GENDER JUSTICE SPECIAL

J.T.R.I.

JOURNAL

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LUCKNOW

Fourth year *1998*
Issues- 10 & 11 *March*

Ms Justice M. Fathima Beevi
(Former Judge, Supreme Court of India)
GOVERNOR, TAMIL NADU
RAJ BHAVAN CHENNAI-600 022

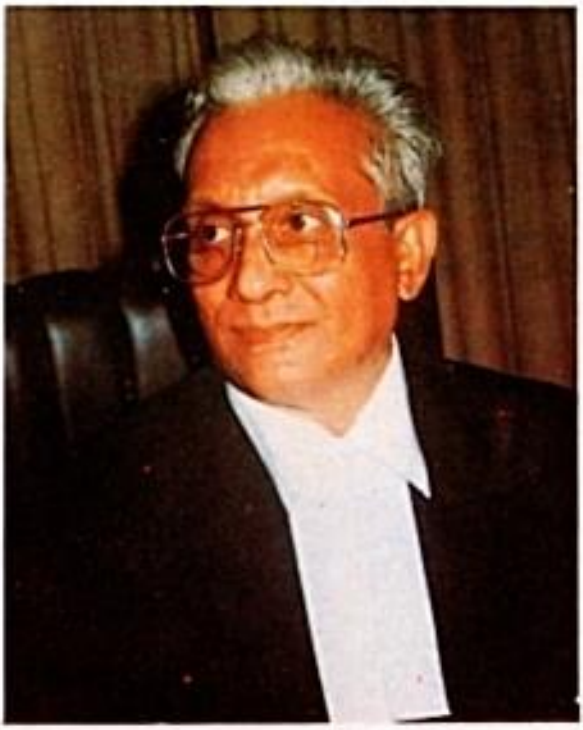
MESSAGE

I am much pleased to learn that the Institute of Judicial Training and Research, Uttar Pradesh is bringing out a special number of the J.T.R.I. Journal on Gender Justice.

I hope the journal will make a significant contribution in upholding Gender Justice by the judicial system in our country. I extend my best wishes for the successful publication of the journal.

—(M. FATHIMA BEEVI)

OUR CHIEF JUSTICE



Hon'ble Mr. Justice D.P. Mohapatra,
Chief Justice, Allahabad High Court,
(Since February 16, 1996)

Mr. D.P. Varshney, Director J.T.R.I. UP
welcoming the delegates.

Hon'ble Mr. Justice **S.C. Mathur,** Hon'ble Mr. Justice **Brijesh Kumar** & Hon'ble Mr. Justice **K.N. Goyal** coming out of the Conference-Hall

Guests of Honour present in the Function

Round-up of the Conference

EDITORIAL

On November 8, 1997 the Institute hosted a regional seminar on sensitising the judiciary to gender justice. Need was then felt to make available to our judicial officers to adequate reference material on the subjects. This special number seeks mainly to collect relevant statute and case law on some of the issues involved.

The gender issues are so varied and complex that it is impossible to cover them in only one special number of the Journal. It is planned to have a sequel after some time. For that number not only judges (including necessarily the officers working in the districts) but also social workers and opinion makers will be requested to send their views on themes selected by them.

According to the National Crime Records Bureau there has been an increases of 431 percent in the numbers of rapes since 1971.This rate of increases exceeds even that in the incidence of murders which rose between 1953 and 1994 by 294 per cent. We can not thus ensure justice to female victims of crime unless we can make punishment of offenders quicker and more certain. We have borrowed our criminal justice system from nineteenth century England. Throughout the twentieth, the laws of criminal evidence and procedure have undergone changes in the developed countries, but we have not awakened to the need of making similar changes here. The accused person in our soft state can get away without being cross-examined, and even an adverse inference can not be drawn against him for his failure to enter the witness box. He is also not obliged to disclose his defense until the close of the prosecution case. In England, France,

U.S.A. the defendant is not given such kid glove treatment. The crime police in these countries is also separate from security police and thus immune from executive interference. Frequent transfers of police officers at the behest of politicians, posting of investigating officers on law and order and V.I.P. duties is also a potent cause of delay in bringing the cases to trial.

We are grateful to all learned contributors and also to faculty members and other staff who have helped in bringing out this number.

We thank the hon'ble Chief Justice Mr. D. P. Mohapatra for his kind guidance, encouragement and good wishes.

Our special and respectful thanks to the Governor of Tamil Nadu Smt. Fathima Beewi, the first woman to have adorned the bench of the Supreme Court and thereafter the office of Governor of an important state. The fact that she rose from the lowest rung of the subordinate judiciary should be a source of inspiration for our judicial officers to work hard, harder and harder still

- Editor

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GENDER AND LAW[1]

Justice Brijesh Kumar [2]

It is indeed a strange phenomenon that of the two genders 'male' and 'female' who are complementary to each other and can be said to be two sides of the same coin, namely, the human-being, one needs protection, through law, from the other. Harmony between the two leads to peace and prosperity, and conflict, to destruction. It may perhaps not be correct to say that gender problem is a thing of recent development. A peep into the ancient past would show that attention of the wise was even then attracted, who felt the need to set behavioural norms through religious scriptures and reformatory literature.

In the Hindu religion, one finds that female deities, like *Durga, Kali, Saraswati, Laxmi* and many others are objects of worship. Female deities and goddesses are considered *'Shakti'* wielding highest order of spiritual power, more particularly for destruction of evil. They are worshipped by men and women alike in many ways, may be with folded hands to lie prostrate on the ground on the feet of the female deities. Male obeisance to female deities in this manner would normally do away with any kind of inhibition towards the other gender. It is an ancient saying that " presence of gods is felt where women are honoured." [3] Girls are addressed as Devis and any female as Ma (the mother), a wife as *'Grih Laxmi'* , and to honour the sisters the festival if Raksha Bandhan is celebrated. Under the Muslim Law too, it is said that Jannat is under the feet of the mother. In other societies as well, great regard and courtesy is shown to women. The riddle, thus, which remains unresolved is that despite such ideas prevalent since times immemorial, male arrogance has tendency to undermine and defile the other gender.

It is not that women have not been given opportunities to develop themselves. They have excelled in all fields including male dominated fields. From collecting fire-wood from far flung jungles, they have risen to flying in space. In earlier times also, many of them made great warriors out of them in the battle-fields, Nursing, Education, Engineering and Medicine are well within their easy reach. They are coming up in the fields of entrepreneurship and financial management as well. Their capability is a proven fact, yet the males' arrogance, their false sense of supremacy and retaliation continues unabated.

It may be thought that education may bring about some change, but experience shows, it hardly made any significant impact on male behaviour. The mence of wife-beating is prevalent throughout the world including the so-called developed countries materially, and in civilisations with high-rates of literacy and education. If one would turn and think about day-to-day matters, it would then be realised how often female counterparts in the families are

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1 Inaugural address at the regional seminar held at J.T.R.I. on Nov. 9, 1997.

2 Hon'ble Senior Judge, Allahabad High Court.

3 यत्र नार्यस्त पूज्यते रमंते तत्र देवताः

unreasonably frowned and howled upon and called blockheads and given names. Is it not a constant mental torture, though lower in degree?

Yet another notion is that financial dependence of females upon their counterparts is one of the major contributory factors for their harassment. We now find that female education is much higher as compared to the earlier time, and couple employment is catching up, In developed countries, it is a normal feature. Yet we find that atrocities on the female spouse continues. Only in some cases, the mode and method of harassment may have changed. The male desire to dominate remains unsubsided. On the other hand, one would find that the venue of harassment has shifted from the house to the place of work where women workers are subjected to sexual harassment by their colleagues, bosses and employer, which is a common feature world-wide, so much so that in India, it has recently attracted the attention of our Apex Court and an important pronouncement[4] on the subject has been made. Day-to-day practical difficulties have been noticed which are faced by women and it has been laid down as to what amounts to sexual harassment.

Desired human behaviour is regulated by law in a civilised society. Since the male behavioural standards were much below the desired level vis-à-vis their female counterparts, need of legislation was felt, Our Constitution safeguards women from any kind of discrimination by the State on the ground of sex, and clause (3) of Article 15 on the other hand, permits special legislation for women besides children. Equal protection of laws is guaranteed to all under Article 14 and equal opportunity in the matter of public employment under Article 16. The case of *Nargesh Meerza*[5] is an example of such a protection given by the Hon'ble Supreme Court. It has also been provided in the Fundamental Duties of Citizens to renounce practices derogatory to the dignity of women.[6] The Constitutional provisions indicated above show the national outlook and social ethos towards women. Each citizen of India is fastened with the fundamental duty to maintain the dignity of women. Constitutional protection and guide-lines are the highest possible guarantees available to the women under the law of the country. Our constitutional provisions profess the same ideas as are to be found in the Universal Declaration on Human Rights, 1948, adopted by the United Nations General Assembly. Many other International Conventions and Declarations are to be same effect, needless to list them here. The Year 1975 was declared as International Women's Year by the United Nations and 1976-1985 as decade for women.

Apart form constitutional provisions, to meet the specific problems which are being faced day-to-day, legislation was resorted to since more than one and a half century ago. Acts passed in that direction are for abolition of Sati system in 1829 and for permitting widow re-marriage in 1856. Section 125

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4 *Vishaka* v *State of Rajasthan*, (1997) 6 SCC 241.
5 Air India V Nargesh, AIR 1981 SC 1829.
6 Article 51 A (e).

of the Code of Criminal Procedure provides for payment of maintenance to wife in case of neglect or refusal to maintain by husband, so as to save the wife from destitution. It is also to be found that under Section 437 of the Code of Criminal Procedure, some special consideration has been made for the purposes of grant of bail to women. Again we find that so as to keep effective control over male sexual behaviour, Section 497 of the I.P.C. provides that for adultery, a wife shall not be punishable as an abettor. Enticing a married women with ill motives has been particularly categorized as a separate offence under Section 498 of the Penal Code. In the fifties, many Acts have been passed which gave rights and protection to the women, e.g. Hindu Marriage Act. Through legislation women got right to inherit and hold property. Stridhan came into being. In the recent past, it had been noticed that there was on unusual spurt in crimes relating to demand of dowry which necessitated passing of the Dowry Prohibition Act, 1961, but how far it has helped in checking the menace is a question which calls for an answer.

Again we find that to check the cruelty towards women by husbands or their relatives, Section 498-A has been added in the Penal Code by the Amendment Act, 1983. The idea is to check the harassment of women or their coercion for demand of property or their harassment in any such manner as to drive them to commit suicide. Bride burning or death of bride within seven years of marriage has been specifically taken note of. It raises a presumption about the guilt of the husband or his relatives if the death is caused in the circumstances other than normal, provided it is found that soon before her death she was subjected to cruelty or harassment. To provide teeth to the above said provisions, Sections 113-A and 113-B in regard to dowry deaths and suicide by married women have been inserted in the Evidence Act. What sometimes surprises is that women themselves have been found abetting such crimes and discriminating against female children. This is a paradox indeed.

The other aspect is about empowerment of women, which has also been a subject-matter of discussion on different platforms recently. In that regard also, we find that certain legislations provide for nomination of women in local bodies. Reservation of seats in Assemblies and Parliament is a current subject under debate. The number of women high officers in Executive and police service has considerably increased.

What is to be noted is that it is harmony between the two genders which is needed, not conflict. The change must be brought about in their attitudes in a way which may not cause bruises. So far as Law is concerned, more may be needed, but the laws as existing are also not inadequate to meet the malady of discrimination and harassment of women at the hands of their male counterparts. Application and implementation of laws need a very careful handling. The agencies responsible for it have to act in right earnest and with special zeal to deal with the situation, but care has to be taken that he implementation may not be mis-handled and law be not mis-applied. Fear of law and punishment no doubt plays a very important role in giving desired

behavioural direction to the society, and only effective implementation of laws gives effective results. Therefore, special attention is required in matters relating to implementation of laws already existing to check harassment to women, gender bias and discrimination. Law alone may not be enough to provide effective protective cover to women against male atrocities. Efforts on the part of the people in society and N.G.Os. may be much desirable. A systematic method to bring about a change in the male mentality must be invented. The two genders are complementary to each other, their harmonious relationship brings fullness to the life.

I hope that deliberations to be made in this Conference would bring fruitful results and concrete suggestions would come out which would usefully help in checking and minimising the gender bias, discrimination and atrocities to women at the hands of none-else but their male counterparts, the human-beings.

Smuggling Women

Rome: A Chinese man was arrested at Rome's Fuicino airport trying to smuggle three young women into the country, police said on Saturday. Tang Mingpik, 42, from Heilongjiang province, travelling on a false Singaporean passport, said he had been paid $500 per woman to accompany them to Rome from Bangkok. The women, aged between 22 and 26, from Fujian, were travelling on well-forged British passports but spoke no English, carried no baggage and wore clothing totally unsuitable for a European winter climate. The told immigration officials they had travelled from China to the Cambodian capital of Phnom Penh, where they become prostitutes to pay the fare to Europe via Bangkok. The women were sent back to Thailand while Tang was held in a Rome jail.

Indian Express 12-1-98

'Romeos' Held

DUBAI: Four Arabs have been arrested as Dubai pursues a crackdown against men who harass women in public places, newspapers reported today. A special squad setup three years ago seized the four offenders in separate incidence last week. " The Dubai police..... appeals for youths to stay away from this indecent behaviour, which does not confirms to our values, tradition and religion," the police in a statement said. Scores of men have been rounded up in the crackdown, ordered by the Emirate's crown Prince Sheikh Mohammad Ibn Rashid Al Maktoum. Offenders are fined and jailed. Their pictures are also published in newspapers.

Indian Express 12-1-98

GENDER JUSTICE : SOME PRACTICAL ASPECTS[1]

Justice K.N. Goyal[2]

Constitutional Provisions

So far as our Constitution is concerned there is by every reason to be proud of its basic fairness and justice towards women. The Constitution guarantees as a fundamental right that the State, and that includes, (vide Articles 12 and 36), the Executive and the Legislature and all other public authorities, shall not discriminate against any citizen on ground only of sex : Article 15 (1) and (2). Not only is any discrimination against the female sex prohibited, affirmative action in their favour is permitted: Article 15 (3), and even mandated : Article 39 (a), (d), (e) and 42; 51-A(e). The founding fathers gave them the right to vote from the every beginning (Article 326) while even in developed countries women had to fight for it for countries before they got it. Through a recent amendment women have been given reserved seats as members and reserved offices of chairpersons in local government bodies : Articles 243-D and 243-T.

Other Laws

Our Parliament also not been found wanting in this behalf. It has enacted various laws like the Equal Remuneration Act besides various labour laws containing special provisions relating to women and the Dowry Prohibition Act, etc. and also amended, the Indian Penal Code for the protection of women from atrocities: sections 304-B, 376 to 376D, 498-A. While in U.S.A. the right to choice in relation to abortion is still a contentious issue, our Parliament gave this right quite some time back through the Medical Termination of Pregnancy Act. The Central Legislature even under British rule had enacted law for prohibition of the abhorrent custom of sati and also liberally amended the personal law of Hindus (such as on right to property) and also to some extent of Muslims, and exempted women from punishment for adultery : section 497.

Personal laws and the question of Uniform Civil Code

In the field of personal law, after Independence much more progress had been made in the case of Hindus who constitute the majority community: polygamy has been prohibited, daughters have been given equal right in inheritance along with brothers,[3] the wife, also the husband, has been given right to divorce, and so on. The progress has been less satisfactory in the field

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[1] Lecture at the regional seminar held at J.T.R.I. on Nov. 9, 1997.

[2] Retired Judge, Allahabad High Court, ex-Lokayukta, U.P., former member Law Commission of India, Founder Director of J.T.R.I. (1986-1989)

[3] However the Hindu Succession Act, being a Central law, is not applicable to rural agricultural tenancies, They fall within the legislative competency of the States. In most or perhaps all States the sons are preferential heirs, and unmarried daughters come after them and thereafter, married daughters. However in this field, personal laws do not prevail and the laws are uniform for all communities since British times.

of personal laws of other communities, It is not for want of will but because the majority community wants to avoid the charge of imposition of their will on the minorities. Though there is a directive in the Constitution (Article 44) that the State shall endeavour to secure for the citizens a uniform Civil Code, successive Governments have for political reasons been waiting for demands for reforms coming from the concerned communities themselves. The Supreme Court, untrammeled by any such political constraints, has been less inhibited in this regard and time and again been reminding the Executive and the Parliament of this directive.[4] The cautious approach of the Government in this regard is more or less similar to that adopted by the British rulers in relation to personal law reform. As Hindu social reformers commanded greater influence in their community they were able to get many more law reforms enacted. Among Muslims the only law which was a concession to liberal opinion was the Dissolution of Muslim Marriages Acts of 1939 which was initiated as a private member's Bill by a Muslim legislator *Mr. Kazmi*. In India a few years back (1986) the Government caved in[5] before the ferocious assault of the Muslim fundamentalist forces. The immediate provocation for them was the Supreme Court judgement in the *Shah Bano* case (1985) 2 SCC 556, AIR SC 945, giving the right of maintenance under sec. 125 Cr. P.C. even to divorced wives. Because of this weak kneed approach India is lagging behind even Islamic countries in this field. As Sri *K.M. Munshi* an eminent jurist and a member of the Drafting committee, in a very well reasoned speech[6] had

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4 *Shan Bano's case., infra, Sarla Mudgal* v. *Union of India*, (1995) 3 SCC 635.

5 By undoing the Supreme Court judgement in *Shah Bano's* case by taking Muslim divorced women out of the purview of sec. 125 Cr. P.C. and enacting the Muslim Women (Protection of Right on Divorce) Act, 1986 instead.

6 "A further argument has been advanced that the enactment of a civil code would be tyrannical to minorities. Is it tyrannical? Nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosant as to prevent the enactment of a civil code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. But I go further. When the Shariat Act was passed in the Central Legislature in the old regime, the Khojas and Cutchi Memons were highly dissatisfied.They then followed certain Hindu customs; for generations since they became converts they had done so. They did not want to conform to the Shariat and yet by a legislation of the Central Legislature certain Muslim members who felt that Shariat law should be enforced upon the whole community carried their point. The Khojas and Cutchi Memons most unwillingly had to submit to it. Where were the rights of minorities then? When you want to consolidate a community you have to take into consideration the benefit which may accrue to the whole community and not to the customs of a part of it. It is not, therefore, correct to say that such an act is tyranny of the majority. So you will look at the countries in Europe which have a civil code, everyone who goes there from any part of the world and every minority has to submit to the civil code. It is not felt to be tyrannical to the minority. The point, however, is this, whether we are going to consolidate and unify our personal law in such a way of life of the whole country as may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion I really fail to understand.

Now look at the disadvantages that you will perpetuate if there is no civil code. Take for instance the Hindus. We have the law of Mayukha applying in some parts of India, we have Mitakshara in others, and we have the law of Dayabhaga in Bengal. In this way even the Hindus themselves have separate laws and most of our Provinces and States have started

pointed out in the Constituent Assembly, enactment of a uniform civil code can never be regarded as tyranny by the majority. However that may be, it is encouraging to find that even among Muslims more and more liberals, men as well as women, are now boldly challenging the fundamentalists and pleading for reforms, particularly in the fields of marriage and divorce laws.

Among Christians also, the liberal forces are lately coming up to assert themselves against some unfair provisions of the Divorce Act[7] which we have inherited form the Victorian era, Among those leading the attack on the discrimination against women in the matter of the right to divorce has been *Mary Roy,* the mother of the celebrated author *Arundhati Roy* who recently made waves as winner of the 1997 Booker Prize for her novel The God of Small Things. The Bombay (Mrs. Pragati Varghese v. Cyril, AIR 1997 Bom. 349; 1997 AIHC 3493, FB), Calcutta (Swapna Ghose v. Sadanand, AIR 1989, Cal. 128 SB), Madras (Solomon v. Chandirah, 1968 – 1 MLJ 289) and Kerala (Mary Sonia v. Union of India, 1990 – 1 Ker. L.T. 130) High Courts have already held the provisions of sec. 10 to be discriminatory against women. The Supreme Court has however not yet come out unambiguously on the question whether personal laws of different communities are subject to article 14 of the Constitution.[8]

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making separate Hindu laws for themselves. Are we going to permit this piecemeal legislation on the ground that it affects the personal law of the country? It is therefore, not merely a question for minorities but it also affects the majority.

I know there are many among Hindus who do not like a uniform civil code. ..... They feel that the personal law of inheritance, succession, etc. is really a pat of their religion, If that were so, you can never give, for instance, equality to women. But you have already passed a fundamental right to that effect and you have an article here which lays down that there should be no discrimination against sex. Look at Hindu law, you get any amount of discrimination against women and if that is part of Hindu religion or Hindu religion or Hindu religious practice, you cannot pass a single law which would elevate the position of Hindu women to that of men. Therefrom there is no reason why there should not be a civil code throughout the territory of India. Religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve as early as possible, a strong and consolidated nation. Out first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors-and important factor-which still offer serious dangers to out national consolidation national consolidation and it is very necessary that the whole of our life., so far as it is restricted to secular spheres, must be unified in such a way that as early as possible we may be able to say, We, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation. From that point of view alone I submit the opposition is not, if I may say so, very well advised. I hope our friends will not feel that this is an attempt to exercise tyranny over a minority, it is much more tyrannous to the majority. (*Constituent Assembly Debates*, Vol. VII. pp. 547-48)

7 Under sec, 10, Divorce Act, 1869 while the husband may seek divorce on the ground of adultery the wife may not, unless the adultery is coupled with some other aggravating factors specified therein.

8 See for instance, *Sri Krishana Singh* v. *Mathura* (1961) 3 SCC 689 (per Sen J., obiter, that Part III of the constitution does not touch upon the personal laws), *C. Masalmani Mudaliar* v. *Idol of Sri Swaminathaswami* (1986) 8 SCC 525 (Articles 14 and 21 applied for removing gender discrimination while interpreting Hindu Succession Act.); *Sant Ram* v. *Labh Singh*, AIR 1965 SC 314 (Customs and usages are also laws in force, hence governed by Part III).

The prevailing impression or apprehension among Muslims that codification of a uniform civil law would mean the imposition of Hindu law on Muslims has first to be removed. The Hindu Code itself, enacted in the *Nehru-Ambedkar* era, though a considerable advance on the traditional Hindu law, still remains far from perfect.[9] A uniform Code, when its details come to be worked out, may result in Hindus having to accept many good features of the personal laws of Muslims, Christians and others. It may imply even the abolition of the obnoxious and outdated caste system itself. Indeed if this is highlighted, many fundamentalist Hindus who are now aggressively rooting for a uniform code may then back out. The battle will ultimately have to be joined between the liberal forces of all communities on the one hand and the reactionaries of all communities on the other.

Need for a proper adoption law

The worst sufferers from the lack of progress in this field are women. For want of a proper adoption law, childless couples among non-Hindus are not able to legally adopt a child at all. They can only secure guardianship through the supervision of the court. One route is that of the Guardian and Wards Act as indicated in the series of *L.K.Pande* cases of the Supreme Court (AIR 1984 SC 469, AIR 1986 SC 272, AIR 1987 SC 232, AIR 1992 SC 118) and in *Suman Lal* v. *Asha* (AIR 1995 SC 1892). The other is that of the Juvenile Justice Act 1986 as recently interpreted and extended by the Madhya Pradesh High Court *(Lilly Kutty* v. *State*,. 1997 AIHC 1273). This route covers not only non-Hindus but those Hindus as well who want to adopt an orphan. In that respect even the Hindu Adoptions Act suffers from a serious lacuna.[10] These are however only instances of judicial law-making. They can only serve as provisional devices to cover the lacunae in law. They are no substitute for a properly drafted statute adopted by the Legislature who will not be under any need to resort to twisting or stretching of the existing laws for achieving a not wholly satisfactory result. A uniform adoption statute will necessarily be permissive in nature, like the Special Marriage Act and there can be no possible objection to its enactment.

Sexual harassment of prostitutes and their children

Against the social menace of sexual harassment of women at the work place, the Supreme Court has again felt compelled to resort to some innovative judicial law-making (*Vishaka* v. *State of Rajasthan*, 1997-6 SCC 241). Similarly, in *Gaurav Jain* v. *Union of India* AIR 1997 SC 3021: (1997) 8 SCC 114, guidelines have been issued for the rescue and rehabilitates of prostitution and for the protection of their children. Howsoever laudable the guidelines issued by the court, the difficulties of enforcement will remain. The

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[9] See for instance, article by *Mr. B, Srivaramayya* in (1997) 3 SCC (J) 25 on *Coparcenary Rights to Daughters: Constitutional and interpretational Issues.*

[10] Sec. 9 (4) of the Hindu Adoption and Maintenance Act now does permit adoption even of an orphan, but the provision is not quite happily worded.

only sanction for their breach is resort to the contempt jurisdiction of the apex Court. But how many such complaints can the court scrutinise, and what will be the machinery for inquiring into them? Conceivably the already overburdened District Judges, unassisted by any investigating agency, will be ordered to hold inquiries, and the even busier Supreme Court will then have to hear fresh arguments and finally adjudicate on them.

Judicial law making

Similar guidelines has earlier been issued in many other fields, bonded labour, child labour, environmental pollution, ecology, prison reforms, speedy trials, objective investigation of cases of corruption, treatment of suspects at police stations, and so on. But after all, how can the Court alone, even all the High Courts combined, ensure or oversee or monitor the implementation of such guidelines? And how frequently can the invocation of contempt jurisdiction be practicable? These judicial forays in the field of law making do however serve the purpose of creating greater awareness of the problem among the general public. More particularly among the opinion makers. So it should be hoped that in course of time, sooner the better, public opinion will assert and see to it that the legislators and also the enforcing agencies do their duty in this behalf.

Criminal justice system in practice

While finding fault with the other wings of the State, the judiciary is also expected so do some introspection. Even within the existing laws, are we doing our best in the field of gender justice? In cases of offences against women, rape, molestation, dowry deaths, and the like, the victims in most cases do not get justice at all. There are numerous cases of gender injustice in practice, but here I will confine myself to rape and dowry extortion. A rape victim faces the first harassment at the police station while lodging her first information report. She is required to state all the lurid details of the outrage in her own words before a minion of law not enjoying the highest reputation for rectitude. She is then asked to accompany a constable to a doctor for her medical examination. Because of too many adjournments of dates, and a long wait at each date of hearing, doctors are often reluctant to take up medico legal cases. Only official doctors are authorised to handle them. Other, may be more competent, doctors will not touch the case for any attention or treatment that may be immediately required, until the medico-legal formalities have first been gone through. Then at the investigation stage, a police inspector will again interrogate her. When at long last the matter reaches the court for trial, the victim will be the first to be examined. This contrasts with the continental practice where the accused is the first witness at the trial. In her statement-in-chief the prosecutrix will have to relate the details for the third time, including necessarily the fact of penetration and to mouth words forbidden to be spoken in decent company. It is followed by a grueling cross-examination. The presiding officer, if he does not know his job, is often ignorant of the parameters of a proper cross-examination. Or, if he is weak, he dare not interrupt for fear of being branded by the bar to be pro-prosecution. As recently emphasised by the Supreme Court in the *State of Rajasthan* v. *Ani*

(1997) 6 SCC 162, a Judge remaining mute during trial is not an ideal situation. His role is not that of a more spectator or even an umpire. He is expected to actively participate in the trial, and to elicit necessary material from witnesses in the appropriate context. He may put questions to the witness at any stage to elicit truth. If the Judge feels that a witness has committed an error or a slip it in his duty to ascertain whether it was so, for to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Due to failure of many judges to keep this salutary advice in mind, all sorts of scandalising and even inadmissible questions often get asked. The complainant is made to feel like she were the defendant. If a digression into international politics be permitted, one is tempted to compare her position to that of India vis-à-vis its complaint on Kashmir which our then inexperienced rulers in their naivete or idealism thought it proper to refer to the United Nations thinking of it as an apolitical, objective and impartial tribunal.

While the prosecutrix is facing this ordeal, the accused moves about on an easily granted bail, free to influence and intimidate the prosecution witnesses. The defence goes on seeking adjournments until the witnesses have been managed. The investigator and the prosecutor, through their inefficiency, if not worse, leave out material evidence from being produced., In a case under the Dowry Prohibition Act the Supreme Court[11] acquitted the accused on the ground that the various letters allegedly written by the accused husband, in which monetary demands for dowry were made from his father-in-law remained unproved because of want of a sufficient number of standard undisputed specimens of his handwriting on the record. The accused was a well educated public servant and there must have been hundreds of such specimens available in government files and his service records. So if the police and the prosecutor were negligent in procuring them, why could not the court summon the same? It has power to summon and examine even court witnesses. The court has always to remember that while it is an injustice if an innocent person is convicted, it is equally unjust if a guilty criminal is acquitted.

After the close of the prosecution the accused person is formally examined by the court, but questions in the nature of cross-examination cannot be put to him. So he gives out tutored replies of bland denials. He then may or may not enter the witness box to face cross-examination. Proviso(b) to section 315 (1) of the Code of Criminal Procedure lays down that his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or to give rise to any presumption against him. In England, on the other hand, only the prosecutor is barred from making a comment on his failure[12]. The reason being that he may unduly influence the lay jury; the

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[11] *S. Gopal Reddy v. State of A.P.*(1996) 4 SCC 596.

[12] Even this restriction on the prosecutor is not favoured by the jurists see, for instance, the Hamlyn lecture on the Proof of Guilt by Professor (Dr) Glanville Williams. The American Law Institute's Model Code of Evidence (1942), rule 201 (3) allows the Judge to comment while the Uniform Rules produced by the Commissioners of Uniform State Laws in 1953 would allow the prosecuting counsel also to comment. The "Justice" committee report also recommended that the prosecution should also be permitted to comment on the accused person's failure to enter

judge may comment if in his discretion he thinks it proper to do so. In France and other countries of the Continent even the prosecutor is not so barred. In our country the Judge tries the case without any jury; so there is no reason why the defendant's failure to give evidence regarding facts which require some explaining on his part, should not be a proper subject of comment even by the prosecutor. This provision therefore needs to be deleted or at least whittled down. The proviso goes much farther than the constitutional privilege against testimonial compulsion; Art. 20 (3).

There are also faults in the investigation procedure. The Continental and the American systems need to be studied too. What we have so far done is to adopt only parts of the adversarial system followed in England which favour the accused while dropping those parts which may go against him. This approach needs to be reviewed in order to ensure that victims of crime, particularly female victims of violent crime, also get justice.[13]

Thus it is the whole system which is to blame though the judiciary cannot totally absolve itself of least the charge of contributory negligence.

Much rhetoric has already flowed down the pages of the apex Court's judgments on the utmost importance of gender justice. What is now required is some practical steps, and a constant vigil in that behalf on the part of individual judges, to ensure that it is actually delivered.

New action against teachers who harass female pupils

ABIDJAN: The Ivoirian government has brought a new law before Parliament to take tough action against school teachers who sexually harass female students.

Reports of a high drop-out rate of young girls from school due to sexual harassment and teen pregnancy have prompted a bill, which carries a two to five year jail sentence and a fine of between 500 CFA and 5,000,000 CFA for any teacher found guilty of sexual harassment. (One US dollar is equivalent to 610 CFAs)

The law is widely expected to be passed by Parliament and it would then come into effect later this year.

According to the minister for National Education, Mr. Pierre Kipre, about 37 per cent of the girls in schools have "Dropped out after they were impregnated by their teachers".

Cote d'Ivoire already has a law on the books making it an offence to have sex with minors. But this law, which carries a maximum penalty of 20 years in jail is rarely applied.(P)

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the witness box (see 1960 Cr. L.R., pp. 794-823). (Note : Justice was the British branch of the International Commission of Jurists).

[18] Now in England, the accused is required to disclose his defence as soon as details or the proposed prosecution evidence are supplied to him. But in India he is not required to disclose his defence at all until the trial stage

SEXUAL HARASSMENT OF WOMEN AT THE WORK-PLACE

Justice A. N. Gupta[1]

Even after fifty years of Independence, when we are just to switch-over to the dawn of Twenty-first Century- there seems to be little change in the poor plight of vast majority of women in this great country. Women had all along been suffering from anti-women psyche-and has been victim of feudals and religious fundamentalist.

Although the right to equality with men, has been expressly granted and aptly provided in the scheme of Articles 14, 15 and 16 of the constitution, besides Articles 39 (e) and 51A, yet there appears to no effective statute to provide for protection and safeguards to working women against their sexual harassment, molestation and hazards to which a working woman may be exposed to at their workplace.

In India, sexual harassment of women has adopted manifold dimensions especially with the increasing number of women in the workplace at urban or rural level including public and private sectors.[2] Although there had been 24% increase in the number of working women in rural and urban sectors in India in the recent past[3], yet women tend to occupy junior and minor positions in their employment. This aggravates chances of further discrediting women in the workplace and they are treated to be sexual objects rather than credible co-workers[4]. While dealing with Sexual harassment of women generally, "Outraging the modesty of woman"[5] or insulting the modesty of a woman[6] are included besides "rape and attempt to rape"[7] within the framework of Indian penal Code. It was however in 1993, in the I.L.O. seminar held at Manila that sexual harassment of women at the work place was acknowledged as an existing form of gender discrimination against women.

Each incident of sexual harassment at the workplace results in violation of the Fundamental rights to Gender Equality and the Right to Life

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1 Judge Allahabad High Court.

2 *Anuradha Bhotla* in "Women Employees and Rural Development" : Problems of Employed Women in Rural Areas.

3 India Economic Year Book, 1995.

4 Theresa Lahmann v. Toys R (Supreme Court of New Jersey).

5 Section 354 I.P.C.

6 Section 509 I.P.C.

7 State of Karnataka v. *Mahabaleshwar Gourya Naik* AIR 1992 S.C. 2034 By – S. *Ratnavel Pandian* J,..... "Hymen was intact, no bleeding or dried blood mark was seen. No discharge was seen ..... No swelling ..... No commission of sexual intercourse found. However sentence of four months passed under section 323 and 341 I.P.C. altered to five years under section 376 I.P.C. read with 511 I.P.C.

and Liberty.[8] The depravity which sexual harassment can degenerate and urgency for safeguards by an alternative mechanism in the absence of legislative measures was strongly felt by the Hon'ble Supreme Court because of growing incidents of violation to fundamental rights enshrined under Articles 14, 15, 21, 42, 51A and in particular article19 (1) (g) – conferring the right to freedom to "practice any profession or to carry out any occupation, trade or business."

The meaning and content of the fundamental rights guaranteed in the Constitution are of sufficient amplitude to encompass all the facets of gender equality, including prevention of sexual harassment and abuse.

In the Vienna Declaration[9] it was resolved that gender based violence and all forms of sexual harassment and exploitation including those resulting form cultural prejudice and international trafficking are incompatible with the dignity and worth of the human person and must be eliminated – which can be achieved by legal measures and through national action and international co-operation in such fields as economic and social support. The Draft Declaration of Vienna has now been adopted by the U.N. General Assembly.

In the CEDAW recommendation No. 17 gender based violence was defined as " a form of discrimination which seriously inhibits women's ability to enjoy rights and freedom on a basis of equality with men". Significantly violence (in all forms) has precisely the effect on the fundamental rights of women, including the right to life, the prohibition of torture and cruel treatment, equal protection of humanitarian law, the right to liberty and security of person, equal protection of laws, the right to equality within the family, the right to physical and mental health and the right to just and favourable conditions of work. In CEDAW,[10] the general recommendation on violence, present the possibility of perceiving and understanding violence, including sexual harassment, as the women experience it.

The International Labour Organisation[11] had also detailed parameters for defending sexual harassment in the workplace. "Conduct which is unwanted by the recipient" was held to be the guiding factor and it was for the 'woman who experiences the same' to decide as to whether the same was "offensive" or not. Viewed in this prospect. The difference in flirtation, romantic behaviour or sexual harassment has to be judged. Even amusing or harmless behaviour in the view point of a men may be tauntingly teasing, abrasively

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[8] Hon'ble Mr. Justice *J.S. Verma* (Chief Justice, Supreme Court of India with hon'ble Mrs Justice *Sujata Manohar* and hon'ble Mr. justice *B.N. Kirpal*, in the case of *'Vishaka' v State of Rajasthan'* (1997) 6 Supreme Cases 241).

[9] Vienna Declaration and Programme of Action 1993 adopted at the World Conference on Human Rights Vienna – Draft UN Declaration on Elimination of violence Against Women.

[10] CEDAW – Committee on the Elimination of Discrimination Against Women.

[11] See conditions of Work Digest: combating Sexual harassment (International Labour Office, Geneva).

offensive and incompatibly abnormal in the opinion of a woman. In very many cases sexual harassment of a woman in the workplace originates from the fancied conceptions of a man towards the woman such as, the woman is inviting him or giving certain indications or that she is sexually promiscuous or when she puts herself in a vulnerable position indicating her obvious assent. The subject of sexual harassment of women is thus closely linked with the behavioural psychology, sociology and prevalent ethics not only of the men but women as well.

In its landmarks decision in the case of Vishakha the Supreme Court, with a view to filling the Vacuum in existing legislation and preventing sexual harassment of working women in all workplaces has provided a working code to eliminate this vice of gender discrimination. The Hon'ble Supreme Court observed.

"The Guidelines and Norms prescribed herein are as under-

Having regard to the definition of 'human rights' in section 2(d) of the protection of Human Rights Act, 1993.

TAKING NOTE of the fact that the present civil and penal laws in India do not *adequately* provide for specific protection of women from sexual harassment in workplaces and that enactment of such legislation will take considerable time.

It is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.

1. Duty of the employer or other responsible persons in workplaces and other institutions:

It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution settlement or prosecution of acts of sexual harassment by taking all steps required.

For this purpose sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

(a) Physical contract and advances.

(b) a demand or request and advances;

(c) Sexually-coloured remarks;

(d) Showing pornography

(e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or hanorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recreating or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raise any objection thereto.

3. Preventive steps

All employers or persons in charge of workplace whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generally of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the workplace should be noticed, published and circulated in appropriate ways.

(b) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules'/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender:

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual

harassment. The victims of *sexual harassment it should have the option to see transfer of the perpetrator or their own transfer.*

5. Disciplinary action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules .

6. Complaint mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government Department concerned of the complaints and action taken by them.

The employers and person-in-charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government Department.

8. Workers' initiative:

Employers should be allowed to raise issue of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

9.Awareness:

Awareness of the right of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate

legislation when enacted on the subject) in a suitable manner.

10. Third-party harassment:

Where sexual harassment occurs as a results of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993".

The Hon'ble Supreme Court further directed that these guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working woman. These directions have been ordered to be binding and enforceable in law until suitable legislation is enacted to occupy the field.

In this context it would be worth while to mention that –Article 51(c)[12] and Article 253 of the Constitution[13] took into consideration the objectives of the Judiciary mentioned in the Beijing Statement (Principles accepted by the Chief Justices of Asia and the pacific) of Principles of the Independence of the Judiciary in the 'LAWASIA' region.

In this backdrop the provision as contained in Articles 11 and 24 in the "Convention on the Elimination of All Forms of Discrimination against Woman." are quite significant.

These read as follows :

"Article 11 : States parties shall take all appropriate measures ,to eliminate discrimination against women in the field of employment in order to

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[12] Article 51 : Promotion of International Peace and Security : The State shall endeavour (a)-(b) (c) Foster respect for international law and treaty obligations in the dealings of organised peoples with one another.

[13] Article 253 : Legislation for giving effect to international agreements-Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to made any law for the whole or any part of the territory 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.
Seventh Schedule :
List I Union List
Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

ensure, on a basis of equality of men and women, the same rights, in particular

(a) The right to work as an inalienable right of all human beings.

(f) The right to protection of health and to safety in working conditions including the safeguarding of the function of reproduction.

Article 24 : State Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present convention.

The general recommendations of CEDAW[14] in the coutexty in respect of Article 11 are :

"Violence and equality in employment

22. Equality in employment can seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace:

23. Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually-coloured remarks, showing pornography and sexual demands, whether by words or action. Such conduct can be humiliating and may constitute a health and safety problem it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints, procedures and remedies, including compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.

The Government of India had ratified the above resolution on 25.6.1993. At the Fourth World Conference on women in Beijing an official statement was made in consonance with these articles.[15]

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[14] Convention on the Elimination of All Forms of Discrimination against Women.

[15] The Government of India made an official commitment to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector, to set up a commission for Women's Rights to act as a public defender of woman's human rights, to institutionalize a national level mechanism to monitor the implementation of the Platform for Action.

In an earlier decision[16] the Hon'ble Supreme Court of India had taken the view that "an enforceable right to compensation is not alien to the concepts of enforcement of a guaranteed rights" and *in Visaka* 'Judicial Activism' held.

"Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all workplaces the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality right to work with human dignity in Articles 14, 15 19 (1) (g) and 21 of the constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit form Article 51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List of Seventh Schedule of the Constitution.

In *Madhu Kishwar*[17] The Supreme Court has held the provisions of CEDAW to be an integral scheme of the Fundamental Rights and the Directives Principles. "Human Rights", observed Ramaswamy J, in the case of *Gaurav Jain*[18] "are derived from the dignity and worth interest in the human person" It was further observed that the recommendations of CEDAW were to "breathe life into the dry bones of constitutions", to prevent gender based discrimination.

With the rising number of working women in all segments of society and with the enormously increasing orbit of their functioning,[19] time has come to root out the sinister weeds of gender bias and to acknowledge the personal and bodily integrity of women providing them fundamental freedoms in all fields, eliminating gender based violence as a discrimination against women at her workplace by acts which inflict physically mental, psychological, ethical or sexual harm or suffering including threat of such acts, coercion and deprivation of their liberty.

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[16] Nilabati Behea vs. State of Orissa, (1993) 2 SCC 746. For further reading on the Subject see People's another (1997) Supreme Court Cases 433 (Where in legal aspects in the case of Nilabati Behera's case were further discussed at length).

[17] *Madhu Kishwar* v. State of Bihar, 2 (1996) 5 SCC 125.

[18] *Gaurav Jain* vs. Union of India, (1997) 8 SCC 114

[19] *'Kalpana chawla'* – plays odyssy in orbit along with four American a Japanese and a Ukranian in the crew of Columbia launched from NASA Mission STS-87 in the month of Nov., 1997.

THE INDO-BRITISH PROJECT ON GENDER AND LAW[1]

Dr. Ms. Ann Stewart[2]

Hon'ble Justices, *Mr. Varshney*, distinguished persons, Judges gathered here together today, friends whom I already know from working on this course, friends that I hope to make in future, who will be involved in this programme. I thought I would just like to say a few words about gender issues in the United Kingdom while reflecting on some of the reasons why we are here today, and why we have become involved in this particular programme. We might ask ourselves, why is there now a focus internationally and in most common law jurisdictions, why is there a focus on looking at the judiciary. II think this is because, as the distinguished speakers have illustrated already, there has been a focus on law and the delivery of law within the courts as a process of bringing about gender justice, about social reforms, in many jurisdictions. This is a very challenging responsibility that has been laid on the backs of the judiciary. As a result, there is a very strong need for judges to be sensitive to the issues that are raised by legislation in this field and to their constitutional responsibilities. It is not an easy one, they are complicated issues as the distinguished speakers have already illustrated. So, there is now a sense of trying to find ways of assisting those important people, the judges, in this process, and our training programme, the cooperation that we are involved in, is really an attempt to make a contribution towards the development of our expertise. It is essentially a partnership. It is process of learning, from two jurisdictions that share some common history, although have many differences. We are looking really to see to what extent an international experience can assist in the development of this sensitivity amongst judges. I would like just to say a few words about the issues of gender justice before you of U.K. Courts. I think there are two separate gender justice issues : One is the way in which women have become involved in the legal system. It will be useful to do a character study of what England was like in the 1970's as far as the legal system is concerned. It would look very much as an activity that only involved the male part of the species. Most judges, all of our higher courts Judges, were male, most barristers, the counsel that appeared before the courts, would be male, although there would be some areas, possibly in the area of family law, where there would be a few women. In the criminal legal system, most of the defendants would also be male. It would look a bit like a male legal system. Certainly on the criminal sioe, it was about the issues that confront men and dominated by male judges. Now we might say what significance has that got? Just the way the things are, trends in my country, and I suspect the same in yours women do not appear so much

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[1] This is a transcript of her extempore speech at the seminar held at the J.T.R.I. Lucknow, on Nov. 9, 1997. Transcript incomplete due to some technical snag in recording.

[2] Of the School of Law, University of Warwick, Co-ordinator of the Project.

before the criminal system. So in the 1970s, so it is 20 years ago, we would see quite a world where women would not really figure too much. That is not to say they are in the margins. Since then we have seen a development internationally of the significance of law and international conventions on the process of bringing about gender justice. We have seen and the hon'ble speakers have detailed those most ably, we have seen the adoption by the UN General Assembly of an International Convention on the Elimination of All Forms of Discrimination Against Women. A significant landmark in 1979, implemented and enforced in 1981. We have seen in 1993 the World Conference on Human Rights in Vienna '4 the declaration that came from that conference stressing the importance of working to eliminate gender bias within the administration of justice. We have seen the development of a constituency of International Law, in the area of gender which had in our country an impact, although a limited impact, I have to say, on the way the Judicial system works, and the laws as we know them. More significant perhaps, often in the United Kingdom, has been the European Union, in term of developing and understanding gender justice. I notice the impact of the UN Declaration and the Convention on the Elimination of All Forms of Discrimination Against Women on your supreme Court and I was able to obtain, and I think most of you got it today, the judgement by the Hon'ble Chief Justice of India and others in Vishaka varsus the State of Rajasthan which has been referred to by Justice Goyal.

Cruel but right

Labour Party's new women MPs, some of whom have complained about the rough ways of the Commons, must not expect special favours from Madam Speaker. For, Betty Boothroyd, as revealed by a recent magazine interview, takes a dim view of women who demand equality but expect gallantry. During the interview, Boothroyd was asked by the magazine editor whether the former thought that modern women want it both ways. Boothroyd answered in affirmative "Some of these women show a lack of sensitivity about these things..... That old saying was cruel but right: "if you cannot stand the heat, get out of the kitchen," she said.

Temptress gain

An actress hired to playa slender temptress on television's Melrose Place- but fired after she became pregnant-has won a judgement of nearly $5 million from a Los Angeles jury. The actress, Hunter Tylo, 34, maintained in her lawsuit against Spelling Television that clever camera angles, advanced technology, body doubles and her own fit figure could have allowed her to continue in the cost of the evening melodrama. Instead, she alleged, one of the producers of the show had said: Why doesn't she just go out and get an abortion? Then she can work." Spelling officials denied making the remark and argued that a pregnant woman would not be credible as a seductress.

(The Pioneer, 27-12-97)

GENDER AND LAW[1]

D. P. Varshney

Regrettably, Gender and Law zig zag with "one step forward, two steps back" and so, a sardonic critic may borrow the words used by Freud in a letter written to one of his friends:

"These non-results conjure up an ugly picture of mills that grind so slowly that, before the flour is ready, men are dead of hunger".

There have been several United Nations Conventions on Gender Justice and Law, and textually women enjoy equality. Article 2 of the Economic, Social and Cultural Covenant and Article 2 of Civil and Political Rights covenant guarantee that the rights enunciated in these covenants will be exercised without discrimination of any kind as to race, colour, sex etc.

Article 3 of both these covenants, ensure equal rights to men and women. The term "human rights of women" emphasises the indivisibility and universality of all human rights and their full application to women as human beings.

The United Nations held the following conventions on rights of women:

1. 1949 Convention on suppression of traffic in persons and exploitation of the prostitution of others.
2. 1952 Conventions (UN) on Political Rights of Women.
3. 1956 Supplementary Convention of abolition of slavery trade and practices similar to slavery.
4. 1957 Convention on the nationality of married women.
5. 1963 Convention on consent of marriage, minimum age of marriage and registration of marriage.

In the short space at my disposal it is not possible to go into details of those Conventions, and suffice it is to say that they had only a limited effect on the overall situation of women as an under-privileged and traditionally oppressed group.

In 1967 the General Assembly of the United Nations adopted a declaration on discrimination against women. 1975 was declared by the United Nations as being the International Women's year, and 1976-85 was subsequently declared as decade for women. In 1979 there was again an International Convention on Elimination of All forms of Discrimination Against

[1] Welcome address by Judge D.P. VARSHNEY, Director, Institute of Judicial Training & Research (U.P.), Lucknow, at the Regional Commonwealth conference on Gender and law on Nov. 9, 1997

Women, and lastly in 1985, there was an International Conference at Nairobi (Kenya) to review the UN decade for women by United Nations General Assembly in 1985. The deliberations of this convention were subsequently ratified by the General Assembly of the United Nations.

All these strategies, though only recommendatory in character, articulate specific measures to ensure equality, development and peace for women, excluding distinction, and exclusion of restriction made on basis of sex tending to nullify the recognition, enjoyment or exercise by women of human rights on the basis of equality.

The gnawing reality is that women constitute half the world's population, perform for nearly two thirds of working hours, receive one tenth of the world's income and own 1/100 of the world's property. They are euphemistically referred to as " better half of men", but they have the worst deal at the hands of society which physically and sexually exploits and abuses them. They are denied a say in governance, denied equal wages and are always treated as appendage of man. She is wife, mother, an unpaid worker in the household. When widowed young, she is a fair game for all the lecherous young men, and even dirty old men.

From International to the Indian scenario

Article 14 of the Indian Constitution ensures equality of status and equal protection of laws to all men and women. Article 15 of the Constitution of India goes still further and prohibits discrimination on ground of sex and also provides passing of laws in favour of women and children. The Hindu Succession Act, 1956 removed the disability attached to women as heirs and legal representatives. Earlier, under Hindu Law, they were entitled to only a life estate but Section 14 of the Hindu Succession Act declared in unequivocal terms that a property held by a woman will be held as absolute owner. This Act places females (Hindu) at par with their male counterparts. Under Mohammedan law a female is only a half male for she gets only a half of what a male gets and the concept of parity of women to men is still alien to it.

The Hindu Adoptions and Maintenance Act allows even an illegitimate daughter to claim maintenance from those who take the estate of her father (Sec. 21 and 22). In *C.M. Muthamma* vs. *U.O.I.*, AIR 1979 SC 1868, the Supreme Court did not approve of denial of right to employment to a married woman on ground of sex. In *Radhacharan* v. *State*, AIR 1969 Orissa 237, the Orissa High Court upheld the posting of a woman as District Judge. In *Air India* vs. *Nargesh Mirza*, AIR 1981 SC 1829, the Supreme Court of India held that a rule requiring an air hostess to resign on getting married or on attaining 35 years or upon first pregnancy was violative of Art. 14 of the supremo lex of the country. It was discriminatory and was an insult to Indian womanhood, the judges said.

Following are the Indian landmark legislations on the subject of Gender and Law :

1. 1829 Abolition of Sati.
2. 1856 Widow remarriage made legal.
3. 1870 Female infanticide banned.
4. 1872 Inter-caste, inter-community marriage made legal.
5. 1891 Age of consent raised to 12 years for girls.
6. 1921 Women get right to vote in Madras.
7. 1929 Child Marriage Restraint Act.
8. 1937 Women get limited right of property.
9. 1954 Special Marriage Act.
10. 1955 Hindu Marriage Act.
11. 1956 Suppression of Immoral Traffic Act.
12. 1961 Dowry Prohibition Act.
13. 1981 Criminal Law Amendment Act.

Some of Indian legislations containing special provisions for women assuring social security are as follows :

- Workmen Compensation Act, 1923
- Payment of Wages Act, 1936
- Factories Act, 1948
- Maternity Benefits Act, 1961
- Minimum Wages Act, 1948
- Pensions Act, 1987
- Shops & Commercial Establishments Act

Provisions exist in many Acts relating to :

- Prohibitory employment to women during periods of pregnancy.
- Provisions for separate urinals and toilets
- Provisions for crèches
- Prohibitions of employment of women in hazardous tasks
- Prohibition of their employment during night.

The Indian Supreme Court has done a yeoman's service to the cause of women in India but it started out of a scathing criticism of a Supreme Court Judgement in a rape case popularly known as Mathura's rape case (1972) 2 SCC 143, in which the Supreme Court recorded an order of acquittal by setting aside a High Court conviction order against a rapist. The notable cases and the milestone pervasive and comprehensive shape to FEMIJURIST are *Women's Resource Centre* vs *Commisssioner of Police, Delhi,* AIR 1990 SC 513, W.P. (c) No. 635 of 1992 *All India Democratic Women's Association* vs. *Tamil Nadu,* (*Ameena's* case) in which a girl child was married to an Arab Sheikh old enough to be her grandfather, *Brinda Karah* vs. *State* (Cr. Misc. NO. 1819 of 91 Delhi), *Devadasi* case whereby *Devadasi* system was abolished and *Vimala's* death in Hyderebad reported in 'Manushi' No. 20, 1984. The law on gang rape and child rape has undergone extensive change by amendment of Sec. 376 IPC. *Roop Kunwar's Sati* case in Jhunjunu in 1987, reported in AIR 1989 SC 280, gave new dimensions to abolition of *Sati* and that showed that the 1829 legislation on the subject had not become a dead letter of law. *Rathinam* vs. *Union of India* 1987 (2) Scale 317 (1464) was a case of custodial rape in which six accused persons were bailed out on technical grounds of no-submission of charge sheet within a period of 90 days. In a case reported in 1993(2) Scale 126 (631) the victim of rape was, for the first time, awarded a compensation amounting to Rs. 50,000. This is a land mark decision because, *it included* the *principles of victimology* into law for the first time. Hon'ble *Mr. Justice Gumanmal Lodha,* Chief Justice, strongly deprecated aggressive resorts to sexual assaults on families and girl children in the case reported in (1988) 1 *Guwa L.R.* 489 and the conscience of the nation was rudely shaken by the *Gajraula* nuns' rape case where unsuspecting nuns residing in a convent were molested and raped by unmitigated scoundrels and the Hon'ble Supreme Court in a decision reported in 1991 (2) Scale 241 (1305) came down heavily on them by returning a finding of guilt and sentencing them heavily. Petitions to challenge the validity of the Muslim Women (Protection of Rights on Divorce) Act 1986 have been decided by the Supreme Court of India to re-affirm Supreme Court decision in *Mohd. Ahmad Khan* v. *Shah Bano,* AIR 1985 SC 945.

The Indian Penal Code deals with offences against women under Section 376 (rape), kidnapping and abduction (Section 366), dowry death (Section 304 – B), torture (Section 498-A), molestation (Section 354), eve-teasing (Section 294) and lastly, bigamy and adultery, (section 494 & 498).

It is disheartening however, that due to poverty and illiteracy, it has not always been possible for the Indian womanhood to take advantage of these laws and legal provisions. It is not infrequent to see that a court is constrained to record an order of acquittal because the doctor has not come across any evidence of rape and the root cause behind this is that the unsuspecting rape victim went to toilet, washed herself and cleaned her clothes and that simply destroyed the entire evidence of rape and this is what explains the low rate of convictions in rape cases in Indian Courts.

संस्कृत व हिन्दी साहित्य में नारी

तेज बहादुर सिंह[1]

वेदों में नारी को शक्ति का स्रोत माना गया है। वैदिक काल में कुलीन और संभ्रांत परिवारों की स्त्रियां वेद पाठ और यज्ञों में भागीदारी करने को स्वतंत्र थी किन्तु निम्न और मध्यम् वर्ग की स्त्रियां दासी व सेविका के रूप में पुरूषों और स्त्रियों की आश्रित थीं। ऋग्वेद काल के पश्चात् स्त्रियों को पूजा–पाठ की स्वतंत्रता तो थी किन्तु उन्हें समाज में वह आदर नहीं मिला जो ऋग्वेद काल में प्राप्त था। एक ओर गार्गी, मैत्रेयी, अनुसूइया और अरून्धती के चित्र उभरते हैं तो दूसरी ओर सौन्दर्य और विलास से परिपूर्ण कामिनियों का भी कोई अभाव नहीं है।

महाभारत काल आते–आते नारी के पूजनीया रूप ने भोग्या का रूप धारण कर लिया और कालान्तर में नारी की स्थिति दयनीय होती गयी। यहां तक कि स्त्री जाति की स्वतंत्रता पर्दे के भीतर सिमट कर रह गयी। अकबर इलाहाबादी फरमाते हैं :

''बेपर्दा नजर आयीं जो कल चन्द बीवियां,
अकबर जमीं, में गैरत-कौमी से गड़ गया।
पूछा जब उनसे आप का पर्दा कहाँ गया,
कहने लगीं कि अक्ल पे मर्दों की पड़ गया।।''

स्मृतियों में जहां एक तरफ नारी की स्वतंत्रता को प्रतिबंधित किया गया है, यथा–

पिता रक्षति कौमारे भर्ता रक्षति यौवने।
रक्षन्ति स्थविरे पुत्रा न स्त्री स्वातन्त्र्यमर्हति।

(मनुस्मृति, अध्याय IX श्लोक 3)

(स्त्रियों की बाल्यावस्था में पिता, युवावस्था में पति, और बुढ़ापे में पुत्र रक्षा करता है, स्त्री कभी स्वतन्त्रता के योग्य नहीं).

वहीं दूसरी तरफ नारी जाति के प्रति सम्मान बोधक विशेषणों का भी अभाव नहीं है। कहा गया है जहाँ स्त्रियाँ पूजित होती हैं, वहां देवताओं का वास होता है, जहाँ इनकी पूजा नहीं होती वहाँ सब क्रियाएं निष्फल हो जाती हैं।

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[1] उपनिदेशक (प्रशासन), न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान, उत्तर प्रदेश, लखनऊ।

(यत्रनार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः ।
यत्रैतास्तु न पूज्यन्ते सर्वास्त्राफलाः क्रियाः ।।

(मनुस्मृति, अध्याय III श्लोक 56)

'त्रिया चरित्रम्' पुरुषस्य भाग्यम् दैवो न जानाति कुतः मनुष्यः

भाग्य तो चाहे पुरुष का हो अथवा स्त्री का, भविष्य के गर्भ में अज्ञात ही रहता है। शायद जब शास्त्रकार ने यह कथन व्यक्त किया तो उस समय उसकी कल्पना में वैदिक तथा उपनिषद काल की विदुषी नारियों के उदाहरण विस्मृति के गर्भ में समा चुके होंगे। हो सकता है कि शास्त्रकार के अनुभव में किसी स्त्री के अवांछित व्यवहार ने कटुता की विषबेल लगा दी होगी।

संस्कृत साहित्य में भी इसी भाव का उद्‌बोध मिलता है। जैसा कि कालिदास ने कहा है–

निसर्गनिपुणाः स्त्रियः ।

(स्त्रियां स्वभाव से ही चतुर होती हैं)।

(मालविकाग्निमित्र, 3/2 के परचात्)

वास्तविकता यह है कि चारित्र्य की चंचलता पर स्त्री का एकाधिकार कभी नहीं रहा। यह अवश्य है कि पुरुष को समाज ने इस विषय में निर्बाध स्वतन्त्रता दे रखी थी और इसीलिए उसकी प्रत्येक उच्छृंखलता को सामान्य रूप से स्वीकार किया। पुरुष को न केवल बहुविवाह की अनुमति थी बल्कि बिना विवाह के भी उसे अपने महलों में स्त्रियों को रखने की छूट थी। पुरुष के इस प्रकार के चंचल मन को किसी शास्त्रकार अथवा साहित्यकार ने "पुरुष चरित्रम्" की संज्ञा नहीं दी। भारतवर्ष में स्त्रियों ने अपने पति की सेवा सुश्रुषा तथा भक्ति में क्या–क्या नहीं किया? यहां तक कि पतिवियोग में आत्मदाह द्वारा अपने सतीत्व को प्रमाणित करने की प्रथा भी स्थापित की, किन्तु वाह रे पुरुष, कि फिर भी स्त्री के विरुद्ध चंचल चरित्र का अभियोग लगाकर ही रहा। **(द्रष्टव्यः नारी भीतर और बाहर द्वारा कमला सिंघवी)**

दूसरी ओर **कालिदास** का ही निम्न विचार भी द्रष्टव्य है:–

गृहिणी सचिवः सखी मिथः प्रिय शिष्या ललिते कलाविधौ।
करुणा रहितेन वेधसा हरता त्वां वद किं न मे हृतम् ।।

(रघुवंश, अध्याय 8)

अर्थात् स्त्री और पुरुष आपस में केवल पति और पत्नी नहीं है, बल्कि एक दूसरे के लिए मित्र, भाई और बहन, पिता और पुत्री, पुत्र और माँ, सम्प्रभु एवं सचिव गुरू और शिष्य भी हैं।

नारी सौन्दर्य, कोमलता, करूणा, दया तथा स्नेह आदि की साक्षात् मूर्ति है। उसे पुत्री के रूप में देखिये, चाहे भार्या के अथवा माता के, सभी अवस्थाओं में वह प्रेम की मूर्ति है।

नारी साहित्य-परम्परा में प्रेरणा, पूजा और प्रेम का स्रोत थी। आरम्भ से ही नारी और पुरूष का संबंध समाज का आधार रहा है। यह संबंध साहित्य, संस्कृति, कला और सौन्दर्य बोध के माध्यम से अभिव्यंजित होता रहा है। नारी सदैव से इस अभिव्यंजना की मुख्य प्रेरणा स्रोत तथा प्रमुख नायिका रही है, शायद इसीलिए कि कला और साहित्य के प्रणेता अधिकाशतः पुरूष वर्ग से होते थे। द्रष्टव्य है **दिनकर** जी की कुछ पंक्तियाँ-

खोजता पुरुष सौन्दर्य, त्रिया प्रतिभा को,
नारी चरित्र बल को, नर मात्र त्वचा को।
श्री नहीं पाणि, जिसके सिर पर धरती है,
कामिनी हृदय से, उसे नहीं वरती है।।

कवियों की अवधारणा स्त्री जाति के प्रति प्रायः नकारात्मक ही रही है। **कबीर** के शब्दों में-

नारी की झांई परत, अन्धा होत भुजंग।
कविरा तिनकी कौन गति नित नारी के संग।।

किन्तु **कबीर** ने ही मातृत्व भाव को इस प्रकार व्यक्त किया है-

सुत अपराध करै दिन केते,
जननी के चित रहै न तेते।
कर गहि केस करै जो घाता,
तऊ न हेतु उतारै माता।।
कहै कबीर एक बुधि बिचारी,
बालक दुखी दुखी महतारी।

(कबीर, ग्रन्थावली, पृष्ठ 123)

रामभक्ति मंदाकिनी की धवल धारा प्रवाहित करने वाले **गोस्वामी तुलसीदास** ने तो जैसे स्त्री जाति के प्रति कटुता एवं आक्षेपों की लड़ी ही लगा दी है-

ढोल गवांर सुद्र पसु नारी, सकल ताड़ना के अधिकारी।

(सुन्दर काण्ड, दोहा 58-चौ. -3)

विधिहुँ न नारि हृदय गति जानी।
सकल कपट अघ अवगुन खानी।।

(अयोध्या काण्ड, दोहा 161 –चौ.–2)

नारि सुभाउ सत्य सब कहहीं।
अवगुन आठ सदा उर रहहीं।।
साहस अनृप चपलता माया।
भय अविवेक असौच अदाया।।

(लंका काण्ड, दोहा 15 (ख) चौ0–1/2)

वैसे देखा जाय तो उपर्युक्त पंक्तियां क्रमशः समुद्र, तत्क्षण क्रोधावेशी भरत एवं रावण के माध्यम से व्यक्त की गयी हैं, जो उनकी तत्कालीन मानसिकता का चित्रण करती हैं, इन्हें गोस्वामी तुलसीदास का मत नहीं माना जा सकता है।

प्रख्यात साहित्यकार **प्रेमचन्द** ने **"गोदान"** में एक पात्र से कहलवाया है:

''औरत को भगवान सब कुछ दे, रूप न दे,
नहीं वह कबू में नहीं रहती।''

उक्त पंक्तियां भी मुख्य नायक होरी द्वारा नहीं व्यक्त की गयी है बल्कि एक गौण पात्र चौधरी द्वारा व्यक्त की गयी है। अतः इस आधार पर प्रेमचन्द को नारी की भावनाओं को आहत करने का दोष नहीं लगाया जा सकता।

प्रेमचन्द मातृत्व को तो नारीत्व की **"साधना"** समझते हैं, उन्ही के शब्दों में–

"नारी केवल माता है, और इसके उपरान्त वह जो कुछ है, वह सब मातृत्व का उपक्रम मात्र। मातृत्व संसार की सबसे बड़ी साधना, सबसे बड़ी तपस्या, सबसे बड़ा त्याग और सबसे महान विजय है। एक शब्द में उसे लय कहूँगा –जीवन का, व्यक्तित्व का और नारीत्व का भी।"

(गोदान, पृष्ठ 202)

उक्त रचनाकारों के केवल ऐसे उद्धरणों के आधार पर उनकी मूल अवधारणा का मूल्यांकन नहीं किया जा सकता बल्कि इस तथ्य का अध्ययन भी करना समीचीन होगा कि किस प्रसंग में व किस पात्र द्वारा ऐसा विचार व्यक्त किया गया है।

तुलसीदास ने ही माता के आदेश को पिता के आदेश से सर्वोपरि मानते हुए यह कहा है–

जौ केवल पितु आयसु ताता। तौ जनि जाहु जानि बड़ि माता।।

(हे तात यदि केवल पिताजी की आज्ञा हो, तो माता को पिता से बड़ी जानकार वन को मत जाओ)

(अयोध्या काण्ड, दोहा 55 चौ० –1)

वास्तव में पुरुष अथवा स्त्री की अपनी कोई स्वतन्त्र सत्ता नहीं है। वे एक दूसरे के पूरक हैं। इसी भाव को तुलसीदास ने इन पंक्तियों में बड़े मार्मिक ढंग से व्यक्त किया है–

जिय बिनु देह नदी बिनु बारी। तैसिअ नाथ पुरुष बिनु नारी।।

(जैसे बिना जीव के देह और बिना जल के नदी, वैसे ही नाथ बिना पुरुष के स्त्री है)

(अयोध्या काण्ड, दोहा 64–चौ० –4)

जयशंकर प्रसाद ने नारी को **"श्रद्धा"** की उपाधि से विभूषित करते हुए कहा है:

नारी! तुम केवल श्रद्धा हो
विश्वास रजत नग पग तल में,
पीयूष स्रोत सी बहा करो
जीवन के सुन्दर समतल में।

(कामायनी, लज्जासर्ग)

अपनी कृति **"ध्रुवस्वामिनी"** के माध्यम से प्रसाद जी ने नारी के भाग्य का निरूपण इन शब्दों में किया है–

"भगवान ने स्त्रियों को उत्पन्न करके ही अधिकारों से वंचित नहीं किया है। किन्तु तुम लोगों की दस्युवृत्ति ने उन्हें लूटा है।"

(ध्रुवस्वामिनी, तृतीय अंक)

इसी परिप्रेक्ष्य में **मैथिलीशरण गुप्त** की चन्द पंक्तियां बरबस स्मृति पटल पर उभर आती है–

अबला-जीवन, हाय! तुम्हारी यही कहानी,
आँचल में है दूध और आँखों में पानी।।

(यशोधरा, पृष्ठ 4)

साथ ही, वह यह भी मानते हैं कि नारी किसी भी मायने में पुरुष से कम नहीं है। वह दया की मूर्ति है। मगर उसे दया व कृपा का पात्र समझने का तात्पर्य उसकी वास्तविक सत्ता को नकारना होगा:

.....हीन नहीं नारी कभी,
भूत-दया-मूर्ति वह मन से शरीर से।

(यशोधरा)

नारी के त्याग एवं उसके सद्गुणों की सराहना करते हुए लोचन प्रसाद पाण्डेय ने लिखा है–

सेवा आत्म त्याग भरे शुभ-सुगुण तुम्हारे।
सुमन बिछाते कंटक-पथ से सदा हमारे।।
तुमसे जाति-समाज सहित पावन है अवनी।
नारी। तुम हो धन्य नरों की विक्रम जननी।।

("नारी महिमा" कविता)

सुमित्रा नंदन पंत के शब्दों में :–

नारी का तन माँ का तन है,
जाति वृद्धि के लिए विनिर्मित,
पुरुष प्रणय अधिकार प्रणय है,
सुख विलास के हित उत्कंठित।

(स्वर्ण किरण)

नारी की वर्तमान सामाजिक स्थिति के अवलोकन से स्पष्ट है कि न तो वह वैदिक कालीन सुसंस्कारयुता है, न ही मुगल कालीन आक्रान्ता स्थिति में है, और न तो वह महाभारत तथा उसके बाद की भोग्या तथा उपेक्षिता जैसी स्थिति में है। आज वह पुरुष के समकक्ष अपने अधिकारों के प्रति सचेष्ट, तथा अपने अस्तित्व को स्थापित करने में संघर्षशील है। उसकी भागीदारी जीवन के विविध प्रशासनिक, राजनीतिक, सामाजिक, आर्थिक, वैज्ञानिक, उद्योगिक और व्यापारिक क्षेत्रों में, यहां तक कि रक्षा व आंतरिक सुरक्षा के क्षेत्रों में भी पुरुष के समानान्तर है। आज वह प्रसाद की श्रद्धा या मैथिलीशरण गुप्त की "अबला" या पन्त की "मुक्त करो नारी को मानव" नहीं रही।

"मातृपद ही संसार का सबसे श्रेष्ठ पद है, क्योंकि यही एक ऐसी स्थिति है जहाँ निस्स्वार्थता की महत्तम् शिक्षा प्राप्त की जा सकती है। केवल भगवत् प्रेम ही माता के प्रेम से उच्च है, अन्य सब तो निम्न श्रेणी के हैं।"

–विवेकानन्द (विवेकानन्द साहित्य खण्ड–3 पृष्ठ 42)

"SECTION 354 I.P.C. – A PLEA FOR ITS AMENDMENT."

- R. K. Rastogi,[1]

Section 354 I.P.C. which deals with indecent assault on woman runs as under:

"whoever assaults or uses criminal force to a woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The aforesaid offence under the First Schedule of the Cr. P.C. is a bilabial offence, triable by any Magistrate. The above provision was enacted long ago to cover those cases of indecent assault on a woman, which fell short of rape or attempt to commit rape. Mostly such incidents of indecent assault took place at a secluded place, away from the public eye, and were rightly dealt with and properly punished under the above provision of Section 354 I.P.C.

Recently a trend has developed that a group of persons with a view to take revenge on account of some previous enmity or with some other motive of the like nature, strips a woman at a public place and compels her to move about naket, thereby outraging her modesty which is her most valuable asset. The war of Mahabharata was fought simply on this account that in the Rajya Sabha of Dhritrashtra, an attempt was made by Dushasan to strip Dropadi under the instructions of Duryodhana etc. and Dropadi could never forgive Dushasan for this misdeed, thought she was kind enough to forgive Aswatthama, who had mercilessly killed her all five sons, when they were sleeping in their camp after the end of the war, stating that by giving death sentence to Aswatthama her sons could not be alive, but on the other hand, the mother of Aswatthama, would be suffering from the same mental pain and agony from which she was suffering at that time, and so fruitful purpose was going to be served by punishing Aswatthama. Such a kind lady, who forgave Aswatthama for the heinous murder of all her sons, could not forgive Dushasan for the attempt to strip her in the Rajya Sabha. She did not dress her hair for 13 years and dressed them only after washing them with the blood of Dushasan after his death in the battle-field.

What I want to stress is that keeping into consideration the gravity of the offence of public stripping of a woman, an amendment should be made in Section 354 I.P.C. to the following effect.

The present Section 354 I.P.C. should be re-numbered as Section 354 (1) I.P.C.

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[1] District & Sessions Judge, Chamoli.

Section 354 (2) I.P.C. should be added below the above sub-section to the following effect;

"Whenever in any such assault criminal force is used to any woman to strip her publicly and the woman is stripped as a result of such assault or use of criminal force, the offender shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine."

Schedule - I of Cr. P.C. should also be amended and after the present entry in respect of section 354 I.P.C., the following words should be added in columns No. 2, 3, 4, 5, and 6.

"Column No. 2: Stripping of a woman publicly with intent to outrage her modesty."

"Column No. 3: Imprisonment for ten years and fine."

"Column No. 4: Ditto."

"Column No. 5: Non-bailable."

"Column No. 6: Court of Session."

The kind attention of the lawmakers is invited to consider the necessity of making suitable amendment in the light of the submissions made above.

Compensation For Sex Slaves

SEOUL: The South Korean Foreign Minister, Mr. Tae Chong-ha has demanded compensation from the Japanese Government for atrocities committee on sex slaves during World War II.

"It is not acceptable from a legal viewpoint that Japan assumes no responsibility to provide compensation to the comfort women," Mr. Yoo said at a Parliament meeting. "That's because there were no discussions on the comfort women issue at the time the Korea-Japan basic agreement was signed in 1965," he added.

The basic agreement settled all claims made by South Korea to Japan's colonial rule of the country. Under the agreement, South Korea accepted $500 million in grants and loans.

Mr. Yoo's remarks are considered as South Korea advancing one step further in the comfort women issue, taking into account that it has called on Japan to take steps acceptable to the victims of forced sexual slavery without directly touching on the legal responsibility of the Japanese government on the issue.

Mr. Yoo also said that he shared the view that South Korea needs to approach bilateral relations (between South Korea and Japan) 'from a new perspective'. (Yonhap)

TENDER GENDER ; TRAILS AND TRIALS

Nirvikar Gupta[1]

Better to say at the beginning what could not help saying at the end: Human virtue has defined limits – human depravity has none. However, the dire need of the hour is neither desperation nor exasperation but to mould and evolve the existing laws and applicable procedure with a more sensitive approach so as to provide an effective Code in the prevailing legal set up.

Even after completing 50 years of independent India when offences against women are scaling newer heights every day and night, the time has come for jurists, Judges and other devoted to the realm of law to have a closer study of various pitfalls and trails in the trials of offences against women.

First Information Report-Delay *Perse* Immaterial ; Sexual Offence

Generally speaking the wheels of law are set into motion by lodging an FIR. True that an FIR has to be lodged without unreasonable delay to eliminate the chances of consultation, fabrication and planning by others, yet while dealing with crimes against women the usual defence of delay in lodging FIR should be viewed in the light of some special factors. Sometimes delay computed with precision in minutes, hours, day or night is attributed as a basis to rob the intrinsic truth of the entire prosecution version. It may or may not happen to be a rule of general application while considering crimes generally yet, where the honour of a family and the reputation of the prosecutrix is concerned the Courts cannot overlook the fact that some delay might be caused in lodging of the FIR due to variety of reasons viz the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns with their reputation and honour. The apathy of the relations and their kith and kin to avoid reporting the matter to the police out of reproach and ignorance of procedural technicalities leads to delay. It is not the law that every delay is fatal to discredit the prosecution version.

The Hon'ble Supreme Court in *Gurmit Singh Case*[2] has held that the reluctance of the prosecutrix or her family members to go to the police and complain about the incident cannot be made a rebel against the realism so as to defy the sanctity and credibility of the prosecution case. It is only after giving a cool thought to the untimely and flaring incident happened, that a complaint of sexual offence is generally lodged either by the prosecutrix or by her family members who take their own time. In the case of *Gurmit Singh* (Supra), after the commission of rape, efforts were made by the Punchayats of two villages to sit together and settle the matter and it was only when the Punchayats failed

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[1] BSc. LLB. HJS. Addl. District and Session Judge/Addl. Director, Judicial Training & Research Institute U.P.

[2] State of Punjab v. *Gurmit Singh*, (1996) 2 SCC 384.

to provide any relief or render any justice to the prosecutrix that she and her family decided to report the matter to the police. Before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussion it might have on the reputation and future prospects of the marriage of their daughter who was trapped in the ugly incident. In the case of *Harpal Singh*[3] even a delay of 10 days in filing FIR was held to have been duly explained as having been caused due to deliberations in the family. In a recent decision in the case of *Priyasaran Maharaj*[4] the Apex Court has held that even the delay by the girls in disclosing the illegal acts of molestation to their parents is of no consequence. How a girl of tender years who is the victim of such an offence will behave would depend upon the circumstances in which she is placed. The Court observed:

> "It often happens that such victims do not complain against such illegal acts immediately because of factors like fear or shame or uncertainties about the reactions of their parents or husbands in case of married girls or women and the adverse consequences which, they apprehend, would follow because of disclosure of such act."

Investigation ; Gender Bias

In India where the society is mainly dominated by males and male chauvinistic approach still looms large in the mental horizons of most people, the Gender Bias takes all of its crude form in suppressing the crime against the fair sex and if reported to the police, then to debilitate the same so that a woman is not in a position to seek a conviction against the guilty one. It has been observed that the investigating agency is still manned by male personnel as women are found in traces in the police service. The investigating officer, sometimes acting on his own whims, societal status and gender bias in his mind either does not conduct the investigation strictly in accordance with the law or leaves various loopholes in the investigation. Sometimes the statement of the victim is not recorded at the earliest stage, medical examination is delayed and if a medical examination is even entrusted to the junior police constables, they too do not take any care in getting the medical examination conducted at an earliest and without taking care that the requisite evidence is not wiped out. On the other hand the accused is rarely got medically examined. This leads to unnecessary criticism in court and the perpetrator of the crime derives undue advantage because of the lapses committed by the investigating officer.

The Law Commission of India in its 41st report has observed:

> "Chapter 45 deals with the effect of irregularities in procedure on the validity of the proceeding in which they appear. The Code recognises the principle that it is not every deviation from or neglect of, procedural formalities and technicalities that would vitiate the proceedings of a

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3 *Harpal Singh* and another V. state of Himanchal Pradesh (1981), SCC 560.

4 State of Maharashtra V. *Priyasaran Maharaj* and others (1997)4 Supreme Court Cases 393.

court. Broadly speaking only irregularities that have caused substantial prejudice to the accused will render the proceedings invalid, while minor or inconsequential errors or omissions are considered curable."

Lapses in investigation may be broadly categorised into irregularities and illegalities. In the Code of Criminal Procedure section 460(a) to (i) sets out a list of irregularities which do not destroy the prosecution version at the very root itself. It was held long back in the cases of *H.N.Rishbud*[5] and *Sailendra Nath*[6] that a defect or illegality in investigation, however serious has no direct bearing on the competence or the procedure relating to cognizance or trial.

Rule of Caution and Test

The only rule of caution is that there should be no miscarriage of justice caused thereby. Lord Denning has observed about the role of a police officer that :

> " A society for its defence needs a well led, well trained and well disciplined force of police whom it can trust and they be able to prevent crime before it happens or if it does happen to detect it and to bring the accused to justice."

The true test is the prejudice caused to the accused because of faulty investigation and not the mere fault in the investigation itself. If the prosecution evidence is held to be true and the accused have full say in the matter the conviction cannot be refused or set aside on the ground of mere irregularities in the matter of investigation. The Hon'ble Supreme Court in the case of *Bhagwant Kishore Joshi*[7] has held that there must be sufficient nexus, either established or probabilised, between the conviction and irregularities in the investigation.

In a recent decision in the case of *Kamel Singh*[8] the Hon'ble Supreme Court has commented upon the defective investigation:

"Notwithstanding the unhappiness regarding the nature of investigation", observed Hon'ble Mr. Chief Justice *A.M. Ahmadi* "It is to be considered whether the evidence on record, even on strict scrutiny establishes the guilt. In case of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting the accused solely on account of the defect. To do so would tantamount to playing in the hands of the investigating officer, if the investigations is designedly defective." The court further held, "to acquit the accused because of the loopholes in the prosecution would be adding insult to injury.

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5 *H.N.Rishbud* V. State of Delhi AIR 1955 SC 196; 1956 Cr LJ 526.
6 *Sailendra Nath* V. State of Bihar, 1968 Cr.L.J.1484; AIR 1968 SC 1292.
7 State of UP V *Bhagwant Kishore Joshi* 1964 (I) Cr LJ 140, AIR 1964SC 221.
8 *Kamel Singh* V. State of M.P. 1995 (2) ALT (Cri.) 485 (SC) (Hon'ble Mr. Justice *A.M. Ahmadi* C.J. and the Hon'ble *Mr. Justice S.C.Sen).*

Investigation in Dowry-deaths

In dealing with the investigation in cases of dowry deaths which are scaling new peaks in Haryana and Rajasthan the Hon'ble Supreme Court held in the case of Joint Women's Programme[9].

> "We direct that investigation shall be conducted by an officer not below the rank of Superintendent of Police. In case it has so far been conducted by an officer lower in rank to him, the Superintendent of Police will also give a fresh look to the whole matter and proceed further with the investigation without being inhibited by the view taken by the subordinate officers earlier if circumstances so demand." The court further directed the State of Haryana and Rajasthan, "By way of an interim order to create a Special Dowry cell at the State level to investigate into the dowry deaths through specialised investigative units."

In the case of *Lichhama Devi*[10] the Hon'ble Supreme Court deprecated and commented adversely against the indifferent attitude of the investigating agency in the following words:

> "In the instant case of dowry death, during the investigation the accused mother-in-law, who was charged to have poured kerosene on the deceased, her daughter-in-law herself stated that her son, might have burnt her daughter-in-law. He is the elder brother of the husband. He was also seen by the neighbours behind the kitchen and running downstairs at the time when daughter-in-law was in flames inside. The police, however, did not prosecute him. The husband of the deceased appears to have no human qualities. He was a silent spectator for all the dastardly attack on his wife. He had not even the courtesy to take his wife to the hospital. He did not even make arrangements for securing blood when she was struggling for life. He positively dissociated himself as if he had nothing to do with his wife. His tacit understanding with those who have perpetrated the crime is so apparent that it could not have been ignored. Yet he was not charge-sheeted."

To iron out these defects in the State of U.P. the offences under Section 304 B I.P.C. relating to dowry death have been directed to be investigated by senior police officers not less than the rank of C.O. This has to some extent rendered credibility to the investigation conducted. However, the need of the hour is to provide a well trained, qualified and experienced police officers to conduct investigation without any favour or fear. The matter of investigation of offences against women should be primarily allocated to women police officer recruited in the service or to the women wing specially

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9 Joint Women's Programme V state of Rajasthan and others AIR 1987 S.C. 2060, (1987) 2 J.T. 764 (1)

10 Lichhma Devi V State of Rajasthan, AIR 1988 S.C. 1785.

established for investigating crimes against women. The investigation should be scientific, methodical and fair. If it is found that the investigation has suffered from delay or coloured with gender bias or reluctantly regulated or negatively conducted then the investigating officer should also be fairly punished so as to improve the sense of good working in the investigating agency and eliminate further chances of gender-biased in justice.

Prosecution of the case : Separate Courts and Private counsel

"To make a law yet not see that it is enforced is to authorize what you have yourself forbidden."[11] Thus to give effect to the laws is as significant as to make these. The prosecution branch is bestowed with sacrosanct duly to give effect to the laws enacted, to restore equality to women and eliminating gender based discrimination.

In the present set up every offence relating to women is being tried in a similar manner as trial of offences against others. There are no special courts or separate trial forums for disposing of the cases of dowry death, torture or harassment on account of dowry, and gender-bias based offences against women in general. If separate courts are created for trying such offences and they are provided with the required infrastructure to deal with such a variety of offences, the penological object of punishing the guilty ones can be achieved without unnecessary delays. The primary and principal person who places the prosecution version, adducing evidence in it support and thus to bring home the charge, is the prosecution Counsel entrusted with the solemn duties of seeking justice by doing justice with the case. As various special Acts are being pressed into service alongwith latest amendments, there are challenges before the prosecution counsel besides responsibility to cope with the prosecution expectations. This requires that there should be special prosecution counsels to conduct such cases, who are specially trained on the subject and are well aware of the substantial and procedural laws in this behalf.

Plea for Pleader to victim

Section 301 of Cr.P.C. provides that the public prosecutor or assistant public prosecutor incharge of a case may appear and plead before the court in any inquiry, trial or appeal and in case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor in charge of the case shall conduct the prosecution and the pleader so instructed shall act therein under the directions of the Public prosecutor or Assistant Public Prosecutor's and may with the permission of the Court, submit written arguments after the evidence is closed in the case. It is further significant to observe that while Section 303 Cr.P.C. acknowledges the right of the accused to be defended by a pleader of his choice there is no such right provided in the scheme of Cr.P.C. to the victim of offence e.g. a prosecutrix girl or woman or

[11] Maxim in Testament Politique"

her family members etc. In a case from Calcutta[12] it was held that a lawyer engaged by the private party shall have no right of audience and no right to address the court orally. There appears to be no justification for curtailing the rights of the victim of the offence to have a counsel of her choice to place her case before the court of law.

The rules for filing appeal or revision etc, in this behalf are also required to be suitably amended. In the existing legal system no appeal is provided against an order of acquittal at the instance of the complainant or the prosecutix or the victim of such an offence against women and the law provides by the state only instead of providing an individual right to the complaimant or victim of the offence to file an appeal on her own behalf through personally engaged counsel so as to challenge the verdict. A victim may file a revision under session 401 Cr. P.C. before The High Court against acquittal of the accused but the revisional jurisdiction is very narrow and limited-one and a finding of acquittal cannot be converted into that of conviction in view of section 401 (3). Further more the invocation of revisional jurisdiction is not a matter of right but can be exercised in exceptional cases. Inadequacy of sentence can also not be appropriately challenged at the instance of the victim or the complainant even. There appears to be no justification in limiting the participatory role of the victim in the prosecution.

In a landmark decision in the case of *Delhi Domestic Working Women's Forum*[13] the Hon'ble Supreme Court has indicated broad parameters in assisting the victims of rape, as below.

> "The defects in the present system are: Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims invariably are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself.
>
> In the background, it is necessary to indicate the broad parameters in assisting the victims of rape.
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> (1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for

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[12] Rakhan in (1988) Cr. L.J. 278 (Para 16) (D.B.)

[13] (Delhi Domestic working women's forum v. Union of India, 1995 SCC (Cri) 7 decided by S. Mohan J. (Bench constituted by M.N. Venkatchaliah C. J. and S.B. Majumdar also.)

example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represents her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station. The guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under the duty to inform the victim of her right to representation before any questions were asked to her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) it is necessary, having regard to the directive principles contained under Article 38(1) of the Constitution of India to set up **Criminal Injuries Compensation Board.** Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the **Criminal Injuries Compensation Board** whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."

Compounding

The Code of Criminal Procedure does not provide a fair scheme in the compounding of the case by women-victim. While a victim cannot avail compounding under section 320(2) unless she herself is the complainant and with the permission of the court. Section 320 (1) I.P.C. confers an absolute right on the victim to oust the jurisdiction of the courts and thus let the guilty escape the penetly of law. To the contrary the provisions of section 498 A have been kept outside the purview of compoundable offences and though

sincerely required in the welfare of the family – the offence U/S 498 A IPC has been kept outside the scope of section 320 I.P.C."[14]

Heavily commenting upon the inefficient prosecution in the case of *Nilamani Das* [15] the Orissa High Court remarked:

> "It is strange that counsel for state declined to examine as many as six witness including investigating officer and the informant merely because two other witness had stated something about the alleged acts of the accused persons. The manner in which prosecution was conducted leaves a bad taste in the mouth. The prosecutious who have a vital role to assist the court, many fail in their duties."

True that "when a State undertakes a case, the rights of the complainant becomes subordinate to that of the state"[16] yet the role of a victim aggrieved party has been highlighted by the Allahabad High Court[17] That the "Complainant aggrieved party may not have any legal right of being heard but the rule of prudence and natural justice requires that the aggrieved party must be afforded an opportunity to have its say personally or through a counsel of his choice, if he so desires".

Opposing grant of Bail: and Cancellation

The principle governing the grant of bail have been so laid, understood and interpreted that grant of bail is a matter of rule and refusal an exception[18], that a person accused of an offence is to be presumed innocent till he is proved guilty[19] ; that a person accused of an offence has to be provided with opportunity to defend and to secure bail even though involved in graver and serious crime particularly against women. They, thus enlarged indulge in tempering with evidence, interfering in investigation, threatening the prosecutrix and her family members. The resultant effects are not secret and known to all.

The existing legal system do not permit the prosecutrix or the victim of an offence of the gender bias to participate in hearing of bail. The usual trend is to depend upon the 'mercy' of the prosecution counsel who but for his variety of involvements has little thought to the interests of victim rather to look after his own interest and that of the offender. In the case of *khimiben*[20] it was observed by the Gujarat High Court:

"Despite announcements by the State Government that it is taking

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[14] *Suresh Nath Mal Rathi Nath* V. State of Maharastra and other 1992 Cr. L.J. 2106 (No. dispute between parties left, destruction of married life in case permission refused. suggestion made for amendment in section 498 A I.P.C. and 320 I.P.C.

[15] *Nilamani Das* v. *Bhikari Nayak*; 1992 Cr.L. 2242.

[16] *Bishesar* v. R. AIR 1949 Allahabad 213 (214)

[17] *Lakhanpur Panti* v. *Ram Dev*; 1993 Cr.LJ 3277 (All)

[18] *Gurucharan* v. State AIR 1978 SC 179 and *Babu* v. State of U.P.; AIR 1978 SC 527.

[19] State of Rajashthan v. *Balchand*; *AIR 1977 SC 2447*

[20] *Khimibev* vs State of Gujrat 1994 Cr.LJ 1994.

special care in cases of atrocities on women, dowry deaths etc., unfortunately in practice what we are noticing is that simple step like moving the High Court for cancellation of the bail is either not taken at all, if taken, then the same is not taken as expeditiously as one ordinarily expects it to be. This court is coming across several such cases wherein the State Government has not moved for cancellation of bail and as a result, the aggrieved individuals having been left with no alternatives, are constrained to file the application for cancellation of bail."

The victim of offence of gender discrimination has no established right in the Code of Criminal Procedure to oppose bail nor there is any procedure of giving her notice of bail even in the gravest or harshest crimes against her. The Allahabad high Court[21] is of the view that "though the complainant may or way not have legal right of being heard yet the rule of prudence and natural justice requires the aggrieved party must be afforded an opportunity to have is say personally or though a counsel of his/her choice if so desired."

Duty of the State

The role of the State is not only to provide legal assistance to the accused or under trial but to see that the interests of the victim are also adequately safeguarded. "The State Governments made little effort for opposing the bail application or moving the application for cancellation of bail where it has been granted. Quite often, the offender is able to bribe the concerned public prosecutor with the result that the bail application is not resisted at all."[22]

In a bride burning case[23] the Delhi High Court rejected permission to oppose the bail, sought by the father of the deceased and some woman organisation on the ground that granting of such permission would amount to "extending the creed of populism in the realm of judicial action." The court further observed' "The father of the deceased may be interested in the result of the proceedings but that by itself does not give him any right to intervene in these bail proceedings."

To make the machinery of law more effective and workable the women should be provided to have their say in bail matters as well.

EVIDENCE DURING TRIAL

"Frailty thy name is woman" said *Shakespeare* and when this frailty is taken advantage of, in committing an offence against 'your sister his mother and my wife' another ordeal of crude, rude and nude behaviour partake into criminal trial while the frailty gathers some meek courage having come to the courts to seek justice. Influenced by prejudices of time, Aristotle had opined

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21 Gram Sabha Lakhanpur v. *Ram Dev* 1993 Cr.LJ. 3277

22 See ' Victims Participation in Trial of the Offence" By: Dr. D.D. Rishi. ; 1996 (Journal – p. 117.)

23 *Praveen Malhotra* v. state 1990 Cr.L.J. 2184.

'women belonged with slaves as naturally subordinate and quite unworthy of participation in public affairs". The sands of past culminating in the rocks of male chauvinism take its ugliest form of gender bias in the courts of law.

The male offenders, exhibiting their self assumed superiority start demeaning and degrading the tender gender in Court. This entails endless adjournments on countless flimsly grounds, well planned delaying harassment besides teasing and taunting-cross-examination crossing all sophistication barriers for decency in courts.

It was probably with these thoughts in mind that the Hon'ble Supreme Court in a recent decision in the case of State of Punjab v. *Gurmit Singh (Supra)* has observed the nature of crimes against women, and the evidence during trial *vis-a-vis* the approach of the Court in following words:

> "Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female, The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

Continual Questionings Should Be Avoided

The court was conscious of the harassment to the victim of sexual assault during unending cross examination at the persistent instances of the defence counsel. In *Gurmit singh* the Supreme Court observed;.

> "There has been lately, lot of criticism of the treatment of the victims of

sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts not withstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her soon as to make them appear inconsistent with her allegations. The court's,therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the Court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as discrepancies and contradiction".

TRIAL *IN CAMERA*

Keeping in mind the aggravating agony of the prosecutrix in such cases and making a reference to section 327 of the Cr. P.C. whereby it has been provided that offence under Sections 376, 376A, 376B, 376C and 376D, of IPC have to be conducted *in camera*, the Hon'ble Supreme Court in the case of *Gurmit Singh* considered the proviso to Section 327 and held that "these two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court *in camera*. The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section(2) of Section 327 Cr.P.C. is not only significant but very important. It casts a duty on the court to conduct the trial of rape cases etc. invariably '*in camera*'. The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) Cr.. P.C. and hold the trial of rape cases *in camera*. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial *in camera* would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood.

The High Court would therefore be well advised to draw the attention of the trial courts to the amended provisions of Section 327 Cr.P.C. and to impress upon the presiding officers to invariably hold the trial of rape cases *in camera*, rather than in the open court as envisaged by Section 327(2) Cr.P.C."

Publicity of Trial and Trial by Lady Judges

The Apex Court, realizing further embarrassment of the victim of sexual crime and its elimination during trial observed in the case of *Gurmit Singh* (Supra).

> "When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) Cr.P.C. This would save any further embarrassment being caused to the victim of sex crime. Whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can made her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327 (2) and (3) Cr.P.C. liberally. Trial of rape in camera should be the rule and an open trial in such cases an exception."

Section 228(A) was also inserted in Indian Penal Code by same Criminal Law Amendment Act of 1983 through which printing and publication of name or any matter which marks the identity of victim of rape known, is punishable with imprisonment for a term which may extend up to two years and shall also be liable to fine. But it is permissible only under an order in writing by Police Officer incharge of Police Station investigating into offence or written authorisation is given by the victim or if the victim is dead, minor or of unsound mind, authorisation by next of kin. Furthermore this section also prohibits the publication of proceedings of court, except with the previous permission of Court and non-compliance of it, results in imprisonment of a term which may extend up to two years and shall also be liable to fine which is evident of its cognizable and bailable nature. However, publication of judgement of High Courts and Supreme Courts does not amount to offence under this Section.

The trial Judge has an important and significant role in saving the women from further humiliation and character assassination during cross-

examination and he should actively participate in the proceeding rather to sit as a mute spectator in the trial

BURDEN OF PROOF.

In Dowry Deaths

In criminal jurisprudence the burden of proof of the crime lies on the shoulders of prosecution and the accused is initially taken to be innocent until proved guilty of the charges levelled. The legislature keeping in mind the increasing incidents of dowry deaths has loosened the rigour of law and lessened the burden of proof by making special provisions for the 'evidential burden' in such cases. The most important section, to be noted at the first sight in this perspect is section 304B I.P.C.[24]

It reads as follows:

"Sec. 304B Dowry Deaths: (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband, for or in connection with any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation: For the purposes of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act 1961 (28 of 1961).

2. Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

It would be worthwhile to make a mention of the four essentials to constitute an offence under Section 304B IPC which have been summarised by the Hon'ble Supreme Court in the noteworthy case of *Shanti*[25] as below:

" A careful analysis of S. 304B shows that this section has the following essentials:-

(1) The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances;

(2) Such death should have occurred within seven years of her marriage;

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

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[24] Section 304 IPC inserted by Act No. 43 of 1986 w.e.f. 19.11.1986.
[25] Shanti v. State of Haryana, (1991) ISCC 371; AIR 1991 SC 1296.

(4) Such cruelty or harassment should be for or in connection with demand for dowry.

Then there are recent amendments in the Evidence Act whereby section 113A and 113B of Evidence Act have been added. These read as follows:

Section 113-A Presumption as to abetment of suicide by a married woman:- when the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Section113 B. Presumption as to dowry death:- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with any demand for dowry, the court shall presume that such person had caused the dowry death.

CONSENT IN RAPE CASE

As the mater of "consent" of woman alleged to have been raped had been a much debatable point during trials of offences covered under Section 376 IPC, section 114-A has been inserted providing a statutory presumption in such cases which reads as follows:

Section 114A- Presumption as to absence of consent in certain prosecutions for rape- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

It may be pointed at this juncture that though the presumption of Section114-A Evidence Act has been made applicable to offences under Clauses (a), (b), (c), (d), or (e) of sub-section (2) of Section 376 IPC it has not yet been specifically and expressly made applicable to offences relating to clause (f) to Section 376 presumably because a child witness's evidence has to be considered with caution.

Summarising the scope of the section 304B in the light of Section 113B of the Evidence Act, the Hon'ble Supreme Court in its recent decision,

Hemchand V. State of Haryana[26] observed.

> "A reading of Section 304-B IPC would show that when a question arises whether a person has committed the offence of dowry death of a woman what all that is necessary is it should be shown that soon before her unnatural death, which took place within seven years of the marriage the deceased had been subjected, by such person, to cruelty or harassment for or in connection with demand for dowry. If that is shown than the court shall presume that such a person has caused the dowry death. Likewise there is presumption under Section 113-B of the Evidence Act as to the dowry death. Practically this is the presumption that has been incorporated in Section 304-B IPC also. It can therefore, be seen that *irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed the dowry death* provided the other requirements mentioned in the section are satisfied. (emphasis supplied).

Highlighting the concept of consent, the Hon'ble Supreme Court in another decision in the case of Raju[27] has held that.

"Even the fact that the prosecutrix (a nurse in a clinic) was simple enough to repose confidence in accused person after taking food with the accused persons, stayed with them in a room in a hotel while on way to attend the marriage of her brother, was not held to be a circumstance to believe that she was a consenting party". However, the circumstance of staying in the room voluntarily with the accused by itself was treated to be a mitigating circumstance in reducing the sentence.

In another decision of *Ranvir Singh*[28] rendered recently the accused gave lift to the prosecutrix and her companions in a truck and committed rape on her while the accused drove away the truck with the prosecutrix leaving her two companions near the Rly. Station and the prosecutrix was found below the driver's seat. The Hon'ble Supreme Court held that.

"Even if the prosecutrix was a woman of easy virtue, she could not be raped by the accused, If she had voluntarily agreed to have sexual intercourse with the accused, she would not have complained immediately."

Though Presumption- yet no assumption

It is not in every case to draw a presumption under Section 113B of Evidence Act so as to pass a conviction under Section 304B IPC. In the case of *Rajnesh Tandon*[29] the Hon'ble Supreme Court took into consideration the cordial relationship between the deceased (wife) and her husband as well as

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[26] *Hemchand* v. State of Haryana (1994) 5 SCC 727.
[27] *Raju & Krishana* v. State of Karnataka ;(1994) ISCC 453.
[28] *Ranvir Singh* v. State of Madhya Pradesh. (1996) 11 SCC 595.
[29] *Rajnesh Tandon* v. State of Punjab, 1995 SCC (Cri) 817.

relatives, non-production of any letters written by the deceased to her family members, the diametrically opposed evidence of some of the witnesses and also suicide note written by the deceased (wife) before her death and lastly the cumulative effect of the entire evidence which showed on scrupulous examination that the deceased (wife) was not subjected to cruelty or harassment by the appellant (husband) for or in connection with any demand for dowry. The court held in clear words that in the absence of necessary ingredients provided under Section 304B I.P.C. the presumption of dowry death as envisaged in Section 113 B Evidence Act could not be attracted.

However, the Hon'ble Supreme Court has dealt with the effect of the provisions of Sec. 304 B IPC read in the light of Section 113B Evidence Act and in the case of *Shanti (Supra)* it was held reverting to the facts of the case by Hon'ble Mr. Justice *K. Jayachandra Reddy(J):*

> "The facts revealed a saga of atrocities for a few items by way of dowry. The father and brother came to see her but they were driven out and she was not permitted to go with them. The only question that required consideration was whether the death was natural or otherwise. Certain facts convinced the court that she was not claimed by a natural death. Her parents and brothers were not even informed soon after her death and she was hurriedly cremated. This created the presumption of unnatural death under S. 113B of the Evidence Act, 1972. The court found no evidence for the projected theory of heart attack and said. "If it was natural death there was no need for the appellants to act in such unnatural manner and cremate the body in great and unholy haste without even informing the parents, Because of the cremation no postmortem could be conducted and the actual cause of death could not be established clearly. There is absolutely no material to indicate even remotely that it was a case of natural death. It is no body case' that it was accidental death. In the result, it was a unnatural death, either homicidal or suicidal. But even assuming that it is a case of suicide, it would be death which had occurred in unnatural circumstances. Even in such a case Sec. 304B is attracted and this position is not disputed. Therefore, the prosecution has established that the appellants have committed an offence punishable under Sec. 304B. beyond all reasonable doubt."

Standard of Proof:

Many often there are marathon argument advanced on the side of the accused regarding the nature of proof required or the standard of proof necessary to prove charges levelled in relation to dowry deaths, demand of dowry, ill treatment to the wife, suicide and very many other categories of crime against women. It would be pertinent to mention at the very outset that the concept of proof beyond reasonable doubt is gradually undergoing change because of series of judgements rendered by the Hon'ble Supreme Court. The net result is that it is now well established proposition of law in a criminal trial

that the prosecution has to establish its case beyond reasonable doubts unlike a civil case which has to be adjudicated on the basis of probability. However, the meaning of word reasonable doubt can never be so enlarged to make a foundation stone for giving enormous weight to trivial circumstances or factors.

The Hon'ble Supreme Court in a recent decision rendered in the case of State of West Bengal v. *Orilal Jaiswal*[30] has held;

> "In a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubt does not stand altered ever after the introduction of section 498-A IPC and Section 113-A of Indian Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offence alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials places on record. The doubt must be of reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter."

In *Gurbachan Singh*[31] Hon'ble Mr. Justice *Sabyasachi Mukharji* had indicated.

> "That the conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgement. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. *Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty is not doing justice, according to law.*" (emphasis supplied).

SUICIDE AND HYPERSENSITIVITY-DOWRY DEMAND

In *Shivaji Saheb Rao Bobade*[32] followed in *Pussu*[33] the Apex Court ruled, in the words of Venkataramaih J. The "dangers of exaggerated devotion

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[30] State of West Bengal vs. *Orilal Jaiswal* and another :(1994) 1 SCC 773.
[31] *Gurbachan Singh* v. *Satpal Singh* (1990) 1 SCC 445. (By Mukharji and B.C. Ray J.J.)
[32] Shivaji Saheb Rao Bobade v. State of Maharastra,AIR 1972 S.C. 2622 at page 2626-2627.
[33] State of U.P. v. *Pussu* , AIR 1983 S.C. 867 ("A criminal trial is not like a fairy tale when one is free to give flight to ones imagination and fantasy.

to rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr should not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heatedly as a learned author Glanville Williams in 'Proof of Guilt' has saliently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons and more servere punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....." In short, our jurisprudentially enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic."

In the case of Orilal (Supra) the question of committing suicide was not investigated and the court highlighting the concept of hypersensitivity of the deceased vis-a-vis the alleged commission of suicide held.:

> "If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance. discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to endure discord and differences, were not expected to induce a similarly circumstanced individual in given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty. But in the facts and circumstances of the case. there is no material worthy of credence to hold that the deceased was hypersensitive and that for other reasons and not on account of cruelty she had lost normal frame of mind and being overcome by usual psychic imbalance decide to end her life by committing suicide. The evidence in the case reveals an act of extreme form of cruelty by telling the unfortunate mother that she was vile enough to swallow her own baby and she should commit suicide. There is also evidence in the case that the husband used to come home drunk and abuse her and also used to assault her on occasions. The bridal presents brought by her were branded as goods of inferior quality and she was

asked to take the said articles back to her parental home. Such acts, to say the least, were very unkind and a newly married woman is bound to suffer a great mental pain and humiliation. The evidence of the mother clearly establishes that the deceased has been subjected to physical and mental torture all throughout. The husband, instead of giving her solace against the humiliation and abuses hurled by the mother-in-law, either kept silent or expressed his inability to give good counselling to the mother and to protest against act of mental torture and humiliation. On the contrary, he also treated the wife with cruelty by telling her to take the bridal gifts back to her parental home and also by physically assaulting her. Such acts, were quite likely to destroy the normal frame of mind of the deceased and to frustration and mental agony and to end her life by committing suicide."

Change is needed – Awakening required

In adjudicating cases of gender-bias courts are required to apply their mind to the standard of proof which could have been best available in the factual background of the case and also to keep in mind that inevitably there is a long distance to travel between "may be true" and "must be true,"[34] and that suspicion is no substitute for proof and in criminal law the prosecution has to prove the guilt beyond reasonable doubt[35] and even strong emotional considerations[36] cannot replace proof. Thus a reasonably acceptable standard of proof in contradiction to too technical and rigid one, is essentially needed. The observations of the Apex court in the leading case of *Kundula Bala Subrahmanyam*[37] throw flood of light for guidance in such matters:

"Awakening of the collective consciousness is the need of the day. Change of heart and attitude is what is needed. If man were to regain his harmony with others and replace hatred sub by, greed selfishness and anger by mutual love, trust and understanding and if woman were to receive education and economically independent a natural death may not remain a dream only. The legislature, realising the gravity of the situation has amended the laws and provided for stringent punishment in such cases and even permitted the raising of presumptions against an accused in cases of unnatural deaths of the brides within the first seven years of their marriage. The Dowry Prohibition Act was enacted in 1961 and has been amended from growing menace of the social evil, also does not appear to have served much purpose as dowry seekers are hardly brought to book and convictions recorded are rather few. Laws are not enough to

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[34] As observed by the Hon'ble Supreme Court in *Sarwan Singh* v State of Punjab ; AIR 1957 SC 637.

[35] *Jaja Singh* v. State of Punjab, 1994 (Cri) SCC 1798, in this case the Hon'ble Supreme Court held that merely accused was seen running way from the place of occurrence it cannot be held that he was guilty of murder and attempted rape of a young girl.

[36] *Akilesh Hajam* v. State of Bihar, 1995 Supp. (3) SCC 357.

[37] *Kundula Bala Subrahmanyam* v. State of Andhara Pradesh, (1993) 2 SCC 684.

combat the evil. A wider social movement of educating women of their rights, to conquer the menace, is what is needed more particularly in rural areas where woman are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation. The role of courts, under the circumstances assumes greater importance and it is expected that the court would deal with such cases in a more realistic manner and not allow the criminals to escape on account of procedural technicalities or insignificant lacuna in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the trial court. This case is an apt illustration of the lack of sensitivity on the part of the trial court. It recorded the verdict of acquittal on mere surmises and conjectures and disregarded the evidence of the witnesses for wholly insufficient and insignificant reasons.

RAPE AND MURDER

While considering the case of rape and murder of a young girl by the security guard of the building[38] Dr. *Anand J.* of the Supreme Court held that conviction can be solely based on the circumstantial evidence and emphasised on the nature of evidence required as:

> "All the circumstances established by the prosecution, as discussed above are conclusive in nature and specific in details. They are consistent only with the hypothesis of the guilt of the appellant and totally inconsistent with his innocence"

Simply because the injuries found on the private parts of the girl could also be caused in several ways than the sexual assault as the victim could not be made the basis of an 'unmerited acquitted'[39] particularly in crimes against girls child which would encourage criminals,. Appreciation of the evidence in a realistic manner[40] has to be done keeping in mind that different persons react differently in different situations and circumstances. No hard and fast rule of universal application with regard to the reaction of a person in a given circumstance can be laid down. Most often when a person happens to see or come across a gruesome and cruel act being perpetrated within his sight then there is a possibility that he may lose his equilibrium and balance of mind and therefore he may remain as a silent spectator till he is able to reconcile himself and then react in his own way. There may be a person who may react by shouting for help while others may even choose to quietly slip away from the place of occurrence giving an impression as if they have seen nothing with a view to avoid their involvement in any way with the occurrence. Yet, there may be persons who may be so daring, hazardous and chivalrous enough to come forward unhesitantly and jump in the fray at the peril of their own life with a zeal to scare away the assailants and save the victim from further assailants.

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[38] *Dhanjanjaya chatterjee* v. State of West Bengal, 1994 SCC (Cri.) 358.
[39] *Faizanuddin J.* in the case of State of U.P. v. *Bapul Nath*. 1994 SCC (Cri) 1585.
[40] *Marwadi Kishor parmanand* v. State of Gujarat, 1994 SCC (Cri.) 1294.

Similarly merely because the girl was not available to be examined[41] (since dead having committed suicide after the incident of rape) the prosecution case was held not to be thrown altogether. The agitated mental state of a rustic woman[42] in a case of outraging modesty or rape of a village girl has to be kept in mind and inconsequential and immaterial mistakes in identification of any pros cution witness cannot weaken her evidence. In a case of uxoricide[43] the cc nduct of the accused in not putting out the fire nor raising an alarm seeking he help of the others was held to be consistent with the guilt. Simultaneously when deceased received 100% burns and there was absence of cries[44] suicide was ruled out. Like wise the abscondence[45] or non-abscondence[46] of the accused has been held to be not by itself a determining factor. Yet in the case of *Kundula Bala Subramanyam*[47] it was taken to be an important and significant circumstance in the chain of circumstances pointing to the guilt of the accused.

It is now firmly established that minor discrepancy in the testimony or incorrect statement of number of days after which complaint was filed[48] or even the non-examination of certain persons or witnesses whose statements were recorded by the police[49] or the part of the testimony being untruthful are not destructive to the truth of the prosecution[50]. The established principles of the standard of proof were opthy laid down by Thakkar J, in the case of *Bhogini Bhai Hirjibhai*[51] in the following words:

> "Overmuch importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so when the all important "probabilities factor" echoes in favour of the version narrated by the witnesses.

A similar view was taken by the Hon'ble Supreme Court in the case *M.K. Anthony*[52]. The Court observed:

> 'Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of contest here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence a whole. If the Court before whom the witness gives evidence had the

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41 State of Karnataka v. *Mahabalshwer Gaury Naik*, 1993 SCC (Cri) 180.
42 State of Tamil Nadu v *Karuppuswamy*, 1993 SCC (Cri) 123.
43 *Betal Singh* v. State of Madhya Pradesh, (1996) 4SCC 205.
44 *Prabhudayal* v. State of Maharashtra, 1993 SCC (Cri) 950.
45 *Rajinder Singh* v. State of U.P./1993 SCC (Cri) 135.
46 *Baboo* v. State of M.P., 1993 SCC (Cri) 1047.
47 *Kundula Bala Subramanyam* v. State of A.P.,1993 SCC (Cri) 655.
48 *Gajanand* v. State of Gujrat, 19 CrLJ 37419.
49 *Sawal Das* v. State of Bihar, AIR 1974 SC 778.
50 *Gajanand's* case (supra).
51 Bhogini Bhai Hirjibhai v. State of Gujrat, AIR 1983 SC 753 ; 198 3 Cr LJ 1096.
52 State of U.P., V. *M.K. Anthony*, 1985 SC 48 : 1985 CrLJ 493.

opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trial details."

The value which should be attached to the testimony of the victim of sexual offence has to be judged in the Indian perspect and not with inflexible rigidity which with dead uniformity and unrealistic diversity may introduce a new type of procedural tyranny[53] In a case where victim belonged to backward and poor class[54] it was observed relying upon the observations in the case of *Bhognibhai* by Ravani, J. in the case of Gujanand (supra).

"It is highly improbable that the girl and her relatives would ever invent false charges against the accused by inviting dishonour and disgrace on herself and on the family. Such a course would mar her further career. By inventing false charges she would inflict injury on herself. No sane person would adopt such a course, even for the purpose of wreaking vengeance if there be any.

Referring to backward classes the Court observed.

"Moral character and such other virtues are not the monopoly of rich, educated and so called upper caste elites in the society. The backward class people are generally poor in terms of character. For them violation of law or that of social norms in not the culture of their life. They are afraid of violating social norms and traditions. They do not know what the law is and they never dream of breaking the law. They cannot afford to lead the life or behave in any manner disregarding the social sanctions. Violation of social norms and disregard of the social sanctions may be possible for the few fortunate rolling into wealth because they can win the respect of others with the help of their money power while this is not possible for backward and poorer class of people."

CHARACTER OF THE PROSECUTRIX IF A VALID DEFENCE

Usual tendency in defending the cases of sexual violence against women is to attribute to the prosecutrix easy virtue and her promiscuous conduct and character in the past. The aim is to discredit the victim's credibility.

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[53] See *Rafiq* v. State of U.P., 1980 CrLJ 1344 (para 5)

[54] by *Sri V.R. Krishna Iyer, J.* of Supreme Court in the case of Gajanand (Supra)

"Generally immoral character" – Imputation and proof.

Section 155 (4) of the Evidence Act[55] provides that in sexual offences the credit of the prosecutrix may be impeached by showing that she was of "generally immoral character". Taylor commenting upon the worth of the provisions so incorporated had observed that in a case of indictment for rape or attempts to commit that crime, not only the evidence of general bad character of the prosecutrix is admissible but also the proof that she is a reputed prostitute, for it goes far towards raising an inference that she yielded willingly. Cunnigham has remarked that "The character of the woman as to chastity is of considerable probative value in judging of the likelihood of her consent". The same view was incorporated in a decision in the case of *Karamat*[56] wherein it was held that "That prosecutrix can be cross-examined to show her consent in other immoral acts." However in a later decision in the case of *Wahid Ali*[57] it was observed; "such evidence, in our opinion, means some thing more than that it can be proved that she has on specific occasions done acts which may be called immoral. Thus, same meaning has to be given to the words 'generally' used in Clause IV of Section 155, which refers to the "general reputation of the prosecutrix to be a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men."

A composite reading of section 155 Evidence Act makes it amply clear that this section was enacted for the purposed of impeaching the credit of a witness in the ways provided in this section.

Character-what is?

Character is not defined either in I.P.C. or in General Clauses Act. The terms occurs in Section 140 Evidence Act and as a whole in the 9th exception to section 499 of I.P.C. According to Lord Denning "A man's character is the exteem in which he is held by others who know him and are in a portion to judge his worth." It was held in the case of D. *Rama Subba Reddy*[58] "Character is an expression of very wide import which takes in all the traits, special and particular qualities impressed by nature or habit serving as an index to the essential, intrinsic nature of a person. Character also includes reputation. but character and reputation are not synonymous." In a recent decision in the case of *Raghuvir Singh*[59] The scope of section 140 Evidence Act read in the light of section 155 of the Evidence Act was closely scrutinized and dealt with.

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[55] Section 155; Evidence Act impeaching credit of witness. The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the courts, by the party who calls him.

[56] Karamat v. Rex ; AIR 1926 Cal. 147 When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

[57] Wahid Ali v. Emperor, AIR 1932 Cal. 523.

[58] D. Rama Subba Reddy v. PVS Rama Das, 1970 Cr. LJ 83 (AP)

[59] State of U.P. v. *Raghuvir Singh* (1997) 3 S.C.C. 75.

Imputations to character-permissible extent

In criminal prosecutions the word character means character generally, and quite apart from the issue raised by the indictment including moral antecedent. The Hon'ble Supreme Court in the case of *Raghuvir Singh*[60] (supra) observed "Though sections 140 and 155 of the Evidence Act permit that "the witnesses to character may be cross-examined and re examined" and the credit of the witness may be impeached in the modes enumerated therein, yet Court should not allow indecent and scandalous imputations on the moral character of the witness. In the case a mother it was held that the murderer cannot escape off establishing that the mother of the child was of loose morals."

Very recently in the case of *Dayanand*[61] a learned single judge of the Hon'ble Allahabad High Court acquitted the accused for the charges of rape taking into consideration her illicit relationship with the accused and holding that, "it becomes apparent that she was a girl of easy virtue". However in the case of *Gangula Satya Murti*[62] Hon'ble Thomas, J. held that:

"Casting stigma on the character of prosecutrix should be deprecated and even in the circumstances that the prosecutrix was used to sexual intercourse prior to rape, she had every right to refuse to submit herself to sexual intercourse against her will."

The court held that a girl of woman is not a "vulnerable object or prey for sexual assault by any one and casting stigma on the character of the prosecutirx is unwarranted in law. In the case of *Gurmit Singh*[63] it has been reiterated that character must be avoided by the Courts as a matter of self-restraint while recording such findings. Even if the girl is found to be habituated to sexual intercourse, Dr. Anand, J. held that uncharitable and unjustifiable characterisation of the girl victim as " a girl of loose moral" or " such type of a girl" is erroneous and such observations lacks sobriety expected of a judge. The Court further observed:

> "Such like stigmas have the potential of not only discouraging an even otherwise reluctant victims of sexual assault to bring forth complaint for trial of criminals, there by making the society suffer by letting the criminal escape even a trial. The courts are expected to use self restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as whole where the victim of crime is discouraged, the criminal encouraged and in turn crime gets rewarded! Even in cases, unlike the present case, where there is some acceptable materials on the record to show that the

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[60] See R.V. Vallett (1951) 1 All E.R.231.
[61] Dayanand v. State of U.P., 1996 Cr. LJ 4263 (All).
[62] State of A.P. v. *Gangula Satya Murti*, (1997) 1 SCC 272.
[63] State of Punjab v. *Gurmit Singh*, (1996) 2 SCC 384.

victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in the given case, has been promiscuous in her sexual behavious earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexual assaulted by anyone and everyone. No stigma, like the one as cast in the present case, should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the court."

In the case of *M.N. Mardika*[64] Ahmadi, (J) as he then was, reversing a decision of the Bombay High Court, held that even a prostitute or a woman of easy virtue is entitled to privacy and equally entitled to the protection of law. As such her evidence cannot be thrown over the board on the ground that she is a woman of easy virtue.

"The observation of the High Court that the complainant being an unchaste woman it would be extremely unsafe to allow the fortune and career of a Government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person was wrong. On the contrary she was honest enough to admit the dark side of her life. Her evidence was also corroborated in material particulars."

Even the promiscuous character of the prosecutrix is of no relevance as has been held in the recent decision in the case of *Ranvir Singh*[65] G.N. Rao J. held that even if the prosecutrix is a woman of easy virtues she cannot be raped for that reason.

Character and Sentence : Correlation

Referring to an earlier decision[66] of the hon'ble Supreme Court wherein after taking into consideration the facts, the court had observed that while no doubt an offence of this nature had to be viewed very seriously and had to be dealt with condign punishment, yet on the peculiar facts and circumstances of this case coupled with the conduct of the victim girl the sentence was reduced, the Court in a subsequent decision in the case of *Prem Chand*[67] observed.

"The factors like the character or reputation of the victim wholly alien to the very scope of section 376 and never serve either as mitigating or extenuating circumstances for imposing the sub-minimum sentence."

The court in very clear worlds expressed its esteem towards woman

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[64] State of Maharastra v. *Madhukar Narayan Mardikar, AIR 1991 SC 207.*
[65] *Ranvir Singh* v. State of Madhya Pradesh, (1996) 11 SC 595.
[66] *Prem Chand* v. State of Haryana, AIR 1989 SC 937.
[67] State of Haryana v. *Prem Chand*, and AIR 1990 SC 538.

"we would like to express that this court is second to none in upholding the decency and dignity of womanhood". It was further held that character, reputation or status of a raped victim is not a relevant factor for consideration by the court while awarding the sentence to a rapist.

Law's Bias – Just yet unjust remarks

A reading of catena of cases indicates that the perpetrators of the crime of rape, have tried to paint the victim as woman of easy virtues, or of "promiscuous character" or 'immoral' and sometimes as being of "loose morals" "bad conduct" having "illicit relations with others" and many more[68]. To lend weight to such derisive aspersions and lurid imputations the medical evidence is pressed into service indicating that the prosecutrix herself was accustomed to sexual intercourse. Thus the' virtue' of the prosecutrix is unnecessarily interlinked with her 'virginity' and the entire judicial process is diverted into adjudging the moral character of the victim.

These judicial dicta notwithstanding the statutory position on the subject has remained unchanged. "On charge of rape, attempted rape, assault with intent to rape and indecent assault, the character of the complainant is relevant to the issue of consent, and she may therefore be cross-examined (1) to show that she is of general bad character, for example that she is a common prostitute, or is of loose morals or is in the habit of having intercourse on first acquaintance whether for money or not, or (2) that she has had intercourse with the defendant on previous occasions and witnesses may be called to give evidence in support of such imputations".[69] Likewise " A defendant may attack the character of a woman who alleges rape without thereby putting his own character in issue".[70] However Andrew and Hirst[71] have expressed the view the extent to which the complainant in a sexual case may be cross-examined as to her previous sexual experience is one of acute sensitivity.

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[68] She was 'habitual of sexual intercourse", Bharat v. State of M.P., 1992 Cr. L.J. 3218.
(b) "She (a minor) creased to be virgin long ago and was used to sexual intercourse", Omi v. State of U.P., 1994 Cr.L.J. 135.
(c) "She must have agreed to sexual intercourse because she was in love with the accused" *Hari Majhi* v. state, 1990 Cr.L.J. 650.
(d) She was a girl of 'easy virtues and having illicit (love) relationship with the accused, " Dayanand v. state, 1966 Cr.L.J. 4263 (All.)
(e) She (a minor) "sought to satisfy her lust" *Satish Kumar* v. state, 1968 Cr.L.J. 565, Balasahipb v. state of Maharastra, 1994 Cr.L.J. 3044.
(f) "The accused was an eligible bachelor and obviously an attractive catch for girls," Janannivasam v. State of Kerala, 1995 Sup. 3 SCC 204.
(g) She was of "questionable character" and "easy virtue" with lewd and lascivious behaviour *Prem Chand* v. State of Haryana, AIR 1989 SC 937.

[69] *R. V. Krausz* (1973) 57 Cr. App. Rep. 466. *R.V. Bashir* and *Manjur* (1969) 3 All ER 692.

[70] By virtue of the Criminal Evidence Act 1898 (England) Selvey V. Director of Prosecution (1970) AC 304. For further details see Halsbury's Laws , of England (Fourth Edition) Vol. II (Criminal Law, Evidence and Procedure) Pages 206-207 (paras 371-374).

[71] Andrew and Hirst on Criminal Evidence

In the case of *Holmes*[72] it was held that "on an indictment for rape or an attempt to commit rape, or for an indecent assault, which in effect may amount to an attempt to commit rape' where the complainant denied that she had had sexual relations with another man, her answer could not be contradicted." However it is significant to observe that the English pattern of society or for that reason the English legal approach to the subject is of no help or application in our country, As was aptly remarked by *Thakkar, J.*[73]

"We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life". The court further observed that "a girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, she being conscious of being ostracized by the society including the fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence."

Viewed in the light of the aforesaid it is quite clear that the presence of section 155(4) of Evidence Act is a clear manifestation of law's bias, for reasons more than one. It not only permits the trials of the victim's morality alone, it provides a crude opportunity to explore her sexual history, her fallibility and thus to discard her credibility. The law's bias is clearly implicit because of the restriction to investigate and lead evidence into the bad character of the accused, and the 'male accused' is well safeguarded and amply protected against any such inquiry or evidence by sections 53 and 54 of the Evidence Act.[74] Andrews and Hirst[75] has opined that the sexual morality, of the complainant should not be made a sufficient reason that she ought not to be believed on oath when "as a general rule the prosecution is debarred from tendering evidence to show that the accused is of bad character, or is guilty of criminal acts other than the offence charged, or has a propensity to commit criminal acts of the same nature as the offence charged, to show that he is a person from his conduct or character to have committed the offence for which he is being tried."[76]

Statutory gender bias

The Apex Court thus rules that "Casting stigma on the character of the prosecutrix should be deprecated"; indecent and scandalous imputations on the moral character should not be allowed", characterizing a rape victim as a

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[72] *R.V. Holmes* (1871) 12 Cox. C. 137) where the complainant denied that she had sexual relations with another man, her answer could not be contradicted. The principle was seen as an application of the rule that answers to questions on collateral issues are final.

[73] see *Bharwada Bhoginibai Hirjibhai* v. State of Gujrat. AIR 1983 S.C. 753

[74] Section 53 (Evidence Act); in criminal proceedings the fact that the person accused is of a good character is relevant.

[75] Andrews & Hirst on Criminal Evidence. Chapter 16

[76] See Halsbury's Laws of England page 204, and *R.V. Horwood* (1970) 1 Q.B. 133, (1969) 3 All ER 1156 at 1158.

girl of loose character must be avoided", "for after all it is the accused and not the victim of sex crime who is on trial in the Court" and lastly in very clear words that "the character, reputation or status of a raped victim is not relevant factor for consideration." This exposition of law is binding on all the courts and everyone in India. (Article 141 of the Constitution) However the validity of section 155 (4) of Evidence Act has not been specifically challenged in any of the decisions and the statutory provisions still holds good. This may further intertwine the legal tangles. Better that in such a piquant situation section 155 (4) Evidence Act is deleted. If not, in the alternative it be substituted with some provisions similar in nature to that of Section 2 of Sexual offences Amendment Act (1976) (England) which requires the Court's leave for adducing such evidence or putting questions in cross-examination which 'seeks to blacken the sexual character of the complainant." Deletion of, or Amending section 155 (4) of the Indian Evidence Act, in the light of aforesaid would considerably extend the protection to the prosecutrix in a trial for rape offence since it would not merely protect the finality of her answers but prevent any question being asked in cross-examination in respect of her early sexual experience. By amending the section, Judges would not only have a discretion but a duty to give leave " If and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked."

Sentencing

The increasing violence against women has forced the law-framers to provides for stringent penal provisions for the same.

PUNISHMENT FOR RAPE

"Rape," observed Hale C.J. of Australia, "is an accusation easily to be made and hard to be proved, and harder to be defended by the party concerned, though never so innocent."

According to the latest report of "Crime Bureau of India" since 1971 upto 1995 there has been an increase of 43.1 percent increase in the rape crime. this requires a closer examination of the offence with the punishments provided and usually awarded.

The punishments for the offence of rape have been provided under section 376 I.P.C. which can be subdivided as follows:-

Sub-section(1): Punishment for rape with a woman other than the wife of the accused is imprisonment for not less than 7 years and it may extend to imprisonment for life or for a term up to 10 years besides fine.

In case the woman raped is the own wife of the accused, a lighter punishment of imprisonment for a term extending to 2 years or fine or both was provided.

First proviso to this sub-section however provides that the court "may for adequate and special reasons impose a sentence of imprisonment of a term of less than 7 years"

Sub-section (2) of section 376 I.P.C. deals with the quantum of punishment in case of police officer who commits rape within the limits of police station or on a woman in his custody, and also in case of a public servant taking advantage of his official position, an officer incharge of the management jail, remand home, women or children institutions taking advantage of his official position and committing rape on inmates of such jail, remand, home, place or institution or in case of the person incharge of the management or the staff of a hospital as well as cases in which a rape is committed on a pregnant woman, or on a woman who is under 12 years of age or in case of gang rape. The punishment provided is rigorous imprisonment for a term which shall not be less than 10 years but which may be for life, and also fine. Proviso to sub-section (2) provides a discretion to the Court to impose a sentence of imprisonment for a term of less than 10 years but "for adequate and special reasons."

Section 376I.P.C. provides the punishment for a term which may extend to two years along with fine for an offence of having sexual intercourse with one's own wife, who is living separately under a decree of separation or under any custom or usage if the intercourse is committed without her consent. A punishment extending to 5 years along with fine has been provided (Sec. 376B) in case the intercourse is committed by a public servant taking advantage of his official position upon any woman who is in his custody s a public servant or subordinate to him. Section 376C provides a similar punishment in case of accused being Superintendent or Manager of a Jail, Remand Home, or other place of custody of women or children and Section 376D IPC provides similar punishment for an offence of sexual intercourse with a woman in the hospital by the management or staff of the hospital.

PENALOGY AND SENTENCING

Although the legislature in its wisdom had provided specific punishments for specific incidents of rape, yet, it is found that the provisions to section 376 IPC have further reduced the rigour of law to a greater extent and thus in very many cases the offender though found guilty are sentenced to go minimal imprisonment. In the case of *Gurmit Singh*[17] although the accused was found guilty of committing rape after abducting a girl of less than 16 years of age the punishment was reduced to 5 years RI and a fine of Rs. 5000/- and in default of payment of the fine to one year RI, " since the accused persons were held not to have been involved in any other offence after their acquittal by the trail court during a period of 10 years" and under the impression that "all

[17] State of Punjab v. *Gurmit Singh*, (1996) 2 SCC 384

the respondents as well as the prosecutrix must have by now got married and settled down in their lives". In the case of *Ranvir Singh*[78] for an offence under Section 376 IPC committed against the prosecutrix who was below 18 years of age a sentence of 3 years RI was held to be sufficient. Likewise in the case of *Maniappa*[79] the Supreme Court although held that the sentence of three years RI passed by the Trial Court for committing rape forcibly on a minor girl aged 14 years too lenient, yet it was observed; "But at this point of time we do not wish to enhance it in this proceeding". In another case of *Ram Narain*[80] the conviction of the accused was upheld by the. Supreme Court, and the theory of the village girl being a consenting party was held not tenable. The punishment awarded by the High Court was for the period already undergone which was equal to 1½ months only while the trial court had awarded a sentence of 7 years RI along with fine of Rs. 200/-. The Supreme Court sentenced the accused to undergo RI for 5 years under section 376 IPC in addition to a fine of Rs. 2000/- and in default to undergo further RI for three months.

Mitigating factors

The theory of reduction in sentence is based on the concept of 'mitigating factors". The expiry of long lapse of time made the Supreme Court to reduce 7 years RI to only 3 years RI in the case of *Raju*[81]. On the other hand, even in a case of attempt to commit rape a sentence of 3½ years RI with a fine of Rs. 1000/- was held not excessive in the case of *Nathu Ram*[82]. In an early decision in the case of *Bharwada Bhognibhai*[83] for an offence under Sec. 376/511 IPC a meager sentence of 2½ years RI was further reduced to 15 months RI on the ground that the accused had lost the job in view of the conviction recorded against him and on the ground that he must have suffered great humiliation in the society, the prospect of getting suitable match for his own daughter have perhaps marred in view of the stigma in the wake of the finding of guilt recorded against him in the context of such an offence and the incident occurred some 7 years back and about 6½ yeas elapsed since the dismissal of appeal by the High Court".

Marriage after rape

In the case of *P. Narsimha*[84] the girl had married with the accused after the incident of the rape, the High Court had acquitted the accused u/s. 376

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[78] *Ranvir Singh*, v. State of Madhya Pradesh, (1996) 11 SCC 595.
[79] State of karnataka v. *Maniappa*, (1994) 5 SCC 728.
[80] State of Rajasthan v. *Ram Narain*, (1996) 8 SCC 64.
[81] *Raju* v. *State of karnataka*, (1994) 1 SCC 453.
[82] *Nathu Ram* v. *State of Haryana*, (1994) 1 SCC 491.
[83] *Bhanwada Bhognibhai* v. *State of Gujarat*, (1983) 3 SCC 217
[84] State of A.P. v. *P. Narsimha* (1994) 4 SCC 453.

IPC yet the Supreme Court reversed the order of acquittal yet imprisonment was reduced to already undergone.

INTERIM COMPENSATION-IN RAPE CASES

Very recently the concept of awarding interim compensation to a victim of an offence under Section 376 IPC was recognised in the path-breaking case of *Bodhi Sattwa Gautam*[84] Hon'ble Mr. Justice *S. Sagir Ahmad* observed that rape is a cruelty against the entire society, violative of the right to life including right to lie with human dignity and directed the accused to pay Rs. 1000/- p.m. as interim compensation to the respondent during the pendency of the criminal case. when a girl was raped by four police officers and the matter was under investigation the Supreme Court directed an interview compensation of Rs. 20,000/- to be police to her by the state with the two weeks in the case of *P. Rathiuam*[86]

SENTENCE IN DOWRY DEATHS

In cases of dowry deaths it has been observed by the Supreme Court in the case of *Rajeshwari Devi*[87] that the husband and father-in-law and the servants "who merely acted on the instructions of their master' should be treated differently while awarding sentence. It was found in this case that the dead body was cremated without waiting for any one from the side of parents of the deceased and the cremation took place in the field adjoining the house of her in-law and there was deliberate attempt to prevent others to join in the funeral and even no report of the death of the wife was made by any one. The two domestic servants were convicted and sentenced to 4 years RI, the village Chaukidar was convicted and sentenced six month RI under section 201 IPC while the husband and the parents were convicted to life imprisonment under Sec. 302 IPC read with section 149 IPC and further sentenced to two years and 4 years RI under sections 147 and 201 I.P.C. Yet in another case in *Salamat Ali*[88] the conviction of parents of the accused husband was convicted under section 304B IPC simpliciter without the aid of section 34 IPC amd sentenced to undergo RI for 7 years. Since the provisions of section 304B IPC & sec. 113 Evidence Act came into effect only on 19.11.1986, they being prospective in nature, in the case of *Lakhjeet*[89] it was held that section 304B IPC could not be invoked and thus the punishment was awarded under section 306IPC to undergo RI for 5 years and fine of Rs. 2000/- and in default of payment of fine further RI for six months was substituted. Although the murder of a wife in connection wit the demand of

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[84] *Bodhisattwa Gautam* v. *Subhra chakraborty* (s) (1996) 1 SCC 490.

[86] *P. Rathunam* v. Union of India 10, 1989 Sup. (2) SCC 716 (Before *Rang Nath Misra* and *M.N. Venkatchallah J.J.*).

[87] *Rajeshwari Devi* v. State of U.P. (1996) 5 SCC 121.

[88] *Salamat Ali v. STate of Bihar*; AIR 1995 SCC 1863.

[89] *Lakjeet* v. *State of Punjab*, 1994 supp. (1) SCC 173.

dowry with a view to marry with another girl was held to be undoubtedly most foul by the Supreme Court (in which ghastly incident a child in the womb was also murdered and the body was cut into nine pieces and the cut body parts were found contained in two bags kept in a local train) yet Hansaria J., in the case of *Ravindra Trimbak* held that the dowry death had ceased to belong to that species of killing which could be regarded as the 'rarest of the rare" type. The court observed:-

"The present was thus a murder most foul, as pointed out by us in the opening paragraph. The motive was to get another girl for the appellant who could get dowry to satisfy the greed of the father. Dowry deaths are bloodboiling, as human blood is spilled to satisfy raw greed, naked greed; a greed which has no limit. Nonetheless, the question is whether the extreme penalty was merited in the parents case.?

We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the "rarest of the rare" type. *This is so because dowry death has ceased to belong to that species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefor, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us.* we, therefore, commute the sentence of death to one of RI for life imprisonment." (emphasis supplied). In this case a sentence of 7 years RI or the offence under sention 201/34 IPC was however awarded to run after life impreisonmnet had run its course as per law.

Punishment for obscenity

Section 294 IPC provides 3 months imprisonment or fine or both for causing annoyance to any woman when any one does any obscene act or sings, recites or utters any ballad words or songs causing annoyance in public place. Section 509 IPC provides when any one intending to insult the modesty of any woman utters any words, sound, or makers, intending that such words or sound shall be heard or gesture seen or when any one intrudes in the privacy of a woman a punishment of imprisonment for one year or with fine or with both is provided.

In the case of *Pawan Kumar*[10] it was held that an offence under section 294 IPC was not an offence involving moral turpitude, and the punishment of termination of the services of *Pawan Kumar,* appointed as class IV worker on ad hoc basis, was found to be excessive.

[10] *Pawan Kumar* v. *State of Haryana*, (1996) 4 SCC 17.

Sentencing for outraging modesty:- Need to amend law

"Outraging the modesty of a 'woman' is not an offence of trivial nature" observed Hon'ble Supreme Court in the case of *Rupal Deol Bajaj*[91] and slapping on her posterior in full presence of guests at a social gathering was held to be an offence u/s 354 IPC and 509 IPC. In the case of *Major singh*[92] the accused had caused injuries to private parts of a female child of seven and half months only. The court held that the absence of reaction of the woman (irrespective of the age) was not decisive and convicted the accused to R.I. for 2 years and fine of Rs. 1000/- and in default rigious imprisonment for a period of six months. Out of the fine, a sum of Rs. 500/- was directed to be paid to the child. In another case[93], some poor women were collected and taken to a police station for doing some work when they demanded their labour charges, were beaten up and one of them also stripped of her clothes and thrashed in the police station. The Supreme Court in a writ (public interest litigation) petition awarded compensation of Rs. 500/- to the said woman, also directing prosecution of the culprits. Yet in another case of *Rafiuddin Khan*[94] the accused was found guilty of catching hold of the lady while returning from attending the call of the nature, carrying her to verandah and gagging her mouth, but the sentence passed was reduced to the period already undergone as "he was a married person belonging to the lower strata of society, it a sole bread earner of his family, was in his twenties at the time of occurrence was in custody for 6 weeks and no useful would be served by sending him to custody as the uncalled for heat of passion is likely to have been colled off by social castigation".

When a letter containing indecent overtures was posted to an English nurse by a University graduate it was held to be an act intended to insult her modesty and sentence of 3 months simple imprisonment was passed. Fawcett J. held the act disgusting and refused to reduce the sentence. Fawcett, J. held the act disgusting and refused to reduce the sentence Madavkar, J. observed : I am unable to accept the argument that the applicant; age or education are an extenuation of the offence, on the contrary, I would hold that education is, if at all aggravation and not extenuation".

OBSCENITY TOWARDS GIRLS-ROAD ROMEOS

Where the accused openly addressed two respectable girls who were strangers to him, in amorous words suggestive of illicit sex relations with them and asked them to go alongwith him on his rickshaw he was held to have committed an obscene act[95]. In this Lucknow Bench decision, Hon'ble Mr.

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[91] *Rupan Deol Bajaj* v. *K.P. S. Gill*, AIR 1996 SC 309.
[92] State of Punjab v. *Major Singh, Air 1967 SC 63*
[93] *Basudev Naik* v. State 1991 Cr.L.J. 1954.
[94] People Union for Democratic Rights v. Police Commissioner, Delhi, (1989) 4 SCC 730.
[95] *Zafar Ahmad* v. State of U.P., AIR 1963 All. 105.

Justice *R.A. Mishra* maintaining the maximum sentence of 3 months passed observed.

> "Teasing by road-side Romeos is fast on the increase in the cities, Unfortunately, no offence is so easy to commit yet so difficult to be booked. The victims of the offences are mostly modest and shy girls or young women of respectable families. While on the road or passing in the by lanes, prowling desperades cut filthy jokes with them and pass indecent, sensuous and sarcastic remarks against them. The poor victims dare not protest in order to avoid creating a scene and attracting a crowd at the spot. Publicity of such incidents sometimes leads to injurious effects against the victims themselves inasmuch as it subsequently provides material for groundless scandal and unjustified gossip against their character from interested quarters. The victims, therefore, are compelled as of necessity to silently suffer the disgrace and instinctively leave the spot as quick as they can without disclosing their identity. The offenders being riff-raffs and desperate characters, prudence dictates that even respectable passersby, who happen to hear and see the ugly incident much to their mental anguish, must pretend not to have heard or noticed it and to pass off the place quickly in their own safety. The result is that the offenders indulge in the crime freely and with impunity without any fear of consequence to themselves. The offence hardly ever is brought to the notice of the authorities. In my opionion such an offence, when proved, must be looked upon with utmost severity and should be punished deterrently. The maximum sentence of imprisonment provided under Section 294, IPC is three months rigorous only, plus fine also in the discretion of the court and in my opinion in the present case the trial court made no mistake in awarding three months' rigorous imprisonment to the applicant without fine. In fact, I think it is time that, considering its large incidence, the Legislature thought fit to amend the law and provide severer punishment for this offence".

WINKING EYES AT A WOMAN

Winking an eye at a woman in public and backoning her to the notice of others is definitely insulting the modesty of a lady which causes annoyance to her and thus punishable.

MAKING AMOROUS REMARKS TO A LADY TEACHER BY THE HEAD MASTER

In a case from Punjab & Haryana[36] a Head Master of Govt. Middle School was abusing his superior position and used to tease the working lady teacher by cutting indecent jokes and making remarks to her in the presence of others- "when I see you I forget my beloved" and "We would got to jail

[36] *Smt Chandra Kala* v. *Ram kishan*, AIR 1985 SC 1268.

together and live in the same Cell" The Supreme Court maintained six months R.I. under sec. 294 and fine of Rs. 1000/- directing payment of the fine to the lady teacher.

OTHER CASED WHERE SENTENCE PASSED

Pulling of a girl's hair or lifting the purdah of woman, a kiss resented by the woman, indecent proposals even as pulling a woman by the arm[97], taking indecent liberty such as touching her breasts[98], even the stripping of a patient by doctor under pretence that he could not otherwise judge of her illness[99] have been punished.

INDIVIDUAL OFFENCE: MAY BE; MAY NOT

Opening a 'palki' of purdanshin lady has been punished when with an intention to outrage modesty of a "lady of the quality" yet when it was by mistake or innocence or believing that palki contained a criminal against whom warrant of arrest was there is not punishable.[100]

HARASSMENT OF WIFE –AND SENTENCE

Sentence must be commensurate and in consonance with the gravity of offence proved. Section 498-A IPC provides a punishment of imprisonment for a term which may extend to 3 years and also with fine. In a case of *Madhuri Mukund Chitnis*[101] the court found the husband guilty of the litigative cruelty u/s 498 IPC, yet observed that there is no compulsion that a jail sentence must be imposed, and the sentences of six months RI was reversed but the fine awarded by the Court below to the tune of Rs. 3000/- was enhanced to Rs. 30000/- and in default six months RI; simultaneously directing the payment of entire fine to the wife.

In *Shobha Rani's*[102] case the husband, father in law, and mother-in-law of the deceased bride were sentenced to 2 years rigorous imprisonment. Even the harassment of "mistress" was punished who committed suicide.[103]

However, when the wife herself condoned the matrimonial cruelty of which she was the victim and resumed consortium with her husband- the Court found no obstruction in the provisions of this section permitting them to compound the complaint.[104]

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[97] Mihla So v. *Nagathan*, 4 Bur. L.T. 268; 13 I.C. 389.

[98] *Sena Chetty* (1910) 1 Weir 347: (See Indian Penal Code by Dr. Sir *H.S. Gour (10th* Edition page 3026)

[99] Rosinshki, 1 Mood C.C. 19: See I.P.C. by Dr. *H.S Gour page 3026 (Ibid)*

[100] *Kanai Lal Gawala* v. *Emperor, ILR 24 Cal 885.*

[101] *Madhuri Mukund Chitnis* v. *Mukund Martand Chitnis*, 1992 Cr.L.J. 111 (DB) (Bombay) (H.C.)

[102] *Shobha Rani* v. *Madhukar Reddy* (1988) 1 SCC 105=1988 SC 121.

[103] *Vamgarala Yedukondala* v. State of A.P., 1988 Cr. L.J. 1538.

[104] A similar approach was adopted by A.P. High Court in Thathapadi Venkatalakshmi v. state of A.P., 1991 Cr.L.J. 746. See also state of Rajasthan v. *Gopilal* 1992 Cr.L.J. 273.

SOME TALES FROM HISTORY, FICTION AND THE SCRIPTURES

Justice K.N. Goyal

Lustful Judges

The Holy Bible contains a story of the beautiful Susanna, wife of Joacim who was resident of Babylon. She was attempted to be seduced by two lustful Judges who threatened her that unless she complied they would get her charged with adultery. She declined, saying, "It is better for me to fall into your hands, and not to do it, than to sin in the sight of the Lord".

The elders then executed their throat and cited false witnesses who were believed by the assembly of the people. The Lord, however, heard her pleas "and raised up the holy spirit of a young youth, whose name was Daniel." Daniel proved her innocence by cross-examining the two witnesses for the prosecution, after " they were put asunder, one from another," and eliciting material contradictions. The elders were then convicted "of false witness and put to death, and Susanna's innocent blood was saved."

A quixotic, and yet correct decision

In Cervantes' Don Quixote, there is an interesting story of the hero's campanion Sancho Panza who was appointed as Governor of Bartaria Island which was given to him for a short period by the Duke of that island just in a joke. During his governorship, he decided several cases One was a case of a woman who charged a rich merchant with rape and asked for compensation. The defence was that they had indulged voluntarily and that he had already paid her. The Governor awarded her a purse containing coins and when she left he sent the man after her to snatch it back from her. She successfully resisted the man's efforts to snatch the purse. Sancho Panza than ordered her to return the purse to the man as it was obvious that she was too strong to be raped by the man and that their indulgence was voluntary.

Royal Injustices (England)

Recently we witnessed a wave of public sympathy on Princess Diana's death, - accentuated by what was perceived to be injustice meted out to her by her royal husband and in-laws. In the past also there have been some cases of Royal injustice. In 1533, when Henry VIII failed to secure a divorce from his Queen (Catherine), by the Papal Court, he compelled an English court to grant it and married Anne Boleyn. Three years later he forced a jury of her peers to convict Anne Boleyn of adultery and sent her to death.

Here it may be mentioned that adultery on the part of a queen was a ground not only for divorce but for a conviction of her for treason punishable with death. It is also a matter of history that it was because of the Pope refusing to oblige the King that the English throne severed its ties from the Roman Catholic Church, and a separate Church of England was official established. The King or the Queen is also called, apart from his or her other titles, the Defender of faith. Thus it will be seen that Britain is not a secular state.

In 1820, again, the then King George IV charged his Queen with adultery committed, during foreign travels, with a member of her staff Bergami. A committee of 15 peers (i.e. members of the House of Lords) was appointed to examine the King's message. The Committee reported that the charges required a special inquiry which should best take the ftrsm of parliamentary proceedings. Government then introduced a Bill of Pains and Penalties to deprive the Queen of her title, and to dissolve the royal marriage, Its preamble recited the allegations of adultery. It was decided that the Queen's legal advisers Brougham and Denman, even though members of the House of Commons, would be heard and be permitted to conduct her defence at the bar of the Lords. The Queen's trial was in the form of an examination, before the House of Lords, of the truth of the recitals set forth in the preamble of the Bill.

Only Lord Erskine made an impassioned plea for fair procedure. The House of Lords, however, did not allow the defence in advance even a list of prosecution witnesses. At the trial, most of the witnesses who gave circumstantial evidence were Italians and one of them Magocchi was driven in cross-examination to reply to every question, "Non mi ricardo" (I do not recollect). Similar was the plight of two British naval officers who gave evidence for the prosecution. Public sympathy was totally with the Queen. The King himself had earlier secretly married one Mrs. Fitzherbert.

The prosecution witnesses were thus shown to have been suborned.

The masterly opening arguments by Brougham and the closing arguments by Denman are a literary treat and are available in the book "The Workd of Law, Vol. I. The Law in Literature. edited by Ephraim London. (1960) Mr. London was himself a well known counsel and had affeared, among others, in the Lady Chatterliy's Lover case.

Lord Erskine made a masterly intervention against the wily old Lord Chancellor's speech in favour of conviction.

The vote on the Bill on the third reading was 108 against 99.

In view of the narrow margin Lord Liverpool for Government moved for adjournment for further consideration of the Bill by six months. This was carried by acclamation. The Bill was never revived.

Seeta : Onus on Victim to Prove her Innocence

In the Raamaayana, after Raavana, who had abducted Seeta, was defeated by Raama, Seeta was rescued and brought in a palanquin to the battlefield where Raama was seated surrounded by his Vaanar soldiers. One connot do better than relate the episode in the words of C. Rajagopalachari (Rajaii) in his Raamaayana *(published by the Bharatiby Vidya Bhawan).*

'Alighting from the palanquin, Seeta, with downcast eyes, proceeded towards Raama. "Aaryaputra", she said and sobbed, unable to speak more.

Aaryaputra in Sanskrit means beloved and noble one and is an intimate form of address of wife to husband.

"I have slain the enemy," said Raama. "I have recovered you. I have done my duty as a Kshatriya. My vow is now fulfilled."

Incomprehensible and wholly unexpected were these words that he uttered. His ace darkened for some reason. Then he spoke even harsher words.

"It was not for mere attachment to you that I waged this grim battle but in the discharge of duty as Kshatriya. It gives me no joy now to get you back, for dubiety envelopes you like a dark cloud of smoke."

"What do you wish to do now?" he continued. " You must alone, for we cannot live together. You can stay under the protection of any of our kinsmen or friends. How can a Kshatriya take back a wife who has lived so long in s stranger's house?"

Seeta looked at Raama. her eyes flashed fire.

"Unworthy words have you spoken" she said. "My ears hafe heard them and my heart is broken. The uncultured may speak such words but not one nobly born and brought up like you. Your anger, it seems, has destroyed your understanding. My lord does not remember the family from which I come, Juanka, the great seer, was my father and he brought me up. Is it my fault that the wicked Raakshasa seized me by force and imprisoned me? But since this is now you look at it, there is but one course open to me."

Seeta then voluntarily underwent a trial by fire and came out unscathed. Thereupon Raama accepted Seeta fire-proved and gave an explanation to her again quoting form Rajaji's bork :

" Think you that I did not know your irreproachable purity? This ordeal was to satisfy the people. Without it, they would say would they not? that Raama, blinded by love, behaved with a strange weakness and broke the rule of well-brought-up men."

Rajaji has later referred to the other story of injustice to Seeta at the hands of Raama a case of double glopardy in the following words :

'I have followed the story of the Prince of Ayodhya as told by Vaalmeeki. There was a legend current among people, I think even before Vaalmemi's time, that after recovering Seeta, for fear of scandal, Raama sent her away to live in the forest.

This pathetic episode must have sprung form the sorrow-laden imagination of our women. It has taken shape as the Uttarakaanda of Raamaayana. Although there is beauty in the Uttarakaanda, I must may may heart rebels against it. Baalmeeki had disposed of this old legend through the fire ordeal in the ballet-field. Even that ordeal does not seem to me as consistent with Raama's character. It is painful to read it.

As the Prince returned form Mithila he met Parasuraama. I have heard it said that with that meeting parasuraama's avataar came to an end.:olewose, it should be held, I think, that jraama's avataar came to an end with the slaying of Raavana. After that battle, Raama remained only as a king of the Lkshvaaku race.

On this theory, Raama's threatment of Seeta after the battle and the Uttarakaanda can be explained simply as the behaviour of a kind in accordance with the customs of the times.

But, how can we comment on a work composed thousands of years ago and coming down to us in palm leaf manus cripts subjects to corruption? If, even after the fire, ordeal in the Yuddhakaanda, it is said in the Uttarakaanda that Seeta was sent to the forest, we may take it that it mirrors the voiceless and endless suffering of our womenfolk.

Rajaji ocncludes thus,

'It is no sin or shame to an innocent women if a villa in bahaves like a brute. Yet, mistakenly, we in this country look on the violence of a brute as

causing a blemish to the woman's purity. It is in deference to this wrong feeling that Kamban departed from Vaalmeeki here.

For the same reason, Tulasi relates that the Seeta seized and carreied off by Raavana was not the real Seeta at all but a palpable image of hers left behind by the real Seeta. Thus the story is told in all North India. During the fire ordeal, it is the maaya-Seeta that disappears and the real Seeta springs again and returns from the flames.

Women as Chattels : Droupadis humiliation

In the Mahabarata also, Draupadi's story, may be related in his context. when pandavas lost Draupadi to the Kauravas in a game of dice, Draupadi was asked to come to Kind Dhrutarasturs assembly hall where she was to be handed over to the Kauravas. The Story may be related in the words of the same learned author Rajaji who, in his Mahabarata also published byt he Bhawatiya Bidya Bhawan) has recounted in it in the following words :

As soon as she came to assembly, Draupadi controlled her anguish and appealed to the elders gathered there:

"How could you consent to may being staked by the king who was himself trapped into the game and cheated by wicked persons expert in the art? Since he was no longer a free man. How could he stake anything at all?. Then, stretching out her arms and raising her flowing eyes in agonised supplication she cried in a voice broken with sobs :

"If you have loved and revered the mothers who bore you and gave you suck, if the honour of wife or sister or daughter, has been dear to you, if you, if you believe in God and dharma, forsake me not in this horror more cruel than death !".

At this hear broken cry – as of a poor fawn stricken to death the elders hung their heads n grief and shame Vikarna, the son of Dhritarashtra, could not hear the sight of the agony of Panchali. He rose up and said "O Kshtriya heroes, why are you silent? I am a mere youth, I know, but your silence compels me to speak. Listen. Youdhishthira was enticed to this game by a deeply plotted invitation and he pledged this lady when he had no right to do so, because she does not belong to Yudhishthira alone. For that reason alone the wager is illegal. Besides, Yudhishthira has already lost his freedom. and being no longer a free man, how could he have a right to offer her as a stake? And there is this further objection. It was Sakuni who suggested her as a pledge, which is against the rules of the game, under which neither player may demand a specific bet. If we consider all these points, we must admit that Panchali has not bee lethally won by us. This is my opinion."

When the young Vikarna spoke thus courageously, the wisdom given bh God to the members of the assembly suddenly illumined their minds. There were great shouts of applause. They shouted: "Dharma has been saved. Dharma has been saved."

At that moment Karna rose up and said:

"O Visarna, forgetting that there are elders in this assembly you lay down the law though you are but a stripling. By you ignorance and rashness you are rashness you are injuring the very family which gave you birth, just as the flame generated by the arani destroys its sources, the stick. It is an ill bird that fouls it honest. At the very beginning, when Yudhishthira was a free man, he forfeited all he possessed and that, of course, included Draupadi. Hence Draupadi had already come into Sakuni's possession. There is noting more to be said in the matter. Even the clothes they have on are not Sakuni's property. O Duhsasana, seize the garments of the Pandavas and the robes of Draupadi and hand them over to Sakuni."

As soon as they hear the cruel words of Kar na,the Pandavas, feeling that they had to stand the test of Dharma to the bitter end, flund off their upper garments to show that they were ready to follow the path to honour and right at any cost.

Seeing this, Duhsasana went to Draupadi and made read to seize her clothes by force. All earthly aid had failed, and in the anguish of utter helplessness, she implored divine mercy and succour : "O Lord of the World ," she wailed "God whom I adore and trust, abandon me not in this dire plight, You are my sole refuge Protect me." And she fainted away. then as the wicked Duhsasana started his shameful work of pulling at Panchali's robes, and good men shuddered and averted their eyes, even then in the mercy of Good a miracle occurred. In vain Duhsasana toiled to strip off her garments for as he pulled off each ever fresh garment were seen to clothe her body and soon a great heap of resplendent clothes was piled up before the assembly till Duhsasana disisted and sat down in sheer fatigue. The assembly Trembled at this marvel and good men praised God and wept.

Bangla women targets of fundamentalist' fatwas

More and more women are failing prey to extra-judicial 'fatwas' (editct) by ultra-conservative religious leaders in Bangladesh.

Many underprivileged women in rural Bangladesh are falling victim to *'fatwas'* passed by Mullhas (Muslim religious leaders) ranging from death by stoning, burning or social boycott. Many have been subjected to indignities or even driven to suicide.

Social thinker, Mr Utpal Saha said society might face a serious crisis due to such fatwas. "these sort of extra-constitutional sentences cannot go on in the present day world," he said. the fundamentalists, though few in number, have been issuing such *'fatwas'* and the inadequacy of institutional back-up helps them get away with impunity, he noted with alarm.

Mr Ahmed Rafiq, an intellectual and poel, noted that the rate of passing of fatwas' has risen since the fail of autocratic governments. Mullahs, he said often enjoy tremendous social influence in rural areas as they and local leaders form unholy alliances to promote mutual interests. The return of democracy had under mined their status, which they were trying ot restore by putting the fear of god in people, he said.

The ferocity of such *'fatwas'* reached a peak in 1993 when a 30-years old woman called Ms Nurjahan was stoned to death by a mob in Kamalganj Thana of north eastern Sylhet. The incident shocked all Bangladesh.

Ms Nurhahan's father had taken her back from the home of her husband, who had been missing for years. The village Mullah, Mr Abdul Mannan, said he wished to marry her, a proposal that Ms Nurjahan's fatehr rejected and married his daughter off to another man in the village. Just 45 days after the wedding, the Mullah passed a *'fatwas'* declaring the marriage illegal and organised a trial. Following the verdict, the lower half of Nurjahan's body was buried and she was stoned 101 times. She died in an hour. The Mullah and eight of his accomplices were later sentenced by a court of law to seven years in prison.

In Faridpur a mother of two children was set on fire, her "guilt" being an illict relationship with her brother-in-law. She was tied to a tree and flogged 50 times and then set on fire.

Yet another woman called Ms Laille was flogged in a village in Zakiganj in northeastern Sylhet for giving birth to an illegitimate child from a man who had promised to marry her. In northern Tangail district freedom fighter Mr Abdul Wahab was sentenced to death by Mullahs for reading a progressive, book. Later he was pardoned , but was taken around the village wearing a garland of shoes.

(The Pioneer, 2-12-97)

Women tend to make their emotions perform the functions they exist to serve, and hence remain mentally much healthier than men.

Ashley Montagu,
The Natural Superiority of Women, 1995

GIRL CHILD AND INHERITANCE

Shivanand Mishra [1]

A girl child in India is normally an unwanted child. Women do not receive equal treatment with men. The society treats her inferior to men, girl child receives less care and attention at home compared to male child. Traditional role of a model ideal women is confined within the four walls of the house to feel her more protected. The religion continuously thought her glory in sacrifice for her, brother, father husband and son. In Hindu religion special ceremonial festivals are organised through-out the year to remember sacrificing for her relations belonging to the other sex. In this way a women is given life of drudgery and tears.

The most unfortunate tragedy is this that a girl child is being exploited by her own family even by her own sex. From her childhood her movements are restricted. She is groomed for marriage. She is prepared for a wife's role. It is told to her since very beginning that she has to leave the parental house and after marriage she will have a house of her own. This creates insecurity in her mind. The difference of treatment with her and her brother in her own family leads her to frustration. She cannot be able to develop her own personality properly.

The grown up girl child watches marathon race of her parents in search of her mate. Most of her marriage proposals are not materialized due to not settlement of dowry demand. As she is fully aware of her parental economic status and she patiently sees the anxiety of non-settlement of her marriage, on the faces of her parents. This situation leads her to think that her life is useless and she is born to trouble her parents. Many girl child had committed sucide to get rid of with this situation. Group sucides are also reported.

After marriage she is brought to her husband's home, where she is to live with a family not known to her. In this materialistic era now days her husband's family members want to snatch more money in form of dowry from her parents and for this purpose they used to torture her for demanding more dowry. It she complains to parents she is told that henceforth her home is her husband's home regard less of the treatment meted out to her. This is extreme situation when none helps her. Often she is brutly murdered or such situation is created that leads her to commit sucide by her own in laws including her own sex.

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1. H.J.S. Joint L.R. (Legislative) (U.P.).

In such situation, who will start struggle for her emancipation? The woman her self believe that she is weak and vulnerable, that she lacks the physical and mental potential, she cannot stand besides the man. Considering difficulties it is crystal clear that not all but most of her troubles are related with the money. Money can be achieved by her through her own earning. For which she required education. In present society sufficient opportunities for her study is necessity. But due to vigorous growth in population, desired results are not obtained. Instead of demanding reservation in parliament and state assemblies, reservation in all studies and all services will be more appropriate and helpful. Under Muslim and Christian personal laws women are discriminated against men in the matter of inheriting property. They are not entitled to get equal share. Women are always assigned to lower status in the matter of right to property.

सम्राज्ञी श्वशुरे भव सम्राज्ञी श्वश्वां भव

ननान्दरि सम्राज्ञी भव सम्राज्ञी अधिदेवृषु।। (ऋगवेद 10/85/46)

Women you go to your husband house and live like Queen along with your father in law mother in law, sister in law, brother in law and others.

In ancient times, as matter of policy a married woman was supposed to be queen of her husband's house. But actually the position of Hindu woman was inferior in nature as compared to men. They were allowed absolute property right over their stridhan only. She had no right over joint family property. She was never treated as a coparcenar and had no right over the co-parcenary properties. she had only a right to claim maintenance.

The Hindu Women's Right to property Act, 1937 was enacted to give better right to women in respect of property. After independence, in the Seventh Year of the Republic of India, The Hindu Succession Act, 1956 was enacted which brought radical chances in this respect. Section 8 of this Act provides general rules of succession in the case of males. As per Schedule of the act heirs of class 1 includes daughters' widow, widow of predeceased son etc. Section 23 of this act deals with special provision respecting partition of dwelling houses. It clearly states where a female heir specified in class I of the schedule to the Act inherits along with other male heirs. The share in dwelling house though devolves on her absolutely though. This sections postpones her right to claim partition of her share until the male heirs choose to decide their respective shares therein. Thus this section intends to curtail the right of the female her to claim partition of a dwelling house.

In a case where the intestates leaves only one male heir and some female heirs specified in class I the claim of the family heirs for partition may not be enforced if the male heir is not willing to decide the welling house. In Matayalu v. Olura Appanama 1993 orrisa 36 (FB) The Orissa High Court held

that if there is only one male heir the right to any female heir to claim partition is not taken away by this section. The Bombay High Court is also of the same view. But Calcutta, Gujrat and Madras High Courts are not agreeable with the view of Orissa and Bombay High Court, Finally This issue is settled by the Hon'ble Supreme Court in Narshimha Murthy v. *Suseela bai* (1996) 3 S.C.C. 644. The female heir's right to claim partition of the dwelling house of a Hindu intestate to be deferred or kept in abeyance during the life time of even of a role surviving until be chooses to separate his share or ceases to occupy it or lets if out. Now it is for the National Commission for woman which is suit up in 1992 in India as a national apex statutory level body to review ever this matter and record the appropriate amendment in the sec. 23 of the act to give right of partition to females.

Global recognition to protect women's right came with the adoption of a Convention on the Elimination of all forms of Discrimination Against women (CEDAW) by the UN General assembly on June 25, 1993 India ratified CEDAW with some reservation . This convention is the only legally binding international instrument dealing with rights of women. While much has been done to project the new values in respect of woman in letter of law, there is still a kind of ambivalence about is on the fact that old values continued to be reared.

The right to equality is fundamental one. It is empowerment strategy which is to day emerging as unique Indian response to the challenges of equality, development and peace. If women are to be empowered to be freed from their gender related shacles. To ensure economic equality women are to be provided with additional channels of credit, training employment greater visibility, management skills and social security. The foremost requirement towards fulfillment of the goal is basic education of woman coupled with awareness about their legal status and their rightful status in society.

Thus women's secrets I've surveyed

And let them see how curiously they're made,

And that, tho' they of different sexes be,

Yet in the whole they are the same as we.

For those that have the strictest searchers been,

Find women are but men turned outside in;

And men, if they but cast their eyes about,

May find they're women with their inside out.

The Works of Aristotle in Four Parts, 1822 p. 16

WOMEN IN SOCIO-LEGAL PERSPECTIVE

O.P. Dwivedi[1]

Gender-justice, Gender-bias, gender-injustice have now become a common concern. A survery by an eminent feminist organisation SAKSHI revealed that when the judges were asked as to what they wanted to be if reborn – men or women, as many as 63% wanted their rebirth as men. There is no surprise in it. It is self-apparent that by gender-justice, call we for justice to the women, who are weak, oppressed requiring emancipation. According to international statistics, they consist of a class having their number to be the ½ of the world population, with 2/3rd working hours but sharing only 1/10th of the income and owning only 1/100th part of the property.

Adding to our experience, on the otherside, a view lately expressed by Centre for Media Studies (C.M.S.) brought to light that 47.3% women in India are not exposed to any media at all, whereas only 43.5% listen to radio only once a week, and 31.8% watch the television. The rest of the female population has no access to media. The conditions are so discouraging even after 50 years of Independence. Another aspect is still more agonising. Statistics made available by deptt. of Women and Child Development, make startling disclosure that between years 1990 to 1996, there has been 54% rise in the crimes against women.

If the above statistics are not lies, then a question is raised are women equal to men? Is observance of year 1975 as international – women's year and year 1985 as international women's decade is sufficient for awakening and equality? Or if few urban-female-elite are able to form women's organisation to raise their voice against inequality in fact, then is it an end. The answer to these questions is that the reasons are to be explored at social, economic, cultural, political, legislative and judicial levels.

In this back drop, with limitations at hand I am preferring only to present a profile touching political, legislative and judicial fields. For two decades after independence, there was no cry for such an equality, as the legislature, on its part, legislated substantive laws to recognise de-jure equality.

Since 1950, Constitution in its far-sight, enacted Articles 15 and 16 prohibiting descrimination on grounds of Sex, Article 14 guaranteed equality before law with equal protection of laws: Article 15 (3) permitted the state to adopt protective descrimination as a measure, in favour of women on account of their inherent physical nature. Above all a fundamental duty is cast by Article 51-A(e) on every one to renounce practices derogatory to the dignity of women and thus Constitution also granted a preferential status for women.

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In obedience to Constitutional mandate, substantive legislations were enacted by parliament granting equality to women and even preferential status in many respects. But 'Law is what law does' and not what is in the law-books or what it lisps. If the paper tiger has no biting teeth to ensure justice and equality, then it cannot serve the society, particularly in India where the base of the problem lies in social, cultural and economic factors. Above all the social cultural habits of Indian women are hostile to equality. A few women living in cities forming urban-elite are not the ideals of Indian woman-hood, for the majority who are illiterate and down trodden, hailing from poverty stricken strata, alone need the equal justice through law. Law can safely be ahead of times in our democratic society, but if the gulf with the public opinion is too wide, then the likelihood of non-observance is not ruled out, till the procedure at the same time is not too vigilant, strict and flexible, I may refer to Ministry of Education and Social Welfare, Government of India (1986), report on "Dowry Legislation and Social Change in India" that among those who consider dowry as good, there are greater number of women than men. Inspite of 50 years of independence, still women have not been able to shed off concept of Vardakshina which has now taken shape of status symbol and if dowry is not given then it is not taken to be normal behaviour. It is talk of majority of women in India and not about extreme minority who are educated and economically self-reliant.

The legislative-overtures were not oblivious of the procedural impediments and the committee on status of women (1974) carefully considered it and in the procedural dimensions, the first notable contribution has been made by the Family Court Act 1984, wherein the justice to women was to be imparted by Judges meant for these courts only. Complications of civil procedure were kept aloof and the judge was allowed to adopt procedure which is just, fair and reasonable to settle family disputes. Moreso, the weapon to be used for this purpose is mediation, counselling and reconciliation. The lawyers were also kept aloof consciously, by this law. The judges become more the helpers and facilitators than decision-dictators. But once again illiteracy comes in the way of this protective and welfare legislation, as access to the courts is clogged by factors co-related with social backwardness. As these courts take cognizance of those cases alone, which came to it, and there is no medium still with law and procedure to detect, the undetected cases, beyond the clutches of law, which I feel, are more than that have come to light, No doubt 1984 Act, served the purpose as desired, but it cannot be, be all and end all, as exhaustive remedy for equal and protective justice to women in our society.

Second aspect of procedural justice to women came to light when the Dowry Prohibition Act, 1961 was amended after joint parliamentary committee (August, 1982) pointed out total failure of the Act in working. Amending Act 1984 and the 1986 Amendment Act made extensive changes in this Act, in Indian Penal Code and Indian Evidence Act and the Criminal Procedure Code. Two new offences were added making, cruelty to women (Sec. 498 A I.P.C.)

and death due to cruelty (Sec. 304BI.P.C.), were made specially punishable, with definition of cruelty having wider ambit and import. For taking cognizane, Section 196A, Cr. P.C. was made liberal and suitably modified. Again, in Criminal Procedure Code, by Criminal Law (second amendment) Act 1983, Section 174 (3) was added making postmortem compulsory, after taking away discretion of police officer (i) if the case involves suicide of women within 7 years of marriage (ii) if relates to death within 7 years, suspecting offence (iii) if any relative of woman makes request, and 7 years of marriage have not elapsed, and (iv) there is any doubt regarding cause of death. Similarly Sec. 176 Cr. P.C. was amended that inquiry and inquest procedure are to be conducted by Magistrates in such circumstances as above, on the death of a women. Not only this, in Dowry Prohibition Act burden of proof more or less shifted on defence (Sec. 8A Dowry prohibition. Act and similarly through Sections 113A, 113B and 114A Indian Evidence Act presumptions were made available to prosecution in penal prosecutions for offences relating to cruelty against women. No doubt these procedural modifications empowered judicial apparatus to be more sensitive to women related crimes, but enforcement potential is below expectations and impact on society is marginal. The reasons are obvious as it is old assessment that welfare legislations must be more preventive, preemptive and educative than harsh in penalties. Further more, judicial instrument has public accountability and mandatory punishment with assistance of presumption of guilt produce contrary impact upon the society, eroding the credibility of judicial system, and agencies attached with their investigation, get an opportunity to exploit the system. It may not be lost sight of that dowry offences are related to marriage which is an institution, and dealing in such offences by criminal law approach of harsh penalties, may disturb social harmony rather leading to social good and hence purely punitive approach may be destructive and disruptive both.

In this thought provoking back-ground, I will prefer to take to the reader to the measure to procedural justice which is mixed with remedy, with steadfast view of social preservation and harmony. and in this procedural field, I invoke assistance of Legal Aid and Advice Board which alone may come to our rescue. The board may take up the legal literacy and publicity drive to educate that silent and illiterate majority, who tremble to come to court, not for the fear of system, but due to faith in legal system and their own lack of confidence. Prevention, not through deterrence, but through education and reformation, by social organisations or by legal aid and exclusive Lok Adalats for women to settle family disputes, may provide better results in due process of time. Criminal prosecutions in family matters may be kept in reserve only in extreme cases. Programme of legal awareness can also be implemented with the active assistance of women-lawyer groups and Legal Aid Board may chalk out systematic programmes and periodic orientation courses for attitudinal change of women. Qualitative and quantitative assessment, in this field be made by legal aid Board and free legal aid be provided to all women without discrimination. And thus, legal aid may be utilised for structural and attitudinal change to ensure access and equal justice to women on procedural side.

So far as judicial instrument is concerned it may be pointed out at the outset that judicial power is independent in technique and distinct in style. A Judge has always to strike a right balance between criticism of excessive exercise of jurisdiction and assumption of jurisdiction. He cannot ignore the fundamental law but can only weigh it with objectivity, integrity, independence and then to act on the dictates of this conscience. Any creativity by him is controlled by self-restraint and practical wisdom. In brief, he has his patent limitations barbed in process of interpretation. But he is conscious as a creature of ordinary prudence that social justice has its roots in equal justice to women.

It we look at the problem with this angle, then we find that the courts have given decisive tempo, tendency and direction, for equal justice to women, through process of interpreation, in cases coming before it for adjudication. Cases decided by our Supreme Court from Muthamma (1979- 4SCC 260) up to Vishaka case (1997-6 SCC 241) lead to one and only one inference that the judicial system has proved its functional utility to ensure equal justice to women. Needless to say that law-in-action in C.M. Mudaliar case (1996- 8 SCC 525) stretched right of equality of women to co-ordinate personal dignity with it which is all pervasive and has wider connotation ensuring full development. Similarly, recent decisions in dowry-deaths, rape, custodial-injustice, employment harassment cases- the view taken by the courts, has a patent tendency, towards equal justice to women, enthusiastically. In other words, in case of women, we have sympathetic or empathetic judges and sparingly antagonists.

A voice is always raised that the women should have adequate elective-representations. In this context, it may safely be referred that 33% representation of women in Municipal bodies and Panchayat Raj institutions has already been achieved by 73rd Constitutional Amendment.

Women as a socially handicapped and backward class in majority, pose a challenge to equality but with ever increasing fairness for them, their response is sensitive and positive. Much has been done yet still more remains, is an old saying as there is always scope to improve. No doubt, thus women in socio-legal perspective are being held in esteem and dealt with fairness and equality, but what is positively needed is change of attitude of men or women in society and women to understand men in action, to ensure required social change to harmonise the society and in turn Indian polity. For afterall, de-jure equality is only the means and the end of activity in every field is de-facto equality.

The degree and essential nature of any human being's sexuality extend into the highest pinnacle of his spirit.

Nietzsche

GENDER ISSUES IN THE JUDICIARY

Manju Goel[1]

Until recently the question of equality between men and women was only for theoretical discussions. At times the question cropped up in the legislature and the courts. But a frontal attack to the injustice caused by discrimination between the sexes was not formally made till the adoption of the convention on the elimination of all forms of Discrimination against women (CEDAW) on 18th December, 1979 by the United Nations General Assembly preceded by the First UN World conference on Women in Mexico in 1975. A proper study of the gender situation is now possible with the help of statistical data relating comparative situation of education, income, mortality rate, life expectancy, employment, sex-ratio etc. between men and women. As the overall world situation is today 66% of world's total work is done by women, they get only 10% of total income earned and only 1% of world's total property. So far India is concerned, discrimination is writ large in the population statistics as given in census of 1991 compared to that given in 1901. The sex ratio as per the census was 972 females per one thousand males in 1901 which has reduced to 927 in 1991. In the country Report released by the Government of India for Fourth World Conference on women in Beijing 1995, the falling and adverse sex ratio is attributed mainly to higher mortality among females as compared to males, in all age groups right from childhood through child-bearing ages, limited access to the health infrastructure contributing to high maternal mortality and relative deprivation of the female child from nutrition, health and medical care have also been identified as some of the other contributory factors. Without burdening the paper with statistics it can be said that the level of literacy among women is lower than among men and that school dropout ratio amongst girls is much higher than amongst boys. Only 32% of the girls entering the primary stage reach the end to schooling. The Country Report says that the reasons for such high drop out rates amongst girls are embedded in the socio-cultural and economic factors.

It we properly analyse the situation we will find that at the root of the evil is the fact that we value our women less than we value our men. The health, education, personality development , comforts, work, contribution and happiness of women are less important than that of men. Hence comes the question of perception and perspective. Perception and perspective in treating women as lesser humans is embedded in the entire society. It is of no use blaming one section of the society or the other or attributing one factor or the other for the malady. A change in the perception and perspective is called for and the change must begin on all fronts. The discriminatory attitude has to be removed rights from the minds of the rural poor to that of the urban elite from

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the minds of the grass roots level worker to that of the high level policy makers, legislatiors and bureaucrats and from that of intellectuals to lawyers and judges. As a sequel of CEDAW in 1994 the first judicial colloquium of senior judges in the domestic application of International Law in gender issues was held in Zimbvabwe. The judges considered ways and means to promote interests of women through domestic application of international human norms. It was recognised in the colloquium that many existing international regional and national human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity. It stressed the duty of an independent judiciary in interpreting and applying the provisions contained in their national constitutions and laws in order to realise the equality concept enshrined in them.

Law and judicial process is influenced by the current social thinking. At the same time, the judicial process can also influence the social thinking. The judicial process starts from enactment and ends in its final enforcement with judicial decision making in the middle. Judges, traditionally speaking do not make law. They only employ the law in the process of adjudication. Yet they influence both law making and law enforcing in various ways. Social reforms have led to various legislations. At the same time, legislations may be seen in concrete form it is necessary for various forces started at one end may disappear somewhere midway unless each of the agencies involved is eager to pick up the cue on its turn. Therefore, it is necessary that each agency puts its own house in order.

Gender is now the centre stage of all decision making-political, social legal and economical. It is not necessary to waste words to emphasise that the world has been unequal and unjust for the women, and, men have ruled over the women on account of the power of their muscles Male chauvinism generated by the patriarchal society has often been glorified. So has been the subservient and passive role of women. Male chauvinism is not justified. Nor is female passivity. Yet, stereotyping of male and female roles, their character traits and the separate sets of values that each is expected to adhere to have led to hidden gender bias which permeates our decision making as well as implementations. However much may one try to be rational, the bias in the unconscious mind persists. A violent alcoholic husband gets sympathetic treatment as the violence is attributed to alcohol and at times even to the wife's failure to handle an intoxicated husband. If similar violence may come from the wife, it matter. Contribution of women in economic activity particularly in the home bases activity is ignored as a rule and the income of such activity is naturally pocketed by the master of the house. It at any time separation of the couple takes place the house and the business belongs to the husband and a subsistence maintenance falls in the share of the wife. Women are supposed to be morally superior to men. They are also expected to maintain such superiority at great sacrifice without any rewards or even appreciation and acknowledgement. However, she is treated as intellectually inferior and maintained at an inferior level in such activities. For some unknown reasons a woman is not expected to have much insight in political affairs of the country.

Widespread skepticism has been expressed by all sections of the society with the move to secure reservation for women in the Parliament.

Is the present law enough? is it gender sensitive? Is there any deficiency in the law? Is there any drawback in its implementation? If so, how does one proceed to make the amends? These are some of the questions that I may ask myself? Let us look at our Constitution. The Constitution not only ensures action in favour of women. The Constitution not only ensures action in favour of women. The Constitution is not merely gender neutral, it is gender sensitive. We have all the freedom to legislate new laws for the protection of women as well as to remove the discriminatory ones. Evidence Act which says "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." In contrast, no evidence can be led to prove that the accused is a person of bad character because such evidence is barred by section 55 of the same Act.

Many other gender related provisions lie only in the books. Take for example the law relating to bigamy. Prosecute X for having married Y first and later Z. The prosectution has to prove the entire marriage ceremonies to establish that both the marriages were validly performed . Obviously Y could not have been in the marriage of z & x. In any case if x denies that he validly married z, the entire case will fall. Hence hardly any case under section 494 IPC succeeds. Hindu Adoption & Maintenance act has provided some valuable reliefs to the wife. Unfortunately if a woman seeks maintenance (that is when she is likely to be a destitute) she is required to pay ad valorem court fees on 10 years' maintenance claimed. No wonder no woman dares seek maintenance under that Act. No wonder we have so many applications under Sections 125 Cr.PC. despite there being a more effective law. And then why should the relief under section 125 Cr.P.C. be limited to only Rs. 500/- a month?

Then there are areas in which there are not enough laws. Our laws still do not recognise rape within marriage. The law does not give the wife any right in the husband's property or even the marital home so that if the husband so wants he can always turn the wife out. Generally even if the wife contributes to the property is owned by the husband if the title deed shows only his name.

Access to justice is another important aspect that is required to be attended to. Access to justice does not merely mean making legal-aid infrastructure available. Legal aid treated in India in 1970. From the very beginning of the legal aid movement, women have been entitled to it irrespective of their income and status. Yet lack of basic education and information of availability of legal redress has resulted in denial of justice. Litigating women are often looked upon as deviants. This, coupled with low rats of convictions on account of certain flaws in the existing legal system has led to reluctance on the part of women in seeking justice in courts.

While emphasizing the demand for equality it must be remembered that justice to women at times may mean something very different from what justice may mean to a man particularly in the area of family violence. It is easy to ask the battered wife to give up the violent husband and to live an independent life. Yet in a country like ours, in some cases it may be more difficult for a woman to live a separated life by herself than to bear a violent husband. If the home is cruel the outside world is not heaven. It is only when she can be provided with a better alternative that she can be advised to break away from the matrimonial ties. Here it becomes necessary to resort to matrimonial counselling and alternative methods of dispute resolution so that the grievances can be attended to without breaking the family. Proper modification in the behaviour of the parties brought about by prolonged and deft counselling may restore peace in disturbed home. Here one may draw the distinction between the approaches of the feminists in the western developed countries and of woman's organizations in India. We must remember that we do not have enough social securities in the form of old age homes or shelter homes for women. This makes the institution of the family absolutely indispensable. Fortunately, the judicial system in India has taken the lead in the matter of matrimonial counselling. This is a thrust area now for the legal aid activity. In Delhi, although the family courts have not been set up, the civil and criminal courts have been refereeing family disputes to the Delhi State Legal Services Authority. The success rate of peaceful reconciliations arrived at in the counselling centres of the Authority is quite encouraging.

This leads us to the question of alternative system of dispute resolution. By the very nature of family disputes a legalistic and technical approach may not be the best. All such disputes are mixed baskets of claims relating to stridhan, alimony and property, disputes relating to custody of children, misunderstandings, violence and anguish. Very often both parties feel wronged and both seek redress. In such situations a conciliated settlement followed by a compromise decree is the best solution. The recent efforts of various state judiciaries in collaboration with National Commission for Women in holding large scale Lok Adalats described as Mahila Adalats for resolving family disputes is commendable. We hope to see more Family Courts envisaged under the Family Courts Act giving further impetus to the culture of conciliated settlements. Till then the Courts can resort to Order 32A of the C.P.C. which requires the courts dealing with family disputes to make efforts for settlement and enables the courts to take assistance from welfare agencies for such purpose.

Finally it can be said that although substantial attention has been paid to the question of betterment of the condition of the convicts in jail and for their rehabilitation in the society not enough attention has been paid for better protection of the victims of crime more particularly those against women. In the case of *Delhi Domestic Working Forum* v. *Union of India* (1995) 1 SCC 14 the Supreme Court turned to this aspect and emphasised that we have to be victim oriented. The Court laid down the broad parameters in assistance to rape victims which includes continued legal, medical and psychological

support. Further the Court suggested that in view of the Directive Principles contained in Article 38 (1) of the Constitution of India a Criminal Injuries Compensation Board should be set up so as to give financial support to the rape victims. The national Commission for Women has been entrusted with the responsibility of carrying out the directions given in the judgement.

In this connection one can refer to the increased awareness world over in the matter of rehabilitation and protection of the victims if crime. The United Nations has expressed its concern through the U.N. Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. The victimologists of the world started discussing the various problems of victims by convening the first International Symposium on victimology in 1973 in Jerusalem. A world society of victimology were founded in 1977. The Indian Society of victimology founded in 1992 in attempting to draft a Bill on Compensation to Victims of Crime in India.

At the end, I may say that while much ground has been covered much is yet to be achieved. We still have miles to go. The Indian Judiciary has evinced enthusiasm in achieving the target. A word of appropriation is due to the National Judicial Academy which under the benign guidance of the Hon'ble Chief Justice of India took up the project to train Judges in matter relating to gender as its first venture. A project called "Gender and Law" started by the Academy in collaborating with the War wick University of England & British Council has already imparted training to a batch of en select judicial officers. More such batches are to follow. These trained judges are to be used in future as resource personnel in such gender related programmes in the Academy. I am hopeful that the gender scenario in the judicial area is soon going to look up and present an exemplary model.

Girls sometimes wish they were boys-You can see what man does-His work is wonderful-What is greater than man's work? Man-Who made the man?-Made by mother's training-Abraham Lincoln's mother-Great responsibility to train future President-Cannot tell what any child may become-No greater work than child training-The wife may think the husband's work greater than hers-Her work monotonous and tiresome-Some is business-Woman's work not less than a man's success dependent upon woman-his health depends on his wife's cooking-The fate of a nation may depend upon a wholesome meal-If both man and woman were in business life would lose much brightness-Woman makes social life-Moral life-Keeps man thinking-Values of home education-Daniel Webster's table manners-Woman embroiders man's life-Embroider is to beautify-The embroidery of cleanliness-Of a smile-Of gentle words.

Summary of Mary Wood-Allen,
What a Young Girl Ought to Know, 1928 (cited verbatim)

Wife Syndrome

Subodh Chandra Verma[1]

"Hillary's Husband Wins Elections", New York Times used this unusual expression for reporting Bill Clinton's victory in election. Probably it is for the first time in modern social history that a man was let known through his wife, though, may be, with a touch of humour. On the other hand we have legendry characters like Tolstoy's Natacha who is charming, gay, thinking and living untill she is married. After marriage she becomes merely virtuous mother without any mental life. From Natacha to Hillery is a meaningful story.

Institutions are created by society in consonance of time and space. Gradually old institutions die giving place to new. Kingship is withering away, so is joint family. Knowledge has become information and administration is taking the shape of management.

In the family bounds, father was the replica of king in his dominion. To a wife her husband was her lord and master. This status was embodiment of power, power to impose decisions, power to enforce will and power to hold others wrong. Since earliest history, social morality has the power of law behind it and individual morality is based on conscience.

Social morality is older than personal morality and in fact the basis of law and government. Originally it were tribal customs that law developed. Some primitive societies had elaborate rules as to who may marry whom. They were not just rules but were strictly followed even without a police force. How these ethical codes manifested themselves into power codes, is a matter of deep thinking and sociological research. Authority over wife was probably the root cause of entire concept of gender bias.

It cannot be physical superiority alone which gives males a deminating position. Superior strength of male animals does not lead to female subjugation. In fact there is no gender bias in animals. It is the rational mind of males which has mischievously developed it. All kinds of power, be that of priest or king, church or father or husband are connected with morals. There were the institutions which the long drawn social history of humanity created to give a better life on earth. Kingship to counter the fear of anarchy, church for proper weaving of social fabric, and father and husband to create happy family unit . Scientific temper influenced all walks of life. In particular, the modern legal system was the outcome of this scientific temper in day to day thinking. Democracy was developed on the ruins of kingship which earlier used to check anarchy. Due to fear of anarchy man developed volumes of laws in democracy to protect itself from anarchy. The scene is conspicuous in a developing democracy like India that we have a jungle of laws which has been laid to prevent the law of jungle.

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The oldest institutions in social fabric still are those of father and husband. It is interesting to look into the origin of these institutions. Lenin in his "Origin of Family Property and State" attributes the advent of private property as the source or origin of family. In the tribal society there was no question of own son and therefore woman was a common wife to all the male members. Tribal owner-ship of property gradually developed into individual ownership of property the obvious result was development of family so that the property may remain in the family or should be inherited by his son. This caused the development of sex morality so as to bind wife to have sex liberty with her husband alone so that the paternity of the child may remain undisputed. This might have been private morality for certain period which later became social morality. This gradually but completely resulted into total subjugation of women to men. As said by Bertrand Russel: "Among the human beings the subjection of women is much more complete at a certain level of civilization than it is among savages. This subjection is always reinforced by morality." St. Paul said that man is the image of glory of man. Neither was the man created for the woman but the woman for man (I Corinthians XI-. 7-9). The wives are supposed to obey their husbands and unfaithfulness is a worse sin in a wife than in a husband. This concept is the basis of entire philosophy behind gender bias. Any-thing against this firm morality regarding sexual restraint by females was regarded immoral. Gradually this become a positive morality for women to be under subjugation of males almost similar to the morality of submission to parents and kings. This personal morality was fortified by the Church is western society and social customs in our oriental society. In western society after marriage the couple is declared man and wife and not man and woman as if wife is a status different from women or the wife is subhuman. In Indian marriages the secret terms are the limitation which a wife has to observe under a husband. Morality, virtue, modesty, restraint are the qualities more expected from women than men. More rigid laws of restraint made women's status inferior to men's. In a way the Church or religion on the one hand and social customs on the other hand were hands and gloves in deteriorating the status of women.

The glorification of motherhood, the household goddess or the obedient docile wife is in a way to make her subordinate to menfolk. It may be desirable from the point of view of healthy national, social, and family life. But in higher state of society women find motherhood unsatisfying. In professional classes the young women who have initiative, energy or intelligence are as a rule not inclined to marry young or to have one or at the most two children when they do marry. In the past marriage was the only means of livelihood for women. Pressure from parents and fear of becoming an old maid forced many women to enter the prison of wed-lock, though they had no inclination towards duties of a wife, duties not so clearly defined by any written law but still more effective them legislative law. Those who perform there duties obediently like cooking food or upbringing child were considered more ideal for women. But this gradually made her a "Second-sex." Beauty, elegance, glamour and similar other adjectives have made her further weaken. Gradually they

themselves are coming against such false praises. Recent protests by women against beauty-contest in Banglore are the examples of consciousness in that direction.

Movie world is also making a dent in that direction, Kramar vs. Kramar was the plight of upbriging a child without a wife., but that was 15 years ago. Now the father willingly plays the role of a lady to be near his child be it Oscar winner Mrs. Doutfire or our own Bolly-wood new wave Chachi 420. This definitely reflects the change of thinking in society.

Such revolutionary concepts are need of the hour, more so in judicial mind that the role of women in family is not inferior or that is is meant for women alone. But this is not sufficient. What is needed is total change towards women and particularly to the status of wife. This change should not be in the form of rebellion on individual level but on social level. Every disobedience has some motives but it is acceptable only when the motive is social and not personal. The role of arbitrary authority was challenged, as we see in history, by noble thoughts of justice and liberty beginning with politics and reaching at last to private relations of marriage and family. When once the question has been asked, "why should a women submit to men?" when answers from traditional morality cease to satisfy, the possibility of maintaining old subordination is just impossible. This transition to equality now can not be countered by any opposition. The progress in this direction is very slow. But when we look towards our attitude to children the picture is very positive. Our grandfather were very strict to their children. Until recently the punishment of children was taken as a matter of course and was universally regard as indispensable in family administration. Our grandfathers taught their children that it was their duty to love their parents and proceeded to make this duty impossible of performance. The modern parents want their children to be as unconstrained in their presence as in their absence. Todays father wants them to feel please when they see him coming. Earlier children used to run to their rooms when they saw their male parent coming as if he was sort of unwelcome. Now children welcome their fathers in home by shouting and giggling. To win the genuine affection of children is a compassion as great as any that life has to offer. Our grand-fathers did not know of this feel and therefore did not know what they were missing. What is needed is total rejection of any false status symbol attached to womanhood. Attack on this target by women-folk is not as sharp as desirable. Now Women lib movement of Kate Millet of 70s needs a revival. Gender issues raised in Vienna Congress 1992 are a positive step in this direction. For the first time the judicial system which was hitherto supposed to be all pious and able to meet the demands of the days is being probed and attempted to be gender sensitised. In the modern age of electronic media, laser technology and space shuttle the concept of wife as a mere house keeper is withering away though in very slow movement. Necessary steps are to be taken to sensitise the judicial system towards gender consciousness so that news headlines like that the "Hillary's Husband" may be a routine headline in morning news-papers.

WINDS OF CHANGE

Umesh Chandra Dhyani[1]

Lahore High Court's Landmark Judgment

The Lahore High Court has ruled, according to a report of ANI, as published in 'Hindustan Times' (Dec. 13, 1997), that an adult girl is free to marry a man of her choice according to Islamic Laws. The Court ruled this during the hearing on an application of one *Kulsoom Bibi* of Sargodha, Punjab. *Kulsoom* had approached the Court alleging that her father wanted to sell her off but she married a man of her choice.

Rapist MP Jailed for 173 years

A member of Philippines Parliament has been sent to jail for 173 years, for repeatedly raping an 11 year old girl in 1996. Passing the sentence in Dec. 1997, a trial Court in Manila said that Ramco Jalosjos Y. Gracia was being convicted on two counts of Statutory rape and accordingly he would serve the penalty of 'relusion perpetua' for each count.

Actress to get $5 million in damages

A jury awarded an actress Hunter Tylo damages for being fired from a soap opera " Melrose Place" on the ground that she, according to a news item published in "Indian Express" (24.12.1997), had become pregnant. The jury at Los Angles awarded Hunter Tylo four million dollars for emotional distress and 894,601 for economic loss. She had filed a suit claiming wrongful termination, breach of contract and pregnancy discrimination. The jury in the precedent-setting case gave Tylo aged 34, double the amount she had sought. William Waldo, the attorney for Spelling Entertainment, which produces the popular soap opera, said he will file appeal against the decision.

Salutary Bombay High Court Judgment

The Bombay Court, in a recent judgment, has held that to give precedence to Muslim personal law over the Indian Penal Code, would be to deny due protection to minor Muslim Women. The case involved the kidnapping of a minor girl, with the counsel for the defendant contending that Muslim Personal Law entitled a girl who had attained puberty to marry a man of his choice. The Court has placed a premium on ensuring gender-justice under the law and has maintained that the Indian Penal Code takes precedence over Muslim Personal Law. By emphasising the primacy and universal applicability of the Civil law for all citizens irrespective of religion, the court has rejected the alleged immutability of personal law. The Editorial in the 'Times of India' dated April 15, 1993 comments:, "The more contentious issue of having a Uniform Civil Code must also be debated keeping this in mind. Unfortunately, the Civil Code debate has acquired communal overtones with

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the result that it is seen more as an attempt to score political points and even to harass the minorities than to make all citizens equal under the law. There should instead be a cross community dialogue aimed at rejecting those aspects of personal law that are inimical to modernity and justice while retaining those which preserve the uniqueness of pluralistic society. Such a give and take is not antithetical to religious freedom."

Iran names four women judges

Iran has, for the first time, named four women as Judges to Courts for family affairs in a city in the province of Teheran. The Iranian official news agency IRNA has quoted the Chief Judge in the town of Ray as saying on Dec. 25, 1997 that to expedite the legal procedures of the pending files of the people, some ten Judges, including four women, have been added to the board of judges of the city Court. The four women are lawyers by profession. Iran has 13 female members of Parliament and one female Vice-President.

Equal Right for women in Iran advocated

The President of Iran *Mohd. Khatmi* has advocated equal rights to women to that of men and has said that the women should not be denied due opportunity on the basis of religion, according to the Iranian news agency AP *Mr. Khatmi* was speaking at a conference in Tehran on Nov. 29. 1997. He has also appointed a lady Mausemeh Ibteqar, as the Vice-President of Iran and has recommended allocation of 20% of the revenue received from Cigarette producing Companies as Income Tax, to be utilised in the sports activities of females.

Islam for monogamy

The director of Turkey's state-run Department of Religions affairs Mehmat Nuri Yilmaz, came out in Ankara against polygamy for Muslims and said Islam called for a man to be married to one woman (as per the report of news agency DPA) Mr. Yilmaz acknowledged that Islam under certain circumstances allowed a man to take up to four wives. On the other hands, he added there sere verses in the Koran which were fundamentally opposed to polygamy. Thus, one verse said, a man should enter only a single marriage if he feared that he would be unable to do justice to several women. Another verse said, as much as I would want, I could not do justice to her. The implication was material justice so that in the case of several wives, none would be disadvantaged. This proved that Islam prescribed monogamy. Mr. Yimaz added.

Common Civil Code and Muslim Leadership

Ms. Sultan Shahin, in an article published in 'Hindustan Times' (June 8, 1995), has expressed her views on Muslim personal law. The following is the substance of her article: "It is said that a sinking person would try to float even with the help of straws. The Muslim leadership has been on the look out for any straw that might appear on the horizon. Those who floated a straw in the form of obnoxious idea of reservation of jobs for Muslims, have apparently designed to alienate Muslims further from the mainstream of society as well as

create and promote caste divisions among Muslims themselves. The Muslim community, however, in its belated wisdom, scuttled the move by refusing to support it. They took their destiny in their own hands. The overall impression is that in the view of the judges of Supreme Court, all Personal Laws on marriage simply need to be dropped and the Special Marriages Act or a somewhat spruced up version of this law needs to be enforced as the Common Civil Code. The projection of Hindu personal law as a model of gender justice is neither acceptable to women activists and reformers of Hindu Law nor to those who want greater gender justice in Christian and Parsi laws or are trying to make sense of a bewildering variety of tribal traditions. Indeed different schools of Hindu Law like Mitakshara and Dayabhaga with different versions of a United Hindu family are yet to be reconciled .....India is the only non-Muslim majority country, apart from Sri Lanka, to the best of my knowledge, which has allowed its Muslim minority enjoy the Privilege of conducting their life according to their own personal laws.....(They should) start rationalising and codifying Muslim Personal Law to make it more difficult for Unscrupulous Muslims to misuse the privilege of this law which is actually meant for God-fearing Muslims in truly Islamic society, some thing that does not exist anywhere in the world."

NCERT Guidelines

NCERT is laying stress on removing gender disparities, specifically emphasising the elimination of sex stereotypes and sex biases from text book which always show women doing household chores and men as earinig members and working outside the home. Educational pshchologists were worried that gender stereotypes adversely affect the emotional psyche of children, forcing them to perform a set pattern of behaviour pre-determined on the basis of gender discrimination. In the U.S. in the primary level text books men are also seen baby sitting clearing the house, washing clothes etc. At places boys are also shown losing tennis and basketball matches to girls. The NCERT tried to identity areas of sex-bias in language text books. Some projects and workshops were launched to create an awareness about gender difference. NCERT has developed a set of guidelines for the elimination of gender stereotyping in textual material, according to an article contributed by one Mr. Feroze Bakht Ahmed and Published in 'the Pioneer' (Jan 10, 1998). NCERT has also set up a women's study group called "Department of women's studies" which conducts workshops and carries on useful research work.

Removing gender bias

In a bid to remove gender bias, the Ministry of Human Resource Development has agreed to include the mother's name along with that of the father in all forms and certificates issued by the Central Board of Secondary Education (CBSE), the University Grants Commission (UGC) and the All India Council for Technical Education (AICTE). The CBSE has incorporated the instruction. its chairman has gone a step ahead by announcing that the mother's name will precede that of father. (Amit Ahuja's letter to the Editor, Indian Express, Dec. 16, 1997).

It's Time To See The World Through Women's Eyes

Ms. Rekha Dixit[1]

Gender equality and gender equity are seen as major issues in human development and consequently in global development in the future. This is keenly felt because gender discrimination is a subtle but all pervading form of institutionalized deprivation. Only the empowerment of women from the lowest possible levels of policymaking and administration can put an end to the inequality and oppression of women. A participatory rather than a passive role must form the thrust of developmental plans for women. It is particularly important that women find their own voice and become participants and decision makers in the home, the workplace, community and nation, Recent history has taught us that

'Where women prosper countries prosper".

One must recognize the significance of the slogan painted in a Manila Park where a coalition of 70 women's groups was meeting:

" A nation is not free unless its women are free".

Gender equality is not a new concept in India. The nineteenth century saw a lot of reform movement related to women's issues. Raja Ram Mohan Roy and other liberal thinkers like Tagore and K.C. Sen joined the fight for the remedy of gender inequalities and atrocities against women. Mahatma Gandhi was a serious prescriber of equality for women and women's participation.

The Constitution of India in 1950 not only grants equality to women, but also empowers the state to adopt measures of affirmative discrimination in favour of women. It further imposes a fundamental duty on every citizen to renounce practices derogatory to the dignity of women. The right to share property and the right to divorce are available to women. There have been a number of legislations, usually called special legislations relating to Dowry Prohibition, Sati Prevention, Child Marriage Restraint and so on. However the benefit of these intentions did not accrue to women as each community prefers to keep alive ritual and discriminatory practices. Education, employment, opportunities and economic independence are still largely male prerogatives. A majority of the women remain poor, illiterate subject and invisible. As ever gap between legislation and implementation is wide and perhaps growing wider.

It has been noted that lack of self-image among women and continuing discrimination in the name of caste, creed and religion have

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[1] Joint Registrar, State Adhinistrative Tribunal, Lucknow.

prevented any fresh thinking towards change. Girls are not allowed to educate themselves beyond a certain level because the parents would have to find boys with higher qualifications, who will demand higher dowry. Though law forbids it, parents continue to meet dowry demand and suffer exploitation. Socio-cultural pressures still force parents to resort to female infanticide. Girl children are deprived of the privileges given to boys. Grown to maturity they have to compete with men to prove their worth in

"male preserves".

This life-long cycle deprives rural women and even urban women from participating in developmental activities. Today the Indian women in far from equal to the Indian man. There is a negative female sex-ratio at the national level which has been steadily falling.

Though the world community has accepted that discrimination against women begins at birth, and that it is not enough to raise the status of women without ensuring that girls are allowed to be born and if that happens then they are educated and raised with a sense of self-worth. Women must shed her soft flower submissiveness and with a vigilant, vibrant panache, press for her rights. Unless development is

"engendered (it) is endangered".

The four critical concerns of human development-productivity, sustainability and empowerment demand that gender issues be addressed as development issues and human rights concerns. Eradications of poverty is not a precondition for improvement in women's status because dependence and servility are forced on women by many societies at least in developing countries. As such equality of status is of priority and not economics. Governments and employers in developing countries discriminate against women because of social sanction behind such discrimination due to the absence of rapid strides in literacy education and employment by women.

Uniform Civil Code is a much hyped issue in recent times. Its objective is to bring all the communities on a common platform on matters which are not governed by diverse personal laws but which do not form the essence of any religion. The Uniform Civil Dode should be voluntary until all communities are ready for it. Each community should try for internal reforms within personal law on issues which perpetrate gender justice and inequality. Internal reforms in every community particularly in the areas of marriage, divorce property and settlement, should be strengthened by a powerful campaign for gender justice launched by women activists. The country must first strive for gender justice and legal equity. It is better to talk of a gender equal law than a Uniform Civil Code.

Policy makers in India should begin to perceive social and economic development through the angle of women's empowerment. Women must

equal legal status. But the problem does not end here. It only commences at the point where women begin to affect the political deliberations of the nation. The demand of reservation for women in assemblies and Parliament came from several quarters. It was a promise all political parties made in their election manifestoes. Women's organisations, which were never comfortable with the idea of reservation for women for a variety of reasons, also gave their assent. The aforesaid Bill was opposed on the ground of separate code for women from could have died out quite so rapidly. An elaborate pretence of conviction was quickly transformed into ambivalence and just as swiftly into embarrassment, as the Bill on reservations for women in legislative institutions lapsed into oblivion.

The real and more difficult problem which needs to be tackled is the subjugation of women to men. So long as nations and governments play their games of power, so long as they have reservations of proposals and techniques of retractions, the wheels of progress in the area of women's empowerment will grind ever so slowly.

Despite broader perception levels in the country traditional mind-sets have not been able to get over the negative concept of

"Woman as a victim"

In understanding the empowerment process. The status of women as a value addition in the development process of the country is yet to be promoted.

An evaluation of empowerment does not necessarily imply the rectification of an in-equitous relationship. Our country has witnessed Rule of woman nearly for a decade with no worth mentioning developments regarding fairer sex. It must be an attempt to change the stereotyped image of women in the country. It ought to be based on introspection of the gender inputs as critical components in the development of the country. Empowerment in the present context has also to be viewed as participatory machanism. It correlates participation and empowerment in terms of confidence, capabilities and consciousness of the existing womenfolk as equal partners in the decision-making process. It enhances gender identity by doing away with traditional role-models of women being powerless and deprived. It integrates impotent with self-reliance and qualitative development.

An attitudinal change is required and the community should be used as the propelling force as far as empowerment is concerned. Stereotyped thinking, gender roles and values and established patriarchy have to make way for equal participation. Time will prove the efficacy of women's participation. It is expected that rural women will lead the way in rendering justice to womankind.

GENDER AND SENSITIVITY

Ms. Rekha Gupta, PCS

Gender on one side denotes sexlessness, while on the other projects inequality. Its basic concept is that all persons whether male or female are equal and should be treated equally – the concept enshrined in our constitution (Article 14). Sensitivity denotes consciousness and will to enforce while bias is an obstacle between Gender and Sensitivity.

In a patriarchical society, certain prerogative are given to the male, for e.g. defending the honour of nation, governing the Society, protecting the family he created. These prerogative are further projected in attributes of power, force and aggressiveness. On the other hand Morality is a female prerogative, which she has to honour and protect. It is manifested in the form of docility, following the rules, compliance, chastity and subservience. This separation of spheres has lead to the rap of protecting larger interest of state symbolised by partriarchical system, and the smaller ones denoting the protection and struggle for civil liberties- inevitably falling in the realm of feminism. This duality is one way of expressing the Separation between the private and public, between female and male and between Gender and Sensitivity. Morality and power which are opposed to each other show their true colours in the form of physical force and aggression against women.

In the male psyche, female is a "thing" to protect, to care, to some extent to be loved and chrished. "Things" are simply articles, which can be owned but cannot be equal. Articles are useful items which are connected with male honour, hence the chivalry and notions of protecting. This will aptly explain, the war crimes. What had happened in Second world war was repeated in Bosnia. Destruction at war is furthered by personal humiliation to the male – hence the need to insult the women he ownes.

This duality is further expressed in the enforcement of criminal justice. The parameter of bias is accentuated further with the treatment a woman receives when she is the aggressor and when she is the victim. An aggressor can be analysed, assessed, tolerated and even pardoned. Aggressiveness is a trait familiar to the patriarchical system, well understood, hence we can think of pardoning *Phoolan Devi*. We can still think of vieling her aggressiveness with a heroic image, give her recognition, a title and conveniently forget about it. A victim on the other hand can be sympathised with one can affored to be charitable also, but a victim if a women seeking justice is another thing. It not only implies personal justice but also a denounce, a revolt against the duality- so deeply entrenched in the system. It is like overstepping the lines drawn to demarcate the system. She is reminded by the apathetic attitude of the enforcing machinary of her morality and chastity. This is truly expressed in the

apathetic treatment which Mrs. *Roopan Deol Bajaj* had to receive initially.

It is presumed that with "development" there is increased gender equality. The success of public policies can be assumed in terms of positive impact on the quality of women lives and work. We are asserting women right at worm which is free from aggression and violence and bias. In fact it was the feminist movement in the early 70 which gave it the name of "sexual harassment". It is a recognised reality that women at work can never quite escape being defined as a 'thing" or "objects of view". Either for their colleagues or other access to repeated request for dinner, to proposals having sexual overtones can be assumed to be a part of working relationships. It was around 1975 when feminist organisations in U.S. organised and spoke of sexual harassment at work. In turn, a flood of testimony poured in telling of thousands of women who fled from their jobs and promotions. When a woman actually complains of such harassment, it is the victim rather than the harasser who is seen as a problem Her perception, Sanity, morality and chastity is at once questioned.

Judiciary, a part of the criminal administrative system is also not free from bias. Some important cases where courts gave benefit of doubt, where no such doubt should even exist. A woman was raped in Bengal, She was blinded, her tongue and hands cut off. The purpose was she could in no way give evidence or identify the man She could neither read his name, nor could write or speak his name. She could hear and could possibly nod her head if the name was read aloud to her. But no one bothered to ask her. Her evidence given in gestures was not admissible.

In 1977 there was *Hansa's* case: She was burnt to death by her mother-in-law while asleep. Her dying declaration implicating the mother-in-law was rejected because when *Hansa* was asked if she had actually seem lighting a match, she said 'How could I? I was asleep. No manner that she woke up, when she was set on fire, the court found these loopholes enough to reject her declaration.

Take the case *Vimla* who recorded a statement against her husband *Abdul Hameed*, who had mutilated her by throwing acid on her body. The case was rejected and the husband could not be punished because of a thing error in the suit- his name had been spelt *"Vaheed"* instead of *"Hameed"*.

And then there was *Sudha's* case. At the point of death she spoke to a number of people and gave oral evidence that her husband and in-laws burnt her. What was produced in the court was a dying declaration on paper, which testified to the contrary. The session judge had no hesitation in declaring this to be a framed, obtained by coercion, as all circumstantial evidence pointed to the fact that *Sudha's* murder had been carefully planned and executed . But the High Court set aside this judgement, took no account to *Sudha's* oral

declaration, passed strictures on the session court and acquitted the husband.

What are we to believe? Is it only a manner of convenience for those who are supposed to dispense justice, that they choose to believe some things and not others? Why is it that a woman's dying statement has importance only when it serves to acquit her husband. It is because that the Supreme Court judgement in the Meesala RAmakrishnan case ruled that a dying declaration recorded on the basis of nods and gestures is admissible in court and possesses evidentary value is so important. Ramakrishanan, had set fire to his wife. She died, but not before she recorded in the signs, nods gestures that her husband was the guilty person. It needs thinking, how stoves can burst with such regularity or boiling milk set wives, never to mother-in-laws, sisters and servants. Indeed, the judgement proclaimers have boiled milk at some time or other in their lives.

Take the case of "women stripped outside the Court". In the district of Saharanpur, some powerful Gujjars of Navagaon village and some goondas stopped and beat a harijan woman *Usha Dhiman* 35 years, outside the court room of a judicial magistrate on May 26.

Till a few years, the concept of sexual harassment at job was almost unrecognised in India. Very few women would admit to sexual exploitation by male colleagues and even less would complain. The spate of cases that have come under the spotlight in recent years is ample proof that Indian women is not willing to put up any longer and thus "Affirming the Right to say No".

In June 1995 dispute between the Indian Airlines management and pilots which hit the headlines had a whiff of sexism to it, with senior air hostess *Kanchan Khanna*.

Women who have dared to defy social norms and act as agents of social change have been particularly vulnerable to sexual harassment. Bhanwari Devi a Sathin with the "women's Development Programme" in Rajasthan, prevented a child marriage form taking place. In the process she antogonished upper caste men who took revenge by gang raping her. This fiery woman has now filed a petition in the Supreme Court.

The incident of women doctors of the Maulana Azad Medical College in the capital being allegedly sexually harassed by the head of the department of Dermatology S.N. Reddy is another case in this point.

There is still contradiction in the judgement delivered by Hon'ble High Court and Supreme Court. The war vs. State of Madras AIR 1951 SC 1964, *Hirrmand Dondu* vs. State of Maharastra, 1988(2) Bombay CR 187, *Daler Singh* vs State of Haryana, 1955, cri LJ, *Bivan Soren* vs State of West Bengal are cases in which court held that the single testimony of the victim needs

corroboration. Another series of judgement like Bhoginbhai Hirjibhai vs State of Gujarat AIR 1983-SC-753, Prithvichand vs State AIR 1989 SC 702, *Rafigu* vs UP-AIR 1981 SC 559, and *B.B. Brijbai* vs Gujarat AIR 1983 SC 753 upheld the single testimony of the victim. In *Bhoginibhai* case the court observed – "There is an inbuilt assurance that the charge is genuine rather than fabricated". In a landmark judgment with respect to protection of the right of victims, the Supreme Court has laid down broad parameters in Delhi domestic working forum vs Union of India & others (1995-1-SC-Cases 14).

From 1947 to 1997 many constitutional, legal and administrative initiatives have been taken. Prominent among them are constitutional mandates for gender equality, sitting up Women and Child Development Department at the union and State level, National Commission for Women, State Women Development Corporations, Special Schemes like Rastriya Mahila Kosh, Indira Mihila Yojna, reservation of one third seat to be filled by direct election in Panchayats and local bodies, the introduction of 81st Constitutional Amendment Bill for reservation in Lok Sabha and State Legislatures. However, these useful enactment actually lag behind implementation because the society has not kept pace with the rapidity of legislation.

Violence against women is a major hurdle to the process of development of women and their empowerment. The rising incidents of crime and Violence against women is a reflection of the widening gap between constitutional mandate and social viability.

The right to personal liberty when it comes to the case of women involves a high risk not only at the place where she works, but also after incidence of harassment has taken place, at the level of complaint or arrest or in prison, unless the women police is compulsorily present to ward off potentials of molestation.

Seema Mustafa argues assuming the validity of the separation of spheres, while asserting that Gill's positive contribution in one sphere cannot detract from his misdemeanours in another. In discussing issues of gender, one focuses on the focuses on the family without looking at how the state institutionalises gender. The fact is that *Rupan Bajaj* is firmly married, has limitation of this victory are that it would have been inconceivable for a single woman not so firmly embedded within the institution of marriage that is so assiduously supported and protected by the state. The Gill episode is important because it sends the right message down the line. No one, not even national heroes are above the law. through the *Rupan Bajaj* verdict is an important sense of the subversion of the patriachal traditions of the Indian State and a rupture of the boundaries between the political sphere and society, between home and the world, between the workplace and the street.

As such there is an obvious need for a law that specifically punishes sexual harassment and for the institution of mechanisms in the workplace to deal with this problem. Internal codes of conduct for employees need to be formulated by institutions and procedures for registering and processing complaints need to be set up. Women need to capture their sense of outrage and turn it into positive energy.

Atrocity on women vis-avis the limited supportive machinery that exist for her help, becomes all the more less effective when the aggressor is influential and has high connections. This coupled with vulnerability of women. attitude towards morality, the indifference of the criminal administrative system often reverses the role of the victim and violator, Realising the gravity of human right having gender specifications, the first world Women Conference was held in Mexico in 1975, second at Copenhagen in 1980, third at Nairobi in 1985 and the fourth at Beijing in 1995 . The theme of 'Equality' 'Development' and peace has been running through all these conferences. they have laid down various principles lime elimination of illiteracy, women education, economic security and autonomy, basic health for the advancement of women till 2000 AD. The declaration adopted at Beijing expressed its conviction that" women empowerment and their full participation on basis of equality in all spheres of society, including participation in the decision making process and access to power are fundamental for the achievement of equality, development and peace" As such empowerment and equality should not be considered in isolation, and equality should not be considered in isolation, and realisation of these goals is the only ways to build a just and balanced society.

Sensitivity towards women has become so much blunted that in 1976 through the 42 Amendment, Article 51 a was inserted in the Constitution – "It shall be the duty of every citizen of India to ------ renounce practice derogatory to the dignity of women". Today the Amnesty International has for the first tiem called all government to implement a 12 point programme to protect women from discrimination and abuse.

The social psyche developed over a long period has led to a systematic deprivation and exploitation of women. This psyche needs attitudinal change. Today in the absence of requirement of brute physical force women should be viewed as person, who like any other person be treated alike, neither with interest nor by favors but only by equality.

While woman remains nearer the infantile type, man approaches more to the senile. The extreme variational tendency of man expresses itself in a larger percentage of genius, insanity and idiocy; woman remains more nearly normal

W. I. Thomas, Sex and Society, 1907, P. 51

Themes & Issues

Dr. Smt. Saroj Raj[1]

Sex Discrimination v. Age discrimination

Young and attractive Air Hostess may be the requirement of AIR India but termination of services by the Management, if an Air Hostess becomes pregnant, was held equivalant to compelling the poor Air Hostess not to have any children and thus a callous and cruel interference to divert the ordinary course of human nature and as an insult to Indian woman-hood. Fixing of retirement age for Air Hostess from 58 to 45 coupled with unbriddled powers of the management to terminate their services was struck down by the Hon'ble Supreme Court of India in *Narges Meerza*[2] giving directions for suitable amendment.

"Sex like race and national origin is a immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon a member of a particular sex because of their sex would seem to violate the basic concept of our system with legal burdens and bear some relationship to individual responsibility" was observed by the United States Supreme Court in case of pregnant Air Hostess, in *Sharron A. Frontiero.*[3]

It was held that pregnancy is not a disability but one of the natural consequences of marriage and is a immutable characteristic of married life. Hence distinction made on the ground of pregnancy was held to be "extremely arbitrary".

Maternity Leave Rule and Gender Bias

In the United States in the Department of Employment Security the maternity leave rules requiring a teacher to quit her job several moths before the expected child was severely criticised by the United States Supreme Court in *Mary Ann Turnor*[4].

The court held that "Mandatory maternity leave Rules requiring a teacher to quit her job several months before the expected birth of her child and prohibit her return to work till three months after child birth violated the 14th Amendment.

Disclosures as to menstruation unnecessary for employment.

In a recent decision[5] the Hon'ble Supreme Court sharply reacted to

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1 B.Sc., M.A., Ph.D. Principal, Ramakanya Girls Inter College, FZD.
2 Air India v. *Nerges M'eerza*. AIR 1981 SC 1829.
3 *Sharron A. Frontiero* v. Elliot L. Rechardson, (1973) 36 L Ed, II, 583.
4 *Mary Ann Turnor* v. Department of Employment (1975) 46 L.Ed. II 181.
5 Mrs. *Neera Mathur* v. Life Insurance Corporation of India, AIR 1992 S.C. 392.

some rules and regulations seeking disclosures of number of conception, abortion or miscarriage, the last menstruation and whether the menstruation periods were regular from eligible woman candidates to be appointed as Assistants in LIC on the ground that these disclosures had nothing to do with the employment. Deprecating the practice the Court observed:

"The particulars to be furnished under column (iii) to (viii) in the declaration are indeed embarrassing if not humiliating. The modesty and self respect may perhaps preclude the disclosures of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full terms etc."

Right to Priest-hood

Hundreds of years of slavery negatived the respected place of a woman in the society denying her right to become a Sheveit or Mahant of a religious institution. Of late in the year 1985 the Hon'ble Supreme Court in the case of *Shambhu Charan Shukla*[4] recognised the right of a woman to become a Sheveit irrespective of her inability to do personal sewa pooja (as pujari) for which a suitable person may be appointed. In this decision the Court took into consideration the rights of a scheduled caste woman to be appointed shebeit or Mahant.

Priest hood amongst Mohammadan females is not yet recognised- the religious headship being the exclusive domain of men.

Offering Prayers and Gender Bias

The statement of a Shakracharya of Puri created furore and controversy amongst the Hindus when he tried to place a restriction for reciting Mantras or Vedas by Hindu women questioning the eligibility of a woman to recite vedic-hymns. The question of offering prayers in Mosque by some women activists of Kerala and the right to offer Namaz by sections of Muslim women is much debated one. Prophet Mohammed had declared that "The best of you are those who are best in treating their wives." Yet to strictly keep women as veiled forever, it is being argued that offering Namaz by women inside the Mosque is unislamic and unholy.

Laws of the Statutory Bias

Section 497 IPC does not provide for hearing the wife; it does not contain a provision for hearing the married women with whom the accused is alleged to have committed adultery, there being no rational behind it. The law Commission of India in its 42nd report of 1971 recommended modifications in section 497 IPC to the effect that even the wife who has sexual relations with a

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4 *Shambhu Charan Shukla* v. Shri *Thakur Radhacharan Madan Gopalji Maharaj*; AIR 1985 SC 905

person other than husband should be made punishable for adultery but the suggestions have not yet been accepted by the legislature. Section 497 does not entitle a woman to be made a party or hearing and the same was held valid and constitutional *Sowmithri Vishnnu*[7] observed "the offence of adultery as defined in that section can only be committed by a man, not by a woman. Indeed the wife shall not be punishable even as an abettor". the Court also made it clear that "section 497 cannot be said to be violative of Art. 14 f the Constitution on the ground that it makes that (1) Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery; (2) S. 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and (3) S. 497 does not take in cases where the husband has sexual relations as it were, a free licence under the law to have extramarital relationship with unmarried women.[8]

Even sec. 198 Cr.PC. does not permit a wife to take action under section 497. Why a wife must not have the right to prosecute her disloyal husband? Yet, the statutory gender bias was justified in Veravathi.

Gender Bias under Divorce Act, 1869

Section 10 of the Divorce Act provides discriminatory grounds for between wife and husband . While the husband can seek the divorce on the ground of adultery alone the wife has to prove that the husband is guilty of adultery which is (1) incestuous (2) coupled with cruelty as without adultery would have entitled her to a divorce a mensa-et-toro (3) coupled with desertion, without reasonable excuse for two years or upwards.

Husband is thus placed in a much favourable position as compared to the wife. In Marison Gacharia[9] the discriminatory provisions of Sec. 10 have been held to be without any constitutional justification and violative of Articles 14, 15 and 21 of the constitution of India. Surprisingly the Divorce Act is still awaiting amendment. For further reading see *Swapna Ghosh*.[10]

Gender Bias in Succession to property :

In *Masilamani Mudaliar*[11] the Supreme Court has categorically ruled

7 Sowmithri Vishnnu v. Union of India, AIR 1985 SC 1618. Chandrachud, C.J.)

8 In this connection, it cannot be said that women, both married and unmarried have changed their life style over the years and there are cases where they have wrecked the peace and happiness of other matrimonial homes. It is hoped that it is not too right, but an under-inclusive definition is not necessarily discriminatory. The alleged transformation in feminine attitudes, for good or for bad, may justly engage the attention of the law-makers when the reform of penal law is undertaken. Tbey may enlarge the definition of 'adultery' to keep pace with the moving times. But, until then, the law must remain as it is.

9 Marison Gacharia v. Union of India, AIR 1995 (1) K.L.T. 644 (F.B.)

10 *Swapna Ghosh* v. *Sadanand Ghosh*, AIR 1989 Cal. 1.

11 *Masilamain Mudaliar* v. Idol of Sri Swaminathaswami Tirukoil, (1996) 8 SCC 525.

that women have right to elimination of gender based discrimination particularly in respect of property.

Section 8 of the Hindu succession Act, 1956 confers rights to the property in a female heir as a daughter. Section 23 of the Hindu Succession Act unusually and unnecessarily restricts the same referring it to the wishes of male heirs when they choose to divide, further discriminating between females as such whereby unmarried daughters have not been conferred a right to partition and separate right of residence. The position was upheld in the case of *Narsimha Moorthi*.[12]

Service Law and Gender Bias

Out of turn allotment of Railway quarters-eligibility-provision in Railway Board circular dated 27.12.1982 restricting the eligibility of married daughter, of the retiring official, only to cases where such official has no son or the daughter is the only persons prepared to maintain the parents and the sons are not in a position to do so held suffering from gender dis-crimination. Hence, in order to cure the infirmity, read down from its initiation as postulating the married daughter as one of the eligibles subjects interalia, to the twin conditions that she is a railway employee and the retiring official opts for regularisation in her favour.[13]

Tenancy and Land Laws vis-a-vis Gender Bias

Chotanagpur Tenancy Act, 1908

It has been held in *Madhu Kishwar* [14]that denial of right to succession to ST women would amount to deprivation of their right to livelihood under Art. 21- Hence exclusive succession in the male line of heirs under the Act must remain in suspended animation till the immediate female relatives of the last make tenant continue to depend their livelihood on the land . But the custom of tribal inhabitants of exclusion of female line of successions cannot be declared to be ultra vires Arts. 14, 15 and 21. Yet the state of Bihar was directed to comprehensively examine the question on the premise of our constitutional ethos and the need voiced to amend the law. The court further directed to examine the question of recommending to the Central Government whether the latter would consider it just and necessary to withdraw the exemptions given under the Hindu succession Act and the Indian succession act at this point of time insofar as the applicability of these provisions to the scheduled Tribes in the state of Bihar is concerned.

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[12] *Narsimha Moorthi* v. *Susila*, 1996 (3) SCC 344.
[13] *Savita Samvedi* v. Union of India, (1996) 2 SCC 380.
[14] *Madhu Kishwar* v. State of Bihar, 1996 (5) SCC 125. (Kuldip Singh and Punchhi, JJ. concurring K. Ramaswami J. contra.)

CHRISTIAN DIVORCE – TILT AGAINST WIFE

By : Rita Agnes Cocker[1]
&
Alok Pandey[2]

INTRODUCTION

Two thousand years ago Jesus Christ came on this earth to save the mankind. Through him Resurrection came into Christianity, but is there hope in Christian wives' life or do they have to suffer more and more? or they have to wait for another Christ?

How will the kingdom of God come in Christian wives life. Will it come through adultery? Keep growing in Christ means growing together with love. Christ message is "fee will" and "dignity of person", that they can grow with full freedom. Gospel gives freedom to people, but why not there's freedom for Christian wives?

We are celebrating fifty years of independence. But Christians in India are still governed by Colonial Law of England. Indian divorce act 1869 is virtually a zerox copy of Matrimonial Causes Act of England.

Religious Background:

Divorce has not come from God,- "For I hate divorce" – says the Lord.[3]

God created man in his own image and when he found, it is not good that the man should be alone, "I will make him a helper fit for him". And he created" Woman from man's own ribs", taken out of ribs means Gods has given "her" place near man's heart. which is taken out we have to take care, of it, with love we have to care for it because it will be part of oneself but in today's world men has forgotten that women is a part of his own body.

ENDURING GRACE-MARRIAGE

"Submit yourselves to one another because of your reverence for Christ. Wives, submit to your husbands as to the Lord. For a husband has authority over his wife just as Christ has authority over the Church; and Christ is himself the Saviour of the Church, his body. And so wives must submit completely to their husbands, love your wives just as Christ loved the Church and gave his life for it. He did this to dedicate the Church to God by his word, after making it clean by washing it in water, in order to present the Church to himself in all its beauty-pure and faultless, without spot or wrinkle or any other imperfection. Men ought to loves their wives as they love their own bodies. A

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3 "Malachi – 2:16" (Old Testament).

man who loves his wife loves himself. (No one ever hates his own body) instead, he feeds it any takes care of it just as Christ does the Church; for we are members of his body"[4]

Marital exclusiveness and indissolubility

Father, by your power you have made everything out of nothing. In the beginning you created the universe and made mankind in your own likeness. You gave man the constant help of woman so that man and woman should no longer be two, but one flesh and you teach us that what you have united may never be divided. (Symbol of Christ's union with the Church) Father, you have made the union of man and woman so holy a mystery that it symbolized the marriage of Christ and his Church. (Marriage, a holy institution) Father, by your plan man and who man are united, and marriage has been established as the one blessing that was not forfeited by original sin or washed away in the flood (Love and peace for the wife) Look with love upon this woman, your daughter, now jointed to her husband in marriage. She asks your blessing. Give her the grace of love and peace. May she always follow the example of the holy woman whose praises are sung in the scriptures. (Honor and love in the husband) May the husband put his trust in her and recognize that she is his equal and the heir with him in the life of grace. May he always honour her and love her as Christ loves his bride, the Church. (Mutual fidelity and Children) Father, keep them always true to your commandments. Keep them faithful in marriage and let them be living examples of Christian life. Give them the strength which comes from the Gospel so that they may be witnesses of Christ to others. Bless them with children and help them to be good parents. May they live to see their children's children. And, after a happy old age, grant them fullness of life with the saints in the kingdom of heaven". Throughout the ceremony, which is celebrated during Mass, the couples are told that their marriage is 'for the rest of your lives," that they are to "accept children lovingly from God, and bring them up according to the law of Christ and his Church, "that the rings they exchange are to be symbols," of true faith in each other and always remind them of their love", and that the Lord will "strengthen your consent and fill you both with his blessings."[5]

"Jesus Teaches About Divorce"[6]

When Jesus finished saying these things, he left Galilee and went to the territory of Judaea on the other side of River Jordan. Large crowd followed him and he healed them there some Pharisees came to him and tried to trap him by asking "Does our law allow a man to divorce his wife for whatever reason he wishes? Jesus answered, "Haven't you read the scripture that says that in the beginning the creature made people male and female? God said,

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[4] EPHESIANA – (New Testament CR. 5: 21-30

[5] The Catholic Catechism, A contemporary catechism of the Teachings of the Catholic Church by John A. Hardon, S.J. Page 536.

[6] Mathew 19 Verses 2 to 9 New Testament.

"For this reason he will leave his father and mother and unite with his wife and two will become one. So, they are no longer two but one. Man must not separate them, what God has joint together".

The Pharisees asked him ,"why, then, did the Moses give the law for a man to hand his wife a divorce notice and send her away. Jesus answered, "Moses gave you permission to divorce your wife because you are so hard to teach. But it was not like that at the time of creation I tell you then that any man who divorces his wife even though she has not been unfaithful, commits adultery if he marries some other woman". In the New Testament Christian marriage is not sacramental in character. There is a wrong notion among jurist in India that Christian Marriage has a sacramental character because the concept of divorcee originated from the New Testament (Bible) and the dialogue between Jesus and Pharisees. So it is wrong approach of court of law in abstaining from inducting the principle of English Law in India by means of Sec.[7] held the "thought Section 7 of the Act, provides that in construing the Act, the principles and rules followed by the England", thus, where the parties alleged that they had not been able to live together and that their marriage has broken down irretrievably and that, therefore, they were entitled to a decree by consent, relying upon section 7 of the Indian Divorce Act read with section 1 (2) (d) of the Matrimonial Causes Acts, 1973 of England, which permitted such a divorce, the Supreme Court while dismissing the petition, held that the parties were not entitled to rely on the provisions of the English statutes for adding new grounds of divorce under the Act.

Legal Provisions:

The Indian Divorce Act was enacted in the year 1869 when Indians were not free; the sole purpose of this act was to govern the Christians who were domiciled in India at that time. The Christian Law on divorce was very advance for those times as the matrimonial tie causes be broken with the help of section 10 by the competent court. Hindus could not get divorce at that time because the marriage of Hindus was supposed to be a sacrament and could not be broken. It is important to mention here that the ground available for divorce by a Christian Man is adultery while the Christian wife if she wants to her divorce from her husband has to prove not only adultery but aggravating circumstances section 10 of the Indian Divorce reads as under :-

10. When husband may petition for dissolution: any husband may presents petition to the District Court or the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization hereof, been guilty of adultery. When wife may petition for dissolution: Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form

[7] Reynold Rajamani v. Union of India, AIR 1982 SC 1261: (1982) II DMC 268.

of marriage with another woman; or has been guilty or incestuous adultery, or of bigamy with adultery or of marriage with another woman with adultery, or a rape, sodomy or bestiality or adultery coupled with such cruelty as with out adultery would have entitled her to a divorce a mensaet toro, or of adultery coupled with desertion, without reasonable excuse, for two years of upwards.

Contents of Petition:

Every such petition shall state as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded. There is a State amendment of U.P. :- In section 10, the word "or to the High Court" wherever occurring in the sec. shall be omitted- U.P. Act XX of 1967, S. 2 and violative of Article 15 of the constitution of India. Article 15 of the constitution- lex supreme prohibits discrimination on the ground of religion race, caste, sex and place of birth- yet sec. 10 of Indian Divorce Act suffers from gender discrimination. In England the Matrimonial Causes Act 1973 is now quite liberal section 1 of the Act provides as under : 1 Divorce on break-down of marriage. (I) Subject to section 3 below, a petition for divorce may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably". While changes were effected in the English law no corresponding amendments were bought about in the Indian Divorce Act 1869. Although they Adopted into Parsi Marriage and Divorce Act in 1937.

sect"7 of the Indian Divorce Act, however provides Court to act on principles of English Divorce Court :- Subject to the provisions contained in this Act, the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts are as nearly as may be comfortable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

Provided that nothing in this section shall deprive the said courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.

The amendments proposed.

In or around 1958-59 some private bills were introduced in Parliament to reform provision of the Act . Consequently, the Government refereed the matter to the law commission. In the recommendation of the law Commission (XV report) grounds for divorce were laid down, which include (i) adultery (ii) conversion (iii) insanity (iv) virulent and incurable leprosy (v) communicable verbal disease (vi) not heard of for seven years (vii) Non consummation of marriage (viii) Non-compliance with a decree of restitution conjugal rights (ix) desertion and (x) cruelty. Remedy of divorce by mutual consent was not introduced at this point of time. Desertion and cruelty were treated as independent grounds for claiming divorce.

Representatives of the Roman Catholic Church submitted before the Commission that the Roman Church is opposed to divorce and that Roma Catholics should be exempt from these provisions. But the Law commission pointed out that the provision for divorce exists since 1869 and the Church had not raised any protest. Further, the proposed amendments were only an enabling legislation and the same would not compel any Catholic to divorce. The law Commiss on further pointed out that the proposed provisions of divorce did not introduce any new remedy but merely widened the scope of the existing provisions. The Fifteenth report of the Law Commission was submitted tot the Ministry of Law. But, at this Stage, the Government concluded that public opinion should be again elicited and sent the Bill back to the Law Commission. Law Commission reexamined some of the clauses in the proposed Bill and submitted its twenty-second report to the Law Ministry. But the Bill was shelved.

Efforts by Law Commission:

In 1983 the Law Commission under the Chairmanship of Mr Justice K.K. Mathew, again took up the limited question of amending section 10 of the Act based on letter sent by Christian women to the ?Commission detailing the cruelty experienced by Christian Women at the hands of their husbands. The commission after considering various options, concluded that there is urgent need for amending section 10 of the Act, so as to remove the discrimination from which Christian women suffered. The Law Commission observed," If the Parliament does not remove the discrimination, the Courts in exercise of their jurisdiction to remedy violations of fundamental rights are bound some day to declare the section as void". The Ninetieth Report of the Law Commission was submitted to the Law Ministry in May, 1983 Despite the Recommendations, the Government did not introduce any legislation for amending section 10 o the Act and the warnings of Law Commission proved to be true.[8]

Unfortunately the fate of the Proposal legislation is still enwrapped in uncertainly, because Indian politicians are worried about their vote bank and Minority Christians are horridly represented in the House and some of the few who do reach the House .

The Hon'ble Supreme Court may pass such directive like the directives passed in the matter relating to rights of arrestees and rights of working women.

The Christian Women in India are craving and crying for justice while they are forced to live with their husbands even if they treat them with cruelty. This aching legal disparity from which Indian Christian Women suffer must be abolished at an earliest. The sooner the better.

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[8] See Decisions of Kerala High Court in AIR 1995 Kerala 252 Ammini E.J. v. Union of India; Bombay High Court in Air 1997 Bombay 349 (Full Bench) Mrs. Pragati Varthese v. Cyril George verghese.

DOWRY AND DOWRY RELATED OFFENCES

N. V. GUPTA[1]

In India where in theory women are idolized and worshipped and amongst Hindus marriage is regarded as a sacrament bestowed with divinity, the present day consumerism and get-rich quick mentality and increasing lust for easy money has made coercive demands for dowry and consequent cases of torture, harassment, murder and suicide of brides to be a curse to the society. The dowry evil originally confined to middle class Hindu society has lately spread to poorer classes and to Muslims and Christian as well.

Dowry Prohibition Act 1961

In recent years the evil has been flourishing beyond imaginable proportions. In 1991 one dowry death took place in every 102 minutes[2]. The original justification of dowry (meaning marriage portion) was the need to provide the new couple with essential requirements to set up a marital home. Also involved were factors of social prestige. But later on it came to assume the form of extortion. It was to curb this evil that led Parliament to enact the Dowry Prohibition Act in 1961. The Act is intended to prohibit the 'giving or taking of Dowry' and makes its 'demand' by itself also an offence under section 4. Even the abetment of giving, taking or demanding dowry has been made an offence. Further, the Act provides that any agreement for giving or taking of dowry shall be void. Offences punishable under the act have been made non-compoundable, vide section 8 of the Act. The Hon'ble Supreme Court, in the case of *S. Gopal Reddy*[3] first quoted the relevant provisions of the Dowry Prohibition Act 1961 as follows:-

> "Sec 2. In this Act "Dowry" means any property or valuable security given or agreed to be given either directly or indirectly-
>
> (a) by one party to a marriage to the other party to the marriage or.
>
> (b) by the parents of either party to a marriage or to any other person, at or before or after the marriage, as consideration for the marriage of the said parties,.
>
> But does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.
>
> **Sec. 3. Penalty for giving or taking dowry.-** If any person, after the commencement of this Act, gives or takes or abets the giving

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1 H.J.S.; Addl. Director, J.T.R.I., U.P.

2 National Crime Records Bureau; Crimes Against Women 1991.

3 *S. Gopal Reddy* vs. State of A.P., (1996) 4 SCC 596 = 1996 SCC (Cri) 792 (Before *Dr. A.S. Anand and M.K. Mukherjee JJ*).

taking or dowry, he shall be punishable with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more:

Provided that the Court may, for adequate and special reasons to be recorded in the judgement impose a sentence of imprisonment for a term of less than five years (five years were substituted for the words 'six months' w.e.f. 19th November, 1996).

Sec. 4. Penalty for demanding dowry- If any person demands directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom as the case may be, and dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees.

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than six months."

What is dowry?

Since the giving and taking of dowry is a social malaise the object and aim of the Dowry Prohibition Act is to prohibit and prevent this evil practice.

Dowry:- the word dowry has a Latin origin. The word according to the Webster's New Twentieth Century Dictionary, means.

(1) the money, goods or estate which a woman brings to her husband in marriage; the portion given with a wife.

(2) a natural talent, gift or endowment as, poetry was his dowry.

(3) a gift given to or for a wife (Archaic).

In Law lexicon of British India, 1940 Edition, Page 364 the meaning of dowry in the field of law has been summed up in the following words:

'Dowry or Dote.(Dos Mulieris.) Was in ancient times applied to that which the wife brings her husband in marriage otherwise called maritagium or marriage goods; but these are termed more properly, goods given in marriage, and the marriage portion."

There had been lot of controversy in defining the meaning and scope of the term 'dowry' as given under Section 2 of the Dowry Prohibition Act. In a recent decision of *S. Gopal Reddy*, after noting various dictionary definitions and the objects of the Act the Apex Court went on to observe:

"The definition of the term 'dowry' under Section 2 of the Act, shows that any property or valuable security given or "agreed to be given" either directly or indirectly by one party to the marriage to the other party to the marriage "at or before or after the marriage" would become "dowry" punishable under the Act. Property or valuable security so as to constitute "dowry" within the meaning of the Act must therefore be given or demanded "as consideration for the marriage."

The legislature has in its wisdom while providing for the definition of "dowry" emphasised that any money, property or valuable security given, as a cosideration for marriage, "before, at or after" the marriage would be covered by the expression 'dowry' and this definition as maintained in Section 2 has to be read wherever the expression "dowry" as commonly used and understood is different than the peculiar definition thereof under the Act. Under Section 4 of the Act, mere demand of 'dowry' is sufficient to bring home the offence to an accused. Thus, any 'demand' of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice versa would fall within the mischief of 'dowry' under the Act where such demand is not properly referable to any legal recognised claim and is relatable only to the consideration of marriage.

Where no marriage takes place:

The Hon'ble Court further observed "Particularly where the non-fulfillment of the 'demand of dowry' leads to the ugly consequence of the marriage not taking place at all, the expression 'dowry' under the Act must be interpreted in the sense which the statute wishes to attribute to it. Mr. *P.P. Rao*, learned Senior Counsel referred to various dictionaries for the meaning of 'dowry' 'bride' and 'bridegroom' and on the basis of those meanings submitted that 'dowry' must be construed only as such property goods or valuable security which is given to a husband subs. by, by and on behalf of the wife at marriage and any demand made prior to marriage would not amount to dowry. We cannot agree. Where definition has been given in a statute itself, it is neither proper nor desirable to look to the dictionaries etc. to find out of the meaning of the expression. The definition given in the statute is the determinative factor. The Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made before or at the time or after the marriage where such demand is referable to the consideration of marriage".

Voluntary gifts and presents- Providing the guidelines for differentiating as to whether every gift or present would be included in the definition of the dowry, their Lordships of the Supreme Court made the legal position very clear in the following words. "Dowry as a quid pro quo for marriage is prohibited and not the giving of traditional presents to the bride or the bridegroom by friends and relatives. Thus, voluntary presents given at or

before or after the marriage to the bride or the bridegroom as the case may be, of the traditional nature, which are given not as consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression 'dowry' made punishable under the Act."

Demands during Negotiations : Demands after marriage

Rejecting the contention that it is only the property or valuable security given at the time of marriage which would bring the same within the definition of 'dowry' punishable under the Act, the Hon'ble Supreme Court further held in *S.Gopal Reddy (Supra)*.

> "Keeping in view the object of the Act, "demand of dowry' as a consideration for a proposed marriage would also come within the meaning of the expression dowry under the Act. If we were to agree with *Mr. Rao* that it is only the 'demand' made at or after marriage which is punishable under Section 4 of the Act, some serious consequences, which the legislature wanted to avoid are bound to follow. Take for example a case where the bridegroom or his parents or other relatives made a "demand" of dowry during marriage negotiations and later on after bringing the bridal party to the bridegroom house find that the bride or her parents or relatives have not met the earlier 'demand' and call off the marriage and leave the bride's house, should they escape the punishment under the Act. The answer has to be an emphatic "no." It would be adding insult to injury if we were to countenance that their action would not attract the provisions of Section 4 of the Act. Such an interpretation would frustrate the very object of the Act and would also run contrary to the accepted principles relating to the interpretation of statutes."

Referring to another decision of the Hon'ble Supreme Court in *L.V. Jadav* case[4] Hon'ble *Mr. Justice Dr. A.S. Anand* observed:-

> "Section 4 which lays down that 'if any person after the commencement of this Act, demand, directly or indirectly from the parents or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to six months or with fine which may extend to five thousand rupee's or with both. According to Webster's New World Dictionary, 1962 Edn. bride means a woman who has just been married or is about to be married, and bridegroom means a man who has just been married or is about to be married. If we give this strict meaning of a bride or a bridegroom to the word bride or bridegrooms used in section 4 of Act, property or valuable security demanded and consented to be given prior to the time when the woman had become a bride or the man had become a bridegroom may not be "Dowry" within the

[4] *L.V. Jadav v. Shankerrao Abasaheb Pawar*, (1983) 4 SCC 231: 1983 SCC (Cri) 813.

meaning of the Act. We are of the opinion that having regard to the object of the Act a liberal construction has to be given to the word 'dowry' used in Section 4 of the Act to mean that any property or valuable security which if consented to be given on the demand being made would become dowry within the meaning of Section 2 of the Act. We are also of the opinion that the object of Section 4 of the Act is to discourage the very demand of the property or valuable security as consideration for a marriage between the parties thereto. Section 4 prohibits the demand for 'giving property or valuable security which demand if satisfied, would constitute an offence under Sec. 3 read with Section 2 of the Act. There is no warrant for taking the view that the initial demand for giving of property or valuable security would not constitute offence (emphasis supplied).

"Therefore, interpreting the expressions 'dowry' and 'demand' in the context of the scheme of the Act, we are of the opinion that any 'demand' of 'dowry' made before, at or after the marriage, where such demand is made as a consideration for marriage would attract the provisions of Section 4 of the Act."

Evaluation of evidence : Construction of statutory ingredients

The role of the Court in such matter was emphasised by the Hon'ble Supreme Court in the following words in the case *S. Gopal Reddy.*

"The alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides has always sent shock waves to the civilized society but unfortunately the evil has continued unabated. Awakening of the collective consciousness is the need of the day. Change of heart and attitude is needed. A wider social movement not only of educating women of their rights but also of the menfolk to respect and recognise the basic human values is essentially needed to bury this pernicious social evil. The role of the courts, under the circumstances, assumes a great importance. The courts are expected to deal with such cases in a realistic manner so as to further the object of the legislation. However the courts must not lost sight of the fact that the Act, though a piece of social legislation, is a penal statute. One of the cardinal rules of interpretation in such cases is that a penal statute must be strictly construed. The courts have, thus, to be watchful to see that emotions of sentiment, are not allowed to influence their judgement one way or the other and that they do not ignore the golden thread passing through criminal jurisprudence that an accused is presumed to be innocent till proved guilty and that the guilt of an accused must be established beyond a reasonable doubt. They must carefully assess the evidence and not allow either suspicion or surmise or conjectures to take the place of proof in their zeal to stamp out of the evil from the society while at the same time not adopting the easy course of letting

technicalities or minor discrepancies in the evidence result in acquitting an accused. They must critically analyse the evidence and decide the case in a realistic manner."

In view of this categorical pronouncement the precedential value of some older decisions of High Courts has, with due respect, become doubtful; for instance in cases when article were given with a view to have smooth sailing and continuance of good marital relations, these were not held to constitute any consideration or reward or motive for marriage. Hon'ble Delhi High Court has also taken a similar view[5] to the effect that property given after marriage merely to save marriage from being broken." is not dowry. The property given to "save the wife from humiliation or taunts or other wise to keep the family of the in-laws of the wife better disposed towards her was also not included with the purview of dowry.[6]

SUICIDE AND MURDER-AS DOWRY-DEATH

In the case of *Kundula Bala Subrahmanyam*[7] Dr. *Anand, J* of the Hon'ble Supreme Court observed:

> "The testimony of P.Ws. 2,3 and 4 who are immediate neighbours of the appellant and the deceased, they had heard the cry of the deceased and rushed to her house. P.Ws. 2 and 3 found the decease lying on the floor of the kitchen engulfed in flames while both the appellants and father-in-law of the deceased were coming out of the kitchen in the verandah, None of the two appellants or the father-in-law made any attempt whatsoever to extinguish the fire and save the deceased. They raised no alarm. They stood there as if waiting for her death. rather than make any effort to save her. Their conduct thus, runs consistent with the hypothesis of their guilt and betrays that of an innocent person. In their statements under section 313 of Cr.P.C. they did not deny their presence in the house at the time of the occurrence, but denied their involvement in the crime. The normal human conduct of any person finding someone engulfed in flames would be to make all efforts to put off the flames and save the life of the persons. Though, the appellants were the closest relations of the deceased, they did not do anything of the kind. Let alone makes any effort the extir.guish the fire, according to PW 2 when the father-in-law of the deceased, at her request, was giving her the bontha to extinguish the flames, appellant 2 the mother-in-law of the deceased, objected to the same. This conduct speaks volumes exhibited towards her daughter-in-law. They rendered no first-aid to the deceased. Their conduct at the time of the occurrence, therefore, clearly points towards their guilt and is inconsistent with their innocence. The applellants did

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5 *Inder Sen* vs. State, 1981 CR.LJ 1116.
6 *Kuljit Kaur* v *Khem Singh* 1985, (1) Crimes 712 (Patna).
7 *Kundula Bala Subrahmanyam*. v. State of Andhara Pradesh, (1993) 2 SCC 684.

not even accompany the deceased to the hospital in the matador van. had the husband not been a party to the crime. One would have expected that he would be the first person to take steps to remove the deceased to the hospital and leave no stone unturned to save her life. An innocent mother-in-law would also done the same, even if she had no love or emotional feelings for her daughter-in-law. Neither the husband nor the mother-in-law of the deceased took any steps to remove the deceased to the hospital, let alone accompany her to the hospital. This conduct also is inconsistent with their innocence and consistent only with the hypothesis as stated by the deceased in her dying declarations, that the mother-in-law had poured kerosine on her while her husband had lit fire and put her on flames. Mr *Reddy* the learned senior counsel appearing for the appellants submitted of that since the neighbours and other relations of the deceased had almost taken over the house and the person of the daughter-in-law , the appellants were afraid of being beaten and as such they rendered no aid to the deceased needs a notice only to be rejected. No suggestion whatsoever on these lines was made to any to the witnesses and in any event such an explanation betrays common sense. Since, the deceased had admittedly suffered burn injuries in the kitchen of her house, there was an obligation on the part of the appellants and the father-in-law of the deceased, who have admitted their presence in the house at the time of occurrence, to explain the circumstances leading to the deceased dying of 90% burn injuries. None has been offered. The theory of suicide was put up only as an argument of despair. While discussion the motive and the dying declarations we have come to the conclusion that the deceased died as a result of the designed move on the part of both the appellants to put an end to her life and she did not commit suicide as was sought to be suggested during cross-examination by the defense to some witnesses. The theory of suicide has no legs to stand upon. The conduct of the appellants who did not try to extinguish the fire or render any first-aid to her, also totally betrays the theory of suicide and we agree with the High Court that the theory as set up by the appellants is highly unbelievable or unacceptable, The prosecution has, thus successfully established that the conduct of both the appellants both at the time of the occurrence and immediately thereafter, is consistent only with the hypothesis of the guilt of the appellants and inconsistent with their innocence."

Differentiating between the murder on account of demand of dowry and a suicidal death, Hon'ble Mr. Justice *Yogeshwar Dayal* in a decision given in the case of *Prabhudayal*[8] held.

"If the demand of dowry and cruel treatment to decease was proved,

[8] Prabhudayal *and others v.* State of Maharashtra, AIR 1993 SC 2164.

there were 100% burns without shouts or cries, and internal injuries which occur in case of strangulation were found and the neck of the deceased was totally burnt to destroy the evidence of attempted strangulation and the accused persons watching incident through window without any hue and cry and without any serious attempt to save the deceased" was held to be a case of dowry death.

In the case of *Rajnesh Tandon*[9] though the incident was taken to be very unfortunate in which the deceased with fourteen weeks of foetus in her womb had resorted to put the tragic end to her life by consuming poision, the Hon'ble Supreme Court held.

"The case of death still remains a mystery, though the father of the deceased has stated that he had given the jewellery and other articles worth about Rs. 1.5 lac the husband and his family member were making a demand of Rs. 2.0 lac more for meeting their expenses of agency business. The mother of the deceased had also stated that her daughter was physically and mentally harassed and she had complained of torture and harassment at the hands of her husband and relatives," yet relying upon the suicidal note left by the deceased in which she had stated that she was committing suicide on her own free will and that neither her husband nor her in-law were responsible for her death, the court exonerated the husband of all charges levelled against him.

Yet in the case of *Baldev*[10] the death took place by burning and the deceased left behind a six months old child. Considering the question of death being a murder or suicide the Hon'ble Supreme Court held that having regard to the ordinary course of human conduct and in a particular of mother she would not commit suicide and the accused persons were convicted under section 304 B IPC.

Even making of 'humiliating remarks as regards poor quality of gift of meagre value given at the time of marriage" has been held to be amounting to harassment on account of insufficient dowry.

Thus cruelty by husband or relatives of husband has been included within the preview of domestic cruelty so as to bring the same under the liberal interpretation of the provisions of Dowry Prohibition Act. But it has been held in the case of *Sarla Prabhakar*[11] that every harassment or every type of cruelty was not declared punishable under law.

In *Sarla Prabhaker (supra)* it was held that beating and harassment could not amount to cruelty as it could not be established that this was with a view to forcing her to commit suicide or to compelling fulfilment of the illegal demand. In India where in the society long established tradition governs the

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9 *Rajnesh Tandon* v. State of Punjab, 1995 (Cri) 817.
10 *Baldev Krishna* v. State of Punjab (1997) 4 S.C.C. 486 (by *S.P. Kurdukar J.*)
11 *Sarla Pabhakar* v. State 1990 Cr.LJ. 407 (Bomb).

mental horizon of people at large the giving and accepting of dowry had been acknowledged as gratuitous giving and traditional acceptance of dowry. There appears to be a very thin line of demarcation in separating the legalised acceptance of dowry from criminalised demand of dowry. In the case of *Mohan Lal*[12] it was held.

> "Property that may pass hands subsequent to marriage, even months or years after it, merely to save the marriage form being broken or to save the wife from harassment, humiliation or taunts, on the ground that she did not bring enough at the time of marriage is not dowry."

DOWRY DEATHS- *"YEH AAG KAB BUJHEGI"*

The statutory provisions prohibiting the demand of dowry and Consequential harassment to the wife or his family members and punishment for violation is provided in Dowry Prohibition Act 1961, section 498 A I.P.C.and section 304 B IPC.

The words "Dowry death" find place in section 304 B IPC. In the case of *Shanti*[13] Hon'ble Supreme Court had laid down the essential ingredients of the offence of dowry death as follows:

(1) The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances (The expression "otherwise than under normal circumstances" covers suicide).

(2) Such death should have occurred with in 7 years of her marriage.

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband and.

(4) Such cruelty or harassment should be for or in connection with demand for dowry.

Dowry Prohibition Act. 1961.(as amended in the year 1984 and 1986) was intended to eradicate the devil and monster of 'giving and taking of dowry[14]. Subsequently when the Dowry Prohibition, Act 1961 was found to be in-effective in controlling the murders of wives for an in connection with the insatiable demand of dowry, commonly called as dowry deaths, specific section was introduced in the Indian Penal Code as 304-B IPC. The Honb'le Supreme Court in the case of *Nikku Ram*[15] taking into consideration the cumulative effect of Sections 302, 304 and 304B IPC has held that: the cause of the death was already covered by I.P.C. in Sec. 302 and Sec. 304. In effect

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[12] *Mohal Lal and ors v. Amar Nath, 1985 Cri.LJ NOC 118.*
[13] *Santi* v. State of Haryana (1991) ISCC 371.
[14] Statements of objects and reasons Act. No. of 1961.
[15] State of H.P. v. *Nikku Ram*, (1995) 6 SCC 219.

the observations in the present case would, it is submitted render section 304B otiose and superfluous. The new sec. 304B was designedly inserted to cover dowry deaths which have been held to include cases of suicide (provided other ingredients are satisfied). The very concept of marriage in Indian societal environment trains an Indian woman where she is brought up and trained in a traditional atmosphere and told that it is better to die in the husband's home than return to her parents home and bring disgrace to them. Thus the parents are willing to pay dowry in order to get their daughters married, each time the girl is harassed or returns to her parents for demand of dowry, she is sent back making additional payment as dowry and with a hope of reconciliation, and the girl also clings to the marriage at all costs till the end, and the parents as well as the girl are reluctant to register cases against the husband and his family members.

Thus the need of the hour is that the courts and judges who are invested with the power to decide the cases of dowry deaths should sensitivise themselves to the socially accepted notions and the indelible impression in the mind of a girl or woman in the traditionally bound Indian Society. The Hon'ble Supreme Court held:

> "This is the social reality of a woman's life. The legal agents in power need to understand this and be sensitive to it. Hence simply because no complaint is lodged about the harassment for dowry it should not be the reason to draw an adverse inference against the victims especially in a case which involves the bias of one gender."

Thus even the presence of child, pregnancy or advance stage of pregnancy or even in the case of educated and intelligent women the desperate step of committing suicide unless provoked and compelled by the intolerance of other misery cannot be taken to reject the theory of psychotic emotional disorders of a weak mind as was held by the Hon'ble Supreme Court in the case of *Prabhu Dayal*[16], *Bhagwat Singh*[17] *and Subedar Tewari*[18].

In a recent decision in the case of *Nikku Ram*[19] the Hon'ble Supreme Court observed :-

> 'Dowry , dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours where in good old days the belief was: Yatra Naryastu Pujyante, Ramante Tatra Devta.
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> (Where woman is worshipped, there is abode of God).We have mentioned about dowry thrice, because this demand is made on three occasions: (1) before marriage (ii) at the time of marriage and

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[16] *Prabhudayal v. State of M.P.* AIR 1993 SC 2164.
[17] *Bhagwant Singh* v. Commissioner of Police Delhi, 1983 Cr.LJ 1081.
[18] *Subedar Tiwari* v. State of U.P. 1989 Cr. LJ 923.
[19] State of Himanchal Pradesh v. *Nikku Ram*, AIR 1996, SC 67.

(iii) after the marriage. Greed being limitless the demands become insatiable in many cases, followed by torture on the girl leading to either suicide in some cases or murder in some."

The court further observed:

"The highly injurious and deleterious effect on the girl, her parents and the society at large required legislative interference. It started with enactment of the Dowry Prohibition Act, 1961, containing some penal provisions also. But as the evil could not be taken care of by this soft statute, the Penal code was amended first by inserting chapter XXA (Containing the only Section 498-A) in it by the Criminal Law (Second Amendment) Act, 1983 (46 of 1983), and then by insertion of section 304-B by the Dowry Prohibition (Amendment) Act, 1986 (43 of 1986). Section 498-A seeks to protect a married woman from being subjected to cruelty by the husband or his relative section 304-B is aimed at those who indulge in" Dowry deaths". To give teeth to these provisions act, 46, of 1983 inserted Section 113-A in the Evidence act, permitting a court to presume, having regard to the circumstances of the case, that suicide by the woman was abetted by her husband or his relative. Similarly Act 43 of 1986 inserted Section 113-B in the Evidence Act requiring some presumption to be drawn in case of dowry death. Amendment was also made in the Code of Criminal Procedure making the offence of dowry death cognizable nonbailable and triable by a court of session."

Dowry deaths have been held to be pernicious crime and the responsibility squarely lies on the husband and his family members to eliminate this social evil. In the case of *Kundala Bala*[20] *the Hon'ble* Supreme Court held:-

"Of late there has been an alarming increase in cases relating to harassment, torture abetted suicides and dowry deaths of young innocent brides. This growing cult of violence and exploitation of the young brides though keeps on sending shock waves to the civilised society whenever it happens, continues unabated. There is a constant erosion of the basic human values of tolerance and the spirit of "live and let live" lack of education and economic dependence of women have encouraged the greedy perpetrators of the crime. It is more disturbing and sad that in most of such reported cases it is the woman who plays a pivotal role in this crime against the younger woman as in this case, with the husband either acting as a mute spectator or even an active participant in the crime. In utter disregard of his matrimonial obligations many cases , it has been noticed that the husband even, after marriage continues to be *'mamma's baby'* and the umbilical cord appears not to have been cut even at that stage".

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[20] *Kundala Bala Subrahmanyam* v. State of A.P. (1993) 2 SWCC 684

The Hon'ble Court further observed;

> "Awakening of the collective consciousness is the need of the day. Change of heart and attitude is what is needed. If were to regain his harmony with others and replace hatred agreed selfishness and anger by mutual love, trust and understanding and if woman were to receive education and become economically independent the possibility of this pernicious social evil; dying a natural death may not remain a dream only. The legislature, realising the gravity of the situation has amended the laws and provided for stringent punishments in such cases and even permitted the raising the presumptions against an accused in cases of unnatural deaths of the brides within the first sever years of their marriage. The Dowry Prohibition Act was enacted in 1961 and has been amended from time to time but this piece of social legislation, keeping in view the growing menace of the social evil also does not appear to have served much purpose as dowry seekers are hardly brought to book and convictions recorded are rather few. Laws are not enough to combat the evil. A wider social movement of educating women of their rights, to conquer the menace is what is needed more particularly in rural areas where women are still largely uneducated and less aware of their rights and fall an easy prey to their exploitation. The role of court under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner and not allow the criminals to escape on account of procedural technicalities or insignificant lacunae in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the crime going unpunished. The courts are expected to be sensitive in cases involving crime against women. The verdict of acquittal made by the trial court in this case is an apt illustration of the lack of sensitivity on the part of the trial court. It recorded the verdict of acquittal on mere surmises and conjectures and disregarded the evidence of the witnesses for wholly insufficient and insignificant reasons."

R.N. Misra J. (as his lordship then was) in case of *Laxman Kumar*[21] while dealing with a bride burning case observed.

> "Marriage according to community to which parties belong is sacramental and is believed to have been ordained in heaven. The religious rites performed at the marriage altar clearly indicate that the man accepts the woman as his better-half by assuring her protection as guardian ensuring food and necessaries of life as the provider, guaranteeing companionship as the mate and by resolving that the pleasures and sorrows in the pursuit of life shall be shared with her

[21] State Delhi Admn. v. *Laxman Kumar (1985) 4 SCC 476; 1986 SCC (Cri) 2*

and Dharma shall be observed. If this be the concept of marriage, there would be no scope to look for worldly considerations particularly dowry.

When a girl is transplanted from her natural setting into an alien family the care expected is bound to be more than in the case of a plant. Plant has life but the girl has a more developed one. Human emotions are unknown to the plant life. In the growing years in the natural setting the girl-now a bride has formed her own habits gathered her own impressions developed her own aptitude and got used to a way of life. In the new setting some of these have to be accepted and some she has to surrender. This process of adaptation is not and cannot be one-sided. Give and take, live and let live are the ways of life and when the bride is received in the new family she must have a feeling of welcome and by the fond bonds of love and affection grace and generosity, attachment and consideration that she may receive in the family of the husband she will get into a new mould the mould which would last for her life. She has to get used to a new set of relationships one type with the husband, another with the parents-in—law, are expected to show her the way. The husband has to stand as a mountain of support ready to protect her and espouse her cause where she is on the right and equally ready to cover her either by pulling her up or protecting her willingly taking the responsibility on to himself when she is at fault. The process has to be a natural one and there has to be exhibition of co-operation and willingness from every side. Otherwise how would the transplant succeed."

Wife's sensitivity to blame for the suicide?

In *Sharad Birdhichand*[22] the Hon'ble Supreme Court acquitted the husband on the ground that the deceased, wife was a secretive, extremely emotional, sentimental, sensitive, depressive and pshychotic woman prone to suicide. In a case form Punjab and Haryana High Court in *Jagdish Chandra*[23] the husband was acquitted because the wife was" probably a sentimental woman and did not like the drinking habits of the appellant (husband). In another case[24] the suicide by the wife was taken by the Andra Pradesh High Court to have been committed due to strained domestic quarrels in a joint family due to her own extreme sensitiveness, sentimentalism and none of the accused could be blamed for that. In a Madhya Pradesh of case *Smt.Padmabai*[25] the behaviour her frustration due to her own extreme sensitiveness and sentimentalism was held to be the reason of the incident and the husband was held not to be blamed "for the psychotic and emotional disorder of a weak mind."

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[22] *Sharad Birdhichand Sarda V.* State of Maharastra; AIR 16984 S.C. 1622.
[23] Jagdishahandra v. State of Haryana; 1988 Cri.L.J. 1048
[24] Public Prosecutor v. tota Basaba Punnaiah 1991 Cri. L.J. 2
[25] Smt. Padmabai v. State of M.P., 1987 Cr.L.J. 1573.

Dowry- the other way round

Even after various amendments in the dowry Prohibition Act some propositions require to be considered afresh. The words "as consideration for the marriage" generally reflected the demands by bridegroom side yet the demands of bride and bridewallas should also be included in the 'dowry'. Paras Diwan,[26] has suggested that "the reason seems to be that amongst Hindus by and large dowry is demanded from or given by the bride's side to the bridegroom or his parents. But this does not mean that what the bride or bridewallas demand or take or agree to take some money or property from the groom or his parents in connection with marriage. They will not be guilty of the offence of taking or demanding or agreeing to take dowry under the Dowry Prohibition Act. They will as much be guilty of dowry offences as the other way round."

Even the money advanced by a person to prospective son-in-law for purchasing land in the joint name of himself and the daughter, would amount to dowry. In a pre-amendment decision in the case of Kunju Moideen[27] the Kerala High Court following its another earlier decision[28] held that the money could be recovered as the prospective son-in-law not only broke the engagement but also refused to refund the money[29].

Government Servants And Dowry

The Civil Services (Conduct) Rules 1964, specifically prohibit Government servants from giving and taking dowry or abetting the giving and taking of dowry. A similar provision has also been enacted in the Indian Services (Conduct) Rules, 1968. Rule 13-a lays down.

"No Govt. servant shall

1. give or take or abet the giving and taking of dowry, or

2. demand directly or indirectly, as the case may be , any dowry.

Expl.- For the purpose of this rule, dowry has the same meaning as the in the dowry prohibition Act , 1961.

The laws with all the law's flows being there, the need of the time is that we reshape our concepts, outlooks and attitudes to rescue the society from the evil clutches of dowry-devil.

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[26] Paras Diwan; Dowry and Protection to Married women, II revised edition page 41.
[27] Kunju Moideen v. Sayed Mohammad, AIR 1969 Ker. 48
[28] K. Chillappan v. K. Kunju, 1969 Ker L.R. 659.
[29] Although it was held that the money was not 'dowry'. But by virtue of amendment this amount is dowry being in consideration for marriage.

GENDER MISCELLANY

Muslims feel legal awareness rather than changes in the personal law is what is called for, says Humra Quraishi

Do Muslims want a change in their personal laws? Well, much against the hyped notion that Muslims themselves want a change in their personal laws, it came as a surprise to know that they do not want any such changes.

Tahir Mohmood, professor of law and the former dean of the Law Faculty, Delhi University, says "the biggest problem of Muslim society in India is the prevailing lack of legal literacy. People generally do not know their law and often believe a distorted view of it to be the true law.

In the matter of bigamy, for instance, even not-Muslims believes that the mere fact of being a Muslim even through sham conversions is a licence for freely indulging in unprincipled bigamy. This is not true. The way married men from all communities sometimes ditch their wives to marry again does not represent Islam's concept of bigamy. Women's rights to divorce, post divorce relief and property sanctioned by Islam are equally misunderstood and often denied. And for this popular education in the true principles of Islamic law is a must.

S M H Burney, former chairman of the Minorities Commission and former chancellor of Jamia University says, "When not-Muslims talk about reforms in our Personal Law, their main fears are polygamy which they feel will lead to an increase of the Muslim population. Where are those muslims who marry four times? Even the much hyped up concept of triple talaq is based on wrong interpretations.

"Can our real problems of inadequate jobs, educational and health problems be eradicated by the common civil code? It cannot be, so why this urgency to bring about this change?"

An Advocate with Delhi High Court, Sumbul Rizvi, says, " I personally fell that so far as any statute is concerned, there are invariably objections by various sections of society regarding change but in this particular case that the Islamic Law as is prevalent in India, I feel it is self sufficient and inherently, it has provision of this law and the actual implementation of those provisions. For example the kabinama (the nikaah contract)has all those provisions which could go in the woman's favour like the husband can delegate the power to divorce to the wife, along with other provisions like her upkeep and that of the children but most of us do not been know of these clauses and those who know it do not implement it. It is convenient to lay the blame on Islam or its laws but it is actually our fault for not implementing those laws. Regarding nikaah it is well known. It that mehr money has to be provided according to the economic status of the two families but how many of us actually do so. or, else people

think that the mehr money is only payable at the time of divorce but Islamic law calls for a quick and prompt payment of mehr money either at the time of then nikaah or at a subsequent time. Triple talaq is not talaq said three times at one go, rather spread out over three menstrual periods of the woman. Javed Abidi, a prominent activist working with the disabled, says," As far as I can interpret the law of Islm it is quite clearly pro women. Care is taken to give women equal status so that not only are they encouraged to retain their maiden surnames but are also put in two broad categories, Mutazawajat, (those in matrimony) and the ghair mutazawajat (those not in matrimony). There is no such classification like widows, divorced women, spinsters."

Senior police officer Yamin Hazarika, who earlier headed the Crime Against Women's Cells, says, " I do not think there is any need for changes to be brought about in the personal Law of the muslims. Issues like men marrying four times, triple talaq have been quoted out of context. Four wives were allowed under very specific conditions and again it is mentioned that if they are not being treated equally then they can opt for divorce. There are conditions laid down for talaq and triple talaq said at one go is definitely discouraged. In fact anything said or done in anger is definitely discouraged in Islam. Care is said to be taken so that it is a calm decision and carried out gracefully. Marriage is a contract and care should be taken that conditions laid out in htis contract be in the favour of women.

Imtiaz Ahmed, a professor in the Sociology Department of Jawaharlal Nehru university, says, "I personally feel that sections of Muslims that would wants a change in the personal Law would be in small numbers. Regarding the triple talaq issue the Quranic position is such that divorce is spread over three months and there is not single sitting divorce. This notion of divorce in a single sitting is a wrong interpretation Multiple marriages are not a license but permitted under stringent conditions.

"Perhaps what is urgently required is better education improvement of the awareness level and a process of internal reforms should be started with reforms should be started within the community."

Spreading literacy

Women and children

Family Plainning has always, been the core issue of the population debate the world over. "Educate a girl and you educate a family", goes the adages. Literate are not essentially partriachal set up such as it exists in India. They are also more likely to be aware of their environment as well as themselves and their potential.

According to the "Universal primary education of rural girls in India" (1990) brought out by the NCERT, the Total Fertility Rate (TFR) has come down from 5.8 in 1960 to 3.6 in 1981. " The TFR varies from 2.4 in Kerala to 5.9 in Uttar Pradesh and Bihar and is 3.0 in rural areas and 2.8 in urban areas.

Female literacy is highly correlated with the proportion of population which is urban, and districts with high female literacy also tend to be urbanised."

According to UN statistics, "while the majority of adults in industrialised countries are married by the age of 30. the average age at marriage for women drops precipitously in developing regions, half the women in Africa, 40 percent of Asian women and 30 percent of Latin American women are already married by the time they are 18 years old. On the Indian sub-continent, some are as young as 10 or 11 years old, :Even though the law against child marriages exists, it is quite often bypassed especially in the northern States of India such as Rajasthan.

Education changes a person's whole outlook on life "Literate women tend to marry later than illiterate women; school; schools attendance tends to reduce the labour value of children which in turn leads to smaller size of the family; conversely, the labour value of children is very high in illiterate households which are also more than likely to the be very poor and need the labour or income of the child; literate women also tend to be more knowledgeable about health and hygiene, so more of their children tend to survive which reduces the family size in turn; literate women are more likely to have work interests outsides the family that competes with children for time and attention and hence the motivation for fewer children, " says the report.

It has been pointed out that literacy is the poorest among the rural Scheduled Caste and Scheduled Trible category especially as it is directly linked to the urban factor. Urban areas, with better infrastructure have in general a higher degree of literacy than rural areas. A girl who is literate will be more aware of her rights, more capable of fighting her battles and less prone to exploitation, She is also better able to take care of her family.

There is need to accelerate the universal primary education programme for rural girls who account for 80 percent of the girls in the primary education age group of 6 to 14 years.

The report remarks that primary education of five years or equivalent leads to permanent literacy and that fertility decline occurs when a girl completes middle school. It also enhances the changes that a girl has of receiving vocational and technical education which in turn results in employment and smaller family size.

Education can be used as an instrument to bring about change in the status of women. An attitudinal change towards women is important in a largely traditional country like India School textbooks should also refrain from promoting gender bias.

A lot of our national heros tend to be men. Throughout Indian history the contribution of women has been significant. There is need to check gender bias and emphasise the important contribution that women have made in

various fields in the schools textbooks.

(The Pioneer, October 19, 1996)

The Court Declines

The Supreme Court's dismissal of three public interest petitions seeking protection for women against certain discriminatory personal laws as put the ball back in the court of the legislature. The court has clarified that the remedy for inequities in personal laws for the Hindu, Muslim and Christian communities lies outside its domain. This is in keeping with the obiter dicta issued by a two-member division bench in May 1995 asking the government to take steps to ring about a uniform civil code as enjoined in the Directive Principles of the Constitution. The government's long silence and inaction in this matter can be put down as much to a reluctance to run afoul of those who control critical vote banks as to a fear of doing anything to disturb the fragile peace between the majority and minority communities post-Barbri Masjid. The bloody communal riots and bomb blasts that followed the destruction of the mosque marked the culmination of a process in which the communalisation of politics placed an entire community under siege. Significantly, Muslim women themselves identified more closely with their beleaguered community than with abstract principles of equality. The result was that the ideals of justice were overshadowed by the more immediate considerations of peace, safety and security. The exigencies of such a situation have been acknowledged amidst quarters, including the government, the judiciary and women's groups. The latter, which had earlier favoured a uniform civil code, now recognise the radically different coloration that the issue has taken and support the gradualist approach of reform within communities.

This line of thinking, which is in consonance with the Narasimha Rao government's stated position that the initiative for changes in personal laws should come from within the community, is not as nebulous or impractical as it might appear. On the contrary, efforts to take a fresh look at some unjust personal laws are already under way in the Hindu, Muslim and Christian communities. The Christian community, for instance, in consolation with church authorities, has prepared a comprehensive draft bill for reform in its personal laws which the government has not yet presented before Parliament. The Muslim community, shaken by attacks from without and questioned from within by women who are studying the liberating aspects of Islam, is also taking a fresh look at gender inequities. As a first step, a model *nikahnamma* or marriage contract that would protect the rights of women has been drawn up and discussed. Hindu reformists too are suggesting a series of measures to tackle discriminatory laws, such as the legal entity of the Hindu joint family. By endorsing these moves, women's group should not be seen to have sacrificed their earlier plea for a uniform civil code. Rather, their acceptance of a gradualist approach suggests that they are seeking more effective ways within the changed political climate to lay the groundwork for equitable gender relations within personal laws. One proposal is for the state to draft a common

law applicable to women of all communities to guarantee them minimum economic rights within marriage, for example the right to reside in the matrimonial home and the joint ownership of property.

(The Times of India, March 16, 1997)

MOLESTATION OF WOMEN ; Legal Perspective

Instances abound where destitute women have been molested, beaten up and even paraded in the most shameful manner. Some women kept in police custody unauthorisedly have even committed suicide out of shame and desperation. Their continuous unauthorised detention made them to have recourse to this extreme step due to despair and despondency.

It is too well known women in police custody are treated most shabbily. The People's Union for Democratic Rights (PUDR) has been taking up their cause from time to time but to no avail. Though several cases have been registered with the police about custodial rapes, conviction has not been secured in even one case which is not only disappointing, but shocking too.

Molestation of women and their stripping by policemen is common in several parts of rural India. Despite restrictions imposed by the law, the number of these cases continues to swell. Sometime ago, the National Commission for Women organised a seminar stressing the need for securing better conditions for women in jails.

The law has imposed certain decent striations on the police to ensure decent treatment to women. The Criminal Procedure Code (CrPC) was amended after Independence in this regard. Section160 of the CrPC lays down that no female of any age can be called to the station even for interrogation in any case by a police officer of any rank.

In case a women is to be questioned, she has to be interrogated "at her place only" in the presence of her male/female relatives so that she is not put to any inconvenience. But instances are not lacking where the police transgress their limits and summon deep innocent/illiterate women in their custody. Needless to mention that in many cases, the poor women fall prey to the savagery of the policemen who indulge in gang rape. It was because of these barbaric acts that the Government thought it prudent to amend the CrPC.

It after the interrogation, the female's involvement is proved in cognisable crimes, she has to be arrested. In such cases the arrest of the women has to be made by in the presence of a female police officer. Further, the personal search of the accused woman must be conducted by a female as laid down in Section 51 CrPC (2) which specifically lays down that the "search will be made by a female wit strict regard to decency"

The police has to send a 'specific" report for her arrest to senior officers

and the sub-divisional magistrate as per the law. It is on record that women in custody were occasionally raped by those in authority. There have also been cases where women were molested/raped by persons on the management or staff of jails, remand homes, children's institutions, hospitals etc.

To deal with such cases, the laws (Section 376 (2) of Indian Penal Code) should be amended and life imprisonment be made for the guilty and a minimum fine of Rs. 1 lakh or more. the law should be further amended so that if the victim conceives and gives birth to a baby, the child is given a share in the property of the guilty.

Separate jails for women should be set up and these should have a senior women IAS/IPS officer in charge. The entire staff of the jail should also be female. It is also imperative that the female accused be saved from mental harassment, sexual abuse and malnutrition.

Besides, it is essential that woman officials both in the police and in jails or in jail hospitals are deployed for duty to attend to women. Often, women are required to be medically treated at odd hours in jails. So the availability of qualified female doctors round the clock is an absolute necessity.

Poor Houses and Nari Niketan should be set up in al districts/towns. Vocational training can be imparted in such institutions to destitute women. The law is clear on the point that women should be taken to the magistrate immediately after arrest. They should be remanded to judicial, custody except in case where police remand is an absolute necessity.

No remand should be obtained without the explicit order or of the gazetted officer who must be satisfied about the necessity of such a remand. The officer recommending the remand should be made personally responsible for taking necessary measures to ensure safe and decent custody of the female. A women police officer of a responsible rank should be entrusted with her safe custody.

Though rules have been framed by the States, legislation for removal of police remand of women and their decent custody is the need of the hour. The legislation should also specify that they are responsible for the safe custody of the woman. When the woman is sent to police custody, it must be ensured that she is interrogated in the presence of a women police officer. Female accused should not be harassed in any way during interrogation.

Article 20 (3) of the Constitution of the India has clearly laid down that "no one will be compelled/harassed to be a witness against himself/herself". Police and jail authorities should regularly monitor hail conditions. Heavy responsibilities lies on the chiefs of districts police, superintendents of jails and Prisons to ensure good treatment to women in custody. It is high time that legislation is enacted to safeguard women in police and judicial lock-ups.

(The Pioneer, March 8, 1997)

IN PERSECTIVE

R D SHARMA

Shocking acquittal

Of the burning of Roop kanwar, a 27-year-old widow on the pyre of her husband on September 4, 1987 was shocking, the acquittal of all the 39 accused by an additiional district and sessions judge of Neem-Ka-Thana sub-division jn Sikar district of Rajasthan is no less stunning. The instant verdict sends a clear message to the world at large that you can commit a murder and get away with it. What is worse, the perpetrators of the heinous crime and all those who abetted it have sought to interpret the judgement and their acquittal as a "victory of justice".

In fact, the prosecution case became weak with all the eye-witnesses turning hostile. Although thousands of people witnessed the unfortunate yound bride going up in flames on her husband's pyre, no one came forward to identify those who brought the hapless girl to the site and lit the pyre. This callous attitude underlines the fact that the practice of Sati, however ghastly, is a deep rooted social malady. Even the Rajasthan Sati Act 1987 and the Commission of Sati (Prevention) Act 1987 have been found to be inadequate to deal with the problem.

In any case, a preventive measure alone, however deterrent it may be cannot necessarily eradicate the social custom like sati lock, stock and barrel. The limited purpose of the anti-sati law, like many other criminal laws of the land, is to cbeck the commission of sati or to punish the guilty after the offence has been committed.

This is aspect of the problem which the law seeks to tackle without taking into cognisance of other proximate causes responsible for keeping this diehard custom alive till today. What was really required of our law-makers was to have identified all those social compulsions forcing a widow into self-immolation and suggest appropriate remedies to nip the evil in the bud.

Initially, the practice of sati existed only among the ruling Rajput class during the Mughal period. The mass "jauhar system" a form of group suicide, was committed by queens of vanquished warriors by jumping from the roof-top or the castle wall into the raging fire below probably to save their honour and avoid humiliation at the hands of victorious invaders. However, in course of time, the custom became widely prevalent among other sections of people be cause of the then Hindu society's extremely cruel treatment of widows.

Even after Independence, when every field of life has been thrown open to women and when several women's organisations are espousing their cause, the plight of women in general and destitute widows in particular is no better. Often they are victims of social crimes abused and raped and doubly punished by social rejection. And when they become the victims of crime,

there is no sympathy for them. All this goes to prove beyond any shadow of doubt that no reforms worth the name can improve women's lot when society itself is not ready for this.

Not even the most progressive laws like the Widow remarriage Act, the Child Restraint Marriage Act and the Dowry Prohibition Act have been enforced against those who violate them with impunity. For instance, in Rajasthan thousands of children are reported to be bound in wedlock on a particular day every year. When a social worker tried to prevent a child marriage his conduct was fraught with and was maltreated by other who were guilty of revenge, who were later on acquitted by a law court. So what is the use of enacting one law after the other when there is not political will to enforce them.

In a larger perspective, only education holds the key to sati and several other problems the country is up against on social fronts. Besides the concept of widow remarriage ought to be popularised in sati prone areas to ensure proper areas to ensure proper settlement of young widows. The cause of those women in whose case remarriage is not possible will be better served if they are trained to work and helped to stand on their own feet.

(The Pioneer, Oct.24, 1996)

MEDIA SCAN

Good news for women doctors

Women medicos are doing well, says K Satyanarayana, analysing data from the US and India

The trend for young women doctors in India is very heartening. statistics collected by the Ministry of Health and Family Welfare show that the number of women doctors has just zoomed even while the total seats in medical colleges has remained near stagnant. In 1971-72 of the total 10,825 medical student just 2,917 (26 percent) were girls. By 1992-93 (latest figures available), their number has shot up to 40 percent just as in the US.

The UNESCO's world Science Report 1996 shows that of the 25 percent Indian women who enter science, three quarters leave midstream. It is very well known that the main reason for these young scientists, in just the age of getting married, leave their career mid stream to set up home. Medicine ranks high among their priorities as compared to engineering and technology. Interestingly, it is only in medicine that they are able to pursue advanced studies. Many of these are spouses of doctors and it is not surprising to find many husband wife teams in the same medical college pursuing post-graduation.

Meanwhile, close on the heels of the report that women scientists, at least in the US, have edged out men when the quality of their science was

measured according to some established parameters, comes the news that they are not far behind in another profession, that of medicine. Young American male and female physicians with similar characteristics who are into practice are earning an equal amount of money. This is good news for women doctors who seem to be on the fast track having quadrupled in the past two decades.

This study published in a recent issued of New England Journal of Medicine examines whether there is a gender difference in the earnings of doctors who have similar degrees and background and equal experience. Laurence C Baker of the Health Research Policy department of the Standford Schools of Medicine took up this study essentially to know whether things have changed since the 1976 report when a substantial gap was noticed between the earnings of male and female physicians. The sample chosen for the survey included all the categories of practicing doctors like general practice, internal medicine pediatrics, general surgery obstetrics and gynecology and psychiatry. The mean annual earnings were $ 155,400 and $ 109,900 for these young men and women (less than 45 years) respectively. Men earned more since they worked longer (62 hours per week for 47 weeks) as compared to women who worked for an average fo 51 hours per week for 46 weeks every year.

There was some difference in the earning of men and women which was essentially linked to the practice setting, specialty and experience. In general, men were better represented in specialised areas and were more likely to be self-employed. While the relative representation was near similar in general or family practice, the numbers varied with other disciplines. Men dominated in the specialities of emergency medicine, subg-specialities of medicine and surgery while women were more in specialities like peadiatries obstetrics and gynaecology.

This study has reason to cheer up the women medical community in the US and elsewhere. As compared to less than 10 per cent in the 1960s and 1970s women now constitute about 40 percent of student strength in US medical schools . Ruth Krichstein a senior doctor with the National Institutes of Health, Gethseda commenting on the Baker study raises several pertinent questions that are relevant of women physicians across the globe. Even with the American Medical Association's The Women in Medical Services Office which keeps tracks of women physicians, not much in known about many women who graduate from the US medical schools. Do they continue to be professionally active? Do they work full time or part time? How many of them go into practice and how many take up academic medicine?

These questions should be relevant to women physicians in India too, as constraints for pursuing the career of their choice are perhaps same or even more severe as their colleagues in the US. While the fact that men and women earn nearly equal is heartening. as Krichsten says, there are disturbingly few women in sub-specialities of medicine and surgery where men

out number women almost two to three times. As Baker notes in his study, the choice of specialify depends on various considerations that may be unique to women physicians burdened with family responsibilities and societal obligations. It is too well known in India, That once married even a bright young woman doctor often willingly opts for less prestigious specialities like pathology, microbiology and anatomy which are less demanding in terms of hours absence from home and family.

But the bad news, as Krichstein puts it, relates to the position of women physicians and scientists in academic medical institutions and other biomedical research centres. In 1994 she notes that there were only 24 percent of full time medical schools faculty members were women and more depressingly, less than 10 percent were at the full professor level.

Contrast this with 32 percent of men who were full time faculty members. Worse still; only 4 percent of heads of department chairs were occupied by women. She notes that although there has been as increase in the representation by women physicians on academic medicine, it is nowhere near the proportion demanded by their increased overall strength.

What about the sought after leadership positions in the medical profession? just the other day, the prestigious position of the Director of National Institutes of Health. Betheseda, was held by Bernadine Healy probably the first woman to hold such a position Krichstein notes that the American Medical Women's Association seems to gaining strength with women physicians slowly emerging as leaders in their respective specialities.

Although, Basker did not study as to why few women physicians reach the top, it could well be their attitude. Sociolgist Gerhard Sonnert and physicist Gerald Holton from the Harvard University evaluated the research performance of over 800 elite men and women scientists to know, among others, whether women do science differently and how successful are they in their endeavour. Holton and Sonnert found that a large number of women interviewed do not seem to be pushing hard enough. A successful women chemist, a rare breed even in the US with a tradition of decades of good chemistry schools, Kinda Wilson says, " Our social heritage hasn't winner or provider". A recent study by the American Chemical Society confirms Wilson's observation. Just 10 percent of women chemists put theirs careers before family as opposed to over 65 percent men. but unlike their ?American colleges, Several women doctors seem to be steadily making past, the prestigious AIMS, in the Capital had the first woman director and not the top medical research body, the Indian Council of Medical Research has a woman chief.

N.B. In Uttar Pradesh, at least two medical colleges are headed by women: DR. P.K. Misra in K.G. Medical College Lucknow and Dr. Krishna Mukheji in Allahabad.

(The Pioneer)

TRIPLE TALAQ ANY WAY OUT ?

By – Javed Ahmed

It is not often that a pucca middle-class Muslim greets a highly respected mufti saheb's views on the Islamic way of life with four letter works and that to in --------. But, then, nothing has tested the patience and credulity of suffering Muslim women and men with conscience in the last 18 months as the reason-defying stance of the Ulema on the question of triple talaq- upholding the legal validity of a practice where a Muslim male need merely utter the magic word talaq three times and instantly snap the marital bond with his wife.

So, why blame the bearded young man for responding angrily, almost involuntarily, to the mufti saheb's weighty views with an expletive loud enough to attract the attention of many Muslims seated around him.

It happened at the K.D. College in Bombay on November 26, during the question answer session at the end of a national symposium of 'Protection of Muslim Women's Rights in Marriage's organised by IDRAAK, an organisation engaged among other things, in the difficult impossible, some might say- task of nudging the ulema of India towards badly –needly reform.

"A pregnant Muslim woman from Hyderabad was divorced by her husband telegraphically. I would like to ask the honourable ulema whether such a talaq is valid according to the Shariat?' The question was raised through a chit sent up to the dais by one of the many burqa clad women present on the occasion.

Mufti fazallur Rahman Hilal Usmani , director, Jamia Darul Salam, Malarkotla, Punjab , who chose to field the question countered "Since a telegram does not carry the signature of the sender, there is the problem of ascertaining whether it has in fact been sent by the husband. But if there is some ways of confirming that the telegram had been sent by him, then the talaq is valid".

That's when the derisive shouting reached its peak. Only one man in the audience lost control over his language. But by no means was he the only person, man or woman, in the large audience who was stung by the mufti saheb's edict. The sense of outrage was that much more pronounced because the words of wisdom had come not from the mouth of some ill-informed maulvi saheb from the mahalla. It was the opinion of someone whom a retired justice, M.M. Kazi of the Bombay High Court, had during his talk earlier referred to as mufti-e-azam (mufti-in-chief).

Also seated on the dais were some other leading lights of Indian Islam- Mualana Mohammed Salim qasmi, director of Darul Uloom, Deoband Mufti Fuzailur Rahman Hilal Usmani, director, Jamia Darul Salam, Malarkotla, Punjab and Mufti Azizur Rahman Fatehpuri, director, Darul Uloom axixia, Bombay. Neither of them expressed a differing view.

Professor Tahir Mohmood, the dean of the faculty of law, Delhi who conducted the meeting did all he could to contradict and challenge, cozx and cajole the eminent theologians into taking a position on the triple talaq issue which would at least provide some relief to countless Muslim women who, as one burqa-clad women pointed out through her question, live under perpetual fear of the dreaded made weapon. But his commendable effort bore little fruit.

You don't have to be a religious or any other kind of scholar to recognise the injustice inherent in a system where a Muslim male, in a system where a Muslim male in a fit of anger, a naked display of male ego a monetary whim or in recognition of his supposed "Islamic right" to do what he pleases with his wife, can dispense with her with an instant mantra talaq, talaq, talaq.

To be fair to them, even the maulana and the mufti sahebs agree that the practice is "most abhorred and detested in Islam". But, and here lies the catch, it is , legally speaking, a valid form ef divorce in Islam, they claim. For those with even a little knowledge of Islam, it is apparent that the ulema who peddle such a convoluted logic, open themselves upto ridicule, But, worse, the custodians of Islam also end up reinforcing an image of their faith as inhuman and anti-women among non-Muslims.

By maintaining that though theologically repugnant, instant talaq is nonetheless legal according to the Shariat the ulema are resorting to a lie wittingly or unwittingly. This is for two reasons:first, it is not Islam which upholding the legality of instant divorce but only the Hanafi Sunnis-who constitute a majority of Muslims in India – who follow the schools of Islamic jurisprudence as elaborated by Imam Abu Hanifah.

The 18-month-old controversy on the issue, it may be recalled, was triggered in May, 1993, not by some non-Muslim, but by the Ahle-Hadith sect, which reiterated its long held position that the practice of instant talaq is un-Islamic and invalid.

Secondly, it also needs to be noted that even in Pakistan, where again the majority are Hanafi Sunnis, as also in a number of other Islamic countries, divorce is illegal prior to an arbitration process.

It is thus obvious that the position that instant divorce is legal is a sectarian, not an Islamic position. It needs no extraordinary wisdom, no innovative thinking , no courage on the part of the ulema to cry a halt to the triple talaq practice. All they need to do is to consider the existing alternative within other schools of Islamic jurisprudence or to merely follow the practice prevalent in many Muslim majority societies.

Why won't the ulema take this simple alternative Islam is a very practical religion, they never tire of telling the believes which would save countless Muslim women and children from agony, besides stopping themselves and Islam from being open to constant ridicule?

The answer in this writer's views is manifold first, no holy hierarchy claming to be the custodian of its faith, be it Islam, Hinduism. Christianity or Judaism has ever taken an initiative in bringing about reforms. they have almost always been forced to respond to pressures from outside their respective religious establishments. Educated Indian Muslims have only now begun to bring some pressure on their ulema.

Secondly, the resistance of the tradition bound to change is aided by an ostrich like attitude to real life issues. This was evident at the Bombay meeting where in his presidential address, the director of the prestigious Darual Uloom, Maulana Mohammed Salim Quasi tried to dismiss the triple talaq question as an "insignificant"problem for the community. Professor Mahmood was constrained to point out that the refusal to recognise that the problem exists was itself a major hurdle to its solution.

Thirdly, the same Maulana Qasmi spent a lot of his breath warning Muslims that if they responded to the "biased" media's "unwarranted anti-Muslim tirade" over triple talaq, it would rake up other issues and raise fresh problems for the community. By the same logic, the Hindus of Rajasthan for example, must continue with the practice of sati for fear that if would encourage the media to highlight other social evils.

What then can hapless Muslim women do? One solution presently being attempted is a model nikahnama, which firstly, provides for a substantial payment to the wife as mehr and, secondly, commits the husband through the marriage contract to a heavy monetary compensation to his wife in case he resorts to triple talaq.

Secondary, there is the option of a Muslim couple registering their marriage under the Special Marriages, Act, which would make the provisions of the Muslim Personal Law redundant and the latter enactment operational. the catch here is that both the parties must agree to registering the marriage.

Finally, as the former vice-chancellor of the Aligarh Muslim University warned last year, there is the option of Muslim women marrying outside their religion merely t circumvent the possibility of instant divorce, Muslim women did precisely this in the 12930s. The ulema had until then held the "Islamic" position that in cases where the husband was missing a wife must wait 90 years before she could remarry!

A large number of Muslim women affected by this outrageous provision found a simple ways of freeing themselves from the ulema's clutch. they converted to Hunduism. As nothing terrifies the moulvi saheb more than the fact of a Muslim deserting the "correct path" Muslim women today may have to resort to the route taken by their sisters seven decades ago, if only to joit the insensitive guardian custodians of their faith who appear to be irrevocably wedded to an anti woman, anti-child practice.

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