

**THE JURAT INTERNATIONAL LAW JOURNAL****RECENT DEVELOPMENTS IN AREA OF WOMEN LAWS IN INDIA**  
**AND THE ROAD AHEAD***SYED M. AATIF**ADVOCATE, SUPREME COURT OF INDIA***INTRODUCTION**

India is a land having a very glorious history. At the same time this history has some black spots as well. Degradation of women and considering them as slaves is written all over our history and is prevalent in this society since ancient times. From sati to child marriage to denying them property rights, you name it and we had it. Ironically, a nation that worships women in different forms is also the nation that exploits and discriminates them in various ways. Women rights' movements became the center of India's freedom struggle and the country witnessed some prominent women leaders and freedom fighters that fought for our independence and were instrumental in achieving it. Their struggles and sacrifices had to be commemorated. This became a moot point for discussion at the time when the Constitution of this country was being drafted and the constitutional makers unanimously agreed that women need to be protected and be given a respectable status in independent India. Thus, provisions were made under the Constitution to guarantee protection to women in this country which became the bedrock for all subsequent laws for women.

Over the years we have seen how the legislature and the judiciary in this country has acted as a catalyst in upholding this principle of the Constitution. This paper shall enlist some recent developments that have implemented this protective provision for women under the Constitution in its true sense, where are we still lacking and what can be done to fill those loopholes.

Last decade has seen a massive turn of socio-legal as well as political scenario as far as women rights and laws in India are concerned. From having its first law against sexual harassment in 2013 based on the Vishaka guidelines to introducing death penalty for the offence of rape, the development of women laws in India has been substantive and unprecedented.

Women have been accrued a special status under the Indian Constitution vide the provisions under Article 15(3), an exception to the provision of equality under the Preamble to the Constitution and the fundamental right to equality under Article 14. Equality, again, has been interpreted to a great extent for the purpose of application of various provisions under the Indian constitution.

As noted by Justice P.N. Bhagwati in *E.P. Royappa v. State of Tamil Nadu*, “Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness.”

Hereunder the author shall discuss few landmark judgments of the Honorable Supreme Court of India (hereinafter, ‘the Apex court’) and some legislative enhancements that have impacted women’s rights in India.

### **VISHAKA CASE AND THE 2013 ACT**

In 1997, a three judge Bench of the Honorable Supreme Court of India comprising of the then Chief Justice of India, Justice J S Verma, Justice Sujata Manohar and Justice B N Kirpal was moved by a writ petition filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Indian Constitution. The immediate cause for filing of the writ was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan.

A writ of mandamus for enforcement of such working women’s rights under the above stated fundamental rights at workplace led to a list of rules that need to be abided by while employing a woman at a workplace, famously known as the Vishaka guidelines.

This led to the enactment of the first law in India against sexual harassment which was a culmination of the Vishaka guidelines.

### **NIRBHAYA RAPE AND THE 2013 CRIMINAL LAW AMENDMENT**

A heinous and horrific incident shocked the nation’s capital in 2012. On the eve of 16<sup>th</sup> December, 2012, Nirbhaya (name changed) was brutally raped by a group of men and left to die on the streets of Delhi. The Delhi gang rape led to a serious relook at the provisions dealing with the offence of rape in India. On 23<sup>rd</sup> December, 2012, a three-member committee headed by the late Justice J.S. Verma, was constituted to recommend amendments to the

Indian criminal law for speedy trial and enhanced punishments for those convicted of committing sexual assault on a woman. Some salient features of the Verma Committee report were as follows:

1. Speedy justice is an aspect of right to life with dignity as well as for prevention of its violation.
2. Systematic changes in judicial infrastructure can reduce the burden in courts that in turn leads to delay in enforcing the law of the land.
3. Failure of public functionaries leads to breach of rule of law which leads to such heinous offences.
4. Equality of women is an integral part of the Constitution and denial of the same is a constitutional violation. The three organs of the State viz., the Legislative, the Executive and the Judiciary must respect women's rights.
5. Marriages must be mandatorily registered in presence of a magistrate. This shall ensure that the marriage was solemnized with the free consent of both intending spouses and without any demand for dowry.
6. The police must register every complaint of rape and civil society must perform its duty to report any rape case that comes to its knowledge.
7. Non-registration of a case reported, by an officer shall subject him to a prescribed punishment.
8. The CrPC needs to be necessarily amended to include procedure for protecting persons with disabilities from rape and sexual violence.

This led to the 2013 criminal law amendment wherein the definition of rape under the Indian Penal Code (hereinafter, 'IPC') was enhanced and changed to make it more specific and exclusive. New provisions were inserted. Provisions were amended and new provisions were added under the Evidence Act and the Code of Criminal Procedure.

One of the peculiar changes in this law was the introduction of death penalty as a punishment for the offence of rape.

This law, however, has often been criticized for its gender bias as it makes only sexual violence on women, punishable and conveniently ignores sexual violence faced by men. Also, the provision of death penalty has been criticized vis-a-vis the presumptive provision under the Evidence Act on the ground that on the basis of a presumption death penalty has been prescribed which otherwise is given only in the rarest of the rare case.

## SABRIMALA VERDICT

The Honorable Supreme Court of India on September 18, 2018 delivered its verdict in the matter concerning the entry of women in the Sabrimala temple in the State of Kerala. In the fight between religious rituals and right to equality, the five judges Bench weighed in favor of the right to equality.

Four out of the five judges ruled in favor of women's entry. The dissenting verdict was surprisingly given by the sole woman judge on the Bench.

Justice D.Y. Chandrachud held that religious communities are at freedom to define for themselves what constitutes an essential aspect of religion. This 'enhances the liberal values of the Constitution'. However, such a religious practice will have to give away to the Indian constitution's liberal values if it impairs the dignity of an individual or hampers an individual's access to something which is otherwise guaranteed to him or her by the Constitution

## BAN ON TRIPLE TALAQ

The Honorable Apex court on August 22, 2017 declared Muslim divorce by means of instant triple talaq as unconstitutional. The moot point before the court was that *talaq-ul-biddat* or instant triple talaq, as it is commonly known, a practice among certain Muslims that gave a Muslim man the right to pronounce the word 'talaq' three times at once in oral, written or of lately, electronic form, thereby arbitrarily effecting an instant and irrevocable divorce, was violative of the fundamental right of equality, prohibition of discrimination on basis of gender, right to dignified life and the freedom of religion.

While acknowledging that triple talaq is a part Muslim personal law and has been sanctioned vide the Muslim Personal Law (Shariat) Application Act, 1937, the court observed that an action to be arbitrary must involve negation of equality and since the practice of instant triple talaq gave the Muslim man the right to irrevocably end the marriage without leaving any scope for reconciliation, it clearly violates Article 14.

The Court declared the Act of 1937 to be void to the extent it recognizes triple talaq on the basis that a pre-Constitution law shall be void so far as it is inconsistent with the fundamental rights enshrined under Part III of it.

## **SUPREME COURT'S ACTION ON ACID ATTACKS**

In *Parivartan Kendra v. Union of India and others*, the petitioner, an NGO, had filed a public interest litigation in the Supreme Court under Article 32 to address the plight of acid attack victims while bringing to the Court's notice the increasing number of acid attack cases in the country, the inadequacy of current legislations, and schemes in properly addressing these cases.

The main contention before the Honorable court in this case was whether the guidelines laid down in *Laxmi Shankar Pandey v. Union of India and others*, provisions under the Survivor Compensation Schemes, the criminal law amendment of 2013 and a compensation amount of Rupees three lakhs provide an adequate remedy to an acid attack victim or not. Also, it was emphasized that there is a need for a set of guidelines regarding speedy treatment, recovery and rehabilitation of acid attack survivors and any additional measures that need to be taken to ensure protection of fundamental rights of such victims.

The court held up the state for failing to keep a check over distribution of acid. Thus, strict action needed to be taken against those acid suppliers who are carrying out the work without proper authorization and also against the state authorities concerned.

The court also held that the Victim Compensation Scheme has not been complied with and States have been sanctioning only a meagre amount which was insufficient to address trauma of such victims.

Hence, court allowed a compensation of Rupees ten lakhs for the main victim and three lakhs for the sister to be paid within a period of three months from the date of the order.

## **DECRIMINALISING HOMOSEXUALITY**

Recently a Supreme Court bench, headed by the former Chief Justice, Honorable Justice Dipak Misra, read down the colonial law of 'unnatural offences' under the IPC to the extent to which it hampered individual freedoms and rights of homosexuals in this country.

The court in its verdict struck down the portions of Section 377 that criminalized consensual sexual relations between same-sex couples, thus recognizing the rights of homosexuals and the LGBTQ community to live a life with dignity.

Section 377 in its wisdom punished anybody for establishing sexual relations 'against the order of nature', with or without mutual consent. However, it is important to understand what really is 'against the order of nature'. What is natural about sexual relations? God has made

human beings for various purposes and establishing sexual relations also has a purpose. That purpose according to every religion and every belief across the world is to procreate, to have children. Thus, any such physical relation that will not ultimately lead to legitimate children is condemned by all religions unanimously. Hence, obviously since homosexual relations or bestiality in no way can naturally lead to procreation of children, all such relations fall under the ambit of 'against the order of nature'.

Now the next question which arises is why was this punishable? Every single religion or community or society in this world, irrespective of how liberal it may become, has not given up on its core principles. And all religions irrespective of how different they are, unanimously condemn, oppose and criminalize such relations between individuals.

However, with the passage of time people started opening about their sexual orientation and same sex relationships are very common nowadays. The peculiar aspect of Section 377 was that it did not discuss the aspect of consent at all and thus punished even consensual sexual relations under its ambit of 'against the order of nature'. This did not strike the right chord with the Indian judiciary which finally in the *case of Navtej Singh Johar* recognized rights of homosexuals and the LGBTQ community to live as a couple freely without state intervention.

## **DECRIMINALISING ADULTERY**

A writ under Article 32 was filed challenging the constitutional validity of Section 497 of the IPC (adultery) read with Section 198 of the CrPC as violative of Article 14, 19 and 21. The petition claimed that the provision of adultery was arbitrary and discriminatory on the basis of gender. It demolished the dignity of women. A five judge Bench deliberated on the constitutionality of this provision that punished people for establishing sexual relations outside the bonds of marriage.

The court held that adultery may be committed by two consenting adults and the provision aimed to protect sanctity of marriage but due to a pre-existing disruption of marital tie adultery is committed. The court held that adultery is a good ground for divorce but cannot be considered a crime.

This judgment is criticized on the ground that it has directly attacked the institution of marriage, rendering it a meaningless institute. Critics argue that this judgment has made marriage vows and marital obligations futile, giving an open platform for anybody to establish sexual relations with anybody. Freedoms under the Indian Constitution are not absolute and have certain reasonable restrictions. Thus, though establishing consensual sexual relations with

someone is a right guaranteed by the constitution, being married must be considered a reasonable restriction on this fundamental and basic right. The court should have made it a gender-neutral crime punishing both men and women for the offence of adultery. On the contrary it did away with it *in toto* thus paving a way for illegitimate relations in the Indian society and promoting immorality.

## **PROPERTY RIGHTS**

On September 9, 2005 the landmark amendment to the Hindu Succession Act, 1956 which originally denied women the right to inherit ancestral property, changed it and gave a Hindu woman or a girl child, right to inherit family property. Prior to this amendment, a Hindu woman had no right in family property ever. Even during the ancient times or the Vedic period or even before that, a Hindu woman had no right in ancestral property. This was just one of the many rights that were denied to a woman in the ancient Hindu society of India. However, after independence and once we got our Constitution which recognized the right to equality, all such discriminatory practices against women which were prevalent in the ancient Hindu society were either done away with or put to challenge as violative of the fundamental rights. Denial of inheritance right in Hindu undivided family property was just one of the many discriminatory practices against women in the Hindu society. The 2005 amendment finally did away with this blatant discrimination.

In August 2020, giving the amendment a retrospective effect, the Honorable Supreme Court said that daughters are entitled to equal property rights as sons even in the case where the coparcener had died prior to the coming into force of the Hindu Succession (Amendment) Act, 2005.

## **REPRODUCTIVE RIGHTS**

The last decade witnessed the Indian judiciary delivering some landmark decisions recognizing a woman's right to reproduce as part of the "inalienable survival rights" implicitly protected by the fundamental right to life under Article 21.

Reproductive rights are important for realization of other human rights. States' obligation to guarantee such rights requires women to have access to a comprehensive reproductive health information as well as services but also that they experience positive reproductive health outcomes such as lower rates of unsafe abortion and maternal mortality.

Although India was among the first nations to develop a legal framework that guaranteed access to abortion and contraception, women in India continue to experience many hurdles to absolute enjoyment of reproductive rights.

A landmark joint decision was given by the Honorable Delhi High Court in the year 2011 in the matters of *Laxmi Mandal v. Deen Dayal Harinagar Hospital and Others* and *Jaitun v. Maternity Home, MCD, Jangpura and Others* concerning denial of maternity health care to two women living below poverty line. Citing international conventions like CEDAW and ICESCR, the court held, “no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background. This is the primary function in the public health services. This is where the inalienable right to health which is so inherent to the right to life gets enforced.”

**Maternity Benefit (Amendment) Act, 2017-** The 2017 amendment to the Maternity Benefit Act, 1961 effective as of April 1, 2017, has brought in some key changes which include, (i) increased paid maternity leaves for women employees (from 12 weeks to 26 weeks), unless they have two or more surviving children; (ii) recognition of rights of an adoptive mother and a commissioning mother; (iii) ‘work from home’ option; (iv) mandatory crèche (day care) facility for every establishment employing fifty or more employees, including the right of mothers to visit the crèche four times a day. Employees shall be obligated to educate employees about these benefits.

## CHILD MARRIAGE

The 2013 amendment to the law of rape in India introduced a new age clause in the law wherein establishing sexual relations with a woman below the age of eighteen shall be considered rape, irrespective of the consent of the girl. However, the second exception to Section 375 allowed such relations if the man is married to such a woman.

In *Independent Thought v. Union of India*, the Honorable Apex court delivered a landmark verdict striking down this exception to the offence of rape under Section 375 thereby holding that establishing sexual relations with a girl below the age of eighteen is rape irrespective of her consent and irrespective of the fact whether she is married to the man or not. However, this judgment is often criticized for its incomplete nature wherein it failed to de-recognize all such marriages under various personal laws of different religions wherein marrying a woman below the age of eighteen and establishing sexual relations with them is perfectly valid. Had the court

stated so explicitly in the judgment it would have saved the judiciary from frivolous litigation in the future which is inevitable now.

## **WOMEN'S RESERVATION BILL**

The Women's Reservation Bill is a pending bill in the Indian parliament that proposes to amend the Indian constitution to reserve thirty-three per cent seats in the lower house i.e. Lok Sabha and in all state legislative assemblies for women. It is yet to see the light of the day. The Bill was initially introduced by the HD Deve Gowda government in the Parliament on September 12, 1996. The NDA government led by BJP under Mr. Atal Bihari Vajpayee pushed for the Bill in Lok Sabha but it still wasn't passed. The Congress led UPA-I government introduced the Bill to reserve seats for women in the Lok Sabha and legislative assemblies in May, 2008. After reintroduction, the bill was passed by the Rajya Sabha on March 2010 but was still left pending in Lok Sabha. In last ten years, including the six years of the BJP led NDA government the Bill hasn't seen any development. It would be interesting to see how the BJP with its absolute majority goes with it in the future.

## **CONCLUSION**

India has witnessed a surge in women laws and development on that front. However, we still have a long way to go.

Cases like that in Kathua and Unnao are still happening. What happened in Hathras is not hidden from anybody. A country so embroiled in caste and religious hatred cannot develop through legislative changes. The mindset needs to change to truly witness development.

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