CHAPTER III
GENDER JUSTICE AND EQUALITY OF WOMEN

(A) RIGHT TO EQUALITY
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CHAPTER – III

GENDER JUSTICE AND EQUALITY OF WOMEN

"The reason for gender injustice can be attributed to unequal power equation in gender relations. Patriarchal society, considering women's household work as economically insignificant, male child preference in society, lack of legal awareness in women and so on aggravated the differential status to the disadvantage of women. Neither the term 'gender justice' nor struggle for it is new. What has intensified in recent days is the awareness on gender justice. It is being increasingly realized that crimes against women are to be handled with greater sensitivity and women as seekers of justice, to be treated with extra care."[1]

Gender Justice means that there should not be any discrimination in administering justice merely based upon sex differences. In other words, women should get justice just like men get it. But in law enforcement people argue not for gender equality to get justice, but a sort of preferential treatment for the fair sex.

Discrimination of Individuals or groups of individuals cannot exist in a civilized society a society which believes in human rights and the dignity of individuals. Gender equality as an ideal has always baffled the Constitutional provisions for equality before the law or equal protection of law. Gender equality is an important issue of human rights and social justice women represent half the resources and half the potential in all the societies. Efforts to promote greater equality between women and men can also contribute to the overall development and men can also contribute to the overall development of human society. The empowerment of Women's social, economic and political status is essential for the achievement of sustainable development in all area of life.[2]

Since long period in history, women have been legally denied rights and privileges enjoyed by men. Women's right to vote, for example, had to be won

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[1] Quoted in Banerjea Samaresh (Justice), Barriers to Fairs and Proper Judicial Decision Making Process in Women Related Issues, *Gender Justice*, Edited by Chakrabarti N.K.(Dr.) & Chakrabarty Shachi (Dr.) R. Cambray & co. Pvt. Ltd. (1st Ed.) 2006.

[2] Feminist researchers characterise the contemporary phase of the India women's movement as the third one in the modern India. The 1st wave is identified with the social reform movements of the 19th century when issues of widow remarriage, sati and women's education took up the central stage. The second wave coincided with the Civil Disobedience Movement in the 1930's which enjoyed overwhelming participation of women. The first political utterance of 'equal rights for women' is traced to this phase.

through long struggles. Even today, equal rights between men and women, in broader senses are still as much contested terrain in different parts of the world.

Gender based discrimination represents ugly face of the society. This issue is global with varying degree and very old. Really, it is a travesty of all canons of social justice and equity that women who constitute half of the world's population and work two-third of world's working hours should earn just $1/10^{th}$ of world's property and also should remain victim of inequality and injustice. This anomaly is, now, being openly questioned and the underlying discrimination is seriously challenged. As human development moves centre-stage in the global development debate, gender equality and gender equity are emerging as major challenges. Gender discrimination, though amongst the most subtle, is one of the most all pervading forms of institutionalized deprivation.

The term 'sex' and 'gender' are often used interchangeably in every day life, but in sociological literature they are frequently differentiated. The term 'sex' is applied to differences between men and women that are based on biological differences such as anatomy, physiology, hormones and chromosomes, and in this respect, people are female or male. The term 'gender' is applied to the cultural aspects of male and female roles. In other words the behaviour, personality and other social attributes that are expected of males and females, and these social attributes become the basis of masculine and feminine roles. Sexuality and the different capacities of men and women in the reproductive process are particularly likely to be thought of as giving 'natural' reasons for gender divisions in society.

The question of gender equality is very old and burning problem. In Mexico the first world conference on women inspired a movement that has helped: to reduce gender inequality worldwide. Illiteracy among women is declining, maternal mortality and total fertility rates are beginning to fall, and more women are participating in the labour force than even before. However, much remains to be done. Persistent inequality between women and men constrains a society's productivity and, ultimately, slows its rate of economic growth. Although this problem has been generally recognized, evidence on the need for corrective action is more compelling today than ever[3].

[3] Bhatt J.N. (Justice), Gender Equality: Turmoil or Triumph, AIR 1998 *(Journal)* 81.

The principles of gender equality and gender equity have been basic to Indian thinking. The 19th and early 20th centuries saw a succession of women's movements first around social issues and later around the freedom struggle itself. The Constitution of India adopted in 1950 not only grants equality of women, but also empowers the state to adopt measures of affirmative discrimination in favour of women.

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental duties and Directive Principles. However, there still exists a very wide gap between the goals enunciated in the Constitution, legislation, policies, plans, programmes and related mechanisms on the one hand and the situational reality of the status of women in India on the other.

In India equality between men and women is Constitutionally guaranteed. In practice the social relations of gender continue to subordinate women, irrespective of their class, caste or community. At the various points in the history of modern Indian women and men, made concerted efforts to redress the balance in favour of women. Efforts to seek gender equality and equity have historically had close linkages to the judicial system. The women's movement in India marked by the fact it repeatedly appealed to the state as the arbitrator in cases of gender injustice and persistently sought legal reform or enacting new laws on behalf of women.

(A) RIGHT TO EQUALITY

The right to equality is one of the six rights that have been granted to us. Indian Constitution guarantees equality before the law and equal protection of the law it has been interpreted as a prohibition against unreasonable classification. Reference to equality between women and men in the Constitution are to be found in the Part III of the Constitution which guarantees the Fundamental rights of men and women. In particulars Articles 14, 15 and 16 of the part III of the Constitution which guarantees right to equality and elaborate on the concept of equality underpinning these rights. Article 325 which guarantees that all shall have the right to vote irrespective of sex, Part IV of the Constitution, the Directive principles of state policy which are Fundamental guidelines for governance, although not enforceable in a Court of law.

In addition, some Constitutional amendments also refer to women e.g. the 42nd amendment to the Constitution which contains a clause referring specifically to

women. It shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. The 73rd Constitutional Amendment also provides for the reservation of one-third seats in all tiers of local government for women.[4]

Although these rights guarantee, equally to men and women, there are several ways in which the structure of the family and the existence of several inequitable social customs and practices serve to deprive women of these rights. In particular, discrimination occurs within the family, where norms regarding women's secondary status are reinforced in children from birth, son preference is one of the key aspects underlining social values that view girls as burdens. Women are viewed as dependents within the family and face severe restrictions on their mobility, which further impedes their ability to gain access to education, economic opportunities, to move freely and settle anywhere, to form unions or groups and so on, which are all Fundamental freedoms under the Indian Constitution. Freedom of speech and expression is often denied to women within the family, and women are kept out of decision making processes even within the community and state institutions. Cultural norms regarding appropriate behaviours for women often reinforce images of docility, passivity and subservience severely curtailing for women the exposure and confidence they require to participate on an equal footing with men in public life. Practices like foeticide, Infanticide and the constant if not increasing incidences of violence on women also constitute consistent assaults on women's right to life and personal liberty.[5] The Constitution guarantees several Fundamental rights in addition to the right to equality and non-discrimination. [6]

It must be emphasized that the Constitution of India provides the only explicit guarantee of women's right to equality in the country. There is no other legislation explicitly or specifically prohibiting discrimination against women in specific areas. The Constitution provides the equality standard. However, the way the Constitution is interpreted and acted upon in some cases.[7] Law reveals not only the bias of the judiciary, but the normative approach to gender equality that underpins much of state

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[4] *Article* 243(d) (l) Constitution of India

[5] *Article* 4 of the Constitution.

[6] *Article* 21 – Protection of life and personal liberty. *Article* 19(d) – Freedom of movement. *Article* 19(g) – Right to choose an occupation and pursue a lawful vocation. *Article* 23(i) – Right against Exploitation: traffic in human beings and other forms of Forced labour.*Article* 19(C) – Right to Form Association and Unions. *Article* 19(a) – Right to Freedom of speech and Expression.

[7] *Indra Swamy v. Union of India*, AIR 1993 SC 477

action in India, which views women as persons deserving protection, rather then promoting women's rights. Violations of women's rights continue in practice, aided by the legal system which is slow, often expensive (despite the existence of legal aid cells which are supposed to provide women with free legal services if required) and often procedurally biased against women who face restrictions on their mobility and access to resources. Further, public institutions or authorities are not regulated specially by laws prohibiting discrimination, and there is no code that lays down guidelines for equal opportunities or non-discrimination that institutions can follow while employers are bound by laws regarding maternity benefits, provision of crèches and so on, the only other law that binds public institution concerns the matter of custodial rape, where the minimum sentence has been set for a higher period than that of non custodial rape, and where the burden of proof rests on the perpetrators.

Article 14, it is trite, does not forbid a reasonable classification. The Supreme Court has reiterated the tests of reasonable classification. In the challenge related to the Constitutional validity of an ordinance by which a statutory body known as the Indian council of world Affairs was constituted, having perpetual succession and a common seal, with power to hold and dispose of movable and immovable property[8]. The said ordinance was subsequently replaced by an Act of Parliament, which was also challenged. Dismissing the writ petition with costs, the Supreme Court observed that Article 14 of the Constitution prohibits class legislation and not reasonable classification for the purpose of legislation. The requirements of the validity of legislation by reference to Article 14 of the Constitution are: that the subject matter of legislation should be well defined class founded on an intelligible differentia which distinguishes that subject matter from the others left out, and such differentia must have rational relation with the object sought to be achieved by the legislation.[9] The laying down of intelligible differentia does not, however, mean that the legislative classification should be scientifically perfect or logically complete.[10]

The Narcotic Drugs and Psychotropic Substances (Amendment) Act 2001, was challenged as violative of Article 14 of the Constitution[11]. Section 41(1) of the Act made the amended provisions applicable to all cases pending before the Courts on

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[8] *Dharam Dutt* v. *Union of India*, (2004) SCC 712

[9] *Id.* At 747 *See also M.P. Rural Agriculture Extension officers Assn.* v *State of M.P.* (2004) 4 SCC 646 at 653 and *E.V. Chinnaaiah* v *State of A.P.* (2005) 1 SCC 394.

[10] *See Chandravathi P.K.* v *C.K. Saji* (2004) 3 SCC 734

[11] *Basheer* v *State of Kerala* (2004) 3 SCC 609.

2.10.2001 or under investigation on that date but its provision excluded the application of the rationalized sentencing structure to cases pending in appeal. The apex Court held that the possibility of an appellant getting the benefit of the amended provisions in one exceptional fortuitous situation where trail concluded prior to, and appeal was filed after date of commencement of the Amendment Act 2001, would not render the proviso violative of Article 14 of the Constitution. The Court further rightly observed : [12]

> *"Merely because the classification has not been carried out with mathematical precision, or that there are some categories distributed across the dividing line, is hardly a ground for holding that the legislation fall foul of Article 14, as long as there is broad discernible classification based on intelligible differentia, which advances the object of the legislation, even if it be class legislation."*

In this case, Parliament had two discernible objectives in bringing forth the Amendment Act of 2001. These were evident from the statement of objects and reasons and they were avoidance of delay in trails and rationalization of sentence structure[13]. Accordingly, the classification was held to be very much rational and based on clearly intelligible differentia, which had rational relation with the objectives to be achieved by the classification. It has also been noticed that whenever a question of classification or under classification or discrimination in a taxing statute is involved the Court would lean in favour of upholding Constitutionality of the statue unless it is manifestly discriminatory.[14] In *Mandia Chemicals Ltd.* v. *Union of India.*[15] The Supreme Court made it clear that in the matters relating to fiscal and economic policies resorted to in public interest, the presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly, but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce it. Presumption of Constitutionality of legislation also extends in relation to a law, which has been enacted for imposing reasonable restrictions an Fundamental rights. Presumption may also be drawn that the statutory authority would not exercise the power arbitrarily[16].

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[12] *Id.* 616
[13] *Ibid*
[14] *See State of Gujrat* v *Akhil Gujrat Pravasi V. S. Mahamandal*, (2004) 5 SCC 155.
[15] (2004) 4 SCC 311.
[16] *See People's Union for Civil Liberties* v *Union of India*, (2004) 2 SCC 476.

(i) Equality, Legal and Real

Equality postulates not merely legal equality but also real equality. The equality of the opportunity has to be distinguished from the equality of results. The various provisions of our Constitution and particularly those of Articles 38, 46, 335, 338 and 340 together with the Preamble, show that right to equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. It is a positive right and the state is under an obligation to undertake measures to make it real and effectual. A mere formal declaration of the right would not make unequals equal. To enable all to complete with each other equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Article 14 and 16(i) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them[17].

(ii) Equality Before Law

The concept equality before law means that among equals the law should be equal and should be equally administrated and that the likes should be treated alike. Article 14 guarantees is a similarity of treatment and not identical treatment. The guarantee of equal protection of law and equality before the law does not prohibit reasonable classification. In other words, there must be a nexus between the basis of classification and the object of the legislation. So long as the classification is based on rational basis and so long as all persons falling in the same class are treated alike, there can be no question of violating the equality clause. If there is equality and uniformity within each group, the law cannot be condemned as discriminatory, though due to some fortuitous circumstances arising out of a peculiar situation, some included in the class get an advantage over others, so long as they are not singled out for special treatment.[18]

What Article 14 prohibits is class legislation and not reasonable classification for the purpose of legislation. If the rule making Authority takes care to reasonably classify persons for a particular purpose and if it deals equally with all persons belonging to a well-defined class then it would not be open to the charge of

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[17] *Indra Sawhney* v *Union of India*, AIR 1993 SC 477 at 643

[18] *K.R. lakshman* v *Karnataka Electricity Board*, AIR 2001 SC 595 at 597, 598. *See also P. Murgesan* v *State of Tamil Nadu*, (1993) 2 SCC 340.

discrimination. But to pass the test of permissible classification two conditions, must be fulfilled:

(a) That the classification must be founded on an intelligible differentia which distinguishes persons or things which are grouped together and

(b) That the differentia must have a rational relation to the object sought to be achieved by the statute in question.[19]

The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law" and "equal protection of the laws" in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18. Through Article 15 they declared in positive terms that the state shall not discriminate against any citizen on the grounds only of religion, race caste, sex, place of birth or any of them. With a view to eradicate certain prevalent undesirable practices it was declared in clause (2) of Article 15 that no citizen shall on the grounds only of religion, race, caste, sex place of birth or any of them be subject to any disability, liability, restriction or condition with regards to shops, public restaurants, hotels and places of public entertainment or to the use of wells, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public. At the same time, with a view to ameliorate the conditions of women and children a provision was made in clause (3) that nothing in the said Article shall prevent the state from making any special provision for women and children.[20]

(iii) Affirmative Action as Compensatory and Distributive Justice

It is wrong and unwise to see affirmative action merely as a penance or an atonement for the sins of past discrimination. It is not retributive justice on wrong doers. It is corrective and remedial justice to compensate the victims of prior injustice. It is not merely focused on reparation for past inequities. It is a forward looking balancing act of reformative social engineering an architecture of a better future of harmonious relationship amongst all classes of citizens, and equitable redistribution of community resources with a view to the greatest happiness of the greatest number of people. Affirmative action is not merely compensatory justice which it is, but it is also distributive justice seeking to ensure that community resources are more equitably

[19] *K. Thimmappa* v *Chairman Control Board of Directors S.B.I.* AIR 2001 SC 467.
[20] *Indra Sawhney* v *Union of India*, AIR 1993 SC 477 at 502, 503.

and justly shared among all classes of citizens. Furthermore, from the point of view of social utility, affirmative action promotes maximum well being for the society as a whole and strengthens forces of national integration and general economic prosperity.[21]

(iv) Law as an Instrument of Social and Distributive Justice.

The rule of law, as an instrument of social justice has to adopt itself to serve equally as an instrument of distributive justice in achieving a fair division of wealth among the members of the society. Legislative control has been exercised over unfair agreements in nullifying them, and thus, leading to protection of weaker sections against injustice, and all forms of exploitation, such as debt relief,[22] imposing ceiling on land-holdings, forbidding transactions and restoration of lands to those deprived by unconscious bargaining and by reopening cases of transfers such measures to a great extent made weaker sections to reap the benefits conformed by social and economic laws contributing to social and economic justice. Social order informed by economic justice motivates the law in the direction of responding effectively and to rise to the need of transformation such as adoption of nationalized schemes and fair and equitable distribution of goods and of agricultural income. The welfare component in social and economic justice, paves the way for promoting the welfare of different segments of society, such as protecting the aged in the matter of pension and gratuity,[23] equal pay for equal work[24] and even suggesting for uniform civil code,[25] particular mention requires to be made regarding the obligation of the state to keep the environment unpolluted and to protect the lives of the citizens against environmental hazards[26].

(v) Egalitarian Society and Doctrine of Equality

The doctrine of equality as enshrined in the Constitution promised on egalitarian society and the contract labour (regulation and Abolition) Act 1970 is the resultant effect of such Constitutional mandate having its due focus in the perspective. The Apex Court in *Minerva Mill's* case[27] on certain terms laid down that the equality

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[21] *Indra Sawhney* v *Union of India*, AIR 1993 SC 477 at 697, 698.
[22] *Pathumma* v *State of Kerala*, AIR 1978 SC 771.
[23] *D. S. Nakara* v *Union of India*, AIR 1983 SC 130.
[24] *Randhir Singh* v *Union of India*, AIR 1982 SC 879.
[25] *Jordan Diengdeh (M/S)* v *SS Chopra*, AIR 1985 SC 935.
[26] *Madarsa Road Residents Association* v *Lt. Governor*, AIR 1995 Delhi 195.
[27] AIR 1980 SC 1789.

clause in the Constitution does not speak of mere formal equality before the law but embodies, the concept of real and substantive equality which strike at the inequalities arising on account of vast social and economic differentiation and is thus consequently an essential ingredient of social and economic justice. As a matter of fact the socialistic concept of society is very well laid in Part III and Part IV of the Constitution and the Constitution being Supreme, it is bounden duty of the law Courts to give shape and offer reality to such a concept.[28]

(vi) Equality to the Child

The right of the child is the concern of the society so that fallen women surpass trafficking of their person from exploitation contribute to bring up their children, live a life with dignity and not to continue in the foul social environment. Equally, the children have the right to equality of opportunity, dignity and care, protection and rehabilitation by the society with both hands open to bring them into the mainstream of social life without pre-stigma affixed on them for no fault of her/his. The Convention on the Right of the Child, the Fundamental Rights in Part III of the Constitution. Universal Declaration of Human Rights, the Directive Principles of the State Policy are equally made available and made meaningful instruments and means to ameliorate their conditions social, educational, economical and cultural and to bring them into the social stream by giving the same opportunities as enjoyed by other children.[29]

(vii) Gender Equality - A Basic Human Right

Social Justice is the key stone of the Indian Constitution. One facet of it is gender justice, which is a composite concept. It is the human right of women. The principle of gender equality is enshrined in the Indian Constitution, in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Universal Declaration of Human Rights (1948) to affirm the ideal of equal rights of men and women. The U.N. Convention on the Elimination of all forms of Discrimination against Women (1979) observes that discrimination against women violates the principles of equality of rights and respect for human dignity.[30]

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[28] *Secretary Haryana State Electricity Board* v *Suresh*, AIR 1999 SC 1160.
[29] *Gaurav Jain* v *Union of India*, AIR 1997 SC 3021 at 3027.
[30] Misra Priti, Gender Justice; Some issues, AIR 2001(*Journal*) 149.

The meaning and concept of the Fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary form a part of Indian Constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them it is now an excepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when where is no in consistency between them and there is a void in the domestic law.[31]

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are therefore, of great significance in the formulation of the guidelines to achieve this purpose.

Gender relations need to be measured in the context of participation in and sharing of the important decision-making process those results in the above inequalities. Such a measure would help indentify the differing degrees of inequality in terms of age, income levels and geographical location. For governments and concerned citizens seeking to redress these inequalities indices are means of determining the issues on which they must concentrate and provide feedback on the effectiveness of their actions. Clearly, then the accuracy of any measure of gender inequality needs close scrutiny.[32] There has been some progress in the field of gender equality since 1985, but much less than what was expected. Women's ability to bear children means they are expected to take responsibility for domestic work worldwide. But housework is everywhere invisible and undervalued[33].

The causes of gender inequality are complex linked as they are to the intra household decision making process. However, the decisions are made, the extra household allocation of resources is influenced by market signals and institutional norms that do not capture the full benefits to society of investing in women. Low levels of education and training, poor health and nutritional status, and limited access

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[31] *Vishaka v. State of Rajasthan* AIR 1997 SC 3011.

[32] Bhatt J.N. (Justice), General equality turmoil or triump AIR 1998 (*Journal*) 81.

[33] Basu Pofak (Justice), "*Law relating to protection of human rights*" Modern Law publications, 1st Edition - 2002

to resources depress women's equality of life and exacts hurdle in economic efficiency and growth. Regional perspectives play a very important role in the realm of gender equality. The causes of persistent disparity and inequality between men and women are only partially examined, explored and understood. In recent years, attention was focused on inequalities in the allocation of resources at the household level, as seen in the higher share of education, and health and food expenditures boys receive in comparison to girls. The decision making process within households is complex and is influenced by social and cultural norms market opportunities and institutional factors. There is considerable proof that the intra-household allocation of resources according to household members is a key factor in determining the levels of schooling health and nutrition. Regional factors also have constituted in gender equalities.[34]

One of the Fundamental obstacles to promote gender equality in development remains at the community level where attitudinal biases often prevent women from realizing their rights. The government has done little to take on board these obstacles, apart from occasional and irregular campaigns around single issues like dowry, girl child education, amniocentesis and so on. Policy education campaigns are restricted to occasional posters and T.V. spots, but are not consistent or backed up by strong and clear action by the state. Their impact remains less than effective, particularly since there is little action taken against advertising or campaigns that are gender discriminatory.

The National Human Rights Commission was set up in 1993 as a statutory body to which individuals and interested parties can make complaints on human rights violations in the country. The NHRC has explicitly stated that women's right will be a part of its concerns. As yet the NHRC has taken up no specific issue of violation, though it has attempted to address single instance of state violence on women. It is yet to take a significant interest in women's rights. Part of the problem arises out of the division seen between the National Commission for women and the NHRC, although a member of the women's Commission is represented on the NHRC, it is often assumed that the women's Commission will deal primarily with women's rights violations. The NHRC ability to function as an autonomous body is yet to be

[34] Bhatt J.N. (Justice), Judge Gujarat High Court in his Article "Gender Equality - Turmoil or Triumph" AIR 1993 (*Journal*) 81.

established. Like the women's Commission its establishment has been criticized as a move on the state to appear accountable without providing these bodies with sufficient autonomy to push through decisions or recommendations that may appear to the contrary to state interests. The law Commission the minorities Commissions, the Commission for Scheduled Tribes and scheduled castes that have been set up are broadly mandated to look at women's issues, barring the law Commission which has participated actively in recommending gender just legal change the remaining Commissions have shown little concern for women's rights in their functioning .

Women themselves are agents for change they play a key role in shaping the welfare of future generations. Public policies cannot be effective without the participation of the target group in this case, women make up more than half of the world's population. Their views, therefore, must find place into the policy formulation.

The general recommendations of "Convention on the Elimination of all forms of Discrimination against Women (CEDAW) in this context in respect of Article 11 are:

> 22. "Violence and equality in employment Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.
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> 23. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem, it is discriminatory when the women has reasonable grounds to believe that her objection would disadvantage her in connection with her employment including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies including compensation should be provided.
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> 24. States should include in there reports information about sexual harassment and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place."[35]

(viii) Discrimination on Ground of Gender

Human Rights are derived from the dignity and worth inherent in the human person. Human rights and Fundamental freedoms have been reiterated in the

[35] *Vishaka* v *State of Rajasthan*, AIR 1997 SC 3011.

Universal Declaration of Human Rights democracy development and respect for human rights and Fundamental freedoms are inter dependent and have mutual reinforcement. The human rights for women including girl child are, therefore, inalienable, integral and individual part of the universal human rights. The full development of personality and Fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development. Social and family stability and growth cultural social and economical. All terms of discrimination on grounds of gender is violative of Fundamental freedom and human rights[36].

The Supreme Court considered the provisions of the convention on the Elimination of all forms of Discrimination against Women, 1979 and held the same to be integral scheme of the Fundamental Rights and the Directive Principles[37]. Article 2(7) read with Articles 3, 14 and 15 of the CEDAW embodies concomitant right to development as an integral scheme of the Indian Constitution and the human rights act. Section 12 of the protection of human Rights Act charges the National Commission with duty to ensure proper implementation as well as prevention of violation of Human rights and Fundamental freedom[38]

(ix) Sensitivity Towards Gender Bias

Long time ago, terms such as 'judicial gender bias' or 'gender bias and the Courts' were unheard of today, the systematic discussion of gender bias is not only part of the most rational judicial education system, but it has also received national and international recognition and pervasive gender bias in the Courts which was virtually invisible at 1980 became apparent and is plainly visible on record and one cannot miss it even with a casual glance. Research conducted into this matter by social scientists and researches in the legal official have documented a judicial gender bias and its profound effect on judicial fact finding and decision making. Originally, such progressive empirical studies were uncoordinated. In numerous areas of the law, disquieting picture emerged which shows that gender bias existed in all areas operating some times to the advantage of men and more often and more seriously to the disadvantage of women. If gender bias is identified in all its nuisance and hues

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[36] *Valsamma Paul* v *Cochin University*, AIR 1996 SC 1011.
[37] *Madhu Kishwar* v *State of Bihar*, AIR 1996 SC 1864.
[38] *Gaurav Jain* v *Union of India*, AIR 1997 SC 3021 3030, 3031.

that would be a large step in dealing with this dilemma. It is not special treatment for women or for men that is called for, because such special treatment is not needed. Instead, what is needed is sensitivity to the ways in which unexamined attitudes about men and women lead to the unintended result of biased decision-making. Once this sensitivity is achieved and it is reinforced by curiosity, analysis and openness, then and only then will the litigants be able to explain their circumstances to a Court that is both willing to learn and to judge to achieve a gender neutrality in its judicial system, which is both vital and important to the ultimate achievement of justice in its purest and highest form[39].

(x) Rights to Degraded Women under the Constitution

Article 6 declares that everyone has a right to recognition everywhere as a person before the law. The victims of flesh trade are equally entitled before the law to the recognition as equal citizens with equal status and dignity in the society. Article 7 postulates that all are equal before the law and are entitled, without discrimination, to equal protection of the law. So, denial of equality of the rights and opportunities and of dignity and of the right to equal protection against any discrimination of fallen women is violation of the universal declaration under Article 7 and 14 of the Indian Constitution.[40]

(xi) Judicial Response to Gender Justice

The Supreme Court of India has responded to issues of gender justice in a positive manner. Some of the cases significantly advance the cause and dignity of women. A service rule whereby marriage was a disability for appointment to foreign service was declared unconstitutional[41] where pregnancy as a disqualification to continue in public employment was declared *ultra virus* Articles 14 and 16(1) of the Constitution, the *Shah Bano Judgment* [42]granting equal right of maintenance under section 125 of the Code of Criminal Procedure, 1973 to a divorced Muslim women notwithstanding the personal law *Pratibha Rani.*[43] on women's right to her *Sridhana, Shobha Rani*[44] where dowry demand was held enough to amount to cruelty, *Thota*

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[39] Bhatt J.N. (Justice), Gender Equality: Turmoil or Triumph, AIR 1998 (*Journal)* 82.
[40] Quoted in Basu Polak (Justice), "Law relating to Protection of Human Rights"modern Law Publications,1st Edition-2002.
[41] *C.B. Muthamma (Miss)* v *Union of India*, AIR 1979 SC 1868.
[42] *Mohd. Ahmed khan* v *Shah Bano Begum*, AIR 1985 SC 945.
[43] *Pratibha Rani* v *Suraj Kumar*, AIR 1985 SC 628.
[44] *Shobha Rani* v *Madhukar Reddi*, AIR 1988 SC 121.

Sesharatharmma[45] which permanently eliminated the economic disparity between the male and female and put a seal of finality on a Hindu female's right to property, The Gautam Kundu case[46] in which the woman refused the husbands application for a blood test to disprove paternity as it would be standerous, embarrassing and humiliating for the women. The Supreme Court observed in *Bodhi Sattwa's* case[47] that rape was not only an offence under the criminal law but it was violation of the Fundamental right to life and liberty guaranteed by Article 21 of the Constitution. *Gurmit Singh's* case[48] in which rape was held to be violative of the right to privacy, *Savita Samvedis* case[49] where a married daughter was allowed accommodation in parental house and *Vishaka v. State of Rajasthan*[50], where the Supreme Court provided adequate safeguards to working women against sexual harassment. The guidelines given in *Vishaka* were applied by the Bombay High Court in case of *Shahnaz Sait*.[51] In Shakila Parveen's case[52] Mr. Justice *Basudev Panigrahi* of the Calcutta High Court extended the *iddat* period till such time the women remains to allow Muslim women a maintenance allowance beyond the customary *iddat* period of about three and a holy months under the Muslim women (Convention of rights in Divorce) Act 1986.

Though the Supreme Court has exhibited a dynamic attitude in ensuring gender equality judicial activism is yet to percolate to the lower levels of the judicial system. Moreover some of the much talked about reforms such as legal aid etc. have not taken off at all. Women's access to justice becomes much more difficult because of the cultural barriers that arise from gender[53].

(xii) Effective Enforcement of Basic Rights of Gender Equality

In *Nilabati Behera v State of Orissa*[54] a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right' as a public law remedy under Article 32

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[45] The Pioneer 24 Apr 1996, referred in AIR 2001 (*Journal*) 149 at 152
[46] *Gautam Kunda* v *State of West Bengal*, AIR 1993 SC 2295.
[47] *Bodhisattwa Goutam (Shri)* v *Subhra Chakraborty*, AIR 1996 SC 922.
[48] *State of Punjab* v *Gurmit Singh*, AIR 1996, 1393
[49] *Savita Samvedi* v *Union of India*, (1996) (2) SCC 380
[50] AIR 1997 SC 3011
[51] The week, Dec. 13, 1998, P. 28 reffered in AIR 2001 (*Journal)* 149.
[52] The Pioneer 21 June 2000, P 4 reffered in AIR 2001 (*Journal)* 149 at 153.
[53] Mishra Preeti. Gender Justice: Some issues, AIR 2001 (*Journal)* 149 at 152-153.
[54] AIR 1993 SC 1960

distinct from the private law remedy in torts. There is no reason why these International Conventions and norms cannot, therefore, be used for construing the Fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

In view of the above and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, the Apex Court laid down the guidelines and norms for due observance at all work places or other institutions, untill a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the Fundamental rights and it is further emphasized that this would be treated as the law declared by the Apex Court under Article 141 of the Constitution[55].

(B) RIGHT TO WORK AND WORKING CONDITION

(a) Right to Work

The rights of workers are comparatively new development in the field of jurisprudence with the development of science and technology and growth of industrialization a new class of workers started emerging at the global level since the mid nineteenth century with the invention of the steam power it was applied to generate the mechanical power for running the industries which give an imputes to the establishment of industries in Europe and America.

Although the legislations were enacted in America and France for the protection of mill workers truly speaking there were no laws laying down the rights of workers as such till the end of nineteenth century. By that time a famine developed in Europe as well as in America and the need of uniform labour laws was felt.

Various conferences were held in Berne, Paris and Washington DC in order to establish the International Labour Organisation however, this development received a set back due to the 1st world war, the movement was strengthened rapidly after the World war which laid to establishment of ILO of which India is a member since beginning.[56]

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[55] *Vishaka* v *State of Rajasthan*, AIR 1997 SC 3011.

[56] Draft Convention of ILO and Declaration of Human Rights.

The II[nd] world war has greater effect on the labour welfare in particular, for two reasons First, concept of modern state changed from laissez-faire to the social welfare state and secondly the Universal Declaration of Human rights had humanising effect on the workers rights. During this period the position of rights of workers was secondary and weak as it was comparable to morality of international Law. In order to learn historical development of the rights of the workers it becomes necessary to study the development at the national level and the development of new jurisprudence in this field. Our Constitution has been drafted during the same period when the United Nations was preparing its charter of human rights. All these contemporary developments have influence on the framing of our Constitution incorporating the social justice dimension of the rights of the workers. The present study examines the above development and analyse the new jurisprudence of the worker's rights.

31 Draft Conventions and 39 recommendations adopted by the conference during 1919 to 1931 represent a definite trend towards the international codification of the labour laws, covering a wide variety of subjects e.g. freedom of association, hours of work regulations of conditions of labour in the agriculture and industrial sectors, welfare provisions for women, children, forced native labourers, foreign workers seamen, coal miners and provisions for social insurance, industrial hygiene, security inspection and prevention of industrial accidents and measures for combating employment.[57]

The preamble of the Constitution declares[58] :

> *"Justice, social, economic and political Liberty of thought, expression belief, Faith and worship, equality of Status and of opportunity".*

The preamble of the Constitution is notable for two reasons. First, it resorts to a fiction by conferring on the people of India the ultimate authority for not only constituting the future society but also laying down the cherished ideals of the society and bringing into force the Constitution itself. Secondly, it spells out a social mission that people of India resolve to pursue, namely, setting up a sovereign, socialist, secular, democratic republic, securing the ideals of justice liberty, equality and fraternity and adopt enact and give a Constitution.

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[57] Draft Conventions of ILO and Declaration of Human rights.
[58] Constitution of India, 1950

The people having given unto themselves the Constitution. They constituted India into a sovereign, socialist, Secular, democratic, republic. They resolved that justice, liberty, equality and fraternity are four corner stones to restructure its republic It assures to its citizen to secure justice-social economic and political, liberty of thought etc: equality of status and of opportunity, and to promote fraternity among them all assuring dignity of the individual and the unity and integrity of the country.

In fulfillment thereof, part III of the Constitution assures the rights which are Fundamental to the citizen persons and part IV provides certain Fundamental principles of state policy. On a conjoint reading of the preamble, it is apparent that the founding father intended to usher in an egalitarian society where every citizen is assured of social and economic, justice, equality of status and opportunity assuring him dignity of person. Justice equality, the two 'priceless jewels', occupying pride of place, are thus embedded as corner stones to restructure an egalitarian socialist republic.

Part III of the Constitution of India contains the Fundamental rights, which are as necessary and important as a heart to human being. The infractions of Fundamental rights could be complained under Article 32 of the Constitution to the Supreme Court of India or under Article 226 to the respective High Court of States. Article 136 provides for appeals by special leave before the Supreme Court against judgments and orders of High Courts and Tribunals. The Constitution guaranteed equality of opportunity in matter of public employment.[59] But it does not guarantee right to employment or work. Article 21 embraces the field of life and personal liberty of the citizens and are jealously guarded.[60] Article 21 provides "No person shall be deprived of his life or personal liberty except according to procedure established by law". "The state shall within the limits of its economic capacity and development, make effective provisions for securing right to work", "the state shall make provisions for securing just and human conditions of work".[61]

Having discussion certain broad social features in respect of the labour as analysis may now be made on the condition of there employment pattern of

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[59] *Article* 16 of the Constitution of India.

[60] *Article* 41 of the Constitution, provides, Right to work, to education and to public assistance, in certain cases of unemployment, old ages, sickness, and disablement, and in other cases of undesired want.

[61] *Article* 42, provides "that the State shall make provision for just and human conditions of work and maternity relief".

unemployment and sessional divisions in the number of days in which employment is available. In the existing agrarian pattern, the nature of agriculture and the unfavourable man land ratio, there are uncertainty and inadequacy of employment. The extent of under employment or distinguished unemployment is a usual feature, under-employment has also affected to a considerable extent the standard of living. It has also created disparity in the working class. It has hampered the growth of the labour movement and trade unions. Political parties may take advantage of the unemployed millions and divert them from the search for gainful employment into unproductive political actions.[62]

Whether the right to work is included into the concept of 'personal liberty'? This question was considered by the Andhra Prades High Court [63] which give a positive answer , Chaudhury J., applied the *Meneka* wavelength to include the right to work in personal liberty in the circumstances of the case where no remuneration was given to the employee during the period of his suspension . This question came up for consideration before the Supreme Court in *Delhi Transport Corpn* v *D.T.C. Mazdoor congress*[64], where Regulation 9(b) of the Delhi Transport Authority. Conditions of Appointment and Service Regulations 1952 was challenged. Sawant, J. derived the right to work from the right to livelihood and observed:

Income is the foundation of many Fundamental rights and when work is the sole source of income the right to work becomes as much Fundamental.[65] The learned judge however placed a rider on this right in the next case [66] that the right to work was qualified by the limits of economic capacity and the development of state.

The *Francis*[67] ratio was further applied to evolve the 'basic human dignity' of labourers in the *Asiad* Case [68] . The personal liberty was connected not only with the other Fundamental right in Article 23 but also with the Directive Principal of State Policy in Article 39. Then the mixture thus produced was dissolved in the Constitutional goal of new socio-economic order. Justice Bhagawati opined that any form of 'Forced Labour' was violative of human dignity and contrary to basic human

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[62] Mishra Srikanta, "*Rural Labour some key Dimensions*", *IV CIL Q* (1991), 482.
[63] *A.P.S.R.T* v *Labour Court, Guntur*, AIR 1980 AP 316.
[64] AIR 1991 SC 101.
[65] *Id* at 173, *See also Delhi Development Horticulture Employees Union* v *Delhi Administration*, AIR 1992 SC 789.
[66] *Delhi Development Horticulture Employees Union* v *Delhi Administration* , AIR 1992 SC 789.
[67] *Francis Coralie* v *Union Territory of Delhi*, AIR 1981 SC 746.
[68] *Peoples Union for Democratic Rights* v *Union of India*, AIR 1982 SC 1473.

values"[69] Thus by analogy the 'personal' liberty was extended to include the protection against any form of forced labour . The Court interpreted the basic human dignity included in 'personal liberty' requiring the observance of the provisions of the Contract Labour (Regulation and Abolition) Act 1970, and the Inter State Migrant Workmen (Regulation of Employment and condition of service) Act 1979.[70] Thus the 'personal liberty' has come to mean and include the benefits conferred and protection provided to labourers under the social welfare legislations.

The question as to the interpretation of the word 'life' so as to include livelihood in Article 21 came up for consideration before the Supreme Court for the first time in *Re Sant Ram*[71]. Sinha C. J., speaking through the Court held that the language of Art 21 cannot be pressed into aid of the argument that the word life in Article 21 includes "livelihood also". Although the argument of 'livelihood' was not pressed into the concept of personal liberty" and it was rejected into the right to "life" the Court did not rule out the right to livelihood altogether. The learned Chief Justice was of the opinion that the 'right to livelihood' was included in the freedoms enumerated in Article 19, particularly (g) or even in Article 16 in a limited sense".[72]

Whether the right to 'life and personal liberty' includes 'livelihood'? This question was again raised in *Bengulla Bapi Raju* v *Andhra Pradesh.*[73] where the challenge was against land reforms law fixing ceiling on agricultural holdings. The Court following the Re Sant Ram[74], rejected the 'livelihood ' into 'life and personal liberty' and did not examine the above claim in the light of decisions in *Maneka's*[75] and *Francis coralie's*[76] cases. However in the pavement *Dweller's*[77] case *Chandrachud C.J.*, included the right to livelihood into "right to life". The learned Chief Justice observed that if the right to livelihood was not treated as a part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogration.[78]

This right to livelihood, evolved by the Court as an aspect of life under Article

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[69] *Id* at 1487.
[70] *Id* at 1485.
[71] AIR 1960 SC 932.
[72] *Id*, at 935.
[73] AIR 1983 SC 1073.
[74] AIR 1960 SC 932
[75] AIR 1978 SC 597.
[76] AIR 1981 SC 746.
[77] *Olga Tellis* v *Bombay Municipal Corporation*, AIR 1986 SC 180.
[78] *Id.* 193,194.

21 would have far reaching consequences in expanding the meaning of "personal liberty". Following the above cases subsequently, the Court extended the right to life to include the right to access to inaccessible places.[79]

Justice S. Mukharji opined that Right to Life embraces not only physical existence of life but the quality of life and for residents of hilly areas access to road is access to life itself.[80]

However, the right to live with human dignity was meant to protect the persons of their livelihood and not to provide them. It does not create any positive right in favour of anyone to claim means of livelihood from the Government[81]. It merely protects that standard of livelihood to which a person is entitled. The Court extended the right to live to include "the decent residential accommodation" in *Sankar* v *Durgapur Projects Limited*[82], as the petitioner was entitle to that standard of living. The minimum standard ensuring human dignity [83]was included in the "quality of life" for women and children in care homes.[84]

It is significant to note here that the new human right jurisprudence, developed under Article 21 by connecting it to the Directive Principals and International Conventions made remarkable impact on the meaning and content of personal liberty. It included all the essential facilities and opportunities to the poor people which were Fundamental means to development, to live with minimum comforts, food, shelter, clothing and health.[85] Due to economic constraints though right to work was not declared as a Fundamental right, the Court upheld the right to work of workmen, lower class middle class and poor people as means to development and source to earn livelihood. Though, right to employment cannot as a right be claimed, but after the appointment to a post or an office it is included into personal liberty.

The aforesaid discussion brings home the `conclusion that variety of rights essential for the development of human personality in its full vigour and verve were

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[79] *State of HP.* v *Umed Ram*, AIR 1986 SC 784, *See also Daulat Singh ji* v *Executive Engineer Himatnagar*, AIR 1997 Guj. 64, where the Court upheld the right of the rural people to have easy access to their rural areas in all seasons including monsoon.

[80] *Id.* at 851. *See also*, *O.P. Gupta* v *Union of India*, AIR 1987 SC 2257, where the right to life was extended to include the protection against illegal suspension of employee.

[81] *Bhartiya Veterinary Education Society, Bangalore* v *State of Karnataka*, AIR 1988 Kan. 293.

[82] AIR 1988 Cal 137.

[83] *Vikram Deo Singh Tomar* v *State of Bihar*, AIR 1988 SC 1782.

[84] *All India Statutory Corpn* v *United Labour Union*, AIR 1997 SC 645.

[85] *Id*, at 670.

included into personal liberty, with varying content from case to case. The meaning of personal liberty was extended to include the customs followed among the tribes in the matter of successions and inheritance,[86]protection of woman against rape,[87]the right to reputation in the matter of national political figure,[88] health hazards from use of harmful drugs,[89] right to social justice and economic empowerment [90] and the suitable building and other facilities to the Advocates Association.[91] In this wavelength a significant question was raised before the Allahabad High Court.[92] Whether the state and its officers were bound to providing the security guard in the form of gunners, armed shadows and armed constables etc., whenever an application was made by a citizen at the cost of the state government or otherwise. The Court gave a positive answer to it. The above expansion may be misused by the people for the symbol of status or fashion to demand shadows invoking Article 21. Such a situation may be set at right by the state, it is submitted, by enacting legislation on the above subject.

(i) Directive Principles and the Judicial Trend.

In earlier days, the Directive Principles of State Policy were considered to be dormant in as much as they are not enforceable in the Courts and do not create any justifiable rights in favour of the individuals. The Courts were also helpless and not in a position to declare any laws as void on the ground that it contravenes any of the Directive Principles. Further the Courts are also not competent to compel the government to carry out any Directive or to make any law for that purpose. For example, to provide compulsory education within the time limit by Article 45 to provide adequate means of livelihood to every citizen. Though the earlier decisions of the Supreme Court paid comparatively scant attention to the Directive in Part IV on the ground that the Courts had little to do with them since they were not justifiable or enforceable in the Courts of law like the Fundamental rights, the duty of the Courts in relation to Directives came to emphasize in later decisions, this trend reached its

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[86] *Madhu Kishwar* v *State of Bihar*, AIR 1996 SC 1864.
[87] *Bodhisattwa Goutam* v *Subhra Chakraborty*, AIR 1996 SC 922.
[88] *Lal Krishna Advani* v *State if Bihar* , AIR 1997 Pat 15.
[89] *Dr Ashok* v *Union of India,* (1997) 5 SCC 10.
[90] *Ashok Kumar Gupta* v *State of U.P.* (1997) 5 SCC 201, *Gaurav Jain* v *Union of India* , AIR 1997 SC 3021.
[91] *Advocates Assocn, Bangalore* v *Chief Minister Govt of Karnataka* , AIR 1997 Kant 18
[92] *Ramveer Upaddhya* v *State of Uttar Pradesh*, AIR 1996 All 131.

culmination in the 13 judges Bench of Supreme Court of India in *Kesavanand Bharati*[93] case which laid down certain board propositions.

(1) There is no disharmony between the Directive Principles and Fundamental Rights because they supplement each other in aiming at the same goal or bringing about a social revolution and the establishment of a welfare state which is envisaged in preamble (2) even the conditions for exercise by each individual of his Fundamental Rights cannot be ensured until the Directives are implemented (3) the Parliament is competent to amend the Constitution to override and abrogate any of the Fundamental Rights in order to enable the state to implement the Directives so long as the basic structure of the Constitution are not effected.

The Courts thus have a responsibility in interpreting the Constitution to ensure the implementation of Directives and to harmonise the social objectives underline the Directives with the individual rights. It necessarily follows that the Courts should as far as possible, legislation enacted by the state to ensure distributive justice the laws which seek to remove inequalities and also attempt to achieve a fair division of wealth among the members of the society redressing unconstitutionable or unfair bargains.[94]

The Courts while applying the doctrine of harmonious construction held that the Directives are to adjust the ambit of Fundamental Rights themselves to give liberal interpretation to the ambit of Legislative entry so as to make it possible for the legislature to implement the Directives. In the recent cases though the Directives *per-se* cannot enforceable by the Courts nor can the Court compel the state to undertake legislation to implement the Directive, the Supreme Court has been issuing various directions to the Government and the Administrative authorities to take positive action to remove the grievances which has been caused by non-implementation of Directives. Directives are thus being enforceable directly by the Court by issuing suitable directions.[95]

The problems of gathering relevant facts-how can the Court know the social reality. The Supreme Court, in exercise of its power under Article 32 and Supreme Court rules, invoked the power to appoint inquiry Commissions as to certain Various

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[93] *Kesavanand Bharati* v *State of Kerala*, AIR 1973 SC 1461.
[94] *Lingappa* v *State of Maharastra*, AIR 1985 SC 385.
[95] *Id.*

facts. In the *Bandhua Mukti Morcha* case[96] the Court appointed two advocates as Commissioners to inquire into the conditions of workers. They reported *inter-alia*, that there was pollution of air and water. The report disclosed that the condition of workers were worst than animals. These reports were treated by the Supreme Court as *prime facie* evidence on behalf of bonded labour.

In *D.S Nakara* v. *Union of India*[97] Court held that Articles 39, 41 and 43 aimed at establishing a socialist state as envisaged by the Preamble which would endeavor to secure a decent standard of life and economic security to the working people. To most of workers the "right to work" is primarily concerned with the maintenance of full employment, the availability of suitable work for which worker is trained and job security by way of protection from arbitrary dismissal.

Some of the important social pieces of legislation towards the achievement of the cherished goals of the Constitution are Industrial Disputes Act, Beedi and Cigar workers (conditions of employment) Act 1966, Dock workers (regulation of employment) Act 1948, the Factories Act, 1948, the Mines Act, 1952, the Motor Transport Workers Act 1961.

The various protective provisions were aimed at ensuring that the workmen are not unduly subjected to unemployment, thereby upholding their right to work[98].

In this regard, it is also pertinent to refer to Dock workers (regulation of employment) Act 1948 which comes closer to the labour legislation "right to work" in a sense right to be engaged for employment.

Similarly in *Beedi* and Cigar workers Act the authorities are constituted to ensure that these casual daily, home workers, *Adhoc* labour get the work continuously. In fact this legislation is in the right direction in tune with the doctrine of right to work. The Factories Act 1948, Minimum Wages Act 1948, Employees State Insurance Act 1948, Contract Labour (Regulation and Abolition) Act 1970, Maternity Benefit Act 1961, Motor Transport Workers Act 1961, etc. are clearly intended to ensure basic human dignity to workmen. Any violated of these provisions would be violative of Article 21 of the Constitution of India. Suitable provisions have been made for redressal when workmen are terminated from service. Therefore,

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[96] *Bandhua Mukti Morcha* v *Union of India*, AIR 1992 SC 38
[97] AIR 1983 SC 130
[98] Industrial Disputes Act, 1947

though the right to work is a Directive under Article 41, the legislation conferred various legal protective umbrellas to ensure that the employees are not thrown out of employment. It is not a myth, but a real and effective right.

(ii) Judicial Activism

Millions of persons belonging to the section of humanity have been looking to the Courts for improving their life conditions and making their basic human rights meaningful for them. They have been crying for justice. *Mahatma Gandhi* once said to *Gurudev Tagore* "I have had the paid of watching birds, who for want of strength could not be coaxed over into a floater of their wings. The human bird under the Indian sky gets up weaker than when be pretended to retire. For million it is an external vigil or an eternal trace". [99]

In case of federation of *All India Stenographers (Custom & Central Excise) and other v Union of India and other*[100]. The principle of equal pay for equal work was sought to be distinguished by the Supreme Court in certain cases where slight distinction is drawn in the nature of duties.

The Supreme Court only not directed the employees working Nehru Yuvak Kendra to pay the wages to class IV employees at par with the regular employees by stating that the casual employees accepted employment with full knowledge that they will be paid only daily wages and that they will not get the same salary and conditions of service as other class IV employees cannot be a ground to avoid mandate to equality enshrined in Article 14 of the Constitution.

Daily Rated Casual Labour Employed under P & T v Union of India[101]. the Supreme Court has been most eloquent about the problem of *adhoc* casual employees. Workers in P and T, department, wherein the observations are note worthy. "India is a socialist republic it implies the existence of certain important obligation which the state has to discharge.

The right to work, right to free choice of employment, the right to just and favourable condition of work, right to protection against unemployment the right of everyone who works to just and favourable remuneration ensuring a decent living for

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[99] Bikashapathy Sri G, "Right to work- Its Constitutional Aspect VI (III) *CILQ* (1993) at 303

[100] AIR 1988 SC 1291

[101] AIR 1987 SC 2342

himself and family the right of everyone without discrimination of any kind to equal work the right to rest leisure, reasonable limitation on working hours and periodic holiday with pay, the right to form trade union, and right to security of work are some of the rights which have to be ensured by appropriate legislative and executive measures. Similarly in U.P. *Income tax Department Contingent paid Staff Welfare Association* v. *Union of India*[102] the Supreme Court issued directions to regularize their services.

In *Bhagwati Prasad* v. *Delhi State Mineral Development Corporation*[103] the principle of equal pay and regularization of services was involved. One of the contentions raised by the employers that they cannot be regularized as they did not posses the minimum educational qualification for regular service. This was dispelled by the Supreme Court, by saying "Once the appointments are made as daily workers and they were allowed to work for considerable length of time, it would be hard and harsh not to confirm them in respective posts on the ground that they lack the prescribed educational qualifications".

The right to work almost has been crystalised into a substantive right Fundamental in nature through various notable judgment of the Supreme Court of India. However, as a feather in cap of the labour, the government of India has decided to amend the Constitution, providing right to work as Fundamental Right. Justice Raina had rightly perceive. The difficulties and legal problems which would arise if right to work is declared a Fundamental Right. He says –

> *"It must be realized that if we amend the Constitution so as to make the right to work a Fundamental right casting a duty on the state to provide employment to each person numerous in surmountable difficulties would crop up. The first question that would arise is as to what would be the upper age and lower limits of the age of which a person shall be entitled to claim this right".*[104]

In order to avoid further complication that would arose if right to work is declared a Fundamental right it would be a right and arise step if the state strives to achieve only the objectives enshrined in the Preamble to the Constitution. The Preamble is the sole depository of legitimate aspiration of the Indian citizens.

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[102] AIR 1988 SC 517
[103] AIR 1990 SC 371
[104] Raina S.M.N. (Justice), "A Fresh look at Right to Work",IV. *CILQ* (1990) at 324

(iii) Right to Public Employment Vis-à-Vis Right to Work

These two rights travel on different tracks but they aim at attaining the common goal for fulfillment of socialistic republic. "Whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use, enjoyment and deposition of"[105] security of employment had no place in common law. Award of monetary damages was the only solace to the employee where he establishes a breach of contract. Now, the law changed and revolutionized. With the advent of industrial society, fragmented by high walls of division of labour, the state of law was found inadequate. Today, no right stands on a greater need of legal protection than the right for public employment. Man's life and personal liberty and other basic rights cannot be enjoyed by him while being unemployed. As full employment is the Keynesian ideal of modern economy, the protection of right to public employment has become the Constitutional ideal of a welfare state.

In *Sukhdev Singh* v *Bhagat Ram*[106] *Justice Mathew*, had held that public employment is a species of property. *Justice Ramaswamy K.* (as he then was) after churning the entire case law foreign and India held that right of employment is modicum of Fundamental Right[107] *Justice Chowdhary* of A.P. High Court while sitting in Full bench in District Manager, *APSRTC* v. *Labour Court*[108] observed "law is today prepared to recognize and protect the right to public employment as a right of new property the employment of which is necessary for the exercise of the creative faculties of man". The judgment was referred by the Supreme Court in *State of Maharashtra* v *Chandrabhan*[109]. However while agreeing with *Justice Varadarajan*, *Justice Chinnappa* Reddy observed "I am afraid it is a non-sequitur and as at present advised I wish to guard myself against accepting the view that the right to opportunity to public employment may be treated as a new form of private property with the attributes of competitive exploitation".

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[105] Cooley – Constitutional Law, 392.
[106] AIR 1975 SC 1331.
[107] *Supdt. of Post Offices* v *Vasavya*, Andhra Weekly Reporter, 1984.
[108] AIR 1980 AP. 316.
[109] AIR 1983 SC 803.

(iv) Right to Work and its Concern in other Countries

Peter Townsend, in his work on Survey of Poverty in the United Kingdom[110] revived the proposal that there should be 'legally enforceable right to work' for everyone over the age of compulsory education, with corresponding obligation on the part of employers, the Government and especially local authorities, to provide alternative types of employment. He was primarily concerned with the social security system. Townsend had, in this proposal, touched some of the most sensitive nerves in the complex organism of labour relations. Can individual legal right contribute to substantive justice as distinct from procedural justice? Do individual right hamper or do they help, collective action to safeguard jobs and living standards? Does the statutory 'floor' of minimum employment rights reinforce or does it reduce the relative deprivation of the lower ranks in the hierarchy of states of employment; sub employment and unemployment? Most of these questions lies in the fact that since the 1960s, there has been a dramatic expansion of protective legislation which confers individual legal rights upon employees. The right to work is a value – laden phrase. It must be distinguished in various sense in which it is used. It may indicate, first a right against the state, secondly a right against the employer' and thirdly, a right against workers and trade unions.

It is common to speak of an abstract 'back ground right of the individual requiring the state to maintain a full employment policy to protect the opportunity of every worker to earn his living in an occupation freely entered upon, to establish and maintain free employment service for all workers and to provide and promote vocational training. Lord Denning who since 1952 has championed the idea that 'a man right to work is just as important to him as, if not more important then, the right of property". The Courts intervened everyday to protect the rights of property. They must also intervene right to work[111]. The European social, charter, Article 1 describes the 'right to work', as do the Constitution of some western democracies such as Article 4 of the Italian Constitution. The Constitutions and Labour codes of the European socialist countries also proclaim the 'right to work' in the sense of the guarantee of employment. This is not a right to any particular job but in the words of Article 40 of the USSR Constitution of October 7, 1977 is in accordance with the

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[110] Peter Townsend – *Poverty in the United Kingdom* – A survey of Household resources and standard of living (1979).

[111] *Lee Showman's Guide of G.B.* 1952 *QB* 329

abilities, training and education of individual and 'with the due account of the needs of society'. Moreover it is a 'right' only in the sense of a political goal because it is used to be ensured by the socialist economic system, steady growth of the productive forces, free vocational and professional training improvement of skills, training in new trades or professions, and development of the systems of vocational guidance and job placement"[112] what distinguishes the 'right to work' in these countries. From the 'right to work' in the European Social charter apart from the Fundamentally different political and economic methods used to achieve full employment is that in those countries there corresponds to the abstract background 'right to work' a concrete legal duty to work and strictly to observe labour discipline. Article 10(2) of Labour Code of polish peoples Republic provides. "The Right to work shall be protected according to the rules laid down in this Labour Code and is special provisions"[113] Evasion of socially useful work' declares. Article 60 of the USSR Constitution. "it is incompatible with the principles of socialist society". Any such legal duty to work does not – indeed cannot form part of the legal system of a "capitalist' – market economy except in times of war emergency, when the state assumes the role of directing labour. This is expressly recognized by section 16 of the Trade Union and Labour Relations Act 1974 (re-enacting a provision of the 1971 Industrial Relations Act and codifying a principle long observed by Courts of equality) which provides that no Court shall, whether by way of an order for specific performance..... of (a) a contract of employment or (b) an injunction restraining a breach of threatened breach of such a contract, compel an employee to do any work or attend at any place for the doing of any work. "While in the socialist countries the duty to work is derived from the abstract "Right to work" and forms a Fundamental part of labour law", in England the duty to work forms a part only of social security law since it is a condition for the receipt of various social benefits that a person is not voluntarily unemployed is not dismissed for misconduct and is available for employment[114]. In other words the duty to work. The Bill on Right to Work in England was not introduced as the emphasis was shifted to Right to Maintenance, whereby the principle of compulsory Insurance scheme was introduced. In Netherland according to extraordinary decree on labour

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[112] Constitution (Fundamental Law) of the Union of Soviet Socialist Republic (Eng. Trans. 1977)

[113] Labour Code of the Polish people Republic (Eng. Trans. Polish Academy of Science, 1979).

[114] A.I. Ogus and E. Barendt – *The Law of Social Security* London, 1978 H. Calvert *Social security Law* London 1978

relations 1945[115] an employment relationship can be terminated only with the prior consent of District Labour office. A dismissal without his consent is void and employer shall pay wages as long as the employee is willing to work.

Prof. Bob Hepple of University of kent in his lecture on "Right to work? Concluded, "My conclusion is pessimistic one for those who place their faith in legally enforceable right to work as a means of enlarging access to jobs, particularly for those in low paid discontinuous employment without the benefit of strong collective organizations. I would insist that there is a Fundamental distinction between participation in productive employment and participation in social security and that any attempt to create a individual right obliging local authorities to provide alternative forms of employment would in practice be only a right to social assistance[116].

From various surveys conducted in other countries it is concluded that the redressal of grievances through the media of arbitration, adjudication take considerable time. Most of the employees either terminated or made to resign prefer compensation rather than reinstatement as it would not be possible from them to wait for a long time. In India, condition of labour is very precarious. Once terminated, it would be difficult for the workmen to get employment, not due to surplus man power, but the ghost haunting tactics adopted by the employers to see that the terminated employee does not get job elsewhere. This is one of the reasons why Indian labour depends on labour tribunals for relief's it may take years / decades. By gone were the days of hire and fire. The doctrine of absolute freedom of contract has thus to yield to the higher claims of social justice. The right to dismiss an employee is also controlled subject to well recognized limits in order to guarantee security of tenure to industrial employees. It is now too late in the day to stress the absolute freedom of an employer to impose any condition as he likes on labour. It is important to remember that just as the employer's right to exercise his option in terms of the contract has to be recognized so is the employees right to expect security of tenures to be taken into account. The concept of social justice has now become such an integral part of industrial law that it would be idle for any faculty to suggest that industrial adjudication can or should ignore the claims of social justice in dealing with industrial disputes.

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[115] Annsoms E.J.W. and Bakels H.L. - *Job Security and Industrial Relations in the Netherlands Bulletin of Comparative Labour Relations* No 11(Leuven 1981).

[116] Sidney Ball Lecture on '*Right to work*' in the University of Oxford February 15, 1980

(b) Working Condition

Article 42 provides the basis of the large body of labour law that obtains in India. Referring to Articles 42 and 43 the Supreme Court has emphasized that the Constitution expresses a deep concern for the welfare of the workers. The Courts may not enforce Directive principles as such, but they must interpret laws so as to further and not hinder the goals set out in the Directive principles[117].

In *D.B.M. Patnaik* v *State of Andhra Pradesh*[118] the Supreme Court has suggested that Article 42, may 'benevolently' be extended to living conditions in jails. The labour and subtle forms of punishment, to which convicts and under trails are subjected to offend against the letter and spirit of our Constitution.

By reading Article 21 along with several Directive Principles, such as Articles 39(e) and (f), 41 and 42, the Supreme Court has given a very broad connotation to Article 21 so as to include therein "the right to live with human dignity. This concept 'derives its life breath from the Directive Principles of State Policy"[119]

One of the elements promoting dignified life is the Right to Education. The Supreme Court in *Mohini Jain*[120] sought to give a very broad connotation to the right to education. The Court said "The state is under a Constitutional mandate to provide educational institutions at all levels for the benefit of the citizens".

The Delhi Municipal Corporation granted maternity leave to regular female workers but denied the same to female workers on muster roll on the ground that their service not having been regularized, they were not entitled to any such leave. Invoking Article 42 and the concept of social justice, the Supreme Court has conceded the demand of these female workers for maternity leave. The Court has emphasized that a just social order can be achieved only when inequalities are obliterated and every one is provided what is legally due[121].

(i) Ventilation and Temperature

According to section 13(1) of the Factories Act 1948, effective and suitable provision shall be made in every factory for securing and maintaining in every work room:

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[117]. *U.P.S.E. Board* v *Hari Shankar*, AIR 1979 SC 65: (1978) 4 SCC 16.
[118]. AIR 1974 SC 2092: (1975) 3 SCC 185.
[119]. *Bandhua Mukti Morcha* v *Union of India*, AIR, 1984 SC 802.
[120]. *Mohini Jain* v *State of Karnataka*, AIR 1992 SC 1858 at 1864.
[121]. *Municipal Corporation of Delhi* v *Female workers* (Muster Roll), AIR 2000 SC 1274.

(a) adequate ventilation by the circulation of fresh air and

(b) Such a temperature as will secure to workers therein reasonable conditions of comfort and prevent injure to health.

It is further provided that walls and roofs shall be of such material and so designed that such temperature shall not be exceeded but kept as low as practicable. Where the nature of the work carried on in the factory involves, or is likely to involve, the production of excessively high temperatures, such adequate measures as are practicable shall be taken to protect the workers there from, by separating the process which produces such temperatures from the work-room, by insulting the hot posts or by other effective means.

Section 13(2) empowers the State Government to prescribe a standard of adequate ventilation and reasonable temperature for any factory or class or description of factories on part thereof. The state government may also direct that proper measuring instruments, at such places and in such position as may be specified, shall be provided and such records, as may be prescribed, shall be maintained.[122]

(ii) Lighting

According to section 17(1) every part of the factory, where workers are working or passing there shall be provided and maintained sufficient and suitable lighting, natural, artificial or both.[123]

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[122] *Section* 13(3) if it appears to the chief Inspector that excessively high temperatures in any factory can be reduced by the adoption of suitable measures, he may, without prejudice to the rules made under sub-section (2) serve on the occupier, an order in writing specifying the measures which in his opinion, should be adopted and requiring them to be carried out before a specified date.

[123] *Section* 17(2) of the Factories Act lays down that in every factory all glazed windows and sky-lights used for the lighting of the work rooms shall be kept clean on both the inner and outer surfaces and so far a compliance with the provisions of any rules made under sub-section (3) of section 13 will allow, free from obstruction. Section 17(3) requires that in every factory effective provisions shall so far as practicable, be made for the prevention of – glare either directly from a source of light or by reflective from a smooth or polished surface; the formation of shadows to such an extent as to cause eye-strain or the risk of accident to any worker. Section 17(4) lays down that the state Government may prescribe standards of sufficient and suitable lighting for factories or for any class or description of factories or for any manufacturing process.

(iii) Drinking Water

Section 18 deals with the provisions relating to arrangements for drinking water in factories sub-section (1) provides that in every factory effective arrangements shall be made to provide and maintain at suitable points conveniently situated for all workers employed therein, a sufficient supply of wholesome drinking water.

Sub-section (2) provides that all such points shall be legibly marked "drinking water" in a language understood by a majority of the workers employed in the factory and no such point shall be situated within six meters of any washing place, urinal, latrine, spittoon, open drain carrying sullage or effluent or any other source of contamination unless a shorter distance is approved in writing by the chief inspector.

Latrines and Urinals in the Factories premises:

a) sufficient latrine and urinal accommodation of prescribed type shall be provided conveniently situated and accessible to workers at all times while they are at the factory;

b) Separate enclosed accommodation shall be provided for male and female workers;

c) Such accommodation shall be adequately lighted and ventilated, and no latrine or urinal, shall, unless specially exempted in writing by the chief inspector, communicate with any workroom except through an intervening open space or ventilated passage.

d) All such accommodation shall be maintained in a clean and sanitary condition at all times;

e) Sweepers shall be employed whose primary duty would be to keep clean latrines, urinals and work-places.

Sub-section (2) of Section 19 lays down that in every factory wherein more than two hundred and fifty workers are ordinarily employed –

a) all latrine and urinal accommodation shall be of prescribed sanitary types;

b) the floors and urinal walls up to a height of ninety centimeters of the latrines and urinals and the sanitary block shall be laid in glazed tiles or otherwise finished to provide a smooth polished impervious surface;

c) without prejudice to the provisions of clauses (d) and (e) of sub-section (i) the floors, partitions of the walls and blocks so laid or finished and the sanitary pans of latrine and urinals shall be thoroughly washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.[124]

[124] *Section* 19(1) of the Factories Act 1948.

(iv) Work on or near Machinery in Motion

No woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman or young person to risk of injury from any motoring part either of that machine or of any adjacent machinery.[125]

(v) Prohibitions of Employment of Women and Children near Cotton Openers

Section 27 lays down that no women or children shall be employed to any part of a factory for pressing cotton in which a cotton opener is at work. But if the feed end of a cotton opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the inspector may in any particular case specify in writing, women and children may be employed on the side of the partition where the feed end is situated.

(vi) Dust and Fume

Every factory in which by reason of the manufacturing process carried on, there is given off any dust or fume or other impurity of such a nature and to such an extent as is likely to be injurious or offensive to the workers employed therein, or any dust in substantial quantities, effective measures shall be taken to prevent its inhalation and accumulation in any work-room. If any exhaust appliance is necessary for the above purposes; it shall be applied as near as possible to the point of origin of the dust, fume or other impurity and such point shall be enclosed as far as possible.[126]

According to section 14 (II) In any factory no stationary internal combustion engine shall be operated unless the exhaust is conducted into the open air, and no other internal combustion engine shall be operated in any room unless effective measures have been taken to prevent such accumulation if fumes there from as are likely to be injurious to workers employed in the room.[127]

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[125] *Section* 22 (2) of the Factories Act 1948.

[126] *Section* 14(1) of the Factory Act, deals with the effective measures which should be adopted to keep the work- rooms free from dust and fume.

[127] *Section* 14 (II) of the Factory Act, 1948.

(vii) Restrictions on Employment of Women

Section 66 (i) lays down that the provisions of this chapter shall, in their application to women in factories, be supplemented by the following further restrictions namely:

a) No exemption for the provisions of section 54 may be granted in respect of any woman;

b) No woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m. But the state Government may by notification in the official gazette, in respect of any factory or group or class or description of factories vary the limit laid down in clause (b) in such a manner that in no case any such variation shall authorize the employment of any woman between the hours of 10 p.m. and 5 a.m.;

c) there shall be no change of shifts except after a weekly holiday or any other holiday section 66 (2) empowers the state Government to make rules providing for the exemption from the restrictions set out in sub-section (i) to such extent and subject to such conditions as it may prescribe of women working in fish curing or fish-canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to, or deterioration in, any raw material. Section 66 (3) provides that the rules made under sub-section (2) shall remain in force for not more than three years at a time.

The Royal Commission on Labour in its report has pointed out that "the main arguments in favour of fixing the maximum for women's hours at lower levels than those prescribed for men are that women have domestic duties to perform and that they find long hours as a greater strain".

Where women workers in a textile factory voluntarily ousted and otherwise regulated their spinning loom for their own satisfaction and comfort about twenty minutes before the statutory hour for beginning work: it was held that the woman had not been employed before the statutory hour[128]. "The inspector has no right to issue a general prohibition against employment of woman at night without going into the question whether the staff is sufficient[129].

(C) EQUAL PAY FOR EQUAL WORK

For ages those belonging to lower echelons of the society in India have suffered discrimination and unequal treatment in various forms both at the hands of the rulers and the society. The history of India before its independence is replete with

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[128]. *Peterson* v. *Duke*, (1904) 6 F 53.
[129]. *J.N. Coudas* v. *Emperor*, AIR 1921 All 229.

large scale exploitation of the illiterate masses. The Government of the day sanctioned exploitative practices. The rulers connived with the richer class and shut their eyes to the system of bonded labour, usurpation of land of the poor and other evil practices. The victims suffered heavily on the social and economic front. That is why the framers of the Constitution mandated that the state would direct its policy towards securing, *inter alia*, equal pay for equal work for both men and women[130].

Parliament has enacted the Equal Remuneration Act, 1976, to implement Article 39(d), of the Constitution of India. The act provided for payment of equal remuneration to men and women workers for the same work, or work of a similar nature and for the prevention of discrimination on grounds of sex. The act also ensure that there will be no discrimination against recruitment of women and provides for the setting up of advisory committees to promote employment opportunities for women. A provision is also made for appointment of officers for hearing and deciding complaints regarding contravention of the provisions of the Act.

Inspectors are to be appointed for the purpose of investigating whether the provisions of the Act are being complied by the employers. Non observance of the Act by government contractors has been held to raise questions under Article 14. Paradoxically the socialist state of India, in disregard of the Constitutional policy, has largely carried on the legacy of the past and denied to a vast number of daily wage employees equal pay for equal work.[131]

Besides the principle of gender equality in the matter specifically embodied in Article 39(d). The Supreme Court has extracted the General principle for equal pay for equal work be reading Article 14, 16 and 39(d) the Supreme Court has emphasized in *Randhir Singh* v. *Union of India*[132], referring to Article 39(d), that the principle of "Equal Pay for Equal Work" is not an abstract doctrine but one of substance.

Justice Chinnappa Reddy, gave it content by declaring that it is no "more demagogic slogan" but a "Constitutional goal" capable of being achieved through Constitutional remedies and enforcement of Constitutional rights. He hailed "the rising social and political consciousness and the expectations aroused as a

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[130]. *Article* 39(d) Constitution of India provides: *Equal pay for equal work.*
[131]. *See*, e.g. *Surindar Singh* v *Engineer in Chief* CPWD, AIR 1986 SC 584
[132]. AIR 1982 SC 879.

consequence" among the under privileged who are now seeking the Courts intervention to protect and promoted their rights.

The judge interpreted the Directive Principle of equal pay for equal work for both men and women as "equal pay for equal work for everyone guaranteed by Article 14 securing equality before the law and by Article 16 equality of opportunity in matters of public employment. The equality provisions and the term "socialist" in the preamble will be meaningful to the vast majority of the people only if equal work draws equal pay; otherwise it will lead to unrest imperiling peace and harmony of the society. In this context the judge said:

> *"The principle of equal pay for equal wok is deducible from Articles 14, 16 and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer"*

Accordingly the respondent was directed to fix the scale of pay of driver – constable of the Delhi Police Force at least as par with that of Drivers of railway Protection Force both doing identical work under the same employer.

The *Randhir Singh*[133] verdict, though cautiously restricted to "identical work under the same employer", is an excellent example of judicial creativity and has tremendous potential to bring justice to numerous employees who are the real but neglected lot at the base of nation building. A critic greeted the actual decision in the case but doubted whether its *ratio decidendi* could easily be implemented. It seems the doubt was the result of his thinking of disparities in wage structure in various sectors of public employment[134].But given the political will and administrative concern, the principle with its limited scope should pose no problem in its effective implementation.

Another critic mounted a scathing attack on the judgment. He charged the Court with a lack of serious thinking about the disastrous consequences of its ruling and was convinced that it would open a floodgate of litigation that the central and state governments would go in liquidation if parties in pay scales of their employees and those of public undertakings were enforced. In his view, the goal could be achieved through a gradual and slow process of change of the nation as a whole, not

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[133] *Randhir Singh* v *Union of India*,AIR 1982 SC 879

[134] Sathe S.P., "Constitutional Law – I, XVIII *ASIL* (1982) at 302.

by a decree of the Court.[135] The criticism is both baseless and opposed to reason. The ruling has not resulted into explosion of litigation; the governments are not doomed, and the public exchequers are not emptied. The decisions have restricted application, and its economics have been thoroughly misunderstood. Its countrywide implementation, even at very level of public employment, would not cost the treasury even a fraction of the wasteful expenditure the governments and public undertakings knowingly incur.

The Supreme Court has played an activist role as the Apex Court of this country since *Menaka Gandhi* v. *Union of India*[136] in providing relief in a variety of situations to the poor and the oppressed in arousing people's consciousness about their rights and duties and in reminding slumbering sentinels of the nation of their assigned task otherwise the critic would not has excluded the judiciary from participating in the development role assigned to the state.

The *Randhir Singhs* decision was affirmed and expanded within two years by a Constitution bench of the Supreme Court in *D.S. Nakara* v. *Union of India*[137] giving relief to pensioners. Justice Desai, representing the Court, explained the objective of a socialist state thus:

> *"The principal aim of a socialist state is to eliminate inequality in income and status and standards of life. The basic framework of socialism is t o provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged equality and equitable distribution of income. This a blend of Marxism and Gandhism leaning heavily towards Gandian socialism.*[138]

Within a period of about two years of it s affirmation and expansion in D.S.Nakara. the *Ranadhir Singh's* ruling was followed by the Supreme Court in several cases, for example, *Ramachandra Iyer* v. *Union of India*[139] and *P. Santa* v. *Union of India*[140].

In the former, the irrational and arbitrary differential treatment in the matter of pay scale accorded to some professors by the Indian Council of Agricultural Research

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[135] Quoted in Mittal J.K., "*Casual Labour and Equal pay for equal work*," XXVI *JILI* (1986) at 261
[136] AIR 1978 SC 597
[137] AIR 1983. SC 130
[138] *Id* at 139
[139] AIR 1984 SC 541.
[140] AIR 1985 SC 1124.

was struck down and the revised pay scale granted. Similarly, the latter saved the equality doctrine from being flouted by authorities under the cover of artificial division of senior draughtsman in the Ministry of defence Production resulting unequal scales of pay for the same work.

It is evident that the exposition in of Constitutional law in *Randhir Singh* added new dimension to service jurisprudence. It, however, gave rise to some whispering dissent in that the doctrine was extended beyond permissible limits[141].

In *Mool Raj Upadhyaya*[142] class III and class IV employees working as daily wages in the irrigation and public health wings of Himachal Pradesh Public works department sought regularization and parity of pay with regular employees of the State Government on the principle of equal pay for equal work. Some of these employees had served for more than 10 years as daily wages.

The Court was informed that under a "scheme for Betterment (appointment) Regularisation of master roll daily wages in Himachal Pradesh" prepared by the state government it was willing to regularize daily wage works that have completed 10 years service and place them on work charge cadre.

The Court modified the scheme of regularization and made it operational from 1.1.94. It however did not direct the state to pay arrears to the employees who had served for more than ten years on the date of regularization.

The Courts substituted paragraphs 1 to 4 of the scheme to the following effect:

1. Daily wage / muster roll workers, both skilled and unskilled who have completed 10 years or more of continuous service with 240 days, in a calendar year on 31.12.1993, shall be appointed as work charged employees from 1.1.1994 with pay scale applicable to the lowest grade.
2. Those with lesser service shall be appointed as work charged employees as and when they complete the requisite length of service.
3. Meanwhile they shall be paid daily wages at the rates prescribed by the government for class II and class IV employees; and
4. They shall be regularized in a phased manner on the basis of seniority cum suitability including physical fitness. On regularization they shall be given the time scale and other

[141] *See Id* at 1127.
[142] *Mool Raj Upadhyaya* v *State of H.P.* (1994) Supp (2) SCC 316.

benefits as applicable to regular employees of the corresponding lowest scale.

The Court rightly restrained the employees from recovering the excess amount of pay, if any, received by class III and class IV employees under its *interim* orders passed earlier. With respect, it is submitted that, the Court could have ordered the state to pay arrears to the employees who had put in more than ten years of service on the date of regularization. The Court need not have taken notice of the additional financial burden on the state exchequer. After all payment of a few thousand rupees would not have been such a burden on the states whereas it would have been a great help to the poor daily rated employees for whom existence itself is a daily struggle.

The principle of equal pay for equal work has no mechanical application in every case of similar work was once again stressed by the apex Court in *State of Haryana* v *Jasmer Singh.*[143] The quality of work performed by different sets of persons holding different jobs will have to be assessed, evaluated and determined by an expert body before arising at a conclusion. A more nomenclature designating a person as a carpenter or a craftsman is not enough to conclude that he is doing the same work as another carpenter in regular service. Comparison cannot be made with counterparts in other establishments with different locations though owned by the same management. The equality of work which is produced, the accuracy required and the density that the job may entail, may differ from job to job. Educational or technical qualification, age mode of recruitment, etc may also vary.[144]

In the instant case the respondents were employed as *Mali*-cum-*Chowkidars* pump operators on daily wages by the state of Haryana from different dates. They prayed for same salary as was being paid by the state to their employees in regular employment on the basis of equal pay for equal work the Punjab and Haryana High Court directed the state to pay the respondents the same pay and allowances as was being paid to regular employees holding similar posts from the date of their employment.

In appeal to the Supreme Court the Court opined that the principle of 'equal pay for equal work" was not always easy to apply since there were inherent

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[143] (1996) 11 SCC 77.

[144] *See, State of U.P.* v *J.P. Chaurasia* (1998) 1 SCC 121; *Mewa Ram Kanojia* v *All India Institute of Medical Sciences*, (1989) 2 SCC 235; *Harbanslal* v *State of H.P.* (1989) 4 SCC 459 and *Ghaziabad Development Authority* v *Vikram Chaudhury*, (1995) 5 SCC 210.

difficulties in comparing and evaluating work done by different persons in different organizations or even in the same organization.

The respondent in the instant case, were not required to possess the prescribed qualification of the regular workers, nor were they required to fulfill the age requirement at the time of recruitment. They were also not selected in the manner in which the regular employees were selected. Besides, the regular workers could be transferred as and when required and were also subjected to the disciplinary jurisdictions of the authorities as prescribed, the Court held, they could not be equated with regular workmen for the purpose of their wages. However, if a minimum wage was prescribed for such workers, the respondent would be entitled to it if it was more than what they were actually being paid[145]

The Supreme Court has applied well settled law that the doctrine of Equal pay for equal work does not complete that only because the nature of the work is same, irrespective of their source of recruitment or other relevant considerations the said doctrine would be automatically applied. The holders of a higher educational qualification can be treated as a separate class such classification, it is trite, is reasonable[146]

In *U.P. Rural Agriculture Extension officers Association* v *State of M.P.*[147] the Supreme Court held that two different pay scales could be provided in the same cadre on the basis of educational qualification even if nature of work is the same and posts are inter changeable.

Whether advocates working as part time lecturers in Law College appointed purely on contractual basis can claim minimum scale of pay of assistant professor? This question was considered by the Supreme Court in *Apangshu Mohan Lodh* v. *State of Tripura*[148]. It was rightly held that their claim was not maintainable since their appointment was not in terms of the relevant statutory provisions but only contractual. Moreover, when the post of part time lecturer was not contemplated as a cadre post under the relevant service rules.[149]

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145 Supra note 37 at 81-82

146 *Govt. of W.B.* v *Tarun K. Roy*, (2004) 1 SCC 347 at 355

147 (2004) 4 SCC 646, *See also Union of India* v *Manu Dev Arya*, (2004) 5 SCC 232 at 235

148 (2004) 1 SCC 118. *See also Vijay Kumar* v *State of Punjab*, (1995) Supp (4) SCC 573

149 Quoted in Jaswal Paramjit S., Constitutional Law, I XL *ASIL* (2004) 88.

(D) RIGHT TO PROPERTY OF WOMEN

Men and women both constitute the basic of the family and therefore of society. A society is impossible without a family and there cannot be a family without a woman. It is said that the position of women in any society is a significant indicator of the level of culture and mortality of that society[150].

Much like those of women of any other country, property rights of Indian women evolved out a continuing struggle between the status quest and the progressive free and pretty much like the property rights of women elsewhere, property rights of Indian women too are unequal and unfair, while they have come a long way ahead in the last century, Indian women still continue to get less rights in property than the men, both in terms of quality and quantity.

What may be slightly different about the property rights of Indian women is that along with many other personal rights, in the matter of property rights too the Indian women are highly divided within themselves. Home to diverse religions, till date, India has failed to bring in a uniform civil code. Therefore, every religious community continues to be governed by its respective personal laws in several matters property rights are one of them. In fact even within the different religious groups, there are sub-groups and local customs and norms with their respective property rights. Thus *Hindus, Sikhs, Buddhists* and *Jains* are governed by one code of property rights codified in the year 1956, while Christians are governed by another code and the Muslims have not codified their property rights, neither the *Shias* nor the *Sunnis*. Also, the tribal women of various religions and states continue to be governed for their property rights by the customs and norms of their tribes. To complicate it further, under the Constitution, both the central and the state governments are competent to enact laws on matters of succession and hence the states can, and some have, enacted their own variations of property laws within each personal law.

There is therefore no single body of property rights of Indian women. The property rights of the Indian women get determined depending on which religion and religious school she follows, if she is married or unmarried which part of the country she comes from, if she is a tribal or non-tribal and so on.

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[150] Chawla Manika (Dr.), Rights of female, XVII *CILQ* (2005) 443.

Ironically, what unifies them is the fact that cutting across all those divisions, the property rights of the Indian women are immense from Constitutional protection; the various property rights could be as they indeed are in several ways, discriminatory and arbitrary, not withstanding the Constitutional guarantee of equality and fairness. For, by and large, with a few exceptions, the Indian Courts have refused to test the personal laws. On the touchstone of Constitution to strike down those that are clearly unconstitutional and have left it to the wisdom of legislature to choose the time to frame the uniform Civil Code as per the mandate of a Directive principle in Article 44 of the Constitution.

(1) Women's Property Right in Vedic Period

Women in the Vedic age appear to have enjoyed a comparatively higher status than that enjoyed by their sister in the post Vedic age.[151] In the Vedic age women held great respect and enjoyed considerable rights and privileges. A girl was free to get herself educated just as a boy in those days. During the Vedic period, study started after the thread ceremony, which was called "*Upnayan Samsakar*". There are many statements in Vedic literature, which indicate clearly that women were under going *Upnayan Samskara* studied holy scriptures and recited mantras. In the *Rig-Veda*, women who wore the sacred thread were considered capable of many responsible jobs.[152]

The *Rig-Veda* speaks about the individual proprietorship of a log of wood,[153] the sons dividing fathers property after the demise of father[154] unmarried daughter staging in father's home and asking for a share of a father's property.[155] In one *Rik* it is said. "A begotten son does not give paternal wealth to his sister" he gets her married.[156]

These *Rig-Vedic* quotations reflected that the private property was an established institution of the time. The sons used to inherit their fathers property after his demise and used to divide it among themselves. Also unmarried daughters got a share of their fathers property, but the brothers did not partition their paternal property

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[151] *Sri Debaprasad Kar, The Status of Hindu Women*, Past and present (1978) XIV) CLT (*Journal*)
[152] *Rig-Veda*, X, 19,4
[153] *Rig-Veda* X, 155,3
[154] *Id* at III, 51, 2.
[155] *Id* at II, 17, 7.
[156] *Id* at III, 31,2.

with their married sister. The status of daughters son was well recognized at that time but only for religious functions. It was said that "the sonless father honoring the son-in-law, goes to the grand son born of the daughter. The sonless father lives pleasantly hoping that the daughter will give birth to a son"[157] this shows that for a sonless person his daughters son stood on the same footing as that of his son's son for religious functions.

It is seen from the above that during the *Vedic* period there was no common ownership of the family property individualism in wealth and society was rampant in *Vedic* days.[158] It is prescribed in *Vedic* literature that unmarried daughter had the right to get a share of her paternal wealth. In this respect one passage from *Rig-Veda* may be quoted.[159]

> *Anuja, who lived her whole life at her parents house, generally demanded and got a share of the ancestral property for inheritance. Again, where the daughter was the only child of the family she had the right of inheritance. Yaska has explained the legal position of the only daughter by laying down the brother less maiden can perform funeral rites of the father even after she has been given in marriage*[160]*. This gives her the right to inherit the property. Also, it shows that she is legally recognized as equal to a son.*

During the *Vedic* period the husband and wife were joint owners of the household. The husband was required to take a solemn vow at the time of marriage that he would never transgress the rights and interest of his wife in economic matters. On the basis of this joint ownership theory of husband and wife in the household, it was concluded in the "*Apastamba Dharmasutra*" that the wife was entitled to incur normal expenditure on the household during her husband's absence.[161]

The theory of joint ownership of the husband and wife in the house hold gave only minor advantages to the wife. She was given the right over her husband's property to enjoy it as a usufruct and not as a property. It did not, however, secure for her equality with the husband in the ownership of the property.

The *Vedic* literature has not defined *Stridhana*. But it seems that the wife's right to own *Stridhana* was recognized even during *Vedic* times. In *Vedic* period the

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[157] *Id* at III, 31, 1. Quoted in Chawala Monika (Dr.), "Rights of female," XVII *CILQ* (2005) 443.
[158] Dutta Bhupendra Nath, "*Hindu Law of Inheritance*", 13(1957)
[159] *Rig Veda*, II, 17.7
[160] *Id* at VII, 4. 8.
[161] Apastamba Dharmasutra, II, 14, 16, 20

bride used to receive some wedding gifts and *Parinahya* was the term used to denote them. The Vedic texts declare them to be the wife's property.[162]

(2) Property Rights During British Period

During the British India legal history the privy council preferred the *Dayabhaga* rule limiting the proprietary independence of Hindu females and thus *Vijnaneswara's*" view was thwarted to emerge and develop into a rule of law. The Hindu female's absolute right to property advocated by *Vijnaneswara*[163] was judicially curtailed by the Privy Council for the first time in 1866 in *Mussumat Thakoor Deyhee* v *Rai Baluk* Ram.[164] In this case the Privy Council held that a widow may have power of disposing of movable property inherited from her husband but she had no such right in respect of immovable property. This case was from the Benares Hindu law and the Privy Council held that though under the Bengal school a Hindu widow is restricted to dispose of both kinds of property movable and immovable but in Benaras school she was free to dispose of movable property inherited from her husband[165] In 1867 the Hindu woman's power was curtailed in Benares School also, by the Judicial Committee of the Privy Council even to dispose of movable property inherited from her husband. In *Bhagwandeen Dubey* v *Mynabaee*[166] the Privy Council held. "By the Hindu law, prevailing in Benares (the western school) no part of the Husband's estate, movable or immovable, forms portion of his widow's *Stridhan* and has no power to alienate the estate inherited from her Husband to the prejudice of his heirs which at her death, devolves on them"[167].

(3) The Present Position of Property Rights of Women

(a) Hindu Women's Property Right

The property rights of the Hindu women are highly fragmented on the basis of several factors apart from those like religion and the geographical region which have been already mentioned. Property rights of Hindu women also vary depending on the status of the woman in the family and her marital status: whether the woman is a

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[162] Taitiriya Samhita IV.2.1.1

[163] Mitakshara, Ch. 2 S.11, Paras 2-4. also see, *Supramaniam* v *Arunachelam*, (1905) ILR 28 Mad 17; *Salemma* v *Lutchmana*, (1898) ILR 21 Mad 100 at 103-105

[164] (1866) XI, MIA 139.

[165] Kumar Vijender "Proprietary Rights of Females under Hindu Law : Strains and Stresses, XXXIX (2-4) *JILI* (1997), 377.

[166] (1867) IX MIA 487.

[167] *Id* at 488

daughter married or unmarried or deserted, wife or widow or mother. It also depends on the kind of property one is looking at: whether the property is hereditary ancestral or self-acquired, land on dwelling house or matrimonial property.

Prior to the Hindu Succession Act, 1956 "*Shastric* (Hindu Canonical) and customary laws that varied from region to region governed the Hindus. Consequently in matters of succession also, there were different schools, like *Dayabhaga* in Bengal in eastern India and the adjoining areas; *Mayukha* in Bombay, *Konkan* and Gujarat in the western part and *Marumakkattayam* or *Nambudri* in Kerala in far south and *Mitakshra* in other parts of India, with slight variations.[168]

Mitakashara school of Hindu law recognizes a difference between ancestral property and self-acquired property. It also recognizes an entity by the name of 'coparcenaries". A coparcenary is a legal institution consisting of three generations of male heirs in the family. Every male member, or birth, within three generations becomes a member of the coparcenary. This means that no person's share in ancestral property can be determined with certainty. It diminishes on the birth of a male member and enlarges on the death of a male member. Any coparcener has the right to demand partition of the joint family. Once a partition takes place, a new coparcenary would come into existence, namely the partitioned member and his next two generations of males. For this reason coparcenary rights do not exist in self acquired property, which was not thrown into the common hotchpotch of the joint family.

The Hindu Succession Act, enacted in 1956, was the first law to provide a comprehensive and uniform system of inheritance among Hindus and to address gender inequalities in the area of inheritance– it was therefore a process of codification as well as a reform at the same time. Prior to this; the Hindu Women's Rights to Property Act, 1937 was in operation and though this enactment was itself radical as it conferred rights of succession to the Hindu widow for the first time, it also gave rise to lacunae which were later filled by the Hindu Succession Act (HSA).[169] was the first post-independence enactment of property rights among Hindus – it applies to both the *Mitakshara* and the *Doyabhaga* systems, as also to persons in

[168] Quated in Pandey Shruti "Property Rights of Indian Women" http//www.google.com.in, visited on 8-09-2008.

[169] Hindu Succession Act 1956, herein after referred to as the HSA.

certain parts of south India previously governed by certain matriarchal systems of Hindu Law such as the *Marumakhatayam*, *Aliyasantana* and *Nambudri* systems.

The main scheme of the Act is:

(1) The hitherto limited estate given to women was converted to absolute one.

(2) Female heirs other than the widow were recognized while the widow's position was strengthened.

(3) The principle of simultaneous succession of heirs of a certain class was introduced.

(4) In the case of the Mitakshara Coparcenary the principle of survivorship continues to apply but if there is a female in the line, the principle of testamentary succession is applied so as to not exclude her.

(5) Remarriage, conversion and unchastity are no longer held as grounds for disability to inherit.

(6) Even the unborn child, son or daughter, has a right if she was in the womb at the time of death of the intestate, if born subsequently.

In the case of *V.Tulasamma & Dr. S.V.* v. *Sesha Reddy*[170] the Supreme Court of India clearly laid down the scope and ambit of section 14(1) and (2) of the HSA, in which a fine distinction was made by the Court recognizing the women right to property through her pre-existing right to be maintained. The Court applied the exception only for the cases where an instrument created an independent and new title in favour of females for the first time and ruled it out where the instrument concerned merely confined, endorsed, declared or recognized pre-existing rights, like the right to maintenance.

This case arose from the facts where, under a compromise in a suit for maintenance filed by the appellant, *Tulasamma*, against her deceased husband's brother, who was in a state of jointness in the ownership of properties with her husband at the time of husband's death. *Tulasamma* was allotted certain properties, but as per the written term's, she was to enjoy only a limited interest in it with no power of alienation at all. According to the terms of the compromise the properties were to revert to the brother after the death of *Tulsamma*. Subsequently *Tulasamma* continued to remain in possession of the properties even after coming into force of the HSA and after the HSA was enacted *Tulsamma* alienated her shares to some one else. The alienation was challenged by the husband's brother on the ground that she had got a restricted estate only under the terms of the compromise and her interest could

[170]. (1977) 3 SCC 99

not be enlarged into an absolute interest by the provisions of the HSA in view of exception to section 14 of the Act.

In declining the challenge by the brother the Supreme Court upheld the absolute right of *Tulsamma*. In fact the relevant observations in the judgment deserve to be extracted in extend (sub Para (1) in Para 62).

> *"The Hindu females right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a langible right against property which flows from the spiritual relationship between the husband and the wife and is recognized and enjoyed by pure shastric Hindu law and has been strongly stressed even by the earlier Hindu jurists starting from yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained there from. If a charge is created for the maintenance of a female. The said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognizing such a right does not confer any new title but merely endorses or confirms the pre-existing rights".*[171]

This principle has subsequently been reiterated and expanded in several later decisions. The second important change has been brought about by section 6 of the HSA by virtue of which on the death of a members of a coparcenary, the property devolves upon his mother, widow and daughter, although his son, by testamentary or intestate succession, as the case may be and net by survivorship.

This rule confers on the women an equal right with the male member of the coparcenary. However, when the proviso to section 6 applies, those are no disruption of joint family status the proviso creates a fiction so those people who are to inherit are identified.

While the Hindu Succession Act may be said to have revolutionized the previously held concepts on rules of inheritance. It has its own flaws while dealing with property rights of women since it still does not give the right to the daughter of a coparcener in a Hindu Joint Family to be coparcener by birth in her own right in the same manner as the son or to have right of claim by birth. Also there is a provision in section 23 which states that "when the coparcenary property includes a dwelling

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[171] Quated in Pandey Shruti. "Property Rights of Indian Women".

house, the rights of a daughter to claim partition of the dwelling house shall not arise until the male coparcener choose to divide their respective shares and the daughter shall be entitled to a right of residence therein." This fails to take into account that the right to claim partition of dwelling houses is one of the basic incidents of ownership by women. Under this provision in its present form a daughter has to wait till the male members seek a partition.

Though an amendment by the Central Government, to address these anomalies, is on the anvil and is likely to be introduced in the Parliament in this session, in five southern states in India namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharastra and Karnataka necessary amendments have been made. As per the law of four of these states, except Kerala, in a joint Hindu family governed by *Mitakshara* law the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. Kerala, however has gone one step further and has abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family. In fact, the Kerala Act is the only law that has abolished the joint Hindu family system altogether in the state including the *Mitaksara Marumakkattayam, Aliyasantana* and *Nambudri* systems. The approach of the Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka state legislatures is different from that of Kerala and these states have not abolished the coparcenary and the right by birth, while broadly removing the gender discrimination inherent in *Mitakshara* coparcenary.

The broad features of the legislations in the four states are more or less couched in the same language:

(a) The daughter of a coparcener in a Joint Hindu Family governed by *Mitakshara* law shall become a coparcener by birth in her own right in the same manner as the son and have similar rights in the coparcenary property and be subject to similar liabilities and disabilities;

(b) On partition of a joint Hindu family of the coparcenary property, the daughter will be allotted a share equal to that of a son. The share of the predeceased son or a predeceased daughter on such partition would be allotted to the surviving children of such predeceased son or predeceased daughter, if alive at the time of the partition.

(c) This property shall be held by the woman with the incidents of coparcenary ownership and shall be regarded as property capable of being disposed of by her will or other testamentary disposition.

In Kerala Section 4(i) of the Kerala Joint Family System (Abolition) Act, lays down that all the members of a *Mitakshara* coparcenary will hold the property as tenants in common on the day the Act comes into force as if a partition had taken place and each holding his or her share separately.

The provision for daughter's right by birth will enhance the share of daughters by making daughters coparceners on the same basis as sons in the *Mitakshara* coparcenary. But in doing so it will alter the shares of other class I female heirs of the deceased such as the deceased's mother and widow. These inequalities would remain unless the entire coparcenary system is abolished totally since it has folds of inequalities which cannot be dealt with in a piecemeal manner. However the Central Government seems reluctant to do so right away.

(b) Rights of Tribal Women

It is also pertinent to mention here that as far as property rights of the tribal women are concerned, they continue to be ruled by even more archaic system of customary law under which they totally lack rights of succession or partition. In fact the tribal women do not even have any right in agriculture lands. What is ironical is that reforms to making the property rights gender just are being resisted in the name of preservation of tribal culture.

In *Madhu Kishwar & others* v *State of Bihar & others*[172] there was a public interest petition filed by a leading women's rights activist challenging the customary law operating in the Bihar state and other parts of the country excluding tribal women from inheritance of land or property belonging to father husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The contention of the petition was there is no recognition of the fact that the tribal women toil, share with men equally the daily sweat troubles and tribulations in agricultural operations and family management. It was alleged that even Usufructuary Rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought to bear brunt at the behest of lineal descendants or their extermination. Even married or unmarried daughters are excluded from inheritance, when they are subjected to adultery by non-tribals they are denuded of the right to enjoy the property of her father deceased husband for life. The

[172] (1996) 5 SCC 125

widow on remarriage is denied inherited property of her former husband. The elaborated further by narrating several incidents in which the women either were forced to give up their life interest or become target of violent attacks or murdered. Therefore the discrimination based on the customary law of inheritance was challenged as being unconstitutional, unjust, unfair and illegal.

In the judgment in the case[173] the Supreme Court of India laid down some important principles to uphold the rights of inheritance of the tribal women, basing its verdict on the broad philosophy of the Indian Constitution and said:

> *"The public policy and Constitutional philosophy envisaged under Article 38, 39, 46 and 15(1) & (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the Constitution. They constitute core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social economic political and cultural rights on equal footing."*

Another passage in this judgment that deserves to be quoted wherein the desirability of flexible and adaptable laws, even customary law, to changing times was emphasized is:

> *"Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and more must undergo change with March of time. Justice to the individual is one of the highest interests of the democratic state. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adopt itself to the needs of the changing society, it must be flexible and adaptable."*

The Court declined to be persuaded by the argument that giving the women rights in property would lead to fragmentation of lands:

> *"The reason assigned by the state level committee is that permitting succession to the female would fragment the holding and in case of inter-caste marriage or marriage outside the tribe, the non- tribe's or outsiders would enter into their community to take away their lands. There is no prohibition for a son to claim partition and to take his share of the property at the partition. Of fragmentation at his instance is permissible under law why is the*

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[173] *Madhu Kishwar & others* v *State of Bihar and others*, AIR (1996) 5 SCC 125.

daughter widow denied inheritance and succession on par with son''

Accordingly it was held that the tribal women would succeed to the estate of their parent, brother, husband as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956 as amended and interpreted by the Court and equally of the Indian Succession Act to tribal Christian.

(c) Muslim Women's Property Rights

Indian Muslim broadly belong to two schools of thought in Islamic law the Sunnite and the Shiite. Under the Sunnite school which is the preponderant school in India, there are four sub categories; *Hanafis, Shafis, Malik* is and *Honbalis*. The vast majority of Muslims in India, Pakistan, Afghanistan and Turkey are *Hanafis*. The Shelters are divided into a large number of sub schools, the two most important of which, so far as India is concerned are the *Ismailis* and the *Ithna Asharis*, but they form a smaller section of the Indian Muslim population. The usual practice in this sub-continent is to use the terms "*Sunni*" law or '*Shia*' law. Strictly speaking, this is in exact: by the former is meant the *Hanafi* law and by the latter, the *Ithna Ashari* School.

Broad principles of inheritance in Muslim law: Till 1937 Muslims in India were governed by customary law which was highly unjust. After the *Shariat* Act of Muslims[174] in India came to be governed in their personal matters, including property rights, by Muslim personal law as it "restored" personal law in preference to custom. However this did not mean either "reform" or "codification" of Muslim law and till date both these have been resisted by the patriarchal forced in the garb of religion.

Broadly the *Islamic* scheme of inheritance discloses three features, which are markedly different from the Hindu law of inheritance:

(i) the Koran gives specific shares to certain individuals

(ii) the residue goes to the agnatic heirs and failing them to uterine heirs and

(iii) Bequests are limited to one-third share in the property can be called away by the owner.

[174] Shariat Act, 1937.

The nearly created heirs were mostly females; but where a female is equal to the customary heir in proximity to the deceased, the Islamic law gives her half the share of a male. For example if a daughter co-exists with the son, or a sister with a brother the female gets one share and the male two shares.

The doctrine of survivorship in Hindu law is not known to Mohammedan law; the share of each Muslim heir is definite and known before actual partition Rights of Inheritance arise only on the death of a certain person. Hence the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims dies, the order of death being the sole guide. The relinquishment of a contingent right of inheritance by a Muslim heir is generally void in Mohammedan law, but if it is supported by good consideration and forms part of a valid family settlement, it is perfectly valid. The rule of representation is not recognized for example if 'A' dies leaving a son 'B' and a predeceased son's son 'C', the rule is that the nearer excluded the more remote and there being no representation, 'C' is entirely excluded by 'B'. There is however no difference between movable property and immovable property.

Some of the features of the *Hanafi* School are being pointed out here to get a glimpse into the broad structure of the property rights of Muslim women in India. The *Hanafi* jurists divide heirs into seven categories; three principal and four subsidiaries. The 3 principal heirs are *Koranic* heirs, Agnatic heirs (through male lineage) and uterine heirs. The 4 subsidiaries are the successor by contract, the acknowledged relative, the sole legatee and the state by escheat.

Another rule that requires consideration is that, 'a person though excludes others.' For example, mother, father and two sisters; the two sisters are excluded by the father and yet they reduce the mothers share to $1/6^{th}$. Class II heir (Agnatic heir): their classification is done as follows; Males (group I)– agnate in his own right group II (females)– the agnate in the right of another group III the agnate with another.

The first group comprises all male agnates; it includes the son, the son's son the father, the brother,, the paternal uncle and his son and so forth. These in pre-Islamic law were the most important heirs; to a large extent they retain, in *Hanafi* law, their primacy influence and power. The second group contains four specified female

agnates, when they co-exist with male relatives of the same degree namely daughter (with son) and son's daughter howsoever low with equal son's son however low, full sister with full brother and consanguine sister with consanguine brother.

The third group comprises the case of the full sister and consanguine sister. For example if there are two daughters and two sisters, here the daughter is preferred as a descendant to the sister who is a collateral; thus the daughter would be placed in class I and she would be placed in class I and she would be allotted the *Koranic* share and the residue would be given to the sister as a member of class II.

Under this system the rule that is followed is first the descendants then the ascendants and finally the collaterals. The agnatic heirs come into picture when there are no Koranic heirs or some residue is left after having dealt with the *Koranic* heirs.

(d) Property Rights of Christian, Parsi (Zoroastrians) Women

The Laws of Succession for *Christians* and *Parsis* are laid down in the Indian Succession Act, 1925 (ISA). Sections 31 to 49 deal with Christian Succession and Sections 50 to 56 deals with Succession for Parsis.

(e) Christian Women's Property Rights

The Indian Christian widow's right is not an exclusive right and gets curtailed as the other heirs step in. only if the interest has left none who are of kindred to him, the whole of his property would belong to his widow. Where the intestate has left a widow and any lineal descendents, one third of his property devolves to his widow and the remaining two thirds go to his lineal descendants. If he has left lineal descendants but has left persons who are kindred to him one half of his property devolves to his widow and the remaining half goes to those who are of kindred to him. Another anomaly is a peculiar feature that the widow of a predeceased son gets no share, but the children whether born or in the womb at the time of the death would be entitled to equal shares.

Where there are no lineal descendants, after having deducted the widow's share, the remaining property devolves to the, father of the intestate in the first instance. Only in case the father of the intestate is dead but mother and brothers and sisters are alive they all would share equally. If the intestate's father has died, but his mother is living and there are no surviving brothers, sisters, niece, and nephews then, the entire property would belong to the mother.

A celebrated litigation and judgment around the Christian women's property right is *Mary Roy* v *State of Kerala & others*[175] in which provisions of the Travancore Christian Succession Act. 1092 were challenged as they severely restricted the property rights of women belonging to the Indian Christian community in a part of south India formerly called Travancore. The said law laid down that for succession to the immovable property of the intestate is concerned a widow or mother shall have only life interest terminable at death or on remarriage and that a daughter will be entitled to one-fourth the value of the share of the son or Rs. 5000 whichever is less and even to this amount she will not be entitled on intestacy, of *Streedhana* (woman's property given to her at the time of her marriage) was provided or promised to her by the intestate or in the life time of the intestate, either by his wife or husband or after the death of such wife or husband, by his or her heirs. These provisions were challenged as *unconstitutional* and void on account of discrimination and being violative of Right to Equality under Article 14 of the Constitution.

The writ petition was allowed by the Supreme Court and the curtailment of the property rights of Christian women in former Travance was held to be invalid on the ground that the said state Act stood repealed by the subsequent Succession Act,[176] which governs all Indian Christians. However, the provisions were not struck down as unconstitutional since the Court felt that it was unnecessary to go into the Constitutionality issue of the provisions as they are in any case inoperable due to the overriding effort of the Act.

(f) Parsi Women's Right To Property

Prima facie the Property Rights of the Paris are quite gender just. Basically, a Parsi widow and all her children, both sons and daughters, irrespective of their marital status, get equal shares in the property of the intestate while each parent, both father and mother get half of the share of each child. However, on a closer look there are anomalies: for example a widow of a predeceased son who died issueless, gets no share at all.

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[175] (1950) SCR 747

[176] Indian Succession Act, 1925.

(4) The Response of the Judiciary

It is clear from the foregoing that though the property rights of Indian women have grown better with advance of time they are far from totally equal and fair. There is much that remains in Indian women's property rights that can be struck down as unconstitutional.

The response of the judiciary has been ambivalent. On one hand the Supreme Court of India has in a number of cases held that personal laws of parties are not susceptible to Fundamental Rights under the Constitution and therefore they cannot be challenged on the ground that they are in violation of Fundamental Rights especially those guaranteed under Articles 14, 15, and 21 of the Constitution of India[177]. On the other hand, in number of other cases the Supreme Court has tested personal laws on the touch stone of Fundamental Rights and read down the laws or interpreted them so as to make them consistent with Fundamental Rights. Though in these decisions the personal laws under challenge may not have been struck down, but the fact that the decisions were on merits go to show that through enactment of a uniform Civil Code may require legislative intervention but the discriminatory aspects of personal laws can definitely be challenged as being violative of the Fundamental rights of women under Article 14 and 15 can be struck down.[178] In fact in one case the Supreme Court has held that personal laws to the extent that they are in violation of the Fundamental Rights, are void[179]. In some judgments the Supreme Court has expressly recommended to the state to carry out its obligation under Article 44 of the Constitution and formulate a uniform Civil Code[180] there is a definite swing is towards a uniform Civil Code and one can see that the Courts are going to play a significant role to usher it is. Another heartening trend is that the Indian Courts are increasingly relying on International standards, derived from various International

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[177] *Krishna Singh* v *Mathura Ahir* , AIR 1980 SC 707, *Maharishi Avdhesh* v *Union of India* (1994) supp (1) SCC 713, *Ahmedabad Women Action Groupd & Ors.* v *Union of India* (1997) 3 SCC 573, *Pannalal Pitti* v *State of A.P.* (1996) 2 SCC 498.

[178] *Anil Kumar Mhasi* v *Union of India* (1994) 5 SCC 704, *Madhu Kishwar* v *State of Bihar* (1996) 5 SCC 125, *Githa Hariharan* v *Reserve Bank of India* (1999 2 SCC 228) *Daniel Latifi* v *Union of India* (2001) 7 SCC 740, *N. Adithyan* v *Travancore Devaswom Board & Ors* (2002) 8 SCC 106, *John Vallamattom* v *Union of India* (2003) 6 SCC 611.

[179] *Masilamani Mudaliar* v *Idol of Sri Swaminathaswami Thirukoli* (1996) 8 SCC 525.

[180] *National textile Mazdur Union* v *P.R. Ramkrishnan* (1983) 1 SCC 224, *Mohd. Ahmed Khan* v *Shah Bano Begum* (1985) 2 SCC 556, *Jordam Diengdeh* v *S.S. Chopra* (1985) 3 SCC 62, *Sarla Mudgal* v*Union of India* (1995) 3 SCC 635, *Lily Thomas* v *Union of India* (2000) 6 SCC 224 *John Vellomatham* v *Union of India* (2003) 6 SCC 611.

Declarations and Conventions.[181] Specifically CEDAW has been referred to and relied upon by the Supreme Court of India in some judgments.[182] These line of judgments give a firm basis for the Women of India to demand gender justice and equal rights on per with International Standards. Apart from the on going struggle for a uniform Civil Code in accordance with the Constitutional frame work, today the India women are fighting for rights in marital property, denied uniformly to them across all religious boundaries. There is also significant movement in some of the hill states, towards community ownership of land by women by creating group titles and promoting group production and management of land and natural resources by landless women for joint cultivation or related farm activity. Land rights would be linked directly to residence and working on land under this approach being lobbied for under the Beijing Platform for action.

However, the challenges are many: social acceptance of women's rights in property leads them in a country where women continue to be property themselves the road ahead promises to be long and bumpy.

(i) Property Rights, Compensation and Claims

In order to overcome the difficulty posed by the judgment in *State of J& K* v. *Dr. Susheela Sawhney*,[183] the Jammu and Kashmir Government passed the J&K permanent resident (Disqualification) Bill, 2004 in the Legislative Assembly. On becoming an Act it was to come in force with effect from 7.10.2002, the date when the full bench decision was delivered. Clause 2 of the Act reads "not withstanding anything to the contrary obtained in any law, notification or judgment, decree or order of any Court a female permanent resident on her marriage with a person who is not a permanent resident shall with effect from the date of such marriage cease to be a permanent resident..."

Clause 3 of the above Act further makes it clear that its intention is to affect the Constitution of Jammu and Kashmir. Clause 3 reads, "For the purposes of the Act,

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[181] For instance: *Jolly George Verghese and Anr.* v *State Bank of India*, AIR 1980 SC 470, *Gramophone Company of India Ltd.* v *Birendra Bahadur Pandey and Ors*, AIR 1984 SC 667, *People's Union for Civil Liberties* v *Union of India and Anr*, (1997) 3 SEC 433.

[182] *Vishaka and Ors.* v *State of Rajasthan and Ors*, AIR1997 SC 3011, *Gita Hariharan* v *Reserve Bank of India*, AIR 1999 SC 1149, C. *Masilamani Mudaliar and Ors.* v *The idol of Sri Swaminatha Swami*: (1996) 8 SCC 525.

[183] In the year 2003 the effect of the full bench judgment on the position of married women and their status as Jammu and Kashmir permanent residents was noted. See Kamala Sankaran, "Women and the Law" *ASIL* (2003).

the expression permanent resident means a person who is or is deemed to be a permanent resident under section 6 of the Constitution of Jammu and Kashmir subject to the modification that a female permanent resident shall cease to be such on her marriage to a person who is not a permanent resident". However, this bill could not muster sufficient support in the legislative council. However, one can be sure that further attempts would be made to reintroduce this bill.[184]

Under the Karnataka Rent Act of 1961, a ground for eviction of a tenant could be made *inter alia* on the ground that the premises were reasonably and bona fide required by the landlord for occupation by himself. Yet under section 21(4) a decree for eviction could not be passed if the Court was satisfied, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord, that a greater hardship would be caused to the tenant by passing the decree than by refusing to pass it. However, under the revised Act, the concept of comparative hardship has been given up. Under Section 31 of the 1999 Act, if the landlady be a widow and the premises were let out by her or her husband and the tenanted premises are required for use by her and for her family members or for any one ordinarily living with her she may apply to the Court for recovery of immediate possession of such premises. An explanation to section 27 of the Act directs the Court to draw a presumption that the premises are indeed required by the landlord or any member of the family dependent on him if it is so claimed. The Supreme Court has held that drawing such presumption is mandatory.[185]

This decision may go a long way in cases where a widow requires properties rented out by her deceased husband.[186] In a important holding, the Punjab and Haryana High Court has noted that in Sections 8 and 15 (1) (a) of the Hindu Succession Act, 1956 (HSA), no distinction has been made between married and unmarried daughters for the purpose of determining the heirs of a deceased Hindu. Thus, it has been held that a married daughter is also entitled to collect compensation

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[184] *See* Sharma G.D., "The Jammu and Kashmir Permanent residents (Disqualification) Bill 2004 is Unconstitutional", AIR 2004 (J & K) 161. He argues that Article 35 of the Indian Constitution allows special provision to be made. Yet this permits special restriction on those who are non permanent residents but it would not warrant taking away permanent resident status from women who married outside. That is unreasonable classification between females and males and also between females and females. *See also* Kumar Virendra, The Jammu and Kashmir permanent residents (disqualification) Bill 2004: A Constitutional perspective 534 *JILI* (2004).

[185] *P.Suryanarayana v K.S. Muddugowramma*, AIR 2004 SC 1930.

[186] Quoted in Sankaran Kamala, Women and the Law, *ASIL* XL (2004) 583.

announced by the Haryana government for the family of those killed in the November 1984 riots in the state and could get her share for the death of her mother in the riots.[187] Dependant' means any of the following relative of a deceased passenger, namely:[188]

(i) The wife, husband, son and daughter and incase the deceased passenger is unmarried or is a minor, his parent ;

(ii) The parent, minor brother or unmarried sister, widow sister, widowed daughter-in-law and a minor child of a pre-deceased son, if dependent wholly or partly on the deceased passenger;

(iii) The minor child of a predeceased daughter, if wholly dependent on the deceased passenger;

(iv) The paternal ground parent wholly dependent on the deceased passenger.

In the case of *N. Kantabai*[189] the Court ruled that on a plain reading of the section, it can be safely be concluded that in respect of wife, husband, son and daughter, there is no condition that they should wholly or partly be dependent on the deceased passenger. Thus, in this case an accident claim preferred by a married daughter would also be maintainable. One can note, however that the list of dependants privileges the male line over the female line – something that one can see in the list of class I heirs in the second generation and class II heirs under the HSA which is premised partly on the preference of agnates over cognates.

This in-built bias in the law against women is a feature of the HSA. Women in several states do not have a share in the *Mitakshara* joint family property as of birth, there is a distinction drawn even among women, between daughters on the one hand wives and widows. On the other in some states that have reformed the law, and finally even, where the law is reformed it often excludes agricultural property from the purview of the HSA.[190] It is in fact to rectify this gender bias that the Hindu Succession (Amendment) Bill, 2004 has been introduced in the Rajya Sabha on 20.12.2004. Yet, it must also be noted that there are several gender – neutral provisions of this law. Thus, the Court while interpreting section 30 of the Act has held that the adoption of a son does not deprive the adoptive mother of her power to dispose of her separate property by transfer or will.[191] It has also been held that

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[187] *Smt. Naraini Bai* v *State of Haryana*, AIR 2004 P & H 206.
[188] *Section* 23(b) of the Railway Act, 1989.
[189] *Union of India* v *N. Kantabai*, AIR 2004 AP 228.
[190] Hindu Succession Act, 1956.
[191] *Ugre Gowda* v *Nagegowda*, AIR 2004 SC 3975.

Section 23 HSA is not an absolute bar to a claim by a daughter for partition of the dwelling house left behind several houses as well as other properties[192].

Explaining section 27 of the Hindu Marriage Act (HMA) the Supreme Court had classified that the expression "property presented on or about the time of marriage used in section 27 has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties to become their "joint property", implying thereby that the property can be traced to have connection with the marriage. All such property is covered by section 27 of the Act."[193] The Bombay High Court cited this decision to clarify that property not given to the couple as their joint property cannot be the subject matter of an order under section 27 of the HMA. Thus, property acquired by the couple by their own efforts and not given to them at or about the time of marriage to be held jointly would not be property covered by section 27 of the Act. Thus, it is necessary that (1) the property must have been presented at or about the time of marriage; and (2) to become their joint property an order under section 27 has to be passed. In this case even though the wife showed that she had made half the contribution for the construction of the house property the Court held that this could not be the subject matter of an order under section 27 of the Act and set aside the order of the family Court on these grounds.[194] It has been pointed out that section 27 of the HMA falls well short of the notion of matrimonial property that needs to be incorporated in Indian law.[195] This lacuna has yet to be filled.

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[192] *R. Deivanai Ammal* v *G. Meenakshi Ammal*, AIR 2004 Mad. 529.
[193] *Balkrishna Ramchandra Kadam* v *Sangeeta Balkrishna Kadam*, AIR 1997 SC 3562
[194] *Kamalakar Ganesh Sambhus* v *Master Tejas Kamalakar Sambhus*, AIR 2004 Bom 478.
[195] See for instance B. Sivaramayya, Matrimonial Property Law in India (1999)