



# Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820  
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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## Gender Justice and Judicial System

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*Received* 25 November 2021; *Accepted* 15 December 2021; *Published* 20 December 2021

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*The research paper analyses the legal aspects of Gender issues within a Society. It also analyses the Constitutional and Legal Provisions for women to secure their inherent rights. It aims to talk about the major steps taken by the judiciary in addressing Gender-based biasness. It proceeds with introducing the current scenario of Gender biases and the stereotypical nature of the society and then moves towards explaining the interference of the Judiciary, the role of the Apex Court in addressing and securing justice for women. It also focuses on changing the nature of policymaking of government by the influence of the Judiciary. The analysis concludes the prevalence of various unwelcome biases. It also concluded that humans have not yet overcome their primal tendencies of “might is right”.*

**Keywords:** *gender, justice, judicial system.*

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### INTRODUCTION

Humans from the very beginning are making efforts to create an environment of competence. Women have always been badly treated in society and the irony lies in the fact that in India women are worshipped as ‘shakti’ and considered as a goddess. The nature of society has kept on changing from the beginning till now. Hence, we have now established a patriarchal nature

of society. There is a huge amount of difference in the view of people w.r.t gender and consequently, have raised the issue of 'Gender Justice' in our society.

According to the World Economic Forum's Global Gender Gap report 2021, India has elevated its 62% of the gender gap, still positioned at 140<sup>th</sup> out of 156 countries in the world. The earned income of the women is only 1/5 of that of men's income, which puts India among the bottom 10.<sup>1</sup> Gender Justice primarily means to provide equal rights and justice to the individual irrespective of the gender factor.<sup>2</sup> The Judiciary of India by evolved for years, developing and overcoming its views on the stereotypical gender biases of the society, taking a bold move for procuring gender justice and leading the society towards progressive equality attitude. This active attempt of the Judiciary was supported by a popular historical judgement of Vishakha & Ors. vs State of Rajasthan (1997).<sup>3</sup>

Judicial activism in most simpler words is a performance of judicial review where a judge plays a supreme role to put forth the constitutional issues and invalidate any legislative or executive action. The concept of judicial activism was firstly by American Historian Arthur M. Schlesinger, Jr., in 1947.<sup>4</sup> The Black's Law Dictionary led a definition of judicial activism as a "philosophy of judicial decision making whereby judges allow their personal views about various public policies, among all the other factors, to reach their decision."<sup>5</sup>

In India, the judiciary plays a very active role, and the introduction of Public Interest Litigation by P.N Bhagwati shows an attempt of the judiciary to look into the wider interest of the public.<sup>6</sup> The course of judicial activism can be clearly seen and reflected in a famous landmark case of the Keshwananda Bharti case (Keshwanada Bharti vs State of Kerala)<sup>7</sup> in which the apex court tampered with the basic structure of the constitution, activism gained an emerging

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<sup>1</sup>'WEF's gender gap index: India slips 28 places, ranks 140 among 156 countries' (*The Hindu*, 31 March 2021) <<https://www.thehindu.com/news/national/wefs-gender-gap-index-india-slips-28-places-ranks-140-among-156-countries/article34206867.ece>> accessed 21 November 2021

<sup>2</sup> *Ibid*

<sup>3</sup> *Vishakha & Ors v State of Rajasthan* (1997) 6 SCC 241

<sup>4</sup> *Ibid*

<sup>5</sup> Brian A Garner, *Black's law dictionary* (St. Paul, MN: Thomson Reuters 2014)

<sup>6</sup> *Ibid*

<sup>7</sup> *Keshwanada Bharti v State of Kerala* (1973) 4 SCC 225

power from this case. The judicial activism overlooks the domain of all the organs of government, as an interface to reach into the appropriate working of democratic rights.<sup>8</sup>

## RESEARCH OBJECTIVES

The distinction and discrimination on the basis of sex, colour, creed, caste, race, religion, etc exist in our society from the head start, and according to fundamental rights it has been declared unlawful and void. Through this paper, the author aims to talk about how the Judiciary has taken drastic improvements over the years in an affirmative order to let justice prevail for women and for human rights.

**The main objectives of the paper are as follows:**

- To analyse the interference of the judiciary in gender biases and stereotypes.
- To highlight the role of the Supreme Court in securing justice for women.
- To study Legislative provisions, Constitutional privileges, and Landmark judgements for ensuring gender justice.
- To study the function of the judiciary in preserving Human rights w.r.t Gender Equality.
- Focus on evolving nature of policymaking of Government by the impact of the judiciary.

## RESEARCH METHODOLOGY

Firstly, the paper analyses the various Constitutional and Legal Provisions available to secure Gender Justice for women in India. The influence of state court decisions in promoting equality and unbiased behaviour in society. It then proceeds to the explanation of the significance of the judiciary and the role played in eliminating stereotypical existing laws in the Constitution. The main source of data handling is secondary data and is collected to

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<sup>8</sup> *Ibid*

examine the objectives and to answer the questions of the research from various research papers, websites, and books.<sup>9</sup>

## REVIEW OF LITERATURE

**Hussain, S. (2009). Community Identity, Citizenship Rights and Gender Justice: The Case of Muslim Women in India. *Contemporary Perspectives*, 3(2), 351–363.** The author has explained the challenges faced in women's rights from the cultural and political viewpoint. The concern of the paper is to explain the manner in which community and gender join with each other, and these two then further with government policies. The paper has analysed the issues faced especially by Muslim women in achieving gender justice, women's citizenship right through personal law, and the community identity. The author has made the path of evolution for gender justice from Muslim women's struggle till the personal law comes in support and also added the political views on the topic. The author has supported his analysis with the famous landmark cases and government policies.

**Yousuf, A. M. (2018). ROLE OF JUDICIARY IN PROTECTING WOMEN RIGHTS. *JOURNAL ON CONTEMPORARY ISSUES OF LAW*, 3(12).** The author starts his paper by discussing the objectives and targets of The Millennium Development Goals (MDGs). The main concern of the author is about empowering women and uplifting the social and political status of women. The paper tried to analyse the contribution of the Judiciary in protecting women rights and highlighted the role of the Supreme Court in eradicating the issues and challenges faced by women in India like dowry-related problems, domestic violence, lack of education, refusal of providing equal rights, etc. and also rescuing the rights of women whenever anti-women legislation comes into the picture. The paper aims to progress the techniques of empowering women as same as men.

**PRITAM JYOTI PEGU, ARKIDA YASMIN. (2021). Role of the Indian State and Judiciary in ensuring Gender Justice: A Paradigm shift in the nature of Policy Making and Proactive role of the Judiciary. *PalArch's Journal of Archaeology of Egypt / Egyptology*, 18(1), 3675-**

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<sup>9</sup> *Ibid*

**3687.** The author has summarized the pro-active role of the judiciary by putting forth legislative acts and policies, constitutional safeguards on gender justice, and other provisions of law. This paper closely analyses the process of transition in policymaking by bold moves of judiciary such as Abolition of Sati Act, 1829, Dowry Prohibition Act, 1961, The Maternity Benefit Act, 1961, etc. and the government schemes to achieve gender equality such as Beti Bachao Beti Padhao, Mahila E-Haats, Ujjawala Yojana, etc. The author has also gone through the role of the judiciary with the various precedents it has set, mainly Sabarimala Judgement and Section 377 of IPC.

**Chhabra, S. (2015). Legislative and Judicial Perspective of Women Empowerment. *International Journal of Law and Legal Jurisprudence Studies: ISSN, 2348-8212.*** The paper analyses constitutional rights (i.e., fundamental rights and provisions) with respect to women. It analyses the position and standing of women and the major steps taken for woman upliftment. It describes the positioning of India and its commitments at the international platform for attaining sustainable goals of gender equality. The major loopholes such as Patriarchal issues, gaps, lack of political standpoint, and problems with the judicial structure.

**Fix, M. P., & Johnson, G. E. (2017). Public perceptions of gender bias in the decisions of female state court judges. *Vanderbilt Law Review, 70(6), 1845-1886.*** The author has compared the perspective of people and their reaction to the judgement when women lead the bench and has examined gender affects the way the public responds to judicial outcomes. The paper has presented the argument on what if traditional gender stereotypes continue to dominate the society, and frightfully conveyed the male-dominant ideology in the judgements. The author has collected the statistical data on the male and female judge differences in perception decisions making of any case. The author has concluded the paper on a point that the agreement of the public with male judges would lead to a male dominating society resulting in women judges being considered as an ineligible factor overall.

## **INDIAN CONSTITUTIONAL VIEW ON GENDER JUSTICE**

The Preamble, the Fundamental Rights and Duties, Directive Principle of State Policies (DPSPs) of the Indian Constitution lays provision to provide assurance of safeguarding the women's human rights. The Preamble provides justice both economically and socially, equality of status, and dignity to both genders. The Fundamental Rights under Articles 14,<sup>10</sup> 15(1),<sup>11</sup> 15(3),<sup>12</sup> 16,<sup>13</sup> 39(a),<sup>14</sup> 39(b),<sup>15</sup> 39(c),<sup>16</sup> and 42<sup>17</sup> are of specific importance safeguarding women's rights.

### **Constitutional Privileges for women:**

- Equality before law for woman (Article 14);
- The women should not be discriminated on the grounds of sex by the State (Article 15(1));
- Special provisions to favour women rights (Article 15(3));
- Equal opportunity to all the genders related to employment under the State (Article 16)
- Equal payment at work to both of the gender (Article 39(a, d<sup>18</sup>));
- The duty of the state to make provisions securing maternity benefits and providing humane conditions to women (Article 42);
- To discard the practices which are derogatory to the dignity of women and promote the spirit of brotherhood (Article 51(A) (e)<sup>19</sup>);
- 1/3 of the total seats of the panchayat are to be reserved for women (Article 243 D (3)<sup>20</sup>).

### **LEGAL PROVISIONS**

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<sup>10</sup> Constitution of India, art 14

<sup>11</sup> Constitution of India, art 15(1)

<sup>12</sup> Constitution of India, art 15(3)

<sup>13</sup> Constitution of India, art 16

<sup>14</sup> Constitution of India, art 39(a)

<sup>15</sup> Constitution of India, art 39(b)

<sup>16</sup> Constitution of India, art 39(c)

<sup>17</sup> Constitution of India, art 42

<sup>18</sup> Constitution of India, art 39(d)

<sup>19</sup> Constitution of India, art 51(A)(e)

<sup>20</sup> Constitution of India, art 243(D)(3)

To uphold the constitutional remedies for women, the Government has enacted various measures to ensure equal rights, especially for women. These are some of the laws passed by the Parliament with an objective to fulfill the Constitutional obligation of women right's securement:

**1. The Dowry Prohibition Act, 1961**<sup>21</sup>: This act was passed on May 1, 1961 (Act no. 28), to prohibit the custom of giving or receiving a dowry. Under this act, dowry includes property, goods, money given by any party to the marriage.<sup>22</sup> Section 3<sup>23</sup> of the Act provides the minimum punishment for abetting or taking of dowry for 6 months up to 5 years and the fine of rupees, fifteen thousand.<sup>24</sup>

**2. Maternity Benefits Act, 1961**<sup>25</sup>: The Maternity Benefit Act on November 1, 1961 (Act no. 53), aims to protect the employment rights of women during the time of her maternity i.e,<sup>26</sup> to provide fully paid leave for work, to take care of the child. The women must be working in an established period of at least 80 days in the last 1 year to entitle benefits under this act. It provides a fully paid leave of 26 weeks and for the second child 12 weeks. Under Maternity Benefit Bill, 2016, the further added on the benefit of work from home.<sup>27</sup>

**3. The Medical Termination of Pregnancy Act, 1971**<sup>28</sup>: The Medical Termination of Pregnancy (MTP) act, 1971, stated that the abortion of a child is legal only up to twenty weeks of pregnancy after the advice of a minimum of two doctors. The abortion will be valid under specific conditions and situations which is either the risk of the life of the pregnant woman or grave physical or mental injury or if there is a considerable risk that if the child was born,<sup>29</sup> it would have some abnormalities. In the recent amendment of the Medical Termination of Pregnancy Act, the termination of pregnancy up to 20 weeks is valid for married women with

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<sup>21</sup> Dowry Prohibition Act 1961

<sup>22</sup> *Ibid*

<sup>23</sup> Dowry Prohibition Act 1961, s 3

<sup>24</sup> *Ibid*

<sup>25</sup> Maternity Benefits Act 1961

<sup>26</sup> *Ibid*

<sup>27</sup> *Ibid*

<sup>28</sup> Medical Termination of Pregnancy Act 1971

<sup>29</sup> *Ibid*

the permission of one registered practitioner.<sup>30</sup> The new law helps eradicate maternal mortality to meet the Sustainable Development Goals (SDGs) and also increase the access of safe abortion to women.<sup>31</sup>

**4. The Sexual Harassment at the workplace, 2013<sup>32</sup>:** Sexual Harassment of women at work (Prevention, Prohibition and Redressal) was enacted on 22<sup>nd</sup> April 2013 (Act no. 14), referred to as “PoSH Act” enacted with the objective of making the workplace safer and secure for women, by preventing and prohibiting unacceptable act at workplace. The act defines sexual harassment as unwelcome behaviour or acts, physical contact, demand for sexual favour, sexual remarks, showing pornography, or any other unwelcome behaviour, of sexual nature.<sup>33</sup>

## **ROLE OF GOVERNMENT POLICIES, SCHEMES, AND SPECIAL INITIATIVES FOR WOMEN**

A number of schemes, policies, and initiatives are implemented by the government of India to promote an active presence of women, achieve gender equality and equal opportunities for women. The policies of government mainly focus on poor, vulnerable, and marginal sections of society, especially women. These are the following schemes, policies, and initiatives executed by the government for the overall upliftment of the prevailing conditions:

- **National Policy for Empowerment of Women:** This policy of the government was launched in the year 2001, with the objective of creating an environment that is gender-neutral to eliminate discrimination, empower women and promote development. It aims to provide de-facto enjoyment of all the human rights to women in all the spheres – political, economic, social, and cultural.
- **Mahila E-Haats:** Mahila E-Haat is an initiative and an online marketing platform for women aspiring to be entrepreneurs. It is a platform where women can display their unique products. It was launched under “Digital India” and “Make in India” projects to

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<sup>30</sup> *Ibid*

<sup>31</sup> *Ibid*

<sup>32</sup> Sexual Harassment at work place Act 2013

<sup>33</sup> *Ibid*

encourage women, entrepreneurs, to come forward and reflect their potential to create a gender-neutral nation.

- **Implementation of United Nation Sustainable Development Goals:** The 5<sup>th</sup> Sustainable Development Goal of the United Nation is to achieve gender equality. The Government of India has aimed to end violence against women as a national priority, which complies with the target set by the United Nations. The key initiative Beti Bachao Beti Padhao aims at equalizing education for girls in India.
- **Establishment of the National Commission of Women:** The National Commission of women was set up in January 1992 by the Government of India to ensure justice for women. It is a platform that provides a voice to the major issues and problems of women. It acts in suo-moto to provide speedy trials and justice on women's issues. It organizes workshops, gender awareness campaigns against major social evils.<sup>34</sup>

## SIGNIFICANCE OF JUDICIARY IN ENSURING GENDER JUSTICE

The Judiciary of India has played an important role in delivering gender neutral justice and ensuring constitutional rights and equality of the people. For many years the judiciary has delivered various indispensable judgements which have upheld its faith among the general public.

**The major rulings and judgements by the judiciary are as follows:**

**1. *Vishaka Sawhney vs State of Rajasthan (1997)***<sup>35</sup>: The Supreme Court laid the guidelines for the basic rights for the women at the workplace in the case of Vishaka Sawhney vs State of Rajasthan, 1997 w.r.t to the gang rape of Bhanwari Devi by a bunch of Thakurs as she took a forward step and attempted to stop a child marriage occurring in their family. Wherein the trial court held the accused to be not liable, but Bhanwaridevi was determined to fight further

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<sup>34</sup> Pritam Jyoti Pegu and Arkida Yasmin, 'Role of the Indian State and Judiciary in ensuring Gender Justice: A Paradigm shift in the nature of Policy Making and Pro- active role of the Judiciary' (2021) 18(1) PalArch's Journal of Archaeology of Egypt / Egyptology <<https://archives.palarch.nl/index.php/jae/article/view/5631>> accessed 20 November 2021

<sup>35</sup> *Vishaka Sawhney v State of Rajasthan (1997)* 6 SCC 241

and get justice.<sup>36</sup> In December 1993, the High Court said “it is a case of gang rape which was committed out of vengeance”. This provoked NGOs to file a petition under the name ‘Vishaka’ to give direction for sexual harassment, as a result, Supreme Court led Vishaka Guidelines on 13 August 1997.

**2. *The Secretary, Ministry of Defence vs Babita Puniya & Others (2020)***<sup>37</sup>: In 1992, the Indian Government issued a notification allowing female candidates to join certain cadres of the army for a short period (Short Service Commission). The petitioner, Babita Puniya argued that women undergo rigorous training and all mandatory courses which male officers undergo.<sup>38</sup> The Supreme Court bench observed that depriving women officers of the category of Permanent Commission in the armed forces is a violation of their Fundamental Rights guaranteed under Article 14, which is Equality before the law and equal protection of the law.<sup>39</sup>

**3. *Mohammad Ahmed Khan vs Shah Bano Begum (1985)***<sup>40</sup>: Shah Bano was a divorced Muslim woman denied by her husband for maintenance of Rs 200. She appealed in lower court under Section 125 of CRPC.<sup>41</sup> The Supreme Court finally ruled in favour of Muslim divorcee Shah Bano, declaring that her husband should give her alimony.<sup>42</sup> Muslim fundamentalists in India treated it as an encroachment in Muslim Personal Law and protested against it. This set off a political controversy and the government of the day overturned this judgement bypassing the Muslim Women (Protection on Divorce Act), 1986,<sup>43</sup> according to which alimony need be given only during the iddat period.<sup>44</sup>

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<sup>36</sup> *Ibid*

<sup>37</sup> *Secretary, Ministry of Defence v Babita Puniya & Others (2020) 7 SCC 469*

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid*

<sup>40</sup> *Mohammad Ahmed Khan v Shah Bano Begum (1985) 2 SCC 556*

<sup>41</sup> Code of Criminal Procedure 1973, s 125

<sup>42</sup> *Ibid*

<sup>43</sup> Muslim Women (Protection on Divorce Act) 1986

<sup>44</sup> *Ibid*

**4. *Tuka Ram & Anr vs State of Maharashtra (1979)***<sup>45</sup>: The famous Mathura rape case became the episode of custodial rape in India, where a young Harijan girl from Mathura was miserably assaulted and raped by two policemen on the compound of Desaiganj Police Station, Maharashtra.<sup>46</sup> The case was filed under Section 354<sup>47</sup> & 376<sup>48</sup> of the Indian Penal Code. The appellant, Tukaram, and Ganpat were sentenced to one-year and five-year imprisonment respectively by the High Court.<sup>49</sup> However, the Supreme Court of India held that there were no visible injury marks on the body of the victim, thus the judgement noted no struggle therefore no rape.<sup>50</sup>

## SUGGESTION

- The step ahead begins with bridging the existing rooted biases. It will only be possible by encouraging the concept of gender equality and promoting the ideology of indiscrimination.
- The idea of fast-track courts should be promoted for fast-track justice to the victims of rape and other heinous crimes against women. Constructing public awareness is important for judicial activism.
- The National Commission for Women and the National Human Rights Commission can play a crucial role in addressing violations of women's rights and freedom.
- **The** judicial system should be cautious in preserving the rights and justice of women.
- The judicial system of our country should take rigid decisions in punishing the wrongdoers and make constructive decisions.
- The securement of laws for women is done by our constitution and legislature but most of the laws are confined and limited to the books, it should be implemented to the fullest.

## CONCLUSION

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<sup>45</sup> *Tuka Ram & Anr v State of Maharashtra (1979)* 1 SCC 810

<sup>46</sup> *Ibid*

<sup>47</sup> Indian Penal Code 1860, s 354

<sup>48</sup> Indian Penal Code 1860, s 376

<sup>49</sup> *Ibid*

<sup>50</sup> *Ibid*

The Apex Court of India and the other courts classify Constitutional rights and provisions in favour of women. It is the helper to save the rights and considered as the last resort working in the of women. It is time for us to realise that there is a common issue and urgency to this growing danger in society. Fighting crime against women's fundamental rights is a much more important challenge than anything. Society is changing in nature and the government is bound to take steps as it is short of reasons, the Hon'ble Court mainly drawn its attention to the right of women and had forced the Indian Government has to take forward constructive steps for implementing the regulations and rules laid down for the welfare of women in the society is the major challenge before us. The activism of the Judiciary of India on this subject matter is a vital contribution to the protection of women's rights and welfare.