

“Mechanisms and successful areas of integration and implementation of CEDAW at the national level, identification of obstacles, and problem areas to implementation”

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Broad Issues of Concern for Women in India – A background

- Poverty and deprivation
- Participation in decision making processes
- Access to justice
- Discriminatory personal laws
- Violence by both state and non-state actors
- Declining Sex ratios
- Lack of social security

I. Mechanisms and successful areas of integration & implementation of CEDAW

- Constitution of India provides the legal framework for integration and implementation of measures promoting and protecting human rights of women.

- Fundamental Rights

Article 14- equal rights and opportunities for men and women in the political, economic and social sphere

Article 15- prohibition of discrimination on the grounds of sex, religion, caste etc.

Article 15(3)- empowers the State to take affirmative measures for women

Article 16- provides for equality of opportunities in the matter of public appointments

- Directive principles

Article 39- enjoins the state to provide an

✓ adequate means of livelihood to men and women and

✓ Equal pay for equal work

Article 42- State to ensure the provision for just and humane condition of work and maternity relief.

- Fundamental duties

Article 51v (A) (e)- fundamental duty on every citizen to renounce the practices derogatory to the dignity of women.

- Financial Accountability

Article 151- reports relating to the accounts of the Union and states to be prepared and placed before the Parliament and State legislatures respectively.

- **Power to make laws**

Article 245 – Subject to the constitution parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

- **Legislation for giving effect to international agreements**

Article 253 – Parliament is vested with the power of making laws for the whole or part of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body

- Judgments by the Supreme Court are binding on all courts in India.

- Incorporation of CEDAW principles

Vishakha v. State of Rajasthan, AIR 1997 SC 3011

“International conventions and norms, consistent with the spirit of the fundamental rights, can be read into those rights for interpreting them in the larger context to promote the objects of the Constitution – In the absence of domestic law on the particular aspect, these conventions and norms as ratified by India can be relied on by the Supreme Court to formulate guidelines for enforcement of fundamental rights”

Masilamani Mudaliar Case, (1996) 8 SCC 525

On the question of property rights of women under Hindu Succession Act, it stated that “by virtue of the Protection of Human Rights Act, the principles embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution”. The State is enjoined by virtue of Article 2(f) and other articles of CEDAW to take all appropriate measures including legislation to modify or abolish all gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women therefore interpreted the equality provisions under the constitution in accordance with CEDAW and other international instruments, overriding the reservation made by the Indian government on account of customary and personal laws.

- Access to justice through social action litigation

Asiad village case (PUDR v Union of India 1982)

✓ Expanding Locus Standi

“The traditional role of standing which confines access to the judicial process only to those whom legal injury is caused or legal wrong is done has now been jettisoned by the Supreme Court. The new strategy evolved by the Court is where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reasons of poverty, disability or socially or economically disadvantaged position are unable to approach the court and the court is moved by bona fide for this purpose by a member of the public by addressing a letter drawing the attention of the Court to such legal injury or legal wrong, the court would cast aside all technical rule of procedure and entertain the letter as a writ petition on the judicial side and take action upon it.”

- ✓ Shifting Burden of Proving facts from the Petitioner to the State (respondents in these cases) by putting the onus of conducting evidence-based research through expert committees set up specifically for the purpose or by the government.

- Specific legislations and Policies Affecting women

- Labour

- ✓ **The Factories Act, 1948** – Section 34 provides that the State government can lay down rules prescribing weights that may be carried by men and women.
 - ✓ **The Contract Labour (Abolition and Regulation) Act and Rules** - separate provision of utilities for women and fixed working hours.
(These these laws have proper implementation mechanisms, there is no provision for monitoring the effect of these laws on women.
Allowance for special provisions for women have often proven to be detrimental to their employment opportunities.)
 - ✓ **Maternity Benefit Act, 1961** – provides measures and benefits to women in service during pregnancy
 - ✓ **Equal Remuneration Act, 1976** - Mandates equal pay for equal hours of work for men and women.

- Trafficking

Immoral Traffic Prevention Act, 1956

Currently undergoing review for Amendments

- Domestic Violence

Criminal law- Section 498A

Protection of Women from Domestic Violence Act, 2005 & Rules

- ✓ **civil law** on domestic violence
- ✓ Recognition of the right to residence
- ✓ Provision for the appointment of Protection officers and the recognition of Service Providers
- ✓ Trainings for Protection Officers and Judges
- ✓ Awareness creation
- ✓ Budgetary allocation

- Dowry

Dowry Prohibition Act, 1961 – prohibits giving and taking of gifts or money at the time of marriage

- Sex Determination and Abortions

Pre-conception and Pre-natal Diagnostic (Prohibition of Sex Selection) Act

It requires the following bodies to undertake publicity efforts and allows for the filing of compliance reports on a regular basis:

- ✓ Policy Making Bodies at the Centre and State
- ✓ Implementing Authorities at State, District and sub-district levels
- ✓ Advisory Bodies at State, District and sub-district levels

Medical Termination of Pregnancies Act 1971

Prescribes guidelines and procedures to the medical fraternity with regard to abortion.

- Sexual Harassment

Section 354 Indian Penal Code - Outraging the modesty of a woman

Criminalises all non-penetrative sexual offences against women and is often used in cases of sexual harassment.

Supreme Court Guidelines on the prevention of sexual harassment at workplace (*Visakha v. State of Rajasthan*)

Prescribes preventive steps and provides for a complaints mechanism through setting up of complaint committees and disciplinary action.

Proposed Bill on Sexual Harassment at workplace

This bill providing for prevention and redressal mechanisms in cases of sexual harassment at work places is yet to be passed by the Parliament.

- Personal Laws

- ✓ Affect marriage, property rights, guardianship, custody rights and maintenance
- ✓ Personal laws are based on religious practices
- ✓ While some of the laws are codified some are uncodified and understood to form customary practices of communities. **Note:** India's declaration to Art.5(a) CEDAW state it's policy of non-interference in the personal affairs of any community without its initiative and consent.

- Political Participation

73rd and 74th Amendments to the Constitution on reservations for women in Panchayats and municipal bodies (local governments).

Panchayati Raj Acts have been passed by several state governments giving effect to the Constitutional provisions.

- Gender Budgeting

In 2004, detailed guidelines on Gender Budgeting and Gender Mainstreaming have been circulated to all Departments and Ministries in the Government of India and to the State Governments for gender specific expenditure.

- Other legislations and policies

Supreme Court Guidelines on Compulsory Registration of Marriages

Commission of Sati Prevention Act, 1987

Child Marriage Restraint (Amendment) Act, 1979

Indecent representation of Women (Prohibition) Act, 1986

- Commissions set up under statutory provisions to provide better protection for rights of women

National Commission for Women under the National Commission for Women Act, 1990

- Powers to review constitutional and legal safeguards for women
- Recommend remedial legislative measures
- Take suo motu notice of matters relating to deprivation of rights, non-implementation of laws enacted, non-compliance of policy decisions, guidelines or instructions aimed at ensuring welfare of women and take up such cases with appropriate authorities.
- Advise the government on all policy matters affecting women

National Human Rights Commission under Protection of Human Rights Act, 1993

- inquire suo motu, or on petition by victim, or on behalf of a victim regarding violation of human rights by public servants.
- intervene in any proceedings alleging violation of human rights.
- make recommendations for implementation of international treaties and instruments.

II. Obstacles to implementation

- Personal laws relating to marriage, divorce and inheritance governed by laws of the specific community overshadow constitutional guarantees of equality.
 - Discriminatory provisions under personal laws deny equal protection or equality before the law
 - ✓ Triple talaq practice giving unilateral power of divorce to men.
 - ✓ Hindu women have the right to guardianship only in the absence of the male guardian
 - ✓ Discriminatory property rights under Hindu laws persist even after amendments.
 - India's declaration to Art.5(a) CEDAW state it's policy of non-interference in the personal affairs of any community without its initiative and consent.

- Individual challenges to discriminatory provisions by women's movement have succeeded in positive interpretation of the legislations providing relief to women.

Geeta Hariharan's Case

Challenging Hindu law on unequal guardianship rights as Hindu Minority and Guardianship Act stated fathers as the "natural guardian" and after him the mother. The challenge led to a ruling that the term "after him" did not mean the death of the father rather in his absence or by his consent.

Government has since then changed passport application forms and allow application for passports to women on behalf of their children in case of divorce.

Mary Roy's Case 1986(1) SCR 371

Challenging discriminatory provisions of Travancore Christian Succession Act for equal succession rights since the law put an upper limit of Rs. 5000 on the inheritance of the daughter, leaving the entire estate to the son. While the Act was repealed, it was so done on the ground of the Indian Succession Act coming into force rather than subjecting the discriminatory provisions to the test of equality.

Madhu Kishwar v. State of Bihar (1996) 5 SCC 125

Challenging a tribal law dis-entitling tribal women from inheriting land as being discriminatory. The court read down the discriminatory provisions and ruled that women could assert a right of occupation against male inheritors but not alienate it.

Daniel Latifi Case

Challenged discriminatory provisions on maintenance for Muslim women. Although the court did not strike down the law, it held that unless Muslim women are paid not just a provision for the iddat period (three months) but a reasonable and fair provision for life, the provision would be liable to be struck down. The advantage of the challenge was to gain substantial rights to maintenance for Muslim women.

However none of the discriminatory laws have been struck down in entirety on the basis of violating fundamental rights of women.

- Usage of technology and skill in promoting discriminatory practices, particularly in cases of female foeticide.

Despite legislations on sex selective practices, use of technology in conducting pre-natal sex selection continue to support female foeticide. Lack of enforcement of the legislations coupled with inadequate recognition of equal rights of women serve in continuance of such sex discriminatory practices.

III. Problems in implementation

- Institutional bias and lack of political will in implementing policies and legislations
(Despite specific provisions under PWDVA, Protection Officers have yet not been appointed in all states. States that have identified Protection Officers have “deputed” officials as opposed to the required “full-time” appointments)
- Inadequate legal aid to support litigation
(Despite legislations mandating provisions of legal aid, women are often unable to avail of the services. Services are also often not of quality)
- High cost of litigation deters court action by women
- Lack in awareness of rights amongst community prevents women from taking or sustaining action.
- Inadequate responses and lack of co-ordination by multi-agencies in combating violence and discrimination