



Justice Still Eludes Indian Women in the 21st Century

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For anyone who has been keeping track of the legal developments in the United States of America, one of the issues of greatest concern is the overturning of *Roe v. Wade*¹ and with it, all the gains made by the feminist movement regarding Women's Reproductive Rights and more importantly women's right to their bodies. On the other hand, in India, there have been so many more issues, from Muslim women's struggle against triple talaq in one sitting², to the need for a Uniform Civil Code, to criminalising rape in the context of marriage³, laws to regulate surrogacy⁴ etc., that have caused concern, but not the right to abortion as in the US.⁵ One of the positive legal developments is the 106th Amendment Act, passed as recently as 29th September 2023. After decades of struggle for political representation of women in the

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¹ Nina Totenberg and Sarah Mc Cammon, *Supreme Court overturns Roe v. Wade, ending right to abortion upheld for decades*, <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn>

² Supreme Court Observer, *Triple Talaq*, <https://www.scobserver.in/cases/shayara-bano-union-india-triple-talaq-case-background/>

³ Apurva Vishwanath, *Supreme Court to list marital rape petitions for hearing: What are the issues, arguments involved?* <https://indianexpress.com/article/explained/explained-law/sc-marital-rape-issues-and-arguments-8848358/>

⁴ Aman Hingorani, *Surrogacy law in India: A teasing illusion?* <https://www.barandbench.com/columns/the-surrogacy-law-in-india-a-teasing-illusion>

⁵ The Medical Termination of Pregnancy (Amendment) Act, 2021, No.8, Acts of Parliament, 2021 (India)

legislatures by women's groups, providing 33% reservation for women in the Lok Sabha, the state legislative assemblies and also that of Delhi for 15 years is a welcome move.⁶ However, this will not make a difference in the political representation of women in the Indian Parliament in the immediate future, as it can only be implemented after the next census and the delimitation exercise that will follow, i.e., redrawing of the constituencies of the Lok Sabha and the State Legislative Assemblies. Only then can the seats to be reserved for women be determined. This is an important development, without doubt, as issues relating to marriage, violence within the family, and discrimination at the workplace directly impact women's right to education, life and autonomy.

Special Legislations like the Protection of Women from Domestic Violence Act 2005, Criminal Law Amendment Act 2013 and the Sexual Harassment of Women in the Workplace, Protection, Prohibition and Redressal Act 2013, purportedly address these very same concerns like the right to live without violence in their marital and natal homes, and freedom from violence against their bodies in the private and public space. But enactment and implementation of such legislations seemingly have not impacted statistics positively. According to the National Crime Records Bureau, in 2011, there were more than 228,650 reported incidents of crimes against women, while in 2021, there were 4,28,278 reported incidents - an 87% increase.⁷ NCRB's data for 2021 shows that crimes against women increased by 15.3% from the previous year in 2020. According to the NCRB report, the number of crimes against women grew from 56.5% in 2020 to 64.5% in 2021 (incidents

⁶ The Hindu Bureau, *President gives assent to women's reservation Bill*, <https://www.thehindu.com/news/national/womens-reservation-bill-gets-presidents-assent/article67361561.ece>

⁷ National Crime Records Bureau, Ministry of Home Affairs, Government of India, *Crime in India 2021 Statistics*, <https://ncrb.gov.in/crime-in-india-year-wise.html?year=2021&keyword=>

per 1 lakh population). However, the conviction rate in cases of crimes against women in India stood at 26.5 per cent in 2021, down from 29.8 per cent in 2020⁸. The pendency rate of cases was at a shocking 95 per cent. This means that courts are able to dispose-off only 5 per cent of cases.⁹

The society we live in, whether in India or abroad, is still deeply entrenched in patriarchy. This informs the way we perceive women and interact with them. Women who try to break away from stereotypes are generally subjected to violence in varying measures, including physical violence and slut - shaming. Despite the many laws that have been enacted which prohibit, aim to prevent and provide redressal against various forms of violence against women, it is found that, while conviction rates are low, acquittals are too high, and pendency in cases of violence against women are also disproportionately high. All this is in the background of low reporting of crimes against women. ¹⁰Justice, thus, continues to elude women. This means that women do not have security of life and livelihood and therefore are unable to exercise their rights as free citizens, as they are not even able to access their fundamental human rights and freedoms.¹¹

Ensuring women's access to their fundamental human rights and freedoms is of utmost importance, if Gender Equality has to be achieved by 2030, according to Sustainable Development Goal 5¹². At the current rate, the world needs 300

⁸ *Id*

⁹ Vaibhavi Khanwalkar, *10 Years of Nirbhaya: Conviction rate in crimes against women just 26.5% in India*, <https://www.deccanherald.com/india/10-years-of-nirbhaya-conviction-rate-in-crimes-against-women-just-265-in-india-1172228.html>

¹⁰ Rukmini Shrinivasan, *What Crime Stats don't say*, <https://economictimes.indiatimes.com/news/politics-and-nation/what-crime-stats-dont-say/articleshow/66787792.cms?from=mdr>

¹¹ India Constitution, Articles 14, 19 and 21

¹² United Nations, Department of Economic and Social Affairs, Sustainable Development, <https://sdgs.un.org/goals/goal5>

years to end child marriage, 286 years to close gaps in legal protection and remove discriminatory laws, 140 years to achieve equal representation in leadership in the workplace, and 47 years to achieve equal representation in national parliaments.¹³ Given that there is a plethora of laws, there surely is no need for any more. What is required in order to move forward in this scenario is the need for change in the attitude of women and men in our society - which, of course, means not only parents and other immediate members of the family, but also in their roles as teachers, judges, policewomen and men, lawyers, public prosecutors, members of the legislatures, administrators, policymakers etc. Unless we can value/welcome the birth of a baby girl/intersex baby with disabilities and give them every opportunity to grow up in an environment that is enabling, with access to every opportunity to enjoy their childhood, education, health etc., there will be no change in the status of girls and women. It will not be possible to achieve SDG 5, if this trend continues. Unless women and men in our society stop objectifying girls and women and begin to view them as human beings, as persons, as autonomous beings who inherently possess the right to life, liberty, equality, freedom from violence etc., we really can make no advance in the direction of Gender Equality. The definition of Discrimination in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) plugs every loophole in our understanding and practice of discrimination.¹⁴

One of the basic requirements for any human being to function is the ability to make choices which also ought to be respected. It means that the State and the societies that we live in must facilitate the fulfilment of these choices. But girls and

¹³ *Id*

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women, Article 1, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>

women cannot even express their choice, let alone exercise them. They are treated, for the whole of their existence, as beings that are incapable of making decisions for themselves, be it about the food they wish to eat, or need to be healthy, to choosing what to study, where to study, the kind of clothes they wish to wear, and so on. Women have been objectified, and therefore, they are seen as nothing more than existing to fulfil only duties and obligations and satisfy the needs of their natal and marital families and especially that of the men in their lives – brothers, fathers, husbands/boyfriends, sons and so on. Rejection by women in our society is not easily accepted. This leads to violent acid attacks, sexual assault and/or murder. This is exactly why even if a young girl says no to marriage, she is forcibly married, or when a wife says no to sex, she is raped.¹⁵ Or when a woman chooses her life partner, either she or her lover or both are killed.¹⁶ Women and men find it hard to accept that girl's and women's consent is required before one intrudes into their space (physical or digital) or touch their bodies. Girls and women are generally treated as liabilities or as goods/property to be used for negotiation for upward movement or to serve the male members of the family. This is why when a young married woman reaches out to her family and seeks their help in getting out of an unpleasant and violent marriage, the family washes their hands off her. They have done their duty and got her married. This is why there is so much apathy in our country with regard to the so-called “dowry deaths”.¹⁷

¹⁵ Padma-Bhate Deosthali, Sangeeta Rege and Sanjida Arora, *Women's experiences of marital rape and sexual violence within marriage in India: evidence from service records*, (Oct 31, 2023), cbi.nlm.nih.gov/pmc/articles/PMC8967187/pdf/ZRHM_29_2048455.pdf

¹⁶ Tanya D'Lima, Jennifer L. Solotaroff and Rohini Prabha Pande, *For the Sake of Family and Tradition: Honour Killings in India and Pakistan*, *Indian Journal of Women and Social Change* 5(1) 22–39, 2020.

¹⁷ Ainnie Arif, *Dowry Harassment in India: Social Impunity Bypasses Law*,

So long as girls and women are viewed as autonomous individuals less than and not equal to boys and men, they will be considered dispensable, as objects to satisfy the cravings and needs of boys and men, will be malnourished, prevented from being born, killed as infants, sexually assaulted by their own relatives and friends, by the police, military personnel, the strangers and often treated as drudges, barely tolerated and given only basic education. The current literacy rate for girls is 77%, while for boys, it is 84.7%.¹⁸ Further, the enrolment of women in higher education is only 49% in 2020-21.¹⁹ These figures are only the national average, and if one were to examine these figures state-wise as well as district-wise, we would see a huge difference²⁰. If girls and women are not educated, then their participation in the labour force will be affected.²¹ The existence of prejudice/bias against female children and women explains the unequal access to various opportunities and rights and, therefore an abysmal reduction in their participation in the labour force. India is one of the countries which has abysmally low participation of women in the workforce and which has fallen further during the last three years of the pandemic.²² However, women's education

<https://feminisminindia.com/2023/05/11/dowry-harassment-in-india-social-impunity-bypasses-law>

¹⁸ Livemint, *Indian women's literacy rate increased by 68% since Independence: Report*, <https://www.livemint.com/news/india/womens-literacy-rate-increased-by-68-since-independence-report-11678863594186.html>

¹⁹ Sugandha Jha, *More women enrolled in higher education than men in 2020-21, shows AISHE survey*, <https://www.financialexpress.com/jobs-career/education-more-women-enroled-in-higher-education-than-men-in-2020-21-shows-aishe-survey-2963475/>

²⁰ supra note 16

²¹ Sher Verick, *Women's labour force participation in India: Why is it so low?* (2014), International Labour Organisation, https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_342357.pdf

²² Livemint, *Female workforce in India declined to 9% since Covid pandemic. Here's why*, <https://livemint.com/news/india/female-workforce-in-indi>

does not always logically result in higher employment of women or greater autonomy over their bodies and lives, as seen from the crimes against women in a state like Kerala, which has high literacy rates, even more women with higher education, but only 25 % are employed outside their homes.²³ “An overview of the situation of women in Kerala presents a paradoxical picture. Laudable achievements in the socio-demographic realms notwithstanding, such as favourable sex ratio and high levels of literacy, unseen in other parts of the country, issues of economic impoverishment, low participation in political activity, malnourishment and low labour force participation rates are rampant among women in Kerala. Harassment of women in the domestic sphere and the workplace is also observed to be quite common in the State.”²⁴ Clearly then, it is not about the laws' adequacy or nature of these laws; it is about social attitudes and perceptions which affect not only how families treat women, but also how the courts perceive crimes committed against women²⁵ or even the exercise of autonomy by women. This can be clearly seen in the Shafin Jahan Case²⁶. In this case, on May 24th 2017, Kerala High Court Justices Surendra Mohan Kuriakose and Abraham Mathew, annulled the marriage and called it a ‘sham’. Their judgment observed that ‘her [Hadiya’s] marriage being the most important decision in her life, can only be taken with the active involvement of her parents’. The Justices granted Mr. Ashokan custody over Hadiya and ignored the fact that

a-declined-to-9-since-covid-pandemic-here-s-why-11654254827989.html

²³ Pradeep Kumar Panda, *Domestic violence against women in Kerala*, (2004), Kerala Research Programme on Local Level Development, pg. 13, <http://www.cds.ac.in/krpcds/publication/downloads/86.pdf>

²⁴ *Supra* n.21, p.14

²⁵ Mukund P Unny, *Kerala judge's comments: Putting the victim on trial*, *Indian Express*, <https://indianexpress.com/article/opinion/columns/kerala-judge-comments-putting-the-victim-on-trial-8099910/>

²⁶ *Shafin Jahan v Ashokan K.M*, (2018) 16 SCC 368

Hadiya, a legal adult, did not consent to parental custody. Subsequently, Hadiya's husband approached the Supreme Court to challenge the annulment. On March 8th 2018, the three-judge bench of Supreme Court set aside the annulment. On April 9th 2018, it delivered the judgment, holding that the Kerala High Court could not have used Article 226 to annul the marriage of an adult. The Bench was initially headed by Chief Justice Khehar, who took the extraordinary step of ordering the National Investigation Agency (NIA) to investigate Hadiya's marriage²⁷.

Unless women's rights over their bodies and lives are acknowledged, women will never be able to access protection against unwanted pregnancies, abortion, and rape within and outside marriage, all of which are necessary to say that women are empowered. All this calls for a radical overhaul of the societies we live in, and we will need to reconceptualise the very institution of family, which is considered to be fundamental to the current society, yet it is the site of many forms of violence against women – sexual abuse of children, domestic violence, responsible for the lopsided sex ratio, etc.²⁸

The battle for women's empowerment is an uphill struggle in the long run. However, for the time being, the author believes that changes in the way we conceptualise crimes against women may serve us in the short run in ensuring that justice does not continue to elude women in the 21st century. We have come a long way in criminal law from viewing rape as penile penetration of the vagina to conceptualising it as sexual assault with the use of the penis or any object on any orifice of the body. The amendments to the criminal laws made in 2013 definitely are an advance. Not only the changes to Section 375 of the Indian Penal Code, 1860 (IPC), but the inclusion of

²⁷ *Shafin Jahan v Ashokan K.M.*, (2018) 16 SCC 368

²⁸ International Women Development Agency, *The Most Dangerous Place For Women? Their Own Home*, <https://iwda.org.au/the-most-dangerous-place-for-women-their-own-home/>

sections that address the issue of acid attacks on women and criminalising sexual harassment, are all indicative of progress. However, there is a need for change in the very way we conceptualise these crimes against girls and women as a society, in the social context and as legal professionals. As mentioned above, there are many provisions in the Indian Penal Code of 1860 addressing crimes against women. The conviction rate, while being disproportionately low, nevertheless informs us that men are being convicted for these crimes against women. There are other laws that have been enacted to address other crimes against women, the much-maligned S. 498A of the IPC, the Sexual Harassment (Prevention, Protection and Redressal) Act 2013, or The Muslim Women (Protection of Rights on Marriage) Act, 2019. The question is, do women subjected to domestic violence²⁹, divorce by instantaneous triple talaq,³⁰ or those subjected to sexual harassment feel that they have got justice? If they don't, why is it so? What is it that these laws have failed to do when presumably they have all been enacted with the object of providing women "equal protection of the law"? The author's contention is that the legislators and all well-meaning individuals have failed to "ask the woman question". It is a very basic thing that ought to be done - what is it that women want?

Women are so poorly represented in all decision-making bodies, be it the state legislatures, the Parliament or, for that matter, any committee or commission that is responsible for making changes to the laws and policies that affect their lives and persons. No state has more than 20% women representatives in its Assembly. Chhattisgarh had the highest representation with 18% women MLAs, while Himachal

²⁹ Ismat Ara, *A Year Later, Are Instant Triple Talaq Culprits Actually Going to Jail?* <https://thewire.in/religion/a-year-later-are-instant-triple-talaq-culprits-actually-landing-in-jail>

³⁰ *Supra* n.27

Pradesh has just one-woman MLA and Mizoram which had none till recently, now has three women representatives.³¹ Due to the 73rd and 74th amendments to the Constitution we have a mandatory 33% reservation of seats for women in local bodies. In most of the states this representation often tends to be nominal and not empowering for the women representatives. “However, in the majority of cases, increased political representation has not translated into actual transfer of power. Women in PRIs act merely as a rubber stamp, while their husbands actually call the shots. These sarpanch/pradhan/mukhiya-patis (husbands) encourage women to file for nominations and later discourage them from involving themselves in governance. Women are nothing more than proxies. They do not attend panchayat meetings and continue to have a lack of agency. Those who do, face trivialisation and ostracisation by male members of the panchayat”.³²

To what extent are women consulted? Do any of the members of any of these decision-making bodies ever consider what could be the impact of any of these laws on women and their lives? The Protection of Women from Domestic Violence Act, 2005 is an exception, for the simple reason that it was drafted by an organisation that has been working on women’s issues and, at that time, particularly on domestic violence. It was the product of the experience of women lawyers who had been creatively using provisions of the Civil Procedure Code that provide for injunction and protection orders against the men who inflicted violence on their wives as opposed to

³¹ PRS Legislative Research, “In Charts: What Women's Representation in India's Parliament, Assemblies Looks Like Now” <https://thewire.in/government/in-charts-what-womens-representation-in-indias-parliament-assemblies-looks-like-now> (last visited December 22,2023)

³² “Women in Panchayati Raj Institutions”, EPW Vol. 57, Issue No. 3, 15 Jan, 2022 https://www.epw.in/journal/2022/3/letters/women-panchayati-raj-institutions.html?0=ip_login_no_cache%3D4b80ca2e212a81c3e0297f11190ff1e0

invoking the more draconian 498A IPC, which is a non-bailable, non-compoundable and cognisable offence. It was the experience of the women lawyers that informed the drafting of this Act and consequently provided remedies that the average woman seeks in the context of domestic violence. However, judicial interpretation has often resulted in subverting the objective of this Act too. This is why no amount of law reform can guarantee justice to women unless all judges are gender sensitised.

That many, if not most, members of the judiciary are gender insensitive is borne out by the fact that the Supreme Court of India had to bring out a Handbook on Combating Gender Stereotypes.³³ There is a need for change not only in how we describe/conceptualise the crimes against women, but also in the procedure and the evidentiary requirements under the law. Most, if not all, crimes against women occur in private spaces and not often in public, and mostly not in front of witnesses. Most of the crimes against women are committed by men known to the women – husbands, other male relatives, male friends/partners, teachers/professors, co-workers, fellow students etc. Or they are committed by total strangers in a public space, like in the context of street sexual harassment. These two facts have to be taken into consideration since, in such situations, “to prove beyond reasonable doubt”, a fundamental principle of criminal law, can hardly be met. Especially taking into consideration the kind of evidence that has to be produced in order to secure a conviction in such cases. Even before addressing these issues, it is necessary to understand these crimes from the perspective of women. For e.g., we have Section 354 in the Indian Penal Code of 1860

³³The Hindu Editorial, *Fighting Stereotypes: On the Handbook on Combating Gender Stereotypes*, <https://www.thehindu.com/opinion/editorial/fighting-stereotypes-the-hindu-editorial-on-the-handbook-on-combating-gender-stereotypes/article67204889.ece>

(IPC).³⁴ Essentially this section has been used in the past along with S. 509 and S. 298 of IPC to address the issues of street sexual harassment prior to the 2013 Criminal Law Amendment Act. A separate section 354A now defines the offence of sexual harassment and has been retained under the new Bharatiya Nyaya Samhita, 2023.

There are two problems in the way this section is worded as, “outrage the modesty of a woman”. The first problem is with the word modesty, as it is a learned behaviour, socially constructed. A modest woman is one who dresses and behaves in a way that is intended to avoid causing sexual feelings in men. ³⁵ “Modesty, sometimes known as demureness, is a mode of dress and deportment which intends to avoid the encouraging of sexual attraction in others.” ³⁶ Thus, the burden of maintaining modesty is on women. They are taught how to dress and behave in such a way as to ensure that they are modest. Secondly, a woman who is considered to have no modesty, like women in sex work, cannot have their modesty outraged. So, if they are subjected to sexual harassment, would there be no remedy in law? To some extent this has been addressed in *Budhadev Karmaskar v. State of West Bengal*³⁷ which reclaimed the rights of sex workers through judicial interventions. However, the fundamental problem with this conceptualisation of sexual harassment of women is that do women subjected to sexual harassment feel that their modesty has been outraged? Is that what is the problem here? Or is it a violation of their personal space and bodies? That someone has dared to touch their bodies and get into their personal space without their consent? Is it possible at all to

³⁴ Indian Penal Code, 1860, S. 354, No. 45, Acts of Parliament, 1860 (India)

³⁵ Collins Dictionary, *Definition of 'modesty'*, <https://www.collinsdictionary.com/dictionary/english/modesty>

³⁶ Sheila Jennet, *The Oxford Companion to the Body* (eds. Colin Blackmore and Sheila Jennet, Vol. 7, New York, NY: Oxford University Press, 2001.

³⁷ *Budhadev Karmaskar v. State of West Bengal* Cr.Appel 135/2010, (2022) SCC 704

think about various forms of sexual harassment in terms of women's experience and what they want to be protected rather than in terms of how society, (generally men) perceives sexual harassment to be?

In this manner, all crimes against women need to be revisited and reconceptualised using feminist legal methods – asking the woman questions and feminist practical reasoning. Increasingly, scholars and those working on women's human rights have come to realise the value of using a feminist perspective in judicial decision-making.³⁸ In conclusion, if a gender-just society has to prevail and goal 5 of the SDGs has to be achieved then we need to change the way we think, bring up our children and the way we interact with one another. All other efforts in the absence of these fundamental changes in a world that is increasingly growing apart due to differences in access and use of resources will only result in justice continuing to elude women. At the same time, legislators, judges and all involved in the legal system have to adopt feminist legal methods while enacting a law to ask women the question, "How will this law or this decision impact women? Will it provide the relief they need or actually aggravate the conditions in which they live right now?" If judges rely on the feminist legal method of consciousness-raising and decide collaboratively, learning from what they have heard women share and from each other, there would be fewer dissenting opinions, and the judicial decisions would be closer to providing the relief that women seek.

³⁸ Judicial Decision-Making with a Gender Perspective: A Protocol, https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf