# BERICHTE / REPORTS

## Gendered Decision Making: The Engagement of the Supreme Court of India with International Norms in the area of women's rights

By Garima Tiwari*

**Abstract:** This paper explores the engagement of the Supreme Court of India with various international instruments (binding and non-binding) to protect and promote the rights of women. While normally the type of legal system (monist or dualist) creates differences in the application of international law, in the Indian context, judicial activism has on many occasions bridged this difference. The paper studies how international law has served both the traditional statist protectionist position and the modern substantive equality approach. Further, in a domestic setting, the Supreme Court has made women an apparent subject of international law. From direct incorporation of international law to making adequate use of its persuasive value, the Supreme Court has used different methodologies in its reasoning and decisions. Without using any specific approach in enforcing international law in India, the court has cherry picked the catalogue of international instruments to place itself in the larger international legal community. All these judgments have been justified within the constitutional limits and therefore, it forges a positive and legitimate relationship between international and domestic law.

***

### A. Introduction

There is an extensive amount of literature that deals with the relation of international law and domestic law, yet the study on the application and enforcement of international law in domestic courts lies in an amorphous territory. In India, this is situated within a context which is marked by a colonial past, a dualist legal system[1] and competing values of modernization and tradition. Further, the Constitutional provisions on international law do not give any guidance on how to enforce international law effectively. This has forced the Supreme Court of India to expand its interpretive prowess to enforce international obligations. In this legal matrix of domestic and international laws, a discussion on women's

* Assistant Professor,School of Law, Bennett University, India. Email: garima.tiwari@bennett.edu.in.

1 *Jolly George v Bank of Cochin* AIR 1980 SC 470.

rights becomes coagulated with multiple inter-connected and inter-sectional considerations arising from the very nature of Indian society. Interestingly, while issues of international nature may require application of international norms, domestic disputes of domestic nature involving women's rights have not always been projected as an area of application of international law, though this area, too, is covered by certain universal guarantees regarding women's right. Women's rights in India are placed at two broad spectrums of domestic socio-cultural realities on the one hand and international aspirations on the other. With rights and remedial measures already existing in the Constitution of India, references to international instruments to protect and promote women's rights seem to be more a question of choice than necessity. Against this background, this paper will explore the engagement of the Supreme Court of India with international law (binding and non- binding) with the aim to protect and promote the rights of women.

The primary sources of this research are the decisions of the Supreme Court of India that have cited and discussed international instruments relating to women's rights in its judgment, reasoning and the arguments. Judicial precedents and rights advocacy have created social movements and even strategic political actions with the possibility of claims of new rights with this process being called a 'constitutive function'.[2] The use of strategic litigation implies deploying the legal institutions for a social purpose.[3] The paper will start with a brief theoretical discussion exploring existing literature and constitutional framework and thereafter, it will discuss the relevant case law in three sub-headings, rape and sexual harassment, employment and personal law. A concluding analysis has then been provided to discuss the findings.

## B. The Constitution of India and Women as Subjects of International Law

Constitutional jurisprudence is an important source of justifying, clarifying and activating international norms and also for providing a forum for understanding the need and method for such engagement.[4] While international law does not form a prominent part of the Indian Constitutional scheme, it has occupied an important place through "an unexpected ally"[5], the Indian judiciary. Part IV of the Indian Constitution contains six justiciable and enforceable fundamental rights: equality, freedom, protection against exploitation, freedom of religion, cultural and educational rights, and constitutional remedies.[6] In addition, there are non-justiciable, Directive Principles of State Policy and Fundamental duties, all indicating

2 *Michael W. McCann,* Legal Mobilisation and Social Reform Movements: Notes on theory and its application, in: Mc Cann (ed.), Law and Social Movements, Burlington 2006, p. 8.

3 *Charles R. Epp*, The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective, Chicago 1998, pp. 91-95.

4 *Adam M Smith*, Making Itself a Home - Understanding Foreign Law in Domestic Jurisprudence: The Indian Case, Berkeley Journal of International Law 24 (2006), p. 218.

5 Anthea Roberts, Comparative International Law, Oxford 2018, p. 322.

6 Constitution of India, Articles 12-35.

empowerment of women. Article 32 of the Constitution of India gives meaning to the fundamental rights and consequently to international law by allowing appropriate proceedings to be instituted at the Supreme Court.[7]

Being a dualist system, since the implementation of a treaty requires legislation for activating an international treaty, the Parliament has exclusive powers to enact a statute under Article 253 of the Indian Constitution. The *exclusive* reference to international law in the Constitution can be found in Article 51(c) of Part IV dealing with the Directive Principles of State Policy. It states that the State shall endeavor to foster respect for international law and treaty obligations in the dealings of the organized peoples with one another. Being a Directive Principle of State Policy, Article 51 is not directly enforceable implying that even international law *per se* is not justiciable in the domestic sphere. However, this non-justiciability is rectified, by other provisions in the Indian Constitution, through Public Interest Litigation ('PIL') and expansive rights interpretation.[8]

Against the background of the increasing importance of international law, today, the idea of monism and dualism seems to become less important when courts play an 'activist' role and reduce the deference to the executive. Therefore, one of the most important constitutional mechanisms of engaging with international law lies in the interpretation of fundamental rights. Indian women struggle to enforce their rights within a complex socio-cultural set up, and when rights emerging from international instruments are attempted to be enforced in India, it may seem conflicting with the values of Indian society and therefore, unsuitable to Indian conditions. Gender normally tries to assert itself in private spaces claiming authority from religion or traditions. Issues that were previously solely within the regulation and control of the domestic laws have gradually moved to a considerable extent within the parameters of international law. Dynamic approaches have taken over static ones[9] and therefore, international law has percolated through the domestic legal systems through multiple entry points. Qualitative changes in international law have made the participation of domestic courts in the application and enforcement of international law conceptually inevitable and legally essential.[10] These changes are in the form of diversity of its subjects which are no longer just traditional states.[11]

7 *Garima Tiwari*, Understanding Laws: A Legal Quotient Primer, India 2014, pp.40-41.

8 National Commission to Review the Working of the Constitution, A Consultation Paper on Treaty-Making Power under Our Constitution 2001.

9 A static approach is limited to the superficial analysis of what national constitutions say and a dynamic approach is focused on the analysis of the real binding force of these laws as inferred by the study of the judgments: see *Giuseppe Martinico* and *Oreste Pollicino*, The Interaction between Europe's Legal Systems Judicial Dialogue and the Creation of Supranational Laws, United Kingdom 2012, pp.18-19.

10 *Daniel Bodansky*, Human Rights and Universal Jurisdiction', in: M Gibney (ed.), World Justice? U.S. Courts and International Human Rights, Oxford 1991, pp. 11-13.

11 *L Henkin*, International Human Rights Standards in National Law: The Jurisprudence of the United States, in: B Conforti/ F Francioni (eds.), Enforcing International Human Rights in Domestic Courts, The Hague 1997, pp.189-190.

On the flip side, feminist approaches to international law point to the fact that the founding theorists of international law were all male and ignored the unequal distribution of power and political nature of relationships in family life.[12] It is argued that international law is androcentric due to both its organizational and normative structures [13] and that it is biased in favor of men.[14] The explorations of gender and sexuality at international level that are informed by colonialism, inequality and androcentricity have similarly informed the construction of gender, sexuality and culture in domestic systems and vice versa.[15]

While women may be accepted as subjects of international law, there is a certain tension in light of India's colonial past that has led to apprehensions of external values damaging the Indian culture and thus, there is a strong case towards reworking and reiterating international law in India in constitutionalist terms.[16] When looking at international law, courts are faced with questions of colonialism, westoxification[17], cultural specificity and diversity. The inherent dangers of international law and its western origins have been described as moral laxity, social injustice, secularism, devaluation of religion, and an obsession with money.[18] Countering these arguments scholars have suggested that international

12 *Celina Romany*, State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction, in: Rebecca Cook (ed.), Human Rights of Women: National and International Perspectives, Pennsylvania 1994, p.85, 94.

13 *Hilary Charlesworth*/*Christine*/*Chinkin*/*Shelly Wright,* Feminist Approaches to International Law, American Journal of International Law 85 (1991), pp. 613, 643.

14 *Hilary Charlesworth*, Feminist Critiques of International Law and Their Critics, Third World Legal Studies (1994-1995), p.2.

15 *Ratna Kapur*, Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India, Melbourne Journal of International law 14 (2) (2013), p. 343; *Vasuki Nesiah*, Placing International Law: White Spaces on a Map, Leiden Journal of International Law 16 (2003), pp. 3-4.

16 *Nico Krisch*, Beyond Constitutionalism: The Pluralist Structure of Post-National Law, Oxford 2010, p.330.

17 Westoxification is, "the fascination with and dependence upon the West to the detriment of traditional, historical, and cultural ties along with an indiscriminate borrowing from and imitation of the West, joining the twin dangers of cultural imperialism and political domination.": See Oxford Islamic Studies Online, Oxford Dictionary of Islam, http://www.oxfordislamicstudies.com/article/opr/t125/e2501# (last accessed 30 January 2019); *Brumberg,* Reinventing Khomeini: The Struggle for Reform in Iran, Chicago 2001, p.65.

18 *Brumberg,* note 17, p. 65; These arguments can also be seen with reference to the Third World Approaches to International Law: e.g. *RP Anand*, Attitude of the Asian–African States toward Certain Problems of International Law, International and Comparative Law Quarterly 15 (1966), p. 56; *Mrinalini Sinha,* Colonial Masculinity: The 'Manly Englishman' and the 'Effeminate Bengali' in the Late Nineteenth Century, Manchester University Press, 1995; *B S Chimni*, The Past, Present and Future of International Law: A Critical Third World Approach' Melbourne Journal of International Law 8 (2007), p. 499; *Prabhakar Singh*, Indian International Law: From a Colonized Apologist to a Subaltern Protagonist, Leiden Journal of International Law 23 (2010), p. 79.

law is not to be rejected, but that the fragmentation of international law[19] through cultural and national interpretations might be a way to adapt international law to specific local contexts.[20]

The prevailing legal research about Indian society becomes stagnant with the understanding that in a pluralistic society law must be flexible. None of the existing studies on women's rights in India seems to systematically analyze the actual disputes, particularly those with an international dimension that come before the courts .[21] Most studies have suggested that it is through judicial activism, that the courts have expanded the existing laws and developed new rules, serving as an avenue for institutional change.[22] If a particular social problem like dowry, child marriage etc. is deeply embedded in the national and social structure, then invoking international norms may provide some introspection and scope for litigation. The next section will now present a series of cases to decipher how the Supreme Court of India engages with international law.

## C. Gendered Decision Making by the Supreme Court of India: Case Law Analysis

### *I. Rape and Sexual Harassment*

The issue of rape and sexual harassment in India has received serious attention in the last few years. The crime, though abhorred internationally, falls under domestic prosecution and is then overshadowed by an international umbrella of rights and obligations of the state towards women. In India, the female body has been perceived as a reflection of the "communal or familial shame and honour" which provides the basis to distinguish her virtue and character.[23] In the (in) famous case of *Tuka Ram v State of Maharashtra*[24] where two po-

19 *Eyal Benvenisti/ George W. Downs*, National Courts, Domestic Democracy, and the Evolution of International Law, European Journal of International law 20 (2009), p.59.

20 *Jack Donnelly*, The Relative Universality of Human Rights, Human Rights Quarterly 29 (2007), p. 281; Several other solutions have been offered like vernacularisation, indigenization and hybridity*: Sally Engle Merry*, Transnational Human Rights and Local Activism: Mapping the Middle, American Anthropologist 108 (2006), pp.46-48. See also: *Upendra Baxi*, Voices of Suffering and the Future of Human Rights, Transnational Law & Contemporary Problems 8 (1998), p.151 (Baxi refutes the argument that universality ignored cultural diversity).

21 *Mejía Guerrero/Luz Patricia,* Legal Standards Related to Gender Equality and Women's Rights in the Inter- American Human Rights System: Development and Application, OAS official records OEA/Ser.L/V/II.143 Doc 60.

22 Following studies have been conducted on the issue: *Avani Mehta Sood*, Gender Justice through Public Interest Litigation: Case Studies from India, Vanderbilt Journal of Transnational Law (2008), p.833; *S P Purushottam Sathe*, Judicial Activism: The Indian Experience ,Washington University Journal of Law and Policy 6 (2001), p. 29; *Manoj Mate*, The Rise of Judicial Governance in the Supreme Court of India, Boston University International Law Journal 33 (2015), p.169; *Nihal Jayawickrama,* India, in: D Sloss (ed,), The Role of Domestic Courts in Treaty Enforcement, Cambridge 2009, Chapter 6.

23 *Nicole Westmarland/Geetanjali Gangoli*, International Approaches to Rape, Chicago 2012, p. 109.

24 *Tuka Ram v State of Maharashtra* (1979) 1 SCR 810.

licemen raped a sixteen year old girl in the police station, the Supreme Court ruled that since there were no injuries on the person of the girl, it meant that she did not put up resistance and that the incident was a 'peaceful affair' and thus, she must be lying.[25] The evidentiary requirements that the court adopted were those which were incorporated into the Indian legal system during the colonial period from English law and while the United Kingdom had denigrated the importance of prior sexual history and physical evidence of resistance, these continued to remain crucial in trials in India. These were supplemented by the fear imported from Britain about false charges from women. In independent India, where the Supreme Court was still placed in such a colonial legal structure it was re-enforcing these 'stereotypes' of the behavior of women fixated with questions of character and chastity.[26] The dichotomy arises from the fact that while the court was strongly opposed to anything that seemed 'external' or 'un-Indian' during this time, they were still interpreting and implementing the colonial laws. In *Hirjibhai v. State of Gujarat* [27] the Supreme Court suggested that it is the Western women who might make false allegations of rape and noted that an Indian woman of urban or rural background would not dare to lodge a false complaint of rape. It is worth nothing that while these decisions did not elaborate on international norms, they also did not engage in discussions of fundamental rights or human rights of a rape victim. Over the years, however, the issue of consent has received a change both in the society and in the judicial reasoning. Likewise, the argument of the so-called western bias has largely been abandoned. [28] In *The Chairman Railway Board and Others v Mrs Chandrima Das and Others*[29] the court expanded the rights available to a rape survivor by providing her compensation as a constitutional right rather than a private right largely through reliance on international commitments. It noted that the principles of the Universal Declaration of Human Rights ('UDHR')[30] must be read into the domestic jurisprudence.[31] Confirming their duty to look to international human rights standards, the Court held that rape is a violation of the right to live in human dignity. The categorization of women based on their character or 'un-Indian' virtues was not considered as a ground for refusal of fundamental rights.

25 Tuka Ram, note 24, para.5.

26 *Elizabeth Kolsky*, 'The Body Evidencing the Crime': Rape on Trial in Colonial India, 1860–1947, Gender & History 22 (1) (2010), p. 111.

27 *Hirjibhai* v *State of Gujarat* 1983 AIR 753.

28 *State of Madhya Pradesh v Madan Lal* Criminal Appeal No 231of 2015 dated 1 July 2015.

29 *The Chairman Railway Board and Others v Mrs Chandrima Das and Others* (2000) 2 SCC 465.

30 Universal Declaration of Human Rights, GA Res 217 A(III), 3rd session, UN Doc. A/810 (10 December 1948).

31 Court also referred United Kingdom decisions of *Salomon v Commissioners of Customs and Excise* (1996) 3 All ER 871; *Brind v Secretary of State for the Home Department* (1991) 1 All ER 720.

Notwithstanding these developments, a colonial practice used even today is the so called two-finger test or per vaginum examination in case of offence of rape.[32] In this, a doctor concludes whether a woman has a propensity to be 'habituated to intercourse or not'.[33] While the legislature has done nothing to ban such practices, the Supreme Court in *Lillu @ Rajesh & Anr. v State of Haryana* [34] has discarded the practice of the two-finger test in rape cases to establish consent and held it to be a violation of victim's right to privacy and dignity relying on the ICESCR[35] and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.[36]

The landmark decision of *Vishaka and Others v State of Rajasthan* [37] performed a constitutive function with far reaching effects on the engagement of the judiciary with international law. During the 1990s, Bhanwari Devi, belonging to a lower caste community was raped by the landlords of the community. On acquittal by the High Court, a PIL was filed under Article 32 of the Constitution. The Supreme Court held that gender equality is a human right and includes 'protection from sexual harassment and the right to work with dignity.' [38] Further that, 'in the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment…the contents of international Conventions and norms are significant.' [39] The court decided to formulate preventive guidelines to fill the legislative vacuum to provide effective and immediate redress till the legislature came up with a law. To bring the decision, within the Constitutional mandate, the court highlighted its obligation under Article 32 and Article 141[40] of the Constitution for the enforcement of fundamental rights in the absence of legislation. The judgment quoted Article 11 and 24 of the CEDAW[41] along with the General Recommendations No. 22, 23 and 24 of the CEDAW Committee, relating to sexual harassment in the workplace.[42] The court also

32 *Kolsky*, note 26, p.111.

33 *Apurba Nandi*, Medical Evidence of Rape, in: Swati Bhattacharjee (ed.), A Unique Crime: Understanding Rape in India, Kolkata 2008, p. 193, 198.

34 (2013) 14 SCC 643.

35 International Covenant on Economic, Social and Cultural Rights, (entered into force 3 January 1976) ('ICESCR').

36 United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA, A/RES/40/34 (29 November 1985).

37 *Vishaka* and *Ors v State of Rajasthan* and *Ors (*1997) 6 SCC 241, AIR 1997 SC 3011 ('Vishaka').

38 Vishaka*,* note 37, para.10.

39 Vishaka, note 37, para 7.

40 Article 141 of the Constitution of India says: "Law declared by Supreme Court to be binding on all courts: The law declared by the Supreme Court shall be binding on all courts within the territory of India.".

41 Convention on the Elimination of all Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

42 United Nations Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 22: Amending Article 20 of the Convention, 1995, A/50/38; United Na-

used comparable case law from Australia.[43] When the court directly applied and enforced CEDAW, it bypassed the step of converting an international instrument into a domestic legislation as required under Indian law. It acted as more like a court in a monist legal system through judicial activism. The decision engaged with international law harnessing its benefits but did not give complete supremacy to international law,[44]as it reasoned that *if* found inconsistent, any international rule would be subordinate to the Constitution of India. Thus, there was a departure from the reasoning based on chastity, consent and western bias to a reasoning based on rights, protection and prevention. However, the implementation of the *Vishaka* guidelines was not smooth[45] and it was only in 2013 that The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted. *Apparel Export Promotion Council v AK Chopra*[46] was the first case where the Supreme Court applied the *Vishaka* Guidelines and furthered it by holding that 'an attempt to molest' is equally an infringement of a woman's right to dignity at the workplace as a 'successful attempt of molestation'. It noticed that international instruments cast an obligation on the Indian State to *gender sensitize* its laws. Thus, when studied in comparison to the previous position of the court, these judgments have proven gender sensitive.

It is however seen that the court does not *randomly* activate the international commitments, but it carefully analyses the existing paradigm of rights, their factual matrix and relevant constitutional limits. In *Sakshi v Union of India,*[47] a PIL was filed focusing on violence against women to broaden the meaning of 'rape' under India's criminal rape law relying on the Indian Constitution and India's international commitments under instruments such as the CRC[48] and CEDAW[49]. Reference was made to the judgments of the International Criminal Tribunal for the Former Yugoslavia.[50] The court, however, upheld the definition of rape as provided in the existing law relying on *stare decisis*[51] stressing on the need for

tions Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 23: Political and Public Life, 1997, A/52/38; United Nations Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)1999, A/54/38/Rev. 1, chap. I.

43 *Minister of Immigration and Ethnic Affairs* v *Teoh* (1995) 128 ALR 353 (Australian High Court).

44 *Malcolm N Shaw*, International Law, New York 1998, pp. 99-136.

45 See also: *DS Grewal v Vimmi Joshi* (2009) 2 SCC 210; *Medha Kotwal Lele and Others v Union of India and Others* (2013) 1 SCC 311.

46 *Apparel Export Promotion Council v AK Chopra* AIR 1999 SC 625. ('Apparel').

47 *Sakshi v Union of India* (2004) 5 SCC 518.

48 Convention on the Rights of the Child opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990) ('CRC').

49 CEDAW, note 41.

50 *Prosecutor v. Anto Furundzija* (Trial Judgment) (International Criminal Tribunal for the former Yugoslavia, IT-95-17/1-T, 10 December 1998); *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment). (International Criminal Tribunal for the former Yugoslavia, IT-96-23-T 22 February 2001).

51 *Garima Tiwari*, Quick Reference Guide on Jurisprudence II, India 2013, p.82, 86.

criminal law to be certain and unambiguous. Unlike the reasoning of *Vishaka* and *Apparel*, the court in *Sakshi* [52] decided to direct the Parliament for suitable action. In *Salil Bali v. Union of India*[53] the Supreme Court rejected the petition to amend the Juvenile Justice (Care and Protection of Children) Act, 2000 to lower the age of juvenile offenders who allegedly commit crimes such as rape and murder. The court referred to the Geneva Declaration of the Rights of the Child, 1924[54], UDHR, Declaration of the Rights of the Child, 1959[55], Beijing Rules of 1985[56], the Riyadh Guidelines of 1990[57] and the Havana Rules of 14th December 1990 for juveniles.[58] Reference was also made to United Nations Declaration on the Elimination of Violence against Women, 1993. Discussing the rights of juvenile versus the rights of the raped women both supported by international commitments, the court decided that since India has incorporated child rights into domestic legislation, the age of the juvenile shall remain as provided for in the domestic legislation. This clearly demonstrates that in cases when there are two sets of international instruments, and one has found place in the domestic legislation, while the other is still not codified, the courts will maintain the supremacy of the former.[59] Thus, even when the court agrees that the international norms are pertinent, in cases where there is a clear domestic law, the court prefers not to 'amend' it only because there is a treaty obligation.

### *II. Employment Issues*

A second area of women's rights, in which international law has been referred to by the courts are employment and workplace related issues of women. The traditional notion of women as being primarily suited to domestic works has restricted their role in the public sphere. Since there is no supportive comprehensive statute for employment discrimination in India, reliance is largely placed on the constitutional provisions. In many cases, the

52 Sakshi, note 47.

53 *Salil Bali v. Union of India* (2013) 7 SCC 705.

54 League of Nations, Geneva Declaration of the Rights of the Child of 1924, OJ Spec Supp 21,43 (1924).

55 United Nations General Assembly, Declaration of the Rights of the Child, 1959 GA res 1386 (XIV), 14 UNGAOR Supp (No16) at 19, UN Doc. A/4354 (1959).

56 United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) UNGA A/RES/40/33 (29 November 1985).

57 United Nations General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), UNGA A/RES/45/112 (14 December 1990).

58 United Nations General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution / adopted by the General Assembly, UNGA A/RES/45/113 (2 April 1991).

59 See also *Subramanian Swamy and Others v Raju* (2014) 8 SCC 390. See also, *Supreme Court Women Lawyers Association v Union of India* 2016 SCC Online SC 33.

Supreme Court has convoluted the ideas of substantive[60] and formal equality.[61] The main issues in employment matters hinge on discrimination and equality in employment conditions.

The Supreme Court has attributed the differences in the terms and conditions of employment of men and women to physiological differences arising from the gender. While the Constitution allows for making provisions for the benefit of women, the policies of employers may create their own criteria for what would be considered as a 'benefit' for a woman.[62] *Kannabiran* argues that the court links masculinity with the inherent capability for 'arduous' work and thereby suggested that men perform 'arduous' work, which women are incapable of matching. [63]

As in *Vishaka v. State of Rajasthan* [64] the Court filled the legislative vacuum in employment discrimination law through guidelines in the area of sexual harassment applicable to both the public and the private sector. Direct incorporation of international law without legislative enactment was again seen in *Municipal Corporation of Delhi v Female Workers (Muster Rolls) and another* [65]that dealt with the issue of maternity benefit to female workers employed on Muster Roll. While the Parliament had enacted the Maternity Benefit Act, 1961, its benefit was not available to women employees on muster roll. The court first referred to the Preamble of the Constitution that promises social and economic justice and then emphasized that India is a signatory to various International covenants and treaties. It then hailed the UDHR and referred to CEDAW.[66] Thereafter, it read these principles into the contract of service of the muster roll employees directly and allowed them the maternity benefit. Thus, there was a direct incorporation of the principles of CEDAW into the domestic law as well as into the contract of service. The Supreme Court has even diluted the hold of reservations made to CEDAW in the case of *Valsamma Paul etc. v Cochin University and Others*[67] where the court held that voluntary assumption of a disadvantage constitutes an insufficient basis for entitlement to a reserved university post.[68] In dismissing the appeal, the Court interpreted the fundamental rights in light of UDHR and CEDAW and held that, "the principles embodied in CEDAW and the concomitant right to development became in-

60 *Claire McHugh*, The Equality Principle in E.U. Law: Taking a Human Rights Approach?, Irish Student Law Review 14 (2006), p.34.

61 *Owen M Fiss*, Groups and the Equal Protection Clause, Philosophy and Public Affairs 5 (1976), p. 108.

62 For reference see: *Air India v. Meerza* (1982) 1 SCR 438; *Air India Cabin Crew Association v. Yeshaswinee Merchant* AIR 2004 SC 187.

63 *Kalpana Kannabiran*, Women and Law: Critical Feminist Perspectives, New Delhi (2013), pp.191-192.

64 Vishaka, note 37.

65 *Municipal Corporation of Delhi v Female Workers (Muster Rolls) and another* 2000 (2) SCR 171.

66 CEDAW, note 41.

67 *Valsamma Paul etc v Cochin University and Others* AIR 1996 SC 1011.

68 Valsamma Paul, note 67, p. 1012.

tegral part of the Constitution of India "[69] and are thus enforceable. Interestingly, the Court asserted that India's reservations to CEDAW Articles 5(e), 16 (1), (2), and 29, bear little consequence in view of the fundamental rights to equality and the right to life, as well as the directive principles. By still asserting the supremacy of the Constitution of India, it curtailed the effect of reservations and linked women's rights and freedom to national development.

In *Anuj Garg & Others v Hotel Association of India and Others*[70] the constitutional validity of Section 30 of Punjab Excise Act, 1914 was challenged which prohibited inter alia, employment of any woman in any part of such premises in which liquor or intoxicating drug is consumed by the public. The Supreme Court held that women should be allowed to work in premises where liquor is sold as the Constitution calls for prohibition on sex discrimination basing it on the right to autonomy, self-determination, and individual choice.[71] The Court threw light on the relevance of the CEDAW and the Beijing Declaration and noted that, "No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until unless there is a compelling state purpose."[72] The Supreme Court showed a very gender sensitive approach when it held in para 34 that, "Privacy rights prescribe autonomy to choose profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship." Looking at the changing social conditions both at domestic and international level the Court pronounced a very forward-looking judgment.[73]

Another area related to women's rights is prostitution, sex work and bar dancing. In *Gaurav Jain v Union of India and Others*, [74] a writ petition was filed on behalf of women in the work of prostitution claiming their right to be free citizens; right not to be trapped again and readjusted into the society. The Court referred extensively to the UDHR, the CEDAW, and the Declaration on the Right to Development[75] and suggested the Union and the State Governments should develop procedures and principles taking cue of international norms to help the women involved in prostitution to invoke human rights. Again, it would be wrong to depict the Supreme Court merely as an agent of international law who is blind-

69 Valsamma Paul, note 67, para 28 referring to the Protection of Human Rights Act, 1993.

70 *Anuj Garg and Others v Hotel Association of India and Others* (2008) 3 SCC 1.

71 *Tarunabh Khaitan*, Beyond Reasonableness-A Rigorous Standard for Review of Art. 15 Infringement, Journal of Indian Law Institute 5 (2) (April-June 2008), p. 177.

72 Anuj Garg, note 70.

73 See also the case of *Charu Khurana v Union of India and Others* (2015) 1 SCC 192.

74 *Gaurav Jain v Union of India and Others* (1997) 8 SCC 114.

75 United Nations General Assembly, Declaration on the Right to Development UNGA A/RES/41/128 (4 December 1986).

ly executing international legal obligations. Instead, the Court carefully used international norms to improve domestic conditions and to uplift women through various mechanisms of legal protection. [76]

As seen from the matrix of cases, there is a gradual move from formal equality to substantive equality. Greater reliance is placed on international norms to support the principles of non-discrimination, freedom, liberty, livelihood and substantive equality. Though the reliance on international norms is not essential in these cases, the Supreme Court has used them to create a persuasive value. Again, justification for reliance is placed on 'no conflict' with the domestic law and strengthening of fundamental rights.

### *III. Personal Laws*

One of the most complex areas of law in India is the area of personal laws. The Preamble to the Constitution proclaims India to be a secular republic. Nevertheless, in a society of diverse religions and ideologies, every decision involving personal law is scrutinized from the vantage point of secularism and religious specificity making it an issue within the public domain. Thus, when there is already a tussle between the national and personal laws, it makes the discussion of women's rights and international law involving personal laws, even more strained. Rightly so, scholars have suggested that the Supreme Court has failed to "test the personal laws on the touchstone of fundamental rights."[77]

To understand the complexity and the problem of judicial interference in personal laws it is pertinent to mention the historic judgment of *Mohammed Ahmed Khan v Shah Bano* [78] which created a debate about religious rights versus women's rights. When Bano, a Muslim woman, was given maintenance by Supreme Court using the criminal code, which applies to all citizens equally, radical Islamists raised their anger against the judiciary for being biased and for putting the legislative reform over the Muslim Law. To pacify the religious sects, the Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted which in effect facilitated Muslim law's denial of ongoing maintenance to divorced women.[79]

The issue of maintenance for Hindu women came into question in *Vaddeboyina Tulasamma v. Vaddeboyina Shesha Reddi* [80] Here the Supreme Court, cognizant of the changing international position of women highlighted the need for the law to march with time and held that the Hindu female's right to maintenance under Section 14(1) of the Hindu Succession Act, 1956 is a specific and concrete right against property and that it is not an empty formality or an illusory claim. While the case did not detail any international com-

76 See also *Budhadev Karmaskar v. State of West Bengal* (2011) 10 SCR 57; *State of Maharashtra and another v. Indian Hotel and Restaurants Association and Others* (2013) 8 SCC 519.

77 *Marc Galanter* and *Jayanth Krishnan*, Personal Law and Human Rights in India and Israel, Israel Law Review 34 (2000), p. 106.

78 *Mohammed Ahmed Khan v. Shah Bano* 1985 SCC (2) 556.

79 The Muslim Women (Protection of Rights on Divorce) Act 1986, No 25, Acts of Parliament, 1986.

80 *Vaddeboyina Tulasamma v. Vaddeboyina Shesha Reddi* 1977 SCR (3) 261.

mitment, it did appraise the international scenario to move ahead with the global society. Despite the complex political atmosphere regarding personal laws, it is submitted that the position is changing gradually as seen in a recent judgment of *Prakash v. Phulavati* [81]where the Supreme Court *suo motu* took cognizance of the fact that despite Constitutional guarantee, Muslim women are subjected to discrimination and suggested that the law must change with time and international covenants and treaties could be referred to assess this change. The result of this is seen in the case of *Shayara Bano v. Union of India*[82] that declared one form of Muslim divorce as unconstitutional. The reasoning unfortunately did not delve into issues of equality and even though the arguments by lawyers were based on several international treaties and covenants like the UDHR, the ICESCR, and the CEDAW, the Court did not discuss the global rights based discourse.[83] The court held that "[I]t is therefore apparent, that whilst the Constitution of India supports all conventions and declarations which call for gender equality, the Constitution preserves 'personal law' through which religious communities and denominations have governed themselves, as an exception." [84]

Another area which is governed by personal law is property rights of women in India. The issue of property rights has been one of the very contentious issues because in most cases, women had a secondary and only contingent right to property which came after the rights of male members of the family. The right to property is a constitutional right but not a fundamental right. In some cases, particularly those dealing with succession to property, personal laws have played an important role. *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoli* [85] brought the discussion of international law in the personal laws relating to property rights of women under the Hindu Succession Act, 1956 and the court held that women are entitled to full ownership of property left to them in a will. The court held that the principles embodied in CEDAW and the concomitant right to development are integral parts of the Constitution and therefore, enforceable. Thus, the decision made a leap forward, in linking constitutional law, personal laws and international law and clearly articulated that those provisions of personal law that discriminate against women violate the equality guarantee and must be made consistent with constitutional law and international obligations.[86] The reservations to the CEDAW were also made irrelevant in this context when the Court noted that, "Article 5(a) of the CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2(f) denudes its effect and enjoin to implement Article 2(f) read with its obligation undertaken under Articles 3,

81 *Prakash v. Phulavati* 2015 (6) CTC 576.

82 *Shayara Bano v. Union of India* (2017) https://supremecourtofindia.nic.in/supremecourt/2016/6716/6716_2016_Judgement_22-Aug-2017.pdf (last accessed on 1 June 2018).

83 For a detailed analysis of the decision see: *Tanja Herklotz*, Shayara Bano versus Union of India and Others. The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice, Verfassung und Recht in Übersee 3 (2017), pp. 306,307.

84 Shayara Bano, note 82, para.187.

85 *Masilamani Mudaliar* v. *Idol of Sri Swaminathaswami Thirukoli* AIR 1996 SC 1697.

86 See also the case of *Madhu Kishwar and Others* v *State of Bihar and others* 1996 SCC (5) 125.

14 and 15 of the Convention vis-a-vis Articles 1, 3, 6 and 8 of the Convention of Right to Development. The directive principles and fundamental rights though provided the matrix for development of human personality and elimination of discrimination, these conventions add urgently and teeth for immediate implementation." Thus, using Article 2(f) and other related articles of CEDAW, the court directed the State to take all appropriate measures. Similarly, in *Seema v. Ashwani Kumar* [87] marriages of all persons who are citizens of India belonging to various religious denominations were made compulsorily registerable in their respective States. India's reservation to CEDAW said that it was not practical in a vast country like India with its variety of customs, religions and level of literacy to make registration of marriage compulsory. The Court went against the reservation and directed the States and Central Government to take steps for the same by making amendments in the existing rules. In *John Vallamattom v. Union of India*,[88] the court said that it is immoral to discriminate a woman on the ground of sex under both domestic and international law and appealed to the Parliament to consider the Uniform Civil Code.[89] Thus, in relation to property rights, the Court has made a strong case that women have equal rights and even in the presence of an enacted domestic legislation, the court has tried to project itself as an enforcer of the international obligations by asserting that they are relevant and must be referred to.

Apart from maintenance and property matters, guardianship rights also involved discussions on international law. In *Ms Githa Hariharan and Another v Reserve Bank of India and Another* [90], the Court referred to Article 2 of the UDHR to suggest that a mother can act as the natural guardian even when the father is alive. Similarly, in *ABC v. The State (NCT of Delhi)* [91] the Court considered the CRC[92] and the UDHR to conclude that the prevalent view globally is that an unwed mother possesses primary custodial and guardianship rights on her children and is not bound to disclose the name of the child's father.

Thus, in case of personal laws, the decisions do not suggest any radical change in the scope of rights using international norms.[93] The court does refer to international sources, but to highlight the international position and largely to support the existing arguments.

87 *Seema v. Ashwani Kumar* AIR 2006 SC 1158.

88 *John Vallamattom v. Union of India* (2003) 6 SCC 611.

89 Article 44 of Indian Constitution provides for Uniform Civil Code. Read more: *Tanja Herklotz*, Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court, Verfassung und Recht in Übersee 49 (2) (2016).

90 *Ms Githa Hariharan and Another v Reserve Bank of India and Another* 1999 (2) SCC 228.

91 *ABC v. The State (NCT of Delhi)* (2015) 10 SCC 1.

92 CRC, note 48.

93 *Indira Jaising*, Gender Justice and the Supreme Court, in: B. N. Kirpal et al. (eds.), Supreme but not Infallible: Essays in Honour of the Supreme Court of India, New Delhi 2000, p. 290.

## D. Concluding Analysis

In contributing to the existing literature, the current analysis of case law suggests that the Supreme Court of India has perpetuated the rights-based discourse in India through an expansive interpretation of domestic law using international norms acting within the constitutional framework. Such judicial activism with international norms encompasses "indirect material effects" such as the intervention of new actors into the judicial arena or policy debate, "direct symbolic effects" such as prompting greater media coverage, and "indirect symbolic effects" such as reframing public discourse.[94]

Law has been cautiously interpreted within the constitutional scheme to carefully apply external norms to the domestic context. The impeccable positive effect of the decisions is evident in the lack of opposition from executive or the legislature. The court has not used any specific approach in enforcing international law in India but has cherry picked the catalogue of international instruments to place itself in the larger international legal community. The Supreme Court has not 'interpreted' international law *per se*, but rather interpreted 'domestic law' in light of international agreements. It is evident that the fundamental rights provided in the Constitution of India are quite detailed and even without the engagement with international law there is enough scope to evolve the process of a positive gendered decision making. But the court has based its reasoning *not* on the vertical supremacy of international law, but on the transplantation of the value content in which it is supportive of women's rights making the direct effect subject to the constitutional mandate. The judgments that require the government to legislate generally create a persuasive obligatory effect on the legislature to make the domestic law compatible with international obligations.

Further, since the Constitution is comprehensive enough, the court needs to provide a stronger reasoning and justification as to why it uses international law to justify its expansion of rights. The scope of engagement with international norms gets reduced as one move from public to private spaces and therefore, the methods of engagement and impact also became minimal as we move from the cases dealing with rape to personal law matters. In most cases the role is largely persuasive, but directly or indirectly, international legal norms are consistently tiptoeing into the domestic legal relations where matters are of domestic nature. With positive influences through this engagement with international norms, the Supreme Court of India has acted as an enforcer of international law for domestic goals and thereby, has attempted to increase the significance and benevolence of international law for a women's rights movement in India.

94 *César Rodriguez-Garavito*, Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America, Texas Law Review 89 (2011) 1669.