

India: Implementing Sex Equality Through Law

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I. INTRODUCTION

India has a long tradition of attaching profound importance to equality. Addressing some especially entrenched and dramatic inequalities of dignity, material well-being, and political empowerment—deriving from the traditional caste hierarchy, from discrimination against minority religious communities, and from pervasive traditions of sex hierarchy in all the major religions and cultural groups—the constitutional framers made bold and decisive commitments to a range of human rights, liberties, and equalities. The Preamble states that the People of India commit themselves to secure to all citizens: “Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation.”¹ In many respects the nation’s legislative and judicial traditions have pursued these commitments, especially in seeking the full equality of the previously subordinated groups.

On the other hand India remains the scene of striking inequalities, sometimes shaky liberties, and a sometimes threatening absence of fraternity. Literacy rates remain around 65 percent for men and 40 percent for women. Women hold only 6.7 percent of seats in Parliament, and only one seat (out of twenty-six) on the Supreme Court. Women still have a difficult time protecting their bodily integrity, whether against domestic violence (marital rape is not a crime and police rarely enforce laws against domestic violence), or against rape outside the home (a woman’s sexual history is still relevant evidence in rape trials). Economic well-being still too frequently follows traditional lines of caste, class, and sex. Violence along lines of caste and religion remains a common feature of life in many regions of the nation.

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1. Indian Const, Preamble, available online at <<http://alfa.nic.in/const/preamble.html>>.

Following the complex history of the struggle for human rights through law in India thus provides a fascinating study of the prospects and problems for implementation of international human rights norms in a parliamentary democracy, against background traditions of entrenched inequality. This Article will consider the ways in which domestic political processes have implemented, or failed to implement, rights that are important to the international human rights debate—in one case responding to the stimulus of an international treaty, but often enacting ideals already explicit in the national Constitution.

I focus on sex equality and on a range of rights of particular salience for women because this focus proves a valuable way to understand the workings of the political process more generally, its pitfalls, and what citizens may reasonably hope from it. I focus on the role of law, rather than on the diverse efforts of administrative agencies, non-governmental organizations (“NGOs”), and movements and groups of many kinds; therefore I tell only one part of the story of women’s empowerment. Law is not a profession particularly held in honor in India, and thus feminists tend to have lower expectations from law than they do in the United States. If we can show that, nonetheless, considerable progress toward sex equality has been made through law, this finding will suggest (correctly, in my view) that there has been even more significant progress in other domains.

This story of internal reform through law is significant because today people who are deeply committed to international human rights differ profoundly over the appropriate strategies to implement and maintain these rights. Some follow Kant in defending national sovereignty and opposing any serious intervention, in the name of human rights, into the affairs of another nation. Usually these Kantians also share Kant’s own optimism that democratic states, left to their own devices, and exposed to the moral suasion of the international community, will become progressively more enlightened, and come to treat humanity in the person of all their citizens as an end, in the ways international human rights norms spell out. At the other extreme are those who ultimately favor a rather thick structure of international governance, more or less statelike, that would have the power to enforce international human rights norms. These people are convinced that human rights are too urgent and non-negotiable to be left to the vagaries of the democratic political process in each nation.

This Article will use the case of sex equality in India to argue for an intermediate position. Usually, and on balance, I shall argue, the Kantian position is the wisest: norms are meaningful and stable only when they are adopted freely from within. Moreover, the nation is the largest unit we currently have that is sufficiently accountable to people’s voices to be a legitimate vehicle of their most important concerns. On the other hand, there is much to be said about what nations do well and not so well in this area, and the case of India does provide occasion for criticism of certain forms of democratic procedure as ineffective safeguards of fundamental liberties. It also shows that international documents and the pressures they supply are extremely valuable prods to the internal democratic process of nations seeking to

equalize previously unequal groups. Finally, I will grant that there are some cases in which a thin but serious set of international institutions, able to impose sanctions, should indeed intervene in domestic affairs—though not, I believe, in any case we have yet seen in India since Independence.

I begin by setting out some basic facts about the structure of the Indian system, and the ways in which basic rights are addressed in the domestic framework. In Section III, I discuss the problems for sex equality and other important human rights created by the system of personal laws, separate for each of the major religions, that govern family law, property, and inheritance. In Sections IV and V, I examine some outstanding instances of progress toward both sex equality and major liberties through judicial review of statutes and a tradition of substantive due process. In Section VI, I examine an important sexual harassment case in which human rights norms in the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) were held to be binding on the nation. In Section VII, I consider another important legal source of women’s empowerment, the reservation of seats for women in local *panchayats* or councils, and the controversy over extending these reservations to the national parliamentary level. I conclude with some reflections about the prospects for progress on human rights through domestic political action.

II. THE INDIAN DEMOCRACY: FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW

India’s Constitution, adopted in 1950, establishes a parliamentary liberal democracy. The primary legislative body is the *Lok Sabha* (House of the People). The Constitution provides for a Supreme Court, with a Chief Justice and (initially) no more than seven other Justices (now twenty-five others, who do not all sit simultaneously, but are divided into panels), and also for High Courts in the various States. The Justices of the Supreme Court are currently appointed by a collegium of senior Justices. There are numerous complaints that the judiciary is insufficiently representative of India’s diverse population. The first woman was appointed only in 1990, and typically (as currently) there is but a single token woman on the Court. In 2000, a crucial sex equality case pertaining to the Muslim community was heard by a bench consisting of five Judges, of which none was a woman and none belonged to any minority community.

The role of the Supreme Court has evolved over the years in the direction of greater authority and independence. Jawarhalal Nehru, fearing that a conservative judiciary might frustrate progressive social goals, seems to have favored parliamentary sovereignty and a limited role for the Court. Nonetheless, he also accepted a system in which the Supreme Court is the ultimate interpreter of a group of Fundamental Rights that form Section III of the Constitution. These rights cannot be amended by a majority vote of Parliament. A struggle over the status of the Fundamental Rights has been waged on and off since Independence.

The primary focus of the struggle has been the amending power of Parliament. Amendments that alter the Constitution's "essential features" or "basic structure" (for example, the holding of fair and free elections) are held unconstitutional under the Supreme Court's 1973 decision, *Keshavananda Bharati*.² In certain specific areas of state action, however, pertaining to material redistribution, the Directive Principles of State Policy (which will shortly be described) might on occasion override fundamental rights subject to judicial review. Although this system was temporarily disrupted by Mrs. Indira Gandhi during the Emergency, it was restored after her ouster, and today the ideas of judicial review and of the "essential features" have widespread acceptance. Subsequent Supreme Court decisions have held the *Keshavananda* idea of "essential features" to include the rule of law, secularism and federalism, free and fair elections, and judicial review itself.

Thus the Fundamental Rights play a central role in constitutional jurisprudence, in conjunction with the crucial idea of "essential features." These Fundamental Rights, although in many ways comparable to (and influenced by) the US Bill of Rights, are both more numerous and explicit than those recognized in the US Constitution. Their formulation is typically positive ("All citizens shall have the right . . .") rather than negative, in terms of what the state may not do. The account of each right includes a great deal of detail, designed to resolve controversy in advance. The list of explicit entitlements is correspondingly detailed, including matters, such as the freedom of travel and the right to form labor unions, that US constitutional law has arrived at by judicial interpretation of more generally specified rights.

Article 13 of the Constitution explicitly invalidates all "laws in force" that are inconsistent with the list of Fundamental Rights—although, as we shall see, it remains disputed whether "laws in force" includes the personal laws.

Section IV of the Constitution is a set of Directive Principles of State Policy: unenforceable aspirational guidelines that should be goals for governmental action. These include such general matters as the promotion of good nutrition, humane working conditions, and the economic interests of traditionally subordinated groups. But they also include some much more concrete matters, including one of special importance to women. Article 44 states that "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."³ This provision came to be entered among the Directive Principles because there was insufficient agreement to put it into an enforceable section of the Constitution.

The issue of sex equality was much discussed during the drafting of the Constitution. Nehru and his law minister B. R. Ambedkar (himself a lower-caste man) were explicitly and deeply committed to the abolition of inequalities based on caste and sex. The Fundamental Rights were drafted so as to reflect this emphasis.

2. 60 AIR SC1461 (1973).

3. India Const, Art 44, available online at <<http://alfa.nic.in/const/po4044.html>>.

Article 14 guarantees to all persons equality before the law and the equal protection of the laws. Article 15 prohibits State discrimination on grounds of "religion, race, caste, sex, place of birth or any of them." Article 17 abolishes untouchability and the practices associated with it. Other rights that are highly relevant to sex equality include Article 13 (invalidating all laws inconsistent with the Fundamental Rights); Article 16 (equality of opportunity in public employment); Article 19 (protecting freedom of speech and expression, freedom of association, freedom of travel, freedom of residence, and freedom to form labor unions); Article 21 (stating that no citizen shall be deprived of life or liberty "except according to procedure established by law"); Article 23 (prohibition of traffic in human beings and forced labor); and Article 25 (freedom of conscience and religion).

The understanding of equality in the Constitution is explicitly aimed at securing substantive equality for previously subordinated groups, and is designed to ward off merely formal understandings of equality that have, in the US context, been used to oppose affirmative action. Article 15 states that "Nothing in this article shall prevent the State from making any special provision for women and children," and that "Nothing in this article . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." Similar clauses appear in Article 16 (equality of opportunity in public employment) and in Article 19 (various other rights and liberties). The Indian tradition (extending back to the early 20th century) is strongly in favor of quotas and other affirmative action measures for deprived groups. In short, the framers understood the goal of equality in terms of an end to systematic hierarchy and discrimination, based on both caste and sex.

It should be observed at the outset that the Indian Constitution was in some crucial respects not democratic. In a nation with such low literacy rates, any gathering of highly educated people is non-representative, and the Indian framers were clearly an elite, usually by wealth and class as well as by education. (Ambedkar's role was thus vitally important in making the presence of the lower castes a real part of the constitutional process.) Certainly that was true of women: women's issues were debated endlessly, with almost no women present. The elitism was that of a progressive liberal group who was determined to eradicate entrenched inequalities. Today, when the legislature is much more genuinely representative, and caste-based and regional parties play an important political role, there is much less support for some fundamental features of the Constitution than there was in 1950. The Bharatiya Janata Party ("BJP") evidently wants to alter one of the Constitution's most basic features, the equal standing of the religions, in favor of a Hindu state; and, as we shall see below, crucial measures protective of sex equality are vociferously denounced by some of the caste-based parties. Thus the evolution of the democracy provides a classic case study of the tension between the "liberal" and the "democracy" in "liberal democracy." I shall argue below that a strong entrenchment of fundamental liberties

and a correspondingly strong role for judicial review are important in order to retain the original commitments to central human rights.

III. SEX EQUALITY AND PERSONAL LAWS

Although the Constitution protects sex equality and free choice of religion, it also retains plural systems of religious personal law (Muslim, Hindu, Parsi, and Christian). These systems govern property law and inheritance, as well as family law (marriage and divorce, maintenance, child custody, etc.). This decentralized situation dates back to the Raj, when the British codified commercial and criminal law for the nation as a whole, but, in the spirit of divide and rule, encouraged the maintenance of separate spheres of civil law in non-commercial areas, and actually codified Hindu law themselves (since it existed in a plural decentralized condition). At Independence many leading politicians favored a Uniform Civil Code. However, in the wake of the bitter sentiments that followed the violence of the Partition riots of 1947, Muslims who remained in India justly feared that they would become second-class citizens, and strongly insisted on retaining their own legal system. (Interestingly, Muslim clerics had strongly opposed partition and supported a united India.) Because of the strong Muslim opposition to a Uniform Code, it was thought expedient to shelve that proposal for the time; it was therefore placed in the non-enforceable Directive Principles of State Policy. (Article 44 states that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.")

For a time in the 1970s, support for a Uniform Code was growing, and many Muslims supported it. However, as shown below, the backlash occasioned by the Shah Bano judgment began to reverse that trend. More recently, the rise to power of the BJP, for whom Uniform Code would surely mean Hindu Code, has caused backpedaling among all progressive people. It is unlikely that a Uniform Code will be achieved any time soon, unless the BJP should win an outright majority and implement plans of declaring India a Hindu nation. This would be an extremely unfortunate way for the goal of a Uniform Code, in other ways desirable, to come about.

All the systems have gross sex inequalities. Thus, one might suppose that they would automatically be unconstitutional under the Thirteenth Amendment, which declares that all "laws in force" that contradict fundamental rights are null and void. However, in 1952, in *State of Bombay v Narasu Appa Mali*,⁴ the Bombay High Court held that the term "laws in force" in that Amendment does not include the personal laws. They argued that the very presence of Article 44 was a recognition of the continued existence of personal laws; they also argued that untouchability was explicitly abolished by Article 17, and that the framers would not have needed this

4. 39 AIR Bom 84 (1952).

Article had they intended to apply general equal protection guarantees to the personal laws. (It is significant that the case involved a Hindu man who challenged the illegality of bigamous marriage, pointing to the continued legality of polygamy for Muslims and challenging the prohibition on equal-protection grounds. Thus the Court may have thought of itself as acting in a progressive and feminist fashion.)

Thus proponents of sex equality must address this issue within each separate religious system, and feminists have persistently sought to do so, with varying success.⁵

A. HINDU LAW

A major reform of Hindu law began in 1951, when, after great resistance, Parliament finally debated the Hindu Code Bill. The debate was tumultuous, and the provisions of the Bill were eventually adopted only in 1954–1956. Backed by Ambedkar (who ultimately resigned over the 1951 failure to adopt the Bill⁶), the Bill granted Hindu women a right to divorce, removed the option of polygamous marriage for men, raised the legal age of consent to marriage, and granted women more nearly equal property rights. The Bill, however, leaves much work to be done if full equality for women is to be achieved, and many of the mainstream constitutional cases described in Sections III and IV pursue these further issues.

B. CHRISTIAN LAW

Christian law contains inequalities regarding property and marriage and divorce. The issue of succession law, at least for one state, was dramatically raised in the case of *Mary Roy v State of Kerala*.⁷ Christians in Kerala were governed, in property matters, by the Travancore Christian Act,⁸ under which daughters inherit only one-fourth the share of sons—a portion of each daughter's inheritance goes to the Christian church. Mrs. Roy challenged the Act on constitutional grounds of sex equality. The Supreme Court ruled in her favor, but in a narrow and constitutionally uninteresting way. On a narrow technical basis the court held that the Travancore Christian Act had been superseded by the Indian Succession Act (the secular law of property), which gives equal shares to daughters and sons. The court thus avoided taking any stand on the constitutionality of the law. Even this ruling was highly controversial (in part because

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5. See the excellent and detailed account of these reforms in Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage 1982). In what follows I do not discuss the Parsi system, which has not undergone any very interesting reform process. For a more detailed account, see my article on India in Bev Baines, ed, *Constitutions of the World and Women* (forthcoming).
 6. See the longer account of his role in Martha Nussbaum, *Women and Human Development: The Capabilities Approach*, ch 3 (Cambridge 2000).
 7. 73 AIR SC 1011 (1986). Mary Roy is the mother of prize-winning novelist Arundhati Roy.
 8. The state of Kerala unites the former princely kingdoms of Cochin and Travancore.

the Court made the change retroactive to 1951, thus jeopardizing many existing estates). Christian clerics of all the major denominations denounced the Court from the pulpit.

More recently, however, the Christian community has shown interest in serious internal reform, and has provided an interesting example of how sex equality may be promoted through internal change—with the assistance of some state High Court decisions. Christians in India have been governed by the combined provisions of the Christian Marriage Act of 1825 and the Indian Divorce Act of 1869. According to these laws, men may get a divorce only on grounds of adultery. Women are even more constrained: they need to prove additional grounds of desertion or cruelty. In the 1980s, Christian women's groups began a campaign to get the support of all the major Christian denominations for much-needed reform. But differences of opinion between the Churches stalled the process, leading to some remarkable anomalies. For example, in 1983 cruelty to wives was made a criminal offense, and yet it still was not sufficient for a Christian woman to get a divorce.

The law was therefore challenged before relevant state High Courts. In 1995, in *Ammini Ej v UOI*,⁹ and in the similar case of *Mary Sonia Zachariah v UOI*, the Kerala High Court declared the relevant provisions of the law unconstitutional:

The life of a Christian wife who is compelled to live against her will, though in name only, as the wife of a man who hates her, has cruelly treated her and deserted her, putting an end to the matrimonial relation irreversibly, will be a sub-human life without dignity and personal liberty. It will be a humiliating and oppressed life, without the freedom to remarry and enjoy life in the normal course. It will be a life without the freedom to uphold the dignity of the individual in all respects as ensured by the Constitution of India in the Preamble and Article 21. Section 10 . . .¹⁰ [is] highly harsh and oppressive and as such arbitrary and violative of Article 14. . . .

The Bombay High Court soon gave a similar opinion in a case in which the plaintiffs were represented by leading feminist advocate Flavia Agnes. The reform campaign rapidly gathered strength, and in 1994 a consensus was reached among the Catholic Bishops' Conference and the National Council of Churches, supporting a reformed Christian Marriage Bill. The bill was eventually drafted by the Law Commission as the Christian Marriage Bill 2000. It will shortly be introduced into Parliament.

The new bill both equalizes and liberalizes the grounds for divorce—the grounds are the same for men and women and divorce is allowed by mutual consent. It provides for equitable maintenance and an equitable division of marital property. A number of problems, however, remain. A Christian marriage is defined as a marriage between two Christians; no provision is made for cases in which only one party is Christian. The Bill retains an archaic and cumbersome procedure for divorce, by

9. 82 AIR Ker 252 (1995).

10. Id at 252–53.

which two decrees are required, a provisional decree and, no less than six months later, a final decree. Feminists have criticized the extension of maintenance payments to husbands, as reflecting an unacceptably formal conception of equality. They also question the provision by which damage suits may be brought against any person who has committed adultery with one of the divorcing spouses. In addition, some of the arrangements for property are vague and badly worded. Nonetheless, the Bill represents major progress in the area of sex equality, and shows that this progress is possible within the personal law framework, through a combination of judicial and legislative action. It is unfortunate that the cumbersome system results in long delays in implementing reform: although the Christian community itself agreed to reform in 1994, it still has not taken place.

C. MUSLIM LAW

The *Ulema* (Muslim authority) became concerned, early in the 20th century, that Muslims in certain areas were following local customary law rather than the *shariat*, and thus rich landowners were leaving their entire estates to male heirs, rather than giving all heirs due shares as specified by Islamic law (women's shares are not fully equal). They introduced a bill in 1987 to make Islamic law uniform throughout India, citing the improvement of the situation of women as one of the major reasons for the Bill. It was also made clear that Muslim women had expressed strong support for the Bill. Jinnah, leader of the Muslim League, stated, in support of the Bill, that "the economic position of woman is the foundation of her being recognized as equal of man and share the life of man to the fullest extent." However, the final bill as adopted allowed individuals a choice between the *shariat* and customary law with regard to adoption, wills, and legacies, and the Bill exempted agricultural land from its provisions. Thus many inequalities remained to be addressed.

In 1939, the Dissolution of Muslim Marriages Act was introduced in order to improve the prevailing situation of Muslim women with regard to marriage and divorce. Although the *Koran* expressly permits women to seek a divorce in especially grave cases, the *Hanafi* school of interpretation, followed at the time by most Muslims in India, gave few alternatives to women with the exception of apostasizing from Islam, which was held to be a valid way to dissolve the marriage. Because many women were in fact leaving Islam for this reason, concern mounted within the Muslim leadership. The new Act authorized Muslim judges to dissolve a marriage at a woman's request, following the *Maliki* school of interpretation in this instance. The statement attached to the Act spoke of the "unspeakable misery to innumerable Muslim women in British India" caused by the current situation. The Muslim League, however, would not agree with the *Ulema* that only Muslim judges should have the right to dissolve a Muslim marriage; thus the final form in which the Act passed (which allowed dissolution by non-Muslim judges) was highly unsatisfactory to the *Ulema*. The Act did unquestionably improve the situation of women in many respects;

on the other hand, by removing the option of divorce by apostasy, it also closed a relatively painless exit route.

At the time of Independence, there was interest in reforming Islamic personal law to parallel the reforms of Hindu law introduced under the Hindu Code Bill. However, the bitter divisions between the communities after Partition made this too difficult a matter to undertake; thus Islamic personal law was not reformed in any serious way to deal with the remaining issues of sex inequality. Thus, polygamy remains to this day a legal option for Muslim men, although it is exercised relatively rarely (about 5 percent of marriages), and largely by wealthier men. Today, the situation of the Muslim minority remains so threatened (and more so today than twenty years ago) that it is exceedingly difficult to seek any reform of these laws without appearing to support the anti-Muslim feelings and rhetoric of the Hindu fundamentalists.

Especially contentious has been the situation with regard to divorce and maintenance, which occasioned a major judicial/legislative crisis at the time of the notorious *Shah Bano*¹¹ decision. Muslim men are able to divorce their wives summarily, by simply pronouncing the triple "talaq." Women are entitled to claim only the dowry, or *mehr*, that they had brought into the marriage, and no further maintenance. Because this left many Muslim women in desperate circumstances, women had found a remedy through the Criminal Code, which is uniform for all India. Section 125 of the Code forbids a man "of adequate means" to permit various close relatives, including (by special amendment in 1973) an ex-wife, to remain in a state of "destitution and vagrancy." Many women divorced under Muslim law had been able to win grants of maintenance under this Section; the recognition of ex-wives as relations under the Section was introduced explicitly for this purpose (and was objected to by members of the Muslim League on grounds of religious free exercise).

In Madhya Pradesh in 1978, an elderly Muslim woman named Shah Bano was thrown out of her home by her husband, a prosperous lawyer, after forty-four years of marriage. (The occasion seems to have been a quarrel over inheritance between the children of Shah Bano and the children of the husband's other wife.) As required by Islamic law, he returned her marriage portion, Rs. 3000 (about \$60 by today's exchange rates). Following what was by then a common practice, she applied for relief under Section 125. The case found its way to the Supreme Court.¹² Deciding in Shah Bano's favor and awarding her a maintenance of Rs. 180 per month (about \$4), Chief Justice Chandrachud, a Hindu, wrote a lengthy opinion, both criticizing Islamic practices and interpreting Islamic texts on his own hook to show that this grant of maintenance was consistent with Islamic norms. The rhetoric of the opinion was most

11. *Mohammed Ahmed Khan v Shah Bano Begum & Others*, 72 AIR SC 945 (1985).

12. See the full collection of documents pertaining to this case in Asghar Ali Engineer, ed, *The Shah Bano Controversy* (Oriet Longman 1987); see also *Women and Human Development*, ch 3 (cited in note 6).

unfortunate: the Chief Justice cited a British commentary on the *Koran* in support of the proposition that the “fatal point in Islam is the degradation of woman.” He also stated, “Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad, or indifferent. Indeed, for no reason at all.” Perhaps worst of all, he denigrated sacred text, saying, “To the Prophet is ascribed the statement, hopefully wrongly, that ‘Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.’”¹³

The high publicity given to this contemptuous opinion produced a most unfortunate reaction. Up to this time, there was broad support in the Muslim community for sex equality and even for the goal of a Uniform Civil Code. Women had been winning grants of maintenance with no interference from the *Ulema*. But now much of the Muslim community, feeling its honor slighted and its civic position threatened, rallied round the cause of denying women maintenance. Women were barely consulted when statements were made about what Indian Muslims wished and thought; an impression was created by the *Ulema* that all Muslims disagreed with the judgment. Shah Bano herself was ultimately led to recant her views and to state (in a pitiful statement signed with her thumbprint) that she now understands that her salvation in the next world depends on her not pressing her demand for maintenance.

Meanwhile the Muslim leadership persuaded the government of Rajiv Gandhi to pass a law, the Muslim Women’s (Protection after Divorce) Act of 1986, which deprives all, and only, Muslim women of the opportunity to win maintenance under the Criminal Code. The Government never consulted with other segments of the community; they treated the *Ulema* as the voice of the whole community. Muslim women expressed outrage. One activist stood on the steps of Parliament the day the 1986 law was passed and said, “If by making separate laws for Muslim women, you are trying to say that we are not citizens of this country, then why don’t you tell us clearly and unequivocally that we should establish another country—not Hindustan or Pakistan but Auratstan (women’s land):”¹⁴ Hindu men, meanwhile, complained that the new law discriminates against Hindus, giving Muslim males “special privileges.” In the aftermath of the Muslim Women’s Bill, many divorced Muslim women are leading lives of poverty. Worse still, the destitution of these women has had the effect of crippling their children’s education, as children who would otherwise be in school are put to work supporting their mothers. Efforts of women to challenge the new law on grounds of religious non-discrimination (by petition to the Supreme Court) have

13. *Shah Bano*, 72 AIR SC at 946, 947, 946.

14. Quoted in Amrita Chhachhi, *Identity Politics, Secularism and Women: a South Asian Perspective*, in Zoya Hasan, ed, *Forging Identities: Gender, Communities and the State in India* 74 (Westview 1994). See also Zoya Hasan, *Minority Identity, State Policy and the Political Process in Forging Identities* at 59.

been unsuccessful: apparently the Court is in retreat from the controversy occasioned by its role in the *Shah Bano* judgment.

The system of personal laws has many severe problems. It creates difficulties not only for sex equality, but also for freedom of religion (because it makes it so difficult to change religions) and for non-discrimination on the basis of religion (Muslim women, for example, lose out on benefits that other women enjoy). Unfortunately but predictably, male leaders in each religion tend to define their prestige in terms of how far they can resist changes in their religious traditions; the position of women has become a focal point for this resistance. Internal reform is resisted because it seems to signal weakness. Moreover, even when internal reform is successful, as in the case of the Christian Marriage Bill, the cumbersome nature of the arrangement creates huge delays and uncertainties for its implementation. Nonetheless, it is likely that internal reform is the best option for the foreseeable future. In this day of growing Hindu fundamentalism, Uniform Code really does mean Hindu Code, and the resistance of the Muslim minority to losing its legal system is comprehensible.

Here we see a very unfortunate and illiberal feature of the Indian democracy as it currently exists. A system that creates profound inequalities, and serious violations of several basic constitutional rights, is held in place by the jockeying for position that obtains among the religion-based parties, and by the fact that women have no comparable political power base. How might such a system be effectively reformed? History suggests two remedies, which should work in tandem. On the one hand, there must be much more attention paid to Fundamental Rights on the part of the courts. That is what judicial review is supposed to be doing. Judges should not insult the religions, and they should be especially cautious in dealing with the affairs of a religious minority. The unfortunate result in *Shah Bano* was caused by the rhetoric of the judicial opinion, not by its content; similar judgments had been commonplace. The Courts should move decisively to invalidate features of the separate codes that violate basic constitutional rights, as they were willing to do in the case of the Christians.

At the same time, it is clear that only giving women greater access to the political process will ultimately change this situation in a stable way. Through the 73rd and 74th Amendments, 33 percent of the *panchayats* seats, or local councils, are reserved for women. This reform, at first unpopular with many feminists, has proven valuable in teaching women political skills and including their voices in the political process. There is broad support for the 85th Amendment, which would establish a similar system of reservations at the national level. So far, however, although the major parties say they support the Amendment, it has never been seriously debated, because caste-based parties, fearing that they might lose out if the women chosen are largely from upper castes, create disturbances and rip up the copies of the bill. It is the very success of grassroots democracy in India that currently blocks yet further democratizing of the process in a way that would give women greater access and power. Thus the adoption of the 85th Amendment seems an important part of securing sex equality in

the Indian context. As more women become involved in politics nationwide, or even before that time, it would surely be important to appoint more female judges and more judges with a reflective understanding of women's issues.

One might add one more point. In all the jockeying for position and all the massive affirmative action that characterizes Indian politics, one group that has never received any benefits at all is the Muslims. There are reserved seats for scheduled castes, scheduled tribes, and, now, the Other Backward Castes ("OBCs"); at the local level, there are reserved seats for women. Improving democratic equality with regard to the treatment of Muslims would surely be important to any long-term resolution of the personal-law situation, because it is the legitimate sense of exclusion on the part of the Muslim community that leads many Muslims to cling so tenaciously to traditional practices.

IV. EQUALITY AND NON-DISCRIMINATION

In general the understanding of sex equality in the Constitution is not formal, but substantive: laws are to be evaluated in terms of the idea of equal respect for all citizens and an end to traditional forms of hierarchy and discrimination. The jurisprudence interpreting these Articles, however, has a more mixed history.¹⁵ The Supreme Court has interpreted Article 14 as a prohibition against "unreasonable" classifications based on sex. The standard of reasonableness, set out in *Budhan Choudry v State of Bihar* requires that "(i) . . . the classification must be founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group" and "(ii) . . . that differentia must have a rational relation to the object sought to be achieved by the statute in question."¹⁶ These criteria import a formal idea of equality: only those individuals who are similar need be treated similarly; it turns away from what appears to have been the original intent of the Articles, to break down hierarchies founded upon caste and sex. In keeping with this formal understanding of equality, the clauses of Articles 15 and 16 pertaining to affirmative measures were initially interpreted by the Court as exceptions to the (allegedly formal) doctrine of equal treatment articulated within the Articles, rather than as part of the Articles' substantive doctrine of equality.

The substantive approach to equality, present from the Founding in statements of Nehru and Ambedkar, and, arguably, plainly expressed in the Constitution's text, has gradually prevailed in the jurisprudence as well. Under this approach, the sections of Articles 15 and 16 pertaining to women are not exceptions, but part of the Articles'

15. See the excellent treatment of these questions in Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements With the Law in India*, ch 3 (Sage 1996) to which my discussion in this section is indebted.

16. 42 AIR SC 19, 191 (1955).

articulation of an anti-hierarchical understanding of equality. In *Kerala v N. M. Thomas*, the Supreme Court began to articulate this approach, stating:

Though complete identity of equality of opportunity is impossible in this world, measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16 (1).¹⁷

In the area of restitution of conjugal rights, the substantive approach to equality has been influentially articulated. This, of course, is a central issue of women's human rights: for a woman to be forced to return to the conjugal home and undergo intercourse against her will is a paradigmatic violation of basic dignity and also of equality. And indeed the Indian tradition analyzes the issue under these two separate rubrics, as I shall also. *Sareetha v T. Venkata Subbaiah*¹⁸ concerned a popular film actress whose husband—having been indifferent to her departure until she became rich and famous—sued her for restitution of conjugal rights under a provision of the Hindu law of marriage that had its ultimate origins in British ecclesiastical law. The Andhra Pradesh High Court declared that part of the marriage law unconstitutional, on grounds of both privacy and sex equality. The High Court stressed the privacy arm of the argument and it formed the basis for the ultimate reversal by the Supreme Court. But in the less-noticed equality arm of the argument, Justice Choudary noted that the law was neutral on its face, applying to either a male or a female spouse. Nonetheless, he argued that it was discriminatory because of the substantive differences between the social positions of males and females in marriage. The enforcement of such a decree, especially given that it may result in the conception of a child, will alter the wife's life in a way that it could not possibly alter the husband's.

As a result this remedy works in practice only as an engine of oppression to be operated by the husband for the benefit of the husband against the wife. By treating the wife and the husband who are inherently unequal as equals, Section 9 of the Act offends the rule of equal protection of laws. For that reason [it] should therefore be struck down as violative of Article 14 of the Constitution.

Although the decision was overruled (see further in Section IV), this arm of the argument was neither refuted nor so much as mentioned by the Supreme Court. Its status in constitutional jurisprudence thus remains unclear. In other areas of law, however, including divorce, property,²⁰ and employment rights, the substantive approach has generally prevailed.

Inequalities remain in all of these areas, in part because judges appear unaware of the fact that they are taking for granted a patriarchal view of the family; but they are

17. 63 AIR SC 490, 514 (1976).

18. 70 AIR AP 356 (1983).

19. *Id.* at 358.

20. See Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge 1994); Srimati Basu, *She Comes to Take Her Rights: Indian Women, Property, and Propriety* (SUNY 1999).

being gradually eroded. Consider *Air India v Nergesh Meerza*²¹ in which an air hostess challenged the different rules pertaining to air hostesses and male stewards on grounds of sex discrimination. On the one hand, the Court upheld the basic scheme of classification by sex, holding that air hostesses were a category of workers distinct from other airline employees. They also upheld the regulation that a hostess may be fired if she marries within four years after her initial employment, reasoning that this condition was legitimate in the light of state family planning objectives: mature women would be more able to make sound decisions regarding pregnancy. On the other hand, the Court struck down as unconstitutionally unreasonable and arbitrary (thus, in violation of Article 14) a regulation requiring hostesses to terminate employment at the time of pregnancy. Here they argued that the difference between male and female with regard to pregnancy does not license a regulation that “amounts to compelling the poor air hostess not to have any children and thus interfere with and divert the ordinary course of human nature.” The Court’s reasoning contains a remarkable mixture of progressive and traditional elements:

The termination of the services of an Air Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood the most sacrosanct and cherished institution. Such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values.²²

Notice the complex mixture of progressive and traditional considerations. On the one hand, the Court holds that the regulation violates equal protection, and appears to take the woman’s situation into account with sympathy. On the other hand, however, it continues to view woman as a fragile and sacred creature to be put on a pedestal. One might even see in the opinion the view that to be an Indian woman is to be a mother. As a result, the issue of sex discrimination does not emerge with the clarity that one might have wished.

What does this history suggest? It seems to me that it suggests a considerable capacity for internal reform and progress on the part, even, of a rather stodgy judiciary appointed from a relatively narrow segment of Indian society. But it also suggests a need for judges to become more aware of international debates about women’s rights and other issues pertaining to sex equality, and thus more aware of the assumptions about family and woman that they bring to the table. It seems likely that if legal education presented young lawyers and judges with readings critical of patriarchal assumptions regarding the family, some of these assumptions would have been criticized by the judges themselves. Certainly it is difficult to imagine a US judge today writing these things, and surely that is not because the US has a deeper or more extensive commitment to sex equality than does India. When the thinking of well-

21. 68 AIR SC 1829 (1981).

22. *Id.* at 1831.

intentioned and equality-minded judges is archaic and unreflective, legal education may plausibly be blamed, and its reform may be seen as an important part of securing a more adequate implementation of constitutional norms.

V. SUBSTANTIVE DUE PROCESS: LIBERTY AND PRIVACY

When the Constitution was being written, the framers consulted US jurists, in particular Felix Frankfurter, who warned them of the bad history of substantive due process in the United States, in the *Lochner* era, when progressive economic legislation was invalidated through discovering substantive rights in the due process clauses of the Fifth and Fourteenth Amendments. The Indian framers therefore tried to avoid making room for substantive due process by phrasing Article 21 in a way that suggested that all laws passed by an appropriate procedure would be upheld. Instead of the US phrase “due process of law” they used the phrase “procedure established by law,” with the intention of suggesting that only procedural irregularities would be found unconstitutional.²³

The Justices of the Supreme Court, however, soon became convinced that there was an important role for substantive due process to play in the Indian constitutional tradition. The words “life and liberty” in Article 21 have accordingly been the object of a very interesting jurisprudential tradition, which has interpreted them to entail not mere life, but life with dignity (see also section VII). In *Gopalan v State of Madras*,²⁴ a case involving allegedly unlawful police detention, two dissenting Justices already argued that preventive detention was inconsistent with the meaning of “life and liberty,” as well as with the right to movement in Article 19. In 1978, this idea was recognized by the majority in *Maneka Gandhi v Union of India and Anr*,²⁵ a case in which Mrs. Gandhi’s daughter-in-law moved the court against the impounding of her passport. The Court held that the rights of Articles 19 and 21 involve the right to travel abroad. In 1981, in *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, a case involving a female prisoner who had been denied the right to see her family and her lawyer, the Supreme Court held that the right to life involves “the right to live with human dignity and all that goes along with it, namely, the bare necessities of life...and also expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”²⁶ They linked “life” to the idea of human dignity. In *Olga Tellis v Bombay Municipal Corporation*, a case involving the eviction of poor pavement dwellers, the Court extended this doctrine, stating: “Life’ means

23. I discuss this whole issue in greater detail in Martha Nussbaum, *Privacy, Liberty, and Sex Equality: A Comparative Approach to the Feminist Critique*, in E. Sridharan, R. Sudarshan, and Z. Hasan, eds, *Constitutional Ideas and Political Practices: Fifty Years of the Republic* (Oxford forthcoming).

24. 37 AIR SC 27 (1950).

25. 65 AIR SC 597 (1978).

26. 68 AIR SC 746, 747 (1981).

something more than mere animal existence. It does not mean merely that life cannot be extinguished or taken away, except according to procedure established by law. That is but one aspect of the right to life. An equally important aspect of that right is the right to livelihood because, no person can live without the means of living.²⁷

During this same period, the Court also held that a right to privacy, modeled on the right recognized in US constitutional law, was inherent in Article 21. This right seemed to many Indian jurists an important one for Indian constitutional law to recognize, both because of its role in protecting women's bodily autonomy and integrity and because of its other potential uses, especially in plugging a gap created by the fact that the Indian Constitution has no equivalent of the US Fourth Amendment, and police surveillance was proceeding unchecked by any constitutional procedure. The first cases to recognize a right to privacy in connection with Article 21 were cases involving police surveillance. In the first of these, *Kharak Singh v State of Uttar Pradesh*, the dissenters recognized such a right, and in the second, *Govind v State of Madhya Pradesh*,²⁸ the majority recognized the right, citing American privacy cases from a variety of distinct areas, including search and seizure, but also including the Fourteenth Amendment privacy right cases *Griswold* and *Roe*.²⁹

At issue was a state police regulation, framed in accordance with directives provided by a national Police Act, according to which people who had a criminal record or were in other ways suspected of "a determination to lead a life of crime" could be subject to unannounced domiciliary visits, often in the middle of the night, and could also be followed and spied on when outside the house. Justices Mathew, Iyer, and Goswami, citing the 1877 US case *Munn v Illinois*,³⁰ opined that "liberty" in Article 21 should be given an expansive interpretation, as incompatible with "an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep, which is the normal comfort and a dire necessity for human existence even as an animal."³¹ The Justices then brought in the notion of privacy, holding that a right to privacy in one's home is implicated in the meaning of liberty. Citing the dissent in *Kharak Singh*, they held that "in the last resort a person's house, where he lives with his family, is his 'castle,' that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. . . ."³²

27. 73 AIR SC 180, 193 (1986).

28. *Kharak Singh v State of Uttar Pradesh*, 50 AIR SC 1295 (1963); *Govind v State of Madhya Pradesh*, 62 AIR SC 1378 (1975).

29. *Griswold v Connecticut*, 381 US 479 (1965); *Roe v Wade*, 410 US 113 (1973).

30. 94 US 113 (1877).

31. *Govind*, 62 AIR SC at 1382 (quoting *Kharak Singh*).

32. *Id* at 1382.

Notice, then, that from the beginning of this privacy jurisprudence the notion of privacy is coupled with the notion that a (male) householder has the right to control his functioning in a protected space. And in fact traditional notions of the privacy of the home, in Indian legal tradition, strongly define the home as a patriarchal sphere of privilege, in which a man may operate as a king, unconstrained by the reciprocity or deference he might need to exhibit toward others outside the home. This is the very aspect of the concept of privacy that feminists have persistently criticized, arguing that it has been used for centuries to defend male domination over women and children in the home. Even when the issue was simply surveillance, both inside and outside the home, the Court felt the need to allude to this powerful Indian (as well as Western) tradition.

Significantly enough, the Justices understood that the actions of the police threaten important human liberties even when they are not directed at the “sanctity of the home.” And they meant to call into constitutional question not only the domiciliary visits, but the whole pattern of police spying.³³ But at this point they turned to the enumerated liberties of Article 19, holding that the freedom of movement must also be given an expansive construction. Again citing the dissenters in *Kharak Singh*, they opined that it is not “mere freedom to move without physical obstruction and . . . movement under the scrutinizing gaze of the policeman cannot be free movement.” Freedom of movement “must be a movement in a free country, i. e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control and that a person under the shadow of surveillance is certainly deprived of this freedom.”³⁴ Given that the right to be free from surveillance is here extracted from freedom of movement, it is not entirely clear why the privacy of the home had to be invoked earlier on. Domiciliary visits seem to be bad in just the way surveillance outside the home is bad—they deprive a person of liberty to move around, talk to people, and so on. And again, the Justices knew that privacy is a slippery notion: “The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right.”³⁵ But nonetheless they indulged in a vague and diffuse rhetoric about the sanctity of the home, and even refer to aspects of marital sanctity that have no evident connection to the case: “Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.”³⁶ What does this have to do with shadowing a person not charged with or even suspected of any concrete crime?

33. The actual holding is complex: they say that it is possible that the whole pattern is unconstitutional, but for now they will simply hold that the State needs to show a compelling interest in public safety if it is to apply these procedures to a particular individual.

34. *Govind*, 62 AIR SC at 1382–83.

35. *Id.* at 1385.

36. *Id.* at 1385.

In short, the privacy right carries with it some dubious baggage. It is not surprising, then, to discover that it has been a slippery notion when we approach the area of women's sexual autonomy, an area in which even more straightforward ideas of substantive equality sometimes founder. Let us now return to the *Sareetha* case, whose equality aspect I discussed in Section III. Although the equality aspect of Justice Choudary's opinion³⁷ was progressive and interesting in its own right, most of the attention the case attracted focused on its novel and strongly feminist reading of Article 21 in terms of a right to privacy. Drawing on the US tradition of privacy-right jurisprudence and explicitly citing *Griswold* and *Roe* as precedents, he declared that Article 21 implies a right to privacy, which must be understood to be implicit in the meaning of "life and liberty," given that it had already been established (see below) that "life" means not *mere* (animal) life, but a properly dignified human life. The remedy of restitution is "a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Art. 21 of the Constitution."³⁸ Although the Justice admitted that the concept of privacy is hard to pin down, he was satisfied that "any plausible definition of right to privacy is bound to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body's inviolability and integrity and intimacy of personal identity, including marital privacy."³⁹ Thus a major human right of women, prominently discussed in international fora and documents, was given recognition for the first time in the Indian constitutional tradition.

Recognizing a right to bodily integrity under a right to privacy, however, is not unproblematic. Justice Choudary's reference to "marital privacy" betrays the difficulty: the traditional concept of "marital privacy" is subversive of women's liberty and bodily integrity. It is that very concept that makes it so difficult, even today, to get marital rape criminalized and domestic violence prosecuted.⁴⁰ Surely if what was wanted was a right to control one's body, that right would much more naturally have been read out of Article 19's guarantee of freedom of movement, travel, and residence (as the surveillance cases suggest), or out of the more general notions of "life and liberty" recognized in the right-to-livelihood cases. Why not, for example, say directly that Article 21's guarantee of life and liberty involves protection of the very basic right of sexual autonomy—the right to refuse unwanted sex—without which, as the Judge eloquently stated, human life is more bestial than human. Why bring privacy into it?

And indeed, it was with reference to the traditional ideal of the household that the Justice was eventually overruled. At approximately the same time, a restitution

37. The title "Justice" is used in India for both Supreme Court and state High Court judges.

38. 70 AIR AP 356, 356 (1983).

39. *Id.* at 368.

40. In *Privacy, Liberty* I discuss prominent feminist arguments on this point, above all, those of Catharine MacKinnon.

case was heard in the Delhi High Court. In *Harvinder Kaur v Harmander Singh Choudhry*, the Court argued directly against the Choudary opinion, which had created a stir, holding that the remedy of restitution was not unconstitutional under either Article 14 or Article 21.⁴¹ The essence of the Delhi argument is that the intimate nature of marriage makes the application of constitutional principles inappropriate:

Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art. 21 nor Art. 14 have [sic] any place. In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond.⁴²

The opinion also insisted that the restitution decree did not really enforce sexual intercourse and thus could not be counted as a judicial invasion of "marital privacy." Of course, the opinion itself appealed to the traditional notion of marital privacy in its judgment that the Constitution should stay out of marriage.

In 1984, in a different case, the Supreme Court sided with the Delhi Court and against Justice Choudary. Conjugal rights, held the Justices, are "inherent in the very institution of marriage itself."⁴³ Quoting from the Law Commission's 1955 report on the Hindu Marriage Act, they wrote that "the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life. . . Living together is a symbol of such sharing in all its aspects." The decree of restitution thus "serves a social purpose as an aid to the prevention of [the] break-up of marriage."⁴⁴

As for the claim that the law violates women's bodily integrity, the Justices opined that the law contained "sufficient safeguards . . . to prevent it from being a tyranny." In particular, a woman who does not want to obey can always pay a fine, "provided he or she has properties to be attached." To the appellant's contention that "in the social reality of the Indian society, a divorced wife would be materially at a great disadvantage,"⁴⁵ the Justices say yes, this is correct. Therefore in the particular case they order the husband to pay maintenance to the wife and to pay the legal costs of the appeal.

Thus the whole strategy of appeal to Article 21, as a locus of important human rights for women, was denied. But it seems clear that it was easy to deny it because of the way in which the alleged right was framed, as a right of privacy. For it was then so easy to say: "Look at our concept of marital privacy. Surely that concept is threatened not by a kindly law that helps people live together and work out their differences, but

41. 71 AIR Delhi 66 (1984).

42. *Id.* at 67.

43. *Saroj Rani v Sudarshan Kumar*, 71 AIR SC 1562, 1568 (1984).

44. *Id.*

45. *Id.*

by the cold hand of Constitutional Law, which enters in to break up the sanctity of the marital home." It is certainly possible that the Supreme Court would have refused to recognize any liberty-right for women here, no matter how framed. On the other hand, in cases dealing with the rights of the homeless and the rights of criminals it had supported a liberal reading of the general notion of "life and liberty." And surely the appeal to a concept deeply identified with the allegedly seamless unity of the patriarchal family, and with the presumption of consent to sex in marriage, did no good in staving off this result. Both the sex-equality argument (which was totally ignored by the Supreme Court) and the parallel tradition of interpreting Article 21 so as to require "life with dignity" hold more promise for the interests of women than does the dubious and equivocal concept of privacy.

I conclude that in this area as in the area of sex equality, patriarchal assumptions of judges have interfered in some instances to block meaningful recognition of important human rights for women. But this failure, once again, does not seem to show any deep impossibility of internal reform of the constitutional tradition. Indeed, I would argue that the progressive Justice simply chose the wrong constitutional strategy, thus setting himself up for reversal. Once again, the lack of a theoretical tradition of discourse about constitutional ideas shows itself: a legal education that included consideration of the feminist critique of the right to privacy might have set Justice Choudary⁴⁶ on a more productive course. Again, I see an educational failure, but not a deep failure of democratic processes.

VI. CEDAW AND THE INDIAN CONSTITUTION

Article 32 of the Constitution creates a remedy for non-enforcement of rights, according to which citizens may appeal directly by petition to the Supreme Court to secure their rights, and the Court may issue writs, directions, and orders designed to secure enforcement.

In the area of sexual harassment, the petition remedy has led to a major victory for women's interests. *Vishaka v State of Rajasthan* was brought by petition to the Supreme Court⁴⁷ by a group of women's groups and NGO's, on the occasion of an alleged brutal gang rape of a social worker in a village in Rajasthan. The petitioners argued that they and other working women are unsafe and unprotected from harassment in the workplace because of the failure of both employers and the legal system to address this problem. They argued that the sexual harassment of women in the workplace violates the fundamental constitutional rights of both gender equality

46. Choudary did cite quite a number of articles on the topic, but he seems to have been an autodidact and quite unsystematic in his reading.

47. 6 SCC 241 (1997). This case was also the subject of a separate criminal action, and it played no further role in the petition. Article 32 of the Constitution provides for this procedure in cases involving violations of Fundamental Rights.

and “life and liberty” (under Articles 14, 15, and 21 of the Constitution). It was also argued that these violations entailed violations of rights to “practice any occupation, trade, or business” guaranteed under Article 19. In arguing the case, the petitioners made repeated reference to the CEDAW, which has been ratified by India, arguing that the definitions of gender equality in this document “must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”⁴⁸ They argued that this way of understanding the binding force of CEDAW is entailed by Article 51c of the Constitution (among the Directive Principles of State Policy), which holds that “The State shall endeavour to . . . foster respect for international law and treaty obligations in the dealings of organised people with one another.”⁴⁹ Thus it was argued that the account of women’s rights in the workplace described in CEDAW were binding on India through ratification.

The Court accepted the petitioners’ argument, holding that indeed the account of sexual harassment in CEDAW is binding on the nation, and that the relevant Constitutional provisions should henceforth be read in the expanded manner suggested by petitioners, filling in the understanding of the relevant concepts as described in CEDAW. As in previous jurisprudence, the Court held the right to life means “life with dignity,” and that the nation has the responsibility of enforcing such “safety and dignity through suitable legislation.”⁵⁰ The Court issued an admirably clear and comprehensive set of guidelines, closely based on CEDAW, defining sexual harassment in terms of unwelcomeness and potential job disadvantage and/or humiliation. Both quid-pro-quo and hostile environment harassment were described as sex discrimination. The Court then went on to outline preventive measures to be taken by employers, including notification of the prohibition of all forms of harassment, establishment of a complaint mechanism, and appropriately set internal penalties. Internal complaint committees must be headed by a woman and at least half of their members must be women. In an especially interesting and creative step, the Court said that in order to prevent undue influence from higher levels in the business in question, complaint committees must involve a third party, usually an NGO. Finally, the Court concluded that “The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.”⁵¹

This important case shows a productive interaction between international treaties and domestic courts, which has also been seen in other countries.⁵² CEDAW

48. *Id.* at 249.

49. *Id.* at 248.

50. *Id.* at 247.

51. *Id.* at 254.

52. *Attorney General v Unity Dow*, 1992 LRC (Cons) 623 (July 2, 1992) (citing CEDAW for authority on a child’s nationality).

gives domestic activists a blueprint for change that they can take to their own Courts, in this case achieving the incorporation of CEDAW standards into domestic law. The role for NGOs in the solution was especially creative. Legislation binding on non-governmental actors has not yet been passed, and the current political climate does not appear favorable to it.⁵³ Nonetheless, *Vishaka* sets out firmly on a path that can be followed in other areas in the future, a path that productively combines internal democratic legitimacy with the external suasion supplied by an international treaty.

VII. A FRAMEWORK FOR CHANGE

The history of sex equality in India is not one of unilinear and spectacular progress. Nonetheless, even with respect to law—a conservative and not particularly lively segment of Indian institutions—women have achieved substantial progress in fighting for their human rights. As I have suggested, further progress appears to depend both on improving the education of lawyers and judges, making them more attuned to the theoretical dimensions of their enterprise and more aware of feminist arguments, and also, at the same time, enhancing the political role of women and their access to the political process. One valuable aid in linking the “top-down” and the “bottom-up” aspects of Indian reform is the provision that groups or individuals may approach the Supreme Court by petition. In this way, in *Vishaka*, a group of grassroots activists was able to make its concerns known at the highest level of government.

From this history I tentatively conclude that where there is a decent functioning democracy in place, internal reform is the appropriate strategy. Even though one may be impatient with the slow and chaotic movements of this multi-party system, where increasing democratization often means an increasing role for old patriarchal values, it would be utterly inappropriate for another nation to act as the beneficent colonial authority and apply any form of sanctions to promote sex equality as an end. It seems to me that the limit of what it is appropriate for outside governments to do was shown very well by the actions of President Clinton in regard to India. In his visit, he drew attention to women’s NGOs and to the plight of rural women, giving them encouragement and suggesting in a vague way that this is the sort of thing the US likes to aid. He did not condition aid on any specific government action toward women, nor should he have. Even where a foreign nation uses official channels to fund NGOs that work on specific social issues (as the governments of Norway, Sweden, and The Netherlands fund many NGOs that deal with women’s literacy), it seems to me that this action is appropriate only where, as is the case with India, the issue already enjoys

53. For a different approach to the question, through criminal laws relating to women’s modesty, see Martha Nussbaum, *The Modesty of Mrs. Bajaj: India’s Problematic Route to Sexual Harassment Law*, in C. MacKinnon and R. Siegel, eds, *Directions in Sexual Harassment Law* (Yale forthcoming).

tremendous public support, and one could not plausibly argue that alien values are being imposed on Indian people. To proceed otherwise is to act as a colonial despot.

India, of course, is a democracy, and a remarkably successful one.⁵⁴ Where we do not have democracy, there may be a correspondingly larger role for humanitarian intervention. Even here, however, I would argue that intervention should aim at bringing about the stable functioning of representative democratic institutions in the future, as well as, more directly, at the protection of human rights.

Finally, the Indian case contains no atrocities (or, to the extent that atrocities are present, no more such atrocities than in other well-functioning democracies where race riots and hate crimes routinely take place, where marital rape is not prosecuted, and where domestic violence is insufficiently prosecuted).⁵⁵ There are cases of “crimes against humanity” that I think should indeed be punished by an international tribunal, and I strongly favor the treatment of mass rapes of women as a crime against humanity. Thus, ultimately I would favor a thin and decentralized set of international institutions, with sanctions, to deal with crimes against humanity and to establish binding standards in areas such as the environment and trade, but also to deal with trafficking of women and other transnational atrocities. A rape of a woman is a terrible crime against that woman’s human rights no matter where it occurs. Some may feel that I am insufficiently tough when I insist that India should deal with its own domestic problem of rape and that only rapes that are part of a war situation should be dealt with by international tribunals. Nonetheless, I believe that for both prudential and ethical reasons the route of internal reform is the right route to take in these matters; and the best role for international treaties, in general, is as pieces of public persuasion that may help activists and politicians eager to promote a process of domestic reform.

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54. Although one might see some of the party politics as chaotic, it is good to remember that the electoral difficulties that recently beset the US would have been impossible under the Indian system, which had faced all these possibilities in advance and adopted a national Election Commission to resolve difficult situations (in addition to having a uniform system of paper ballots, accessible to both literate and illiterate voters through pictures of the party symbol).
 55. India is one of the few liberal democratic nations that retains the death penalty, but it almost never uses it; so in that respect as well, some might judge it to be more advanced than the US with regard to basic human rights.