

Chapter 8

Dynamics Of Transgression Of Women's Human Rights: The Contemporary Legal Framework In India

Author: Siddharth Pareek⁷⁷

Introduction

The most fundamental requirement in today's world for people, especially women, to live with dignity is the existence of legal rights. These rights are the backbone of a human being and belong to them because of their very existence. The very purpose of having certain human rights is to get protection against the ill elements of the society. The umbrella of human rights protects the women's interests globally. The basic fact behind is that "all men are born and remain free and equal in their rights."⁷⁸ The human rights basically are a philosophy of egalitarian social relations expressed in law through contracts between states and people, as individual and as social groups. States pledge to maintain indivisible, universal and interdependent standards agreed by the international community, articulated in the human rights instruments.

The United Nations and Rights Of Women

For centuries past, women all over the world have not only been denied full social, economic and political justice but also as a 'weaker sex' they have been abused and exploited. The UN General Assembly⁷⁹ recognized that 'gender-based violence, torture, sexual abuse, sexual slavery and exploitation, international trafficking in women and

⁷⁷ Author: Siddharth Pareek

Class: BA. LL.B., 2nd Year

University: National Law University, Jodhpur

Email: siddharth.pareek@nlujodhpur.ac.in

⁷⁸ France: Declaration of the Right of Man and the Citizen, 26 August 1789.

⁷⁹ "Women 2000: Gender Equality, Development and Peace for the 21st Century" The UN General Assembly 23rd Special Edition.

children, forced prostitution and sexual harassment; as well as violence against women and girls resulting from cultural prejudice, racism and racial discrimination, etc. are incompatible with dignity and worth of human person.’ In India, the principles of human rights were embedded in Indian ethos since the *Vedic* age. The “*Vedas*” and the “*Natyashastra*’s” have the concepts like equality of rights of men and women and just and equal treatment of humans in the society.

“Due to the non-stopping efforts of the International Women’s Rights movement, the violence against women received the attention it deserved.”⁸⁰ The moral, humanitarian, economic and political imperatives are clear. Taking cognizance of this repression all over, the United Nations passed various instruments with a focus on women’s emancipation and with the object of enhancing the dignity of women all over the world. The standards set out universally by the United Nations’ Charter⁸¹, and elaborated through the *International Bill of Rights*⁸² that includes the *International Covenant on Economic, Social and Cultural Rights*, together with its sister *Covenant International Covenant on Civil and Political Rights*⁸³, and *Universal Declaration of Human Rights*⁸⁴, along with the *Convention on the Elimination of all forms of Discrimination Against Women*⁸⁵ and *Convention on the Rights of Child*⁸⁶ should be honored. Gender justice, a facet of social justice is a composite concept. The term ‘Gender equality’⁸⁷ refers that women and men should be treated alike and it stands for the wiping out of male domination and focuses on protection of the legal rights of women.

Violation of Women’s Rights: “The Indian Corner”

The primary reason for the exploitation of women is violence against them. Its 21st century and even now the social ills against women take place quite often in different parts of India and around the world. At the international level, a significant number of declarations, conventions and treaties have been adopted in the field of human rights and protection of women. The international community has reacted to these agreements and documents positively. But still, we come across scandalous violations of human rights often.

⁸⁰ Radhika Coomaraswamy and Nimanthi Perera Rajasingham, “Constellations of Violence: Feminist Interventions in South Asia”, *Women Unlimited*, 2008.

⁸¹ United Nations, *Charter of The United Nations*, 24 October 1945, 1 UNTS XVI.

⁸² Newman, ‘The International Bill of Rights: Does it exist?’ in Cassese, A., *Current Problems of International Law*, (ed.) at 107-16.

⁸³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

⁸⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III).

⁸⁵ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, *Treaty Series*, vol. 1249, p. 13.

⁸⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, p. 3.

⁸⁷ B.K. Ghatak, *Dr. Ambedkar’s Thought*, APH Publishing Corporation, 1997 at p. 121.

India, the world's largest democracy, having an independent and extremely vibrant press also frequently suffers from incidents relating to gross violation of women's rights. Going back a few decades, during the *UN Decade for Women* (1976-1985), women from diverse cultural, geographical, religious, racial and class backgrounds initiated and organized to improve the status of women globally. There were different conferences held at different places to spread the awareness about the ills and problems that women faced globally. These conferences were critical and at primary venues at which different women came and stood together to help and support their community and bridge differences to create a global movement. The concept and the term 'women's human rights' does not point only to the theoretical approaches and stands that women have used to recreate the concepts of human rights, agendas and different programs. Also, the idea of rights of women is directly related to and has immense impact as a tool for political activism since it's a revolutionary notion.

According to the *Thomson Reuters 2018 Survey*⁸⁸ on the 'World's Most Dangerous Countries for Women', India lies at the top. This survey measures problems like sexual and non-sexual violence, status of healthcare, numbers of human trafficking, discrimination, etc. This shows our country's inability to protect the rights of our women and how vulnerable they are. It not only stops there, furthermore according to the National Crime Records Bureau⁸⁹, there were 338,954 incidents of crimes happened against women in 2016. Out of these, there were a total of 38,947 rape crimes. The major crimes and problems faced by the women in the society are categorized further on.

Sexual Harassment & Rape and Burden of Proof

The offence of sexual harassment and rape is considered to be one of the most cruel and heinous crimes. But it's disheartening that such offences against women are still widespread and prevalent. Section 375 of the Indian Penal Code deals with the offence of rape. No person has the right to transgress or encroach a women's body. Much more than physical agony, rape creates a mental turmoil. "It is a crime against basic human right and it is also violative of victim's most cherished of fundamental human rights, namely the right to life contained in article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women."⁹⁰ It destroys the physical integrity of a woman.

⁸⁸ Thomson Reuters 2018 Survey, *The World's Most Dangerous Countries for Women*.
[Link - <https://poll2018.trust.org/>].

⁸⁹ National Crime Records Bureau, *Crime in India Survey, 2016*
[Link - <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf>].

⁹⁰ *Bodhisattawa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

Sexual harassment can be in various forms. It is something, which compels a person to join in unwanted sexual contact or attention. *Exhibitionism* (exposing sexual parts in public) and *Voyeurism* (gaining pleasure by watching others private sexual acts) are some examples of sexual harassment without physical contact. The distinguishing factor between rape and sexual intercourse is consent⁹¹. However, it is extremely difficult to prove the presence or absence of consent in a rape offence. A man is said to commit the offence of rape⁹² when he has sexual intercourse with a woman, without her consent and against her will or when the consent has been obtained by putting that person under threat of death or hurt. If the victim in a rape offence submits that her body was put under threat of danger or fear, then the same would never amount to consent. It has been laid down⁹³ that there is a rule of prudence requiring corroboration of the victims in a case of rape. A woman is just a victim of a carnal desire. In cases of rape, corroboration need not be searched for by the judge if in the particular circumstances of the cases before him, he is satisfied that it is safe to rely on the evidence of the victim.

Moreover, for proving guilt in sexual harassment or an offence of rape a woman is on the safer side since she is not required to prove that there was any sort of resistance on her part while the commission of the act. Under the India Evidence Act⁹⁴, there is a compulsory statutory presumption, which requires the courts to believe that consent is absent in such cases. This section was included in furtherance and aftermath of the infamous *Mathura rape case*⁹⁵ in which the court acquitted the accused because there were no signs or marks of resistance, which were visible on the body of the accused. Also, to protect the women at workplace and in the light of absence of legislation, the Supreme Court formulated a set of legal framework and guidelines.⁹⁶ If the victim alleges that there was an absence of consent, then the burden of proof lies on the accused to prove his innocence. It would be inhumane and disastrous if we try to shift this burden of proof on the victim since this would put them in an extremely uncomfortable and vulnerable situation and it might even deter them from filing the complaint in the first place. Therefore, we need more safeguards to protect the women and the victims from primary and secondary victimization.

Assault and Criminal Force against Women

Section 354 of the Indian Penal Code criminalizes assault or criminal force to women. The use of criminal force against women means assaulting a woman with intent to outrage her modesty. Such cases happen frequently and everyday but only a small fraction of them are reported. The Supreme Court while deciding the case of *State of Punjab v. Major Singh*⁹⁷

⁹¹ *Tukaram v. State of Maharashtra*, AIR 1979 SC 185.

⁹² S. 375, *The Indian Penal Code*, 1860.

⁹³ *State of Maharashtra v. M.N. Mardikar*, (1991) 1 SCC 57.

⁹⁴ S. 114, *The Indian Evidence Act*, 1872.

⁹⁵ *Supra* note, 14.

⁹⁶ *Vishakha v. State of Rajasthan*, (1997) 6 SCC 214.

⁹⁷ *State of Punjab v. Major Singh*, AIR 1967 SC 63.

pointed out that an offence, which does amount to rape, may come under the ambit of section 354 of the I.P.C.

In the case of *People's Union Democratic Rights v. Police Commissioner, Delhi, Police Headquarters*⁹⁸ the Supreme Court charged the accused under Section 354 I.P.C. where the accused stripped a woman bare and thrashed her. Though she was awarded compensation but the actual loss that she suffered is not recoverable since the damage was done. We need strong preventive measures rather than merely providing some sort of compensation to the victims.

In the case of *Ripen Deo Bajaj v. Kanwar Pal Singh Gill*⁹⁹, the Supreme Court stated that any offence under this section should not be treated trivially since it's a grave offence transgressing and outraging the modesty of a woman. Right to privacy and personal liberty are sacrosanct rights of any individual, therefore any action, which affects the modesty of a woman, or put her into an uncomfortable situation should be made an offence and the accused should be properly dealt with.

Honor Killing and Women

The expression 'honor killing' is in itself falsified. It is used to cover the cold-blooded murders done by the members of family if any member has brought shame and dishonor to the family. It is often perceived as ritualistic form of murder. In majority of the cases females are the victims of honor killings when they do anything, which the family considers as immoral or impure. It is also called as customary killing in which another member justifies the killing of a member of family.

The perceived dishonor can be because of various reasons. There are several actions, which are strongly linked to honor-based violence; some of them are as follows:

- Pre-marital pregnancy
- Infidelity
- Asking for custody of children after divorce
- Falling victim to rape
- Loss of virginity outside marriage
- Having unapproved relationships
- Refusing an arranged marriage

⁹⁸ *People's Union Democratic Rights v. Police Commissioner, Delhi, Police Headquarters*, (1989) 4 SCC 730.

⁹⁹ *Rupen Deo Bajaj v. Kanwar Pal Singh Gill*, (2005) 6 SCC 161.

- Asking for divorce
- Leaving the family or marital home without permission
- Causing scandal or gossip in the community

In India, honor killings have been reported in various northern regions (primarily in the states of Punjab, Uttar Pradesh, Haryana, Rajasthan and Bihar) as a result of persons acting against their family's will. Also, the erroneous concept of 'Chap Panchayat's is a serious concern since it is against the law of the land. The only legally constituted body to account such issues is the Judiciary and any other non-judicial body should be scrapped. It is very obvious that the country needs stringent legislations to tackle this heinous crime as thousands of people in India have become victim to this social ill and have died.

Domestic Violence

Domestic Violence is an expansive term but one of the very astonishing features is that economic, emotional, mental and verbal abuses have been considered to be constituents of domestic violence. In some countries like the U.S.A., the above-mentioned elements are not considered to be in the ambit of so-called domestic violence. The first set of international norms in the area of protection of women from violence was the *UN Declaration on the Elimination of Violence against Women*¹⁰⁰, which focused on the security of women from certain forms of violence. Both the terms 'legislation' and 'violence' are extremely controversial.

When we talk about the Indian society, violence in home or violence behind closed doors even today in many areas isn't considered as an unacceptable behavior. This "practice" is deep rooted in the Indian society. However, after the recent developments in legislation related to domestic violence have helped women in the society to raise their voices and fight against the violent patriarchal society. But so far if we talk about the efficacy of such legislations, it is limited and somewhat have a dubious benefit to women. "The statistical literature on domestic violence in India till date has focused on sub-national scale such as studies over a few villages in a sub district or slum areas in a metropolitan city."¹⁰¹ The approach of domestic violence is complex. "Across the subcontinent there exist a wide variety of cultural norms and practices relating to domestic violence. The over-arching regional pattern is of more patriarchal and traditional states in the North such as Uttar Pradesh and Punjab, and relatively more egalitarian and educated states in South, such as Kerala and Tamil Nadu."¹⁰² There have been various social and non-social factors emerged which have helped the women to change their outlook towards the society on one hand and

¹⁰⁰ *Declaration on the Elimination of Violence against Women*, A/RES/48/104, 20 December 1993.

¹⁰¹ Hackett, Michelle T. "Domestic Violence against Women: Statistical Analysis of Crimes across India." *Journal of Comparative Family Studies*, vol. 42, no. 2, 2011, pp. 267-288.
[Link - JSTOR, www.jstor.org/stable/41604436].

¹⁰² *Id.*

have changed society's perception towards them on the other. Phenomena like industrialization, globalization, and migration have given a 'positive push' to the women in the society and have enabled them to work away from home and become self-sufficient. Thus, we can see that the structural inequalities present in the society have begun to dilute. Penal provision like *Section 498A*¹⁰³ and *The Protection of Women from Domestic Violence Act, 2005* is the major legal framework in India to protect women from Domestic Violence.

The Contemporary Legal Framework

- The International Perspective
- The progress towards constitution of women's legal rights can be categorized into 3 stages.
- The first stage witnessed the development of international convention that focused on specific rights of women.
- The Second stage witnessed the emergence of Universal Declaration of Human Rights¹⁰⁴, International Covenant on Economic, social and Cultural Rights¹⁰⁵, European Convention for the Protection of Protection of Human Rights¹⁰⁶ etc. were developed.
- Finally, the third stage witnessed the development of important conventions like *Convention on Elimination of Discrimination of All Forms of Discrimination Against Women*¹⁰⁷ and various laws, practices and policies to bring in a genuine change in the society.

Convention on Elimination of Discrimination of All Forms of Discrimination Against Women (CEDAW) – It lays down comprehensive rights for women and also the additional measures for the protection of the women's rights in the international arena. This convention imposes obligations on the Governments of various countries to take comprehensive actions to combat violence against women and to carry out efforts for safety of women. "CEDAW is a truly significant statement of Women's rights, which supersedes and particularizes the applicability of other instruments of other instruments of

¹⁰³ S. 498A, *The Indian Penal Code*, 1860.

¹⁰⁴ *Supra* note, 7.

¹⁰⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural rights*, 16 December, 1966, *United Nations, Treaty Series*, Vol. 993, p. 3.

¹⁰⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950.

¹⁰⁷ *Supra*, 8.

international law to women. Its comprehensiveness touches every aspect of women's lives, in the political, social, economic, legal, health and family spheres.”¹⁰⁸

The National Perspective

“As a reaction to the male-dominated patriarchal structural and culture of our society and politics and the chauvinistic role of men, women of our time have become vocal and started amplifying their equal rights to that of men. So, ours is a women's era in as much as there is an increased consciousness about women rights.”¹⁰⁹ India, today has a set of stringent legislations like –

- The Immoral Traffic (Prevention) Act, 1956
- The Criminal Law (Amendment) Act, 2013
- The Commission of Sati (Prevention) Act, 1987 (3 of 1988)
- The Dowry Prohibition Act, 1961 (28 of 1961) (Amended in 1986)
- Protection of Women from Domestic Violence Act, 2005
- The Sexual Harassment of Women at Workplace (PREVENTION, PROHIBITION and REDRESSAL) Act, 2013
- The Indecent Representation of Women (Prohibition) Act, 1986

But still we need a lot more stringent and comprehensive women-specific legislation to protect the rights of women and spreading an air of deterrence against crimes against women in the society. “To make population policies fully supportive of women's rights, countries must modify restrictive national laws, enforce laws that ensure women's rights and reassess policies of non-ratification of international treaties that bear on women and reproductive rights.”¹¹⁰

Sine India ratified the CEDAW, which imposes a positive obligation to take appropriate steps to take appropriate steps to prevent discriminations of all forms against women besides taking steps to protect the honor and dignity of women. In *Madhu Kishtwar v. State*

¹⁰⁸ Tinker, Catherine. “Human Rights for Women: The U. N. Convention on the Elimination of All Forms of Discrimination against Women.” *Human Rights Quarterly*, vol. 3, no. 2, 1981, pp. 32–43.
[Link - JSTOR, www.jstor.org/stable/761855].

¹⁰⁹ Das, Jogendra Kr. “Reflections on Human Rights and the position of Indian Women”, *The Indian Journal of Political Science*, vol. 64, no. 3/4, 2003, pp. 203–220.
[Link - JSTOR, www.jstor.org/stable/41855782].

¹¹⁰ Pine, Rachel N. “The Legal Approach: Women's Rights as Human Rights.” *Harvard International Review*, vol. 16, no. 4, 1994, pp. 26–77.
[Link - JSTOR, www.jstor.org/stable/42760499].

of Bihar¹¹¹, the Supreme Court observed that CEDAW is an integral scheme of Fundamental Rights and Directive Principles of the Indian Constitution. “The Government had ushered in the new millennium by declaring the year 2001 as ‘*Women’s Empowerment Year*’ to focus on a vision ‘where women are equal partners like men’. The objective of Government policy in India has been to bring about development, advancement and empowerment of women in the country through active participation of all stakeholders.”¹¹²

Conclusion

The present social system cannot be called as a full-fledged prosperous system because we have not reached the stage where we can bring men and women at parity. India, the world’s largest democracy, having an independent and extremely vibrant press frequently suffers from incidents relating gross violation of women’s rights like Rape and Sexual Harassment, Cruelty and Dowry Death, Domestic Violence, Honor killing and suppression of their liberty.

But we have come a long way and have been fighting to bring a genuine change through effective legislations and social participation. Due to phenomena like globalization, industrialization and migration, we can see the transformation in the ideologies of people in the society and the change in the outlook of people towards women with a positive difference. We still have a long way to go but with constant productive efforts, we will surely be able to achieve the status of a society in which women are self-sufficient and safe.

¹¹¹ *Madhu Kishwar v. State of Bihar*, 1996 AIR 1864.

¹¹² Ojha, Purnima. “Women’s Issues in India: Role and Importance of Media”, *The Indian Journal of Political Science*, vol. 72, no. 1, 2011, pp. 87–102.
[Link - JSTOR, www.jstor.org/stable/42761809].