



ANALYSIS OF COLONIAL INHERITANCE SEXUAL OFFENCES LAW IN INDIA

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Woman is an incarnation of 'Shakti'—the Goddess of Power. If she is bestowed with education, India's strength will double. Let the campaign of 'Kanya Kelavni' be spread in every home; let the lamp of educating daughters be lit up in every heart
—Narendra Modi

ABSTRACT: The Constitution of the Republic of India ensures equality for women and men in every sphere of life and activity. The fundamental rights of the Indian Constitution specifically mentions: "The State shall not discriminate against any citizen on grounds only of religion, caste, sex, place of birth or any of them". Women in India have been given equality of opportunity in all matters relating to education, employment, and legal status, and they can aspire to grace the highest office of the State. However, this is truly not indicative of the existing position of women in general in the country, as yet. Though, legally and constitutionally, all women have equal access to and right to venture in every walk of life, a vast majority of them are still illiterate and uneducated. This is a paradoxical situation, which must be understood and seen in its historical perspective. The status of women and their activities can be divided into three main historical periods, the ancient, the medieval and the modern.

KEYWORDS: Women, constitution, education, employment, and legal status

INTRODUCTION

In the modern period, the status of Indian women can be divided into two distinct periods, the British Rule, i.e. Pre-Independence India and Post-Independence India. The British Rule in the 18 Century brought in some degree of political orderliness, but the social structure, customs and practices remained unchanged. It was mainly during the 19 Century that the reform movement undertaken by enlightened thinkers and leaders of Indian society understood the importance of women's participation that the status of Indian women started changing for the better. Though initially all the leaders were men, women gradually came into the scene and played their role not only in changing history but also the society as a whole, through their efforts in different areas of work such as education, politics and freedom movement, women's movement and social welfare. Mrs. Annie Besant, Dr. Sarojini Naidu, Kamladevi Chattopadhyay, Mrs. Nellie Sengupta, and many others gave a direction to Indian womanhood

towards change and betterment. Indian women actively participated in the freedom movement, which also had different thrusts and ideologies. The founding of the Indian National Congress in 1885 and Mahatma Gandhi's non-violent movement not only led to political emancipation but also was a step in the right direction for social and national reconstruction. Women took equal initiatives and participated in all types of struggle for freedom, i.e. non-violent movement advocated by Mahatma Gandhi and the National Congress, as well as in the violent and armed movements advocated by other leaders in different parts of the country. Women's enthusiasm in participating in the armed revolution helped Netaji Subhash Chandra Bose to set up the Rani of Jhansi Regiment of the Indian National Army. Women's participation in the freedom movement was so extensive that the achievers are many in number. Some names of great significance are Smt. Kasturba Gandhi, Madam Bhikaji Cama, Sarla Devi, Muthu Lakshmi Reddy, Aruna Asaf Ali, Sucheta Kriplani, Durga Bai Deshmukh, Priti Lata Waddedar, Captain Lakshmi and Janaki Davar of INA, Jahanara Shahnawaz, Randhabai Subbarayan, etc.

WOMEN IN POST-INDEPENDENCE INDIA

In 1947, India won freedom from foreign rule. In 1949 a Constitution was drafted which gave equal rights and status to all Indian citizens. Independent India has seen various reforms and programmes for the uplift of women of all communities. Indian women have played an important role from the very beginning of Independence in different walks of life. Women have taken bold steps in all nation building activities, which started with education and has now blossomed into women's involvement in every activity of India. They have participated in all activities such as education, politics, media, art and culture, service sectors, science and technology, etc.

UNCOVERING GENDER BASED VIOLENCE IN INDIA

Violence against women, including sexual violence, has been a persistent and chronic social problem within India. This has been the case notwithstanding the emergence of local reform movements in the 19th and 20th centuries that campaigned to improve the status of women and eradicate social practices that have entrenched gender inequality, including the repeal of discriminatory laws and practices relating to dowry, the status of widows, child marriage, as well as demanding better education and equal political rights for women. By the end of the century, British authorities were finding it increasingly difficult to ignore these calls for reform in light of the wider demands for political emancipation from colonial rule, and increasingly vocal demands from the suffragette movement on the domestic home front. Demands for emancipation (both from Empire and Patriarchy) led women to assume leading roles in the reform movements of India, culminating in the foundation of the All India Women's Conference (AIWC) in the 1920s. India's independence from British rule in 1947 witnessed a further growth of women's organizations demanding reform. The rules relating to dowry were an early success: the Dowry Prohibition Act 1961, which was amended in 1984, strengthened the legal measures against perpetrators of dowry related crimes. It would be fair to say that these early social movements in post independence India were focused on eliminating the gravest social harms such as dowry related offences of torture, murder and rape. The key argument of this essay is that many of the laws and practices in India that denied women the same rights accorded to men were part of a colonial inheritance, rather than a product of local indigenous customs, traditions and religious practices. That said, custom, tradition and religion in India has played, and continues to play, a significant part in sustaining the subordination of women. Of course, this is not unique to India, and is a feature of many cultures. As the United Nations made clear in its 1993 Declaration on the Elimination of Violence Against Women (DEVAW): States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. That religion plays a prominent role in subordinating women is particularly in India perplexing since Hinduism is replete with female goddesses, such as Kali and Durga, who were created from the synergies of the Gods to eliminate demons (evil) and were worshipped as a symbol of Shakti (feminine power) in Hindu mythology.

However these mythological images of feminine power have done little to displace the entrenched and commonplace attitudes that devalue women in modern Indian society. As this essay concludes, it is this paradox that has been at the core of India's social system and gender relations for centuries, and continues to this day.

INDIAN LEGISLATION

HISTORY OF INDIAN LAW

Ancient India represented a distinct tradition of law, and had an historically independent school of legal theory and practice. The Arthashastra, dating from 400 BC and the *Manusmriti*, from 100 AD, were influential treatises in India, texts that were considered authoritative legal guidance. Manu's central philosophy was tolerance and pluralism, and was cited across Southeast Asia. Early in this period, which finally culminated in the creation of the Gupta Empire, relations with ancient Greece and Rome were not infrequent. The appearances of similar fundamental institutions of international law in various parts of the world show that they are inherent in international society, irrespective of culture and tradition. Inter-State relations in the pre-Islamic period resulted in clear-cut rules of warfare of a high humanitarian standard, in rules of neutrality, of treaty law, of customary law embodied in religious charters, in exchange of embassies of a temporary or semi permanent character. When India became part of the British Empire, there was a break in tradition, and Hindu and Islamic law was supplanted by the common law. As a result, the present judicial system of the country derives largely from the British system and has little correlation to the institutions of the pre-British era. Law of India refers to the system of law which presently operates in India. It is largely based on English common law because of the long period of British colonial influence during the period of the British Raj. Much of contemporary Indian law shows substantial European and American influence. Various legislations first introduced by the British are still in effect in their modified forms today. During the drafting of the Indian Constitution, laws from Ireland, the United States, Britain, and France were all synthesized to get a refined set of Indian laws, as it currently stands. Indian laws also adhere to the United Nations guidelines on human rights law and the environmental law. Certain international trade laws, such as those on intellectual property, are also enforced in India.

Indian family law is complex, with each religion having its own specific laws which they adhere to. In most states, registering of marriages and divorces is not compulsory. There are separate laws governing Hindus, Muslims, Christians, Sikhs and followers of other religions. The exception to this rule is in the state of Goa, where a Portuguese uniform civil code is in place, in which all religions have a common law regarding marriages, divorces and adoption.

REVIEW OF LITERATURE

In rural India, agriculture and allied industrial sectors employ as much as 89.5% of the total female labour. In overall farm production, women's average contribution is estimated at 55% to 66% of the total labour. According to a 1991 World Bank report, women accounted for 94% of total employment in dairy production in India. Women constitute 51% of the total employed in forest-based small-scale enterprises. One of the most famous female business success stories is the Shri Mahila Griha Udyog Lijjat

Papad. In 2006, Kiran Mazumdar-Shaw, who started Biocon - one of India's first biotech companies, was rated India's richest woman. Lalita Gupte and Kalpana Morparia (both were the only businesswomen in India who made the list of the Forbes World's Most Powerful Women), run India's second-largest bank, ICICI Bank. In the era immediately after independence, the female population of our country was not well educated.

The condition of women in our Indian society was always considered secondary to that of men. This scenario was more pronounced after our independence than it is today. Women in that era were mostly housewives, but the phenomenon of DINK couples soon rose with the economic prosperity and increase of literacy among women. Women are part and parcel of the labor force of the most menial and often

dangerous occupations in India. As such, they are at a high risk of developing various occupational and environmental diseases.

Madhu Kishwar is an influential participant in the women's rights and human rights movements since the 1970s and is the founding editor of *Manushi* - a journal about women and society.

Preeti Rastogi (2000) collection of some of Madhu Kishwar's best and most controversial essays concerning topics central to women's issues in India today: the role of marriage payments and dowry, unwanted daughters, denial of inheritance and land rights to women, love, sex and marriage, sexual harassment, identities, beauty contests etc. Many of these offer a critical appraisal of Madhu Kishwar's activism and engagement. The essays are an attempt to grapple with one of the most serious challenges to women in India: Why is it that in spite of all the high profile attention on women's issues many remain unresolved? Most of the work thus far has resulted only through symbolic actions such as passing of laws, which very often are inappropriate and not implemented. In most cases where laws are misused it contributes to increasing the vulnerability of women's lives. The volume also deals with Madhu Kishwar's moving away of 'ism-driven' politics and orthodox feminist thinking. The essays reject statist interventions in social reform and appeal to people's consciences to bring about any meaningful changes in the position of women.

LITERATURE ON MARRIAGE AND FAMILY LIFE OF WOMEN

Sudhir Chandra (1998), the first case filed in 1884 for restitution of conjugal rights and in detail. It also discusses the repercussions of the case on the society. Rakhamabai wedded Dadaji at an age at which she was incapable to give a wise consent. She refused to be obligated to a marriage solemnized when she was only eleven. During the eleven years of their unconsummated marriage she had grown to develop a strong dislike and argued that she was not bound to go to Dadaji. Dadaji moved the Bombay High court for the restitution of his conjugal rights, which resulted in strengthening her determination to resist the autocracy of indigenous social authority and colonial legal dispensation.

The author looks at ancient shastric Hindu law in matters of rights of women; sati practices, the involvement of the British in enacting laws to protect women's social status. It examines views, interpretations of courts, legislature in matters of bigamy, conjugal rights, inheritance, divorce, maintenance under Hindu marriage act and Muslim personal laws. It also looks at the Muslim community views. It examines the provisions of criminal procedure code and the Indian penal code in relation to above topics. This article cites instances, circumstances of litigation and court interpretations and views. In this article an attempt is made by the author to critically examine the social status of women by way of legislation, judicial interpretations and processes.

Chowdhary Prem (2004) explores the apparently progressive practice of widow remarriage in the state of Haryana in India which has several possible repressive aspects, including forcible remarriage into mismatched and undesirable alliances, polygamy and being deprived of inheritance rights. Widow Remarriage in its levirate form is popular among the landowning classes as it emanates out of the desire to retain landed property within the family. The author shows how the state by its own legislative measures contributes not only to subverting the more positive facets of widow remarriage but it also becomes an accomplice in the subversion of the potentially beneficial effects of its laws, making them ineffective and in fruituous.

LITERATURE ON VIOLENCE AGAINST WOMEN

While the women's organizations in India have opposed individual acts of violence against women ranging from amniocentesis, female infanticide, rape, dowry deaths and sati, there has been little attention given to the theoretical understanding of the causes of violence. The essay therefore discusses some recent Indian feminist theorizing of violence by activist leaders closely involved in movements of women as peasants, forest dwellers and members of the lower castes. The author, while discussing violence

in traditional Marxist and Radical Feminist theories delves into the emerging theories of violence in India. The essay focuses on Sharad Patil's theory, a combination of Marxism and Phule- Ambedkarism, where violence against women is understood as a reflection of the relations of production of a class-caste society; Sharad Joshi's theory influenced by radical feminism, where violence is central to the process of capital accumulation and women's power is the central force of liberation; and eco-feminist, Vandana Shiva's theory, influenced by Gandhian thought where violence seen as inherent in 'western cultures' and women as protectors of nature and the traditional community. The essay apart from bringing out the complexities involved also provides an insightful critique of each of the theories.

Ram Ahuja retired as Professor of Sociology from the University of Rajasthan in 1988 after completing a teaching career of more than 3 decades. He is on the visiting faculty of various national institutions and police academies and has authored numerous research articles and books.

The book while noting the rise in violence against women attempts to answer questions regarding the nature of and causes for violence against women, if any theoretical analysis could be offered explaining the etiology of violence and the effectiveness of women's groups in tackling issues of sexual exploitation and harassment of women. These and other issues are critically examined from sociological perspective. It also deals with issue of trauma faced by victims of violence as they seek acceptance in a hostile environment. The book also offers suggestions regarding treatment of such issues through preventive measures, redefining patriarchal norms, developing support for victims within the family and through women's organizations etc. thus providing a balance between practical and theoretical issues.

SEXUAL OFFENCES LAW IN INDIA

Until recently, the law in India recognized only a narrow range of sexual offences. Applying 19th century definitions of rape from English common law the offence was defined in gender specific terms, namely an act of a male using his penis to penetrate a female's vagina without her consent. Using weapons or other instruments to violate a woman sexually, as occurring in the recent case discussed below, cannot constitute rape under law. This narrow definition of rape has been amended in most other jurisdictions, including in Australia and the UK, where any form of sexual penetration (whether by object or another part of the anatomy) can potentially ground liability for rape if it occurs without consent. The law even extends its protection to surgically constructed vaginas, ensuring that transsexuals are not denied legal protection.

The Indian law has also continued to prioritise a traditional subjective model of fault for rape based on intention and knowledge, which enables perpetrators to raise a mistaken belief in consent to negate the liability of the accused – including where the perpetrators hold an honest but unreasonable mistaken belief in consent, for example where it has been induced by acute intoxication or discriminatory rape mythologies such as “No means Yes”. The controversy over unreasonable mistake defences has generated significant academic debate, and reforms in many jurisdictions including UK, Australia and Canada.

There appears to be limited attention in India on the extent to which traditional definitions of rape has played a role in shaping and excusing dangerous and discriminatory rape mythologies. In India, abuse of power by public officials to procure, often violently, sexual intercourse has been a particular concern motivating reform. In the early 1980s, the legislature inserted an aggravated offence of “custodial rape” into the Indian Penal Code (IPC). The offence applied to public officials (such as police officers) who abused their positions of trust or authority over the victim. The genesis of the reform were three high profile cases of custodial rape Rameezabee in 1978 in Hyderabad, Mathura in Maharashtra in 1980 and the Maya Tyagi in Bagpat in 1981 – which generated significant public outcry.

A bill, passed in 1983, amending the 1860 Indian Penal Code (IPC), deemed custodial rape to be a more heinous offence than other categories of rape. Following the Delhi rape and murder case in 2012, the penalty provisions for custodial rape were further enhanced with the Criminal Law (Amendment) Bill, 2013. While the provision is a welcome addition to the statute book, sadly, custodial rape stands as one of the most under enforced offences in the IPC.

The latest official national crime statistics for India reveal that there was only one reported incident of custodial rape! Further examination of the last decade of official statistics reveals that while law enforcement activity relating to violence against women across all categories has increased, custodial rape continues as a rarity: 2002 statistics reveal that only 3 of the 16,370 rape offences (under section 376 IPC) were custodial rapes, and a decade later, 2012 statistics reveal that custodial rape constituted only 1 of the 24,206 rape offences. Abusing positions of trust and authority are not however limited to public officials or police officers. An abuse of trust and authority also occurs within families for example. Recent official statistics in India reveal that in 98.2% of the cases offenders are known to the victim, and include parents, close family members and neighbours.

Of greatest concern in this statistical picture is the acute vulnerability of children: of the total rape cases reported in 2012, half the victims of reported rape were children under the age of 18. A note of caution however is required in relation to the interpretation of official statistics related to reported crime. The prevalence of child rape in these statistics can be explained by law enforcement prejudices and stereotypes relating to 'worthy' and 'unworthy' rape victims, and the greater credibility and police attention that is paid to 'innocent' victims rather than older and more sexually experienced victims. This dichotomy impacts upon investigator priorities but is also reinforced by the courts, since judges often accord more sympathy (and credibility) to younger and more 'innocent' types of victims.

For example, in the case of Chandraprakash Kewalchand Jain v the State of Maharashtra, 1990, the court held that because of India's "stands of decency and morality... a woman, more so a young girl would not sake her reputation by levying a false charge concerning her chastity". Similar sentiments were expressed by the Supreme Court in the Madan Gopal Kakkad v, Naval Dubey and Anr, 1992, a case of 9 year old victim that "...having lost her virginity still remains unmarried ... and that her future chances for getting married and settling down in a respectable family are completely marred". By contrast, cases where the victim was manifestly not a virgin, being 'habituated to sex', and where no injury marks on the penis or body of the accused consistent with resistance by the victim were evident, the courts have tended to accord more credibility towards the alleged perpetrator's claim that the female consented freely. In India, presenting evidence of a reputation for 'loose morals', in common with many other jurisdictions, has been a staple defence strategy in rape trials (see for example the attacks on chastity and morality of the victims in The Mathura case, 1980).

There has been some judicial resistance to these strategies, for example, in the State of Maharashtra v Madhukar N Mardikar, 1991, the Supreme Court had ruled that the '... unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes.' Subsequently, in the State of Punjab v Gurmit Singh, 1996 the Supreme Court ruled that despite being 'habituated to sex', the woman cannot be considered of 'loose moral character'. In 2003, in its 172nd report the Law Commission of India referred to the New South Wales Crimes Act 1900, which provides that "in prescribed sexual offence proceedings, evidence relating to sexual reputation of the complainant is inadmissible".

Based on the recommendations of the Law Commission, which incorporated the demands of several women's rights groups, the Indian Parliament amended the Evidence Act, inserting section 146, that states that a rape victim can no longer be questioned about her sexual history and 'general immoral character', rejecting what the courts had condoned in the rape cases since the 1980s. Gender violence is of course not limited to rape. The official statistics for 2012 report that there occurred 8,233 dowry deaths (section 302/304 IPC); 106,527 cases of cruelty by husbands and relatives (section 498 A IPC; 45,351 assaults on women with the intent to outrage their modesty (section 354 IPC); and 9,173 cases of insult to the modesty of women (section 509 IPC). Except for the dowry deaths, every other crime against women witnessed a rise of around 6 percent in 2012 in comparison to 2008. The 2012 NCRB report also mentions that there were 2.84 cases occurring every hour in India (amounting to nearly one case every 20 minutes) in which 3.55 persons were arrested in 2012. Reforms to criminal law and procedure seem to have done little to stem the tide of gender violence in India.

Does this mean that these legal reforms are a failure? It is well known in criminological circles that 'official' crime reports are not an accurate estimation of the scale or type of crime in society for a range of reasons. A 'dark' figure of crime exists, which remains unreported in police official crime statistics. International victimization studies suggest that much crime against women and children is not reported. This means that the steady increase in the number of rapes and crimes against women that are reported in the official statistics may be viewed as the 'tip of the iceberg'. Furthermore, increased reporting of rape by victims may simply reflect better and more effective investigative activity. In India there has been mounting political pressure on authorities to take prompt action when offences occur. An example of this is the widespread public outrage that spilled onto the streets of New Delhi in 2012 following a gruesome rape and beating that led to the subsequent death of a 23 year old physiotherapy student, Jyoti Singh Pandey. She had been travelling with a male friend on a bus when she was attacked by six men including a juvenile (who was seventeen years and six months old at the time of the offence). The woman died of her injuries two weeks later.

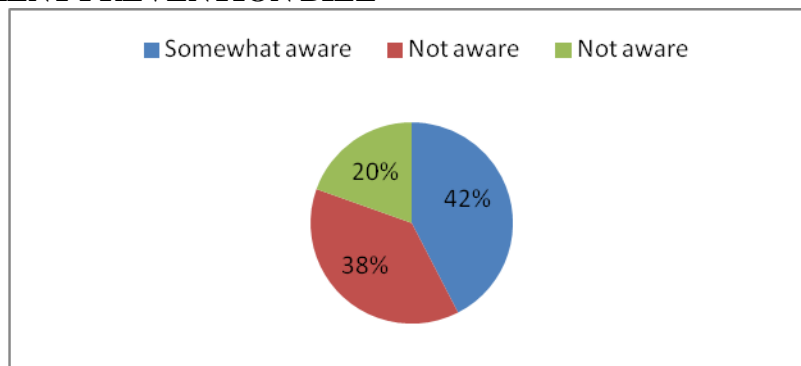
The six men were arrested and tried, though the principal perpetrator, Ram Singh died in custody in March 2013 at the high security Tihar Jail in Delhi, authorities claiming it to be suicide, though media reports suggest the death may have occurred in suspicious circumstances. Responding to public outcry around the case, the government established new fast track courts to facilitate a speedy trial.

In August 2013, the juvenile accused in this case was found guilty of rape and murder and sentenced to three years' imprisonment in a correctional home, (including the prior 9 months spent in remand). In September 2013, the four remaining accused were convicted of murder and rape, and sentenced to death by hanging. In passing the death sentence, the trial judge made the follow remarks: [The] court cannot turn a blind eye to such a gruesome act...when crime against women is rising on a day to day basis, so, at this point in time court cannot keep its eye shut...there should be exemplary punishment in view of the unparalleled brutality with which the victim was gang raped and murdered, as the case falls under the rarest of rare category. All be given death...this is a time when serious crime against a woman has come to the fore and now its judiciary's responsibility to instil confidence among the women. To serve as an effective deterrent, laws must be framed so as to capture the true nature and seriousness of the harm. Punishment, which must be proportionate to that harm, will only be legitimate when it follows from trial and pre trial processes that are fair for both offenders and victims.

However, the exemplary punitive message offered by the trial judge above, while promoting public confidence temporarily, is unlikely on its own to have significant deterrent effect in the longer term indeed, there is little data to suggest that capital punishment is an effective deterrent for these types of crimes. Recent empirical studies and reviews demonstrate ambiguity in the deterrent effect of capital punishment on a range of crimes due to data assumptions. Hence a more important strategy is to devote resources to improving the laws and procedures governing gender violence; in this respect, law reform in India has been much needed and somewhat overdue. Change however is coming. Another immediate effect of the 2012 New Delhi rape and murder case, was the establishment of a judicial committee in December 2012. The committee headed by J.S Verma, a former Chief Justice of India; submitted a report, proposing amendments to criminal law to deal with sexual assault cases more effectively. Accepting more than 90% of the Committee's recommendations, the government introduced into Parliament the Criminal Law (Amendment) Act, 2013.

RESULT

SEXUAL HARASSMENT PREVENTION BILL



This question was asked to find out whether they are aware about bill regarding sexual harassment prevention or not and as seen in the graph 70 people (38%) were fully aware and 80 people (42%) were somewhat aware and 38 people were not aware.

NATIONAL COMMISSION FOR WOMEN

The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 (Act No. 20 of 1990 of Govt. of India) to review the Constitutional and legal safeguards for women; recommend remedial legislative measures, facilitate the redressal of grievances and advise the Government on all policy matters affecting women .

The NCW has also started a very innovative concept of organizing Parivarik Mahila Lok Adalats

The program was first started in the year 1995 with the following objectives:

- To Provide speedy justice to the women;
- To gear up the process of organizing the Lok Adalat.
- To encourage the public to settle their disputes outside the formal set-up.

Section 3 of the National Commission for Women Act, 1990, provides;

□ The national commission for women consists of the following individuals the chairperson committed to the cause of women who shall be nominated by the central government. five Members to be nominated by the Central Government from amongst persons of ability, integrity and standing who have had experience in law or legislation, trade unionism, management of an industry potential of women, women's voluntary organizations (including women activist), administration, economic development, health, education or social welfare; Provided that at least one Member each shall be from amongst persons belonging to the Scheduled Castes and Scheduled Tribes respectively; A Member-Secretary to be nominated by the Central Government who shall be :-

- an expert in the field of management, organisational structure or sociological movement, or
- an officer who is a member of a civil service of the Union or of an all-India service or holds a civil post under the Union with appropriate experience. The provision further provides that the chairperson and every member of the commission shall hold office for a period not exceeding 3 years.

CONCLUSION

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the state to adopt measures of positive discrimination in favour of women. 'Empowerment' may be described as a process which helps people to assert their control over the factors which affect their lives. Empowerment of women means developing them as more aware individuals, who are politically active, economically productive and independent and are able to make intelligent discussion in

matters that affect them. Present article discusses about various initiatives taken by Government of India for empowering women by analysing position of India in Gender Inequality Index and Global Gender Gap Index of United Nations. Article concludes with the note that due recognition must be given to women and society should come forward to ensure equal status for women in all spheres of life.

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