." Paragraph 33.

further involved in human rights discourse in the sphere of personal law. J S Khehar CJI and S Abdul Nazeer J in their dissent, after elaborate references to precedents and international conventions, declined to recognize the purging effect of international conventions on personal law, and on the contrary observed,

“Insofar as 'personal law' is concerned, the same has constitutional protection. Therefore if 'personal law' is in conflict with international conventions and declarations, 'personal law' will prevail. The contention advanced on behalf of the petitioners to hold the practice of 'talaq-e-biddat', on account it being in conflict with conventions and declarations to which India is a signatory can therefore not be acceded to.” Kurien Joseph, Rohinton Nariman and U Lalith JJ did not deal with arguments based on international human rights; but referred to *Maneka*, *EP Royappa*, *Mithu*, *Sunil Batra* and *McDowell* cases to assess the arbitrary and unreasonable character of triple talaq.⁸⁸ It is the human right/fundamental right argument about unfairness of triple talaq practice that persuaded the learned judges to nullify triple talaq as violative of right to equality and right to dignified life. The overall experience is that human rights approach neutralized the culture-based discriminatory practices.”

LABOUR LAW AND THE WOMEN QUESTION

The regime of labour law and service law has accommodated the interests of women in the form of equality of opportunity in employment, special consideration to avoid night shifts, protection against hazardous labour, equal pay for equal work, safety in place of work and provision for maternity benefit. International Covenant on Economic Social and Cultural Rights had influenced interpretation of these measures. While recognizing the rights of temporary female workers on the muster roll of municipality to have maternity benefit, the Supreme Court in *Female Workers Case* indulged in human rights discourse. The Court observed,

“A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. When who

⁸⁸ *Maneka Gandhi v. Union of India* AIR 1978 SC 597; *E P Royappa v. State of Tamil Nadu* AIR 1974 SC 555; *Mithu v. State of Punjab* [(1983) 2 SCC 277: 1983 SCC (Cri) 405] : (AIR 1983 SC 473); *Sunil Batra v. Delhi Administration and Ors.* (1978) 4 SCC 494 : (AIR 1978 SC 1675; *State of A.P. v. McDowell and Co.* (1996) 3 SCC 709 : (AIR 1996 SC 1627).

constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimized for forced absence during the pre or post-natal period.”⁸⁹

Regarding women’s right to property family law and land law have not gone for full recognition of equal rights. However, the trend towards such direction of development in some spheres is visible. The amendment to Hindu Succession Act has provided for gender equality.

In *Anuj Garg v. Hotel Association of India*⁹⁰ the Supreme Court was concerned with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 which prohibited employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or an intoxicating drug is consumed by the public. While upholding the view of the Delhi High Court striking down the provision as unconstitutional, the Court held:

"It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception

⁸⁹ *Municipal Corporation of Delhi v. Female Workers*, AIR 2000 SC 1274.

⁹⁰ (2008) 3 SCC 1; AIR 2008 SC 663.

of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.”⁹¹

In the matter of bar dance as profession for women Altamas Kabir CJI said, “ Women worldwide are becoming more and more assertive of their rights and want to be free to make their own choices, which is not an entirely uncommon or unreasonable approach. But it is necessary to work towards a change in mindset of people in general not only by way of laws and other forms of regulations, but also by way of providing suitable amenities for those who want to get out of this trap and to either improve their existing conditions or to begin a new life altogether.”⁹² Bombay Police Act had classified establishments into prohibited and exempted establishments in the matter of conducting bar dance and there was no empirical evidence to the effect that bar dance in prohibited establishments causes depravity and corruption of public morals. The court examined the issue from the angle of right to equality, dignified life and expressional freedom, and nullified the prohibition.

Human rights discourse on gender discrimination in a bye law of a Trade Union meant for make-up artists had the effect of nullifying the same in Charu Khurana case.⁹³ Dipak Misra J observed,

“It is clear to us that the clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, Article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood.”⁹⁴

⁹¹ Ibid. The Court also observed, “No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases.....it is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy (of the women)”.

⁹² *State of Maharashtra v. Indian Hotels and Restaurants Association*, AIR 2013 SC 2582.

⁹³ *Charu Khurana v. Union of India* AIR 2015 SC 839.

⁹⁴ Ibid. Paragraph 45.

CONCLUSION

The proposition that women's rights are human rights has a cascading effect upon the whole legal system. Abandonment of private/public distinction in the matter of human right/duty has kick-started a jurisprudence of activist magnitude. Human rights discourse has augmented the efficacy of procedural safeguards and moral worthiness of the legal regime. The aspirations of international human rights instruments are effectuated by a highly dynamic constitutional jurisprudence. Delicate issues relating to termination of pregnancy due to rape could be satisfactorily dealt by human rights approach. Reliance on substantive equality approach has augured well. The approach has faced severe difficulty in the case of organized crimes like khap killings and deeply entrenched cultural faults like dowry in spite of judicial activism. While legal development has been optimistic, the support through enlightened public opinion, education to the oppressors and filling confidence amidst women shall continuously flow. The social energy of women's movement and strong commitment to gender justice shall be fully tapped for good result. In combating culture-based prejudices or detrimental practices the human rights approach has yielded positive impact. The fact that woman's rights in workplace could be made strong through human rights approach speaks about its viability and potentiality.